

JONATHAN S. SHAFMASTER

v.

TOWN OF KITTERY et al.

Submitted on Briefs June 4, 2009

Decided June 9, 2009

Panel: SAUFLEY, C.J., and ALEXANDER, LEVY, SILVER, and GORMAN, JJ.

MEMORANDUM OF DECISION

Jonathan S. Shafmaster appeals from a decision of the Superior Court (York County, *Brennan, J.*) affirming the decision of the Kittery Zoning Board of Appeals (ZBA), which denied his application for a permit to construct a new building next to one he had previously constructed.

Shafmaster's efforts to develop the property in issue have long been the subject of litigation with the Town of Kittery. *Shafmaster v. Town of Kittery*, 469 A.2d 848 (Me. 1984). On remand after the 1984 decision, Shafmaster was found to have acted in bad faith in obtaining a permit for a building that was subsequently constructed in violation of a zoning ordinance that requires a 100-foot tidal shoreline setback. The court found that the building would exist in "perpetual violation" of the setback requirement. The court imposed a substantial fine and allowed the Town to revoke the building permit but permitted Shafmaster to complete construction and obtain an occupancy permit.

In the early 1990s, Shafmaster obtained approval for certain changes and modifications to the property, but he never sought approval for any project that would create any additional violations of the 100-foot setback requirement.

In 2007, Shafmaster filed an application to construct a building within the 100-foot setback. He concedes that in order to obtain approval, his proposed development must qualify as a nonconforming building, pursuant to section 16.08.20 of the Kittery Land Use and Development Code Zoning Ordinance. The ZBA concluded that his building is not a legally nonconforming building and denied his request for a permit. Shafmaster appealed, and the Superior Court affirmed.

Shafmaster argues that, for two reasons, the building is a legally nonconforming building. First, he argues that actions taken by the Town in the early 1990s to approve development on the property, and a statement by the Town attorney at that time about whether the building was nonconforming, constitute administrative *res judicata*, thus requiring a finding that his building is nonconforming. Second, he argues that regardless of whether *res judicata* applies, the ZBA misconstrued the ordinance and erred in concluding that the building is not a legally nonconforming building.

When the Superior Court acts in its appellate capacity, we review directly the decision of the ZBA for abuse of discretion, errors of law, or findings not supported by the substantial evidence in the record. *Camp v. Town of Shapleigh*, 2008 ME 53, ¶ 9, 943 A.2d 595, 598. We review the construction of an ordinance *de novo*. *Gensheimer v. Town of Phippsburg*, 2007 ME 85, ¶ 8, 926 A.2d 1168, 1170. “The terms and expressions in the Ordinance will be construed reasonably with regard to both the objectives sought to be obtained and the general structure of the ordinance as a whole.” *Id.* (quotation marks omitted).

Contrary to Shafmaster’s contentions, *res judicata* does not apply because the parties had not previously litigated the issue whether the building was a nonconforming building; there was no adjudication. *See State v. Thompson*, 2008 ME 166, ¶ 8, 958 A.2d 887, 890. Furthermore, the ZBA did not err in denying the permit on the basis that the building is not a legally nonconforming building pursuant to section 16.08.20 of the Kittery Ordinance. The building is not legally nonconforming because no action taken by the Town changed the status of the building from that found by the court in 1984. The building stands in perpetual violation of the ordinance’s setback requirements.

Shafmaster also argues that the court erred in not scheduling a trial on his 80B appeal and his estoppel claim. Shafmaster failed to preserve his right to appeal this issue because he took no steps to address it to the Superior Court. An

issue raised for the first time on appeal is not properly preserved for appellate review. *Foster v. Oral Surgery Assocs., P.A.*, 2008 ME 21, ¶ 22, 940 A.2d 1102, 1107.

The entry is:

Judgment affirmed.

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