

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON COUNTY, SC.

SUPERIOR COURT

CUMBERLAND FARMS, INC. :
:
v. :
:
TOWN OF NARRAGANSETT :
ZONING AND PLATTING BOARD :
OF REVIEW :

C.A. No. 99-0069

DECISION

GAGNON, J. Before this court is an appeal from a decision of the Town of Narragansett Zoning and Platting Board of Review (Board) upholding the building inspector’s revocation of a building permit granted to Cumberland Farms, Inc. (appellant) to construct a pole sign. Appellate jurisdiction is pursuant to G.L. 1956 § 45-24-69.

Facts/Travel

On March 27, 1996, the Board approved a site plan based on the appellant’s application for a variance and a special use permit on property located at 865 Old Point Judith Road in Narragansett (site). (1996 Decision). The appellant needed approval of both a special use permit in order to add two gas pumping stations and a variance in order to allow twenty instead of twenty-seven parking spaces in the parking lot of its gas station and convenience store at the site. The 1996 Decision stated that the special use permit and variance were granted subject to, *inter alia*, the following condition:

“[t]hat the proposed improvements be constructed in strict conformance to the revised site plan dated 3/20/96.” The revised site plan indicated that the existing pole sign on the property would be removed and the plan did not provide for an additional pole sign.

On March 6, 1998, the appellant filed an application with the building inspector requesting permission to construct a pole sign on the site pursuant to § 7.16 of the Narragansett zoning ordinances. On March 11, 1998, the building inspector issued the requested permit. However, on September 1, 1998, after receiving notification from a Board member of the formerly approved site plan, the building inspector revoked the permit stating that the site would not be in compliance with the 1996 Decision with the addition of the pole sign.

The appellant appealed the revocation to the Board and a hearing was held on December 17, 1998. The Board denied the appeal on January 14, 1999, stating that only the Board could grant approval of a pole sign by request for a modification of the 1996 Decision.

Appellant argues that the site was constructed within the stated conditions of the Board's decision and that the proposed sign merely requires approval by the building inspector that it conforms with the ordinances regarding signs. The Board argues that in approving the 1996 site plan, it retained the right to approve any improvements to the site, including the installation of a pole sign.

Standard of Review

This court possesses appellate review jurisdiction of a zoning board of review decision pursuant to G.L. § 45-24-69(D):

"(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."

"In reviewing the action of a zoning board of review, the trial justice "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings. Toohey v. Kilday, 415 A.2d 732, 735 (R.I. 1980) (citing DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979); Apostolou v. Genovesi, 120 R.I. 501, 504, 388 A.2d 821, 824-25(1978)). "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 scintilla but less than a preponderance." Apostolou at 825. Moreover, this court should exercise restraint in substituting its judgment for the zoning board of review 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) (citations omitted).

Special Conditions Upon Variances and Special Use Permits

The appellant argues that the site is in compliance with the 1996 Decision and that the addition of a pole sign only requires approval from the building inspector. The appellees respond that the 1996 Decision was conditioned upon the site being designed in accordance with the site plan submitted March 20, 1996, and that any modifications or improvements must come before the Board for approval.

Section 45-24-43 of the Rhode Island General Laws provides, in pertinent part, that where a zoning board of review grants a variance or makes a determination after public hearing, the review board may apply special conditions that "may include, but are not limited to, provisions for . . .

[m]inimizing the adverse impact of the development upon other land, . . . and [d]esignating the exact location and nature of development” G.L. § 45-24-43. Our Supreme Court has long recognized that the imposition of conditions and safeguards upon grants of variances or special exceptions is within the discretion of the zoning board of a review. Olevson v. Narragansett Zoning Bd., 71 R.I. 303, 44 A.2d 720 (1945) (citations omitted). The Court has further recognized that appropriate conditions must be reasonable and not arbitrary, unnecessary or oppressive. Id. As a fundamental principle of the law of real property the Court has recognized that where there are conditions or restrictions on the use of land, they must appear as of record and be clearly stated in the documents. Town of Warren v. Frost, 111 R.I. 217, 219, 301 A.2d 572, 574 (1973).

In Olevson, the board of review had granted a variance for property to be used as a rooming house with the condition that this use be granted to a specific person. In reversing the board of review, the court held that this condition was unusual and peculiar and was not properly attached to the use of the property, but that it was an attempt to grant a license.

In Frost, the minutes from the board meeting merely stated that an application for a variance “to construct a building for boat repair, construction, storage, sale of boats and accessories and other related services was granted.” Frost, 111 R.I. at 219, 301 A.2d at 574. The Court noted that of particular significance was the total absence of any evidence in the record that the activities requested for approval under the variance would be restricted. Id. The court held that the board had not anywhere in the record in express terms imposed any conditions on the grant of the variance.

This court finds that not only did the Board impose conditions upon the site in the present case, but also that those conditions were reasonable and that they were expressed in the record and in the 1996 Decision.

A review of the transcript of the public hearing shows that members of the Board were concerned about how traffic would flow and how traffic would be prevented from overflowing onto the main route. There were concerns about signs in general. (Tr. at 37-40, 63-64). In addition, members clearly discussed with Mr. Kelly, and Mr. Kelly agreed, that any changes to the site would have to come before the Board. (Tr. at 40). Although the appellant argues that the Board was aware that a new pole sign was intended, there is no evidence in the record before this court that the Board was aware of any intention to construct an additional pole sign. In fact, the plan did not receive approval until the applicant agreed to remove an existing sign pole at the site. The Board may not have granted an exception or a variance had it been aware that a replacement pole sign was intended.

In reviewing the 1996 Decision, it is also clear that the Board was granting approval upon the site being completed in accordance with the plans submitted. These plans do not expire upon completion, but serve as a guide for approved construction.

Conclusion

After review of the record before the court, this court finds that the Board's decision to uphold the revocation of the building permit is not clearly erroneous and that the Board acted within its authority when it required that all modifications to the site plan be presented to the Board. Therefore, the decision of the Board is upheld and the appeal is denied.