Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-046

JULY TERM, 2018

In re 109-111 Shelburne St./97 Locust St. Conditional Use (Margaret Murray*)	}	APPEALED FROM:
	}	Superior Court,
	}	Environmental Division
	}	DOCKET NO. 67-5-17 Vtec
		Trial Judge: Thomas S. Durkin

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

Neighbor Margaret Murray appeals an Environmental Division order dismissing as untimely her appeal from a decision of the Burlington Development Review Board (DRB). We conclude that the Environmental Division failed to properly ascertain whether she met the requirements to reopen the appeal period under Vermont Rule of Appellate Procedure 4(c) and remand.

Applicant Champlain Housing Trust applied for a conditional use permit from the DRB to convert a former hotel into small apartments. Neighbor owns property across the street and both attended and spoke at the DRB hearing on the application. The DRB orally approved the project at the meeting on March 13, 2017. The DRB issued a written decision on March 17, 2017 granting the application, but a copy of the decision was not sent to neighbor. On May 15, 2017, neighbor visited the zoning office in Burlington and obtained a copy of the decision from a search of the file. She filed her appeal on May 26, 2017. Her notice of appeal acknowledged that the thirty-day appeal period had passed and requested that the Environmental Division allow her appeal to proceed because the DRB failed to notify her as required by law. She also asserted that manifest injustice would result if her appeal were disallowed. Applicant moved to dismiss the appeal as untimely and for lack of standing.

The Environmental Division explained that although the appeal was filed beyond the 30-day appeal period there were essentially two mechanisms for neighbor to proceed with her appeal. First, although not specifically cited by neighbor, the court construed her notice of appeal as requesting to reopen the appeal period under Vermont Rule of Appellate Procedure 4. See V.R.E.C.P. 5(b)(1) (incorporating appellate rules). Under Appellate Rule 4, the court may reopen the time to file an appeal if the court finds that (1) the motion is filed within ninety days of judgment or within 7 days[1] of receipt of notice of the judgment, (2) the party is entitled to notice

[1] Appellate Rule 4 was amended, effective January 1, 2018, to change the seven-day period to fourteen days. See Reporter's Notes—2018 Amendment, V.R.A.P. 4 (explaining that seven-day time period in V.R.A.P. 4(c)(1) amended to in accordance with day-is-a-day changes). We apply the seven-day period that was in effect at the time of the relevant events.

of judgment and did not receive it from the clerk or a party within twenty-one days, and (3) no party would be prejudiced. Second, neighbor sought permission to proceed under 10 V.S.A. § 8504(b)(2), which allows an appeal beyond the thirty-day time frame if the court finds one of three bases, including that "some other condition exists which would result in manifest injustice if the person's right to appeal was disallowed." The Environmental Division determined that it lacked sufficient evidence of when neighbor had notice of the underlying decision and directed neighbor to state when she received notice of the judgment to start the seven-day clock. The court construed the "notice" referred to in the first requirement of Appellate Rule 4(c) as either actual or constructive notice. The court stated that if neighbor did not file her appeal within one of week of receiving actual or constructive notice of the DRB's decision, then she would not be able to reopen the appeal under Appellate Rule 4(c). The court also sought information to demonstrate manifest injustice. The parties conducted preliminary discovery on the jurisdictional issues.

In an affidavit, neighbor averred that after she attended the DRB hearing she waited for a copy of the decision, but that DRB did not send anything. She regularly visited the zoning office, to determine whether a decision had been issued, and first learned of the decision on May 15, 2017 when she went to the zoning office that day and viewed the file. She conceded that the date the notice of appeal was filed, May 26, 2017, was more than seven days after she learned of the decision, May 15, 2017.[2]

Following submission of the discovery materials, the court issued a final order. The court did not specifically address whether neighbor met the requirements of Appellate Rule 4 given her concession that she filed the notice of appeal more than seven days after she obtained a copy of the final order. The court analyzed whether there was manifest injustice and concluded that neighbor had failed to demonstrate such. 10 V.S.A. § 8504(b)(2)(C). Therefore, the court dismissed the appeal as untimely. Neighbor appeals.

Appeals to the Environmental Division must be filed "within 30 days of the date of the act, decision, or jurisdictional opinion appealed from, unless the court extends the time." V.R.E.C.P. 5(b)(1). "A party's failure to timely appeal deprives the Environmental Division of subject-matter jurisdiction over the appeal." In re Mahar Conditional Use Permit, 2018 VT 20, ¶ 12.

Neighbor acknowledges that she did not meet the thirty-day deadline, but argues that: (1) the court erred in denying her motion to reopen the appeal period under Appellate Rule 4(c) on the ground that she untimely filed the motion, and, in the alternative, (2) the court abused its discretion in concluding that there was no manifest injustice.

Neighbor's argument related to Appellate Rule 4(c) focuses on the first requirement of that rule—that the motion to reopen must be filed within ninety days or seven days "of receipt of notice of the judgment or order." V.R.A.P. 4(c)(1). The Environmental Division held that the seven-day period for filing the motion was triggered by either actual or constructive notice of the judgment. A few months later, this Court held that the seven-day time period in Appellate Rule 4(c)(1) "is triggered by notice provided under Vermont Rule of Civil Procedure 77(d)" and that "the seven-day window is opened only if and when a party receives notice of the entry of the judgment or

[2] At the time, the seven-day period did not include weekends or holidays. Nonetheless, May 26 was more than seven business days after May 15.

order from the clerk or from a party; it is not triggered by inquiry notice." In re Mahar Conditional Use Permit, 2018 VT 20, ¶ 19, ¶ 19 n. 5 (quotation omitted).[3]

Based the holding of Mahar, neighbor now argues that the seven-day period was not triggered in her case because she did not receive formal notice from either the DRB or another party in accordance with Civil Rule 77(d). Applicant contends that neighbor did not raise this argument before the Environmental Division and waived the issue by conceding that her notice of appeal was filed more than seven days after obtaining the written decision. We conclude that there is no merit to applicant's argument that neighbor failed to preserve her argument. The purpose of preservation is to allow the trial court an opportunity to rule on an issue in the first instance. In re White, 172 Vt. 335, 343 (2001). Here, the issue of whether the seven-day period in Appellate Rule 4(c)(1) was triggered was presented to the Environmental Division, which ruled adversely to neighbor. That neighbor did not foresee the reasoning of this Court's decision in Mahar and advance that particular argument to the Environmental Division does not preclude her from relying on that decision on appeal. We also conclude that neighbor did not waive the issue. Neighbor conceded the fact that she filed her notice of appeal more than seven days after she obtained a copy of the decision on May 15, 2017; she did not concede the legal question of whether she met the requirements of Appellate Rule 4(c).

Therefore, we turn to the question of whether the seven-day time period was triggered in this case. The undisputed facts before the Environmental Division were that neighbor obtained a copy of the DRB decision by going to the zoning office and looking through the file. We reject applicant's argument that when neighbor obtained a copy from the zoning office, this amounted to notice under Civil Rule 77. Civil Rule 77 requires that "the clerk shall give notice" of judgment or any party can "serve a notice." Although there may be different means for providing that notice—for example by traditional mail or electronic mail—the rule language is clear that to satisfy its requirements the notice must be initiated by the clerk or a party. Here, the undisputed facts are that neighbor received a copy of the order by obtaining it herself from the file, not at the instigation of the DRB or another party. Therefore, we conclude that the seven-day time period was not triggered, and neighbor met the requirements of Appellate Rule 4(c)(1) by filing her motion to reopen within ninety days of judgment.

To be eligible to reopen the appeal period Appellate Rule 4(c)(2) also requires that a party be entitled to notice and not receive it within twenty-one days. Here, the Environmental Division found that neighbor was entitled to notice of the decision because she appeared and participated at the DRB hearing. See 24 V.S.A. § 4464(b)(3) (requiring DRB to mail decision to persons appearing and participating at hearing). In addition, as explained above, she did not receive the decision within twenty-one days.

The final requirement for reopening the appeal period is that no party would be prejudiced. V.R.A.P. 4(c)(3). The Environmental Division did not reach this requirement; therefore, we remand for that court to evaluate whether prejudice existed in this case. See Mahar, 2018 VT 20, ¶ 22 (remanding for environmental court to assess prejudice). If the Environmental Division concludes that neighbor has satisfied all three criteria of Rule 4(c), then it must exercise its discretion to determine whether to allow the motion to reopen. See Id. ¶ 29. (explaining that "the

[3] Mahar also clarified that the beginning of the appeal period is not dependent on when a party receives the judgment. The period begins for all parties when judgment is entered and any effort to extend or reopen the period must be within the bounds of existing rules.

trial court has discretion to deny a motion to reopen even where all of the requisite criteria are met").

The issue of whether there was a separate basis to allow an appeal to prevent manifest injustice will be reached on remand only if the Environmental Division denies the motion to reopen. Therefore, we need not reach the question. Nonetheless, because the Environmental Division already evaluated the issue, we address it. Although we have not particularly defined "manifest injustice" under 10 V.S.A. § 8504(b)(2)(C), we have explained that it is an "exacting" standard and is a matter within the trial court's discretion. In re Appeal of MDY Taxes, Inc., 2015 VT 65, ¶ 15, 199 Vt. 248. Here, the Environmental Division concluded that neighbor had failed to demonstrate manifest injustice because, although she did not have formal notice of the DRB decision, she had constructive knowledge of the decision from attending the proceeding where the decision was announced and then from obtaining the order from the zoning office, and yet she failed to immediately act. The court did not abuse its discretion in concluding that because neighbor at the very least had inquiry notice of a decision and yet failed to act right away, it would not be manifestly unjust to disallow her untimely appeal. N. Sec. Ins. Co. v. Mitec Elecs., Ltd., 2008 VT 96, ¶¶ 40-46, 184 Vt. 303 (finding no manifest injustice under Vermont Rule of Civil Procedure 59(e) sufficient to alter or amend final judgment where party seeking relief could have raised claim earlier but did not).

On appeal, applicant also argues that neighbor lacks standing because she does not allege a physical or environmental impact on her interest. Given our remand, we need not reach this question and, in any event, if this issue does arise on remand, it is better left to the Environmental Division to address in the first instance. See In re Appeal of MDY Taxes, Inc., 2015 VT 65, ¶ 7, 199 Vt. 248 (explaining that determination of party status is discretionary decision vested in environmental court).

Reversed and remanded.

BY THE COURT:

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Beth Robinson, Associate Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice