

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

(FILED: March 21, 2013)

CHILD AND FAMILY SERVICES OF :  
NEWPORT COUNTY :

v. :  
:

C.A. No. NC-07-539

ZONING BOARD OF REVIEW FOR THE :  
TOWN OF MIDDLETOWN, by and :  
through its members, THOMAS D. :  
SILVEIRA, LUCY R. LEVADA, :  
EDWARD MOY, THOMAS NEWMAN, :  
and PETER VAN STEEDEN :

DECISION

VAN COUYGHEN, J. The matter before this Court is an appeal from a decision (Decision) of the Zoning Board of Review of the Town of Middletown (Board). Child and Family Services of Newport County (Appellant) objects to a condition placed upon the Board’s approval of its application for a special-use permit and a dimensional variance and thus filed the within appeal. The appeal was timely filed, and jurisdiction is pursuant to Rhode Island General Laws section 45-24-69.

I

Facts and Travel

Appellant owns a 158,891 square-foot parcel of real estate (the Property) on John Clarke Road in Middletown, Rhode Island, which is identified as Lot 671 on Plat 115 of the Middletown Tax Assessor’s Plat. (Decision 1.) The Property, which has 318 feet of frontage on both John Clarke Road and Valley Road, is located in the Aquidneck Corporate Park, which is zoned Office Park-Traffic Sensitive District (OPA). Id. at 1, 6.

To enable approximately 11,000 square feet of a proposed 38,900 square-foot building to be used as a day care center, Appellant applied for a special-use permit pursuant to Article 6, Section 602 and Article 9, Sections 902 and 903 of the Middletown Zoning Ordinance (Ordinance). See id. at 1; Petition for Special Use. Appellant also applied for a dimensional variance pursuant to Sections 603 and 903 of the Ordinance due to the fact that the proposed building would exceed the maximum allowed height by four feet. See Decision at 1; Petition for Variance.

The Board held a hearing on July 26, 2007, at which Appellant presented Noel Patrick Sullivan, Joseph Caldeira, A. Eric Offenberg, and Paul Hogan as witnesses. (Decision at 1-2.) Mr. Sullivan, Chairman of the Board of Directors of Appellant, provided background information regarding Appellant's business, which he said included child care, counseling, home health aide services, and substance-abuse prevention. Id. at 2. At that time, Appellant had three separate offices in different locations but desired to concentrate its operations to the subject Property. Id. He testified that Appellant chose the Property because of its central location and its accessibility, which was enhanced by the proposed driveway access from Valley Road. Id.

Joseph Caldeira, Senior Project Manager for Vision 3 Architects, testified about the proposed building plans. Id. at 2-3. He testified that the height variance was necessitated by the use of a pitched roof rather than a flat roof, which was favored by the new commercial design guidelines. Id. at 3. Mr. Caldeira did not provide any testimony regarding the driveway access from Valley Road.

Mr. Offenberg testified about the Valley Road driveway access. The Board accepted Mr. Offenberg, who is a professional engineer and is the President of Northeast Engineers and Consultants, as an expert in the field of engineering. Id.; Tr. 7/24/07 at 34:7-23. Mr. Offenberg

testified that he was familiar with the proposed plans, the Middletown Zoning Ordinance and the Comprehensive Community Plan for the Town of Middletown (Comprehensive Plan), and the surrounding area. (Decision at 3-4.) Mr. Offenberg explained that the Ordinance encouraged pedestrian-friendly development. See Tr. at 39:3-40:4. He also testified that the only sidewalks in the area are on Valley Road, and thus the curb-cut and driveway would meet Appellant's goal to have both vehicular and pedestrian access from Valley Road. Id.

According to Mr. Offenberg, "[t]raffic is a huge issue in Middletown," and he therefore conducted a traffic study. Id. at 43:23-50:24. The traffic study included current traffic counts as well as projections of the "level of service" at area intersections. Id. The phrase "level of service" refers to the delay that vehicles would experience when trying to enter the main road. Id. Although he explained that the projections indicated that the delays at area intersections would be reduced by the driveway, Mr. Offenberg acknowledged that the Middletown Planning Board (Planning Board) forwarded a positive recommendation of Appellant's petitions subject to removal of the Valley Road driveway access. Id. at 51:24-53:11; Ex. D Notice of Planning Board Recommendation at 1.

The Zoning Board questioned Mr. Offenberg extensively about whether the proposed driveway would serve as access for the entire corporate park, whether the location of the curb-cut was unsafe because of the speed that vehicles travel on Valley Road at that location, and whether the driveway was necessary based on the existing access to the Property through the corporate park. (Tr. at 47:19-62:24.) Mr. Offenberg's opinion was that the direct access to the Property provided by the proposed Valley Road driveway was safe and would reduce delays at the intersections in the area. (Decision at 4.) It was also Mr. Offenberg's opinion that Appellant's petition met the criteria for a special-use permit. Id.; Tr. 86:3-88:11.

Paul Hogan, who was accepted as an expert in the field of real estate, testified about his familiarity with the area, with Appellant's petitions, and with the Middletown Zoning Ordinance and Comprehensive Plan. (Decision at 5.) He opined that Appellant's proposed use of the Property did not conflict with any of the then-existing uses in the corporate park, either in size or in use, and that the design and location were consistent with the surrounding neighborhood. Id.; Tr. 95:3-22. Mr. Hogan testified that the proposed use would not alter the neighborhood's existing character and was compatible with the Ordinance and Comprehensive Plan. See Decision at 5; Tr. 103:10-104:23. He also testified that granting the special-use permit would not be detrimental to the surrounding area or result in hazardous conditions. See Decision at 5; Tr. 103:10-104:23.

After some discussion, the Board granted the four-foot height variance by a vote of four to one.<sup>1</sup> Appellant's special-use permit was then granted by the Zoning Board subject to the same conditions recommended by the Planning Board, including the elimination of the curb-cut and driveway access from Valley Road. See Decision at 7; Tr. 117:5-119:12. A written decision was filed on September 26, 2007, and Appellant filed this appeal, challenging the condition that required elimination of the curb-cut and driveway access. See Decision at 1. A motion to assign for decision was granted on April 16, 2012.

## II

### Standard of Review

Subsection (d) of General Laws 1956 § 45-24-69 governs the Superior Court's review of

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<sup>1</sup> Although the Decision said that the motion to grant Appellant's petition for a height variance was granted by a vote of five to zero, the transcript reveals that the motion to grant the petition actually passed four votes to one. (Decision at 8; Tr. 114:16-117:4.) The motion, therefore, passed, and that part of the Decision has not been appealed. See Zoning Ordinance § 201(B) (providing that only four votes are needed to grant a dimensional variance).

the decision of a municipal zoning board. Accordingly, a reviewing 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.” § 45-24-69(d). The deference given to zoning boards “is due, in part, to the principle that ‘a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.’” Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009) (quoting Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008)).

On appeal, “[t]he court may affirm the decision . . . or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced” by “findings, inferences, conclusions, or decisions” that 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.

Id.

When evaluating a zoning board of review’s factual findings, the court must “‘examine the entire record to determine whether substantial evidence exists to support the board’s findings.’” Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting DeStefano v. Zoning Bd. of Review, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)) (internal quotation marks omitted). “‘Substantial evidence . . . 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.’” Pawtucket Transfer Operations, LLC, 944 A.2d at 859

(alteration in original) (citation omitted). The court must sustain a zoning board’s decision if it “can conscientiously find that the board’s decision was supported by substantial evidence in the whole record.” Mill Realty Assocs., 841 A.2d at 672 (quoting Apostolou v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)).

### III

#### Analysis

A zoning board granting a request for a variance or special use permit “may apply such special conditions to the grant that may, in the opinion of the Board, be required to promote the intent and purposes of the Comprehensive Plan and th[e Ordinance].” Ordinance § 904; see also § 45-24-43 (authorizing the imposition of conditions as Ordinance § 904 describes). Conditions imposed “shall be based on competent credible evidence on the record [and] be incorporated into the decision.” Ordinance § 904; see also § 45-24-43 (requiring that competent evidence on the record support the conditions). The purposes of conditions that a zoning board may impose include “[m]inimizing adverse impact of the development upon other land”; “[d]esignating the exact location and nature of development”; and “[p]roviding standards of site planning for proper circulation of traffic . . . .” Ordinance § 904; see also § 45-24-43 (describing purposes for which conditions may be imposed, including some of the same purposes described by § 904 of the Ordinance). A zoning board has “broad discretion in fixing conditions and safeguards when variances or exceptions are permitted,” but its discretion “is not unlimited.” Olevson v. Zoning Bd. of Review, 71 R.I. 303, 307, 44 A.2d 720, 722 (1945). To be permissible, conditions must be “reasonable” and “appropriate,” the latter of which means that the condition is “fit, suitable, and proper.” Id., 44 A.2d at 722. As a zoning board is “concerned fundamentally only with matters relating to the real estate itself,” conditions should not be connected primarily to “the

person who owns or occupies [the land].” Id., 44 A.2d at 722.

As stated above, “a zoning board of review is presumed to have special knowledge concerning those matters which are related to an effective administration of the zoning ordinance.” See Smith v. Zoning Bd. of Review, 103 R.I. 328, 335, 237 A.2d 551, 555 (1968). In Smith, the Supreme Court affirmed a zoning board’s decision based in part on the board’s rejection of the opinion of a “qualified traffic engineering consultant.” Id. at 331, 334-35, 237 A.2d at 553, 554-55. Although the witness had testified about the effects on traffic of a proposed use, based on its own knowledge of the area, the zoning board in Smith rejected the special-use application because already planned road construction in the area was going to convert the minor road where the lot was located into a “major artery” that drivers would use to bypass other main roads. Id. at 332, 237 A.2d at 553. The increased traffic on the “major artery” led the board to reject the witness’s opinion. Id. The board also rejected the expert’s opinion regarding visibility. Id., 237 A.2d at 553 (explaining that the board determined that visibility was not adequate based on its view of the area and that the lack of visibility would be aggravated by the granting of the application). The Court upheld the decision and explained that “[w]here it appears from the record that a decision was reached in reliance upon [the board’s special] knowledge, it is considered by th[e] [C]ourt to constitute legal evidence sufficient to support such a finding.” Id. at 335, 237 A.2d at 555 (quoting Monforte v. Zoning Bd. of Review, 93 R.I. 447, 449, 176 A.2d 726, 727-28 (1962)).

Regarding a zoning board’s treatment of expert testimony, the Supreme Court has explained that “[i]t should go without saying that expert testimony proffered to a zoning board is not somehow exempt from being attacked in several ways,” including “examination of the expert by members of the zoning board.” See Murphy v. Zoning Bd. of Review, 959 A.2d 535, 542 n.6

(R.I. 2008) (citing Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998)). In Murphy, neither counsel nor the board questioned an expert offered by those opposing a petition before a zoning board. Id. at 542-43 & n.6. The Supreme Court found that fact significant and held that the zoning board abused its discretion by refusing to accept “competent, uncontradicted, and unimpeached” expert testimony. Id.

The record here demonstrates that the Board’s decision to approve the special-use permit subject to the condition that Appellant eliminate the curb-cut and direct access from Valley Road is based on substantial evidence and is within the Board’s broad discretion. See Ordinance § 904; Mill Realty Assocs., 841 A.2d at 672; Olevson, 71 R.I. at 307, 44 A.2d at 722. During Mr. Offenbergs testimony, he was questioned about the extent to which the curb-cut would provide access to the entire corporate park. See Tr. 50:25-51:20. One member of the Zoning Board asked: “One question, aren’t you, by default, making a whole new entrance for the whole corporate park because you have the entrance making completely [sic] a straight line to John Clarke Road?” (Tr. 50:25-51:3.) The exchange noted that the Planning Board had expressed its concerns about the driveway and Appellant had been unable to change their minds. (Tr. 51:24-53:11.) The Zoning Board member stated his belief that by providing access to the entire corporate park, there would be “queuing up both ways for entering and [exiting] the park” and that “[a]s a Middletowner,” he would use that entrance to access the corporate park. (Tr. 53:12-21.) Others agreed that the design of the corporate park called for entrances at each end and that the proposed additional entrance would create traffic problems. (Tr. 59:14-60:2.)

Members of the Board also asked Mr. Offenbergs about whether the location of the driveway was safe based on its placement along a high-speed portion of Valley Road. (Tr. 53:25-58-21.) One board member noted the dearth of accidents on Valley Road and said “right



now there is nobody entering or exiting during that fast, long stretch that [Appellant is] talking about putting a curb cut.” (Tr. 55:25-54:11.) Mr. Offenberg agreed that cars travel fast at that point, but he stated that visibility was greater at that location. (Tr. 54:12-55:9, 55:16-56:4.) The zoning board member said that he “d[id not] see why putting this curb cut is going to make it safer” and questioned whether shorter wait times at area intersections resulted in increased safety. (Tr. 56:15-22.) Towards the end of the hearing, Mr. Offenberg was asked whether his traffic study used national standards or standards specifically designed for Aquidneck Island, and he responded that they were national and state standards. (Tr. 113:22-114:8.)

During its discussion of the special-use permit, the Zoning Board considered the driveway access and ultimately decided to impose its elimination as a condition of approval. (Tr. 117:5-18, 119:9-12.) One member explained that he favored requiring elimination of the driveway because the existing access was sufficient. (Tr. 117:19-118:21.) He also opined that the curb-cut would not alleviate traffic conditions in the area, and that local conditions do not always permit things that are considered safe based on national or state standards. Id. The remaining members of the Zoning Board agreed with this reasoning. (Tr. 118:22-119:12.)

Zoning boards are “presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.” Smith, 103 R.I. at 335, 237 A.2d at 555. It is clear that the Board relied on that special knowledge in conditioning its approval on elimination of the direct access from Valley Road. See id. at 335, 237 A.2d at 555. The Board clearly considered the proposed driveway using its knowledge of the accessibility of the corporate park, the traffic on that particular stretch of Valley Road, and the general nature of traffic in Middletown. The Board questioned Appellant’s expert about these issues. Additionally, the members of the Board extensively questioned Mr. Offenberg, unlike the expert

offered in Murphy, whose testimony was unimpeached and uncontradicted. See Murphy, 959 A.2d at 542-43 & n.6. It appears from the record here that the Board relied on its special knowledge, and that such reliance is sufficient evidence to support the Board's decision to impose the condition. See Smith, 103 R.I. at 335, 237 A.2d at 555. Thus, the Court is satisfied that the Zoning Board did not abuse its discretion and that the condition imposed, which relates to traffic and the impact on surrounding area, is reasonable and appropriate. See Ordinance § 904; Olevson, 71 R.I. at 307, 44 A.2d at 722.

#### **IV**

#### **Conclusion**

After a careful review of the entire record, this Court is satisfied that there is substantial evidence to support the Zoning Board's approval of the special-use permit subject to the condition that Appellant eliminate the proposed curb-cut and driveway providing access from Valley Road. The Decision granting the special-use permit subject to the condition is not clearly erroneous, arbitrary, or characterized by an abuse of discretion and is therefore affirmed. Counsel for the prevailing party shall submit the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Cover Sheet*

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**TITLE OF CASE:** Child and Family Services of Newport County v. Zoning Board of Middletown, by and through its members, Thomas D. Silveira, Lucy R. Levada, Edward Moy, Thomas Newman and Peter Van Steeden

**CASE NO:** NC-07-539

**COURT:** Filed in Newport County Superior Court

**DATE DECISION FILED:** March 21, 2013

**JUSTICE/MAGISTRATE:** Van Couyghen, J.

**ATTORNEYS:**

For Plaintiff: David Martland, Esq.

For Defendant: Turner Scott, Esq.