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. 2020-323

JULY TERM, 2021

VTRE Investments LLC v. Town of Stowe (Nicholas Lizotte*)	}	APPEALED FROM:
	}	
	}	Superior Court, Lamoille Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 43-3-19 Lecv
		Trial Judge: Mary Miles Teachout

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

Plaintiff homeowner appeals the civil division's decision granting summary judgment to defendant Town of Stowe in this action challenging the Town's denial of plaintiff's request for an allocation of additional municipal sewer capacity. We affirm.

The following facts were undisputed for purposes of summary judgment. In January 2019, plaintiff applied to the selectboard of the Town of Stowe for an increased allocation for sewer capacity.[1] Plaintiff owns a property on the Mountain Road in Stowe that has had a single-family residence on it for many years. In 2010, the prior owners applied for and received an allocation for use of the Town's sewer system on the basis that the residence had three bedrooms. Plaintiff's 2019 application sought to change the allocation from three to four bedrooms. Plaintiff asserted that there were four bedrooms prior to 2010 as shown on a 1996 lister's card.

The application was scheduled for hearing before the selectboard on February 11, 2019. No representative of plaintiff appeared at the hearing. The hearing minutes state in pertinent part:

> The property is in the UMR Zoning District, where our Act 250 permit for our 2001 sewer system expansion included restrictions on the amount of sewer flow that can be connected to the system. The 2018 revisions to this provision was [sic] agreed with the Conservation Law Foundation to reaffirm the original intent of not allowing additional flow above what was allocated in March 2001. While there is a Lister's Card that indicates at one time this residence had 4 bedrooms, there are no permits of any kind which show more than 3 bedrooms prior to 2001. The Town Attorney has advised that a Lister[']s [C]ard is not a permit document for the purpose of establishing allowable flows under the current ordinance.

[1] This action was originally filed by VTRE Investments, LLC, the former owner of the property in question. In mid-December 2020, the LLC transferred the property to Nicholas Lizotte, its managing member. For simplicity, we refer to the LLC and Lizotte as plaintiff.

> It was noted that in 2010, the previous owners requested and received allocations and a VTDEC WW permit for 3 bedrooms and the property was connected to the municipal system that year on that basis.

The selectboard accordingly denied plaintiff's request for additional sewer allocation.

Plaintiff filed a complaint in the civil division challenging the selectboard's decision pursuant to Vermont Rule of Civil Procedure 75. Plaintiff subsequently moved for summary judgment, arguing that the Town's sewer ordinance had been superseded by state wastewater rules promulgated in April 2019, and alternatively, that plaintiff's application satisfied the Town's sewer ordinance because the property had four bedrooms prior to 2001. Defendant opposed plaintiff's motion and cross-moved for summary judgment in its favor. The civil division concluded that the selectboard's decision was reasonable and supported by the evidence. It rejected plaintiff's claim that the selectboard improperly allocated sewer capacity on a per-bedroom basis, rather than on gallons per day, because plaintiff had not raised this argument before the selectboard and because the Town had the power to determine how to allocate the capacity of its system. It accordingly granted summary judgment to the Town. Plaintiff appealed.

When reviewing a decision granting summary judgment, we apply the same standard as the trial court. Tillson v. Lane, 2015 VT 121, ¶ 7, 200 Vt. 534. Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "Further, where there is an intermediate level of appeal from an administrative body, we review the case under the same standard as applied in the intermediate appeal." Rhoades Salvage/ABC Metals v. Town of Milton Selectboard, 2010 VT 82, ¶ 13, 188 Vt. 629 (mem.) (quotation and alteration omitted). The trial court's review in this case was in the nature of certiorari because the selectboard's decision was quasi-judicial in nature. See Richards v. Town of Norwich, 169 Vt. 44, 47 (1999) (explaining that landowner's appeal of selectboard's decision authorizing on-site septic system permit for neighbor was quasi-judicial in nature). "In this posture, the court's jurisdiction is usually confined to reviewing questions of law, and consideration of evidentiary questions is limited to determining whether there is any competent evidence to justify the adjudication." Ketchum v. Town of Dorset, 2011 VT 49, ¶ 14, 190 Vt. 507 (mem.) (quotation omitted). Accordingly, we will affirm if, on the record developed before the selectboard, there was a reasonable basis for its decision. Rhoades Salvage, 2010 VT 82, ¶ 13.

Plaintiff first argues that the Town's sewer ordinance has been superseded by the Wastewater System and Potable Water Supply Rules promulgated by the state Agency of Natural Resources in April 2019. See Wastewater System and Potable Water Supply Rules, Code of Vt. Rules 12 033 001, https://dec.vermont.gov/sites/dec/files/dwgwp/rorules/pdf/Wastewater-System-and-Potable-Water-Supply-Rules-April-12-2019.pdf [https://perma.cc/X7KA-ZWJL]. Plaintiff contends that under these rules, he is entitled to the requested additional sewer capacity allocation. As the trial court noted, plaintiff appeared to have abandoned this argument at the summary judgment stage below. In any event, it is not supported by the language of the 2019 rules, which state that they supersede "those provisions of municipal ordinances . . . that establish technical standards for the design, construction, operation, and maintenance of potable water supplies and wastewater systems." Id. § 1-103(a). Rule 1-201(104) explains that "[f]or the purposes of these Rules, 'wastewater system' is limited to soil-based wastewater systems of less than 6500 gallons per day, sanitary sewer service lines, and sanitary sewer collection lines." In support of its motion for summary judgment, the Town submitted an affidavit from its professional engineer stating that the system at issue here is a municipal sewage collection and treatment system that is permitted to discharge up to one million gallons per day. By their plain language, then, the rules do not appear

to apply to the system. See In re Williston Inn Grp., 2008 VT 47, ¶ 14, 183 Vt. 621 (mem.) (explaining that courts interpret agency regulations according to their plain language if unambiguous). Plaintiff failed to present any evidence to the contrary. We therefore decline to disturb the decision below on this basis.

Turning to the merits, we conclude that the selectboard's decision was reasonable and supported by the evidence presented to it. The selectboard determined that plaintiff's predecessors had requested and received sewer allocations for a three-bedroom house, and there was no evidence of a permit for a fourth bedroom. The selectboard acknowledged the existence of the 1996 lister's card stating that the home had four bedrooms, but concluded based on legal advice that this was not equivalent to a permit. The selectboard acted within its discretion in concluding that the property was entitled to an allocation for three bedrooms based on the application approved in 2010, which was when the home was connected to the system.

Plaintiff contends that the selectboard erred in allocating sewer capacity based on bedrooms rather than gallons per day of flow. We agree with the trial court that plaintiff failed to preserve this argument for review by failing to raise it before the selectboard in the first instance.[2] In re White, 172 Vt. 335, 343 (2001) (explaining that this Court "will not address arguments not properly preserved for appeal").

Plaintiff argues that the selectboard's decision is void because the Town failed to provide adequate notice of the hearing, and that the trial court erred in failing to address this argument, which it raised in its complaint. Although it is true that plaintiff asserted in its complaint that the selectboard's decision should be vacated due to inadequate notice, plaintiff effectively abandoned this claim by failing to address the claim in its motion for summary judgment or in opposition to defendant's cross-motion. Plaintiff therefore failed to preserve this argument for our review. See id. Similarly, we do not address plaintiff's claim that structures in the UMR zoning district that existed prior to 2001 have a vested right to connect to the town sewer system without limitation as to the number of bedrooms or amount of sewage flow, and that the Town's decision is equivalent to an uncompensated taking, because plaintiff did not raise this argument before the selectboard or the trial court.

Plaintiff claims that he attempted to raise these arguments in a post-judgment motion to reconsider, which the trial court clerk refused to accept. The docket entries show that on December 29, 2020, plaintiff filed a pro se notice of appearance and motion to reconsider. These documents are in the trial court file, so it is unclear what plaintiff means when he states that the clerk refused to accept them. To the extent that plaintiff is arguing that the court erred in failing to address his motion to reconsider, we disagree. The motion, which was effectively a motion to alter or amend under Rule 59, was filed more than twenty-eight days after the court's November 30, 2020, judgment and was therefore untimely. See V.R.C.P. 59(e) (stating that motion to alter or amend judgment must be filed within twenty-eight days of entry of judgment). Further, the motion attempted to introduce new arguments that plaintiff could have raised in his motion for summary judgment or opposition to the Town's cross-motion, but did not. "The Rule 59(e) motion may not be used to raise arguments that could have been raised prior to the entry of judgment." N. Sec. Ins. Co. v. Mitec Elecs., Ltd., 2008 VT 96, ¶ 44, 184 Vt. 303 (quotation and alteration omitted).

[2] As the court noted, the Town has authority to determine the basis for allocating sewer capacity in its own system. See 24 V.S.A. §§ 3616, 3625; Bryant v. Town of Essex, 152 Vt. 29, 36 (1989). The application form plaintiff filled out stated that capacity for a residential property would be allocated based on the number of bedrooms, and there is no evidence that the selectboard acted inconsistently with this policy.

Even if the motion were timely and meritorious, the court lacked authority to grant the relief requested, because plaintiff appealed the judgment the next day. See Kotz v. Kotz, 134 Vt. 36, 38 (1975) ("[W]hen a proper notice of appeal from a final judgment or order of the lower court is filed the cause is transferred to this Court, and the lower court is divested of jurisdiction as to all matters within the scope of the appeal."). Accordingly, we see no error in the court's treatment of the motion.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice