Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-090

SEPTEMBER TERM, 2002

In re Appeal of Allen Mulheron	}	APPEALED FROM:
	}	Environmental Court
	}	DOCKET NOS. 172-8-00; 217-9-00Vtec
	}	Trial Judge: Merideth Wright

In the above-entitled cause, the Clerk will enter:

Landowner Allen Mulheron appeals from the environmental court' s orders (1) determining that he violated his subdivision approval, his building permit, and the Town of Highgate zoning laws by placing his modular home within the required front setback area; (2) denying his request for a variance; (3) requiring him to move the home inside the approved building envelope; and (4) assessing a $2556 penalty to compensate the Town of Highgate for its enforcement costs. We affirm.

In January 1996, the Town of Highgate Planning Commission granted landowner' s application to create a six-lot subdivision to be called Misty Meadows. The subject property is located in the Town' s Agricultural zoning district, which requires a minimum front setback of sixty feet. The subdivision lots are served by a fifty-foot-wide right of way from which the front setback requirements apply. In December 1999, the zoning administrator granted landowner' s application for a building permit to construct a modular home on lot six of the subdivision. A neighbor appealed the permit. Sometime in late December 1999 or January 2000, landowner installed a slab and placed the home on the slab. The Town of Highgate Zoning Board of Adjustment upheld the building permit in February 2000, but the question of whether the home violated the permit and zoning laws with respect to setback requirements was raised. A complaint was filed, and in June 2000, the zoning administrator notified landowner that the home had been placed within the required front setback area. According to the zoning administrator' s measurements, the house was located forty feet from the edge of the right of way and fifty-three feet from the traveled portion of the right of way.

Landowner appealed to the zoning board of adjustment, arguing that the measurement should be made from the edge of the traveled portion of the right of way, and that the zoning administrator erred in locating the edge of the right of way. Landowner also applied for a variance, contending that the presence of ledges constituted a special circumstance justifying placing the home outside the original building footprint designated on the building permit application. The zoning board upheld the notice of violation and denied landowner a variance. Landowner then appealed to the environmental court, which first ruled that the setback measurement should be made from the edge of the right of way as determined from the survey recorded with the subdivision permit. In a later decision, the court imposed a $2556 penalty after ruling that landowner had failed to satisfy the statutory requirements for obtaining a variance. The court also ordered landowner to move the modular home and place it within the building envelope designated in the building

permit application.

Landowner now appeals to this Court from the environmental court' s decisions. Landowner first argues that the plain language of the Town' s zoning ordinance requires that setback measurements be made from the traveled edge of a right of way. He further argues that even if the ordinance is ambiguous in that regard, it should still be construed to require measurements from the traveled portion of a right of way because ambiguities should be resolved in favor of landowners, and the ordinance fails to give landowners guidance as to how to measure setbacks. We do not find any of these arguments persuasive. We will uphold the environmental court' s construction of a zoning ordinance unless that interpretation is clearly erroneous, arbitrary, or capricious. See Houston v. Town of Waitsfield, 162 Vt. 476, 479 (1994). The Town' s zoning ordinance defines the word " setback" as " [t]he nearest distance between a building face and a street line or a property line." The term " street line" is not defined, but the word " street" is defined as a " road," which, in turn, is defined as " [a]ny thoroughfare which affords the principal means of access to an abutting property, including streets or right of ways." Given these definitions, the appropriate setback measurement in this case is from the edge of the right of way. We agree with the environmental court that measuring a setback from the traveled portion of a right of way, which is subject to change over time, would lead to uncertainty and nonconforming structures. Finally, we find no merit to landowner' s claim that the Town should be estopped from claiming a setback violation because it sat on its rights by not informing landowner of the appropriate method for making setback measurements. This is not a situation in which the Town sat on its rights; rather, the Town brought an enforcement action after receiving a complaint that landowner had violated the zoning ordinance' s setback requirements. If landowner had questions concerning how to make setback measurements, it was his obligation to consult the Town before acting on his own.

Next, landowner argues that the environmental court should have granted his request for a variance because the Town had granted variances to other landowners in prior cases under similar circumstances. The first part of this argument is that because the Town had implicitly determined in previous cases that ledges are exceptional topographical features and that their discovery following subdivision approval is a hardship not attributable to the permit applicant, the environmental court was obligated to give deference to those prior decisions and grant landowner a variance. In support of this proposition, landowner relies upon In re Kisiel, 172 Vt. 124, 133 (2000), in which this Court indicated that the environmental board, in interpreting an ambiguous town plan, must look to the actions of the town responsible for implementing and enforcing the plan. We find no support in Kisiel for landowner' s argument. This case does not concern a question about how to interpret an ambiguous town plan. Rather, the environmental court was asked in a de novo hearing to construe unambiguous statutory variance criteria that had been incorporated into the Town' s zoning ordinance. See 24 V.S.A. § 4468(a).

In reviewing the environmental court' s ruling on a request for a variance, we will uphold its findings and conclusions absent clear error. In re Dunnett, 172 Vt. 196, 199-200 (2001). Moreover, because a zoning variance may be granted only upon a showing that each of the five statutory criteria have been met, we must affirm the environmental court' s denial of a variance as long as the court did not err in its assessment of each and every one of the criteria upon which it based its denial. Id. Here, the environmental court found that (1) the ledge that landowner claims prevented him from placing his home within the permit' s building footprint was not a unique physical condition justifying a variance; (2) landowner created the hardship from which he now seeks relief by obtaining a permit specifying a particular building envelope, but then placing his home outside that envelope, even though he was aware of the condition of the land and the presence of the ledge when he filed his permit application; and (3) landowner failed to demonstrate that the proposed variance represented the minimum deviation from the zoning ordinance that would still provide relief for the alleged hardship. Landowner has failed to demonstrate any error on the court' s part with respect to any of the criteria cited by the court, let alone all of them.

Nevertheless, landowner contends that the court should have granted the variance because the Town acted in a discriminatory manner in selectively denying his request for a variance, while granting all other variance requests, including at least two requests under similar circumstances involving the discovery of a ledge where a structure was to be built. Landowner claims that the Town pursued the enforcement action against him because he had been instrumental in a town meeting in which the zoning administrator' s salary had been reduced. He alleges that the chairman of the zoning board of adjustment told him that if he ever appeared before the Board, his application would be denied. He submitted evidence in the environmental court indicating that his request for a dimensional variance was the only one of the last twenty or so such requests that had been turned down by the Town, and that two of those requests that had been

granted involved situations similar to his request.

A person who alleges discriminatory enforcement by a municipality has the heavy burden of demonstrating conscious, intentional discrimination. In re Letourneau, 168 Vt. 539, 549 (1998). The person must show that (1) he was selectively treated compared to others similarly situated; and (2) the selective treatment was based on impermissible considerations such as race, religion, intent to inhibit the exercise of constitutional rights, or malicious or bad faith intent to injure. Id. Here, the environmental court found that the two prior cases relied upon most heavily by landowner differed in their facts, and that, although landowner had shown that " some degree" of personal animus or business competition " may" have existed between himself and town zoning officials, he had failed to show that the Town' s enforcement action was motivated by a malicious intent to injure him. Once again, we find no error in the court' s findings and conclusions. The present case differs from the other two variance cases relied upon by landowner in that landowner deliberately placed his home outside the permitted area and requested a variance only after an enforcement action was initiated by neighbors. There is no indication that the enforcement action or the denial of the variance was motivated by an intent to injure landowner. Indeed, in its de novo review, the environmental court found that landowner had failed to satisfy at least three of the statutory variance criteria, and we have upheld that determination.

Finally, with respect to landowners' arguments concerning the denial of the variance, we find no abuse of discretion in the court' s decision to allow landowner to submit into evidence the minutes of the two allegedly similar variance cases as well as a table of all of the prior cases in which dimensional variances had been requested, but to deny admission of the minutes of all but the two cases involving ledges. The court acted within its discretion in admitting the minutes only of those variance requests involving situations allegedly similar to landowner' s request. See Southface Condo. Owners Ass' n v. Southface Condo. Ass' n, 169 Vt. 243, 249 (1999) (trial courts have broad discretion in ruling on relevance and admissibility of evidence). Further, the court was not obligated to find an improper discriminatory motive simply because other dimensional variances had been granted.

Next, landowner argues that, even assuming there was a violation and the court did not err in denying his request for a variance, injunctive relief should have been denied because the violation was insignificant and unintentional. Again, we find no basis for reversal. The trial court has wide discretion in determining whether injunctive relief is appropriate in zoning cases. See Letourneau, 168 Vt. at 551. Municipalities are generally entitled to injunctive relief, including the removal of an offending structure, as a matter of course if the zoning violation is substantial and involves conscious wrongdoing. Here, the court found that the front setback of landowner' s house was forty feet from the edge of the right of way, fifty percent closer than that allowed by the zoning ordinance. That can hardly be called an insubstantial violation. Cf. In re Cumberland Farms, Inc., 151 Vt. 59, 64 (1986) (nothing in ordinance or zoning enabling act would allow us to declare eleven-foot front setback violation to be lawful because violation was de minimi overall). The court also found that landowner placed his home outside the building footprint set forth in his permit application, failed to seek an amendment to that permit, and sought a variance to the front setback requirement only after an enforcement action was commenced. Under these circumstances, the court acted within its discretion in requiring landowner to move the home.

Lastly, landowner argues that the penalty imposed by the environmental court was punitive in nature and therefore should be reduced, if not stricken. Landowner notes that the legal fees and costs incurred by the Town in bringing this enforcement action were $1914, $642 less than the $2556 penalty imposed by the court. He contends that because the court considered the wilful nature of his violation in assessing a fine that exceeded the Town' s legal costs, the penalty became punitive in nature, and thus should be stricken, or at least reduced, under this Court' s analysis in Town of Hinesburg v. Dunkling, 167 Vt. 514, 524-528 (1998). We conclude that Dunkling does not require us to strike or reduce the penalty imposed here. In Dunkling, we held that the civil penalties imposed under 24 V.S.A. § 4444(a) for zoning violations were civil rather than punitive in nature. Id. at 527-28. In so holding, we noted, among other things, that § 4444 gives the offender an opportunity to cure the violation and does not require a finding of scienter before a penalty is imposed. Id. at 526, 527. Here, the court imposed a $6 daily fine from the date the zoning board upheld the notice of violation. Although the court mentioned the wilful nature of the violation, it also indicated that the purpose of the fine was to reimburse the Town for its enforcement costs. The penalty actually imposed was only a few hundred dollars more than the attorney' s fees and court costs involved in enforcement, which plainly were not the only costs incurred by the Town in enforcing its zoning ordinance. We find no abuse of discretion in the amount of the court' s penalty. See id. at 528 (party challenging amount of penalty has heavy burden of demonstrating abuse of discretion).

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice