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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-070

JULY TERM, 2010

In re Beliveau Notice of Violation (Burlington)	}	APPEALED FROM:
	}	
	}	Environmental Court
	}	
	}	DOCKET NOS. 274-12-07 Vtec & 29-2-09 Vtec
		Trial Judge: Merideth Wright

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

Landowner appeals from the environmental court's order finding that he violated the terms of a zoning permit and imposing fines. The City of Burlington cross-appeals. We affirm the court's decision.

The environmental court made the following findings. Landowner owns property in a medium density residential zoning district in the City of Burlington. The property contains a duplex residential building. In 1996, landowner obtained a zoning permit and certificate of appropriateness (COA) to replace the duplex's "existing two-story rear porch" with new construction. Landowner's permit application also contained a hand-drawn site plan, but this plan was not stamped as receiving final approval in connection with the 1996 permit. Only the set of elevations of the proposed new stairs and porch was so marked.

Sometime in early 1999, landowner removed an existing small accessory structure from the northeast corner of his property. The structure had been labeled as a "barn/garage" with a footprint of "10x20" feet on the 1996 site plan. In September 1999, landowner received a zoning violation notice, alleging that he had removed a garage, increased the parking area, and installed a fence without first obtaining a zoning permit. Landowner did not appeal this notice of violation and it became final. See 24 V.S.A. § 4472(d).

In October 1999, landowner filed an application for a new zoning permit and COA. This application sought approval to "remove 10 x 20 garage, return area to green space, [and] lay down railroad ties to prevent tenants from driving onto new green space." The application included a photocopy of the 1996 site plan, with railroad ties drawn in at the edges of the parking and driving areas, from the northwest corner at the head of the driveway to the southeast corner of the east parking area (near the northeast corner of the house). The site plan submitted with the 1999 application (1999 site plan) did not show railroad ties along the back (north) of the house, and did not show a walkway along the west side of the house or any railroad ties between the fourteen-foot-wide driveway and the west side of the house. The 1999 site plan was stamped and signed as receiving final approval on October 18, 1999. The approval specifically stated that "[a]ny modifications or deviations from these plans require zoning approval prior to construction." The project was specifically described as follows: "removal of the detached single bay, single story garage in the rear yard of the existing

duplex. Area to be returned to green space. No changes to the existing parking area." The permit required that "[t]he existing parking area as defined on the approved site plan shall be defined with timber curbs (minimum of two 6 by 6, stacked and spiked into the ground) within thirty (30) days of issuance of this zoning permit, or this permit is null & void." Landowner signed the bottom of the permit. He did not appeal this permit, and it became final. In October 2002, landowner applied for a certificate of occupancy for the property and he certified that the project complied with the 1999 permit and site plan. A certificate of occupancy was issued in October 2002 based on landowner's certification.

In June 2007, landowner was issued a notice of violation based on an allegation that the property was inconsistent with the 1999 site plan. Defendant appealed to the Development Review Board (DRB), which upheld the notice of violation. Defendant then appealed to the environmental court, and this appeal was consolidated with an enforcement action brought by the City. Following a hearing, the court entered judgment for the City, finding that landowner violated the 1999 permit and the approved site plan by failing to install and maintain a double layer of 6 by 6 railroad ties, pinned into the ground, around the then-existing parking areas, and by expanding the width of the north parking area by approximately 5 feet and the width of the east parking area by approximately 3 feet, as compared to the areas depicted on the approved site plan. Landowner was directed to move the installed layer and install the second layer of railroad ties in compliance with the width shown on the 1999 site plan. Additionally, the court ordered landowner to pay a penalty of $3.00 per day for 757 days of violation, totaling $2271. This appeal and cross-appeal followed.

Landowner argues that the court erred in relying on the 1999 permit and site plan rather than the 1996 site plan. He also suggests that he signed the 1999 zoning permit under duress. He maintains that he engaged in no "illegal acts" prior to June 2007, when first notified of the violation, and asserts that a town zoning official provided misinformation in connection with the notice of violation. Additionally, landowner argues that: (1) the City lacks authority to bring an enforcement action to compel him to build a fence to separate the driveway from the walkway; (2) the court failed to identify what illegal act he committed; (3) the court erred in identifying the property as located in a medium density residential zoning district and in identifying the purpose of such zoning district; (4) the court should have dismissed the case because the City does not have duly enacted zoning regulations; and (5) the 1996 and 1999 zoning permits and site plans are unconstitutionally vague.

These arguments are without merit. As the court found, the 1996 site plan was never approved by the City and it has no binding effect. The 1999 site plan, in contrast, was approved by the City and a permit was issued with specific conditions noted above. Landowner did not appeal from the approval of his site plan or the issuance of the permit, and thus, the site plan and the terms of the permit are final and binding on landowner. See 24 V.S.A. § 4472(d) (failure to appeal municipal decision binds interested persons to "decision or act of that officer, the provisions, or the decisions of the panel," and individual "shall not thereafter contest, either directly or indirectly, the decision or act, provision, or decision of the panel in any proceeding, including any proceeding brought to enforce this chapter"). Landowner's claim that he signed the permit under duress might have been raised in a timely appeal from the 1999 permit, but landowner cannot collaterally attack the permit in this appeal. See id.; Town of Hinesburg v. Dunkling, 167 Vt. 514, 524 (1998). For the same reason, as held by the court below in response to landowner's amended questions and pretrial motion, it was too late for landowner to challenge or demand the provenance of the Burlington Zoning Ordinance. Further, as to landowner's apparent challenge to the enforcement officer's supposed characterization of alleged violations of the city's quality of life or safety codes by landowner, the trial court correctly noted that its review was de novo and would examine only the question of charged noncompliance with the

zoning permits. As to landowner's argument regarding "illegal acts," it is plain from the court's order that the inappropriate act was violating the express terms of the 1999 zoning permit—a violation found by the court, according to the evidence, to be ongoing. Landowner's complaint about the zoning officer's conduct is equally unavailing. It is immaterial how the City discovered the violation, and, indeed, the fact that the court upheld the zoning violation following a hearing refutes the notion that the finding of violation was based on false information in the notice of violation.

Landowner's remaining arguments are similarly without merit. Landowner was not ordered to build a walkway as he suggests in his brief. Nonetheless, we reject landowner's assertion that the City lacks authority to initiate and pursue enforcement actions. The City plainly has such authority. See 24 V.S.A. §§ 4451(a), 4452; Burlington Zoning Ordinance, § 19.1.9. We find no error in the court's statement that the property is located within a medium density residential zoning district. The court also did not err in describing the purpose of such districts, as set forth in the City's bylaws. Additionally, the City is statutorily authorized to enact zoning regulations, 24 V.S.A. § 4411, and there is no evidence that it failed to enact its regulations properly here. Finally, landowner's challenge to the constitutionality of the permit conditions is barred by 24 V.S.A. § 4472. Because the parking limitation was, contrary to landowner's arguments, governed by the 1999 permit, and was violated by landowner's activity, all as was found by the court and supported by the evidence, we decline to disturb the penalty imposed for the violation.

We thus turn to the City's cross-appeal. The City first argues that landowner should have been required to erect a barrier to limit the area of the driveway to its appropriate boundary. The environmental court concluded otherwise. It found nothing in the approved site plan that showed a walkway between the driveway and the house, or that required timber curbing between the driveway and the house. It explained that the notice of violation stated only that the property was "inconsistent with the site plan approved on October 10, 1999." Thus, this notice did not encompass any alleged fencing requirement. The City argues that a fence is nonetheless appropriate to delineate the parking area. While there could be some logical ground for requiring a fence, the fact remains that the fence was not a requirement of the 1999 permit, and thus, it could not form the basis of a violation, as the court expressly found here.

The City next argues that the court erred in ordering landowner to pay only $3 per day as a fine. As the court explained, in zoning enforcement cases, it assessed a daily penalty for the period during which a landowner had the benefit of the zoning violation. 24 V.S.A. § 4451(a). Citing City of St. Albans v. Hayford, 2008 VT 36, ¶¶ 15-18, 183 Vt. 596 (mem.), the court indicated that such penalties were designed to remove the economic benefit and any avoided costs achieved by the landowner from the violation, as well as to compensate the enforcement entity generally for the legitimate costs of bringing the enforcement action. Additionally, the court could also consider factors enumerated in the state environmental enforcement statute. See 10 V.S.A. § 8010(b), (c)(2); In re Jewell, 169 Vt. 604, 606-07 (1999). These factors included deterrence, the duration of the violation, and mitigating circumstances, including unreasonable delay by the enforcement authority in seeking enforcement. 10 V.S.A. §§ 8010(b)(1)-(8).

In this case, the court found that the appropriate penalty must reflect that it had found in favor of landowner on issues regarding the number of allowed vehicles, parking in the driveway, and placing a barrier between the driveway and the house, which were the primary issues pursued by the City. The court also found significant the long delay between the issuance of the 1999 zoning permit and the 2007 inspection and notice of violation. For these reasons, the court found it inappropriate to reimburse the City for its entire expenditures in the enforcement action. Instead, it concluded that the

goals of deterrence and compliance would be achieved by requiring landowner to move the installed layer of railroad ties and install a second layer of railroad ties in compliance with the 1999 site plan, and by imposing a penalty (in addition to the costs of conducting that work) of $3.00 per day for the 757 days of violation for a total of $2271.

The City maintains that the court overstated the import of its findings regarding the issues of the appropriate number of vehicles and parking in the driveway given that the court found that these issues (while litigated by the City) were not properly before the court. The City also reiterates its argument that while the court found a barrier unnecessary, the violation concerning the width of the driveway was still evident, even without consideration of the walkway. As to the long delay between the issuance of the permit and the notice of violation, the City argues that landowner certified that the property was in compliance with the permit in 2002. By considering this delay, the City argues, landowner escapes liability for making this false statement while the City is penalized for taking landowner at his word. The City also argues that landowner has suffered no harm as a result of the delay in enforcement. The City thus maintains that it is entitled to its full legal fees and expense to defend and pursue this matter.

We review the court's decision for abuse of discretion, Dunkling, 167 Vt. at 528, and we find no abuse of discretion here. In determining the appropriate penalty, the court is specifically authorized to consider the length of time that the violation has existed and mitigating circumstances, including any unreasonable delay in seeking enforcement. See 10 V.S.A. § 8010(b)(2), (8). The court was not wrong, moreover, in stating that landowner had prevailed on many of the issues pursued by the City. Additionally, as discussed above, the court did not err in finding that the 1999 site plan did not obligate landowner to construct a fence. Essentially, the City asks this Court to reweigh the evidence and reach a conclusion different than that reached by the environmental court. This we will not do. It is the role of the factfinder, not this Court, to evaluate the evidence. See, e.g., Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). The fact that this Court might reach a different conclusion based on the facts is not sufficient in itself to demonstrate an abuse of discretion. Where "there is a reasonable basis for the action" of the court, we must uphold the court's decision. Id. The court identified reasonable grounds its decision here, and we find no basis to disturb its opinion.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice