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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-230

FEBRUARY TERM, 2008

In re Kinney Drug and Pomerleau Real Estate Application	}	APPEALED FROM:
	}	Environmental Court
	}	DOCKET NO. 101-5-06 Vtec
		Trial Judge: Merideth Wright

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

Neighbors appeal the Environmental Court's order approving a site plan and granting applicants a conditional use permit to construct an 11,500-square-foot retail store on the corner of Shelburne Road and Prospect Parkway in the City of Burlington. We affirm.

Applicants propose building a retail store with a pharmacy in a commercial zoning district that adjoins a residential low-density zoning district in which neighbors reside. The City's Development Review Board approved a conditional use permit for the project, and neighbors appealed. The City also filed a limited cross-appeal. Following an evidentiary hearing and site-visit, the Environmental Court approved a revised site plan and granted a conditional use permit. On appeal to this Court, neighbors argue that the Environmental Court's conclusions are not supported by its findings, which, in turn, are not supported by the evidence. Neighbors also argue that the Court imposed vague and unworkable conditions on the permit and erred by allowing applicants to submit a revised site plan absent their cross-appealing the Board's decision. We reject each of these arguments.

We start with neighbors' argument that the Environmental Court erred by allowing applicants to present a revised site plan without cross-appealing from the permit granted by the Board. According to neighbors, the Environmental Court lacked jurisdiction to consider a site plan that was neither approved by the Board nor placed at issue before the Environmental Court by way of a cross-appeal by applicants. Neighbors further argue that even if the revised site plan was properly before the Environmental Court, the Court should have remanded the matter to the Board for initial local review. See Timberlake Assocs. v. City of Winooski, 170 Vt. 643, 644 (2000) (mem.) (notwithstanding the Environmental Court's de novo review of zoning matters, a remand "may" be appropriate when the Court is called upon to address issues never presented to the local board). Neighbors complain that they had no opportunity to object to the revised plan, which allowed patrons of the proposed project to exit in two directions rather than one onto the side road, Prospect Parkway. During the evidentiary hearing, the Environmental Court rejected this objection, stating that the differing plans had been at issue before the Board. The Court also noted that the City had indicated a month before the hearing that it would be arguing for full access to the side road, and that the City's cross-appeal had addressed this issue.

We find no abuse of discretion in the Court considering the revised site plan. Id. (the appealing party must demonstrate that the Environmental Court abused its discretion in deciding whether to remand a zoning matter to the local board or commission). The issue concerning the nature of the exit to the side road was raised and debated before the Board and further was within the scope of the City's cross-appeal. Neighbors had an opportunity to address this issue before both the Board and the Environmental Court, and in fact did so. As for neighbors' argument that applicants cannot benefit from the City's cross-appeal because municipalities are limited to challenging zoning board decisions that construe town plans or bylaws, we decline to address the argument because it was not raised below. In re Lorentz, 2003 VT 40, ¶ 5, 175 Vt. 522 (mem.) ("We will not address arguments made for the first time on appeal.").

Neighbors also argue that the Court erred by approving a plan allowing for fewer parking spaces than the number required by the City's ordinance. The ordinance mandates the number of parking spaces based on a certain formula, but allows a waiver of the required number under specified criteria, including the availability and projected use of alternate transportation. The Environmental Court acknowledged that the ordinance required seventy-seven parking spaces, but concluded that a waiver was appropriate to reduce the number of parking spaces to fifty because the proposed store was located on a municipal bus line and over 800 residences were located within a ten-minute walk of the store. The Court also found that the store would accommodate a significant number of drive-through patrons who would not need parking spaces. Finally, the Court noted that a similar store on Williston Road used an average of only sixteen spaces during peak hours. In short, ample evidence presented at the hearing supported the Court's findings and conclusion that the waiver criteria had been met.

We also reject neighbors' challenge to the Court's conclusion that the project provided for safe sight distances from the main intersection to the side exit. There was considerable evidence of sufficient stopping sight distance to assuage any safety concerns. There was also evidence that limitations on corner sight distance were not critical in terms of safety because cars were slowing down anyway as they approached the intersection, and further that any limitations in that regard could be addressed by having the City trim vegetation in the right of way. We find unavailing neighbors' contentions that conditions concerning the trimming of vegetation were vague and unenforceable. Requiring the City to trim any vegetation that might impede corner site distance is not too vague to apprise the parties of what is required, and the City has the authority and incentive to satisfy the conditions.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice