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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-430

AUGUST TERM, 2007

In re Appeal of Ross	}	APPEALED FROM:
	}	
	}	Environmental Court
	}	
	}	DOCKET NO. 137-8-04 Vtec
		Trial Judge: Thomas S. Durkin

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

Applicants appeal pro se from the environmental court's order denying their request for a conditional use permit. They argue that: (1) their neighbor lacked standing to appeal the zoning board's decision; (2) the court misapplied relevant law; and (3) their neighbor lacked credibility. We affirm.

Applicants purchased the subject property, located in the Village of Manchester, in 2003. In 2004, they sought conditional use approval to operate a not-for-profit family business venture called "Teleion Holon." The venture was to include, among other things, overnight accommodations and meals for guests. Although applicants did not specify the exact nature of their proposed use in their application, they later represented to the zoning board that the property would be used as a "clinic." The zoning board granted applicants' request, and a neighbor, H. Lawrence Ross, appealed to the Environmental Court. After a site visit and a merits hearing, the court denied applicants' request for conditional use approval.

In reaching its conclusion, the court made the following findings. The subject property contained approximately five acres of land and improvements. There was one structure on the property, a large twenty-two room building, which had previously been used as a residence, a nursing home, and as housing for hikers and students. In connection with their business venture, applicants had renovated this structure to include ten guest rooms, a multi-purpose ballroom and yoga studio, a large living room, grand dining room, classrooms, offices, and a teaching kitchen in which meals would be prepared and served communally. The facility could accommodate eighteen overnight guests and an undisclosed number of daytime attendees for seminars and other activities provided at the facility.

The property was located in the Village Rural Residential Zoning District (RR District), which allowed the following conditional uses:

> A public park or playground, a community recreation building or center, a library, museum, art center, clinic or similar philanthropic use, operated by a governmental unit or non-profit corporation, or a community association.

Village of Manchester Zoning Bylaw § 5.12(1).

Applicants argued to the court, as they had before the zoning board, that Teleion Holon would be operated as a "clinic." The court was unpersuaded. It found applicants' proposal confusing and unclear at best, but ultimately concluded that the proposed use did not fit within the definition of a clinic. The court explained that although applicants' planned use might have some components that could be described as clinical in nature, their planned use was more in keeping with a country inn or bed and breakfast, albeit with a holistic theme. Applicants also appeared to offer activities that were similar to those offered at the nearby Wilburton Inn, a commercial enterprise owned by applicants and operated as a lawful preexisting non-conforming use. Indeed, they indicated that they intended to make some of the facilities at the Wilburton Inn available for guests at Teleion Holon. The court thus concluded that applicants failed to demonstrate that their proposed use was an allowed conditional use. The court also concluded that, however the planned use was characterized, it did not meet the more specific conditional-use criteria. It found that the use would not be in keeping with the character of the area, it would have a negative effect on the residential uses in the vicinity, and the proposal would likely have an undue adverse impact on neighborhood traffic. The court thus denied applicants' request for a conditional use permit, and this appeal followed.

Applicants first argue that Mr. Ross lacked standing to appeal because he failed to participate in proceedings before the zoning board as required by 24 V.S.A. § 4471(a) (effective July 1, 2004). Applicants maintain that this statutory provision should apply to Mr. Ross because he filed his notice of appeal to the Environmental Court after the effective date of the newly-enacted statutory provision.

We reject this argument. Prior to July 1, 2004, the law allowed any "interested party" to appeal a zoning board decision to the Environmental Court. See 24 V.S.A. § 4471(a) (2003). The zoning board in this case issued its decision on June 21, 2004. On that date, and not the date when the appeal was actually filed, Mr. Ross acquired a substantive right to appeal the zoning board's decision. This right could not be taken away by subsequent legislation. See 1 V.S.A. § 214(b)(2) (a statutory amendment may not affect "any right, privilege, obligation or liability acquired, accrued or incurred prior to the effective date of the amendment"); see also Carpenter v. Dep't of Motor Vehicles, 143 Vt. 329, 333 (1983) (statute said to be retroactive when it is applied to rights acquired prior to its enactment). Mr. Ross plainly had standing to appeal.

Applicants next argue that the court erred in concluding that their proposed use was not a "clinic" as that term is commonly understood. They maintain that their use fits within dictionary definitions of that term, and that any uncertainties in the definition of the term should have been construed in their favor. Applicants also argue that their proposed use fits within the definition of "other philanthropic uses" allowed under the zoning bylaw, and it could also be construed as a museum, library, art center, or community recreation center.

We reject these arguments. The court properly construed the relevant zoning ordinance. See Simendinger v. City of Barre, 171 Vt. 648, 649 (2001) (mem.) (we review the Environmental Court's interpretation of a zoning ordinance to determine whether its construction is clearly erroneous, arbitrary, and capricious). The court recognized that applicants' proposal had some aspects of a clinic, but it concluded, on balance, that the proposed use more closely resembled a bed and breakfast. As support for this conclusion, the court pointed to applicants' advertisements, which provided for nightly room rates and

included "the comforting enticements often found in country inn advertisements." The court also found that overnight guests would not be required to avail themselves of the "clinical" services offered at Teleion Helon, and that the some of the services offered by Teleion Helon would include the same or similar services offered at applicants' nearby commercial inn. While applicants point to evidence they believe supports their position that their proposed use would be a clinic, the environmental court was unpersuaded by this evidence. It is for the environmental court, not this Court, to weigh evidence. See Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). Where, as here, the court's findings are supported by credible evidence in the record, they must stand on appeal. See Simendinger, 171 Vt. at 649 (on review, Supreme Court views evidence in the light most favorable to the prevailing party, and disregards modifying evidence; Supreme Court will set aside the trial court's findings of fact only if there is no credible evidence in the record to support them). We find no basis to disturb the court's conclusion that applicants' proposed use was not a "clinic."

We do not address applicants' assertion that their proposed use fits within other uses described in the zoning bylaw because applicants fail to show that they preserved this argument below. See Bull v. Pinkham Eng'g Assocs., 170 Vt. 450, 459 (2000) ("Contentions not raised or fairly presented to the trial court are not preserved for appeal."); see also In re S.B.L., 150 Vt. 294, 297 (1988) (appellant bears burden of demonstrating how the trial court erred warranting reversal, and Supreme Court "will not comb the record searching for error"). Moreover, given our conclusion above, we need not address applicants' assertion that the court erred in evaluating the more specific conditional-use criteria.

Finally, we reject applicants' challenge to their neighbor's credibility. To the extent that applicants rely on evidence that was not before the Environmental Court, we do not consider it. See Hoover v. Hoover, 171 Vt. 256, 258 (2000) (Supreme Court's review on appeal is confined to the record and evidence adduced at trial; Court cannot consider facts not in the record). More significantly, as discussed above, it is for the Environmental Court, not this Court, to weigh the evidence and assess the credibility of witnesses. See Cabot, 166 Vt. at 497. We find no basis to disturb the court's decision.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice