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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-039

JUNE TERM, 2002

In re Appeal of David Siegel	}	APPEALED FROM:
	}	Environmental Court
	}	DOCKET NO. 258-11-00 Vtec
	}	Trial Judge: Merideth Wright

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

David Siegel appeals from an environmental court judgment denying his appeal of an enforcement action by the Town of Duxbury and dismissing the remainder of his claims. Siegel contends the court erred in: (1) concluding that the setback requirements of the Town's zoning ordinance did not apply to a structure adjacent to a trail; and (2) dismissing the balance of his claims. We affirm.

As found by the trial court, the underlying facts are as follows. Town Highway 30 in the Town of Duxbury was opened as a road in 1893. Sometime prior to 1970, the Connollys acquired their house adjacent to the road. In December 1970, the Town selectboard ordered that the portion of Town Highway 30 running from the westerly end of the Connolly house to the end of Highway 30 be changed from an open highway to a trail. The road is classified as a class 4 road up to the westerly end of the Connolly house.

In May 1995, the Town's zoning administrator approved a permit application to construct a two-car garage across the road from the Connolly house. The permit contained notes stating that all set-back requirements were met and that the garage was not being built on any currently used road. The permit was not appealed. Siegel purchased property to the north and west of the Connolly house in November 1995, after the garage was constructed. In September 1996, he received subdivision approval from the Town planning commission, and an Act 250 permit, for a planned six-lot subdivision of the property. Those permits apparently contain findings and conditions concerning the distance between the Connolly house and garage as it affects Siegel's plans to upgrade access to the subdivision.

Siegel requested the Town zoning administrator to take enforcement action against the Connollys for building the garage within the setback requirement of the zoning ordinance and the road right-of-way. The administrator issued an enforcement letter, stating that the garage did not comply with the setback requirement of the ordinance, which is "seventy feet from the center of the traveled portion of all roads," but declining to take any action to abate the violation other than to require that the Connollys not park vehicles so as to further encroach on the right-of-way or make any other changes that would increase the noncompliance. Siegel appealed to the zoning board of adjustment, which upheld the administrator's decision. He then appealed to the environmental court, identifying nineteen questions to be determined on appeal.

In response to motions to dismiss and for summary judgment filed by appellees the Town of Duxbury and the Connollys, the court issued an initial order, dated April 10, 2001, reducing the number of questions it would consider to

those relating to the merits of the enforcement action under the zoning ordinance. Thereafter, in an order dated May 4, 2001, the court denied appellees' renewed motion for summary judgment, ruling that material issues of fact remained in dispute as to whether the garage was built adjacent to the road or trail. Following an evidentiary hearing and oral arguments on September 28, 2001, the court issued a written decision, finding that the garage was wholly adjacent to the trail, that the zoning ordinance setback requirement applied only to roads, and that the garage was therefore exempt from the requirement. In so holding, the court found that the setback provision in the ordinance applied expressly to "roads," that the ordinance consistently distinguishes between public and private "roads," on the one hand, and permanent easements or rights-of-way, such as trails, on the other, and therefore that the plain language of the ordinance precluded application of the setback requirement to the trail adjacent to the Connolly garage. Accordingly, the court denied the enforcement action. In a brief follow-up ruling, the court dismissed Siegel's remaining claims on appeal, noting that they related to his contention that the garage encroached on the alleged rights of the Town, the parties, or the public to use the trail right-of-way, which implicated property rights - not zoning issues - within the jurisdiction of the superior court rather than the environmental court. This appeal followed.

Although confusingly organized and argued, Siegel's principal contention is that the court erred in construing the zoning ordinance's setback requirements to be applicable only to roads, thereby exempting the Connolly garage. We will uphold the environmental court's construction of a town's zoning ordinance unless clearly erroneous, arbitrary or capricious, and its findings of fact unless clearly erroneous. In re Dunnett, 172 Vt. 196, 200 (2001). Assessed in this light, the court's ruling that the setback requirements of the ordinance expressly apply only to roads, as distinct from trails, is clearly reasonable and must be upheld. Siegel's various claims to the contrary, as best as we can understand them, are unpersuasive. He contends the court erroneously relied on a section of the ordinance dealing with conditional use applications. The court properly cited this section, however, for the purpose of construing the meaning of "road" in the context of the ordinance as a whole. See In re Weeks, 167 Vt. 551, 554 (1998) (zoning ordinances are construed according to general principles of statutory construction); Simendinger v. City of Barre, 171 Vt. 648, 651 (2001) (mem.) (legislative intent must be considered through statute considered as a whole).

Siegel also contends that he should have been given the opportunity to demonstrate the Town's past practice in applying the setback requirement to roads and trails. See In re Vermont Nat'l Bank, 157 Vt. 306, 313 (1991) (court may construe zoning ordinance in light of consistent interpretation by local officials who administer it). The parties were afforded the opportunity to address the court and present arguments on the meaning of the ordinance, and Siegel made no proffer or request to submit evidence on this point. Accordingly, the claim was not preserved for review on appeal. See Greene v. Bell, 171 Vt. 280, 287 n.3 (2000) (issues not raised at trial are waived on appeal). Siegel also appears to argue that the notations by the zoning administrator on the original building permit indicate the Town's understanding that the setback requirement applies to trails as well as roads. The meaning of the notations is unclear, but suggest - if anything - an understanding by the administrator that the garage was to be constructed adjacent to that portion of Highway 30 classified as a class 4 road, rather than adjacent to the trail. Since the permit was not appealed, however, this discrepancy cannot be challenged.

Siegel also complains that the court's findings and conclusions concerning the application of the setback requirement to the Connolly garage conflict with those of the zoning administrator and zoning board of adjustment. The court's review of the ZBA decision, however, is de novo; it takes evidence and makes findings and conclusions independent of the board. 24 V.S.A. 4472(a); In re Poole, 136 Vt. 242, 245 (1978).

Siegel further appears to contend the court erred in failing to address claims that the Connolly garage was constructed in a location substantially different from that approved in the original permit. Siegel's appeal to the ZBA was limited to the administrator's decision not to comply with Siegel's request to enforce the setback violation of the zoning ordinance. The ZBA decision, accordingly, was limited to this issue. Siegel did not request enforcement action relating to the alleged discrepancy in the location of the garage. Accordingly, the issue was not properly before the court. See Simendinger, 171 Vt. at 651 (court is empowered to address only those issues properly raised before board of adjustment).

Finally, Siegel raises a number of claims concerning the Town's authority to authorize construction within the right-of-way of a road or trail, and its impact on his or other's property rights. The court correctly ruled, however, that its jurisdiction in this matter was limited to the enforcement action for the alleged violation of the setback requirement in

the zoning ordinance. Claims relating to alleged violations of property rights must be raised in superior court.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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James L. Morse, Associate Justice

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Marilyn S. Skoglund, Associate Justice