VERMONT SUPERIOR COURT
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ENVIRONMENTAL DIVISION

Villeneuve Sign Permit NOV Appeal; Town of Jericho v. Villeneuve et. al.	Docket No. 21-ENV-00072 Docket No. 21-ENV-00074

DECISION ON MOTIONS

These two related matters concern a sign that the Town of Jericho ("Town") contends is too large. In Docket No. 21-ENV-72, David Villeneuve appeals a decision of the Jericho DRB upholding a Notice of Violation issued to David and Jonathan Villeneuve for a sign exceeding the maximum allowable area under the Town's regulations. In Docket No. 21-ENV-74, the Town seeks injunctive relief and monetary penalties against David and Jonathan Villeneuve ("Appellant-Defendants" or "Defendants") on the basis of that same Notice of Violation. Both parties have moved for summary judgment in each docket. We address all of these cross-motions for summary judgment here.

Background

We recite the following background and procedural history, which we understand to be undisputed unless otherwise noted, based on the record now before us and for the sole purpose of deciding the pending motions. The following are not specific factual findings with relevance outside of this summary judgment decision. *See* Blake v. Nationwide Ins. Co., 2006 VT 48, ¶ 21, 180 Vt. 14 (citing Fritzeen v. Trudell Consulting Eng'rs, Inc., 170 Vt. 632, 633 (2000) (mem.)).

1. Kate's, LLC, doing business as Kate's Food Truck, operates as an establishment serving prepared food at 261 VT Route 15 ("the Property").

2. Jonathan Villeneuve owns Kate's, LLC. David Villeneuve's relationship to Kate's, LLC is unclear.

3. On or about June 1, 2020, David Villeneuve sent an email to Chris Flinn, the Town of Jericho Zoning Administrator, to inquire about applying for a permit for a sign. David Villeneuve represented that the sign would be "approximately 6' wide and 5' high."

4. On or about June 2, 2020, David Villeneuve applied for a sign permit.

5. The sign permit was approved on or about June 3, 2020, permit #2020031.

6. As constructed, the sign is freestanding (i.e. not attached to the food truck or another building), consisting of a permanent metal frame suspending a white panel.

7. The words "Kate's Food Truck" are printed on the white panel in red, with space below for four lines of marquee-style changeable lettering, as seen in the photograph of the sign below.

8. The dimensions of the white panel are approximately eight feet by seven feet, or fifty-six square feet.

9. The area of the smallest rectangle that can be drawn around the painted words and lines of changeable lettering is approximately thirty-two square feet.

10. Per the Town of Jericho Land Use and Development Regulations in effect as of May 9, 2019 ("Regulations,"), § 7.8.2.1, signs in the Commercial Zoning District must be no larger than thirty-two square feet.

11. The Regulations define a sign as "Any words, lettering, parts of letters, logos, symbols, figures, numerals, phrases, sentences, emblems, devices, designs, or trademarks by which anything is made known, such as are used to designate an individual, a firm, an association, a corporation, a profession, a business, or a commodity or product, and which may be visible from a public ROAD or RIGHT-OF-WAY and are used to attract attention." Regulations § 2, p. 17. The sign at issue is a sign per this definition.

12. The Regulations state the following about how to calculate the area of a sign:

> 7.8.4. Measurement of Sign Area
>
> 7.8.4.1 In the case of a permanent or temporary sign or a sign affixed to a structure that is clearly a separate entity, the area of the sign shall be defined by the actual area of the display face. Where such sign is affixed as individual letters or other components or painted on a window or other surface, the area of the sign shall be the

> area of the smallest rectangle enclosing all of the displayed lettering, logo(s) and/or illustration(s) unless such sign is clearly intended to have some other simple geometric shape, in which case the area shall consist of the area of the intended geometric figure. In the case of a sign bearing messages on two sides only one side shall be used to determine the area.
>
> 7.8.4.2. Measurement of sign area for a free standing sign shall not include a permanent sign base that is subordinate in appearance to the sign and contains no lettering, logo(s), or illustration(s). Such permanent sign base requires a permit which may be included as part of the sign permit. If not included as part of the sign permit, the permanent sign base shall be considered a structure subject to minimum yard setbacks.

13. "Permanent sign," "temporary sign," and "free standing sign" are all defined terms in the Regulations, as follows:

> SIGN, FREESTANDING: Any self-supporting sign that is installed in the ground, not including movable or folding sandwich-board type signs. See also TEMPORARY SIGN.
>
> SIGN, PERMANENT: Any freestanding sign, or sign that is affixed to any BUILDING, and which is installed for a period of indefinite duration, not including movable or folding sandwich-board type signs. See SECTION 7.8.
>
> SIGN, TEMPORARY: Any sign that is installed for a period of limited duration, including movable and/or sandwich-board type signs.

14. The term "display area" is not defined in the Regulations.

15. On or about May 4, 2021, the Town issued a Notice of Zoning Violation ("NOV") to David and Jonathan Villeneuve, stating that they were in violation of the ordinance provisions describing the maximum sign area in the Commercial Zoning District.

16. On or about May 28, 2021, David Villeneuve appealed the NOV to the Town of Jericho Development Review Board ("DRB"), which held a public hearing to address the appeal on or about June 23, 2021.

17. On or about June 30, 2021, the DRB issued its decision upholding the NOV.

18. We understand that following the DRB decision the Appellant-Defendants and Town officials made some efforts to achieve a voluntary resolution of the matter without an appeal to our Court that were ultimately unsuccessful. The contents of those discussions, which may constitute confidential settlement negotiations, are not considered here.

19. On July 28, 2021, David Villeneuve filed this appeal of the DRB Decision, which was assigned Docket No. 21-ENV-00072.

20. On August 6, 2021, the Town filed this enforcement action, which was assigned Docket No. 21-ENV-00074.

21. The two matters were coordinated along with a third matter, consisting of an appeal from a Conditional Use Permit issued to David Villeneuve to have Kate's Food Truck recognized as a Restaurant/Tavern, which does not concern the sign. That matter was assigned Docket No. 21-ENV-00071.

Legal Standard

Summary judgment is appropriate if and only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a), which is made applicable to appeals before this Court through V.R.E.C.P. 5(a)(2). We accept as true all of the nonmovant's allegations of fact, as long as they are supported by affidavits or other admissible evidence. White v. Quechee Lakes Landowners' Ass'n, Inc., 170 Vt. 25, 28 (1999) (citation omitted). In considering cross-motions for summary judgment, the Court considers each motion individually and gives the opposing party the benefit of all reasonable doubts and inferences. City of Burlington v. Fairpoint Commc'ns, Inc., 2009 VT 59, ¶ 5, 186 Vt. 332.

Discussion

This is a relatively simple dispute: The purely legal question that divides the parties is how, according to the Regulations, to calculate the area of a freestanding sign such as this one. The Town argues, pointing chiefly to the first sentence of § 7.8.4.1, that one must measure the total area of the panel forming the sign, which it equates to the "display face." The Appellant-Defendants, pointing chiefly to the second sentence of § 7.8.4.1, argue that one must measure only the smallest rectangle that can be drawn around the words or images on the sign, assuming that the words and images are arranged, as they are here, in a rectangle. We are therefore confronted with a question of the proper interpretation of the Regulations and will apply all our normal rules of statutory interpretation. We consider the parties' more specific arguments as we proceed with the analysis.

In interpreting zoning ordinances, as with statutes, we "construe words according to their plain and ordinary meaning, giving effect to the whole and every part of the ordinance." In re Appeal of Trahan, 2008 VT 90, ¶ 19, 184 Vt. 262. Our "paramount goal" is to implement the intent of the ordinance's drafters. Miller v. Miller, 2005 VT 89, ¶ 14, 178 Vt. 273. Therefore, if the plain meaning is not evident on its face, we will "attempt to discern the intent from other sources without being limited by an isolated sentence." In re Stowe Club Highlands, 164 Vt. 272, 280 (1995). Ultimately, we will only "adopt a construction that implements the ordinance's legislative purpose and, in any event, will apply common sense." In re Laberge Moto-Cross Track, 2011 VT 1, ¶ 8, 189 Vt. 578 (quotations omitted).

While the language and structure of the provision is not as clear as it could be, read in its entirety and in context, it is clear to us that the intent of the drafters of § 7.8.4.1 was to establish two different methods of calculating sign area: one method for signs that are free-standing or extend off of a building *in panel form*; and a separate method for signs that consist of letters individually affixed to a building or painted on its walls or windows. The first sentence, which refers to "a permanent or temporary sign or a sign affixed to a structure that is clearly a separate entity" deals with the former. The second sentence, which refers to a sign "affixed as individual letters or other components or painted on a window or other surface" deals with the latter.

This reading comports with the plain meaning of the terms used and the definitions employed in the Regulations. As defined by the Regulations, a permanent sign is one that is freestanding or permanently affixed to a building; in turn, a freestanding sign is one that is "self-supporting" (i.e. not attached to a building) and "installed in the ground." The characteristic examples given of temporary signs are movable and sandwich board style signs. In other words, freestanding and temporary signs are both defined as being independent of whatever business they are advertising, while permanent signs may be either freestanding or affixed. It is not disputed that the sign at issue is a permanent freestanding sign within these definitions. The first sentence of 7.8.4.1 makes clear that permanent, temporary, and freestanding signs (although, for reasons unclear, it uses the words "a sign affixed to a structure that is clearly a separate entity" rather than "freestanding sign") are to be measured according to the "actual area of the display face." "Display face" is not a defined term, but in context, it clearly refers to whatever two-dimensional planar surface the sign's letters and images are displayed upon. The words "actual area" alert us that the entire area of the display face must be measured, not simply that portion covered by text or images.

This reading is supported by the subsequent provision. Section 7.8.4.2 clarifies that for freestanding signs, the support structure—which it refers to as the "sign base"—should ordinarily not be included in the sign area. The only reason that this would even be an issue of potential concern is if the entire area of the main panel forming the sign, and not simply that area with text or images, is included in the calculated area, because it is only at that point that one must begin to differentiate sign panel from support structure.

In contrast, the second sentence of § 7.8.4.1 states in relevant part, "Where such sign is affixed as individual letters or other components or painted on a window or other surface, the area of the sign shall be the area of the smallest rectangle enclosing all of the displayed lettering, logo(s) and/or illustration(s) . . .." This is clearly describing a separate situation from the first sentence. Namely, it

describes scenarios where there is no independent panel, but letters either are affixed independently to a building (as, for example, used to be frequently seen at bowling alleys or hotels, where the name is spelled out in separate letters affixed to a building), or are painted on the walls or windows of the building. We note that the letters independently affixed may still be considered a permanent sign, but this provision clearly singles them out for different treatment from permanent panel style signs. In the situations described in the second sentence, there is no simple "display face" to measure, as there is no freestanding panel that forms the sign. Instead, the Regulation directs us to imagine the smallest possible two-dimensional shape in which the letters and images fit, which, in most cases will be a rectangle.

This understanding accords with common sense. In scenarios of signs that are on a separate panel, impacts (chiefly visual, but potentially also physical or auditory) derive in large part from the entire panel, and not simply the section with words or images painted on it. An illustrative example is the sign at issue here. Although the exterior boundaries of the panel do not contain any lettering, those edges of the panel clearly contribute to one's recognition of and attention to the entire sign.

In situations where letters are free-standing, however, or are painted on an existing wall or window, the impacts are limited to the specific area taken up by the letters—in the latter case, the wall or window predates the sign.

Defendants argue that because the second sentence begins with "Where such sign," it refers back to the categories of signs enumerated in the first sentence. In other words, Defendants argue that on any permanent, freestanding, or temporary sign which features letters "painted" on a "surface" (i.e., all signs), it is only the area of the smallest rectangle that can be drawn around the text and images that counts towards sign area. This interpretation renders the first sentence of 7.8.4.1 entirely superfluous, as it makes all signs subject to the calculation method in the second sentence. Defendants argue that the second sentence simply defines the term "display face" in the first sentence. The weakness of this argument is demonstrated as much by the fact that the second sentence does not use the phrase "display face" as by the fact that it assumes the drafters used two sentences to accomplish what could have been done in one. We reject this interpretation. We will not interpret a statue "in a way that renders a significant part of it pure surplusage." Trombley v. Bellows Falls Union High Sch. Dist. No. 27, 160 Vt. 101, 104 (1993). This is especially true given that an equally plausible interpretation of the words "such sign" in the second sentence of 7.8.4.1 is that they refer back to the general word "sign" in the title of section 7.8.4, "Measurement of Sign Area."

Furthermore, the interpretation urged by Defendants would lead to the absurd scenario that businesses could build panel signs of whatever size they choose in Jericho, as long as the portion of the panel featuring text and images is smaller than the statutory maximum. Such an interpretation defies common sense and is precisely the sort of "irrational result" that we avoid in our interpretation of statutes. In re JSCL, LLC CU Permit, 2021 VT 22, ¶ 16. Precedent suggests that departure from the ordinary meaning of the text might be warranted in the case of an irrational result. Id. It does not suggest that we depart from the plain meaning of the text to achieve an irrational result.

We admit that the last sentence of 7.8.4.1—"In the case of a sign bearing messages on two sides only one side shall be used to determine the area"—initially seems to provide some support for Defendants' interpretation that even on what we have called "panel signs," the area is measured according to the smallest rectangle that can be drawn around text, because otherwise the areas of the two sides of a flat panel should be identical and there would be no need to specify that only one side must be used to calculate the area. However, this sentence could alternatively be read to address a three-dimensional sign with lettering on multiple differently sized faces, or a flat panel sign where one side is covered to a greater extent by the sign's frame than the other.

Given that we find the intent of the Regulations' drafters clear from the plain language of Section 7.4.8.1, read in context of the definitions and neighboring provisions, we need not consider the Town's further arguments that such an interpretation best accords with the objectives expressed for the Commercial District in the Town Plan.

Because it is not disputed that the panel forming the Kate's Food Truck sign—the face of which we take to be the "display face" referred to in § 7.4.8.1 of the Regulations—is 56 square feet, we conclude that it exceeds the regulatory maximum of 32 square feet for the Commercial District. We therefore **AFFIRM** the DRB's upholding of the Notice of Violation, in part, as we find Appellant-Defendants in violation of § 7.8.2.1 of the Regulations.

Remedies

We hereby order Appellant-Defendants to take down and cease to display the sign herein described within thirty days of this Decision and the Judgment Order accompanying it. As it appears that the initial permit for a sign has expired, Defendants must apply for a new permit should they wish to erect a new sign that complies with the Regulations.

The Town has further requested through its motion for summary judgment in the 21-ENV-74 docket monetary penalties in the amount of $114.69 for each day the violation continued from May 14, 2021, (seven days after the date of the May 4 Notice of Violation plus three days, given that the

NOV was mailed to defendants) through February 17, 2022 (the date of the motion for summary judgment). *See* 24 V.S.A. § 4451 (stating that an alleged violator of zoning laws must be given seven days to cure the alleged violation); Town of Ludlow v. Thomas, No. 74-5-14 Vtec, slip op. at 7 (Vt. Super. Ct. Envtl. Div. Jan. 28, 2015) (Walsh, J.) ("Adding three days for US Mail service pursuant to V.R.C.P. 6(e)" to find the date when fines began to accrue).

Applying the Town's requested penalties over the time period in question totals an amount of $32,000. In support, the Town states that its attorney's fees have totaled over $10,000 in these two matters. In their Opposition, Defendants argue that should we affirm the NOV, "only a modest fine is warranted, if any."

In setting monetary penalties under 24 V.S.A. § 4451, our Court has broad discretion to set fines up to the statutory limit of $200/day. We have often relied upon the criteria detailed in the Uniform Environmental Enforcement Act (10 V.S.A. § 8010) to determine what an appropriate level of fines should be imposed against the zoning violator. In re Beliveau NOV, 2013 VT 41, ¶ 23, 194 Vt. 1 ("The [trial] court has the discretion to determine the amount of a fine, and, in doing so, to balance any continuing violation against the cost of compliance and to consider other relevant factors, including those specified in the Uniform Environmental Enforcement Act.") (citing In re Jewell, 169 Vt. 604, 606–07 (1999) (mem.)). We perform that analysis here, based upon the undisputed material facts and record developed by the parties.

i. Public health, safety, or welfare

The record does not establish that there has been any discernible impact from this violation on public health, safety, or welfare. This factor does not support the imposition of fines.

ii. Mitigating circumstances, including unreasonable delay

The record does not suggest that there has been any unreasonable delay in enforcement on the part of the town. It does not establish exactly when Defendants erected the sign, but it could not have been before June 2020. The Notice of Violation was issued in May 2021. We see no unreasonable delay.

In terms of other mitigating circumstances, we note the parties do not appear to dispute that Defendants made efforts and offered to compromise following the DRB affirmation of the Notice of Violation—which efforts were responded to by the Town—and that those efforts ultimately proved unsuccessful. We cannot make any further determinations in this regard based on the record presently before us. This factor supports the imposition of at most modest fines.

iii. Defendants' actual or constructive knowledge that the violation existed

Defendants had actual knowledge of the alleged violation since May of 2021, and our understanding is that they have kept the sign up since that time. Of course, Defendants were pursuing their rights to appeal the NOV in the pending proceedings. Prior to May of 2021, while Defendants had reason to know that they risked being found in violation of the Bylaws, there is no evidence that their (mistaken) interpretation of Section 7.8.4.1, which interpretation would make the sign they erected compliant with the Regulations, was in bad faith. This factor supports the imposition of at most modest fines.

iv. Defendants' record of compliance

We have no evidence of non-compliance by Defendants with the Regulations on this Property or other properties, apart from the NOV forming the subject of these proceedings. As already mentioned, Defendants have kept the sign erected during the pendency of these appeals. This factor supports the imposition of at most modest fines.

v. Deterrent effect of the penalty

In previous decisions, we have considered the economic benefit gained by a defendant from its violations as part of our analysis of what penalty is necessary to deter future violations. *See* City of Burlington v. Sisters and Bros. Invest. Grp., LLP, No. 29-4-20 Vtec, slip op. at 27 (June 7, 2022) (Durkin, J.); *see also* City of St. Albans v. Hayford, 2008 VT 36, ¶¶ 15, 17, 183 Vt. 596 (upholding penalty that accounted for financial benefit obtained from the violation).

We do not have concrete evidence on the benefit Defendants obtained from having a sign larger than permitted by the Regulations. However, it does not take great speculation to deduce that the reason Defendants wanted a larger sign is that they deemed it more likely to attract customers, and that the larger sign did likely attract some customers who might not have otherwise visited the business. We therefore conclude that this factor weighs in favor of a modest penalty.

vi. Town's costs of enforcement.

The Town claims to have been billed over $10,000 by its attorneys in connection with the NOV appeal and enforcement action. It supports this claim with an affidavit from the Town Administrator. We need not award the Town its entire costs of enforcement. Vermont, after all, follows the American rule, whereby each party by default bears its own costs of litigation, whatever the result. *See* Galkin v. Town of Chester, 168 Vt. 82, 91 (1998) ("The American Rule ordinarily prohibits an award of attorney's fees absent a specific statutory provision or an agreement of the

parties."). We consider the reasonableness of these expenditures in light of the stakes of the issues involved—an overlarge sign—in concluding that this factor does not warrant increasing the penalties we would otherwise impose.

vii. Length of violation's existence

We note again that it has been roughly 14 months since the Notice of Violation was issued, but that the NOV has been under appeal that entire time. This factor weighs in favor of a modest penalty at most.

viii. Cost of Compliance

We may factor the cost to Defendants of complying with the injunctive relief we order into our decision on monetary penalties. In re Beliveau NOV, 2013 VT 41, ¶ 23. Taking down the sign should not be very costly at all. Moreover, while not technically a part of compliance, it would be relatively simple and inexpensive for Defendants to repurpose the present sign to comply with the Bylaws by removing the excess area. A new permit application would also be relatively inexpensive.

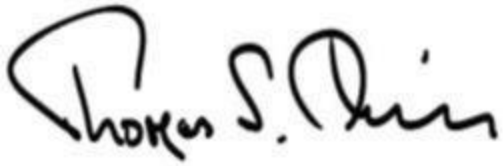
Taking all these factors together, we conclude that a penalty of $10/day from the date the Notice of Violation became final through the date the Town filed its motions for summary judgment is warranted.

From May 14, 2021 to February 17, 2022 is 279 days. We therefore impose a total penalty of $2,790.00.

If either party wishes to dispute these penalties based on further evidence relating to the above factors, they may request an evidentiary hearing. We feel compelled to warn both parties that, whatever the outcome of such a hearing, it is extremely unlikely that either would recover their additional litigation costs associated with preparing for and holding a subsequent hearing.

This completes these two matters. A separate Judgment Order accompanies this Decision.

Electronically signed at Newfane, Vermont on July 12, 2022, pursuant to V.R.E.F. 9(d).



Thomas S. Durkin, Superior Judge
Superior Court, Environmental Division