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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-211

JANUARY TERM, 2002

Town of Barnard	}	APPEALED FROM:
v.	}	Environmental Court
Carroll and Cynthia Rhoades	}	DOCKET NO. 228-12-98 Vtec
	}	Trial Judge: Merideth Wright

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

The Town of Barnard appeals from a judgment of the environmental court imposing a fine of $320 upon defendants Carroll and Cynthia Rhoades for zoning violations. The Town contends the court erred in: (1) calculating the period of the violation; (2) evaluating the merits of the underlying violations in assessing the penalty amount; and (3) imposing a fine limited to one dollar per day. We agree with the first contention, and therefore reverse and remand for the limited purpose of recalculating the amount of the fine.

The underlying facts, as found by the trial court, are as follows. Defendants purchased the subject property, a two-bedroom dwelling, in 1995, and sometime before July 1996 enclosed a former porch. Although the previous owners from Connecticut had used the property as a vacation home, defendants began to use it as a year-round dwelling. The house is winterized and has sufficient water and sewage facilities for year-round use.

In July and December 1996, the Town's zoning administrator issued notices of violations to defendants for enclosing the porch and converting to year-round use without obtaining permits. Defendants failed to appeal the notices of violations to the zoning board of adjustment. Although defendants submitted a permit application to enclose the porch in December 1996, the permit was denied based on the absence of a septic permit, and the denial was not appealed. In June 1998, the zoning administrator issued new notices of violation for both claimed violations. Defendants again failed to appeal the notices or to apply for permits as directed. The Town thereupon commenced this enforcement action. Defendants later applied for and received a septic permit, and received approval for the enclosure and year-round use in April 2000.

Defendants moved to dismiss the enforcement action based, in part, on their contention that the house had always qualified as a year-round dwelling under the Town's zoning regulations, and that a permit was not required for the porch enclosure. The Town moved for summary judgment, arguing that defendants were barred from raising these defenses because they had failed to appeal the notices of violation. See In re Newton Enters., 167 Vt. 459, 462 (1998) (failure to appeal notice of zoning violation to zoning board of adjustment as provided under 24 V.S.A. 4472 binds landowner in enforcement action and precludes assertion of affirmative defenses); accord Town of Sandgate v. Colehamer, 156 Vt. 77, 83-86 (1990). The court agreed with the Town's position, granted summary judgment as to the existence of the violations, and scheduled a separate hearing to determine the fine to be imposed.

Following the penalty hearing, the court issued a written decision, concluding that, although defendants could not contest the violations, their position that no permits were required under the zoning regulations had merit. Accordingly, the court concluded that the amount of the fine should be "mitigated." The court also concluded that the period of the violation should be measured from the second set of violation notices in 1998, rather than from the original violation notices in 1996, which resulted in a violation period of 320 days. The court ordered defendants to pay a penalty of one dollar per day, resulting in a total fine of $320. The court denied the Town's subsequent motion to alter or amend the judgment. This appeal followed.

The Town first contends the court erred in measuring the violation period from the second set of violation notices in 1998 rather than the original notices in 1996. The court reasoned that because the second notices stated that the date of violation "shall be registered as June 10th 1998," they superseded the 1996 notices for the purpose of calculating the duration of the violation. Although we generally defer to the trial court's findings, see Simendinger v. City of Barre, 770 A.2d 888, 891 (2001), we are unable to discern a rational basis for this ruling. Although the Town's zoning administrator testified that he had issued the second notices for purposes of initiating the enforcement action, nothing in his testimony or elsewhere in the record supports the conclusion that the second notices somehow vitiated the earlier - and continuing - violations dating from 1996. Under 24 V.S.A. 4444(a), "[e]ach day that a violation is continued shall constitute a separate offense," and we have held that the trial court lacks authority to impose a fine for only a portion of the time period during which a defendant is in violation. See Town of Sherburne v. Carpenter, 155 Vt. 126, 133 (1990). Accordingly, we must conclude that the court erred in failing to measure the violation period from the effective date of the first notices in 1996.

The Town also contends the court erred in considering the merits of the violations in assessing the fine, misinterpreted the zoning regulations in so doing, and abused its discretion in imposing a fine of one dollar per day. It is well settled, however, that "the circumstances surrounding the violation may be relevant in determining the appropriate remedy." In re Cumberland Farms, Inc., 151 Vt. 59, 64 (1989). Thus, the fact that the court was barred from considering the merits in upholding the violation notices did not preclude it from evaluating the overall circumstances in determining the amount of the fine. Nor did the court clearly err in its construction of the zoning regulations. The regulations defined vacation dwellings or seasonal camps as "[d]wellings that are not designed for primary residence use," and specifically "those structures that do not have sufficient water and/or sewage facilities for year-round use." The court found that defendants' house was adequately heated and insulated for winter use, and had adequate sewage and water systems for year-round use. Thus, the court reasonably concluded that, if the merits were before it, it would conclude that the property was not a vacation dwelling or seasonal camp, and that no permit was required for conversion. See In re Weeks, 167 Vt. 551, 554 (1998) (we uphold environmental court's construction of zoning ordinance unless clearly erroneous, arbitary or capricious). The Town suggests that the evidence did not support the court's finding that the dwelling was adequately equipped for year-round use, but the testimony of the owner concerning the water and sewage disposal systems and the zoning administrator's testimony that a later inspection showed the septic system to be adequate was sufficient to support the finding. See In re Dunnett, 776 A.2d 406, 410 (2001) (we uphold factual findings of environmental court unless clearly erroneous).

Finally, the Town contends the court abused its discretion by imposing a fine of one dollar per day, rather than a fine equal to the Town's costs of enforcement, including attorney's fees. Under 24 V.S.A. 4444(a), the court is authorized to impose fines of up to one hundred dollars per day for each offense, and we have held that the court may determine the amount of the fine to be imposed with reference to the reasonable attorney's fees and costs expended in enforcing the regulation. See Town of Hinesburg v. Dunkling, 167 Vt. 514, 528-29 (1998). We have also held that the court enjoys "broad discretion . . . in setting a fine pursuant to 4444(a)." Id. at 529. In setting a minimum fine of one dollar per day, the court explained that it was strongly influenced by the fact that defendants ultimately qualified for the permits, that on the merits they arguably did not even require permits, and that a portion of the delay in obtaining the permits in 1999 and 2000 was attributable to the Town. The court was authorized to consider all of the circumstances in determining the proper remedy, see Cumberland Farms, 151 Vt. at 64, and we discern no abuse of discretion in the court's consideration of these factors in setting the minimum fine.

Because, as earlier noted, the court erred in calculating the time period of the violation, we remand the case to the trial court for the limited purpose of recalculating the fine based on the correct time period. The court is not required to take

additional evidence on this issue if it determines that the existing record is sufficient. In all other respects, the judgment is affirmed.

Reversed and remanded for further proceedings consistent with the views expressed herein.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

_____
James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice