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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-004

JUNE TERM, 2017

In re Michael Lee NOV	}	APPEALED FROM:
	}	
	}	Superior Court,
	}	Environmental Division
	}	
	}	DOCKET NO. 17-3-15 Vtec
Town of New Haven	}	
	}	
v.	}	
	}	
Michael Lee	}	DOCKET NO. 61-5-15 Vtec
		Trial Judge: Thomas S. Durkin

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

This appeal concerns two cases from the Environmental Division concerning landowner Michael Lee's property in the Town of New Haven. In the first, the court rejected landowner's appeal of a Development Review Board (DRB) decision upholding several violations resulting from landowner's activities of bringing fill onto his property, creating steep slopes with the fill, creating an elevated equipment display area with the fill within the front-yard setback, bringing storage trailers onto his property, and expanding his parking lot. In the second, the court found for the Town in an enforcement action and issued an injunction and penalties. On appeal, landowner argues that (1) the use of storage trailers on his property is a nonconforming use and therefore not a violation; (2) the evidence does not support the court's finding regarding when the elevated equipment display area was constructed; (3) the court erred in ordering the entire elevated equipment area to be removed rather than only the top three and a half feet of the elevated area; and (4) the court's injunction regarding the removal of equipment and parts was outside the scope of the Town's enforcement action. We conclude that one portion of the court's injunction is not supported by the evidence and remove it; in all other respects, we affirm.

The court held a joint hearing on the two cases and made the following relevant findings. When landowner purchased the property in 1995, it contained a commercial building and parking area and had been used by the previous owner as an office equipment retail store and salvage operation. Landowner received three permits during his period of ownership—one in 1995 to improve the barn, one in 2000 to construct a parts room on the barn, and one in 1999 to bring fill

onto the property.[1] Other than those permits, landowner neither sought nor received permits to conduct work on the property. Landowner sought and received site plan approval for the construction of two additional warehouses on the property in 2006, but did not ever build the warehouses authorized by this site plan approval.

Even after the permit for fill expired in April 2001, landowner brought large amounts of fill onto his property. Since that time, he has not sought or obtained a zoning permit for placing fill on his property. Some areas where landowner placed fill have stabilized. In other areas, landowner created steep slopes that exceed the maximum grade allowed by Town regulations.

The prior owner had often displayed items for sale on the front lawn, near Vermont Route 7. Landowner continued this practice with his power equipment from the beginning of his ownership of the property. Between 2009 and 2011, landowner built up the display area on the front lawn of the property using fill to elevate the area. This fill increased the height by three and a half feet. The elevated area is all within the front yard setback from the highway.

Landowner also did extensive work on his parking area without a zoning permit.

After 2000, landowner began bringing box trailers[2] onto his property to store power equipment and other materials for his business. By 2003, there were nine box trailers on landowner's property, by 2006, as many as eleven, by 2008, eighteen, and in 2012, twenty-four. Many of the trailers are disabled in such a way as to not be road-worthy or are secured to the ground by mounded dirt so that they are not readily moved. Landowner did not seek or obtain a zoning permit to permanently locate the box trailers on his property.

The court found that an aerial photo taken in 2013 accurately depicted landowner's parking area, the fill, the uneven slopes, and the elevated and improved display area in the front yard.

The Town zoning administrator initiated several conversations with landowner to cure alleged violations on the property. He wrote in January 2011, identifying the continued placement of fill on the property without a permit as a zoning violation. He wrote again in February 2011, explaining that a zoning permit was required for the equipment display in the front yard within the setback. The zoning administrator sent a cease and desist letter in July 2013. Landowner did not take any action to apply for a permit or to cure the alleged violations.

In November 2013, the zoning administrator issued a notice of violation setting forth six particular violations on the property: (1) placing excessive amounts of fill on the property; (2) creating a slope exceeding the one-to-two ratio permitted by the regulations; (3) constructing

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[1] When landowner received these permits, the Town's zoning regulations provided that work related to a permit must be completed within two years, that the permit would be void two years after it was issued, and that reapplication to complete any activities after that time would be required.

[2] The Environmental Division used this term to refer to forty-foot long trailers that can be connected to a truck for transportation. We use the same terminology on appeal.

the elevated equipment display within the front-yard setback; (4) changing the parking area; (5) using a portion of the property as a junkyard; and (6) storing over twenty box trailers on the property. The notice also set forth two general violations: (1) engaging in land development without a zoning permit; and (2) improving the property without obtaining site plan approval.

Landowner appealed the violations to the DRB. The DRB upheld all the violations, except that it determined that landowner's activities did not amount to a junkyard.[3] Landowner appealed the DRB decision to the Environmental Division. The Town then filed for enforcement in the Environmental Division after landowner failed to apply for permits or to take remedial action.

Following a hearing and a site visit, the court affirmed the DRB's decision to uphold the violations. Regarding the enforcement action, the court issued injunctive relief and penalties. The injunction, among other things, ordered landowner to: (1) regrade, seed, and mulch slopes created by the fill to comply with the regulations' requirement that fill and grading not cause slopes in excess of a one unit vertical to two units horizontal; (2) prepare applications for conditional use and site plan approvals; (3) remove the elevated display, fifteen box trailers, and parking lot improvements if permits are not received; and (4) not bring any more box trailers or fill onto his property or conduct further land development without a permit and to "immediately remove all equipment, parts, and other items from outside storage." Landowner filed this appeal.

Landowner first argues that his use of box trailers for storage on the property is allowed as a preexisting nonconforming use. The environmental division concluded that the box trailers were structures within the meaning of the zoning regulations, and therefore their placement on his property required a zoning permit. The court further found that the trailers were not a pre-existing nonconforming use or structure because they were never in conformance with the prior zoning regulations. The court accordingly upheld the violation for landowner's placement of the trailers on his property.[4]

A nonconforming use is a "use of land that does not conform to the present bylaws but did conform to all applicable laws, ordinances, and regulations prior to the enactment of the present bylaws, including a use improperly authorized as a result of error by the administrative officer." 24 V.S.A. § 4303(15).[5] Landowner does not contest the court's conclusion that the box trailers amounted to structures during all relevant iterations of the zoning ordinance and that their placement thus violated those ordinances. Instead, he focuses on the alternative definition of

[3] The Town did not cross appeal the DRB's decision regarding the junkyard allegation.

[4] Citing the statutory prohibition against prosecutions for zoning violations instituted more than fifteen years from the date the alleged violation first occurred, 24 V.S.A. § 4454(a), the court limited its analysis and enforcement order to the fifteen trailers it found that landowner had placed on the property within the fifteen years preceding the Town's enforcement action.

[5] The statute defines nonconforming structures similarly as "a structure or part of a structure 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, including a structure improperly authorized as a result of error by the administrative officer." 24 V.S.A. § 4303(14).

nonconforming use and asserts that the box trailers are a nonconforming use because the prior zoning administrator authorized the use of them as storage trailers.

In particular, landowner points to the fact that at the time he received the 2006 site plan approval for construction of two warehouses the Town knew that he had many box trailers he was using for storage on his property but did not raise any issues about that fact in the context of his request for site plan approval. He supports his argument with testimony from the prior zoning administrator, who worked in the Town from 2005-2010. The prior administrator said he had a concern about the box trailers, but that he felt there was no particular regulation that addressed the issue, except for a provision about temporary trailers on construction sites. He testified that his belief was that if landowner did not have a permit at the time, then he was not in violation. He also agreed, however, that the current zoning administrator's position that a permit was required had merit. Landowner argues that the court failed to consider or make findings on this question of whether the zoning administrator previously authorized the trailers in error, thus rendering them a pre-existing nonconforming use or structure pursuant to the statute.

We reject landowner's argument that the environmental court failed to make sufficient findings on this issue. The environmental court found that the box trailers were new structures brought onto the property and therefore required a permit under all relevant zoning ordinances, past and present. The court rejected the claim that the storage trailers were implicitly authorized in the context of the 2006 site plan approval for the proposed warehouses. In support of this conclusion, the court found that landowner's 2006 site plan did not include any depiction of the storage trailers, that only two of the fifteen storage trailers that landowner had added by 2013 were on the property at the time of the 2006 proceeding, and that landowner offered no testimony in that proceeding that he intended to bring even more trailers onto the property without zoning approval. These findings were supported by the evidence. See In re Eastview at Middlebury, Inc., 2009 VT 98, ¶ 10, 187 Vt. 208 (explaining that findings of environmental court will be upheld unless clearly erroneous). These findings were also sufficient to support the environmental court's conclusion that the 2006 site plan approval did not amount to an implicit authorization of the nonconforming storage trailers within the meaning of the statute. 24 V.S.A. § 4303(14), (15).

Landowner does not cite any other specific act of "authorization" by the zoning administrator, but essentially relies on the zoning administrator's failure to enforce zoning restrictions relative to the storage trailers. While the prior zoning administrator may have believed at the time that the storage trailers on the land did not require a permit, and accordingly did not pursue violation actions against landowner, landowner has not produced any evidence that the zoning administrator "authorized" their placement on landowner's property as permanent structures. His decision not to initiate any violation or enforcement action did not amount to an authorization of the structures on the land.

Landowner next argues that there was insufficient evidence to show that the elevated equipment display was constructed between 2009 and 2011. Landowner asserts that it existed prior to 1998 and is grandfathered in. If the environmental court "determines the credibility of witnesses and weighs the persuasive effect of evidence, we will not overturn its factual findings unless, taking them in the light most favorable to the prevailing party, they are clearly erroneous." In re Eastview at Middlebury, Inc., 2009 VT 98, ¶ 10. (quotation omitted). Landowner contends that the finding rested solely on aerial photographic evidence that showed the display area, but did

not depict the elevation of that area relative to the surrounding ground. He argues that from the time he acquired the property, he displayed the equipment on an area defined by a building foundation that was raised above the surrounding ground.

We conclude that ample evidence supports the trial court's finding. Among other things, the former zoning administrator testified that there was no elevated area in that location prior to the work by landowner, which began some time in 2009 or 2010. This testimony alone supports the court's finding.

Landowner asserts that the court erred in ordering him to remove the entire elevated equipment display area. He claims that the injunction should be limited to the three and a half feet the court found were added. This argument is a corollary to his claim that prior to the more recent elevation of the display area, and going back to his original ownership of the property, the equipment display area was somewhat elevated above the surrounding ground. He essentially argues that the court can only order him to reduce the elevation to that prior baseline.

The trial court has wide discretion in determining whether injunctive relief is appropriate in zoning cases. See In re Letourneau, 168 Vt. 539, 551 (1998). The court found that the elevated display area, which it described as amounting to approximately three and one-half feet, was built between 2009 and 2011. This finding is supported by the above-cited testimony. The evidence supports the court's decision and the court did not exceed its discretion in ordering the entire area removed.

Finally, landowner argues that the court erred in ordering him to remove "all equipment, parts, and other items from outside storage." Landowner contends that this portion of the injunction requires him to remove items set up for display at the front of the property even though he was not charged with any violations relative to the items on display. The Town interprets this provision of the court's order as requiring landowner to remove the used parts, pieces of power equipment, and items of little discernable value stored outside in several locations along or near the main barn and various trailers. The Town understands the environmental court's order to allow landowner to continue to display items for sale.

Whichever interpretation is correct, we conclude that this aspect of the court's injunction is not supported by the record. The court has discretion to issue an injunction, but the scope must be supported by the evidence. See id. at 552. The court found no violation related to equipment, parts, and other items being displayed or stored on the property. The violation concerning the elevated equipment display area related solely to the use of fill to elevate that area, and not to the longstanding display of equipment for sale in that spot. The only potential violation relating to the other equipment and items found around the property was the original claim that landowner was operating a junkyard without a permit. The DRB rejected this claim and the Town did not appeal. Accordingly, the court exceeded its discretion in ordering landowner to remove these items.[6]

[6] At argument, the Town took the position that the court's requirement that landowner remove all equipment, parts and other items from outside storage was part and parcel of the court's order requiring landowner to secure site plan approval. Our review of the trial court's decision does not support this reading. The trial court made no findings or conclusions concerning the

The phrase "and that he immediately remove all equipment, parts, and other items from outside storage" at the end of the final paragraph on page twenty-three of the court's order and at the end of the third full paragraph on the second page of the judgment order is stricken. In all other respects, the court's decision and judgment order are affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice

equipment in question in its discussion of the site plan issue, and its order requiring landowner to remove the equipment is in a "catchall" paragraph that is distinct from its order relating to securing site plan approval.