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

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2010-064 & 2010-065

JULY TERM, 2010

In re Beliveau Notice of Violation	}	APPEALED FROM:
	}	
	}	Environmental Court
	}	
	}	DOCKET NO. 193-8-08 Vtec
		Trial Judge: Merideth Wright
Town of Fairfax	}	
	}	
v.	}	
	}	
Leon Beliveau	}	DOCKET NO. 274-11-08 Vtec

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

Landowner appeals from the environmental court's final judgment order finding that he committed a zoning violation and imposing a penalty. We reverse and remand.

The record indicates the following. Landowner owns a home in the Town of Fairfax. In May 2008, he was notified by the Town's zoning administrator of an alleged zoning violation after landowner apparently indicated to the zoning administrator that he was renting rooms in his home to nonfamily members. The zoning administrator informed landowner that such use most closely met the definition of a rooming and boarding house under the zoning bylaws, and because this constituted a change in use from the prior use as a single family residence, a permit was required. In June 2008, landowner was issued a formal notice of zoning violation. This notice reiterated that the home was being used as a rooming and boarding house, as defined in Appendix B of the Town's zoning bylaws, without obtaining a permit for such use in accordance with Article 2, Section 2.2.A, of the zoning bylaws. The Town's development review board denied landowner's appeal and upheld the notice of violation. Landowner then appealed to the environmental court. The Town subsequently filed an enforcement complaint, seeking injunctive relief and an award of fines and penalties. The cases were not formally consolidated, but they were essentially treated as one case by the environmental court.

In June 2009, the Town moved for summary judgment. As reflected above, the Town alleged that landowner had been using his residence as a rooming and boarding house without first obtaining a permit for such use. In support of its motion, the Town submitted an affidavit from its zoning administrator, a copy of the Town's grand list for 1998 and 1999, as well as

landowner's response to the Town's interrogatories in which landowner identified individuals who had lived in the home and described the payments he had received from such individuals. Landowner, who was pro se below, filed a response to the Town's motion, although it is very difficult to follow his arguments. In a January 2009 decision, the court granted partial summary judgment to the Town. The court found it undisputed that landowner owned a home in the town and had used the home as a place in which to live, raise a family, and do business since February 1999. The court indicated that while it may not be disputed, it had not actually been established if or for what periods landowner had lived in the home between June 12, 2008 (a week after the notice of violation was sent) and the date of the court's decision. Nonetheless, the court found that landowner had received payments from specific occupants of the house to supply them with sleeping accommodations at the property. It also found that he had not applied for a zoning permit to use the property as a rooming and boarding house. Based on these findings, it concluded that the Town was entitled to summary judgment in its favor as to the zoning violation. The court denied the Town's request for summary judgment as to the appropriate amount of a penalty. Following an evidentiary hearing, the court imposed a penalty of $22,770. Landowner appealed from the court's final judgment order, which incorporated its earlier summary judgment decision.

Landowner first challenges the court's summary judgment decision, arguing in relevant part that the Town failed to establish facts essential to its claim. We review the court's summary judgment decision de novo, using the same standard as the environmental court. Richart v. Jackson, 171 Vt. 94, 97 (2000). Summary judgment is appropriate when, taking all allegations made by the nonmoving party as true and giving the nonmoving party the benefit of all reasonable doubts and inferences, there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3); Richart, 171 Vt. at 97. We agree with landowner that the Town failed to establish that it was entitled to judgment as a matter of law, and we therefore reverse and remand for a trial or for the filing of a new motion for summary judgment. Given our conclusion, we also reverse and remand the court's penalty award, which was based on its July 2009 finding that a zoning violation existed.

As stated above, in its notice of violation, the Town asserted that landowner had been using his home as a rooming and boarding house, as defined in Appendix B of the zoning bylaws, without the permit required by Article 2, section 2.2.A. of the bylaws. Appendix B defines rooming and boarding houses as "[a]n owner occupied residence where a person or persons, for a fixed period of time, are supplied with and charged for meals or sleeping accommodations or both." Article 2, section 2.2.A., provides in relevant part that "[n]o structure may be erected, substantially improved, changed in use or moved, nor shall any Use be initiated or changed, without a Zoning Permit for such action having been duly issued by the Zoning Administrator, except as noted in Article 3, Section 3.5."

The environmental court acknowledged in its order that it had no evidence from which to find that landowner resided in the home during the period in question, which is the first element of the "rooming and boarding house" definition cited above. Additionally, the Town failed to demonstrate that individuals were supplied with and charged for sleeping accommodations "for a fixed period of time." Indeed, the court made no finding that this requirement was satisfied. While landowner indicated the dates for which he was paid rent, there was no allegation or evidence that landowner specified in advance that these rooms would be let only for a "fixed

period of time." It is equally possible that the individuals were free to stay in the home indefinitely. The Town improperly cites evidence that was presented at a later evidentiary hearing to show that it met its summary judgment burden on this point. This evidence was not before the environmental court at the time of its decision, and thus, it could not have formed the basis of its order. Given the deficiencies in the Town's proof, summary judgment was not warranted. We thus reverse the court's final judgment order and remand for additional proceedings, including the filing of a new summary judgment motion if appropriate. Given our conclusion, we need not address landowner's remaining arguments.

The court's July 2009 summary judgment decision and its January 2010 penalty decision are reversed and remanded for additional proceedings.

BY THE COURT:

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Paul L. Reiber, Chief Justice

_____

John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice