STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED – APRIL 24, 2012)

CLAYTON HOLDINGS, LLC	:	
	:	
VS.	:	**C.A. No. KC/2008-1329**
	:	
ZONING BOARD OF REVIEW OF THE TOWN OF WEST GREENWICH and KENNETH D. JONES, CLYDE S. FISH II, GREGORY D. BREENE, EDWARD L. STONE, CHARLOTTE JOLLS, and GILBERT W. Rathbun, in their official capacities only as Members of the Zoning Board of Review of the Town of West Greenwich	:	

DECISION

Lanphear, J. Clayton Holdings, LLC ("Clayton") appeals the September 17, 2012 decision of the Zoning Board of Review of the Town of West Greenwich ("the Zoning Board"). The Zoning Board denied Clayton's appeal from a decision of the West Greenwich Building/Zoning Official pertaining to the property at West Greenwich Tax Assessor's Plat 48, Lot 72 ("the Property"). This Court has jurisdiction pursuant to G.L. 1956 § 45-24-69. For the reasons set forth below, the Zoning Board's decision is affirmed.

1.

Facts

Clayton seeks to construct a single family residence on the Property located on Breakheart Hill Road in West Greenwich. The Property is in a zoning district designated as RFR-02 in Article II, Section 1(D) of the West Greenwich Zoning Ordinance, entitled "Rural,

Farming, Residential[,]" which requires 200 feet of lot frontage and 87,120 square feet[1] of lot area in order to construct a home on a lot therein. However, the Property has only 19.97 feet of frontage and an area of 27,074 square feet. Clayton does not dispute that the Property fails to meet the dimensional requirements for frontage and lot size.

Clayton sought a determination by the West Greenwich Building/Zoning Official, David Tacey, that Lot 7-2 constituted a Substandard Lot of Record, thereby entitling Clayton to relief from the RFR-02 zoning requirements. Owners of Substandard Lots of Record may be entitled to develop such lots according to the current enactment of the Ordinance:

> A lot or parcel of land having a lot width or area of lesser amounts than required in Article II may be considered as coming within the minimum requirements of Article II, provided such lot or parcel of land was shown on a recorded plat or on a recorded deed on the effective date of this Ordinance and did not at such time adjoin other land of the same owner." Ordinance, Art. VII, § 1(A) (1994).

This 1994 Ordinance defines a Substandard Lot of Record as "[a]ny lot lawfully existing at the time of adoption or amendment of this zoning ordinance and not in conformance with the dimensional and/or area provisions of this ordinance."[2] Ordinance, Art. I, § 3(59) (1994). Thus, Clayton asserted that because the Property was created in 1979 as the remainder piece of the original parcel, and the current enactment of the zoning ordinance was adopted by an amendment in 1994, its creation predated the effective date of the Ordinance and, therefore, qualified for development as a Substandard Lot of Record.

By letter dated March 12, 2008, Mr. Tacey informed Clayton of his determination that the Property did not meet the definition of a Substandard Lot of Record and was, for that reason, ineligible for the exception. Specifically, the official noted that when the parcel was created, the

[1] The Ordinance actually requires two acres, which is the equivalent of 87,120 square feet. This measurement will be used for ease of comparison.
[2] This definition comports with that found in G.L. (1956) § 45-24-31(59) for a Substandard Lot of Record.

1969 Ordinance required each lot in the district have 200 feet of frontage and contain 87,120 square feet to be developable, "just as it is today." Mr. Tacey concluded that because the Property did not meet such requirements at the time the Property was created as a remainder piece in 1979, it was ineligible for development and cannot now become a Substandard Lot of Record.

Clayton timely appealed Mr. Tacey's decision to the Zoning Board. Reviewing the history of the Property, the Zoning Board determined that the original parcel of 18.7 acres was first conveyed to Joseph H. Theroux, Inc. from Warren E. Sweet and Ruth E. Sweet by a deed recorded on April 3, 1975. Over the following years, Joseph Theroux made a series of transfers from the original parcel. He conveyed approximately 8.7 acres of the parcel on April 3, 1975, and another portion to Thompson Homes, Inc. on August 11, 1976. The final division of the original parcel occurred on November 13, 1979 when he deeded another portion (now designated as Lot 7-1) to Loran and Susanne Roberts. This left a small, undescribed piece of land - the Property in this case. Significantly, the Zoning Board found that at that time, the Property itself had not been described in any deed or recorded plat or subdivision plan.

The Property was not clearly described in a recorded deed until June 14, 2004, when Joseph Theroux transferred the Property to John Theroux and Jane Hebert by a trustee's deed. The Property was later deeded by quitclaim deed to John Theroux individually and, finally, to Clayton on April 12, 2006.

2.

Travel

In its written opinion upholding the Zoning Inspector's decision, the Zoning Board rejected Clayton's first argument that the 1994 Ordinance was operative as it pertained to the

question of whether creation of the Property predated "the effective date of [the] Ordinance." The Zoning Board referred to the 1969 West Greenwich Ordinance which states:

> No lot area shall be so reduced that yards, total area, and lot width shall be less than prescribed for the district in which the lot is located. . . . .
> Where no adjacent land is in the same ownership so as to form a larger land parcel, a lot smaller than the minimum dimensions and area required by this ordinance which was a lot of record on the effective date of this ordinance or which is within a subdivision approved by the West Greenwich Planning Board under the West Greenwich Subdivision Regulations may be used for a single-family dwelling. . . . . Ordinance, Art. VI, § 1 (1969).

Clayton cited the preamble to Article I of the 1994 Ordinance, which reads:

> In accordance with [G.L. (1956) § 45-24-27 et seq.], as amended, the following Zoning Ordinance is hereby adopted by the Town Council of the Town of West Greenwich effective December 15, 1994. All ordinances and amendments, or parts of ordinances and amendments, which are inconsistent herewith are hereby repealed. Ordinance, Art. I (1994).

However, as the Zoning Board specifically found, the minimum dimensions and area requirements in the 1994 Ordinance for the district in which the Property lay were exactly the same as those listed in the 1969 Ordinance. See Ordinance, Art. II, § 1(D) (1994); Ordinance, Art. II, § 1(D) (1969). Thus, the Zoning Board concluded that the 1994 and 1969 Ordinances were not inconsistent and that "the effective date of [the] Ordinance[,]" to which the exception for a Substandard Lot of Record referred in the 1994 Ordinance, referred back to the effective date of the 1969 Ordinance—May 14, 1969.

The Zoning Board then turned to the question of whether the Property was "lawfully existing" in 1969, pursuant to the definition of a Substandard Lot of Record. Ordinance, Art. I, § 3(59) (1994). The Zoning Board answered this question with reference to the 1969 Ordinance and evidence from the history of the Property. As noted, according to Art. VI, § 1, "[n]o lot area

shall be so reduced that yards, total area, and lot width shall be less than prescribed for the district in which the lot is located." Ordinance, Art. VI, § 1(A). The Zoning Board found that the Property did not conform to the prescribed requirements for the district and there was no record of approval for the Lot. Therefore, the Zoning Board concluded that the Property was neither "lawfully existing" in 1969, nor in 1994, and did not qualify for the exception for Substandard Lots of Record.

The Zoning Board also rejected Clayton's argument that an analysis of the deeds and descriptions of all transfers from the original parcel provided a sufficiently detailed description of the remainder piece so that Lot 7-2 could be considered to have been "shown on a recorded deed." The Zoning Board went on to find that "Lot 7-2 was never shown on any recorded deed until 2004, nor was it ever shown on a recorded plat or approved subdivision." Thus, it concluded that "it d[id] not qualify as a 'Substandard Lot of Record,' nor for the exception afforded such lots."

Thereafter, Clayton filed the instant appeal, arguing that the Zoning Board's Decision was in violation of provisions in the West Greenwich Zoning Ordinance, and was erroneous because of a lack of substantial evidence in the record.

3.

Standard of Review

Section 45-24-69(a) provides this Court with the specific authority to consider appeals brought by aggrieved parties from decisions of a zoning board of review. When a zoning board decision is properly before this Court, the standard of review is governed § 45-24-69(d). Accordingly, a decision of the zoning board may be reversed or modified only 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." Sec. 45-24-69(d).

In conducting its review, this Court "may 'not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.'" Curran v. Church Community Housing Corp., 672 A.2d 453, 454 (quoting § 45-24-69(d)). The Court "'must examine the entire record to determine whether substantial evidence exists to support the board's findings.'" Salve Regina College v. Zoning Board of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Board of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). Regarding questions of law, however, this Court conducts a de novo review. Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008).

4.

Analysis

A.

Effective Date of the Ordinance

Clayton argues that the Zoning Board erred in concluding that the effective date of the Ordinance was May 14, 1969. Specifically, Clayton asserts that the language in the preamble to Article I of the 1994 Ordinance clearly indicates that the effective date of the Ordinance is

December 15, 1994. So delineated, Clayton also argues that the Zoning Board's resort to considering the legislative intent of the 1994 Ordinance for determination of the pertinent effective date was improper because the language of Article I was clear and unambiguous. See Lescault v. Zoning Bd. of Review of Town of Cumberland, 91 R.I. 277, 280, 162 A.2d 807, 809 (1960) ("We have said of a statute, and we think it is equally true of an ordinance, that where the language is clear and certain there is nothing left for interpretation.").

It is well settled that "the rules of statutory construction apply equally to the construction of an ordinance." Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (citing Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981)). As a recent decision stated:

> [I]n ascertaining and effectuating that legislative intent, the plain statutory language itself serves at the best indicator. When that statutory language is clear an unambiguous, the Court must interpret the statute literally and must give the words of the statute their plan and ordinary meanings. Moreover, when we examine an unambiguous statute, there is no room for statutory construction and we must apply the statute as written. McCain v. Town of North Providence, -- A.3d --, 2012 WL 1134814 (April 5, 2012), quotations and citations omitted.

It is certainly clear in the language of the preamble to Article I of the 1994 Ordinance that the effective date of that Ordinance was December 15, 1994. However, it is uncertain to what extent the 1994 Ordinance repealed the 1969 Ordinance with respect to the effective date to which the exception for Substandard Lots of Record refers. Accordingly, the Zoning Board was correct to examine the legislative intent behind the enactment of the 1994 Ordinance, and this Court will do so here.

The Rhode Island Supreme Court has held that zoning ordinance reenactments do not summon the reaper for all provisions of previously enacted zoning ordinances. In Health

Havens, Inc. v. Zoning Board of Review, the petitioner's predecessor in title was granted an exception in 1959 to erect a nursing home on a certain parcel of land. 101 R.I. 258, 221 A.2d 794 (1966). The petitioner later sought to expand the nursing home pursuant to provisions contained in a 1963 reenactment of the town's zoning ordinance allowing special exceptions for nonconforming uses. The Court held that the 1963 reenactment was "not the adoption of a new zoning ordinance so as to make all pure special exceptions and variances theretofore granted by the board legal non-conforming uses." Id. The court stated that the revised ordinance was not the adoption of a new ordinance—rendering all previously granted exceptions and variances nonconforming uses—it was merely a continuation of the original ordinance that became effective in 1926.[3]

Here, the 1994 West Greenwich Ordinance only repealed prior ordinances and parts thereof to the extent they were "inconsistent [there]with." Ordinance, Art. I (1994). Each version of the ordinance requires prior recording by deed or subdivision plot for a lot to come within the protective sweep of the exception. Each contains a merger clause for adjacent lots under a single ownership, and permissive language for consideration of a nonconforming lot as coming within the dimensional requirements for lots in a particular zoning district.

Each ordinance exception expressly limits its scope to lots that do not meet the minimum dimensions required by the Ordinance. The 1969 Ordinance contains lot size and frontage requirements for RFR-02 zoning districts that are identical to those in the 1994 Ordinance. See Ordinance, Art. II, § 1(D) (1994); Ordinance, Art. II, § 1(D) (1969). Article II, Section 1(D) of both ordinances specifies the minimum lot size and frontage as 87,120 square feet and 200 feet, respectively, for lots located in residential districts. Because the regulations have not changed

[3] Id.; see Arden Rathkopf and Daren Rathkopf, The Law of Zoning and Planning (4th ed. 2004, as amended) ("In dealing with substandard lots, as with nonconforming uses which are analogous, the point of reference is the effective date of the bylaw.").

for the Property since it was created in 1979, such provisions are consistent with the 1994 amendment and are not repealed by it. Cf. Skelley v. Zoning Bd. of Review of Town of S. Kingstown, 569 A.2d 1054, 1055-56 (R.I. 1990). Consequently, this Court concurs with the Zoning Board's determination that the effective date to which the exception refers is May 14, 1969.

This Court need go no further. It is undisputed that the Property was not created until the 1979 deed of Lot 7-1 left the remainder piece, the subject Property. This Court agrees with the Zoning Board's determination that it does not qualify for the exception for a substandard lot record because the effective date for purposes of determining eligibility for the Substandard Lot of Record exception predates the earliest time the Property could have become a lot of record. Thus, the Zoning Board's decision did not violate statutory or ordinance provisions.

B.

Eligibility as a Substandard Lot of Record

Though the foregoing analysis is sufficient for disposition of this case, the Court will address Clayton's argument against the applicability of the definitional requirement that a lot be "lawfully existing" at the time of adoption or amendment of a zoning ordinance in order to qualify as a Substandard Lot of Record.

In Marc & Constance Zaccagnini v. Board, C.A. No. 95-3726, 1996 WL 936984 (Sept. 25, 1996) this Court considered whether two lots were required to be merged as Substandard Lots of Record according to the North Providence Zoning Ordinance. In determining whether the two lots were subject to the ordinance's merger clause, the Court examined how inconsistent definitions of a Substandard Lot of Record applied to the particular parcel:

> The North Providence Zoning Ordinance contains inconsistent provisions with respect to [the] definition of Substandard Lots of

> Record. Section 413 entitled 'Substandard Lots of Record' states 'in all zoning districts where adjacent lots which are smaller than the minimum area and width . . . .' However, the definitional sections of Article XIII of the North Providence Zoning Ordinance and R.I.G.L § 45-24-31(59) define 'Substandard Lot of Record' as 'any lot lawfully existing at the time of adoption or amendment of a zoning ordinance and not in conformance with dimensional and/or area provisions of that ordinance.' To apply the interpretation of 'Substandard Lots of Record' in section 413 in accordance with the definition of 'Substandard Lot of Record' in Article XIII of the Town ordinance and Rhode Island General Laws creates an absurd result. 'It is a well-settled principle in this jurisdiction that the rules of statutory construction apply equally to the construction of an ordinance.' Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981) (quoting Town of Warren v. Frost, 111 R.I. 217, 222, 301 A.2d 572, 573 (1973)). This Court, in accordance with Article XIII of the North Providence Zoning Ordinance and R.I.G.L. § 45-24-31(59), construes a 'Substandard Lot of Record' to be a lot lawfully existing at the time of adoption of a zoning ordinance and not in conformance with dimensional and/or area provisions of that ordinance. Id. at 5.

Ultimately, this Court logically concluded that the lots satisfied the definition of a Substandard Lot of Record and held that the merger clause applied in that case.

Here, the Property does not conform to the minimum area and frontage requirements in the 1994 and 1969 Ordinances. At no time since its creation in 1979 has the Property been in conformance with the Ordinance. Accordingly, it has never been "lawfully existing" such that a subsequent enactment, or reenactment for that matter, rendered it a Substandard Lot of Record. See Rathkopf, The Law of Zoning and Planning (4th ed. 2004, as amended) ("An owner who illegally subdivides a tract or creates a lot substandard in area, width, or frontage under the provisions of a zoning ordinance then in effect cannot successfully maintain a confiscation claim, however, and this rule is similarly applied to a later successor in title.") On this basis, this Court agrees with the Zoning Board's determination that the Property did not qualify for the exception for Substandard Lots of Record because it does not constitute a Substandard Lot of Record.

5.

Conclusion

Based upon the foregoing, the appeal from the decision of the Zoning Board of the Town of West Greenwich is affirmed.