STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: May 28, 2013)

JOHN AND SIOBHAN PETRELLA, SHARON FAHY, individually and in her Capacity as President of the Stone Towers Condominium Association, FRANK PARISI, CHARLES BRUCATO, GWEN O'CONNELL, REGINA DUGAN, JOSEPH KAFKA, DEBORAH SIEBRANDT, ROBB WEAVER, COLLEEN WEAVER, MIKE SPICER, FRANK D'ANTUANO, VATCHE GHAZARIAN, BARBARA GHAZARIAN, KEVIN O'CONNOR, JENNIFER O'CONNELL	:	
v.	:	**C.A. No. NC-09-0358**
THOMAS SILVEIRA, LUCY LEVADA, STEPHEN MacGILLIVRAY, PETER VAN STEEDEN, and THOMAS NEWMAN, in their capacities as members of the Zoning Board of Review of the Town of Middletown, BARRY McGOFF, WAIT 'N' SEA, LLC, BRM CO., INC., JEM CO., INC.	:	

DECISION

CLIFTON, J. Before the Court is an appeal from a decision (Decision) of the Zoning Board of Review of the Town of Middletown (Zoning Board), granting the applications for a special-use permit and dimensional variances. The applications were requested to allow for the renovation and enlargement of several residential buildings in Middletown, Rhode Island. Appellants, who are abutting landowners, now ask this Court to reverse the Zoning Board's Decision. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Appellees BRM Co., Inc. (BRM) and JEM Co. Inc. (JEM) own real estate located at 277 and 279 Allston Avenue and 5 Easton Terrace, legally described as lots 175, 176, 177, and 178, Tax Assessor's Plat 116NE (Property). (Tr. 4:3-16, May 12, 2009) Between the four lots, the Property contains twelve residential buildings comprising fourteen dwelling units: ten single-unit dwellings and two two-unit dwellings. (Ex. A-1 "Existing Conditions"; Tr. 12:23-25.) The fourteen units are distributed over lots 175, 176, 177, and 178, which are located in an R-10 zoning district that permits single-family uses by right and duplexes by special-use permit. See Middletown Zoning Ordinance (Ordinance) § 602; Decision at 1; Tr. 12:23-13:4. Significantly, one of the duplexes is located entirely on lot 175. See Ex. A-1 "Existing Conditions."

Constructed approximately in the 1940s, the Property was originally temporary Naval housing. (Tr. 52:21-23, 158:21-25.) Currently, the Property is rental housing, but the owners, along with Appellee-Applicant Wait 'n' Sea, LLC, wish to renovate the units and turn them into fourteen separate single-family condominiums. (Tr. 36:12-13.) The proposal called for the two two-unit buildings to be divided into four single-family dwellings and for each dwelling unit to grow vertically within its existing footprint, which in many cases is within the setback required by the Ordinance. (Decision at 2; Tr. 21:25-23:19.) To accomplish these changes, BRM and JEM, through Appellee Barry McGoff, and Wait 'n' Sea applied for a special-use permit and dimensional variances. (Decision at 1.) The Applicants needed a special-use permit pursuant to §§ 603 and 903 of the Ordinance because the number of proposed dwelling units, which equaled the number of existing units, albeit in two additional buildings, exceeded the number allowed under the Ordinance and was thus a nonconforming use. See id. at 1, 3-4; Tr. 9:1-6, 87:21-25.

The Applicants needed dimensional variances pursuant to §§ 803 and 902 of the Ordinance because the proposed buildings and their porches would be within the required setbacks; although the proposed units would be renovated within the footprint of the existing buildings, those footprints sit closer to the property line than is permitted. See Decision at 1-2, 4; Tr. 9:7-16.

The Zoning Board held a hearing on May 12, 2009, and heard testimony from several experts as well as from objectors, including some of the Appellants. (Decision at 1.) The witnesses who testified as experts were Eric Offenberg, Glenn Gardiner, and Paul Hogan. The Zoning Board also heard the lay testimony of Appellant Kevin O'Connor, Appellant Colleen Weaver, Appellant Sharon Fahy, Appellant John Petrella, and Thomas Darby. Id.

Mr. Offenberg testified as an expert in civil engineering. (Tr. 11:14-12:7.) In addition to testifying about the nature of the Property—such as the number of lots, the total size of the lots, the number of dwelling units, and how the units are divided among the lots—Mr. Offenberg testified that the Property is approximately 45% impervious because it is covered with either buildings or pavement. (Decision at 1-2; Tr. 12:23-13:23.) The impervious surfaces, Mr. Offenberg explained, have contributed to problems with storm water, which "sheet flows" across the pavement without any water quality treatment and accumulates in the collection system of an adjacent street. (Decision at 1-2; Tr. 13:24-16:2.) According to Mr. Offenberg's testimony, the proposed changes—by replacing impervious surfaces with gravel or grass surfaces and by improving the drainage of the surrounding area with the Town of Middletown's input—would be beneficial to the neighborhood. (Decision at 1-2; Tr. 16:13-26:8.) Additionally, Mr. Offenberg testified that the proposed changes would not increase the traffic burden; create any nuisance or hazard; be contrary to the public health, safety and welfare; or injure the appropriate use of

surrounding property. (Decision at 1-2; Tr. 24:14-26:8.)

Mr. Gardiner testified as an expert in architecture. (Decision at 2.) Mr. Gardiner had designed the proposed changes and testified that they were modest and were compatible with the surrounding area. Id. As it currently exists, Mr. Gardiner testified, the interior living space of nine of the dwelling units falls below the amount required by the Ordinance. (Decision at 2; Tr. 53:21-55:6.) The living space would be increased by adding one and one-half stories on top of the existing one-story structures. (Decision at 2.) The designs attempted to conform to the surrounding area in size and character by maintaining the existing footprints and by incorporating certain design features. Id. In Mr. Gardiner's opinion, the development would be compatible with the surrounding area. Id. Mr. Gardiner verified that the design required dimensional variances only because the buildings already sat within the required setbacks and said that any design that would provide the required living space, while complying with the requirements for a special-use permit, would require similar dimensional variances. Id.; Tr. 72:3-12.

Mr. Hogan testified as a real-estate expert. (Decision at 2, Tr. 87:4-9.) In addition to testifying generally about the proposed changes—the plan to convert fourteen rental units in twelve buildings, some of which do not meet setback requirements, into fourteen condominium units in fourteen separate buildings that are built within the existing buildings' footprints—Mr. Hogan testified about the impact on the neighborhood. (Decision at 2-3; Tr. 87:17-88:16, 90:1-22.) According to Mr. Hogan, the existing buildings were "the worst real estate in the neighborhood, as far as physical condition, appearance." (Tr. 90:1-4; see also Decision at 2.) Thus, according to Mr. Hogan, the changes to the Property would enhance the neighborhood by virtue of their improved condition. (Decision at 2; Tr. 90:4-10.) Additionally, converting the

dwellings from rental units to condominiums, he opined, would benefit the neighborhood because condominiums are both more likely to be owner-occupied and usually have fewer occupants per dwelling. (Decision at 2; Tr. 90:10-22, 93:22-94:21.) Mr. Hogan also testified that he believed the Applicants had sought the least relief necessary because the request was to expand vertically within the existing footprints; that the request was due to the unique nature of the property—the four lots contained several buildings, many of which were already within the setbacks—and that if dimensional relief was not granted, then the dwellings could not be made to conform to current requirements for living space, which would be more than a mere inconvenience. See Tr. 90:23-91:23. Mr. Hogan stated that the proposed changes were in compliance with the Middletown Comprehensive Community Plan (Comprehensive Plan) because the proposed development will provide higher-quality housing stock in Middletown. (Tr. 92:12-22.)

Appellant Kevin O'Connor, who lives in the area and opposes the petitions, first clarified the proposed size of each unit relative to the maximum allowed per dwelling in an R-10 zone. (Tr. 82:16-84:25.) He then said that, although he understood that the proposed size of each unit may have been smaller than the maximum allowed, he believed that the cumulative effect of fourteen buildings made the development too dense. (Decision at 3; Tr. 82:16-84:25.)

Appellant Colleen Weaver, who also lives nearby, asked about previous developments by these applicants and whether they were renovated or demolished and reconstructed, which she believed affected the Applicants' eligibility for a special-use permit. (Decision at 3; Tr. 125:9-127:24.) The Zoning Board informed Ms. Weaver that if the petitions were granted, the buildings may be demolished and reconstructed. (Decision at 3; Tr. 127:22-24.)

Appellant Sharon Fahy testified that, as the President of the adjacent Stone Towers

Condominium Association (Stone Towers) and an owner of a condo in that complex, she opposed the petitions for the reasons outlined in a letter to the Zoning Board. (Tr. 145:17-146:16.) Ms. Fahy restated the nature of her opposition: although Stone Towers supported reasonable development, the proposed changes increased the density of the Property too dramatically. (Tr. 147:3-20.)

Appellant John Petrella, who also owns a unit in Stone Towers, testified consistent with the letter opposing the petitions that he had sent the Zoning Board. (Tr. 149:15-151:18.) Mr. Petrella opposed the petitions because the increased height of the buildings on the Property would interfere with his water view. (Decision at 3; Tr. 149:15-151:18.)[1]

At the conclusion of the May 12, 2009 hearing, the Zoning Board voted unanimously to approve the petition for a special-use permit and the petition for dimensional variances, subject to certain conditions. (Tr. 152:19-159:7.) The Zoning Board approved the requested fourteen units in fourteen buildings, compared to the current fourteen units in twelve buildings, but it conditioned the approval on Applicants having all of the interior lot lines eliminated, which would make the Property a single lot, and limiting to three the number of three-bedroom units. (Tr. 153:8-24, 157:6-9, 157:11-15, 159:3-7.) The Zoning Board issued a written Decision on June 24, 2009, granting the petitions. On July 9, 2009, Appellants filed a timely appeal to this Court.[2]

[1] The Zoning Board also heard from Tom Darby, who believed that the Zoning Board should solicit the opinion of other town departments, which the Zoning Board explained was not necessary. (Decision at 3; Tr. 117:2-119:6.)

[2] While the appeal was pending, Mr. McGoff filed a Motion for Priority Assignment pursuant to G.L. 1956 § 9-2-18, which provides for the acceleration of matters involving a party over the age of sixty-five. That Motion was granted.

II

Standard of Review

In reviewing the decision of a zoning board of review, the Superior Court is bound by subsection (d) of section 45-24-69 and "shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact." Sec. 45-24-69(d). "The 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 reviewing questions of fact, 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)). "'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 v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). 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)).

The Superior Court, however, reviews issues of law de novo. See Pawtucket Transfer Operations, 944 A.2d at 859. The Court "'determine[s] what the law is and its applicability to the facts.'" Id. (quoting Gott v. Norberg, 417 A.2d 1352, 1361 (R.I. 1980)). In determining the law, "[i]t is well settled that 'the rules of statutory construction apply equally to the construction of an ordinance.'" Id. (quoting Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981)). Therefore, an ordinance's clear and unambiguous language is given its plain and ordinary meaning. See id. (citing Park v. Rizzo Ford, Inc., 893 A.2d 216, 221 (R.I. 2006)). Unclear or ambiguous ordinances are interpreted to "'establish[] and effectuate[] the legislative intent behind the enactment.'" Id. (quoting State v. Fritz, 801 A.2d 679, 682 (R.I. 2002)).

III

Analysis

Appellants challenge the Zoning Board's Decision on the basis that the current use is nonconforming and the proposed use continues or enlarges that nonconformity. Additionally, Appellants argue, regarding the dimensional variance, that any hardship of Petitioners is self-created and that Petitioners cannot demonstrate that the failure to grant the application would amount to more than a mere inconvenience.

A

Availability of Relief Sought

Applicants have sought both a special-use permit and a dimensional variance because the Property is nonconforming by use—it has too many dwelling units—and nonconforming by

dimension—some of the buildings are within the setbacks.[3] Appellants argue that nonconforming uses are disfavored and should be ended.

As an initial matter, in this State, for a petitioner to obtain a special-use permit with a dimensional variance, the municipality's zoning ordinance must specifically provide that the two forms of relief may be granted together. See §§ 45-24-42(c), -41(d)(2); Lloyd v. Zoning Bd. of Review, 62 A.3d 1078, 1087 (R.I. 2013). Although the Supreme Court had said that "'a dimensional variance [may] be granted only in connection with the enjoyment of a legally permitted beneficial use, [and] not in conjunction with a use granted by special permit,'" the statutory sections dealing with such situations were amended. See Lloyd, 62 A.3d at 1087 (quoting Newton v. Zoning Bd. of Review, 713 A.2d 239, 242 (R.I. 1998)) (citing §§ 45-24-42(c), -41(d)(2)). In 2002, the Legislature enacted changes that permit a zoning board to grant one or more dimensional variances in conjunction with a special-use permit, as long as the municipality's zoning ordinance allows such combined relief. P.L. 2002, ch. 197. Section 45-24-42(c) now provides that "[t]he ordinance additionally may provide that an applicant may apply for, and be issued, a dimensional variance in conjunction with a special use," and § 45-24-41(d)(2) now provides that "[t]he zoning board of review has the power to grant dimensional variances where the use is permitted by special use permit if provided for in the special use permit sections of the zoning ordinance." Secs. 45-24-42(c), -41(d)(2). Middletown's Zoning Ordinance provides in § 902(B) that "[i]n granting a special use permit, the Zoning Board of Review may grant one or more dimensional variances under § 903." Thus, the Ordinance allows dimensional variances to be granted in conjunction with a special-use permit.

[3] There are two types of nonconformance: nonconforming by use, a use that "is not a permitted use in that zoning district," and nonconforming by dimension, "[a] building, structure or parcel of land not in compliance with the dimensional regulations of this chapter." Ordinance § 400.

The Ordinance defines "[n]onconformance" as "[a] building, structure, or parcel of land, or use thereof, lawfully existing at the time of the adoption of this chapter and not in conformity with the provisions of this chapter or amendment." Ordinance § 400. The Ordinance further defines "[n]onconformance by use" as "[a] lawfully established use of land, building or structure which is not a permitted use in that zoning district. A building or structure containing more dwelling units than are permitted by the use regulations of a zoning ordinance shall be nonconforming by use." Id. The Ordinance indicates which uses are permitted, which uses are prohibited, and which uses require a special-use permit; uses that require special-use permits are not permitted but are instead "conditionally permitted." See id. § 602; Ne. Corp. v. Zoning Bd. of Review, 534 A.2d 603, 604 (R.I. 1987). Thus, a use that preexisted zoning regulations is protected as a legal nonconforming use even if it is now prohibited or only conditionally permitted. See RICO Corp. v. Town of Exeter, 787 A.2d 1136, 1144 (R.I. 2001) ("A nonconforming use is a particular use of property that does not conform to the zoning restrictions applicable to that property but which use is protected because it existed lawfully before the effective date of the enactment of the zoning restrictions and has continued unabated since then.").

Article 8 of the Ordinance addresses nonconforming uses. See §§ 801-06. Section 803(A) provides that "[a] legal nonconforming use may not be added to, extended or enlarged without first receiving a special-use permit from the Zoning Board of Review in accordance with Article 9 of this Ordinance," while § 803(B) provides that if an alteration to a nonconforming use "diminishes the extent of its nonconformity," then a special-use permit is not necessary. These provisions are consistent with § 45-24-40, which provides that a town's zoning ordinance may permit the alteration of a "nonconforming development" either by "special-use permit,

authorizing the alteration," or by "allow[ing] the addition and enlargement, expansion, intensification, or change in use . . . by permit or by right."[4]

A change of a nonconforming use is treated differently. See Ordinance § 804; Harmel Corp. v. Members of Zoning Bd. of Review, 603 A.2d 303, 305 (R.I. 1992). In Harmel Corp., 603 A.2d at 306 (quoting Jones v. Rommell, 521 A.2d 543, 545 (R.I. 1987), the Supreme Court explained that "'[a] change of use eliminates the exemption of a nonconforming use from recently enacted zoning ordinances.'" There is no "hard and fast rule as to what constitutes a simple extension of an existing nonconforming use and what is a change of that use." Santoro v. Zoning Bd. of Review, 93 R.I. 68, 71, 171 A.2d 75, 77 (1961). "An extension of a nonconforming use may be of such proportions as to amount to a change in use." Id., 171 A.2d at 77 (citing 2 Rathkopf, Rathkopf's The Law of Zoning and Planning chapter 59-1 (1960)). The Ordinance provides that "[a] legal nonconforming use shall not be changed to another nonconforming use but may be changed to a use conforming to the provisions of this chapter." Sec. 804.

Here, the two-family dwelling that sits on lot 175 is a nonconforming use. The use existed prior to the zoning regulations, and a two-family dwelling, defined in the Ordinance as "[a] building used exclusively for occupancy by two families living independently of each other," is conditionally permitted in an R-10 zone and requires a special-use permit. See Ordinance §§ 400, 602; Ex. A-1 "Existing Conditions." The issue of whether the use of lot 175

[4] Thus, while it is true that nonconforming uses generally are disfavored, see 4 Arden H. Rathkopf & Daren A. Rathkopf, Rathkopf's the Law of Zoning and Planning § 73:8 (2005), this statute "authorizes cities and towns to adopt ordinances that allow the alteration of nonconforming developments by special-use permit, by permit, or by right," which Middletown has chosen to do. See Cohen v. Duncan, 970 A.2d 550, 563 (R.I. 2009) (citing § 45-24-40). Middletown has chosen to permit additions to or extensions or enlargements of nonconforming uses but to prohibit changes to nonconforming uses. See Ordinance §§ 803, 804.

was changing was discussed at the hearing. See Tr. 26:18-32:22; 138:6-143:8. According to the Decision, the Zoning Board's approval was conditioned on Applicants' merging lots 175, 176, 177, and 178, resulting in fourteen units on a single lot. (Decision at 3.) The Zoning Board was apparently under the impression that the removal of the lot lines would avoid the problem of changing the use of lot 175 from one nonconforming use to another. See Tr. 138:6-143:8. Specifically, during a part of the Zoning Board's discussion in which one member wondered whether the use of lot 175 was changing from one nonconforming use, a two-family dwelling, to another nonconforming use, two separate residences, the member was told by the building official that "the answer to that is that as part of this Application, they have already indicated that they are going to extinguish those lot lines, so it becomes part of the entire request. I mean, it's altering the nonconforming use. You're back to that again." (Tr. 138:22-139-2.) Additionally, another member of the Zoning Board pointed out that the elimination of the lot lines was "not an assumption as a consequence of the decision" but was instead "a condition that [the Zoning Board] would put on the decision." (Tr. 141:9-13.) Although the skeptical board member said that he thought the proposal was "a change from one nonconforming use to another," and that there would be "problems with that one as to [section] 804," the Decision indicates that all five members voted to grant the application. See Tr. 142:19-22; Decision at 4. Importantly the Decision did not include findings of fact or conclusions of law relative to the Zoning Board's determination of whether the use of any lot was changing from one nonconforming use to another, which is prohibited by the Ordinance. See Ordinance § 804; Decision 1-4.

A zoning board must "include . . . all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote." Sec. 45-24-61(a). Such findings of fact allow a reviewing court to decide "'whether the board members

resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles.'" Bernuth v. Zoning Bd. of Review, 770 A.2d 396, 401 (R.I. 2001) (quoting Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986)). A zoning board's "'findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany.'" Bernuth, 770 A.2d at 401 (quoting Irish P'ship, 518 A.2d at 358-59). Unless "'[t]hese minimal requirements . . . are satisfied, a judicial review of a board's work is impossible.'" Id. (quoting Irish P'ship, 518 A.2d at 358-59).

Although the Zoning Board may have concluded that the proposed use constitutes a mere extension or alteration of the nonconforming use, the Decision does not factually or legally address this issue. Specifically, the Decision does not reveal the Zoning Board's assessment of whether lot 175's conversion from a two-family dwelling to two single-family dwellings may contravene § 702 of the Ordinance prohibiting multiple principal uses on a single lot or whether the inclusion of fourteen units on a single, combined lot is a change from its current nonconforming use to a multifamily dwelling project. See § 400. A multifamily dwelling project is defined as

> "A large-scale complex of two or more multifamily dwelling structures, or three of more single-family or two-family buildings containing a total of more than five dwelling units, upon a single lot, which are planned, developed and managed as a unit, with required open space and accessory uses. . . . Residential use may be for rental apartments, condominiums or time-share estates."

Ordinance § 400. A multifamily dwelling project is prohibited in an R-10 zone, see § 602, so this use of the merged lot may constitute a nonconforming use different from the nonconforming use currently in existence on lot 175.

IV

Conclusion

After review of the entire record, this Court finds that in granting the requested relief, the Zoning Board failed to make adequate findings of fact and conclusions of law related to the nature of the change of the nonconforming use. Accordingly, this case shall be remanded to the Zoning Board for sufficient findings of fact and conclusions of law regarding why the proposed use constitutes an addition to or extension or enlargement of a nonconforming use, rather than a change in use. This Court shall retain jurisdiction. Counsel for the Applicants shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: John and Siobhan Petrella, et al. v. Thomas Silveira, et al.

CASE NO: NC-09-0358

COURT: Newport Superior Court

DATE DECISION FILED: May 28, 2013

JUSTICE/MAGISTRATE: Clifton, J.

ATTORNEYS:

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