Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-291

APRIL TERM, 2020

Donald Bishop* v. Town of Springfield	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 573-11-15 Wrcv
		Trial Judge: Robert P. Gerety, Jr.

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

Plaintiff appeals the trial court's judgment affirming an order of the Town of Springfield declaring plaintiff's building to be unsafe and directing that it be demolished. We affirm.

In April 2015, the chief of the Springfield Fire Department presented a complaint to the town selectboard asserting that a fire-damaged building owned by plaintiff was unsafe in violation of the town code. The selectboard appointed a committee, which included a licensed professional engineer, to inspect the building. Based on the committee's report, the selectboard issued an order in July 2015 finding that due to fire, neglect, age, and other causes, the building was "dangerous or structurally unsafe" as defined in § 5-26 of the town code and was a public nuisance. The selectboard ordered that the front porch of the building and side shed roof be demolished immediately. It directed that the rest of the building was to remain vacant and the entire foundation was to be repaired within sixty days. If the demolition and repairs were not completed and certified by a licensed structural engineer within sixty days of the order, the Town was authorized to demolish the building.

Plaintiff appealed the order to the selectboard, as permitted by the town code. A hearing was scheduled in August 2015. Plaintiff sought additional time so that he could review the committee's report with his structural engineer. The selectboard granted a continuance and rescheduled the hearing for September 2015.

On September 28, 2015, the selectboard held a hearing at which plaintiff appeared with counsel. Plaintiff and his witness, a local contractor who was not a licensed structural engineer, testified that most of the shed roof had been removed. No work had been done on the front porch. The contractor testified that the structure's foundation needed additional supports, which could be added "in about two hours." The contractor testified about several other proposed repairs, which could be done within thirty days and would support the building. The Town's licensed structural engineer testified that in his opinion, the proposed work could lessen the

likelihood of the building collapsing, but that the building would still be considered unsafe under the town code. He testified that the building was unsafe to be used for storage or regular occupancy. In a written decision issued in November 2015, the selectboard affirmed the findings of the committee. It ordered plaintiff to remove the front porch and remaining shed roof and to repair the foundation. It directed the Town to demolish the building if the listed repairs were not completed and certified by a licensed structural engineer within sixty days.

Plaintiff filed a complaint seeking review of the selectboard's decision in superior court pursuant to Vermont Rule of Civil Procedure 75. The complaint asserted that the decision was not supported by evidence and that the unsafe-building order constituted a taking without compensation. January 2017, the court dismissed the complaint because plaintiff had not filed proof of service. Upon motion by plaintiff, the court vacated the dismissal and reopened the case in March 2017.

Plaintiff requested a trial de novo. After reviewing memoranda and hearing arguments from the parties about the applicable standard of review, the court concluded that it would review the decision based on the record presented to the selectboard and not take additional evidence. The trial court asked the parties to submit a proposed record and ordered plaintiff to provide a statement of his claims of error. Plaintiff filed a memorandum in which he argued that the selectboard abused its discretion by appointing a committee made up of individuals who lacked expertise in construction and asserted that he had since repaired the building in compliance with the order. Following oral argument, the court issued a decision in July 2019 affirming the November 2015 selectboard order and entering judgment in favor of the Town.

On appeal, plaintiff argues that the trial court erred by conducting its review on the record rather than de novo. He argues that the selectboard's decision is not entitled to any deference and the trial court should have permitted him to supplement the record on appeal.

The applicable legal standard for this action is a question of law that we review without deference to the trial court. Garbitelli v. Town of Brookfield, 2011 VT 122, ¶ 5, 191 Vt. 76. Because there is no statute specifically providing for review of the governmental decision being challenged in this case, plaintiff could only appeal under Vermont Rule of Civil Procedure 75. Id. As we explained in Garbitelli, in Rule 75 cases "where the reviewing court is faced with a question of law and where the record is sufficient and complete, on-the-record review is appropriate. The reviewing court has discretion, however, to engage in a de novo proceeding and take additional evidence." Id. ¶ 9 (citing V.R.C.P. 75(d)). However, "where an administrative agency makes its decision following a quasi-judicial procedure in which the plaintiff freely participates, de novo review may be inappropriate." Id. (quotation and brackets omitted).

Here, plaintiff requested, attended, and participated in an evidentiary hearing before the selectboard in September 2015. Plaintiff presented testimony from his own witness and had an opportunity to cross-examine the Town's engineer. The hearing was video-recorded and a copy of the recording was provided to the trial court. Accordingly, this is not one of the rare situations where additional evidence was needed to establish facts necessary for the court's review. See Garbitelli, 2011 VT 122, ¶ 8 (noting that court may take additional evidence in

"limited circumstance[s]" where record is inadequate, such as when transcript from administrative proceeding is unavailable or incomplete); Ketchum v. Town of Dorset, 2011 VT 49, ¶ 16, 190 Vt. 507 (explaining that where statute was silent on method of review, and decision was made after quasi-judicial procedure by town selectboard in which plaintiffs freely participated, on-the-record review was appropriate). The court's role was to determine whether there was adequate evidence to support the selectboard's decision. Ketchum, 2011 VT 49, ¶ 16; see Bishop v. Town of Springfield, No. 2016-128, 2016 WL 6562418, at *2 (Vt. Nov. 4, 2016) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo16-128.pdf, [https://perma.cc/3YDT-2SEG] (affirming trial court's decision to apply on-the-record review in Rule 75 appeal of selectboard's decision ordering town to demolish different house owned by plaintiff). The court did not abuse its discretion in declining to take additional evidence under these circumstances.

Furthermore, the trial court did not err in according deference to the decision of the selectboard. A municipal determination of a nuisance, while not conclusive, "is presumed correct and valid and the court will indulge every presumption in support of its quasi-judicial determination of the facts, in the absence of evidence to the contrary." Eno v. City of Burlington, 125 Vt. 8, 14 (1965). Although plaintiff asserts that the decision was not supported by evidence and that town officials are biased against him and have treated him inconsistently, he has not properly briefed these claims or pointed to any part of the record to support them. See V.R.A.P. 28(a)(4) (providing that appellant must support argument with appropriate citations to record); In re Wright, 131 Vt. 473, 490 (1973) ("This Court is not required nor about to undertake a search for claimed error where it is not adequately briefed, supported by argument, or pointed out in the record before us.").

Plaintiff argues that he was placed in a "catch-22" because he had to file this action within thirty days of the selectboard's decision to preserve his appeal rights, but the order gave him sixty days to make the repairs. He claims that without de novo review, he was unfairly prevented from presenting evidence of his compliance to the court. Plaintiff's strategic decision to file suit instead of simply complying with the order does not alter our legal conclusion that de novo review was inappropriate here. We note that plaintiff did not assert in his original complaint that he was or would be in compliance with the order within sixty days. Rather, he claimed that the selectboard's order was unsupported by evidence and constituted a taking.[*] Nor did plaintiff assert that he had completed the repairs by April 2017, when he refiled his complaint after the court dismissed the action for failure to file proof of service. Even if he did complete the repairs within the allotted time, however, it is undisputed that plaintiff did not submit a certification of those repairs by a licensed professional engineer to the Town within sixty days, and therefore did not comply with the terms of the order.

Plaintiff argues that the certification requirement was arbitrary and violated his right to due process. We do not address this argument because plaintiff failed to preserve it by raising it below. In re White, 172 Vt. 335, 343 (2001) (explaining that this Court "will not address arguments not properly preserved for appeal"). For the same reason, we do not address

[*] Plaintiff did not pursue the latter argument and we therefore do not address it here.

plaintiff's argument that the Vermont Administrative Procedure Act required the trial court to remand the matter to the Town for further proceedings.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice