STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: MARCH 22, 2012)

LAUREL K. BRISTOW	:	
	:	
V.	:	**C.A. No.: WC 11-0508**
	:	
KENYON TERRACE APARTMENTS, INC., OPPORTUNITIES UNLIMITED, and the PLANNING BOARD FOR THE TOWN OF SOUTH KIMGSTOWN, RHODE ISLAND	:	

DECISION

CLIFTON, J. Before this Court is an appeal by Laurel K. Bristow ("Appellant") of a decision by the South Kingstown Planning Board ("Planning Board"), granting an approval of a comprehensive permit application submitted by Kenyon Terrace Apartments, Inc. ("Kenyon") pursuant to the Rhode Island Low and Moderate Income Housing Act, G.L. 1956 §45-53-1, et seq. ("Act"). For the reasons set forth herein, this Court remands this matter to the South Kingstown Planning Board for further proceedings consistent with this opinion.

I
Facts and Travel

On December 13, 2010, Opportunities Unlimited for People with Differing Abilities ("Opportunities Unlimited") and Kenyon Terrace Apartments, Inc. (collectively "Applicant")[1] filed in the Town of South Kingstown ("Town") their application for a Comprehensive Permit

[1] Kenyon is a Rhode Island non-profit corporation and has entered into a purchase and sale agreement with the State of Rhode Island to purchase the property designed as Lot 199 of Assessor' Plat 57-4, commonly known as 327 Kenyon Avenue, Wakefield, Rhode Island. Opportunities Unlimited is a Rhode Island Corporation with interest in Kenyon. The Application lists Kenyon as the applicant; however, the Planning Board's Decision recorded on July 13, 2011, lists Opportunities Unlimited as the applicant, but addresses the Decision to Kenyon.

("application") to convert the property located at 327 Kenyon Avenue in Wakefield, Rhode Island ("Premises"), also identified as Lot 199 of Assessor's Plat 57-4, from a single family home to a six-unit apartment complex. In its application, the Applicant sought to modify the main building from a fourteen-occupant group home to 3 one-bedroom and 1 two-bedroom apartment units. The Applicant also sought to modify an existing accessory building from 1 two-bedroom unit to 2 one-bedroom apartment units. (Appellant's Ex. 7.)

The house on the Premises is a single-family home built in 1898, on a lot approximately one half acre (.515) in size, situated in a Residential 10 (R-10) Zone. The lot fronts Kenyon Avenue. One side of the lot is bordered by Elm Street, which is a small one-way street with traffic entering from Kenyon Avenue and traveling in an easterly direction. The other side of the lot is bordered by Pine Street, a small one-way street with a traffic emptying into Kenyon Avenue.

Sometime around 1973, the State of Rhode Island took title to the Premises and used it as a Group Home for six to nine adult residents with developmental disabilities for over thirty years. The residents were serviced by a support staff twenty-four hours per day. However, no staff resided on the Premises.

Thereafter around 2001, the State of Rhode Island, without the Town's approval, converted the existing garage to a two-bedroom apartment for two of the group home's residents. In March of 2008, the State of Rhode Island closed the group home. Consequently, the Perspectives Corporation[2] provided intermittent custodial care of the premises in order to ensure its integrity. However, there have been no other residents on the premises since its closure.

On July 30, 2010, the United States Department of Housing and Urban Development ("HUD") awarded the Applicant a monetary commitment in the amount of $934,500 to

[2] The Perspectives Corporation is not affiliated with either of the applicants.

"rehabilitate an independent living project consisting of 5 one-bedroom and 1 two bedroom units for 6 persons with multiple disabilities under the Section 811 Supportive Housing for Persons with Disabilities Program . . . ." (Appellant's Ex. 5.) Consequently, the Applicant filed its application for a Comprehensive Permit and requested density relief, indicating that the current zoning would allow two residential units and seeking authority to construct six units. (Pl's Ex. 7 at 3.) Applicant also requested parking relief from the required twelve spaces to five parking spaces. Id. Additionally, Applicant sought relief from "Landscaping per Subdivision Regulations" and a waiver of Sewer Tie-In Fee with regard to the accessory building. Id.

Upon reviewing Applicant's application, the Planning Board issued a certificate of completeness on February 8, 2011. The Public Hearing began on February 8, 2011 and was concluded on June 14, 2011. (Planning Board's Decision at 1.) The Planning Board held public hearings on February 8, 2011; May 10, 2011; and June 14, 2011. The neighboring property owners, including Appellant, expressed concerns with regard to the potential traffic impacts of the proposed project and the safety issues related to site ingress and egress. The opposing neighbors also raised concerns regarding the adequacy of the proposed relief of on-site parking requirements and public safety concerns relating to vehicular and pedestrian traffic. (Planning Board's Decision at 3.) Consequently, at its February 8, 2011 meeting, the Planning Board referred the project to the Town's Transportation and Traffic Review Committee ("TTRC") for review and comment.

TTRC reviewed the project and requested the applicant prepare a formal traffic study for further consideration by TTRC. The TTRC conducted a meeting on April 21, 2011, for review and discussion of a Traffic Impact Assessment ("TIA") prepared by Commonwealth Engineers on behalf of the Applicant. In its recommendation dated May 6, 2011, the TTRC opined that

"the project would have little to no impact on the Average Annual Daily Traffic volume of vehicles per day for the roadways in the study area including Kenyon Avenue, Pine Street, Elm Street, and Main Street." (Planning Board's Decision at 4.) TTRC also noted that the traffic sight distance required for the project, and presented by the Commonwealth Engineers was met or exceeded. However, the neighboring residents strongly disagreed with that determination. Consequently, Commonwealth Engineers issued a series of corrections to the TIA, by which they revised the sight distances and reduced it from 280 feet to 155 feet. These corrections were reported to the Planning Board at its May 10, 2011 meeting.

At the May 10, 2011, Planning Board meeting, the applicant acknowledged that its prior representation concerning the number of residents of the former group home was incorrect. The Applicant explained that the maximum number of residents was nine. The Applicant also clarified that its prior experience was in managing a single-family residence with two to four residents. During the Planning Board's meeting of June 14, 2011, a peer review of the TIA, prepared by Commonwealth Engineers, was presented. The peer review was prepared by Bryant Associates and noted minor errors, questions on methodology, and disagreements with the content of the TIA.

Accordingly, on July 13, 2011, the Planning Board issued its written decision, granting the Applicant the Comprehensive Permit. (Planning Board's Decision at 1.) The Planning Board granted the requested density relief and allowed the conversion of the existing buildings into a six-unit apartment complex and a small office in the main building. The Planning Board also granted the Appellant's request of reduction of the on-site parking space requirements. The proposed plan included ten parking spaces, which is three fewer than the minimum requirement. The Appellant filed a timely appeal on August 2, 2011.

II
Standard of Review

Under the Act "[a]ny person aggrieved by the issuance of an approval may appeal to the superior court within twenty (20) days of the issuance of approval." Sec. 45-53-4(a)(4)(x). Although the Act is silent as to the standard of review to be applied in such an appeal, our Supreme Court explained that the "standard of review is analogous to that applied by the Superior Court in considering appeals from local zoning boards of review pursuant to G.L. 1956 § 45-24-69, as enacted by P.L. 1991, ch. 307, § 1." Curran v. Church Community Housing Corp., 672 A.2d 453, 454 (R.I. 1996). Section 45-24-69(d) provides:

> " The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
>
> (1) In violation of constitutional, statutory, or ordinance provisions;
> (2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

This Court "reviews the decisions of a . . . board of review under the 'traditional judicial review' standard applicable to administrative agency actions." Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998). When reviewing a decision of a zoning board, 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, 672 A.2d at 454 (quoting § 45-24-69(d)). The deferential standard applied by

this Court to the Zoning Board's decisions is due to the fact "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." Monforte v. Zoning Bd. of Review of East Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962).

The trial justice's review is limited to "an examination of the certified record to determine if there is any legally competent evidence therein to support the agency's decision." Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 804-05 (R.I. 2000) (quoting Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)). Our Supreme Court defines legally competent or substantial evidence as one which "a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." Newport Shipyard v. R.I. Comm'n for Human Rights, 484 A.2d 893, 897 (R.I. 1984) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)).

It is well settled that:

> "a municipal board, when acting in a quasi-judicial capacity, must set forth in its decision findings of fact and reasons for the actions taken. Such findings are necessary so that zoning board decisions 'may be susceptible of judicial review.' 'Those 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.' Finally, when the zoning board 'fails to state findings of fact, the [C]ourt will not search the record for supporting evidence or decide for itself what is proper in the circumstances.'" Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005) (internal quotation omitted).

Questions of law are not binding upon this Court and the trial justice conducts a de novo review. Narragansett Wire Co. v. Norberg, 118 R.I. 596, 607, 376 A.2d 1, 6 (R.I. 1977); Bunch v. Bd. of Review, R.I. Dep't of Empl. & Training, 690 A.2d 335, 337 (R.I. 1997). Consequently,

this Court may remand the case for further proceedings or potentially vacate the decision of the Board if it is "clearly erroneous in view of the reliable, probative and substantial evidence of the whole record." Bernuth v. Zoning Board of Review of New Shoreham, 770 A.2d 396, 399 (R.I. 2001).

III

Analysis

Appellant presents several arguments on appeal. Appellant argues that the Planning Board exceeded its authority by granting the Applicant a density bonus in direct violation of that permitted by the Town's Comprehensive Plan. The Appellant also contends that the Planning Board granted the application based on an error of law regarding the conversion of the garage to a 1 two-bedroom apartment. The Appellant further argues that the Planning Board made insufficient findings of fact to support its approval of the application. Next, Appellant asserts that the Planning Board based its decision on false and misleading testimony by the Applicant as to the prior use of the premises, the prior experience of the Applicant in dealing with this type of development, and Applicant's knowledge with respect to the ownership of the vehicles by the population that would be eligible to reside on the premises over the next ninety-nine years, resulting in decision that was clearly erroneous and/or arbitrary and capricious. Lastly, Appellant maintains that the Planning Board based its decision on evidence provided by Commonwealth Engineering, which was so error-filled as to be without evidentiary value, resulting in a decision that was clearly erroneous and/or arbitrary and capricious.

Alternatively, the Applicant argues that the Planning Board had no grounds for denying the application. Furthermore, Applicant contends that even if the Planning Board had a ground to deny the application, the Planning Board has the discretion to grant or reject the application.

The Applicant further maintains that the Planning Board did not err with regard to the density issue and to the use of the garage. Moreover, Applicant contends that the Planning Board made sufficient findings of fact and that Appellant's interpretation of the evidence is irrelevant.

A

The Rhode Island Low and Moderate Income Housing Act

In 1991, in order to address "the acute shortage of affordable, accessible, safe, and sanitary housing for . . . [Rhode Island] citizens of low and moderate income," the General Assembly passed the Low and Moderate Income Housing Act. Sec. 45-53-2. That Act noted: it is "imperative that action is taken immediately" by "each city and town [to] provide opportunities for the establishment of low and moderate low income housing." Sec. 45-53-2. The goal set by the Act, for the majority of the municipalities, is that at least ten percent of the year-round housing units consist of low and moderate income housing. Sec. 45-53-3(4)(i).

The Act provides for a streamlined and expedited application procedure whereby a single application for a comprehensive permit is filed with the local review board in lieu of separate applications to the applicable local boards. Sec. 45-53-4. The Act empowers the local review board, in this case, the Planning Board, to make all decisions that would ordinarily be considered by various boards and officials when faced with a development not involving low and moderate income housing. Id. However, when a local board approves a comprehensive permit application, there is no intermediate review, and an "aggrieved party" may immediately appeal directly to this Court for review. Sec. 45-53-4(a)(4)(x).

B

Adequacy of the Planning Board's Findings

As a threshold matter, this Court will consider Appellant's contention that the Planning Board failed to adequately set forth sufficient factual findings to support its approval of the Comprehensive Permit. Specifically, Appellant asserts that findings of fact three through nine, with the exception of number seven, merely echo the language of § 45-53-4(v)(A)-(G). Appellant further contends that the Planning Board failed to point to any evidence, supporting its finding that the project is consistent with local needs and that there is no factual finding with respect to the status of low or moderate income housing available to special needs citizens within the town. The Appellant also alleges that under the Town's Affordable Housing Plan, a target of twenty housing units for special needs population was proposed over a ten year period; however, according to the Appellant, there are currently nineteen housing units that are in place or have obtained approvals. Therefore, the Appellant maintains, the Planning Board did not provide competent evidence to support granting the requested density bonus.

It is well settled under Rhode Island law that this Court "shall not substitute its judgment for that of the [planning board] as to the weight of the evidence on questions of fact." Sec. 45-24-69. "This deferential standard of review, however, is contingent upon sufficient findings of fact by the zoning board." Kaveny, 875 A.2d at 8. The Planning Board's findings, together with its reasons for the actions taken, are essential to proper judicial review of any appealed matters. Bernuth, 770 A.2d at 401. However, "[t]hose 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." Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986). Thus, when the record is devoid of findings of fact, or findings of fact are inadequate, judicial review becomes

impossible, and this Court "will not search the record for supporting evidence or decide for itself what is proper in the circumstances." Kaveny, 875 A.2d at 8 (citations omitted).

Section 45-53-4(a)(4)(v), which governs a local board's findings regarding its approval of a comprehensive permit, provides:

> "(v) *Required findings.* In approving on an application, the local review board shall make positive findings, supported by legally competent evidence on the record which discloses the nature and character of the observations upon which the fact finders acted, on each of the following standard provisions, where applicable:
>
> (A) The proposed development is consistent with local needs as identified in the local comprehensive community plan with particular emphasis on the community's affordable housing plan and/or has satisfactorily addressed the issues where there may be inconsistencies.
>
> (B) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance and subdivision regulations, and/or where expressly varied or waived local concerns that have been affected by the relief granted do not outweigh the state and local need for low and moderate income housing.
>
> (C) All low and moderate income housing units proposed are integrated throughout the development; are compatible in scale and architectural style to the market rate units within the project; and will be built and occupied prior to, or simultaneous with the construction and occupancy of any market rate units.
>
> (D) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval.
>
> (E) There will be no significant negative impacts on the health and safety of current or future residents of the community, in areas including, but not limited to, safe circulation of pedestrian and vehicular traffic, provision of emergency services, sewerage disposal, availability of potable water, adequate surface water run-off, and the preservation of natural, historical or cultural features that contribute to the attractiveness of the community.
>
> (F) All proposed land developments and all subdivisions lots will have adequate and permanent physical access to a public street in accordance with the requirements of § 45-23-60(5).
>
> (G) The proposed development will not result in the creation of individual lots with any physical constraints to development that building on those lots according to pertinent regulations and

> building standards would be impracticable, unless created only as permanent open space or permanently reserved for a public purpose on the approved, recorded plans."

Section 45-53-4(a)(4)(v) makes clear that in approving such a Comprehensive Plan, the reviewing board "***shall*** make positive finding . . . ." (Emphasis added.) It is well settled that "shall" is a mandatory condition. See Downey v. Carcieri, 996 A.2d 1144, 1151 (R.I. 2010) ("It is an axiomatic principle of statutory construction that the use of the term "may" denotes a permissive, rather than an imperative, condition."); see also Quality Court Condominium Association v. Quality Hill Development Corp., 641 A.2d 746, 751 (R.I. 1994) ("[T]he use of the word 'may' rather than the word 'shall' indicates a discretionary rather than a mandatory provision."). Thus the Act requires the Planning Board to make positive findings.

Here, in granting the Applicant's request for Comprehensive Permit, the Planning Board found in relevant part:

> "3. The Planning Board finds that the proposed development is consistent with local needs as the term is defined in Rhode Island General Laws Title 45, Chapter 53 and as identified in the South Kingstown Comprehensive Community Plan and the South Kingstown Affordable Housing Production Plan and will help to address the needs for affordable housing within the community, particularly for *citizens with disability*." (Planning Board's Decision at 2.) (Emphases added.)

This finding of fact does not amount to anything more than a mere conclusory statement or a "recital of a litany," preventing a meaningful judicial review of the Planning Board's decision. Bernuth, 770 A.2d at 401 (quoting Irish P'ship, 518 A.2d at 358-59). Here, the Planning Board failed to point to the particular needs of the citizens with disabilities. See Kaveny, 875 A.2d at 8 (In its written decision, the Planning Board, must articulate the specific evidence upon which it relied in making its findings). Although, the Planning Board further explained the following—

> "4. The Planning Board finds that the proposed development is in compliance with the standards and provisions of the South Kingstown Zoning Ordinance and Subdivision and Land Development Regulations, and/or expressly varied or waived below, local concerns that have been affected by the relief granted do not outweigh the state and local need for low and moderate income housing.
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> . . . .
>
> 15. The Planning Board finds that the proposed development is reasonable when the number of low income persons accommodated is considered. All six (6) proposed units are to be restricted for rental to very low income individuals/households with special needs and that all the units shall be subsidized.
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> . . .
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> 27. According to the Rhode Island Housing data for 2010, the Town of South Kingstown has 5.93% of its housing stock which qualifies as low and moderate income housing and thus has not met the 10% goal set forth in R.I.G.L. 45-53." (Planning Board's Decision at 2, 3, 5.)

—the Planning Board failed to demonstrate what the interrelationship between the low and moderate income housing and the housing provided for persons with disability is according to the Town's Comprehensive Plan is.

Furthermore, the Planning Board found that:

> 17. The Planning Board finds that the project design provides an efficient reuse of the existing structure, provides safe and affordable housing to a *vulnerable segment* of the population and that the proposed site improvements are functionally supportive of the project and do not detract from the overall site or neighborhood aesthetics." (Planning Board's Decision at 3.) (Emphasis added.)

However, it is unclear how the term, "vulnerable segment" of the population, is defined by the Planning Board or the Town's Comprehensive Plan.

The Planning Board also explained that:

> "20. The Planning Board finds *the testimony of the applicant relevant* to the project's target population vehicle ownership and driving characteristics to be consistent with other approved HUD Section 811 projects in South Kingstown as well as the overall experience of the Rhode Island Department of Behavioral Healthcare, Developmental Disabilities and Hospitals (BHDDH) as testified to by Dr. Craig Stenning, director of BHDDH.
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> . . .
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> 25. . . . The Planning Board finds that that the ten (10) parking spaces proposed are adequate to serve the project's needs based on *the experience and testimony* of the applicant and other healthcare, housing and support services professionals involved in providing housing for this special needs population." (Planning Board's Decision at 3, 5) (emphasis added).

However, it is well settled that the Planning Board, in its written decision, must articulate the specific evidence upon which it relied in making its findings. See Kaveny, 875 A.2d at 8; see also Sciaccia v. Caruso, 769 A.2d 578, 585 (R.I. 2000). Although, here, the Planning Board expressed that it found the testimony and experience of the applicant relevant, it failed to specify exactly which testimony and experience it found relevant.

Absent the necessary specification of supporting evidence relied on by the Planning Board, this Court is unable to determine what evidence persuaded the Planning Board that the request for relief met the statutory requirements. Where a planning board does not set forth in its decision findings of fact and reasons for the action taken, this Court will not look to the record, even if substantial evidence in the record would support the Planning Board's ultimate conclusions. Kaveny, 875 A.2d at 8; see also Sciacca, 769 A.2d at 585. The Decision reveals that the Planning Board failed to address what specific evidence led to its findings stated above.

After careful review of the Planning Board's written decision, this Court finds that the Board failed to make sufficient findings of fact. It is inherent in the power of this Court to order a remand to the administrative agency to "correct deficiencies in the record and thus afford the

litigants a meaningful review." Birchwood Realty, Inc. v. Grant, 627 A.2d 827, 834 (R.I. 1993) (quoting Lemoine v. Dep't of Mental Health, Retardation, & Hospitals, 113 R.I. 285, 290, 320 A.2d 611, 614 (1974)). Accordingly, this Court must remand the case to the Planning Board for further proceedings consistent with this opinion. On remand, the Board is directed to adequately set forth each of its findings of fact, address the specific evidence that led the Planning Board to approve the Comprehensive Permit, and to relate those findings to the applicable law. Kaveny, 875 A.2d at 9; see also Sciacca, 769 A.2d at 585.

CONCLUSION

Upon review of the record before it, this Court finds that the Planning Board's findings of fact amounted to unsupported conclusions. This matter is remanded to the Planning Board, so that it may make sufficient findings of fact consistent with this opinion. This Court will retain Jurisdiction. Counsel shall submit the appropriate order for entry.