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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-422

JUNE TERM, 2006

In re Appeal of John Cito Hardy	}	APPEALED FROM:
	}	
	}	
	}	Environmental Court
	}	
	}	
	}	DOCKET NO. 157-9-04 Vtec

Trial Judge: Thomas S. Durkin

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

Landowner John Cito Hardy appeals the Environmental Court=s summary judgment ruling denying Hardy a zoning permit for an addition to his existing garage. We affirm.

Hardy owns two parcels of land divided by a road in the Town of PlainfieldCan eight-acre parcel that includes his home and a 2.2-acre parcel that includes a garage built in 1980 on what was then a sixty-five-acre parcel owned by his father. In 1991, in response to Hardy=s inquiry, the town planning commission determined that the parcels were located in the Forest and Agricultural Lands zoning district. Hardy did not appeal that

determination. In 1992, Hardy applied to the zoning administrator for a zoning permit to construct a twenty-six-foot by fifty-foot addition to his garage. The zoning administrator issued the permit, but the planning commission appealed to the zoning board of adjustment, which denied the permit because the 2.2-acre lot did not meet the minimum five-acre lot size in the Forest and Agricultural Lands district. Hardy did not appeal the board of adjustment=s decision.

In May 2004, Hardy again applied to the zoning administrator for a permit to construct a twenty-six foot by fifty-foot addition to his garage. The zoning administrator denied the request, and the board of adjustment upheld that decision. Hardy then appealed to the Environmental Court, which granted the Town=s motion for summary judgment. In reaching its decision, the court addressed each of five questions raised by Hardy. The court found that (1) the lots in question were within the Forest and Agricultural Lands zoning district during all times material to Hardy=s 2004 permit application; (2) an unappealed 1991 planning commission decision concluded that Hardy=s land was in the Forest and Agricultural Lands district, and Hardy failed to dispute the Town=s assertion that the zoning districts have remained unchanged since the planning commission=s decision; (3) the doctrine of finality found in 24 V.S.A. ' 4472(a) precludes Hardy from challenging the planning commission=s 1991 decision; (4) Hardy=s 2.2-acre lot is a separate lot from his eight-acre lot not only because the lots are divided by a road but because Hardy himself separated out the eight-acre lot and conveyed it to himself and his wife, leaving the 2.2-acre lot titled solely in his name; (5) the question of whether Hardy could sell the 2.2-acre lot separately is outside the court=s jurisdiction; (6) the fact that the Town had not addressed zoning issues surrounding Hardy=s property during the past ten years is irrelevant; and (7) the 2.2-acre parcel is nonconforming in the Forest and Agricultural Lands district because it is less than five acres.

On appeal to this Court, Hardy makes several arguments, none of which demonstrate that the Environmental Court erred in granting the Town=s motion for summary judgment. Hardy refers to a 1979 town map that he claims indicates his 2.2-acre parcel is not in the Forest and Agricultural Lands district. But, as the Environmental Court stated, the issue is what district the parcel was in when he applied for the permit, and Hardy fails to challenge the court=s finding that the parcel was located in the Forest and Agricultural Lands district at all times material to his permit application.

Hardy also claims that the zoning board of adjustment failed to notify him of his right to appeal its 1992 decision, thereby violating his due process rights under Town of Randolph v. Estate of White, 166 Vt. 280, 285-87 (1997) (notice of zoning violation did not comport with due process because it failed to inform individual of his right to contest violation before board of adjustment). This is essentially the same argument Hardy raised before the Environmental Court, except with respect to the 1991 planning commission decision. The argument is unavailing for at least two reasons. First, irrespective of the 1992 board of adjustment decision, Hardy has failed to demonstrate that he is entitled to a permit under the zoning scheme in place at the time of his current application. Second, assuming the relevancy of the 1992 board of adjustment decision, we have not extended the reach of our holding in Estate of White to situations concerning notice of the right to appeal a decision Afollowing an adversarial proceeding in which the individual had an opportunity to contest the proposed decision.@ Gabriel v. Town of Duxbury, 171 Vt. 610, 611 (2000) (mem.) (applying three-factor analysis contained in Mathews v. Eldridge, 424 U.S. 319, 335 (1976) and finding no due process violation in town=s failure to notify landowner of right to appeal town=s road reclassification decision).

In this case, Hardy claims that he was not notified of his right to appeal a decision in a proceeding that he initiated and had a full opportunity to participate in more than a decade earlier. Although Hardy certainly had a private interest in being able to build an addition to his garage, the risk of erroneous deprivation is mitigated in a situation such as this in which Hardy already had a full opportunity to contest the zoning classification of his land and the legality of his permit application. See Gabriel, 171 Vt. at 611 (AAlthough failing to notify an individual of the right to appeal [a road classification] decision does pose a risk that a meritorious appeal may not be taken, this is not of the same order as a risk posed by failing to notify an individual of the right to contest unilateral action on the part of the government.@). Further, it would be highly prejudicial to municipalities and detrimental to interests of finality to allow permit applicants to claim a lack of notice of appeal rights many years after they initiated and litigated their permit applications. Although requiring towns to notify permit applicants of appeal rights in zoning decisions would not impose a heavy administrative burden, such notice has not been constitutionally required under circumstances similar to those presented here. See id. at 611-12. In short, Estate of White is not controlling, and there is no constitutional due process violation.

Finally, 24 V.S.A. ' 4470(a) does not establish a ten-day deadline for the zoning board of adjustment to render decisions, as Hardy claims, and 24 V.S.A. ' 4408 does not entitle landowners to expand nonconforming structures as long as setback requirements are met. In sum, Hardy has failed to demonstrate any error in the Environmental Court=s decision granting the Town summary judgment with respect to his 2004 permit application.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice