STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: JANUARY 17, 2012)

RI CORE INVESTMENTS, LLC	:	
	:	
V.	:	**C.A. No. NC-08-0426**
	:	
ZONING BOARD OF REVIEW OF THE CITY OF NEWPORT, and MICHAEL MARTIN, PETER J. O'CONNELL, MARTIN L. COHEN, ELIZABTH MINIFIE AND MARVIN L. ABNEY, in their capacities as members of the Zoning Board of Review of the City of Newport	:	

DECISION

NUGENT, J. Before this Court is an appeal from a decision of the Zoning Board of Review of the City of Newport (the "Zoning Board") denying an application for a special use permit. R.I. Core Investments, LLC ("R.I. Core") applied for a special use permit to allow the use of an existing historic structure in downtown Newport which currently contains fourteen residential rental units to contain up to eleven condominium units. R.I. Core seeks a reversal of the Zoning Board's decision. Jurisdiction is pursuant to R.I. Gen. Laws 1956 § 45-24-69.

I

Facts and Travel

R.I. Core is the owner of real property located at 80 Rhode Island Avenue in the City of Newport designated as Lot 5.4 on Tax Assessor's Plat 20. (Compl. ¶ 1.) That address is home to a historic structure known as "Eastbourne Lodge." (Decision at 1.) It is important to note that R.I. Core subdivided the 3.8 acre estate into thirteen parcels, consisting of twelve 10,000 square foot lots and one 37,400 square foot lot. (Pl.'s Mem. 4/13/11 Ex. I.) The larger 37,400 square

foot lot (the "Property") contains the 18,000 square foot "Eastbourne Lodge" and was the subject of R.I. Core's application for a special use permit. Id.

The Property is located in an R-10[1] Residential Zoning District. (Decision at 1.) Through a special use exception[2] issued in 1970, the Property contained fourteen dwelling units. (Decision at 4-5.) Based on its plan to subdivide, R.I. Core[3] submitted a Master Plan to the Newport Planning Board. (Pl.'s Mem. 4/13/11 Ex. C.) This initial plan indicated that R.I. Core intended to subdivide the parcel into thirteen lots; they planned to construct duplexes on twelve of the thirteen lots, and they were going to house two condominium units within the Eastbourne Lodge on the thirteenth lot—the subject Property. Id. This would result in twenty-six units total. Id. In 2006, by a unanimous vote, the Newport Planning Board (the "Planning Board") found that R.I. Core's Master Plan was consistent with the Newport Comprehensive Land Use Plan and approved their application to subdivide the 3.8 acre estate. (Pl.'s Mem. 4/13/11 Ex. H.)

The Planning Board's decision was subject to certain conditions to which R.I. Core agreed. (Pl.'s Mem. 4/13/11 Ex. H.) One of these conditions was that the Property house no more than eleven units—ten of which would be within the Eastbourne Lodge and one of which would be in a separate carriage house also on the Property. Id. The Planning Board additionally required that the remaining twelve lots contain a single-family dwelling only. Id. These conditions had the effect of reducing the overall number of units that R.I. Core could construct throughout the entire subdivision from twenty-six units to twenty-three units. (Compare Pl.'s

[1] At the time that the Plaintiff filed a subdivision application, the Property was located in an R-10 zone. Thereafter, the City of Newport rezoned the property to an R-20 designation. This Court subsequently invalidated the zoning amendment finding that it was in violation of the Comprehensive Plan. The City appealed this Order to our Supreme Court; however, the City withdrew its appeal prior to oral arguments.
[2] Now, this is referred to as a special use permit. See G.L. 1956 § 45-24-31(57).
[3] In fact, the proposal was submitted by R.I. Core's predecessor in interest, The Irish Partnership, on behalf of R.I. Core. (Pl.'s Mem. 4/13/11 Ex. C.)

Mem. 4/13/11 Ex. C, with Pl.'s Mem. 4/13/11 Ex. H.) At the same time, the Planning Board's conditions had the effect of increasing the amount of units R.I. Core planned to house within the Property from two units to eleven units. (Compare Pl.'s Mem. 4/13/11 Ex. C, with Pl.'s Mem. 4/13/11 Ex. H.)

Because an R-10 Zoning District allows a two-family dwelling by right, but requires a special use permit for multifamily dwellings, R.I. Core needed a special use permit to implement the Planning Board's suggestion to construct eleven units on the Property. Thus, in September of 2006, R.I. Core submitted an application to the Zoning Board requesting a special use permit. (Pl.'s Mem. 4/13/11 Ex. I.) On May 22, 2007, the Planning Board issued its recommendation to the Zoning Board stating that R.I. Core's proposal was consistent with the Newport Comprehensive Land Use Plan. (Pl.'s Mem. 4/13/11 Ex. K.) The Board considered R.I. Core's application at six public hearings which were held on July 10, 2007; August 1, 2007; September 24, 2007; October 22, 2007; December 10, 2007; and January 28, 2008. (Decision at 1.)

During these hearings, R.I. Core presented the testimony of seven witnesses, five of whom qualified as experts. See id. Michael W. Desmond of Bryant Associates, Inc. testified as a traffic expert. (Pl.'s Mem. 4/13/11 Ex. A at 102-117.) Mr. Desmond conducted a traffic study of the impact the proposed use would have on the surrounding neighborhood. (Pl.'s Mem. 4/13/11 Ex. M.) Mr. Desmond submitted a report that detailed his findings and testified as to those findings. (Pl.'s Mem. 4/13/11 Ex. M.; Pl.'s Mem. 4/13/11 Ex. A at 102-117.) Mr. Desmond found that R.I. Core's proposed use would not impact the level of use of the neighboring roads, that there would be sufficient access to the single family homes to be constructed, and there were no unusually unsafe conditions at the surrounding intersections. (Pl.'s Mem. 4/13/11 Ex. A at 102-117.)

Matthew Viana also testified on behalf of R.I. Core. (Pl.'s Mem. 4/13/11 Ex. A at 143-146.) Mr. Viana is a senior civil engineer at Northeast Engineering and testified as an engineering expert. Id. Mr. Viana prepared site plans and engineered the drainage and storm water management plans for the Property. Id.; see also (Pl.'s Mem. 4/13/11 at N.) The plans included the use of five storm water basins (these are also referred to as retention ponds). (Pl.'s Mem. 4/13/11 Ex. A at 143-146; Pl.'s Mem. 4/13/11 at N.) Mr. Viana consulted with Newport Public Works Director, Julia Forge, regarding the plans to ensure that they would be acceptable to the Public Works Department. Id. Mr. Viana testified that the five storm water basins were approved by Ms. Forge. Id. Ms. Forge also testified on behalf of R.I. Core. (Pl.'s Mem. 4/13/11 Ex. A at 75-80.) She testified that she reviewed Mr. Viana's work and approved the plans as being in conformance with City requirements. Id.

Member Michael Martin expressed his concern regarding the safety of the storm water basins and cross-examined Mr. Viana on this point. (Pl.'s Mem. 4/13/11 Ex. B at 27-33.) Specifically, member Martin was concerned that children may drown in the basins. Id. at 32-33. Mr. Viana consistently diffused member Martin's concerns reiterating that the basins do not hold water very often and that he knew of no safety issues associated with such basins. Id. In addition, Mr. Viana explained that the basins are "very common" and "standard" with low impact development. Id. at 27-30. In fact, Mr. Viana noted that there are several similar, smaller basins on Aquidneck Island and at least one that is larger. Id. at 23. Mr. Viana also explained that "[i]t takes a significant storm event to [fill] them with any significant depth of water" and that it would take "[o]ver three-and-a-half inches of rain to get them full." Id. at 30. Furthermore, even at full capacity, the basin "would dry over the next day and a half or so." Id. Although member Martin was noticeably concerned regarding the safety of the storm water

basins, there was no evidence presented to dispute Mr. Viana's assessment that they were safe. Indeed, member Martin stated to Mr. Viana, "[y]ou see these as safe; I don't see them as safe. As you know, I worked with the government for years; I have safety drilled into my head" Id. at 32. It is unclear where or how member Martin obtained this notion.

George Gifford, a landscape architect, also testified on behalf of R.I. Core. (Pl.'s Mem. 4/13/11 Ex. B at 78-114.) Mr. Gifford testified that his company was hired to prepare a landscape design for the subdivision after it was completed and a tree protection plan to protect the trees during construction. (Id. at 78; Pl.'s Mem. 4/13/11 Ex. O.) Mr. Gifford further testified that, while developing a tree protection plan, they consulted with City Officials including the City Tree Warden and the Newport Tree Commission. (Pl.'s Mem. 4/13/11 Ex. B at 79-80.)

R.I. Core also had an expert in land use and planning testify. (Pl.'s Mem. 4/13/11 Ex. B at 115-38.) Edward Pimental was hired by R.I. Core to provide an analysis "with regard to land use planning, . . . the Comprehensive Plan[,] the Subdivision Regulations, and consistency with the requisite standards for the granting of a special use permit." Id. at 115-16. Mr. Pimental conducted "no less than seven different density analyses" of the neighborhood. Id. at 116.

From his survey, Mr. Pimental concluded that the proposed density of the Property and the larger subdivision were consistent with the density of the surrounding neighborhood. Id. at 116-23. In fact, Mr. Pimental found that the "density . . . propose[d] for this property in its entirety, and as . . . propose[d] via the special use permit in this mansion house, Eastbourne Lodge, is actually less dense than what is currently in the surrounding neighborhood, both in a one-, two-, and three-block radius." Id. at 122-23. Mr. Pimental went on to explain that, as to the entire subdivision, the density would be one unit per 7200 square feet. Id. at 125-26. Mr. Pimental found that the density of the surrounding neighborhood was one unit per 5500 square

feet; thus, he testified that the subdivision was one-third less dense than the rest of the neighborhood. Id. Accordingly, Mr. Pimental concluded that the proposed use would be in harmony with the character of the surrounding area. Id. He further concluded that the Property would comply with the density requirements for an R-10 Zoning District. Id. at 127-28.

On October 22, 2007, when the Zoning Board resumed the hearing, Mr. Pimental testified in more detail regarding his analyses. (Pl.'s Mem. 4/13/11 Ex. Q at 8-9.) During this hearing, Mr. Pimental explained that he considered the densities of the properties within a one-block, two-block, and three-block radius. Id. When comparing the proposed subdivision with each of the three analyses, he found that the proposal was less dense in all cases. Id. at 9-11. Therefore, Mr. Pimental concluded "[t]he density that's proposed is, in [his] professional opinion, absolutely consistent with the character of the neighborhood[,]" and that it would not be injurious to the neighborhood or detrimental to the public welfare. Id. at 13. Finally, Mr. Pimental agreed with the Planning Board that the plan would be consistent with Newport's Comprehensive Plan. Id. at 13-14.

Mr. Pimental was subject to a very brief cross-examination by the members of the Zoning Board and by the objectors during which he was mostly questioned regarding the designation of the Property as an R-10 Zoning District. Id. at 14-34. Mr. Pimental was briefly asked to further elaborate on his methodology and he testified consistently throughout the examination. Id.

The Zoning Board met again on December 10, 2007, whereupon R.I. Core presented the testimony of William Coyle, who testified as an expert on property values. (Pl.'s Mem. 4/13/11 Ex. R at 16-21). Mr. Coyle testified that he reviewed all of the work of the experts in relation to the Property and that he "believe[s] this [to be] a well-thought-out and well-designed project." Id. at 15-16. Mr. Coyle further believed "that it [would] be an enhancement to the neighborhood

over and above what currently exists." Id.

Though the objectors were present at the hearings, they did not present any expert testimony. (Decision at 1.) Rather, the objectors testified on their own behalf, sent letters to the Zoning Board, and signed a petition. Id. at 1-2. Essentially, the nature of their objection was that the petition should be denied because the Property did not comply with the requirements of an R-20 Zone in terms of density and lot coverage. Id. at 53-58.

B

The Decision

The Zoning Board rendered its formal written Decision on January 28, 2008 and recorded it in the Newport Land Evidence Record on July 15, 2008. (Decision at 1.) The Zoning Board denied the application on a vote of three to two. Id. The Court finds the decision to be flawed because four of the five members accepted the testimony and evidence presented by R.I. Core in support of its application and found that R.I. Core satisfied the requisite standard for a special use permit; however, only two members voted to grant the application. Id. at 2-4.

Members Abney, Martin, Minifie, and O'Connell specifically found that "[t]he proposed use of the Property for up to eleven residential condominiums is in accord with the public convenience and welfare . . ." and took into consideration the factors relevant to granting a special use permit. Id. at 2. Those four members went on to specifically accept the testimony of Mr. Pimentel and found that the "renovation of this historic structure into up to eleven (11) units is in accord with the public convenience and welfare . . . ." Id. at 3. They also found that "the Property complies with all zoning requirements and . . . the proposed size and arrangement of the structure on the lot will allow adequate access, parking, light, and air." Id. As to traffic patterns, the four members accepted the testimony of Mr. Desmond, and they found that the proposed use

would not noticeably affect traffic on surrounding streets and that the proposal satisfied all requirements for off-street parking. Id. Those four members also "found persuasive Mr. Pimentel's testimony as to his research into the surrounding properties." Id. Significantly, they found "that the proposed use of the Property as a multi-family condominium as a part of the larger plan for the development of the entire 3.8 acre parcel . . . is consistent with and in harmony with the surrounding area." Id.

The four Zoning Board members also found that the use of the Property "will not result in any fire hazards and that the proximity to existing buildings and uses poses no increased fire hazard." Id. at 4. Notably, they agreed that "[t]he proposed use for the Property and for the Parcel overall [would] meet all standards for the R-10 zoning designation[.]" Id. Finally, they agreed with the Planning Board's decision that the proposed "use of the existing structure for up to eleven (11) residential condominium units is consistent with the comprehensive plan and the various goals and policies[.]" Id.

Subsequently, two of the four board members who agreed to the above facts went on to make "additional findings of fact" that are inconsistent with their initial findings. See id. at 4-9. Chairman O'Connell found that the Property was located in an R-20 Zoning District.[4] Id. at 5. He further found that the Property "provided a buffer zone" and "an open space, park-like quality." Id. In spite of agreeing with the initial findings of fact that found the proposed use to be in harmony with the surrounding area and in accord with the public convenience and welfare, the Chairman inexplicably concluded that the "special use permit . . . neither promotes the safety, comfort, convenience, appearance, prosperity, or the general welfare of the neighborhood, nor is

[4] This Court takes judicial notice of its finding that rezoning the Property to R-20 was illegal. (Pl.'s Mem. 4/13/11 Ex. F.) Thus, the Court is satisfied that the Chairman's finding on this issue is clearly erroneous and affected by an error of law.

the proposed use in harmony with the surrounding area." Id. at 6. Rather, the Chairman found that the complaints of the objectors "that the proposed use will have a negative impact on the neighborhood [to be] valid." Id. The Chairman further noted that approving the special use permit would be "excessive[,]" "result in an over-intensification of use on the property and will be detrimental to the newly created and existing neighborhoods." Id. at 6-7.

Board member Michael Martin, who also agreed with the initial findings of fact, made one additional finding of fact. Id. at 8. Member Martin found that,

> "[t]here could be up to 25 children living in the 80 Rhode [Island] Avenue area. The retention ponds on the property are going to rise and fall over time. With the nature of these ponds, there is a potential for a small child to fall in one of the ponds and drown. These retention ponds are manmade [sic] disasters and an accident waiting to happen." Id.

The lone board member, who did not agree with the findings of fact crediting the evidence put forth by R.I. Core, was Martin L. Cohen. See id. at 2. Mr. Cohen made only three findings of fact. Id. at 7. Mr. Cohen found that the evidence adduced by R.I. Core merely showed that the proposal would not be inconsistent with the neighborhood, rather than showing that the proposal would be consistent with the neighborhood. Id. at 7. Mr. Cohen also credited the objectors' lay testimony and stated that "they felt the proposal was not harmonious with the neighborhood." Id. Finally, Mr. Cohen stated that the proposal will increase the original lot into "a very large multi-family density of twenty-three (23) families . . . and [s]uch a use is not harmonious with the nature of the surrounding area." Id.

II

Standard of Review

Rhode Island General Laws 1956 § 45-24-69(a) grants the Superior Court jurisdiction to review a local zoning board's grant of a special use application. Such Superior Court review of

zoning board decisions is governed by G.L. 1956 § 45-24-69(d). That section provides:

> "[t]he 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(d).

In reviewing questions of law, this Court conducts a de novo review. Tanner v. Town Council, 880 A.2d 784, 791 (R.I. 2005). In reviewing questions of fact, the trial justice must "examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979). "Substantial evidence is relevant evidence that a reasonable person would accept as adequate to support the board's conclusion and amounts to 'more than a scintilla but less than a preponderance.'" Lischio v. Zoning Bd. of Review of the Town of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand and Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981)).

If this Court "can conscientiously find that the board's decision was supported by substantial evidence on the whole record," it must uphold that decision. Mill Realty Assoc. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting Apostolu v. Genovesi, 120 R.I. 501, 509, 388

A.2d 821, 825 (1978)); see Monroe v. Town of East Greenwich, 733 A.2d 703 (R.I. 1999). Meanwhile, the applicant bears the burden of persuasion to demonstrate why relief should be granted. See DiIorio v. Zoning Bd. of Review East Providence, 105 R.I. 357, 252 A.2d 350 (1969).

III

Analysis

R.I. Core challenges the sufficiency of the Zoning Board's decision pursuant to § 45-24-69, arguing, inter alia, that the Zoning Board's decision is arbitrary, affected by other error of law, and clearly erroneous in view of the reliable probative and substantial evidence of the whole record. Specifically, it contends that, in reaching its decision, the Zoning Board ignored uncontradicted expert testimony, credited unsupported lay opinions voiced by objecting abutters, and relied on their own personal opinions on matters for which expert testimony had been offered and accepted by the Zoning Board.

A

The Board's Decision

Section 45-24-61(a) of the Rhode Island General Laws states that a Zoning Board must issue a written decision which affirms or denies a request for zoning relief. G.L. (1956) § 45-24-61(a). That decision must include "all findings of fact and conditions, the vote of each participating member, and the absence of a member or his or her failure to vote." Id. "When the board fails to state findings of fact, the court will not search the record for supporting evidence or decide for itself what is proper [under] the circumstances." Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 401 (R.I. 2001).

The record reveals that the Zoning Board considered R.I. Core's application at six public

hearings, which were held on July 10, 2007; August 1, 2007; September 24, 2007; October 22, 2007; December 10, 2007; and January 28, 2008. (Decision at 1.) During these hearings, R.I. Core presented the testimony of seven witnesses, five of whom qualified as experts. Id. It also submitted substantial documentary evidence in the form of plans, surveys, and the like. Id.

In its written decision, the Zoning Board listed six findings of fact on which four of the five members agreed. (Decision at 2-3.) In particular, those members found that "[t]he proposed use of the Property for up to eleven residential condominiums is in accord with the public convenience and welfare[.]" Id. at 2. The Zoning Board also took into account the factors for special use permits as required by the Newport Zoning Ordinance. Id. at 2-4. In doing so, four of the five members accepted the expert testimony of Mr. Pimental and found that the proposed use "is consistent with and in harmony with the surrounding area." Id. at 3. In addition, those four members found, specifically, that the proposed use meets all the standards for the R-10 Zoning District and is consistent with the comprehensive plan. Id.

In addition, the members made their own, separate findings of fact to support their vote to grant or deny the application. Id. at 4-9. Two of the board members voted to approve the application while three of the board members voted to deny it. Id. at 9. Two of the members who voted to deny the application found that the proposal was not harmonious with the surrounding area. Id. at 4-7. The third member who voted to deny the application found the proposed use to be unsafe because it includes retention ponds, which "are manmade [sic] disasters and an accident waiting to happen." Id. at 8.

This Court finds that the Zoning Board's decision complies with § 45-24-61(a) because it sets forth the findings of fact that the Zoning Board relied on in denying the application. As such, the Court has the necessary information to evaluate the Zoning Board's Decision and can

reach the substantive merits of the instant appeal. See Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 401 (R.I. 2001) (determining that a zoning board of review must make findings of fact and conclusions of law in support of its decisions to enable effective judicial review).

B

Sufficiency of the Evidence

At issue in this case is the propriety of the Zoning Board's Decision to deny R.I. Core's application for a special use permit. R.I. Core asserts that the Zoning Board improperly ignored expert testimony and that the findings of the Chairman, member Cohen, and member Martin are clearly erroneous, affected by error of law, arbitrary, capricious, and characterized by an abuse of discretion. R.I. Core contends there was no competent evidence to support the Chairman's and member Cohen's finding that the proposed use would not be harmonious with the surrounding neighborhood. It further asserts that there was no competent evidence to support member Martin's finding that the proposed use would be unsafe.

Section 45-24-31(57) defines a special use permit as "[a] regulated use which is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42." G.L. 1956 § 45-24-31(57). Section § 17.108.020(G) of the Newport Zoning Ordinances sets out the governing standard for issuing a special use permit. See NEWPORT, RI., ZONING ORDINANCE § 17.108.020(G) (2000). That section provides:

> "[s]pecial use permits shall be granted only where the zoning board of review finds that the proposed use or the proposed extension or alteration of an existing use is in accord with the public convenience and welfare, after taking into account, where appropriate:
>
> 1. The nature of the proposed site, including its size and shape and the proposed size, shape and arrangement of the structure;

> 2. The resulting traffic patterns and adequacy of proposed off-street parking and loading;
> 3. The nature of the surrounding area and the extent to which the proposed use or feature will be in harmony with the surrounding area;
> 4. The proximity of dwellings, churches, schools, public buildings and other places of public gathering;
> 5. The fire hazard resulting from the nature of the proposed buildings and uses and the proximity of existing buildings and uses;
> 6. All standards contained in this zoning code;
> 7. The comprehensive plan for the city." Id.

As the applicant, R.I. Core must demonstrate that the proposed use "will not result in conditions that will be inimical to the public health, safety, morals and welfare." Salve Regina College v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting Nani v. Zoning Board of Review of Smithfield, 104 R.I. 150, 156, 242 A.2d 403, 406 (1968)). Here, R.I. Core argues that the Zoning Board's decision is not supported by the evidence in the record with respect to the Chairman's and member Cohen's finding that the proposed use would not be harmonious with the surrounding neighborhood and with respect to member Martin's finding that the proposed use included a "manmade [sic] disaster" that was "an accident waiting to happen." (Decision at 6, 8.)

1

Harmony with the Neighborhood

The Court is satisfied that the Chairman's and member Cohen's finding that the proposed use would not be harmonious with the surrounding area was clearly erroneous and affected by error of law. The overwhelming evidence adduced at the hearings clearly indicates that the proposal would be harmonious with the neighborhood rather than the contrary. Mr. Pimental testified in support of R.I. Core on this very proposition. (Pl.'s Mem. 4/13/11 Ex. B at 125-26;

Pl.'s Mem. 4/13/11 Ex. Q at 13.) The objectors did not present an expert to contradict Mr. Viana's findings. Rather, they relied on their own lay opinion that the proposed use would not be harmonious with the surrounding area.

R.I. Core established through its expert, Mr. Pimental, that the proposal would be harmonious with the surrounding area. Mr. Pimental testified consistently, on two occasions, that the proposed density of the Subject Property would be less dense than the rest of the neighborhood. (Pl.'s Mem. 4/13/11 Ex. B at 125-26; Pl.'s Mem. 4/13/11 Ex. Q at 8-34.) As a result of his research and analyses, Mr. Pimental found that "[t]he density that's proposed is, in [his] professional opinion, absolutely consistent with the character of the neighborhood." (Pl.'s Mem. 4/13/11 Ex. Q at 13.) Much of Mr. Pimental's cross-examination concerned his determination that the Property was located in an R-10 Zoning District. See id. 14-34. Though he was questioned with regard to his methodology, Mr. Pimental did not waver with regard to his findings or methodology, and the objectors did not present expert testimony to contradict Mr. Pimentals' testimony. See id.

Despite this uncontradicted expert testimony, Chairman O'Connell inexplicably found that "the proposed use [is not] in harmony with the surrounding area. The complaints of the objectors that the proposed use will have a negative impact on the neighborhood are valid." (Decision at 6.) The Chairman further found that approval would "result in an over-intensification of use on the property." Id. at 6-7. Member Cohen also credited the lay objectors' opinions and found that "they felt the proposal was not harmonious with the neighborhood." Id. at 7. He found further that R.I. Core only demonstrated that the proposed use "would be not [sic] inconsistent with the neighborhood[,]" but failed to show that it would be consistent with the neighborhood. Id.

Our high court has held that a use specially permitted by the zoning ordinance indicates an implicit legislative finding that the use "(1) is harmonious with the other uses permitted in that district, and (2) is not to be excluded unless the standards for a special exception are not satisfied with respect to its establishment at a particular location or site." Perron v. Zoning Bd. of Review of the Town of Burrillville, 117 R.I. 571, 574, 369 A.2d 638, 640-41 (1977). Therefore, a specially permitted use is presumptively harmonious and a finding to the contrary must be supported by substantial evidence. See id. In this case, a multifamily dwelling is clearly a specially permitted use in an R-10 Zoning District. See NEWPORT, RI., ZONING ORDINANCE § 17.20.020(B) (2000). Accordingly, multifamily housing is presumptively harmonious with the surrounding neighborhood. See Perron, 117 R.I. at 574, 369 A.2d at 640-41. Given this designation and the substantial evidence presented by R.I. Core that the proposal would be harmonious, this Court must find substantial evidence to support the Chairman's and member Cohen's finding to the contrary. See id.

After a review of the entire record, the Court is satisfied that Chairman O'Connell's and member Cohen's finding that the proposed use would not be harmonious with the neighborhood was not supported by substantial evidence. In fact, there was uncontradicted expert testimony by Mr. Pimental who stated that the proposed use would be harmonious with the surrounding neighborhood. Mr. Pimental's uncontradicted testimony established that the proposed use would be less dense than other multifamily dwellings in the neighborhood and that the proposed density would be permitted under the Newport Zoning Ordinance. This testimony was accepted by four out of five members of the Zoning Board. (Decision at 2-4.) Further, those four members found that R.I. Core had satisfied the criteria for a special use permit—they found that "[t]he proposed use of the Property for up to eleven residential condominiums is in accord with the public

convenience and welfare[.]" (Decision at 2.) Four of the five Zoning Board members expressly found that the proposed use "is consistent with and in harmony with the surrounding area." Id. at 3. What is further perplexing to this Court is the fact that Chairman O'Connell specifically accepted Mr. Pimental's testimony as credible with regard to his opinion that the proposed use would be harmonious with the surrounding area. (Decision at 2-3.) However, his "additional findings" inexplicably contradicted this initial finding. (Decision at 6.)

Furthermore, both Chairman O'Connell's and member Cohen's findings credited the lay objectors' opinions over the expert opinions which was clearly erroneous and affected by error of law. A zoning board is not free to disregard expert testimony that is the only evidence on an issue without providing a basis for such a rejection. Carter Corp. v. Zoning Bd. of Review of Town of Lincoln, 98 R.I. 270, 273, 201 A.2d 153, 155 (R.I. 1964). While the City seems to argue that Chairman O'Connell and member Cohen did not accept Mr. Pimental's methodology, neither member provided a basis for rejecting Mr. Pimental's testimony on this issue. See Toohey v. Kilday, 415 A.2d 732, 738 (R.I.1980) (if a zoning board rejects uncontradicted expert testimony, the board must "disclose[] on the record the observations or information upon which it acted."). In addition, in light of the expert testimony to the contrary, the objectors' lay opinions lacked probative force to support Chairman O'Connell and member Cohen's findings. See e.g. Accrington Realty, LLC v. Zoning Bd. of Review of Newport, NC-2007-0230, 2009 WL 3443305 (Super. Ct. Oct. 21, 2009). Where there is no competent evidence to offset that of an applicant's experts, the Zoning Board's denial of the application may be characterized as arbitrary and an abuse of discretion. Id. (citing Goldstein v. Zoning Bd. of Review of Warwick, 101 R.I. 728, 227 A.2d 195 (1967)).

2

Not Inimical to the Public Health, Safety, Morals, and Welfare

The Court is satisfied that member Martin's findings were clearly erroneous in view of the reliable, probative, and substantial evidence in the record and was arbitrary. R.I. Core presented substantial evidence to the Zoning Board showing that the proposed use would not be inimical to the public health, safety, morals and welfare. In support of its application, R.I. Core presented the testimony of Mr. Viana and Ms. Forge, the Newport Public Works Director. (Pl.'s Mem. 4/13/11 Ex. A at 143-146, 75-80; Pl.'s Mem. 4/13/11 Ex. B at 27-33.) Mr. Viana testified that storm water basins would be built on the property to facilitate drainage. (Pl.'s Mem. 4/13/11 Ex. A at 143-146; Pl.'s Mem. 4/13/11 Ex. B at 27-33.) Ms. Forge testified that she approved the plans for implementing storm water basins as they would be in conformance with the City's requirements. (Pl.'s Mem. 4/13/11 Ex. A at 75-80.) Taken together, their testimony illustrates that the storm water basins are "standard[,]" safe, and in conformance with the City's requirements. (Pl.'s Mem. 4/13/11 Ex. A at 143-146, 75-80; Pl.'s Mem. 4/13/11 Ex. B at 27-33.)

Indeed, Mr. Viana testified that the basins are "very common" with low impact developments and, in fact, there are several similar basins in the area. (Pl.'s Mem. 4/13/11 Ex. B at 23-30.) Although member Martin expressed his concerns with the storm water basins, Mr. Viana explained that he did not know of any drowning risk associated with the storm water basins. Id. at 32-33. Mr. Viana further explained that the basins would only be filled in the event of a "significant storm" and, even then, they "would dry over the next day and a half or so." Id.

Despite having accepted R.I. Core's evidence and having concluded that R.I. Core's application is "in accord with the public convenience of welfare[,]" the relevant standard for

issuing a special use permit, member Martin found that the application should be denied for safety reasons. (Decision at 2-8.) Member Martin found that the storm water basins were "manmade [sic] disasters" and "an accident waiting to happen." Id. at 8. However, member Martin did not specify his basis for concluding that these basins were unsafe. Id.

The only evidence presented that was pertinent to the safety of the basins was by Mr. Viana who consistently testified as an expert that he was unaware of any safety issues relevant to these basins. (Pl.'s Mem. 4/13/11 Ex. B at 23-33.) He further testified that there were several, similar basins in the area and at least one that was larger. Id. at 23. In addition, Mr. Viana explained that it would take a significant storm to fill the basins and, even at full capacity, they would dry up relatively quickly. Id. at 30. This expert testimony was not contradicted.

It appears that member Martin's concerns were not based on the evidence presented at the hearings. The uncontroverted evidence indicated that the basins were safe and commonly used, even on Aquidneck Island. Indeed, by member Martin's own admission, he simply disagreed with Mr. Viana's safety assessment. (Decision at 8.) During the August 1, 2007 hearing, member Martin stated to Mr. Viana: "[y]ou see these things as safe; I don't see them as safe. As you know, I worked with the government for years; I have safety drilled into my head." (Pl.'s Mem. 4/13/11 Ex. B at 32.) Yet, member Martin did not provide any explanation in the decision for rejecting Mr. Viana's expert testimony and concluding that the basins are "manmade [sic] disasters." (Decision at 8.) Because member Martin's finding of fact required rejecting the uncontradicted expert testimony of Mr. Viana, member Martin was required to "disclose on the record the observations or information upon which [he] acted. Toohey, 415 A.2d at 738. He failed to do so. (Decision at 8.) Member Martin failed to disclose the nature of his knowledge with regard to the unsafe condition of the storm water basins and, therefore, the Court is satisfied

that the evidence was inadequate to support his conclusions. See id.

Conclusion

After a reviewing the entire record, the Court is satisfied that the Zoning Board's denial of the special use permit was clearly erroneous in view of the reliable, probative, and substantial evidence of the record and was arbitrary. Substantial rights of R.I. Core have been prejudiced. Accordingly, this Court reverses the decision by the Zoning Board of Review of the City of Newport. R.I. Core's application for a special use permit is granted. Counsel for the prevailing party shall submit an appropriate order for entry.