

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-064

SEPTEMBER TERM, 2002

	}	APPEALED FROM:
	}	
	}	Environmental Court
In re Appeal of Brian Hehir	}	
	}	
	}	DOCKET NO. 130-6-00 Vtec
	}	
	}	Trial Judge: Merideth Wright
	}	
	}	

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

Appellant Brian Hehir appeals from a decision of the Environmental Court granting a conditional use permit to appellee Four Star Delivery to operate a food delivery service from a location on North Winooski Avenue in the City of Burlington. Hehir contends the court erred in granting the permit because: (1) Four Star does not qualify as a nonconforming use under the City' s zoning ordinance; (2) the evidence does not support the court' s finding that the business would be less harmful or detrimental than the prior use; (3) the business does not meet the parking requirements of the ordinance; (4) the business will have an adverse effect on the neighborhood' s character and fails to comply with other bylaw requirements; (5) the business violates the City' s height restrictions; and (6) the court erroneously failed to subject the business to site plan review. We affirm.

The facts may be summarized as follows. The subject property is located on North Winooski Avenue in a district of the City zoned Residential-Medium Density. Retail businesses are not a permitted or conditional use in the district. Nevertheless, in May 1992, a former occupant received a permit to operate a retail business selling sports cards and comic books. No appeal was taken, and the permit became final. Less than one year later, the former occupant vacated the building, and Four Star Delivery moved in and began operating a restaurant food delivery business, although it did not apply for a permit to operate at the time. The business takes telephone orders for area restaurants, faxes the order to the restaurant, and dispatches drivers by two-way radio to pick up the order and deliver it to the customer. Drivers use their own cars, and come to the office location twice per day, at the beginning and end of their shifts.

After operating for some seven years at the location, Four Star applied for a conditional use permit, apparently in response to a notice of violation. The zoning board of adjustment approved the application as a change or modification of a nonconforming use under the ordinance. Hehir, an interested party who resides nearby, appealed to the Environmental Court. In April 2001, the court issued a written decision, granting partial summary judgment in favor of Four Star on the question of whether it constituted a valid nonconforming use under the ordinance. The court noted that although it was not in a district zoned for retail use, the prior retail establishment had obtained a valid permit, and Four Star had succeeded to the former occupant' s status as a nonconforming use under the zoning ordinance, which provides that if a nonconforming use is discontinued, it may be re-established within one year without losing its status. Nevertheless, the court noted that, under the ordinance, if a non-conforming use is changed or modified in any way, or changed to a different nonconforming use, it must satisfy additional review criteria, including the requirement that the different use be " less harmful or detrimental" to the neighborhood than the prior use. These additional questions involved disputed issues of fact to be resolved after an evidentiary hearing.

Following a hearing in April 2001, the court issued a second decision, ruling in favor of Four Star. The court found that traffic generated by the business would have no adverse effect on traffic in the area; that parking demand generated by

the business was adequately provided for through six rented off-street parking spaces for office staff, and through a permit condition limiting the number of drivers parking on the street to four at any time; that the business, which utilized an antenna for two-way radio dispatching, complied with height limits and parking requirements; and that, on the whole, the business would be less detrimental or harmful to the neighborhood than the prior use, which generated more traffic, and provided for no off-street parking. Accordingly, the court granted the permit application, with specified conditions requiring maintenance of the six off-street parking spaces and that office employees utilize the off-street parking, limiting the number of drivers using on-street parking to four at any time, and prohibiting drivers from parking in front of appellant Hehir's property, blocking nearby driveways, leaving their vehicles idling, parking illegally, or dumping trash within a block of the business. This appeal followed.

Hehir first contends the court erred in determining that Four Star qualified as a nonconforming use. He asserts that the zoning ordinance and statutory law define nonconforming uses as those in existence at the time of the adoption of the regulations that rendered the use nonconforming, thereby excluding Four Star. This argument was not raised below however, and therefore, is not cognizable on appeal. See Greene v. Bell, 171 Vt. 280, 287 n.3 (2000) (issues which plaintiff failed to raise at trial are waived on appeal).

Hehir next contends the court erred in finding that Four Star's business would be less detrimental or harmful to the neighborhood in terms of traffic, parking, hours of operation, and aesthetics than the prior nonconforming use. We will uphold the trial court's findings if there is any reasonable and credible evidence to support them. Agency of Natural Res. v. Bean, 164 Vt. 438, 443 (1995). Robert Alexander, a traffic engineering consultant, testified that, based on his analysis, the Four Star business generated less traffic and parking demand than the prior retail use. In addition, the permit conditions requiring use of the six off-site parking spaces by office employees and limiting the number of drivers parking on the street supported the court's conclusion that the overall effect of the business was less detrimental than the prior retail business, which had no off-street parking. Although Four Star's hours of operation are later than the prior use, the evidence indicated that the times when it actually generated traffic were limited. The additional permit conditions prohibiting drivers from parking illegally, blocking driveways, or littering all further supported the court's conclusion that the business would be less detrimental to the neighborhood than the prior nonconforming use. Accordingly, we discern no basis to disturb the ruling.

Hehir further contends that Four Star fails to meet the City's parking requirement, arguing that the evidence did not support the court's finding that the business would meet the requirement by contracting for six off-street parking spaces in a forty space lot at a Dairy Queen approximately 200 feet away. Hehir contends there was no evidence demonstrating that the spaces were specifically allocated to Four Star employees, or that the spaces were within four hundred feet of the business, as required by the ordinance. The applicant specifically testified as to the availability and distance of the parking spaces, which was sufficient to support the findings. Hehir's additional claim that the availability of the spaces was not adequately documented, as required by the ordinance, was not raised below, and therefore will not be considered on appeal. Greene, 171 Vt. at 287 n.3.

Hehir additionally asserts that an antenna located on the building for two-way radio dispatching is not exempt from the height limitations under the ordinance. The antenna is six feet tall, one half inch in diameter, and located on the back roof of the building. The ordinance limits existing structures in the area to thirty-five feet, but exempts features such as towers, spires, and cupolas which are not used for human occupancy or commercial occupation, and which do not exceed ten percent of the roof area, but specifically provides that satellite dish antennae are not exempt from height limitations. The City's zoning administrator testified that the antenna was exempt under this provision, and the court so found. Although the ordinance is less than clear in its application to the Four Star antenna, its express exception of satellite dish antennae from the height exemption could reasonably be interpreted to mean that other kinds of antennae may be exempt if they satisfy the other criteria. Accordingly, we will not disturb the court's ruling. See Badger v. Town of Ferrisburgh, 168 Vt. 37, 39 (1998) (we are bound by environmental court construction of zoning ordinance unless it is clearly erroneous, arbitrary or capricious).

Finally, Hehir contends the court erred in failing to apply site plan review criteria to Four Star's application. The issue was not raised in the statement of questions to the trial court or developed below. Accordingly, it was waived on appeal. See Greene, 171 Vt. at 287 n.3.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice