

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-020

SEPTEMBER TERM, 2005

In re Appeal of Glenn and Elouise Martin	}	APPEALED FROM:
	}	
	}	Environmental Court
	}	
	}	DOCKET NO. 54-4-03 Vtec
		Trial Judge: Merideth Wright

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

Applicants Glenn and Elouise Martin appeal from the environmental court=s order denying their request to convert three commercially-zoned lots to residential use. Applicants argue that the environmental court erred because: (1) its analysis of the proposal=s adverse effect@ exceeded the scope of the town=s zoning ordinance; (2) its finding of substantial and material adverse effects is not supported by the record; and (3) it incorrectly limited its evaluation of adverse effect to two adjoining landowners. We reverse and remand for additional findings.

Applicants own three lots in a subdivision in Jericho, Vermont. Applicants previously owned all of the lots in the subdivision and they developed the subdivision in two stages. In 1984, they created sixty-three single-family residential lots located to the south of Vermont Route 15. These lots have been sold and there is a single-family residence on each lot. In 1987, applicants created thirty-two commercial lots, twelve of which are located north of Route 15 and twenty of which are located south of Route 15. All of these lots are located in a commercial zoning district. Applicants have sold only three of the lots south of Route 15 as commercial lots, one of which remains undeveloped. The commercial uses include an automobile repair business, which also contains a residential apartment, and a veterinary clinic, which similarly contains a residential apartment. In 1993, applicants obtained approval to construct single-family residences on seven of the remaining twenty commercial lots south of Route 15, all of which have been constructed and sold. In 1999, applicants requested approval to develop single-family homes on all but two of the remaining commercial lots. The request was approved with the exception of the lots at issue in this appeal Clots 7, 16, and 19. Applicants did not appeal from the 1999 denial.

In January 2003, applicants reapplied for approval to construct single-family residences on lots 7, 16, and 19. The town development review board denied the application, finding in part that the project would not be in general harmony with the surrounding commercial uses and would detract from abutting properties.* Applicants appealed to the environmental court.

After an evidentiary hearing and a site visit, the environmental court denied applicants= request. Per the parties= stipulation, the only conditional use standard at issue related to the effect of the proposal on the character of the area. The pertinent regulation specially provided that, to be approved as a conditional use, the proposed use must meet the following criteria:

- 301.4.3.2 that the character of the area affected or the general rural character of the Town shall not be adversely affected, including but not limited to:

* * *

301.4.3.2(b) that the proposed use(s) or building(s) and the relationship between the buildings and the land will be in general harmony with the character of the surrounding neighborhood and will not detract from abutting residences or other property. The presence of a preexisting nonconformance, either on the subject property or nearby, shall not create the presumption that nonconformance is acceptable.

Jericho Zoning Regulations ' 301.4.3.2.

The court found that, although the neighborhood was zoned as a commercial district, it had become a mixed residential and commercial neighborhood. It explained that Lot 7 was adjacent to three single-family residences and to Lot 5, which contained the veterinary clinic and its residential apartment. Lot 19 was adjacent to three single-family residences, as well as Lot 17, which had been approved for a single-family residence, and Lot 5 (the veterinary clinic); it was also directly across the street from the parking area for the commercial automotive repair business on Lot 3. Lot 16 was adjacent to a single-family residence, to Lot 17, to the vacant commercial Lot 1, and to Lot 3. The court found that some property owners had expressed concern that existing commercial uses would become incompatible as the neighborhood became more predominantly residential.

The court concluded that, while single-family residential use of the three lots could be compatible with the surrounding single-family residences and with the outward appearance of the mixed commercial and residential buildings, the proposed solely-residential use of all three lots also needed to be analyzed in connection with the question of whether the area's commercial uses would be adversely affected. In other words, the court stated, it needed to analyze the viability of the area to continue as a mixed-use commercial and residential neighborhood. The court found that the conversion of all three lots to solely residential use would detract from the use of the abutting properties now in commercial use, and it would adversely affect the mixed-use character of the whole area affected. The court therefore denied the application for conversion of the lots to solely residential uses. This appeal followed.

Applicants argue that the environmental court erred in denying their application. They first assert that the court improperly analyzed whether the proposed use would be compatible with the neighborhood. According to applicants, the court exceeded the scope of the ordinance in considering whether the proposed uses would detract from the neighborhood's continued viability as a mixed-use commercial and residential area. They assert that the test for compatibility is essentially a visual one, and they maintain that, visually, the neighborhood resembles a residential area, and thus their proposed uses were compatible. Applicants next contend that there is no evidence to support the court's finding that a substantial and material adverse effect would result from the conversion of the lots to single-family residences. Finally, applicants assert that the court improperly focused its analysis on the potential adverse effect that would be suffered by the commercial properties rather than the effect on the whole neighborhood, which had become predominantly residential.

First, we reject appellants' assertion that the court misconstrued the relevant zoning ordinance. We review the environmental court's interpretation of a zoning ordinance to determine whether its construction is clearly erroneous, arbitrary, or capricious. Simendinger v. City of Barre, 171 Vt. 648, 650 (2001) (mem.). As noted above, the relevant ordinance requires that a conditional use not adversely affect the character of the area affected or the general character of the Town, including, but not limited to . . . that the proposed use(s) or building(s) and the relationship between the buildings and the land will be in general harmony with the character of the surrounding neighborhood and will not detract from abutting residences or other property. Jericho Zoning Regulations ' 301.4.3.2 (emphasis added). Applicants offer no support for their assertion that the appropriate test is essentially a visual one, and their proposed construction is at odds with the ordinance's plain meaning. The character of a neighborhood plainly encompasses factors other than visual compatibility. See Badger v. Town of Ferrisburgh, 168 Vt. 37, 40 (1998) (Words in statutes and ordinances should be given their plain meaning). Otherwise, applicants' interpretation suggests that earlier conditional uses approved by the town would have to preclude approval of subsequent conditional uses by virtue of similarity alone, regardless of the primary zoning plan.

Nonetheless, in this case, the parties stipulated that, with the exception of the provision above, all of the remaining conditional use criteria had been satisfied, including that the continued operation of adjacent uses as permitted in this ordinance will not be adversely affected by the nature of the proposed use; and the proposed use will not impair the integrity of the district or adjoining districts for another reason, nor otherwise derogate from the intent and purpose of this ordinance. See Jericho Zoning Regulations ' 301.4.3.4(a), (c). The court fails to explain how it reached its conclusion that the proposal would have an adverse impact on the continued viability of the neighborhood in light of the parties' stipulation. The court concluded that the conversion of the three lots to solely-residential use would detract from the use of the abutting properties now in commercial use and would adversely affect the mixed-use character of the whole area affected, but it cites no such detractions or loss to the neighborhood. While our review of the environmental court's determination of whether there is material adverse effect is generally deferential, see In re John A. Russell Corp., 2003 VT 93, & 30, 176 Vt. 520 (mem.), in this case we simply cannot discern the basis of the court's conclusion. We therefore reverse and remand its decision for additional findings.

Reversed and remanded.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice

* The town development review board also relied on zoning regulation 301.4.3.4(a) in denying applicants' conditional use application. That regulation requires that the continued operation of adjacent uses as permitted in this ordinance will not be adversely affected by the nature of the proposed use. Jericho Zoning Regulations ' 301.4.3.4(a). As discussed below, the town stipulated that this requirement had been met for purposes of the appeal to the environmental court.