2023 VT 24

No. 22-AP-194

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| City of Burlington | Supreme Court |
| v. | On Appeal from<br>Superior Court,<br>Environmental Division |
| Sisters & Brothers Investment Group, LLP | March Term, 2023 |

Thomas S. Durkin, J.

Kimberlee J. Sturtevant, Office of City Attorney and Corporation Counsel, Burlington, for Plaintiff-Appellee.

Brian P. Hehir of Hehir Law Office, PLLC, Burlington, for Defendant-Appellant.

PRESENT: Reiber, C.J., Eaton, Carroll, Cohen and Waples, JJ.

¶ 1. **CARROLL, J.** Defendant-landowner Sisters & Brothers Investment Group, LLP (SBIG) appeals an environmental-division enforcement order enjoining it from using real property in the City of Burlington, ordering it to address site-improvement deficiencies as required by an agreement executed by a prior owner and the City, and imposing $66,759.22 in fines. We reverse and remand.

¶ 2. SBIG purchased the subject property at 281 Pearl Street in Burlington on June 17, 2004. The property was then in use as a gas and service station, which was a preexisting, nonconforming use permitted under the City's zoning ordinance. The property had eighteen

parking spaces that were, pursuant to permit, required to be used in connection with the service-station business.

¶ 3. Following an unappealed 2002 notice of violation (NOV), the prior owner and the City signed an agreement on June 16, 2004—one day before SBIG purchased the property—which set out specific requirements to cure those violations.[1] At trial, the City proffered a copy of the agreement bearing a date and time stamp indicating the document was filed in the city clerk's office on June 17, 2004, at 11:23 a.m. and had been recorded in the City's land records. The agreement required the prior owner to take certain steps if it wished to sell the property and provided that the agreement was "specifically enforceable and . . .binding upon the successors and assigns of" the previous owner. The City did not enforce compliance with the agreement before this action.

¶ 4. At some point after 2004, SBIG began renting out a small number of parking spaces to private individuals. This was not a permitted use under the zoning ordinance. In July 2017, the gas and service station closed, and SBIG thereafter increased the number of parking spaces it rented out to private individuals. The property was also repeatedly vandalized with graffiti beginning at this time.

¶ 5. Following complaints about the private-parking use and graffiti, the City contacted SBIG in 2018 about bringing the property into compliance with the zoning ordinance. SBIG took no remedial action, and the City issued an NOV on April 5, 2019. The City alleged three violations: an unpermitted change of use from a nonconforming gas and service station to a private parking lot; various breaches of the 2004 agreement; and failure to obtain certificates of

[1] These violations mainly involved upkeep measures, such as maintaining parking stripes and planter barrels, and snow removal.

occupancy.[2] SBIG timely appealed the NOV to the Development Review Board (DRB) but took no action to cure the alleged violations. In June 2019, the DRB affirmed the NOV with respect to the change-of-use violation. It found that the nonconforming use as a gas and service station had been discontinued for more than one year, which, under the zoning ordinance, constituted abandonment of that use. The DRB expressly "d[id] not address" the 2004 agreement in its conclusions but did find that SBIG had breached certain provisions of it. SBIG did not appeal this decision.

¶ 6. In March 2020, the City filed a complaint in the environmental division to enforce the decision and sought fines pursuant to 24 V.S.A. § 4451. The City requested injunctive relief to stop all uses at the property; however, it did not seek relief for the 2004 agreement breaches.

¶ 7. The matter proceeded to a one-day trial on September 21, 2021. SBIG argued that the term "private parking lot" was not defined in the City's ordinance, and so could not have been the basis for a change-of-use violation. It also argued that the statute of limitations for zoning violations otherwise precluded the enforcement action, and that this Court's decision in In re 204 North Avenue NOV, 2019 VT 52, 210 Vt. 572, 218 A.3d 24,[3] which issued shortly after the unappealed DRB decision in 2019, provided an exception to the finality rule in 24 V.S.A. § 4472(d).[4]

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[2] The trial court concluded that the requirement to obtain the certificates was moot and the certificates are not implicated in this appeal.

[3] In 204 North Avenue NOV, we held that the statute of limitations for zoning violations, 24 V.S.A. § 4454(a), "applies to all municipal land-use violations, including use violations." 2019 VT 52, ¶ 7. Prior to this decision, the environmental division treated use violations as continually renewing each day for the purpose of analyzing § 4454(a), which effectively meant that municipalities could "pursue use violations for so long as they continue[d]." Id. ¶ 8.

[4] In relevant part, 24 V.S.A. § 4472(d) provides that, "[u]pon the failure of any interested person to appeal [a DRB decision] . . . to the Environmental Division . . . all interested persons affected shall be bound by that decision . . . and shall not thereafter contest, either directly or indirectly, the decision."

¶ 8. At trial, neither party questioned witnesses concerning SBIG's knowledge of the 2004 agreement. After asking one question to establish a foundation for admitting the 2004 agreement into evidence, counsel for the City asked one other question regarding SBIG's compliance or noncompliance with the agreement—whether the City's code-compliance officer ever noticed, during site visits conducted between June and December 2019,[5] if the property "was in compliance with the 2004 site plan," to which the officer responded, "[n]o . . . the property was not in compliance." Counsel thereafter pivoted to a different line of questioning and did not pursue the issue further.

¶ 9. Following the parties' submission of proposed findings of fact and conclusions of law, the environmental division took the matter under advisement, and simultaneously issued a merits decision and final judgment in June 2022. It found that "all of the zoning violations detailed in the 2019 NOV" were in existence at the time of the April 2019 NOV, were never cured, and continued until trial, a total of 892 days.[6] The court relied on a series of photographs showing parked cars on the lot during that period, along with other evidence such as the complaints by neighbors, water-usage trends, and signs posted in the building's window. The court held that SBIG's failure to appeal the DRB decision resulted in the loss of "its right to challenge the DRB's conclusions that they had committed significant zoning violations," precluding its argument concerning whether "private parking lot" is a defined use in the zoning ordinance. Regarding SBIG's statute-of-limitations argument, the court reasoned that, had credible evidence demonstrated that illegal private parking had occurred for fifteen or more years before this action, the City would have been time-barred from enforcement under the zoning statute of limitations.

[5] The hearing before the DRB took place on June 4, 2019, and the decision issued on June 13, 2019.

[6] April 13, 2019, to September 21, 2021.

See 24 V.S.A. § 4454(a). Finding no such evidence, the court concluded that the limitations period had not run and the City was not barred from seeking injunctive relief and fines.

¶ 10. The court analyzed the City's request for fines using each of the seven statutory factors provided in the Uniform Environmental Law Enforcement Act (UELEA), 10 V.S.A. § 8010(b).[7] The court "independently" concluded that SBIG had "failed to ever comply with the 2004 agreement," despite noting that the DRB decision did not address the agreement. The court then substantially relied on that finding to conclude that the second and fourth factors, in particular, each weighed heavily against SBIG, and found that the remaining factors, taken together with SBIG's record of noncompliance with the 2004 agreement, supported assessing a fine of $50 per day. See 24 V.S.A. § 4451(a) (capping fines for zoning violations at $200 per day). The court ordered SBIG to stop using the property as a private parking lot, address the terms in the 2004 agreement it had failed to comply with, and pay a fine of $66,759.92. This figure included the $50-per-day fine plus the enforcement costs incurred by the City.

¶ 11. On appeal, SBIG presents several arguments. It argues that because "private parking lot" is not defined in the City's ordinance there can be no change-of-use violation from a gas and service station to a private-parking lot. It attacks the City's enforcement action as time-barred under the statute of limitations for zoning violations. See 24 V.S.A. § 4454(a). SBIG contends that the court had no basis on which to find that post-NOV violations continued on each

[7] The factors are:

> (1) the degree of actual or potential impact on public health, safety, welfare, and the environment resulting from the violation;
> (2) the presence of mitigating circumstances, including unreasonable delay by the [municipality] in seeking enforcement;
> (3) whether the respondent knew or had reason to know the violation existed;
> (4) the respondent's record of compliance
> . . . .
> (6) the deterrent effect of the penalty
> (7) the [municipality's] actual costs of enforcement; and
> (8) the length of time the violation has existed.

of 892 days until trial. It argues that because there was no evidence SBIG knew or should have known about the agreement, it was clear error for the court to find otherwise. SBIG asserts that the fine amount is punitive rather than remedial. It finally argues that the 2004 agreement is moot for various reasons and the court erred to the extent it relied on SBIG's noncompliance with a moot agreement.

¶ 12. We take a fresh look at the environmental division's legal conclusions, proceeding with a "nondeferential, on-the-record review." In re Gulli, 174 Vt. 580, 582, 816 A.2d 485, 488 (2002) (mem.). However, we do not disturb its factual findings unless they are clearly erroneous. In re Wood NOV & Permit Applications, 2013 VT 40, ¶ 35, 194 Vt. 190, 75 A.3d 568. Clearly erroneous findings are not supported by any reasonable, credible record evidence. Id.

¶ 13. SBIG's arguments challenging the DRB decision as either incorrect as a matter of law or barred by the limitations statute both fail under our long line of precedent forbidding collateral attacks on unappealed DRB orders. See City of S. Burlington v. Dep't of Corr., 171 Vt. 587, 588-89, 762 A.2d 1229, 1230 (2000) (mem.) ("The broad and unmistakable language of [24 V.S.A. § 4472(d)] is designed to prevent any kind of collateral attack on a zoning decision that has not been properly appealed through the mechanisms provided by the municipal planning and development statutes."). We have held that collateral attacks are impermissible even where the municipal zoning board had no authority to issue the decision. Levy v. Town of St. Albans Zoning Bd. of Adjustment, 152 Vt. 139, 142, 564 A.2d 1361, 1363 (1989) (explaining that statute prohibits collateral attacks even where decision was ultra vires and void ab initio).

¶ 14. The unappealed decision here concluded that SBIG abandoned the nonconforming use as a gas and service station and that it violated the City's ordinance by operating a private parking lot without prior approval. SBIG must live with those conclusions. It cannot now challenge the DRB's legal bases for the decision, and SBIG's argument that the statute of limitations precluded the City's enforcement action provides no alternate route to attack the

decision either. See In re Est. of Spinner, 717 A.2d 362, 366 (D.C. 1998) ("A statute of limitation defense, once waived[,] may not be raised by a collateral attack upon an adverse judgment or for the first time on appeal." (quotation and ellipses omitted)); see also Levy, 152 Vt. at 142, 564 A.2d at 1363 ("The statute unequivocally forecloses [a collateral attack], and the superior court was without jurisdiction to consider it."); Graves v. Town of Waitsfield, 130 Vt. 292, 295, 292 A.2d 247, 249 (1972) ("[T]here should, in fairness, come a time when the decisions of an administrative officer become final so that a person may proceed with assurance instead of peril."). Accordingly, the fact that SBIG committed a change-of-use violation was established by the unappealed DRB decision, leaving only SBIG's remaining arguments relating to the court's imposition of fines.

¶ 15. SBIG next contends that the trial court abused its discretion by finding that SBIG was liable for 892 days of continuing violations, each subject to penalty. See Town of Pawlet v. Banyai, 2022 VT 4, ¶ 30, __ Vt. __, 274 A.3d 23 (explaining that 24 V.S.A. § 4451(a) provides that each day violation occurs is new violation subject to penalty). We disagree. We have held that municipalities "need not produce evidence of a continuing violation for each and every day." In re Jewell, 169 Vt. 604, 737 A.2d 897, 900 (1999) (mem.). Instead, municipalities may sustain their burden of proof with evidence that "weave[s] a sufficient pattern of violations for the court to infer a continuing violation for some or all of the period for which the [municipality] requests that the court impose penalties." Id. Thus, in Jewell, this Court held that the town had sustained its burden to prove 466 days of continuing violations where it provided evidence of periodic noise complaints made by neighbors and periodic inspection reports by zoning officials. Id.

¶ 16. However, SBIG contends that the nature of parking is "transient," and therefore photographs of ten different days cannot be the basis for demonstrating that illegal parking occurred on each of the 892 days. Again, we are unpersuaded. The trial court found that the gas- and service-station business closed in July 2017, the City received complaints about the parking lot use and graffiti beginning shortly thereafter, water use at the property stopped in 2017, and

signs were posted inside the front window of the building directing those seeking car repairs to another location and advertising the property for sale. These findings are in addition to the photographic evidence the court found to be credible evidence of paid, private parking. Taken together, it was within the court's discretion to conclude that SBIG engaged in a "pattern of conduct" for 892 days. See Jewell, 169 Vt. 604, 737 A.2d at 900 ("If we accepted that the [municipality] must prove permit violations on each day of the period for which it seeks penalties, the [municipality's] burden of proof would be so onerous as to vitiate the statute's deterrent purpose by rendering it nearly impossible to demonstrate a continuing violation.").

¶ 17. Finally, SBIG argues that the $66,759.22 fine was an abuse of discretion because the court found that it knowingly breached the 2004 agreement without any evidence demonstrating that SBIG knew or should have known of the agreement's existence. We agree that it was error for the court to factor SBIG's alleged noncompliance with the 2004 agreement into its fine assessment and remand for the court to recalculate the fine without using the agreement as an aggravating factor. Whippie v. O'Connor, 2010 VT 32, ¶ 30, 187 Vt. 523, 996 A.2d 1154 (remanding to trial court to recalculate accounting for contribution in partition action under rule that it is role of trial courts to make credibility determinations and weigh evidence).

¶ 18. The environmental division has broad discretion to set fines once it has determined the existence of zoning violations. 24 V.S.A. § 4451; see also Banyai, 2022 VT 4, ¶ 29. When determining a fine, the court must "balance any continuing violation against the cost of compliance and . . . consider other relevant factors, including those specified in the Uniform Environmental [Law] Enforcement Act," codified at 10 V.S.A. § 8010. In re Beliveau NOV, 2013 VT 41, ¶ 23, 194 Vt. 1, 72 A.3d 918.

¶ 19. The court "independently" found that SBIG had knowingly violated certain terms of the 2004 agreement in the seventeen years since it purchased the property. It relied on that finding to conclude that the second UELEA factor, the presence of mitigating circumstances, and

the fourth UELEA factor, SBIG's record of compliance, weighed heavily in the City's favor.[8] Regarding the second factor, the court opined that it was "particularly distressing that SBIG purchased a property[,] . . . completed its purchase on the day after the City and the prior owner entered" into an agreement resolving pending zoning violations, and took no actions to address those violations "in the 17 years it has owned the property." With respect to the fourth factor, the court concluded that "SBIG was very much aware" of the agreement and the violations outlined in the 2002 NOV and "its actions following the purchase exacerbated those violations . . . weigh[ing] heavily in favor of the imposition of significant fines." However, the finding that SBIG knew or should have known of the agreement is clearly erroneous and therefore cannot serve as a basis to calculate fines without considering the 2004 agreement. See Packard v. State, 147 Vt. 256, 258, 514 A.2d 708, 709 (1986) (per curiam) (holding that finding of fact was clearly erroneous where there was no credible evidence to support it).

¶ 20. The sole documentary evidence in the record relating to whether SBIG knew or should have known of the existence of the agreement was a copy of the agreement itself, which bore a date and time stamp indicating that it was filed late on the same day that SBIG purchased the property, and that it was entered into the City's land records. SBIG's agent did testify that he and the prior owner had discussed the possibility of SBIG purchasing the property for a period of three years prior to 2004, but he was never asked whether he knew of the existence of the agreement or the unappealed 2002 NOV, including by the trial court itself, which asked the agent several questions following direct- and cross-examination. It is significant that the City did not seek relief for breaches of the 2004 agreement in its complaint. Nor did the City seek to elicit testimony concerning whether there was a basis from which to infer that SBIG's counsel—

[8] The court also weighed the first UELEA factor in the City's favor despite concluding that the violations "thankfully" presented no actual or potential impact on public health, safety, welfare, or the environment. To the extent that conclusion involved considerations of the 2004 agreement, it must reweigh the evidence and provide a justification for its conclusions on remand.

assuming SBIG was represented in the 2004 transaction because there is no indication one way or another—would have had reason to believe that additional work was needed to clear title before closing. Furthermore, the court found that the terms of the agreement required the seller to produce a copy of the agreement signed by the buyer "not less" than five business days before closing. However, nothing in the record indicates whether this was carried out or could have been carried out within that time frame given that SBIG purchased the property one day after the agreement was signed.

¶ 21. In light of this lack of evidence, the mere fact of SBIG's purchase one day following the agreement's execution does not reasonably lead to the conclusion that it knew or should have known of its existence, even when viewed in the light most favorable to the City. See In re Lathrop Ltd. P'ship I, 2015 VT 49, ¶ 21, 199 Vt. 19, 121 A.3d 630 (explaining this Court's deference to environmental division's factual findings unless they are clearly erroneous when viewed in light most favorable to prevailing party). Indeed, the opposite conclusion is equally likely—that the prior owner withheld the agreement from SBIG in order to complete the sale without the complication of selling a property with a newly clouded title. We recognize that the trial court found that the agreement expresses that it "is binding upon the successors and assigns of Owner." While we have no reason to disturb that finding, more evidence was needed for the court to conclude SBIG was aware of and intentionally disregarded the agreement from the time it purchased the property for the purpose of calculating fines.

¶ 22. Because the trial court erroneously found that SBIG knew or should have known about the 2004 agreement, we reverse the judgment order, direct the trial court to strike the condition requiring SBIG to address the site-improvement deficiencies in the agreement, and remand for the court to recalculate fines without considering whether SBIG violated the

agreement's terms. Considering the disposition, we need not address SBIG's remaining arguments that the fine was punitive rather than remedial or that the 2004 agreement is moot.

Reversed and remanded to strike the condition requiring SBIG to address site-improvement deficiencies in the 2004 agreement and to recalculate fines without considering the 2004 agreement.

FOR THE COURT:

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Associate Justice