

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**Filed: June 9, 2003**

**PROVIDENCE, SC**

**SUPERIOR COURT**

**ROBERT KNOX, et al.**

**C.A. No. PC 02-0737**

**00-1219**

**v.**

**THE TOWN OF SCITUATE  
ZONING BOARD OF  
REVIEW**

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**DECISION**

**DARIGAN, J.** Before this Court is Robert Knox’s, Carol Knox’s and Candace Caluori’s (the “appellants”) appeal from a January 24, 2002 decision of the Scituate Zoning Board of Review (the “Board” or “appellee”), denying the appellants’ appeal of various determinations of the Scituate building inspector (the “Inspector”) regarding the construction of a hair salon located in the Town of Scituate. Jurisdiction is pursuant to G.L. 1956 §45-24-69.

**FACTS/TRAVEL**

In August of 1999, Mr. and Mrs. Anthony Morra (the “Morras”) began the renovation of their residential structure situated in an RS-120 residential zone, located at 129 Danielson Pike, and known as Assessor’s Plat 16, Lot No. 20 in the Land Evidence Records of the Town of Scituate (the “Property”). The Morrass intended to convert the existing residential use of their home located on the Property to a commercial use, namely, a hair salon. In doing so, the Morrass filed applications with both the Village Review Committee (the “VRC”) and the Town Planning Commission (the “Planning Commission”), however, they did not apply for a special use permit. In September, the Planning Commission stayed the Morrass’ application, pending the Department of

Environmental Management's (the "DEM") approval of an Individual Sewage Disposal System (the "ISDS") permit. Subsequently, the Morrass then submitted their plans to the Inspector to allow for renovations to the building which included a building permit ("Building Permit"), electrical permit ("Electrical Permit") and plumbing permit ("Plumbing Permit"). Notably, however, the Morrass did not apply for a special use permit since a hair salon is not a permitted use in and RS-120 zone; rather, it is a specially permitted use requiring a special use permit.

Despite their failure to receive DEM approval, or to obtain a special use permit, the Morrass began construction of the hair salon. The appellants, who complained of the development to the building inspector numerous times between August and December, 1999, objected to the construction on several grounds. The appellants were especially concerned with the conversion of the Morrass' property from residential to commercial without first obtaining a special use permit from the Board. Appellants also complained that Mr. Morra listed himself as the master plumber and electrical contractor in each of those permits, yet did not perform the work. In November of 1999, the Morrass sought permission from the Inspector to install a parking lot, which he orally authorized. As part of the construction of the parking lot, the Morrass began to remove trees from the property, clearing land for the installation of the parking lot. This involved removal of trees from virtually the entire lot, which appellants thought was excessive. Also, in November, the Morrass sought permission to install a sidewalk and lighting fixtures at the front of the property. The Inspector orally approved the installation of the sidewalk and lighting absent VRC approval. The appellants also complained to the Inspector on several occasions that the Morrass had installed unapproved windows.

Despite appellants' complaints regarding the above actions, no action was taken by the Inspector to enforce the ordinance with respect to the development of the Property from August to early December of 1999. On December 8, 1999, the Inspector finally issued a Cease and Desist Order regarding the parking lot, lighting and sidewalk. However, he did not order removal of any of the completed work.

The appellants filed a notice of appeal with the Zoning Board of Review on December 22, 1999, challenging all of the "erroneous orders, requirements, determinations, and/or decisions of [the Inspector] with respect to the [Property]."<sup>1</sup> Appellants' Notice of Appeal at 1. On February 17, 2000, the Board issued its decision denying the appellants' appeal. In so doing, the Board found that "there is no recorded decision from which to make an appeal." The Board further decided:

"To ratify the Building/Zoning Inspector's decision of stopping the project and that all work is and shall remain stopped until all necessary approvals are obtained from the appropriate authorities before whom these matters are pending. This may also include the decision to reverse some of the work that has been done and to include appearing before the Zoning Board for a determination as to whether a beauty parlor is a permitted use in this zone under the zoning ordinance . . . ."

On their appeal of the Board's February 17, 2000 decision to this Court, the appellants maintained that the Inspector "unjustifiably and unreasonably" failed to enforce the ordinance with respect to the development of the property. Specifically,

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<sup>1</sup> In this Court's August 17, 2001 decision remanding this matter to the Board, the record apparently indicated that the appellants had filed their notice of appeal with the Board on December 16, 1999. Upon considering the matter anew, however, the Board found that it had confused the appellants' legal memoranda, dated December 15, 1999, with the appellants' notice of appeal form, dated December 21, 1999 – the required filing fee having been paid on December 22, 1999. Tr. of November 27, 2001 at 6. Thus, the Board found that the actual filing date was December 22, 1999.

appellants argued that the Inspector: 1) did not have authority to approve the clear cutting of trees prior to consent of the VRC and the Planning Commission; 2) failed to require the owners to obtain a special use permit allowing them to alter the use of the property from residential to commercial; 3) failed to prevent improper building renovations, by not requiring the owners to obtain an ISDS approval by DEM and by not investigating the claim that unlicensed persons were performing the electrical and plumbing work; and, 4) failed to enforce the zoning ordinance by allowing the Morras to install unapproved windows on the front of the home. Finally, appellants contended that parking lot, lighting and sidewalk installation usurped the Planning Commission's and VRC's power to regulate the installation of parking lots, sidewalks, and exterior lighting. The appellants also complained that the Board's decision to deny their appeal on the grounds that there was no recorded decision from which to appeal was erroneous.

In its August 17, 2001 decision, this Court remanded to the Board its February 17, 2000 decision denying the appellants' appeal of the Inspector's determinations. This Court found that "the Board did not determine whether the appeal of the Building Inspector's decision was timely or whether or not the actual notice to the Building Inspector was notice to the Zoning Board of Review." Knox v. Town of Scituate, C.A. 00-1219, August 17, 2001, Darigan, J. at 7. Accordingly, this Court found that "[that] appeal [was] not properly before the Superior Court, but is in order for the consideration of the Scituate Zoning Board of Review . . . [thus] the Board must determine . . . whether the appeal was taken within a reasonable time . . . [and if so the appellants are entitled to a judgment on the merits by the Board.]" Id at 8.

On October 23 and November 27, 2001, the Board held public hearings on these issues, and on January 24, 2002, the Board filed a written decision with the Scituate Town Clerk, making several findings of fact and deciding that the Morras' appeal from the determinations of the Inspector was not timely. The Board also found that notice to the Inspector was not imputed notice to the Board. On February 11, 2002, the appellants timely filed the present appeal with this Court.

### **STANDARD OF REVIEW**

Aggrieved parties may appeal a decision of the Board to this Court pursuant to G.L. 1956 § 45-24-69. This section provides that the Court's review of the decision:

“(c) shall be conducted . . . without a jury. The court shall consider the record of the hearing before the zoning board of review . . .

(d) The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:

- (1) In violation of constitutional, statutory, or ordinance provisions;
- (2) In excess of the authority granted to the zoning board of review by statute or ordinance;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record, or;
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” G.L. 1956 §45-24-69.

When reviewing a zoning board decision, this Court must examine the entire certified record to determine whether substantial evidence exists to support the finding of the board. Salve Regina College v. Zoning Bd. of Review, 594 A.2d 878, 880 (R.I.1991) (citing DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d

1167, 1170 (1979)); Restivo v. Lynch, 707 A.2d 663 (R.I.1998). "Substantial evidence as used in this context means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion and means an amount more than a preponderance." Caswell v. George Sherman Sand and Gravel Co., Inc., 424 A.2d 646, 647 (R.I.1981) (citing Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 825 (1978)). The essential function of the zoning board is to weigh evidence with discretion to accept or reject the evidence presented. Bellevue Shopping Center Associates v. Chase, 574 A.2d 760, 764 (R.I.1990). Moreover, this Court should exercise restraint in substituting its judgment for that of the zoning board and is compelled to uphold the board's decision if the Court "conscientiously finds" that the decision is supported by substantial evidence contained in the record. Mendonsa v. Corey, 495 A.2d 257 (R.I.1985) (quoting Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 825 (1978)).

### **THE BOARD'S DETERMINATIONS**

The Board was directed by this Court to address two specific issues on remand – specifically, whether the appellants' notice of appeal to the Inspector constituted notice of appeal to the Board and whether the appellants timely appealed the determinations of the Inspector to the Board. However, since the Board accurately determined that it did not have appellate jurisdiction over any of the appellants' specific complaints with respect to the development of the property, this Court need not address the Board's findings regarding notice, and need only address the issue of timeliness.

The appellants averred that the Building Inspector improperly authorized the Morras to install several improvements on the Property, all before obtaining a special use permit authorizing a commercial use in a residential zone. More specifically, it was

alleged that the Inspector authorized the Morras to clear cut trees on the Property, as well as install windows, sidewalk, and exterior lighting all without VRC approval. It was also argued that the Inspector improperly granted the Morras the Building Permit of August 31, 1999 before the necessary approvals were obtained from DEM and that unlicensed plumbers and electricians were improperly allowed to renovate the Property. Finally, the appellants argued that the Cease and Desist Order did not fully order the removal of the parking lot.

It is well settled that a reasonable time for appeal within the context of G.L. 1956 §45-24-64 “[begins] to run against an appellant only at such time as he becomes chargeable with knowledge of the decision from which he seeks to appeal.” Hardy v. Zoning Bd. of Review, 113 R.I. 375, 379, 321 A.2d 289, 291 (1974); Sousa v. Town of Coventry, 774 A.2d 812, 815 (R.I. 2001). Thus, while a thirty (30) day period usually constitutes a sufficiently reasonable time to appeal the decisions of zoning officials, ultimately, the “determination of the timeliness of [an] appeal must depend on the particular facts [of a given case].” Zielstra v. Barrington Zoning Bd. of Review, 417 A.2d 303, 308 (R.I. 1980) (where the objecting landowner was charged with knowledge of the decision of the local building inspector when “the so-called garage suddenly sprouted into a unique looking two and one half story structure” occasioning justifiable alarm).

Regarding the appellants’ contention that the Morras were allowed to reconstruct their dwelling without obtaining a special use permit, the record reflects that the Board, in its February 17, 2000 decision, addressed this issue. Specifically, the Board, in ratifying the Inspector’s Cease and Desist Order, found that

“all work is and shall remain stopped until all necessary approvals are obtained from the appropriate authorities before whom these matters are pending. This may also include . . . *appearing before the Zoning Board for a determination as to whether a beauty parlor is a permitted use in this zone under the zoning ordinance . . .*” Decision of February 17, 2000 at 2. (Emphasis added).

The Zoning Ordinances of the Town of Scituate, section 5(B) provides in pertinent part that “[n]o certificate may be issued by the zoning inspector for any use not specifically permitted in this ordinance, except where the inspector receives a statement in writing from the zoning board of review, indicating the granting of . . . [a] special use permit . . . .” Thus, the Board properly found that no further renovation of the Property was proper until all necessary permits, especially a special use permit for the conversion of a residential use to a commercial use, had been obtained.

With respect to the clear cutting of trees, as well as the installation of windows, sidewalk, and exterior lighting, the Zoning Ordinances of the Town of Scituate, Article IV, § 14 (D) indicate that the VRC must first approve all “improvements on public or private land including the construction, reconstruction, alteration, repair, demolition, removal and rehabilitation of the front facade exterior of new and existing buildings . . .” before a building permit may be applied for. Zoning Ordinances of the Town of Scituate Article IV, § 14 (D). The Zoning Ordinances of the Town of Scituate Article four, section 14 (D)(7) further states in relevant portion that “[a] person or persons jointly or severally aggrieved by a decision of the VRC shall have the right to appeal the decision to the zoning board of review . . . .” Zoning Ordinances of the Town of Scituate, § 14 (D)(7).

Here, the Board determined that it did not have jurisdiction over issues regarding the clear cutting of trees, installation of sidewalks, lighting and windows, and that in any

event, “on August 19, 1999 the VRC approved the Owners’ application [to renovate the property] with conditions. No appeal was filed from that decision.” Decision of January 24, 2002 at 4-8. While its is true that the VRC, pursuant to Article IV, § 14 (D), possesses jurisdiction over the clear cutting of trees, as well as the installation of sidewalks, lighting and windows, the Board, pursuant to Article IV, § 14(D)(7), has appellate review authority of determinations of the VRC with respect to such issues. Nevertheless, since the evidence of record indicates that the appellants filed their appeal with the Board on December 22, 1999 – well past thirty days from the VRC’s August 19, 1999 approval – the Board’s finding that the appellants’ appeal was not timely made with respect to the VRC violations was not affected by error of law. See generally Tr; Zielstra, 417 A.2d at 308; see also Branniff Airways, Inc. v. Civil Aeronautics Bd., 379 F.2d 453 (D.C. Cir. 1967) (holding that “[r]eversal is not required by the fact that an agency made an error if it is shown that the error was not prejudicial”).

Similarly, the board found that it did not have jurisdiction to address the appellants’ contentions that the Morrass renovated the Property without the necessary DEM approval, and that unlicensed electricians and plumbers were renovating the Property. Specifically, with respect to DEM, the appellants argued that because the Morrass renovated more than fifty percent (50%) of the existing floor space of the Property, DEM Individual Sewage Disposal System (ISDS), Regulation SD 2.00 required DEM approval before the Inspector could properly issue the Building Permit or the Zoning Certificate. ISDS Regulation 2.00 et seq. states in pertinent part:

“(a) No person shall begin any building . . . renovation . . . from which sewage is being or will have to be disposed of by means of an individual sewage disposal system, including improvements which will result in

increased sewage flow, without first obtaining the Director's written approval in accordance with this section:

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(2) Whenever an applicant proposes any building renovation or change of use (as defined in SD 1.00) of an existing structure from which sewage is disposed of by means of an ISDS, an application for a System Suitability Determination shall be made. For the purposes of this section, the term "building renovation," shall also be defined as including any addition, replacement, demolition and reconstruction, or modification of an existing structure on the subject property which:

- (A) Results in an increase in the sewage flow into the system; or
- (B) Affects fifty (50%) percent or more of the floor space of the existing structure . . . ."

With regard to the ISDS permit, the Board found that "the Zoning Board has no jurisdiction in matters regulated by DEM and therefore, no authority to respond to the appellants' concerns regarding decisions of that state agency." Decision of January 24, 2002 at 5.

As to the appellants' contentions that unlicensed electricians were renovating the Property, G.L. 1956 § 23-27.3-113.3.1 and its mirror provision in the Rhode Island State Building Code require in pertinent part:

"(a) Prior to the approval of a permit for which a state law requires licensed persons to be responsible for the plumbing . . . [and] electrical . . . work, the licensed person(s) shall show the building official a recognized form of identification from the state licensing boards and sign the permit.

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(b) The owner/occupier of a single family dwelling shall be exempt from the requirements of §23-27.3-113.3.1(a), but must obtain a permit, be inspected by the local official in accordance with the provisions of the code, and obtain approval of the work prior to use of the completed alteration . . . ." G.L. 1956 §23-27.3-113.3.1

General Laws 1956 § 5-6-1 et seq. and § 5-20-1 et seq. provide for a Division of Professional Regulation within the state Department of Labor and Training to oversee the

professional licensing and discipline of individuals engaged as electricians and plumbers. According to the provisions set forth in those chapters, the Director of Labor and Training is authorized to punish violators of the standards set forth therein and/or refer violations to the Rhode Island Attorney General for prosecution. See G.L. 1956 §5-6-1 et seq. and §5-20-1 et seq. Similarly, G.L. 1956 §5-65-1 et seq. designates the Building Code Commission, within the Rhode Island Department of Administration, as the licensing and disciplinary authority for those engaged as building contractors in Rhode Island. Here, the Board accurately found that it “ha[d] no jurisdiction relating to the licensing of building contractors, which is the domain of the State of Rhode Island . . . .” Id. at 6.

Both issues should have been addressed to the respective state agencies, and since this Court accords deference to the findings of a zoning board, and its interpretation of its own governing statutes, this Court may not substitute its judgment for that of the zoning board when such a decision is supported by substantial evidence contained in the record. Consequently, this Court finds that the Board’s conclusion that it did not have jurisdiction regarding state agency issues was appropriate and supported by the record. Mendonso v. Corey, 495 A.2d 257 (R.I. 1985); Citizens Savings Bank v. Bell, 605 F. Supp. at 1042.

Finally, the Board addressed the appellants’ contention that the Inspector improperly authorized the construction of a parking lot on the Property without VRC approval. Here, the Inspector, via the Cease and Desist Order, commanded the removal of at least part of the parking lot, and the Board, in its February 17, 2000 decision, ratified this order. Thus, the Board found that an appeal to the Board regarding the parking lot was unnecessary because “the harm complained of (unauthorized expansion

of a parking lot) was remedied by [the Cease and Desist Order].” Decision of January 24, 2002 at 7. In other words, there was nothing for the appellants to appeal regarding the parking lot. The proper course, as the Board correctly noted, would have been “to appeal the site restoration design to the VRC . . . .” since the VRC has proper jurisdiction over such matters pursuant to the Zoning Ordinances of the Town of Scituate Article IV, § (D)(7). Id; Zoning Ordinances of the Town of Scituate, Article IV, § (D)(7). Accordingly, the Board’s decision in this regard was supported by the reliable, probative, and substantial evidence of the whole record and did not constitute an error of law.

### **CONCLUSION**

With respect to the clear cutting of trees, installation of windows, sidewalk, and exterior lighting, this Court affirms the Board’s findings that the appellants’ appeal was not timely made. Regarding the building renovation and DEM violations, this Court affirms the Board’s findings that it lacked jurisdiction to respond to these issues. As to the parking lot, this Court affirms the Board’s findings that the Cease and Desist Order adequately addressed this issue and there was, therefore, no appealable issue. Finally, this Court affirms this Board’s earlier finding that all the construction with respect to the Property shall remain “stopped” until the appellants obtain a special use permit. The appellants’ request for reimbursement for reasonable attorneys’ fees is hereby denied.

Counsel shall submit the appropriate judgment for entry.

