VERMONT SUPERIOR COURT
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Reed Conditional Use Denial & NOV	Docket No. 132-12-18 Vtec

DECISION ON MOTIONS

Douglas Reed Sr. and Douglas Reed Jr. (together "Appellants" or "the Reeds") appeal from a decision of the Town of Weathersfield ("Town") Zoning Board of Adjustment ("ZBA"). The ZBA was in the unusual position of having received the Reeds' application for a conditional use zoning permit, which application also purported to be the appeal of a notice of violation issued to the Reeds by the Town of Weathersfield Zoning Administrator against the same use for which approval was sought. Although the ZBA, through a written decision issued November 5, 2018, only ruled on the conditional use application, it heard testimony in this appeal contending that the use in question was a violation. The parties have stipulated that this decision left the notice of violation in place and have requested that we address the notice of violation as well as the conditional use application. In the interests of fairness and the efficient administration of justice, we do so below.

As an initial matter, it is with sadness that we note the death of Mr. Reed Jr. while these motions for summary judgment were under advisement. Upon being notified of Mr. Reed Jr.'s death, we suspended our drafting of this Decision and we gave the parties ninety days, or until May 25, 2022, to substitute another party for Mr. Reed Jr. No party was substituted. Pursuant to V.R.C.P. 25(a)(1), and as ordered in a separate entry order, the appeal is therefore dismissed as to Mr. Reed Jr. *See* V.R.C.P. 25(a)(1) ("Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record . . . the action shall be dismissed as to the deceased party."). However, dismissal as to Mr. Reed Jr. does not necessitate dismissal of the entire action. Pursuant to V.R.C.P. 25(a)(2), "In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action . . . shall proceed in favor of or against the surviving parties."

It is an undisputed fact that Mr. Reed, Sr. and Mr. Reed, Jr. were co-owners of the parcel subject to the NOV that started these proceedings. The NOV was directed to both of them. While only Mr. Reed Jr. was listed as applicant on the DRB's decision addressing the conditional use application that we are also treating as an appeal of the NOV, Mr. Reed Sr. was listed as a co-property owner. Reed Sr. and Reed Jr. jointly pursued this appeal. As co-owner of the Property, co-respondent to the initial NOV, and co-appellant from the DRB decision denying the conditional use application that was also an appeal of that NOV, Mr. Reed Sr. retains rights in this action. Additionally, the Town's right of enforcement, as implicated in the appeal of the Notice of Violation, survives as to Mr. Reed Sr. We therefore proceed to our consideration of the pending cross motions for summary judgment.

Appellants submitted the application for conditional use approval for a commercial firewood processing operation run by Mr. Reed Jr., through his business enterprises, on a parcel of land they jointly owned. They did so after receiving a notice of an alleged zoning violation for that firewood processing operation and, they claim, being told that filing a conditional use application was the best way to appeal that NOV. The ZBA denied their conditional use application and did not overturn the NOV. This appeal followed shortly thereafter. The Town has appeared in this appeal to defend the decision of the ZBA. Ethan McNaughton, a neighbor who claims interested party status, has also entered an appearance. After continuing the case to await the Supreme Court decision in In re 204 North Avenue NOV, 2019 VT 52, the parties conducted discovery and Appellants and Town both filed motions for summary judgment. Those motions came under advisement in March, 2021.[1] However, we sought clarification from the parties on the relationship between the denial of the conditional use application, the appeal of the NOV, and whether we had authority to review the latter. That led to the aforementioned stipulation that we do have that authority.

Lastly, at an October status conference, we asked the parties to clarify their factual assertions regarding activities conducted at the Property over the three years that Mr. Reed Jr. was injured from

[1] Mr. McNaughton subsequently filed his own "Motion in Support of Summary Judgment." The evasive title may be an acknowledgement that the motion does not meet the requirements of a motion for summary judgment under the Vermont Rules of Civil Procedure in effect at the time the motion was filed. Specifically, Mr. McNaughton does not support the factual positions taken in his memorandum by either including a separate statement of undisputed material facts with citations to the record or by demonstrating the absence of a genuine dispute as to those facts, as required by V.R.C.P. 56(c)(1). Furthermore, Mr. McNaughton does not organize his motion to clarify to which of the Appellants' Questions each of his arguments is directed. For all of the above reasons, and because we do not need to address Mr. McNaughton's motion to reach a final resolution of the legal issues presented in this case, we do not separately rule on Mr. McNaughton's motion.

2009-2012. In response, Appellants submitted four additional affidavits, to which the Town submitted a response. We now address the pending cross-motions for summary judgment.

This case is the latest before our Court to concern a phenomenon that for a long time we struggled to find a good name for. That phenomenon is a use of land that predates the adoption or latest amendments to a town's zoning bylaws, violates the bylaws as adopted or amended, and also was in some other relevant way unlawful prior to the adoption or amendment of the zoning regulations. Were it not for that final condition, this phenomenon would be regarded as a "pre-existing lawful nonconforming use," often referred to simply as a "nonconforming use" for short. *See* 24 V.S.A. § 4303(15). However, pre-existing lawful nonconforming uses, as the name suggests, were fully lawful prior to the time the bylaws which they violate were adopted. They are therefore typically granted some type of protected status by town bylaws, while the phenomenon we describe here is not. In previous decisions we have referred to such a phenomenon as a "pre-existing *unlawful* nonconforming use," *see* Killington Mountain House, LLC NOV, No. 138-12-18 Vtec, slip op. at 9 (Vt. Super. Ct. Envtl. Div. Nov. 17, 2020) (Durkin, J.) (emphasis added). Now we follow the Supreme Court's recent example in In re 15-17 Weston St NOV, 2021 VT 85, ¶ 9 and simply call such a use what it is: a zoning violation (although we still sometimes use the phrase "unlawful nonconforming use" to emphasize the relationship to lawful nonconforming uses).

Factual and Procedural Background

We recite the following factual background and procedural history, which we understand to be undisputed unless otherwise noted, based on the record now before us and for the sole purpose of deciding the pending motions. The following are not specific factual findings with relevance outside of this summary judgment decision. *See* Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14 (citing Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem. op.)).

1. In 1995, Appellants Douglas Reed Sr., and his son Douglas Reed Jr., purchased the 31.2± acre parcel on Plains Road in Weathersfield, Vermont, that is the subject of this proceeding ("the Property"). Town Statement of Undisputed Material Facts ("Town SUMF") at 1.

2. The Property is adjacent to a parcel owned by Douglas Reed Sr. and Nancy Reed, where Mr. Reed Sr. and Mrs. Reed have resided at all times during the events relevant to this proceeding. Appellants' Statement of Undisputed Material Facts ("Appellants' SUMF") at 1.

3. The two properties share a "911 address" of 1802 Plains Road. Appellants' Resp. to Disc. (First) at 3A.

4. The Property is located in the Town of Weathersfield Conservation (C-10) Zoning District. Town SUMF at 2.

5. In 1996, Douglas Reed Jr., doing business as "Hillbilly Farms," began using the Property as a site to process firewood. Town SUMF at 3; Appellants' Resp. to Disc. (Second) at 1A

6. Over the years 1996-1998, Mr. Reed Jr. cleared an area of the site to be used for log stacking, firewood processing and storage. Appellants' SUMF at 3.

7. Although Mr. Reed Jr. applied for and received a permit to construct a mobile home on a separate parcel adjacent to the Property in 2002, he never constructed or moved such a mobile home or any other residence on that parcel or on the Property. Appellants' SUMF at 6; Appellants' Resp. to McNaughton Interrogs. at 4.

8. At the beginning of operations as a firewood processing facility, logs were cut and split into firewood using chainsaws and a splitter. Town SUMF at 8.

9. From the beginning of operations, some of the trees processed into firewood were harvested on site, but most—upwards of 95%, according to Appellants—were delivered to the site from other properties. Town SUMF at 4.

10. From the beginning of operations, Mr. Reed Jr. sold at least some of the firewood to customers. Town SUMF at 5.

11. Over the years 1996 to 2009 Mr. Reed Jr. estimated that the business grew so that by 2009 he was producing an average of 100 cords of firewood per year. Town SUMF at 9.

12. In 2008, Mr. Reed Jr. founded a business to manage his commercial logging and excavation activities, named Mountain and Valley Logging and Excavation. He stored some equipment belonging to Mountain and Valley on the property. Appellants' Resp. to Disc. (First) at 15A; Appellants' Resp. to Disc. (Second) at 12A–13A. It is unclear whether he also conducted firewood sales through Mountain and Valley.

13. In 2009, Mr. Reed Jr. was severely injured in a logging accident and was left unable to directly operate his various businesses. Town SUMF at 10-11.

14. During the period of Mr. Reed Jr.'s recovery from 2009 to 2012, Mr. Reed Jr.'s friends (including friends whom he at times had employed) and family operated the equipment on his property to produce firewood. It is undisputed that they did so at the very least to produce firewood for their personal use and to fulfill remaining orders received before Mr. Reed Jr.'s injury. While Appellants previously did not dispute that "commercial firewood sales stopped" during this period, *see* Town SUMF at 12 and Appellants' Resp. to Town SUMF at 1-28, they have subsequently filed affidavits

with the Court from friends and family attesting that they "stepped in" for Mr. Reed Jr. and continued to receive and fulfill commercial orders throughout this period of time. *See* Adam Bates Aff. at ¶ 8; Nancy Reed Aff. at ¶ 13.

15. In 2013, when Mr. Reed Jr. was working again, he purchased and brought onto the Property a 2001 Cord King firewood processor. Town SUMF at 13.

16. In or after 2013, Mr. Reed Jr. also purchased a Mack Tri-Axle truck and two additional dump trucks to transport logs to the property and firewood to customers. Town Supplemental Statement of Material Facts ("Town Supplemental SUMF") at 2.

17. Ethan McNaughton, a neighbor since 2012, alleges that the Reeds conducted clearing on the Property in 2013, including removing trees and bringing in gravel and fill. McNaughton Aff. at ¶ 7. The Reeds dispute this. Appellants' Response To Town Supplemental SUMF at ¶ 4.

18. With the new processor and trucks, processing increased to roughly 500 cords per year on average. Town SUMF at 14.

19. In recent years of operation, 80 to 90 loads of logs have been delivered to the property each year for processing into firewood. Town SUMF at 17.

20. The logs are stored in large piles and transferred from those piles to the processor by a crane. Town SUMF at 18-19.

21. Neighbors have complained about the noise from the trucks and firewood processor and smoke from burning waste wood and bark on site. Town SUMF at 28.

22. In November, 2016, then Town of Weathersfield Zoning Administrator Hal Wilkins sent Mr. Reed Jr. a letter identifying the firewood operation as a zoning violation and an industrial use and offering to meet to explain possible remedial steps. Ex. 4 to Town SUMF; Appellants' SUMF at 7-8.

23. Mr. Reed Jr. subsequently met with Mr. Wilkins. Appellants' SUMF at 8. Mr. Reed Jr. claimed Mr. Wilkins told him during their meeting that the operation did not constitute a zoning violation. The town disputes this and alleges that this testimony would be inadmissible hearsay at trial as Mr. Wilkins is now deceased. The town claims this therefore may not form part of the undisputed facts for purposes of the Motion for Summary Judgment. Town Resp. to Appellants' SUMF 8.

24. In September, 2018, then Zoning Administrator Sven Federow sent Doug Reed Jr., Douglas Reed Sr., and Nancy Reed a Notice of Violation identifying the operation of a commercial firewood processing operation on the Property without a permit or certificate of occupancy as a violation of the Bylaws. Ex. 5 to Town SUMF

25. The Reeds appealed this Notice of Violation to the Weathersfield ZBA, and at the same time applied for conditional use approval for the firewood processing operation.

26. The ZBA denied the conditional use application in a written decision dated November 5, 2018. The parties have stipulated that this Court has the authority to address the Notice of Violation as though the ZBA upheld it. Stipulation and Order, Docket No. 132-12-18 Vtec (September 1, 2021).

27. The Town of Weathersfield adopted zoning bylaws in 1974. The version of the Bylaws that the parties have stipulated to as governing the Reeds' NOV and application for a conditional use permit was last amended in October 2013. *See* Town SUMF at 34 & Appellant's Resp. To Town SUMF at 34; "Town of Weathersfield Zoning Bylaws (Including All Subsequent Amendments Through October 21, 2013)," Attach. A to Town SUMF Ex. 5.

28. Mr. Reed Jr. passed away on February 24, 2022.

Legal Background

The Town's arguments in its Motion for Summary Judgment rely on somewhat novel applications of the law governing lawful nonconforming uses to the enforcement of zoning violations. In order to properly address these arguments, we must first explain the law as it has evolved and currently stands in these two related areas.

Vermont follows "Dillon's Rule," and thus municipalities have only the powers delegated to them by the Vermont Legislature. Hinesburg Sand & Gravel Co. v. Town of Hinesburg, 135 Vt. 484, 486 (1977). Vermont state law therefore creates the frameworks within which municipalities must operate, if they elect to regulate land-use through tools of planning and zoning. The Vermont Planning and Development Act (as amended), referred to colloquially as the "enabling statute," establishes mandatory provisions and prohibited effects of zoning. It also defines a number of terms and concepts, giving regularity to the interpretation and application of zoning ordinances throughout the state, while preserving flexibility for municipalities to craft laws best suited to their needs. One area where the statute provides guidance is on the subject of pre-existing lawful nonconforming uses, or "nonconforming uses" for short. The statute defines a nonconforming use as "use of land that does not conform to the present bylaws but did conform to all applicable laws, ordinances, and regulations prior to the enactment of the present bylaws, including a use improperly authorized as a result of error by the administrative officer." 24 V.S.A. § 4303(15).[2]

[2] A nonconforming structure is defined similarly, however, the nonconformity "generally involve[s] 'setbacks and size, shape, and placement of buildings on the property.'" In re Poultney Properties LLC, No. 98-7-17 Vtec, slip op. at 10 (Vt.

The basic premise of allowing nonconforming uses to continue within limits is one of fairness: even though the bylaws now in effect would prohibit such a use, if that use was lawfully established prior to the bylaws taking effect, the landowner will not be forced to squander their investments. However, the landowner will typically also not be allowed to expand or alter the use or recontinue it after a period of discontinuance, which would constitute an unfair advantage over other landowners who must abide by the bylaws. *See* Land Use Planning and Development Regulation Law § 4:38 (3d ed.) ("While fairness supports protecting investments in existing uses from newly enacted zoning laws, once the nonconforming use is gone, whether by destruction or abandonment, the investment is lost"); Francisco v. City of Columbus, 31 N.E.2d 236, 242 (Ohio Ct. App. 1937) (noting that provision for nonconforming uses "might be based upon a conception of fairness to those who had their money invested in a certain property.").

The statute also *requires* municipalities that adopt zoning to "define how nonconformities will be addressed." It does not mandate any particular provisions, but only says that municipalities "*may*:

- (i) Specify a time period that shall constitute abandonment or discontinuance of that nonconforming use, provided the time period is not less than six months.
- (ii) Specify the extent to which, and circumstances under which, a nonconformity may be maintained or repaired.
- (iii) Specify the extent to which, and circumstances under which, a nonconformity may change or expand.
- (iv) Regulate relocation or enlargement of a structure containing a nonconforming use.
- (v) Specify the circumstances in which a nonconformity that is destroyed may be rebuilt.
- (vi) Specify other appropriate circumstances in which a nonconformity must comply with the bylaws."

24 V.S.A. § 4412(7)(A) (emphasis added).

The Vermont Supreme Court recently clarified that those provisions i-vi should not be viewed "as a necessary grant of authority" to regulate nonconforming uses as under Dillon's Rule, but rather as "a means to comply with the mandate" to do so. 15-17 Weston St. NOV, 2021 VT 85, ¶ 15.

Both the definition of nonconforming use and the means by which municipalities may fulfill their mandate to address them have not changed much for at least the past 45 years. *See* Vermont Brick & Block, Inc. v. Village of Essex Junction, 135 Vt. 481, 482 (1977) (describing the definition

Super. Ct. Envtl. Div. Nov. 26, 2018) (quoting Miserocchi, 170 Vt. at 328); *see also* 24 V.S.A. § 4303(14). "Nonconformity" is a general term encompassing both nonconforming uses and structures. 24 V.S.A. § 4303(16).

and mandate as then in effect). However, the most recent major amendments to the enabling statute in 2003 did make two subtle but significant changes. Act No. 115 of 2003 repealed the old § 4408 governing nonconforming uses. It changed the definition of non-conformities so that nonconforming structures would no longer also be considered nonconforming uses. *See* 2003, No. 115 § 83 (containing the new definition), Id. at § 119 (repealing § 4408); In re Snelgrove Permit, No. 2009-162, 2010 WL 286742, at *3 (Vt. Jan. 15, 2010) (unpublished mem.) (discussing this change to the law).

Act No. 115 also changed the abandonment or discontinuance provision in the enabling statute. Previously, the statute allowed municipalities to adopt provisions whereby abandonment, which requires proof of an intent to cease a use, could instantly lead to loss of nonconforming status, while discontinuance, which does not require proof of such intent, would be subject to a six-month minimum. *See* Badger v. Town of Ferrisburgh, 168 Vt. 37, 39, 712 A.2d 911, 913 (1998) (declining to require proof of intent to abandon a use in order for a town's one-year discontinuance provision to take effect). As amended by Act No. 115, the enabling statute no longer makes this distinction but rather applies the six-month minimum to both abandonment and discontinuance provisions. 2003, No. 115 §§ 83, 119; *see* 24 V.S.A. § 4412(7)(A)(i).

Although it is up to municipalities to choose how to regulate the expansion or alteration of nonconforming uses, the Vermont Supreme Court has placed implicit limits on that power. Recognizing that a general "goal of zoning is to phase out nonconforming uses," In re Miserocchi, 170 Vt. 320, 327 (2000) (citing In re Weeks, 167 Vt. 551, 555 (1998)), the Court has directed that ordinances allowing expansion or alteration of nonconformities must be construed strictly so as to achieve that goal. In re Casella Waste Mgmt., Inc., 2003 VT 49, ¶ 9, 175 Vt. 335 (citing In re Gregoire, 170 Vt. 556, 559 (1999)). In accordance with a general principle against delegating standardless discretion to municipal panels, municipalities that allow for the expansion, extension, alteration, resumption, or movement of nonconforming uses must create specific standards for their appropriate municipal panel to follow when deciding to allow for such changes, lest the applicant be "left uncertain as to what factors are to be considered." In re Miserocchi, 170 Vt. at 325. The Court held that a municipal ordinance requiring proposals to extend lawful nonconforming uses to satisfy conditional use review criteria and prove a lack of detriment to public health, safety, convenience, and property values created sufficiently specific standards. . In re Casella Waste Mgmt., Inc., 2003 VT 49, ¶ 13.

The Court has also provided guidance on what constitutes permissible enlargement, expansion, or extension of a nonconforming use. The seminal case is Vermont Brick & Block, in which a concrete plant that was a lawful nonconforming use changed its business practices without

obtaining a zoning permit. The plant bought new trucks that enabled it to manufacture concrete blocks at customers' job sites and also installed a new cement screw or auger in a cement tower at its premises to facilitate the use of those trucks. The Court upheld both the Zoning Board and the Superior Court's decisions that these changes constituted unlawful enlargement or expansion of the appellant's nonconforming use. The Court explained that while "mere increase in volume of business alone…is not prohibited" for a nonconforming use, "when new facilities or a new product is involved," that indicates an enlargement that would, depending on the Bylaws, require approval from the municipal panel. Vermont Brick & Block, Inc., 135 Vt. 481, 483–484 (1977).

This rule—permitting a mere increase in sales or other indica of intensity of use, while forbidding the installation without approval of new equipment or facilities, including those that lead to increased production—is one that has been observed by the courts of many states. 2 Am. Law. Zoning § 12:19 (5th ed.) ("The addition of new or modernized equipment has been held to be an unlawful expansion under a variety of circumstances, especially where the expansion would result in negative impacts to surrounding property, where it would materially increase the intensity of the use, or where it would extend the life of the property and thus tend to preserve rather than restrict the nonconformity.") (citing cases from Indiana, Delaware, Michigan, Pennsylvania, and New York).

Expanding the footprint of a non-conforming use or structure will likely also constitute unlawful enlargement. For example, in In re Korbet, 2005 VT 7, ¶¶ 9–13, the Court determined that a proposed addition of a paved parking area was not part of the preexisting nonconforming use of property as a retail store, but rather constituted an enlargement of that use and/or structure. And in Casella Waste Mgmt., 2003 VT ¶¶ 12, 18, the Court seemingly accepted the environmental court's conclusion that constructing an access road to a nonconforming waste treatment facility across a neighboring parcel of land constituted an enlargement or extension of the nonconforming use, when it affirmed that the town panel had properly approved that extension or enlargement. Again, this understanding matches the practice of other states. 2 Am. Law. Zoning § 12:19 (5th ed.) ("In most cases… nonconforming uses have no right to expand beyond their original footprint, even if they claim to have commenced the use with an intent to use the entire structure or parcel") (citing cases from Alabama, Rhode Island, New York, Pennsylvania, Texas, Utah, and West Virginia, among others).

Mirroring the distinction between nonconforming uses and structures, violations of the zoning laws that arise from the use of the property in a manner proscribed are called "use violations," while those that arise from a building that is contrary to dimensional and setback requirements are called

"structural violations." For many years, it was the practice of the Environmental Division to view *use violations* as recurring each day the violation continued, for purposes of applying the statute of limitations governing enforcement of municipal land use laws contained at 24 VSA § 4454. *See, e.g.*, City of Burlington v. Richardson, No. 188-10-03 Vtec, slip op. at 12 (Vt. Envtl. Ct. June 27, 2006) (Wright, J). However, in 2019, the Vermont Supreme Court found that interpretation to be contrary to the plain text and purpose of the relevant statute and held that all zoning violations would be subject to the statute of limitations. In re 204 North Avenue NOV, 2019 VT 52, ¶¶ 6–8, 210 Vt. 572. Therefore, even ongoing "use violations" may no longer be prosecuted more than 15 years after the date they first occurred. Id.

Several questions have emerged as a result of this holding, including how to apply the statute of limitations in scenarios where i) the same violative use has given rise to additional zoning violations as a result of amendments to the zoning bylaws, ii) the violative use has been discontinued and re-established or iii) the violative use has been enlarged or expanded.

We addressed the first scenario in our recent decision in In re Benoit Conversion Application, Nos. 143-7-08 Vtec, 148-8-04 Vtec, 126-7-04 Vtec (Vt. Super. Ct. Envtl. Div. Apr. 20, 2021) (Durkin, J.) (*mot. for reconsideration denied* Oct. 14, 2021) (*appeal pending,* No. 21-AP-247). That case had the unusual procedural posture of being filed as a motion for relief from a 14-year-old decision of the Environmental Court that had been affirmed by the Vermont Supreme Court. While we repeatedly expressed doubt about the possibility of overturning a decade-old and affirmed decision, even assuming the movants were correct in their legal arguments as to why the logic underlying that decision had been vacated, we nevertheless addressed the motion on its merits. The original decision from which relief was sought enjoined the continued use of property for more residential units than the Bylaws permitted. The landowners' predecessors had converted a detached building on the property from a nursery school into an additional residential unit more than 15 years before the enforcement action was filed. That initial conversion occurred without the required permit or certificate of occupancy and was thus a violation. It also kept the same use from becoming lawfully nonconforming as to new "density requirements" that increased the minimum area per dwelling unit and were adopted in 1998, six years before the enforcement action was filed. As the Supreme Court determined in 2008, there was therefore a "new and independent" violation of the zoning bylaws that first occurred in 1998. And as we concluded in deciding on the motion for relief, enforcement against *that* violation was not barred when the case was first decided, even applying the holding of 204 North Ave. Id. at 10–11.

A different recently appealed (and decided) case concerned the second scenario: a use violation that was discontinued and then re-established. *See* In re 15-17 Weston St. NOV, No. 43-9-19 Vtec (Vt. Super. Ct. Envtl. Div. Jan. 22, 2021) (Durkin, J.) (*affirmed*, 2021 VT 85). A provision in the City of Burlington's zoning ordinance establishes that if a use that violates the bylaws and is not a lawful pre-existing nonconforming use is discontinued for sixty days, its re-establishment constitutes a new zoning violation for the purposes of 24 V.S.A. § 4454. We determined, and the Supreme Court affirmed, that enactment of this provision was a lawful exercise of the general power delegated to the City to regulate zoning and that the decision in 204 North Ave did not preempt reliance on it. *See* 2021 VT 85, ¶ 10. The appellant in that case argued that because the legislature had not delegated express authority to municipalities to define what type of discontinuance removed violations from the safe harbor of the statute of limitations, while it had delegated the authority to establish a period of time that would constitute abandonment of a lawful pre-existing nonconforming use, *see* 24 V.S.A. § 4412(7)(A)(i), municipalities had only the latter power and not the former.

The Supreme Court did not find this argument persuasive. In its reasoning, it noted that § 4412(7)(A)(i) left a great deal of flexibility to municipalities to establish what constituted discontinuance or abandonment of a lawful pre-existing nonconforming use, as long as the time period was more than six months. It concluded "There is nothing incongruous about a statutory structure that provides even greater flexibility to municipalities to set a shorter minimum period that constitutes discontinuance in the context of zoning violations." 2021 VT 85, ¶ 17. The Court affirmed that this understanding was actually supported by its decision in 204 North Ave, rather than undermined by it. In 204 North Ave, the Court had noted that the phrase "'[f]irst occurred' [in the statute of limitations] only makes sense for *ongoing* violations—such as use violations." 2019 VT 52, ¶ 7 (emphasis added). In 15-17 Weston St, the Court found that 204 North Ave therefore supported the idea that a discontinuance provision such as Burlington's would be lawful if reasonable, since "a violation [must] be continuous to qualify for the safe harbor established by § 4454(a)." 2021 VT 85, ¶ 18. The Court found Burlington's 60-day window for discontinuance to be reasonable.

In 15-17 Weston St NOV, the Court noted that it did not need to reach the issue of whether discontinuance of a use violation in the absence of a provision such as Burlington's would remove the violation from the safe harbor of 4454(a)—and if so, what period of discontinuance would suffice. Under one of the Town of Weathersfield's arguments in its present motion, that is the issue presented by this case. Under the Town's other argument, a use violation loses protection under the statute of limitations if it is enlarged or significantly altered and such enlargement would be illegal for a lawful

pre-existing nonconforming use. This case therefore implicates the evolving relationship between Vermont law governing (lawful) nonconforming uses and the statute of limitations for prosecuting zoning violations.

With this background in mind concerning the applicable legal concepts, we now turn to the legal issues presented in the pending summary judgment motions.

Legal Standard

First, we note that we are directed to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), made applicable to our Court through V.R.E.C.P. 5(a)(2). We accept as true all of the nonmovant's allegations of fact, as long as they are supported by affidavits or other evidence. White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted). In considering cross-motions for summary judgment, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences for purposes of deciding that motion. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332.

Discussion

The Appellants posed the following Questions for this Court to consider:

1. Does the Town of Weathersfield have the right to pursue an enforcement action to force the closure of a firewood-processing business which has been operating by the same person at the same location for 23 years, due to the fact that the owner has not obtained a zoning permit?
2. Can landowners who have been conducting a firewood processing operation on their own property for 23 years be required to obtain a zoning permit to remain in business?
3. Is a firewood-processing operation which has been on-going for 23 years a Conditional Use within the Conservation District (C-1O) of the Weathersfield Zoning Bylaws?

The scope of our review in a de novo appeal is limited to the questions posed in the statement of questions and the issues intrinsic thereto. V.R.E.C.P. 5(f) (describing the purpose of a statement of questions); Vill. of Woodstock v. Bahramian, 160 Vt. 417, 424 (1993) (limiting trial court's review to those issues preserved in the statement of questions); In re Jolley Assocs., 2006 VT 132, ¶ 9 (indicating our Court may consider issues intrinsic to the statement of questions as well). Moreover, while we consider the Reeds' conditional use application now on appeal "as though no action whatever had [previously] been held," Chioffi v. Winooski Zoning Bd., 151 Vt. 9, 11 (1989), we are constrained

to only considering those matters that were "properly warned…before the local [zoning] board." In re Maple Tree Place, 156 Vt. 494, 500 (1991).

i. Whether the conditional use application should be approved

We address Question 3 first, as doing so resolves certain issues relevant to the other Questions. By this Question, we understand Appellants to ask whether their firewood processing operation as it exists at present should receive conditional use approval. To answer, we must first classify the operation within the categories contained in the Weathersfield Bylaws. Those Bylaws follow a structure wherein uses either do not require a permit at all in a given zoning district; require a permit but will be granted one as "permitted uses" provided certain basic standards are met; require a permit and will only be granted one if further conditional use criteria are met; or are entirely prohibited. *See* Bylaws §§ 4.3.2(e); 6.3-6.4. Therefore, the use classification could prove dispositive to the question of whether the project should receive a permit.

First, we must ask whether the operation constitutes "forestry," which is an activity that does not require a permit in this district. Bylaws § 4.3.2(C). The Bylaws do not define forestry, *see generally* § 8, Definitions. However, the provision exempting forestry from a permit references § 6.10.8. That provision in turn does not mention forestry but states that, pursuant to 24 V.S.A. § 4413, the bylaws exempt "accepted silvicultural practices," along with accepted agricultural practices and farm structures, from permitting requirements. It is clear then that we must look to the enabling statute to determine what activities fall within the meaning of "accepted silvicultural practices" or "forestry," assuming those terms carry similar meanings. 24 V.S.A. § 4413 prohibits zoning bylaws from regulating "accepted silvicultural practices" or "forestry operations." It defines "forestry operations," by reference to 10 V.S.A. § 2602, as "activities related to the management of forests, including a timber harvest; pruning; planting; reforestation; pest, disease, and invasive species control; wildlife habitat management; and fertilization . . . includ[ing] the primary processing of forest products of commercial value *on a parcel where the timber harvest occurs*." 10 V.S.A. § 2602(6) (emphasis added).[3]

Were the timber from which the Reeds are producing firewood harvested solely from the Property, then the harvest and processing might be collectively classified as a "forestry operation" under the enabling statute and "forestry" under the Bylaws. However, given Mr. Reed Jr.'s admission

[3] The enabling statute directs that "Accepted silvicultural practice" will be defined by the Commissioner of Forests, Parks, and Recreation. However, that term does not appear anywhere in Title 16, subtitle 6 of the Code of Vermont Rules, which contains the rules created by the Department of Forests, Parks, & Recreation. Instead, that Subtitle establishes "acceptable management practices" for logging operations, which are directed primarily at proper hydrological management during such operations.

that 95 to 100% of the logs processed into firewood are trucked in from off site, this operation cannot be classified as forestry. *See* Appellants' Resp. to Discov. (First) at 9A; *see also* Biggs v. Zoning Bd. Of Appeals of Town of Pierrepont, N.Y., 30 N.Y.S.3d 797, 802 (N.Y. Sup. Ct. 2016) (holding that firewood processing where logs were bought from offsite met bylaws definition of "natural resource processing" rather than "forestry"); Kawa v. Hartland Zoning Bd. Of Appeals, No. LLICV126006464S, 2013 WL 2350753, at *5 (Conn. Super. Ct. May 6, 2013) ("[B]ringing timber from offsite for cutting and splitting is neither agriculture nor forestry as it relates to the use of his property."); *cf.* Lavoie v. Keown, No. 316444 (LJL), 2007 WL 1705639, at *4 (Mass. Land Ct. June 14, 2007) (finding firewood processing of trees trucked from offsite not to be agriculture because it involved only "the preparation of trees, not… their production.").

Next, we ask whether the operation could be classified as one of the permitted uses in this district. It clearly does not match the description of any of the "principal permitted uses," which are all residential. The other option is to be a "permitted accessory use." The most promising options here are "accessory use or structure" or "home occupation." Bylaws § 4.3.2(e). An accessory use is defined as a "use customarily incidental and subordinate to the principal use of the land or building." Bylaws § 8. However, there is no other known use of the Property, much less one that could be considered the principal use. No residential structure was ever constructed on the property. The firewood operation is therefore not an accessory use. *Cf.* Appeal of Gary Martin, Town of Shrewsbury v. Gary Martin, Nos. 249-11-02 Vtec, 21-2-03 Vtec, 2003 WL 25479282 (Vt. Envtl. Ct. Aug. 11, 2003) (holding that firewood processing *might* count as an accessory use to a residence or as a home industry if it were established on the same parcel as the residence, but not where it is established on a separate parcel owned by the same landowner). For similar reasons, this use is not a "home occupation," which must be "conducted entirely within the living area of a residence." Bylaws § 8.

We therefore turn to conditional uses. To be a principal conditional use, a use must be specifically enumerated as such, or the ZBA must find that it is "of a similar type and character as those listed…and meet[s] the purpose of this district." The two listed conditional principal uses that come closest (though still not very close) to describing the use are "contractor's storage" and "earth excavation." Although Mr. Reed Jr. did store some equipment on the property, the principal use throughout the entire period of use has been described as processing firewood. Thus "contractor's storage" is inapposite. Nor does "earth excavation" describe the processing of firewood, although both may involve the use of large equipment to extract natural resources. We conclude that firewood processing is not a close enough match to any of the listed conditional uses to be considered an "other

conditional use." This conclusion is bolstered by our finding, discussed below, that it does closely match two prohibited uses.

"Home Industry" is a conditional accessory use. It is defined as "Any industry or service type operation that is carried on within a residence or an outbuilding of a residence. Examples of Home Industries include: small manufacturing shops, antique shops, and small professional offices, others deemed similar in nature by the Zoning Board of Adjustment." Again, the firewood processing is not an accessory use to a residence, as none has ever been constructed on the Property. It is therefore not a "Home Industry."

Among the prohibited uses in the Conservation District are "industrial" and "highway commercial." The Bylaws define "Industry" as the "use of a building or land for the manufacture, production, processing, assembly or storage of goods or commodities . . . [i]nclud[ing] research, testing, and large offices (more than ten employees); and others deemed similar in nature by the Zoning Board of Adjustment." On the other hand, "highway commercial" is a strange use category in that it is really made up of a number of different activities. However, a lumberyard is included among the activities defined as highway commercial use. The Reeds' commercial firewood operation clearly meets the definition of industry as it involves "the use of…land for the…production, processing…or storage of goods or commodities." The fact that a lumberyard, which involves the same raw materials and produces similar noises, smells, and other effects to a firewood processing operation, is also prohibited in this District only supports that conclusion.

We consider and deem it irrelevant that the operations *may* better fit the definition of "light industry" than of "industry." The Bylaws define "light industry" as "[s]ame as Industry, but limited to: a) no more than 10 employees, b) buildings do not cover more than 10,000 square feet of land area; c) production of noise, vibration, smoke, dust, heat, odor, glare, or other disturbance shall not exceed what is characteristic of the District; d) production of electrical interferences and line voltage variations must not create a nuisance." It is not clear whether all the above criteria must be met for a use that would otherwise be defined as industry to be defined as light industry, or whether any one is sufficient. Furthermore, we note that Criterion "C" especially requires a determination that can only be made after extensive fact finding to compare the operation's disturbances to what is characteristic of the district. It is therefore undetermined at this stage whether "light industry" would be a more apt classification. However, even if it were, that would not affect our determination here, since the Conservation District standards do not make a distinction between industry and light industry. In fact, "light industrial" is not listed under any of the categories of permitted, conditional, or prohibited

uses in the Conservation District. In contrast, in the Highway Commercial District, "light industrial" is a permitted principal use, while "industrial" is a prohibited use. We will not import a distinction into the standards for the Conservation District when the drafters clearly chose to make that distinction elsewhere but not here. *See* State v. LeBlanc, 171 Vt. 88, 92 (2000) ("If the Legislature intended for the savings clause to apply to third or subsequent convictions, it knew how to so specify…the Court will not 'expand a statute by implication, that is, by reading into it something which is not there, unless it is necessary in order to make it effective.'") (quoting State v. Fuller, 163 Vt. 523, 528 (1995).

Because the commercial firewood processing operation is best classified as "industrial" within the uses categorized for the Conservation District, which is a prohibited use, we determine as a matter of law that conditional use approval must be denied.

In their motion, Appellants do not address any of the above arguments. Rather, they claim that "it was error for the Town to require Appellants to apply for a Conditional Use Permit." However, that question is not before us. Appellants chose to file a conditional use application, admittedly as part of their appeal of a Notice of Violation. We can only now address the application, not whether the application should have been required for them to continue in operation. Nevertheless, we address whether Appellants needed a permit for their operations as part of answering Question 1 below. For the above reasons, we **GRANT** the Town's motion for summary judgment on Appellants' Question 3 and **DENY** the Appellants' motion for summary judgment on the same.

ii. Whether the commercial firewood processing operation violated the Town's Bylaws

To distinguish between Appellants' Questions 1 and 2, which are very similarly worded, we interpret Question 1 to be a question of whether the commercial firewood processing operation constituted a violation of the bylaws in 2018, when the notice of violation was issued. In contrast, we interpret Question 2 to be a question of whether the town had the power to take enforcement action against such a violation.

We have already determined that the firewood processing operation was not forestry or any of the other uses for which a permit is *not* required in the Conservation District under the Bylaws in effect at the time the Notice of Violation was issued. While the Vermont Supreme Court has stated that there exists a class of activities that are "de minimus uses of private property which are neither regulated nor contemplated by the zoning regulations," and for which no zoning permit may be required, *see* In re Scheiber, 168 Vt. 534, 535 (1998) this firewood processing operation does not qualify

as such a de minimus use. Appellants truck logs into the Property and sell the firewood they produce from those logs to customers. The scale and commercial nature of the operation is clearly significant and is subject to the requirements of zoning. Therefore, conducting this firewood processing without a permit would be a violation in any zoning district. Operation in the Conservation District is a more severe violation, since, as we have already explained, firewood processing on this scale would be considered an industrial or light industrial use, and therefore prohibited in this district.

The only way the firewood processing would not have been a violation in 2018 would be if the operation were a lawful nonconforming use at the time the Bylaws then in effect were adopted. The Appellants have not disputed that "[a] zoning permit has consistently been a prerequisite for a firewood processing operation like the Reeds' business at all times since 1996 up to and including the present." Town SUMF at 7; Appellants' Resp. To Town SUMF (not disputing ¶¶ 1-28). Further, Appellants entirely direct their motion for summary judgment to arguing that enforcement is barred by the statute of limitations, because, they claim, the violation first occurred when Mr. Reed Jr. started the operation in 1996, more than 15 years prior to the Notice of Violation being issued. They therefore presume that the operation *was* a violation of the bylaws at the time it began. We therefore conclude that Appellants have waived any argument they may have had that the processing operation was a lawful nonconforming use. However, were they to have made that argument, we would conclude that Mr. Reed Jr. unlawfully expanded or enlarged that use without a permit in 2013 when he installed new processing equipment, for reasons discussed below under Question 2. The use would therefore have lost the protection of being a lawful nonconforming use (assuming it ever was one) and been subject to enforcement in 2018.

Even viewing all undisputed facts in the light most favorable to Appellants, we conclude that we must **GRANT** the Town's motion for summary judgment on Question 1: the use of the property for commercial firewood processing in 2018 was a violation of the Town's Bylaws. For the same reasons, we **DENY** Appellants' motion for summary judgment on this Question.

iii. Whether enforcement against that firewood operation is barred, including by the statute of limitations at 24 V.S.A. 4454?

We read Question 2 as having two sub-parts: first, whether the town generally has the power to take enforcement action against a failure to obtain a zoning permit, and second, whether in this instance enforcement is barred by the statute of limitations.

First, as to whether a town generally has the power to enforce a requirement that property owners obtain a permit before commencing land development, the answer is clearly yes. Zoning has

long been held to be a constitutional exercise of a municipality's police powers, so long as it is reasonably related to protecting the public health, safety, and welfare of its residents. State v. Sanguinetti, 141 Vt. 349, 351 (1982) (citing Euclid v. Ambler Realty Co., 272 U.S. 365, 396 (1926)). The Vermont Legislature has delegated to municipalities not only the power to adopt planning and zoning, but the *responsibility* to enforce those laws. *See* 24 V.S.A § 4452 ("If any street, building, structure, or land is or is proposed to be erected, constructed, reconstructed, altered, converted, maintained, or *used* in violation of any bylaw adopted under this chapter, the administrative officer *shall* institute in the name of the municipality any appropriate action, injunction, other proceeding to prevent, restraint, correct, or abate that construction or use…") (emphasis added). 24 V.S.A. § 4451 empowers municipalities to seek monetary penalties and lays out the specific steps they must take to do so, beginning with the issuance of a notice of violation. It does not matter whether, as Appellants allege, zoning administrators and/or other town officials were aware of the alleged violation for years before acting. Appellants do not allege that their activities were authorized by this non-enforcement, nor could they. *Cf.* In re Lee, No. 2017-004, 2017 WL 2963317 at *4 (Vt. June 26, 2017) (unpublished mem.) (holding that a zoning administrator's "decision not to initiate any violation or enforcement action did not amount to an authorization of the structures on the land.").

Finally, we address the heart of the parties' dispute in their motions, namely whether enforcement against Appellants' use of their property for commercial firewood processing is barred by the statute of limitations at 24 V.S.A. § 4454. Appellants argue that the firewood processing had been ongoing for 22 years at the time the notice of violation was issued, and therefore enforcement was barred by the statute. The Town makes two alternative arguments in response. Both arguments depend on an extrapolation from the Bylaws' provisions governing *lawful* nonconforming uses to this scenario involving a longstanding zoning violation, aka an *unlawful* nonconforming use. To support this extrapolation, the Town makes the general argument that zoning violations must not be afforded any greater protection via the statute of limitations than exists for lawful nonconforming uses. Because the Bylaws limit enlargement or alteration of a nonconformity on the one hand, and resumption of a nonconformity after a 3-year discontinuance on the other, the Town argues that both provisions represent a ceiling on the protections afforded to zoning violations. In other words, it argues that discontinuance for a period of 3 or more years or enlargement or alteration would reset the statute of limitations applicable to the prosecution of a zoning violation in this Town.

This framework, which places all uses of land on a spectrum of protectedness, from de minimus uses not regulated by zoning at one end, to out and out zoning violations on the other, is

attractive in its simplicity. Nevertheless, we must examine the statutes and caselaw to determine whether it comports with the purposes underlying the respective provisions on nonconformities and the statute of limitations for zoning violations. As a starting point, the Supreme Court's statement in 15-17 Weston St. that it did not find it "incongruous" that the Legislature would allow municipalities to establish shorter periods of discontinuance to lose the "safe harbor" of the statute of limitations for zoning violations than to lose the status of a lawful pre-existing nonconformity, supports the Town's position. In explaining why its interpretation supported the general goals of zoning, the Court explained that the alternative—finding discontinuance provisions such as Burlington's void—would lead to "[z]oning violations…be[ing] treated far more favorably than lawful preexisting nonconforming uses," because a zoning violation that occurred outside of the statute of limitations would forever after afford protection to the same use on the property, even after a substantial discontinuance. In re 15-17 Weston St NOV, 2021 VT 85, ¶ 19. Importantly, this logic recognizes that although a statute of limitations against prosecution of violations is conceptually distinct from the status accorded to pre-existing nonconforming uses, the two functionally operate in similar ways.

However, we are also mindful of what the Supreme Court identified as the Legislature's chief purposes behind the statute of limitations at § 4454, namely ensuring landowners' peace of mind and reducing the cost and uncertainty of title searches for prospective buyers. 204 North Ave, 2019 VT 52, ¶ 8. Deeming discontinuance, enlargement, or expansion of a zoning violation to restart the clock on the statute of limitations slightly blurs the otherwise "bright line" of a statute of limitations that bounds the search for potential zoning violations. However, we believe that a reasonably diligent purchaser or title examiner would inquire into current violative uses and whether they were ever discontinued, altered, or expanded. This is true if only because the buyer or examiner could not be sure whether the use was a lawful nonconforming use or a zoning violation absent some affirmative indication from zoning officials. Therefore, in the majority of cases, we believe that applying a municipality's rules governing discontinuance, enlargement, etc. of nonconforming uses to the statute of limitations for zoning violations will not create additional burdens for parties to real estate transactions. Moreover, the legislative purpose behind the statute of limitations must also be balanced against the strong policy the Supreme Court has repeatedly found exists in favor of phasing out nonconformities. That policy exists at least as strongly with regard to illegal nonconformities, i.e. zoning violations, as it does for lawful nonconformities. *See* 15-17 Weston St. NOV, 2021 VT 85, ¶ 19.

As a general matter, we therefore accept the Town's framework: those provisions creating restrictions on (lawful) nonconforming uses create a ceiling to the protections accorded to zoning violations. We next examine the Town's two specific arguments, beginning with the alleged discontinuance, and proceeding to the alleged enlargement or expansion of the violative use.

Section 6.4 of the Bylaws provides that "[n]onconforming uses may be continued indefinitely," except in the circumstances enumerated. The second of those circumstances is that "[o]nce such nonconforming use has been discontinued for the Time Period or has been changed to or replaced by a conforming use, it shall not be re-established." The "Time Period" is defined as "three years [from the day after the nonconforming use was discontinued] plus the time for completion of any appeals of any zoning bylaw decision(s) relating to the parcel on which the nonconforming use existed." Bylaws § 6.4.2. The section goes on to clarify that the "intent to resume a discontinued nonconforming use shall not confer the right to do so." However, it also adds that "If the temporary discontinuation is due to the time needed for restoration after serious damage from any cause, or if it is due to causes beyond the control of the owner, the Board of Adjustment may grant extensions of time due to extenuating circumstances." Id. This provision does not state *when* the Board of Adjustment may grant such an extension of time—whether it may only do so in response to a request from the landowner at the time of discontinuance of a nonconforming use, or whether it may also retroactively extend the time for a discontinuance that preserves lawful nonconforming status, for instance during an appeal of a notice of violation based on the resumption of the use. We keep this ambiguity in mind when ruling on the Town's motion for summary judgment based on this argument.

The Town claims that it is undisputed that Appellant ceased commercial firewood operations on the property during the period of time from 2009 to 2012, while Doug Reed Jr. was recovering from his logging injury. It is true that Appellants did not dispute that "[d]uring the period from Doug Reed, Jr.'s accident in 2009 through his recovery in 2012, processing activity fell off and commercial firewood sales *stopped* with processing conducted by friends, relatives, and former employees for personal and family use," *see* Town SUMF ¶ 12 & Appellant's Resp. to Town SUMF (emphasis added). It is also true that Mr. Reed Jr., in response to interrogatories, stated that he was injured on either February 20 or 22, 2009, *see* Appellants' Resp. to Disc. (Second) at 2A & 9A, and did not return to full time work until June or July of 2012, *see* Id. at 2A & 3A, which is a period of more than three years. He stated that "[d]uring that time…numerous friends, relatives and former employees including Adam Bates, Eric Tabor, and Les Sawyer continued to cut logs into firewood on the site to fulfill prior orders and for their personal and family use." Id. at 2A. The Town interprets this as an exclusive list of the

firewood processing activities that took place during the pendency of Mr. Reed Jr.'s accident, and indeed Appellants' acquiescence to the above statement in the Statement of Questions appeared to support that position.

However, at a status conference on October 18, 2021, we asked if there was any evidence as to how long into the pendency of Mr. Reed Jr.'s injury prior orders were being fulfilled. We reasoned that fulfillment of orders received prior to the injury might be deemed a continuation of the commercial activity. Partly in response to that request, the Town submitted affidavit testimony from Mr. Reed Jr.'s friends and neighbors, and from Nancy Reed. One affidavit came from Adam Bates, who testified that "[d]uring the period from 2009 to 2012 when Doug was unable to work, customers kept placing orders for firewood. Many of Doug's friends pitched-in and helped Doug fill the orders…I personally went to the property many weekends during this period to cut and split the logs…I estimate that I cut, split, and loaded an average of two truckloads of firewood every weekend." Adam Bates Aff. at ¶ 8. Similarly, Nancy Reed testified that "during this time [of Reed Jr.'s injury], friends helped out Doug by filling firewood orders which kept coming in." Nancy Reed Aff. at ¶ 13. In other words, the new affidavit testimony suggests far more than fulfillment only of orders received prior to Mr. Reed Jr.'s injury. It suggests a continuation of commercial firewood processing.

This sworn affidavit testimony is enough to create a genuine dispute of material fact as to whether commercial firewood processing operations ceased during the three-plus years Reed Jr. was injured. *See* V.R.C.P. 56(c)(1)(B) & 56(c)(4). Resolving all reasonable doubts and inferences in a light most favorable to the non-moving party, as we must, we therefore cannot grant the Town summary judgment on Question 2 on this basis. A further reason not to grant the Town's motion on this basis is because we may conclude that even were operations discontinued for three years, an extension of the discontinuance would be justified by Mr. Reed Jr.'s injury, which constituted "serious damage" (to his body), and in any event was "due to causes beyond" his control. *See* Bylaws § 6.4.2 and discussion above. However, accepting all inferences in favor of the Town, we also cannot grant Appellants summary judgment on this argument as to Question 2, because Mr. Reed Jr.'s responses to discovery create a genuine dispute of material fact as to whether commercial firewood processing ever stopped for a period of three years. That issue would need to be resolved at a trial where the credibility of witnesses can be evaluated.

In the alternative, the Town argues that the statute of limitations for prosecuting the zoning violation re-started in 2013, when the Appellants enlarged or altered the violative use of their property. Section 6.4.1 of the bylaws creates another exception to the permission lawful nonconforming uses

have to continue indefinitely. It reads, "The Board of Adjustment, after a conditional use hearing, may permit: moving; enlarging by up to 50% of original size; altering, or changing to another nonconforming use; but increase of external evidence of nonconforming use shall be kept to a minimum." Although this passage uses permissive language, read in the context of the entire Bylaws, it is clear that this passage is prohibitive; i.e. we read it to mean that a lawful nonconforming use may *only* be moved, enlarged, altered, etc. after the landowner receives a conditional use permit from the ZBA, given that such changes constitute land development. *See* Bylaws § 1 ("In Accordance with these Bylaws, *no development shall take place until a zoning permit has been issued* and has become effective") (emphasis added) & § 6.1 (same); Id. § 8 (Defining "development" to include "any change in the use of any building or other structure, land or extension of use of land."). The Town's argument is that if a lawful nonconforming use may not be changed in these ways without a permit, then a zoning violation certainly may not. Changing a zoning use violation in these ways would, the Town argues, either create a fresh violation or, what amounts to much the same thing, restart the statute of limitations on the existing violation.

We generally support this understanding as a common-sense approach to the difference between lawful nonconforming uses and zoning violations. Just as the Supreme Court could not believe that the Legislature intended, by adopting the statute of limitations, to allow a landowner to begin a nonconforming use on their property by virtue of the property having many years previously hosted that same use, *see* 15-17 Weston St. NOV, 2021 VT 85, ¶ 19, we do not believe that the Legislature intended to allow landowners to *expand* a use that has always been a zoning violation but has lasted for more than fifteen years. The alternative holding would encourage landowners to violate the Bylaws in a small and undetectable manner in the expectation that one day they will be able to enlarge their operations without fear of prosecution—a protection that could be highly profitable due to the absence of competitors precluded from opening by the zoning laws.

We must therefore determine whether, as the town argues, the commercial firewood processing operation was "enlarge[ed] by up to 50% of original size" or otherwise "alter[ed]" in 2013. *See* Bylaws § 6.4.1. That is when Appellants brought a Cord King machine onto the property, and added several new dump trucks to their fleet, which led to the subsequent five-fold increase in production. Both sides cite to Vermont Brick & Block, Inc. v. Village of Essex Junction, 135 Vt. 481 (1977) for support. As discussed in the Background section, in that case the Supreme Court established that while "mere increase in business" would not establish that a nonconforming use had enlarged or expanded, "new facilities or a new product" would indicate that it had. Id. at 483. The

Court echoed this in Miserocchi when it found that "a mere increase in the volume or intensity of a nonconforming activity" would not constitute an unlawful extension or enlargement. In re Miserocchi, 170 Vt. 320, 327 (2000). We agree with Appellants that even a five-fold increase in business volume, on its own, would likely not establish an unlawful enlargement under this precedent. However, we conclude that the "Cord King" firewood processing machine that Appellants installed in 2013, like the tower and auger at issue in Vermont Brick & Block, is a new facility and does not represent a mere increase in the intensity of the existing use. As such, it is an "enlargement" of that use and would have required a zoning permit, were the use prior to 2013 lawfully nonconforming. Given that the use was a violation, this enlargement without a permit re-started the statute of limitations.

Finally, insofar as it is relevant, we note that the Bylaws provision at issue does provide specific standards for the ZBA to follow in deciding whether to approve the enlargement of a nonconforming use, as is required by In re Miserocchi, 170 Vt. At 325. Namely, the ZBA must apply all those standards encompassed in conditional use review. *Cf.* In re Casella Waste Mgmt., Inc., 2003 VT 49, ¶ 13.

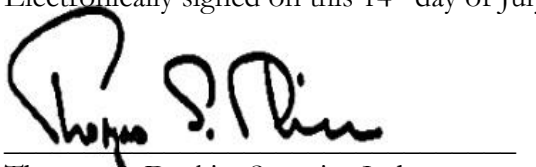
It is on this basis, and not on the basis of the alleged discontinuance, that we **GRANT** the Town's motion for summary judgment on Question 2. Even accepting all inferences and resolving all doubts in favor of the non-moving party (the surviving Appellant), we conclude that Appellants unlawfully enlarged their zoning violation through installation of new facilities in 2013, and that prosecution of this enforcement action is consequently not barred by the statute of limitations.

Conclusion

Having granted the Town summary judgment on all three of Appellants' Questions, we affirm the Notice of Violation and the denial of a conditional use permit.

This concludes the current matter before the Court. A Judgment Order accompanies this Decision.

Electronically signed on this 14th day of July, 2022, at Brattleboro, VT pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Environmental Division