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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-249

DECEMBER TERM, 2001

In re Appeal of Pearl Street Mobil	}	
	}	APPEALED FROM:
	}	Environmental Court
	}	DOCKET NO. 87-5-99 Vtec
	}	Trial Judge: Merideth Wright

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

This appeal from the Vermont Environmental Court concerns the denial of a zoning permit to appellant's business in the City of Burlington. We reverse and remand because we find the court's decision arbitrary and clearly erroneous.

The undisputed facts before the environmental court establish that appellant Pearl Street Mobil ("PSM") owns and operates a gasoline filling station on Pearl Street in the City of Burlington. The business is located in the City's RH zone for high-density residential use. Commercial use is not a permitted use in that area, and PSM operates there as a preexisting nonconforming use.

In 1987, PSM received a permit to add a 360 square foot service bay to the building on its premises. The permit describes the project as follows: "To construct a 12' x 30' addition as an expansion of 25% of a nonconforming use. (Lot is currently at 100% coverage.)." The permit carried with it a series of conditions, none of which are relevant to this appeal.

In early December 1998, PSM applied for a conditional use zoning permit to install a canopy over its gas pumps, landscaping and a new replacement sign. The City's design review board gave the project conditional approval the following month. In March 1999, the Burlington Zoning Board of Adjustment ("ZBA") held a hearing on PSM's application. The ZBA considered the application during its deliberative session on April 12, 1999, and denied the permit on April 26. In its written decision, the ZBA found that "the canopy, as proposed, does not constitute an enlargement of the structural capacity on the property, and, therefore, may be approved provided that the application complies with the relevant provisions of the zoning ordinance." Finding that the project would have undue adverse effect on the area's character, traffic and bylaws, the ZBA denied PSM's permit application. PSM then appealed to the Vermont Environmental Court.

In accordance with environmental court procedure, on June 6, 1999, PSM filed a statement of fifteen questions it sought the court to answer in the appeal. Question four asked the court to determine whether "the proposed canopy is an enlargement of a pre-existing non-conforming use under Vermont law." Questions fourteen and fifteen respectively asked, "[w]hether any applicable Zoning Ordinance limitation on the enlargement of a pre-existing nonconforming use should be calculated using the entire area of appellant's service station dedicated for business use," and "[w]hether the proposed canopy is an accessory use under the Burlington Zoning Ordinance." After a telephone conference with the City and PSM, the court requested the parties to file motions for summary judgment on questions fourteen and fifteen

only. The parties did so, and the court rendered its decision on their cross motions for summary judgment on February 24, 2000.

Apparently disagreeing with the ZBA's decision, the court's February order held that PSM's proposed canopy constituted an enlargement of PSM's nonconforming use. The order contains no analysis, however, explaining how the court reached that decision. Concluding that the canopy was a nonconforming use enlargement, the court went on to analyze whether the enlargement was permissible under section 20.1.6 of the City's zoning ordinance, which prescribes enlargement parameters. The maximum allowable enlargement is equal to "an aggregate of twenty-five per cent (25%) of the floor area, building or structural capacity existing at the time that the use first became nonconforming." City of Burlington Zoning Ordinance 20.1.6 (1997). Based on PSM's 1987 bay addition, the court agreed with the City that PSM had already used the maximum allowable enlargement and therefore no further expansion of PSM's nonconforming use was authorized under the ordinance. PSM appealed after the court denied its motion to amend.

On appeal, PSM contends that the environmental court erred by concluding that PSM's proposed canopy was an enlargement of its nonconforming use and therefore it was subject to section 20.1.6 of the City's zoning ordinance. If the court was correct in that conclusion, however, PSM argues that the court did not correctly calculate the allowable expansion under section 20.1.6. The City maintains that the 1987 permit precludes any further expansion on PSM's lot by virtue of res judicata. We agree with PSM that the proposed project does not entail the enlargement of its nonconforming use, and therefore we do not reach PSM's other arguments on appeal or the City's res judicata claim.

The City is authorized to regulate nonconforming uses of property pursuant to 24 V.S.A. 4408. Section 4408(a)(1) defines "nonconforming use" as "use of land or a structure which does not comply with all zoning regulations where such use conformed to all applicable laws, ordinances and regulations prior to the enactment of such regulations." 4408(a)(1). Extensions or enlargements of nonconforming uses are subject to municipal control. Id. 4408(b)(2). Article 20 of the City's zoning ordinance defines the parameters of permissible nonconforming uses, including enlargements, as well as noncomplying structures. Neither 4408 nor section 20.1.6 of the City's ordinance define "enlargement of nonconforming use," however. We must, therefore, construe both sections under the general rules of statutory construction. See In re Miserocchi, 170 Vt. 320, 324 (2000) (zoning ordinances are construed using general rules of statutory construction). The plain and ordinary meaning of the regulation's words will control absent some ambiguity. Id. Any ambiguity must be construed in the landowner's favor, id., even though an important goal of zoning is to eliminate nonconforming uses. Vt. Brick & Block, Inc. v. Vill. of Essex Junction, 135 Vt. 481, 483 (1977).

To "enlarge" means to make larger or to increase. Black's Law Dictionary 366 (abr. 6th ed. 1991). Thus, an enlargement of a nonconforming use means to increase or to make larger the use that is nonconforming. That meaning is consistent with our holding in Vt. Brick & Block, Inc.. In that case, a company that manufactured concrete bricks and blocks and sold sand, gravel, stone and cement in bulk form for construction operated as a nonconforming use in an area designated for residential, recreational and agricultural use. It sought to start a custom concrete business which required new trucks and the installation of a new cement auger in a cement tower on the premises. The new business entailed loading the trucks with the necessary materials for delivery to the customer's site where the concrete would be mixed inside the truck. We held that the new product (custom concrete), which required new facilities (the new cement tower auger and new trucks), was an expansion and enlargement of the company's existing nonconforming use because the use was far different than its existing "use of on-premises manufacture of concrete bricks and blocks and sale of building materials." Vt. Brick & Block, Inc., 135 Vt. at 483-84. In other words, the new business, evidenced by new facilities and a new product, constituted a larger or increased use not permitted by the residential, recreational and agricultural use designation for the area in which the company's business was situated. Cf. Bd. of Adjustment v. Brown, 969 S.W.2d 214, 215-16 (Ky. Ct. App. 1998) (enclosing front porch, adding siding, adding a bathroom to an auction house and increasing number of auctions per week did not constitute an enlargement of auction house's nonconforming use); WLH Mgmt. Corp. v. Town of Kittery, 639 A.2d 108, 109-10 (Me. 1994) (addition of canopy and siding over restaurant's outdoor deck which was already in use was not expansion of nonconforming use); Clark v. Richardson, 211 S.E.2d 530, 531 (N.C. Ct. App. 1975) (enclosing existing porch on building used by grocery store not an enlargement of nonconforming use); City of Spring Valley v. Hurst, 530 S.W.2d 599, 601 (Tex. App. 1975) (erection of new building to store materials currently stored outside premises is not an extension of nonconforming use where business will remain the same as in the past and no new or added activities will be carried out).

As we stated in In re Miserocchi, zoning regulations generally "provide different restrictions for nonconforming activities and noncomplying structures . . . . This distinction is helpful because rules applying to nonconforming activities often cannot be easily applied to noncomplying structures and vice versa." 170 Vt. at 328. In this case, no dispute existed that no new activity would accompany PSM's proposed canopy. PSM's business, which was the reason PSM's use of the property was nonconforming, would remain the same after the canopy's installation. There was no allegation that the canopy would violate any dimensional requirements set forth in the City's zoning ordinance. PSM would install the proposed canopy over the existing gas pumps. Based on these circumstances, PSM's proposal would not enlarge its nonconforming use.

We will uphold the environmental court's construction of zoning regulations absent a showing that the construction is arbitrary, capricious or clearly erroneous. In re Miserocchi, 170 Vt. at 323. Here, the environmental court's decision, which omits any analysis of the phrase "enlargement of nonconforming use," is arbitrary and clearly erroneous. The court's decision must, therefore, be reversed and further proceedings held to determine whether PSM is otherwise entitled to a permit.

Reversed and remanded.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice