

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2002-080

SEPTEMBER TERM, 2002

	}	APPEALED FROM:
	}	
	}	Environmental Court
In re Appeal of Gary and Suzanne	}	
Gregoire	}	
	}	DOCKET NO. 47-3-98 Vtec
	}	
	}	Trial Judge: Merideth Wright
	}	
	}	

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

In this appeal from a decision of the Environmental Court, we uphold the court' s interpretation of the Town of Colchester' s zoning ordinance regulating the resumption of nonconforming uses, and its conclusion that the Town is not estopped from enforcing the regulation under the facts of this case.

This appeal follows from proceedings before the Environmental Court pursuant to our remand in In re Gregoire, 170 Vt. 556 (1999) (mem.). In that case, we held that two cottages owned by appellants Gary and Suzanne Gregoire were subject to the Town of Colchester' s regulations governing the resumption of nonconforming uses. Id. at 558-59. We remanded to the Environmental Court to determine whether the nonconforming use of the properties was abandoned as the Town contended. Id. at 560. On remand, the court conducted an evidentiary hearing, and issued an order in the Town' s favor. The Gregoires appeal the court' s legal conclusions but do not contest the court' s factual findings. Accordingly, we are bound by those findings, see Rule v. N.H.-Vt. Health Serv., 144 Vt. 323, 325 (1984), which are set forth in relevant part below.

The Gregoires own two cottages in a six-cottage condominium compound in the Town of Colchester, Vermont. The buildings, known as Camp Mike and The Birches, were constructed and occupied as seasonal dwellings prior to the Town' s enactment of zoning regulations. Although seasonal dwelling use is a permitted use in the district in which the cottages are located, they are nonconforming because the Town' s zoning regulations prohibit multiple structures on a single lot.

In 1989, the former owners of Camp Mike and The Birches ceased using the two cottages because they planned to renovate the buildings. Litigation concerning the cottages prevented the owners from commencing the renovations at that time. In March 1993, the Chittenden Superior Court determined that the units may be occupied as seasonal dwellings only, and reinstated building permits issued in 1989 for the installation of foundation footings and a frost wall. The order required the owners to obtain Town approval for any other improvements they desired to make to the properties. The Town thereafter issued a building permit " per court order dated 3-25-93." Pursuant to the 1993 permit, work was done on four of the six units in the compound, except Camp Mike and The Birches.

In 1996, Camp Mike' s foundation was shored up. A condemnation order was issued for both cottages that same year because the Town' s building inspector believed the buildings were not safe for human habitation. The order was later rescinded by an agreement which allowed the owners to stabilize the foundations of both units but not to renovate or

repair them otherwise.

On August 1, 1997, the Gregoires purchased the cottages. At that time, the structures were in poor condition. The Gregoires purchased the properties with the intent to renovate them for residential use in the summer. The court found the low purchase price the Gregoires paid for the properties reflected the uncertainty associated with their permitting status as well as their poor condition. The Gregoires jacked up and painted Camp Mike in the fall of 1997, but did not perform any work on The Birches. The following summer, the Gregoires secured a building permit which authorized them to " fill and replace sea wall, [and the] foundation[s]" of both Camp Mike and The Birches.

Based on the foregoing findings, the court determined that the nonconforming use had been abandoned as defined by the Town's zoning ordinance beginning in 1990, although it measured the period as commencing in March 1993 when the superior court litigation ended. At the time, the zoning regulation prohibited the resumption of an abandoned nonconforming use. The ordinance defined a nonconforming use as abandoned when

- (a) The intent of the owner to discontinue the use is apparent.
- (b) The nonconforming use or the characteristic equipment and furnishings of the nonconforming use have been removed from the premises and have not been resumed or replaced within twelve months unless extended by the Zoning Board of Adjustment.
- (c) It has been replaced by a conforming use.

Town of Colchester Zoning Ordinance § 1801.6 (1991). Relying on the first part of subsection (b), the court concluded that the cottages were not used for seasonal residential use for more than twelve months without any resumption in that use. Therefore, the nonconforming use had been abandoned and the Gregoires could not resume it under the ordinance. The court also rejected the Gregoires' argument that the Town was estopped from enforcing the regulation because it issued building permits for the cottages in 1993, 1996, and 1998. This appeal followed.

On appeal, the Gregoires contend the Environmental Court misconstrued the Town of Colchester's zoning ordinance. We review their claim under a familiar standard. Unless they can show the court's construction of the zoning ordinance is arbitrary, capricious, or clearly erroneous, we will uphold its construction of the ordinance. Badger v. Town of Ferrisburgh, 168 Vt. 37, 39 (1998). Our review must be guided by the legislative purpose behind zoning, which is to " bring about the orderly physical development of a community by confining particular uses to defined areas." Id. Because the public interest in eliminating nonconforming uses is strong, we strictly construe zoning provisions that allow nonconforming uses. Id. at 40. We also interpret zoning regulations under the rules of statutory construction, looking to the plain meaning of the words used to give the regulations effect. Id.

The Gregoires first argue that Colchester is not authorized to implement both a durational discontinuance regulation and an abandonment regulation, but, rather, it must choose between the two principles. They point out that traditionally, a discontinuance of a nonconforming use is distinct from an abandonment because no intent to abandon must be shown to prove discontinuance. They claim our decision in Badger v. Town of Ferrisburgh supports their novel argument that a municipality must choose between the two concepts. In Badger, we observed that 24 V.S.A. § 4408(b)(3) " provides two alternatives from which a municipality may choose in implementing its policy on resumption of nonconforming uses." Badger, 168 Vt. at 41. A municipality may prohibit the resumption of a nonconforming use where the use is discontinued for at least six months, regardless of any intent to abandon the use, or if the use is abandoned for any period of time. Id. Unlike discontinuance, abandonment requires a showing of intent. Id. Nothing in our decision in Badger suggests, however, that the § 4408(b)(3) alternatives are mutually exclusive and require a municipality to pick one alternative or the other, but not both. Considering the strong public interest in eliminating nonconforming uses, the Gregoires' interpretation of our decision in Badger is untenable.

The Gregoires also argue that the plain words of the ordinance at issue require an intent to abandon the nonconforming use. We disagree. The plain language of § 1801.6 of the Town of Colchester Zoning Ordinance sets forth distinct circumstances under which an abandonment may be found, and only the first listed circumstance requires a showing of intent. See § 1801.6(a) (" The intent of the owner to discontinue the use is apparent." ). Subsection (b) plainly allows the Town to prohibit resumption of a nonconforming use where the use has " not been resumed . . . within twelve months."

Alternatively, the Gregoires claim that § 1801.6 is ambiguous, and the court erred by construing the ambiguity in the Town's favor. See In re Miserocchi, 170 Vt. 320, 324 (2000) (any ambiguity in zoning regulation must be construed in landowner's favor). The ambiguity, they claim, flows from the use of the word "abandonment" in the ordinance's title, suggesting that intent to abandon is a necessary criteria, while including a durational discontinuance provision for which no intent element is required. We fail to see any ambiguity in the ordinance. The ordinance clearly spells out the circumstances under which the Town may find abandonment. Those circumstances include the discontinuance of a nonconforming use for a period of twelve months. We find no error in the Environmental Court's interpretation of the ordinance.

Finally, the Gregoires argue that the court erroneously rejected their estoppel claim because the Town issued several building permits upon which the Gregoires and their predecessors in title relied. To prevail on their estoppel claim, the Gregoires had to show that the Town possessed knowledge of the true facts, but the Gregoires and their predecessors did not; that the Town intended the Gregoires and their predecessors to rely on the building permits, and that such reliance was injurious to the Gregoires' interests. See My Sister's Place v. City of Burlington, 139 Vt. 602, 609 (1981). According to the Gregoires, the Town knew that the seasonal residential use had been abandoned as of 1990, but continued to issue building permits to the owners of Camp Mike and The Birches. As a result, the Gregoires and their predecessors reasonably believed that they could resume the residential seasonal use of the properties once they completed the repairs.

The Gregoires' estoppel argument is unconvincing on this record. There is no dispute that the parties knew the cottages had not been used for dwelling purposes as of at least 1990. Thus, both parties possessed knowledge of the true facts, even if the Gregoires and their predecessors did not appreciate the legal significance of those facts. The issuance of the building permits does not alter that result. As the court's findings reflect, each building permit was limited in scope and was consistent with the Town's position that the nonconforming use had long ago ceased. With suitable permits, the structures could be used for purposes other than dwelling, like storage, a screened pavilion, a gazebo, or a deck. Thus, the owners' reliance on the building permits as permission to use the cottages for dwelling was unreasonable because the permits in no way indicated that they contemplated such use.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice