2019 Real Estate Law Day
Vermont Bar Association
November 14, 2019

THE *BIANCHI* 15 YEAR STATUTE AFTER THE *204 NORTH AVENUE NOV* CASE

LIAM L. MURPHY, ESQ.

MSK ATTORNEYS
275 COLLEGE ST
BURLINGTON, VT 05401
lmurphy@mskvt.com
www.mskvt.com

WHAT IS “GRANDFATHERED”?

Does 24 V.S.A. § 4454 Actually “Grandfather” Anything? A Closer Look at the Statute of Limitations for Municipal Zoning Permit Violations under 24 V.S.A. § 4454.

24 V.S.A. § 4454 Creates a 15-Year Statute of Limitations

(a) An action, injunction, or other enforcement proceeding relating to the failure to obtain or comply with the terms and conditions of any required municipal land use permit may be instituted under section 1974a, 4451, or 4452 of this title against the alleged offender if the action, injunction, or other enforcement proceeding is instituted within 15 years from the date the alleged violation first occurred and not thereafter, except that the 15-year limitation for instituting an action, injunction, or enforcement proceeding shall not apply to any action, injunction, or enforcement proceeding instituted for a violation of subchapter 10 of chapter 61 of this title. The burden of proving the date the alleged violation first occurred shall be on the person against whom the enforcement action is instituted.

24 V.S.A. § 4454 Limits Enforcement of Permits Issued After July 1, 1998 to Only Those Permits That Have Been Recorded in the Land Records

(b) No action, injunction, or other enforcement proceeding may be instituted to enforce an alleged violation of a municipal land use permit that received final approval from the applicable board, commissioner, or officer of the municipality after July 1, 1998, unless the municipal land use permit or a notice of the permit generally in the form provided for in subsection 1154(c) of this title was recorded in the land records of the municipality as required by subsection 4449(c) of this title.

- (7) denials of municipal land use permits.

Recording Must be “at length” or Notice of Permit

24 V.S.A. § 4449(c)(1) Within 30 days after a municipal land use permit has been issued or within 30 days of the issuance of any notice of violation, the appropriate municipal official shall:

(A) deliver the original or a legible copy of the municipal land use permit or notice of violation or a notice of municipal land use permit generally in the form set forth in subsection 1154(c) of this title to the town clerk for recording as provided in subsection 1154(a);

24 V.S.A. § 1154(a) A town clerk shall record in the land records, at length or by accurate, legible copy, in books to be furnished by the town:

…

(6) municipal land use permits (as defined in section 4303 of this title) or notices of municipal land use permits as provided for in subsection (c) of this section, notices of violation of ordinances or bylaws relating to municipal land use, and notices of violation of municipal land use permits; … .

24 V.S.A. § 1154(c) A notice of a municipal land use permit or a notice of violation specified in subdivision (a)(6) of this section may be recorded, and if such notice is recorded, it shall list:

(1) as grantor, the owner of record title to the property at the time the municipal land use permit or notice of violation is issued;

(2) as grantee, the municipality issuing the permit, certificate, or notice;

(3) the municipal or village office where the original, or a true, legible copy of the municipal land use permit may be examined;

(4) whether an appeal of such permit, certificate, or notice has been taken;

(5) tax map lot number or other description identifying the lot.

24 V.S.A. § 4454 Does Not Limit Municipal Enforcement Authority Under Other Statutory Provisions

(c) Nothing in this section shall prevent any action, injunction, or other enforcement proceeding by a municipality under any other authority it may have, including a municipality's authority under Title 18, relating to the authority to abate or remove public health risks or hazards.

24 V.S.A. § 4451 Establishes Penalties and Requirements for Beginning Enforcement Proceedings Against a Property in Violation of the Zoning Bylaws

(a) Any person who violates any bylaw after it has been adopted under this chapter or who violates a comparable ordinance or regulation adopted under prior enabling laws shall be fined not more than $200.00 for each offense. No action may be brought under this section unless the alleged offender has had at least seven days' warning notice by certified mail. An action may be brought without the seven-day notice and opportunity to cure if the alleged offender repeats the violation of the bylaw or ordinance after the seven-day notice period and within the next succeeding 12 months. The seven-day warning notice shall state that a violation exists, that the alleged offender has an opportunity to cure the violation within the seven days, and that the alleged offender will not be entitled to an additional warning notice for a violation occurring after the seven days. In default of payment of the fine, the person, the members of any partnership, or the principal officers of the corporation shall each pay double the amount of the fine. Each day that a violation is continued shall constitute a separate offense. All fines collected for the violation of bylaws shall be paid over to the municipality whose bylaw has been violated.

24 V.S.A. § 4451 Also Establishes Penalties for Subdivisions and Planned Unit Developments That Do Not Comply With a Duly Approved Plat

(b) Any person who, being the owner or agent of the owner of any lot, tract, or parcel of land, lays out, constructs, opens, or dedicates any street, sanitary sewer, storm sewer, water main, or other improvements for public use, travel, or other purposes or for the common use of occupants of buildings abutting thereon, or sells, transfers, or agrees or enters into an agreement to sell any land in a subdivision or land development whether by reference to or by other use of a plat of that subdivision or land development or otherwise, or erects any structure on that land, unless a final plat has been prepared in full compliance with this chapter and the bylaws adopted under this chapter and has been recorded as provided in this chapter, shall be fined not more than $200.00, and each lot or parcel so transferred or sold or agreed or included in a contract to be sold shall be deemed a separate violation. All fines collected for these violations shall be paid over to the municipality whose bylaw has been violated. The description by metes and bounds in the instrument of transfer or other document used in the process of selling or transferring shall not exempt the seller or transferor from these penalties or from the remedies provided in this chapter.

24 V.S.A. § 4452 Provides Authority for the Zoning Administrator to Commence Enforcement Proceedings for Violations of a Zoning Bylaw

If any street, building, structure, or land is or is proposed to be erected, constructed, reconstructed, altered, converted, maintained, or used in violation of any bylaw adopted under this chapter, the administrative officer shall institute in the name of the municipality any appropriate action, injunction, or other proceeding to prevent, restrain, correct, or abate that construction or use, or to prevent, in or about those premises, any act, conduct, business, or use constituting a violation. A court action under this section may be initiated in the environmental division, or as appropriate, before the judicial bureau, as provided under section 1974a of this title.

Municipal Land Use Permit Defined.

24 V.S.A. § 4303(11):

“Municipal land use permit” means any of the following whenever issued:

(A) A zoning, subdivision, site plan, or building permit or approval, any of which relate to “land development” as defined in this section, that has received final approval from the applicable board, commission, or officer of the municipality.

(B) A wastewater system permit issued under any municipal ordinance adopted pursuant to chapter 102 of this title.

(C) Final official minutes of a meeting that relate to a permit or approval described in subdivision (11)(A) or (B) of this section that serve as the sole evidence of that permit or approval.

(D) A certificate of occupancy, certificate of compliance, or similar certificate that relates to the permits or approvals described in subdivision (11)(A) or (B) of this section, if the bylaws so require.

(E) An amendment of any of the documents listed in subdivisions (11)(A) through (D) and (F) of this section.

(F) A certificate of approved location for a salvage yard issued under subchapter 10 of chapter 61 of this title.

Land Development Defined

24 V.S.A. § 4303(10):

“Land development” means the division of a parcel into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any building or other structure, or of any mining, excavation, or landfill, and any change in the use of any building or other structure, or land, or extension of use of land.

The Absence of a Permit and a Permit Violation Does Not Constitute an Encumbrance on Title.

27 V.S.A. § 612 reads:

(a) Notwithstanding the majority decision in *Bianchi v. Lorenz* (1997), for land development, as defined in 24 V.S.A. § 4303(10), no encumbrance on record title to real estate or effect on marketability shall be created by the failure to obtain or comply with the terms or conditions of any required municipal land use permit as defined in 24 V.S.A. § 4303(11).

However, the Absence of a Permit or a Permit Violation may be Grounds for Termination of a Purchase and Sale Agreement.

(b) A purchaser shall have the right to terminate a binding contract for the sale of real estate if, prior to closing, the purchaser determines and gives written notice to the seller that land development has occurred on the real estate without a required municipal land use permit or in violation of an existing municipal land use permit. Following the receipt of written notice, the seller shall have 30 days, unless the parties agree to a shorter or longer period, either to obtain the required municipal land use permits or to comply with existing municipal land use permits. If the seller does not obtain the required municipal land use permits or comply with existing municipal land use permits, the purchaser may terminate the contract if, as an owner or occupant of the real estate, the purchaser may be subject to an enforcement action under 24 V.S.A. § 4454.

What Is Not Covered By The Statute of Limitations Under 24 V.S.A. § 4454?

Non-Municipal Violations Not Addressed by 24 V.S.A. § 4454

State Environmental Permits

Uniform Environmental Law Enforcement provisions of 10 V.S.A. chapters 201 and 211.

- Act 250,
- Air Quality,
- Stormwater,
- Water Quality,
- Public Water Supply,
- Dams, Stream Alterations,
- Underground Storage
- Tanks,
- Solid Waste, and
- others.

Under these provisions, ANR or the Environmental Court may enjoin use of the property, mandate remedies, and/or impose fines of up to $50,000 per day per violation.

Act 250 Permits

- 10 V.S.A. § 6081(a) provides in part:

  “No person shall sell or offer for sale any interest in any subdivision located in this state, or commence construction on a subdivision or development, or commence development without a permit.”

Fire Safety Regulations

- In regard to Public Building Permits under 20 V.S.A. § 2734, the penalties are up to $10,000 per violation, up to $20,000 per violation of an emergency order, or up to $200 per day for failure to comply with an order requiring notice.
- Under 20 V.S.A. § 2733, the Commissioner can prevent occupancy of a structure or even order that a structure be demolished.
- Moreover “violation of any rule adopted under this subchapter shall be prima facie evidence of negligence in any civil action for damage or injury which is the result of the violation.” 20 V.S.A. § 2734(d).

Municipal Zoning Violations After *204 North Avenue NOV*

Court Rejected Continuing Use Exception

In a series of cases the Environmental Court held that a violation of the "use" permitted for a parcel under the zoning bylaws, as opposed to a violation of the dimensional regulations by a building constructed on a parcel, is an ongoing violation and thus the 15 year statute of limitations did not apply.

·*City of St. Albans v Hayford*, No. 161-9-03 Vtec (Vt. Envtl. Ct. June 1, 2004) (Wright, J.), *aff'd by* 2008 VT 36

· *City of Burlington v. Richardson*, No. 188-10-03 Vtec, slip op. at 12 (Vt. Envtl. Ct. June 27, 2006) (Wright, J.)

· *Appeal of Gauthier*, No. 172-9-04 Vtec, slip op. at 7-8 (Vt. Envtl. Ct. Jan. 24, 2006) (Durkin, J.)

· *In re Wesco, Inc.*, No.106-5-07 Vtec (Vt. Envtl. Ct., Mar. 6, 2008) (Wright, J.)

· *In re Budget Inn NOV*, No.504-4-13 Vtec (Vt. Envtl. Ct., May 5, 2015) (Durkin, J.)

The Environmental Division Identified the Three Municipal Zoning Exceptions to the Statute of Limitations in 24 V.S.A. § 4454 in *In re Hale Mountain Fish and Game*, No. 149-8-04 Vtec, No. 259-12-05 Vtec, slip op. at 6 (Vt. Envtl. Ct. Nov. 11, 2008) (Durkin, J.).

"[A]ny zoning violations that involve "public health risks or hazards" can be enforced at any time, regardless of when these violations commenced. 24 V.S.A. § 4454(c). . . .

Yet another major exemption from the fifteen-year statute of limitations is for cases brought under 24 V.S.A. § 4470(b). *Richardson,* No. 188-10-03 Vtec, slip op. at 12 (June 27, 2006) ("[T]his statute of limitations ... is specifically not applicable to enforcement actions brought under 24 V.S.A. § 4470(b) to enforce decisions of the former ZBA or Planning Commission, or of the Court sitting in place of those tribunals in a de novo appeal.").

Enforcement of the Decisions of Appropriate Municipal Panels Under 24 V.S.A. § 4470(b)

(b) A municipality shall enforce all decisions of its appropriate municipal panels, and further, the superior court's civil or environmental division shall enforce such decisions upon petition, complaint or appeal or other means in accordance with the laws of this state by such municipality or any interested person by means of mandamus, injunction, process of contempt, or otherwise.

204 North Avenue NOV

- Matter involved conversion of a duplex to a triplex in 1992. Owner did not get zoning approval but obtained building permit and a certificate of occupancy. Property was reassessed as triplex in 1993.
- 24 years later in 2017 City issues a NOV for the change of use from duplex to triplex without zoning approval.
- E. Court grants City Motion for Summary Judgment that the 15 year statute of limitations does not apply because the use is a continuing use.
- Attorney John Franco represented the property owner and appeals to the Supreme Court
- MSK obtains permission to file Amicus Brief and Attorney Franco graciously shares his argument time.

Supreme Court Rejects Continuing Use Argument

In a straight forward decision, *In re 204 North Avenue NOV*, 2019 VT 52, Chief Justice Reiber holds:

"The statute's plain language does not distinguish between 'use' and structural violations. It clearly applies to 'the failure to obtain… any required municipal land use permit' with no exception for use violations. In general, we will not read something into a statute that is not there unless necessary to make the statute effective." *204 North Avenue*, 2019 VT at ¶ 6 (internal citations omitted) (emphasis in original)

"The Legislature explained that it intended to eliminate the 'costs and problems arising from' this Court's decision in *Bianchi v. Lorenz*, in which we held that a zoning violation could encumber real estate title.. Thus, the Legislature's purpose was to streamline title searches and increase confidence in property ownership by limiting the time to enforce all zoning violations. Creating an exception for use violations would circumvent that legislative intent." *Id.* at ¶ 8 (internal citations omitted).

Status of Properties With Unenforceable Municipal Violations

Properties which are in violation of municipal land use regulations but which violations cannot be enforced as a result of the 15 years statute of limitations still have issues.

Such Properties do not have any protection as a "non conformity"

In a subsequent *Hayford* case, *City of St. Albans v Hayford*, 2008 VT 36, the Supreme Court found:

> According to the property owners, the only violation that is actionable is their failure in 1987 to obtain a permit and site-plan approval for converting the nursery school into a residential unit. They contend that the City's adoption of a new zoning ordinance in 1998 could not trigger another violation based on their failure to obtain a permit and site-plan approval in 1987 because the sixth residential unit was a nonconforming use and they did nothing in 1998 to make the use more nonconforming. In other words, **the property owners argue that the sixth residential unit was not a violation, but a grandfathered nonconforming use following the adoption of the 1998 zoning regulations.**

2008 VT ¶ 10 (emphasis added).

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." 24 V.S.A. § 4303(15). Because the Hayfords failed to obtain a required permit and site-plan approval for their 1987 conversion of the nursery school to an additional residential unit, that use did not conform to all applicable laws at the time it commenced. Hence, it was not a grandfathered nonconforming use immune from a later notice of violation after the 1998 regulations made it nonconforming in several additional respects. In short, when the City adopted the new zoning ordinance in 1998, use of the rear building as a sixth residential unit was out of compliance with that ordinance; because its use was never permitted as required by law at the time it commenced, it was not a grandfathered nonconforming use immunized from a new notice of violation based on the 1998 ordinance. Accordingly, the Environmental Court did not err in declining to apply the statute of limitations contained in § 4454(a).

2008 VT ¶ 11 (emphasis added).

Municipality has no obligation to clarify status of property: *In re Keenan Conditional Use Approval*, No. 266-12-07 Vtec (Vt. Envtl. Ct. June 4, 2009) (Durkin, J.)

Perhaps 24 V.SA § 4454(a) precludes the City from commencing an enforcement action against the continued use of these parking spaces. We leave that question to when such an enforcement action is actually noticed, brought, and preserved for our review and an appeal presented to this Court. See Torres, 154 Vt. at 235. **But we are unaware of any legal authority that requires the City to legitimize this nonconformity with a zoning permit. In fact, we understand the relevant precedent to be exactly the opposite: that when the opportunity arises, a municipality is authorized to not sanction nonconformities**. See, e.g., In re Richards, 2005 VT 23, 26, 178 Vt. 478 (mem.) ("[O]ne goal of zoning is to phase out nonconforming uses."); accord Drumheller v. Shelburne Zoning Bd. of Adj., I55 Vt. 524, 529 (1990). The I5-year statute of limitations in 24 V.S.A. § 4454(a) only applies to enforcement proceedings; we have no enforcement proceeding before us in this appeal. We therefore decline to provide any opinion on whether the City is barred from bringing an enforcement action regarding the three parking spaces. opinion on whether the City is barred from bringing an enforcement action regarding the front yard parking spaces. See *Torres*, 154 Vt. at 235. Further, even if we could address the enforcement issues here, we would not do so because they are irrelevant to the question of the legality of the parking spots.

No. 266-12-07 Vtec, slip op. at 7 (June 4, 2009) (Durkin, J.).

City of Burlington Ordinance Provisions

Sec. 5.3.2 “Bianchi” controlled uses, structures, and lots. Although not subject to enforcement action pursuant to Article 2, uses, structures, and lots which are deemed to be controlled by the Bianchi decision, and the subsequent enactment of 24 VSA Sec. 4454, shall be considered violations that are not considered legal to any extent and shall in no event be granted the consideration or allowances of nonconforming structures, uses, and lots. Thus, no change, alteration, enlargement, and reestablishment after discontinuance for more than sixty (60) days or reconstruction after an occurrence or event which destroys at least 50% of the structure in the judgment of the city’s building inspector shall be permitted, except to a conforming use, structure, or lot.

City of Burlington View on Non Conformities and Unenforceable Violations

The CDO addresses non-conformities and “Bianchi” controlled uses, structures and lots in Article 5, Part 3.

- A pre-existing legal non-conformity (grandfathered condition) has an identified legal status with defined opportunities to change.
- A “Bianchi” situation is an unenforceable violation, not entitled to the protections/opportunities for legal nonconformities.
- The City has no legal duty to legitimize a “Bianchi” situation with a zoning permit or certificate of compliance. At the same time, it cannot enforce against that condition, absent one of the exceptions (e.g., public health concerns)

https://www.burlingtonvt.gov/sites/default/files/agendas/Zoning-Grandfathering%20v%20Statute%20of%20Limitations%20Jan302018.pdf

Tolling of The 15 Year Statute of Limitations

"24 V.S.A. § 4454 does not require municipalities to complete all of their enforcement actions within the fifteen-year time period; rather, the statute only requires that such enforcement be "instituted" within this time period. In other words, as soon as a municipality begins an enforcement action, it can look back 15 years from the date of beginning that action, no matter how drawn out the subsequent proceedings are." *In re Hale Mountain Fish and Game*, No. 149-8-04 Vtec, No. 259-12-05 Vtec, slip op. at 7 (Vt. Envtl. Ct. Nov. 21, 2008) (Durkin, J.).

OTHER OUTSTANDING ISSUE 15 YEAR STATUTE MAY NOT APPLY TO VIOLATIONS OF AMPs

4470(b) A municipality shall enforce all decisions of its appropriate municipal panels, and further, the Superior Court's Civil or Environmental Division shall enforce such decisions upon petition, complaint or appeal or other means in accordance with the laws of this State by such municipality or any interested person by means of mandamus, injunction, process of contempt, or otherwise.

When addressing which violations, if any, the statute of limitation under 24 V.S.A. 4454 could be applied to, the court stated that the statute of limitation "is specifically not applicable to enforcement actions brought under 24 V.S.A. §4470(b) to enforce decisions of the former ZBA or Planning Commission, or of the Court sitting in place of those tribunals in a de novo appeal." *City of Burlington v. Richardson*, No. 188-10-03 Vtec, slip op. at (Vt. Envtl. Ct. June 27, 2006) (Wright, J.).

However, such decision may be ripe for a challenge given the language of *204 North Avenue NOV* emphasizing the application to any municipal violations and the intent of the statute