

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

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2009-162

JAN 15 2010

JANUARY TERM, 2010

In re Snelgrove Permit
(Boathouse Replacement)

} APPEALED FROM:
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}
} Environmental Court
}
}
} DOCKET NO. 25-1-07 Vtec

Trial Judge: Merideth Wright

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

Applicant Robert Snelgrove appeals from the Environmental Court's decision, which concluded that his new boathouse is a nonconforming structure and does not qualify for conditional use approval under the Town of Newport's zoning bylaws. We affirm.

The dispute in this case concerns applicant's relocation and replacement of his boathouse on his property bordering Lake Memphremagog. The original one-story boathouse was located along the southerly boundary of applicant's property, bordered by neighbors' adjacent land. In October 2005, applicant submitted a zoning permit application to the Town. The application requested permission to demolish the existing one-story boathouse and replace it with a boathouse the same size, five feet north of the previous structure. The zoning administrator granted the application without a hearing before the Zoning Board of Adjustment (ZBA), and no appeal followed. In 2006, applicant constructed his new boathouse. The new boathouse is a two-story¹ structure, and the second story consists of a finished open room served by electricity, but without plumbing, heating or other utilities. Applicant also constructed a concrete retaining wall at the property boundary in approximately the same location as the southerly wall of the former boathouse, but taller. A stream runs between the retaining wall and the southerly wall of the current boathouse. Neither the retaining wall nor the second story were included in the zoning application.

After construction was completed, applicant attended a meeting of the ZBA in January 2007. During this meeting, applicant completed and submitted what was labeled as an amended zoning application, intending to seek conditional use approval for the finished second level of his new boathouse. Although the matter had not been warned prior to the meeting, the ZBA considered the application. The notes from the meeting indicate that the ZBA approved the application, concluding that the footprint of the building had not changed significantly and that,

¹ Applicant argues that the Environmental Court erred in characterizing the boathouse as a two-and-a-half-story building, rather than a two-story building. Because this distinction is not relevant to our decision, we do not address this issue.

even though the building was higher, the height was still within the limits allowed by the zoning bylaws. The minutes from the meeting were not officially adopted.

Neighbors appealed the approval to the Environmental Court. Neighbors argued that the permit should be invalidated because (1) applicant misrepresented the dimensions of the old and new boathouses on both applications; (2) the application was not properly warned prior to the meeting, and the meeting minutes were not properly adopted; and (3) the boathouse as-built was much larger than the original and therefore beyond the scope of applicant's permit. The court dealt with some issues in a partial summary judgment order. Following a site visit and a merits hearing, the court entered a final decision, concluding that the boathouse was a nonconforming structure, and was not eligible for conditional use approval under the Town's zoning bylaws. Applicant appeals.

The Town's zoning bylaws contain as a single zoning district and include the following provisions. Zoning Bylaws, § 201. Residential lots are subject to a twenty-five foot side yard setback, and a maximum building height of thirty-five feet. *Id.* § 206.1. Permitted uses include single-family dwellings with an accessory use. *Id.* § 206. A nonconforming structure is defined as one "that does not conform to the present bylaws but was in conformance with all applicable laws, ordinances, and regulations prior to the enactment of the present bylaws." The bylaws allow conditional use approval for alterations to nonconforming uses and structures. For a nonconforming use, a structure "may be altered or expanded, [provided it does not] exceed[] 25% of its size." *Id.* § 404(1). In contrast, "[a]ny nonconforming structures may be altered or expanded, providing such action does not increase the degree of nonconformance." *Id.* § 404(2).

The old boathouse was located within the twenty-five-foot setback area and did not exceed the maximum allowed building height. The new boathouse also complies with these requirements. The Environmental Court found that the original boathouse was 21' 3" in width and 32' 3" in length, with an 11' roof peak. The new boathouse is 21' 8 1/2" in width and 38' 6" in length, with a 15' peak.² Based on these measurements, the replacement boathouse is slightly wider and longer than its predecessor, and significantly higher. Thus, despite applicant's argument otherwise, we conclude that the Environmental Court's finding that the new boathouse has a larger footprint and occupies a greater volume is not erroneous.

Applicant first claims that the Environmental Court lacked jurisdiction to review the ZBA decision because the hearing was not properly warned and because the minutes were not properly approved. 24 V.S.A. §§ 4464(a)(1), (b)(1) (requiring municipal panels to notice consideration of zoning applications and to provide written decisions). Applicant therefore asks that the matter be remanded back to the ZBA for a full hearing. See *id.* § 4464(a)(5) (explaining that where an action by a municipal panel is found invalid by the Environmental Court for failure to comply with proper notice requirements, "the action shall be remanded to the applicable municipal panel to provide new posting and notice, hold a new hearing, and take a new action"). Neighbors

² At trial, applicant stipulated to the dimensions of the prior and current boathouses, as set forth in neighbors' exhibit. On appeal, applicant argues that the Environmental Court's dimensions of the old boathouse are incorrect and should be 22' 3" in width and 33' 3" in length. We find no error in the court's dimensions. The exhibit, which applicant agreed contained correct measurements, provides that the width and length of the old boathouse are 21' 3" and 32' 3", respectively. Given this evidence, we cannot conclude that the Environmental Court's findings are clearly erroneous. See *In re Jenness & Berrie*, 2008 VT 117, ¶ 26, 185 Vt. 16 (review of trial court's findings is for clear error).

raised both of these deficiencies in the ZBA decision before the Environmental Court. Applicant did not argue any infirmity in the ZBA decision; rather, applicant simply asked the Environmental Court to affirm the decision.

In its initial partial summary judgment order, the Environmental Court noted that it had insufficient facts to determine if the ZBA meeting was sufficiently noticed, or if the minutes were properly adopted by the ZBA. The court explained “[u]nless Appellee-Applicant or the Town can show at trial that reasonable efforts were made to provide adequate posting and notice, § 4464(a)(5), the Court is required by that section to remand this action to the ZBA.” In its final order, the court found that the ZBA’s notice procedure did not meet the requirements of 24 V.S.A. §§ 4464(a)(1) and (5), and that the ZBA’s minutes did not constitute a written decision under § 4464(b)(1). The court did not, however, remand the matter back to the ZBA because, as explained, it found that as a matter of law no conditional use approval was available for applicant’s boathouse.

On appeal, for the first time, applicant now raises as an issue the sufficiency of notice, and therefore the legality of the ZBA decision, and argues that the Environmental Court lacked jurisdiction to hear the matter due to this infirmity.³ “ ‘Subject matter jurisdiction’ refers to the power of a court to hear and determine a general class or category of cases.” Lamell Lumber Corp. v. Newstress Int’l, Inc., 2007 VT 83, ¶ 6, 182 Vt. 282. Thus, subject matter jurisdiction may be raised at any time. In contrast, other errors relating to the proper procedure required to invoke a court’s authority in a particular case may be waived by the parties’ behavior. See In re Cartmell’s Estate, 120 Vt. 234, 240 (1958) (“If a court has jurisdiction of the subject matter, the parties by their conduct may waive all other jurisdictional requirements.”); see also Brace v. Vergennes Auto, Inc., 2009 VT 49, ¶ 16, ___ Vt. ___ (mem.) (concluding that employer waived procedural defect by not raising it below). Having chosen not to oppose the ZBA’s decision in the Environmental Court based on deficiencies in the notice provided prior to the ZBA hearing, applicant has waived this objection on appeal. See In re Burlington Elec. Dep’t, 141 Vt. 540, 546 (1982) (party by conduct may waive deficiencies in process that is not in the exact form required by statute).

Applicant next argues that the presence of the boathouse within the setback area is a nonconforming use of land and therefore eligible for conditional use approval under § 404(1) of the Town bylaws, which allows a twenty-five percent expansion of preexisting nonconforming uses. Applicant relies on In re Miserocchi, 170 Vt. 320 (2000), for his argument that a structure within a setback area is a nonconforming use. Miserocchi held that a barn within a setback area is a noncomplying structure, and that, under 24 V.S.A. § 4408(b), all noncomplying structures are also nonconforming uses. Miserocchi, 170 Vt. at 323-24. That statute has since been repealed. 2003, No. 115 (Adj. Sess.), § 119(c). The new statute directs local municipalities to define how nonconformities will be addressed. 24 V.S.A. § 4412(7). Therefore, we are not bound by the reasoning of Miserocchi and turn to the provisions of the Town’s bylaws to determine how the boathouse should be classified.

We construe zoning ordinances according to general principles of statutory construction, applying the plain language of the ordinance where it resolves the issue and comports with the Legislature’s overall scheme and intent. In re Weeks, 167 Vt. 551, 554 (1998). “Our standard for reviewing the Environmental Court’s interpretation of a zoning ordinance is whether the construction is clearly erroneous, arbitrary or capricious.” Id. The Environmental Court

³ On appeal, neighbors waive any defect in the notice procedure.

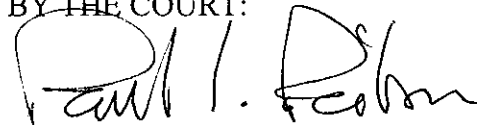
concluded that the boathouse is a nonconforming structure, not a nonconforming use. We agree. In general, nonconforming uses relate to restrictions regarding “the activities that may take place within a certain area,” whereas nonconforming structures relate to restrictions controlling “setbacks and size, shape and placement of buildings on the property.” Miserocchi, 170 Vt. at 328. The Town’s bylaws reinforce these definitions. The bylaws employ the terms “structure or part of a structure” in defining nonconforming structure, and “[u]se of land” in defining nonconforming use. The former boathouse was a nonconforming structure, due to its failure to meet the side setback dimensional requirements, although it housed a permitted use. All parties agree that applicant’s land is used as a single-family dwelling with an accessory, the boathouse, which is a permitted use. Zoning Bylaws, § 206.

Because there is no nonconforming use on the property, applicant cannot receive conditional use approval under § 404(1). Conditional use approval is available for nonconforming structures, but only under § 404(2). Under that section, a nonconforming structure can be altered only insofar as the “action does not increase the degree of nonconformance.” The Environmental Court found that the new boathouse is larger than its predecessor, both because it has a larger footprint and because its overall volume is increased, and therefore it could not receive conditional use approval under this section. The court’s findings pertaining to the size of the original and as-built boathouses support the court’s conclusion that the new boathouse increases the degree of nonconformance because it occupies more of the setback area.⁴ We agree that the boathouse as a nonconforming structure does not qualify for conditional use approval under § 404(2).

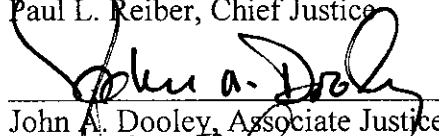
Finally, we address applicant’s argument that the Environmental Court exceeded its jurisdiction by discussing the retaining wall adjacent to the boathouse. The sluiceway and the retaining wall were not part of applicant’s original amended permit and were not before the Environmental Court. Thus, we agree that this language is dicta and strike the references to the sluiceway and retaining wall from the Environmental Court’s decision. See Swezey v. Neel, 2006 VT 38, ¶ 28, 179 Vt. 507 (striking language from trial court’s order where issue was not before superior court and language amounted to an advisory ruling).

The Environmental Court’s order is affirmed, except the first two paragraphs on page 13 of the order are stricken.

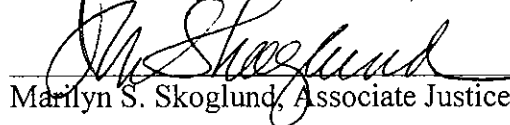
BY THE COURT:



Paul L. Reiber, Chief Justice



John A. Dooley, Associate Justice



Marilyn S. Skoglund, Associate Justice

⁴ Because the new boathouse is both longer and higher than the original boathouse, we do not address applicant’s argument that an increase in height alone, which is still within the bylaw’s allowable height limit, is not an increase in nonconformance.