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. 2020-203

FEBRUARY TERM, 2021

Town of Colchester v. Sisters & Brothers Investment Group LLP*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit, Civil Division
	}	
	}	DOCKET NO. 724-8-19 Cncv
		Trial Judge: Helen M. Toor

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

The Town of Colchester brought this enforcement action seeking damages and injunctive relief related to a health order the Town issued against defendant landlord Sisters & Brothers Investment Group LLP for violations of public health on landlord's rental properties. The trial court found that there were significant public-health violations, which landlord did not address in a timely manner, and ordered landlord to pay a penalty, to provide a bond, and to repair, remove, or replace units that were noncompliant. Landlord appeals the issuance and amount of the penalty on the bases that the Town did not follow the proper procedures in issuing the health order, and that the penalty is punitive, does not account for the cost of repairs made by landlord, and is unrelated to imminent or public-health violation. We affirm.

Following a hearing, the court found the following. The Town's Health Officer received an anonymous report regarding problems at a rental property owned by landlord. The property contains a single-family home, an apartment building, and a dozen cabins. Although the cabins were originally built as seasonal dwellings, they were being used as year-round residences. The Health Officer inspected the dwellings and the property in April 2019. Landlord's representative allowed her, the Town Health Inspector, and the Assistant Fire Marshall to look inside most of the cabins although he said he did not have keys for one and a tenant refused entry to another. The inspection revealed several health-related issues with the cabins, including extensive mold, an exposed septic tank, holes from the exterior to the interior, a leaking water tank, and standing water. These conditions created significant health risks, including respiratory issues linked to the presence of mold, risk of electrocution from water leaking into an outlet, and rodents entering the buildings. The Health Officer issued an emergency health order on May 7 directing landlord to repair seven units and the septic tank by September 1, 2019. On May 16, landlord requested a hearing before the Board of Health. At the hearing, no one appeared on landlord's behalf. The Board of Health took testimony and issued an order affirming the emergency health order and moving the compliance date up to August 1, 2019. Landlord did not take further action to appeal or challenge the health order. Landlord claimed that the Health Officer and someone else at the

Town told him not to worry about the health order and that it would not be enforced. The Health Officer denied making such a statement and the court did not find landlord's claim credible.

Landlord fixed some of the issues identified in the health order. The septic tank was not initially fixed to the satisfaction of the Health Officer. Landlord subsequently hired an engineer, who expected the work to take four months. The work required for the septic system was more extensive than originally thought and was not completed until December 30, 2019. Landlord did not ask the Town for an extension of the deadline. The Health Officer reinspected on August 13, 2019, after the compliance deadline in the health order, and found that repairs were not completed. Upon reinspection in February 2020, the Health Officer found that the required repairs were still not completed in some of the unoccupied cabins, including a faulty stove, a gap in a door, deteriorating windows, mold, and a leaking tank.

The Town filed an enforcement action in August 2019 after confirming that all issues had not been fixed and sought injunctive relief and penalties. Landlord agreed to a preliminary injunction barring rental of the unoccupied cabins until they were repaired. The court concluded that landlord's delays in fixing the violations were egregious. The court found that the penalty assessed by the Town was reasonable under the facts of the case, noting that the Town was entitled to seek up to $10,000 a day for each violation and instead sought a single penalty of $100 a day for all combined violations. The court set the date for penalties to begin accruing as August 2, 2019, the day after compliance was required, and ending on May 1, 2020, as requested by the Town, for a total of $27,300. The court also required landlord to provide the Town with a bond for each of the unoccupied cabins and to repair, replace, or remove the units that still had violations within one year. Landlord filed this appeal.

On appeal, landlord first argues that the trial court abused its discretion in levying a civil penalty. The statute defines the relief that a court may grant in a civil enforcement case pertaining to health violations. Among other relief, the court has discretion to impose a civil penalty of up to $10,000 a day for each violation of public health. 18 V.S.A. § 130(b)(6). This Court reviews an award of civil penalties for an abuse of discretion. Sec'y, Vt. Agency of Nat. Res. v. Irish, 169 Vt. 407, 418 (1999) (explaining that order imposing civil penalty is "discretionary ruling that will not be reversed if there is any reasonable basis for the ruling").

The court's decision in this case to impose a civil penalty was well within its discretion. The penalties were linked to landlord's lack of compliance with the health order. Further, the court found that landlord acted egregiously in delaying repairs to the units and the condition of the cabins was "shocking." Moreover, the penalty sought by the Town was much less than what was authorized by statute.

Contrary to landlord's assertion, the Town was not required to demonstrate that the penalty amount was related to the Town's cost of enforcement. Landlord asserts that the Town failed to offer evidence on the costs of its enforcement and therefore the court lacked sufficient evidence to support the imposed penalty. In support, landlord relies on Town of Milton Bd. of Health v. Brisson, 2016 VT 56, ¶ 22, 202 Vt. 121, which presented the question of whether a Town was entitled to attorney's fees under a provision of the statute allowing reimbursement "for the investigation and mitigation of the public health risk or the investigation, abatement, or removal of public health hazards." 18 V.S.A. § 130(b)(5). This Court looked at whether attorney's fees

could be considered government expenditures. Landlord contends that in this case the Town was required to demonstrate that the penalty was related to the reimbursable cost of its enforcement.[1] Landlord also appears to argue that the penalty was necessarily punitive in nature because there were no findings connecting the penalty amount to the cost of enforcement. "A civil penalty is remedial in nature, while a criminal penalty is designed for deterrence and retribution." Town of Hinesburg v. Dunkling, 167 Vt. 514, 524 (1998). The penalty in this case was civil insofar as it was labeled as such by the Legislature and its purpose and effect were not excessively punitive.[2] See id. at 525 (providing two-step analysis to differentiate between civil and criminal penalty). The statute explicitly labels the penalty as "civil" and links the amount of the penalty to the number and length of the violations. Here, the penalty was coercive and remedial in that it was directly related to landlord's noncompliance with the health order. Thus, the evidence supports the court's finding that the penalty was not punitive.

There is also no merit to landlord's argument that the court was required to offset the penalty amount by the amount landlord spent on repairs, relying on Town of Hinesburg v. Dunkling, 167 Vt. 514. While we held in that case that the trial court did not abuse its discretion in offsetting the penalty by the property owner's expenditures based upon the circumstances presented, we did not hold that the offset was required by the statutory scheme. Id. at 529. The statute does not require that repair costs be deducted from a penalty. As described above, the court acted well within its discretion in this case insofar as the penalty was reasonable in light of the circumstances.

As to landlord's assertion that the court was required to consider the factors in 10 V.S.A. § 8010(b) in determining the penalty amount, landlord failed to preserve this argument for appeal. See In re White, 172 Vt. 335, 343 (2001) (explaining that arguments not presented to trial court will not be addressed on appeal). In the trial court, landlord did not argue that these factors, related to the enforcement of environmental standards, are applicable to penalties assessed under § 130(b)(6) and should be evaluated by the court to assess the civil penalty. Landlord similarly failed to preserve its argument that the rental housing defects were not public health hazards as defined in 18 V.S.A. § 2(9) because the deficiencies were to a residential rental unit and not to a building located on a public sidewalk or a commercial building. This argument was not raised below and has not been properly preserved for appeal.

Landlord next argues that it should not be subject to penalties because the Town's health orders were not issued in compliance with applicable statutory requirements. Among other things, landlord claims that the Town's May 2019 letter to landlord was not an emergency health order because it did not contain statutorily required elements and was not properly served on landlord. The trial court concluded that landlord received actual notice of the initial order, by certified mail, and that landlord could not bring a collateral challenge to the validity of the order in the context

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[1] Contrary to landlord's assertion, the court did not award penalties to reimburse for attorney's fees. The trial court noted the amount of attorney's fees incurred by the Town but specifically explained that the penalty award was not for attorney's fees.

[2] On appeal, the Town asserts that under the law a civil penalty may have a punitive component. We need not address this legal issue given that the evidence supports the trial court's finding that the penalty in this case was not punitive.

of the enforcement action. Landlord does not dispute that it had actual notice of the order and had an opportunity to challenge the order. See OCS/Glenn Pappas v. O'Brien, 2013 VT 11, ¶ 43, 193 Vt. 340 (explaining that actual notice, even if legally inadequate, is sufficient to satisfy due process). As to landlord's other arguments regarding the statutory requirements, landlord is precluded from collaterally attacking the validity of the underlying health orders in the context of this enforcement action. See Town of Hinesburg, 167 Vt. at 521 (explaining that zoning board order could not be challenged in enforcement action); see also In re Jackson, 2003 VT 45, ¶ 29, 175 Vt. 304 ("We have consistently refused to allow a party to challenge the validity of a permit or permit conditions in subsequent enforcement proceedings."). Having received actual notice of the order and had an opportunity to litigate it, landlord cannot now challenge the validity of the health order in this enforcement proceeding.[3]

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Harold E. Eaton, Jr., Associate Justice

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Karen R. Carroll, Associate Justice

[3] Landlord's assertion that the Town untruthfully claimed that its investigation was initiated based on an anonymous complaint is also an attempt to collaterally attack the validity of the health order and therefore we do not address it.