

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2005-277

MARCH TERM, 2006

In re Appeal of Wesco, Inc.

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APPEALED FROM:

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Environmental Court

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DOCKET NO. 107-6-04 Vtec

Trial Judge: Merideth Wright

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

The City of South Burlington appeals from an environmental court decision granting Wesco, Inc.'s application for a zoning permit to construct a canopy over a nonconforming gasoline dispenser use at a service station and convenience store it operates on Williston Road. The City contends the court erred in concluding that construction of the canopy was permitted under the zoning regulations because it would not enlarge or extend a nonconforming use as prohibited under the City's zoning regulations. We affirm.

The property in question has been the subject of numerous prior proceedings. Those material to this dispute may be summarized as follows. In 1999, the City's zoning board of adjustment granted Wesco a

conditional use permit to add a convenience store to its existing gasoline service station on Williston Road and to remove the service and repair portion of the station. The station contained a number of gasoline pumps under a canopy and a separate diesel dispenser. In May 2003, the City adopted zoning regulations under which neither gasoline nor service station uses are permitted or conditional uses. In December 2003, the City's development review board granted a site plan application to amend the existing site plan in order to reconfigure the planned convenience store and fueling stations and to add a second canopy. In January 2004, Wesco applied for a zoning permit to construct the reconfigured plan but specifically omitted from the application the proposed second canopy. The City approved the application and Wesco constructed and completed the project and received a certificate of occupancy in November 2004.

In the meantime, in February 2004, Wesco submitted a second zoning application to construct the second canopy. The development review board denied the application, and Wesco appealed to the environmental court. The parties filed cross-motions for summary judgment, and the court subsequently issued a written decision granting Wesco's motion and denying the City's. The court found that the gasoline station/convenience store was a nonconforming use under the current zoning regulations, but approved the canopy on the grounds that it did not violate any setback or other dimensional requirements under the current regulations, and would not alter or enlarge the existing use of the property. The City appealed from the subsequent judgment order entered by the court.

The City's principal contention is that the court misconstrued pertinent provisions of the zoning regulations. We construe zoning ordinances according to general principles of statutory construction, applying the plain language of the ordinance where it resolves the issue and comports with the legislative scheme and intent. In re Weeks, 167 Vt. 551, 554 (1998). We review the court's construction to determine whether it is clearly erroneous, arbitrary, or capricious. Id.

Neither party disputes the court's finding that the gasoline station represents a nonconforming use under the current zoning regulations. The City contends the court erred, however, in concluding construction of the canopy would not enlarge or extend the nonconforming use, and therefore would not offend the regulations.

Section 3.11(B)(6) of the City's zoning ordinance provides, in pertinent part, that A[a] non-conforming use shall not be extended or enlarged,@ and the court reasonably concluded that a canopy over an existing gasoline dispenser will not extend or enlarge the use of the property. The court noted that this Court so held in In re Pearl Street Mobil, Docket No. 2001-249, slip op. at 3 (Vt. Dec. 21, 2001) (unreported mem.). It was also undisputed that the City had previously approved the applicant's site plan application containing the disputed canopy; the court's finding that the canopy would not violate existing setback and other dimensional requirements was reasonably based on this prior approval. See South Burlington Land Development Regulations, ' 14.05(D) (2003) (site plan application must show area and boundaries of property, building or setback lines, and lines of streets and adjoining lots). Nor did the City dispute applicant's arguments that the canopy will mitigate adverse weather conditions around the gasoline equipment, thereby reducing maintenance requirements, containing potential oil spills, and ultimately minimizing the impacts of the nonconforming use.

The City's counter-argument relies principally on ' 3.11(B)(2) of the regulations, which provides: AThe non-conforming use may be continued provided that such structure shall not be enlarged or extended unless the use therein is changed to a conforming use.@ The City argues that the canopy represents, in effect, the extension or enlargement of an existing structure committed to a nonconforming use. We read the provision, however, as prohibiting structural enlargements that will effectively enlarge the nonconforming use, consistent with the general legislative policy of containing or eliminating nonconforming uses. In re Richards, 174 Vt. 416, 424 (2002) (general goal of zoning is to eliminate nonconforming uses). That was not the case here. The City also argues that the court erred in relying on its finding that the canopy met the definition of an Aaccessory structure@ under the regulations as a detached structure incidental to the principal building or use of the lot. The court's finding was relevant to its conclusion that the canopy would merely shelter the underlying gasoline dispensers, and therefore would not extend or enlarge the principal use.

We thus discern no error, or basis to disturb the judgment. The trial court did not address applicant's additional argument that the diesel use preexisted the current zoning ordinance and its right to construct a canopy over the diesel dispenser vested with the granting of the conditional use permit in 1999. Our holding renders it unnecessary to address these arguments.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice