STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 21, 2013)

ROBERT STANTON & SYLVIE SNOW	:	
	:	
V.	:	**C.A. No. PC 11-4105**
	:	
JOHN McCOY, CARL ZOUBRA, TARA CAPUANO, ROBERT CHAPUT, EDMUND M. McGRATH, KIMBERLY HAWTHORNE, and RICHARD C. BARRETT, in their capacity as Members of the Zoning Board of Review of the Town of Cumberland, State of Rhode Island	:	

DECISION

PROCACCINI, J. Robert Stanton (Stanton) and intervenors Raymond and Diane Papineau (the Papineaus) are before this Court seeking clarification of this Court's January 2, 2013 decision (the Decision) vacating and remanding the denial of Stanton's application for a special use permit by the Zoning Board of Review of the Town of Cumberland (the Board).

I

Facts and Travel

This case first came before the Court on an appeal from the Board's denial of Stanton's application for a special use permit. Stanton had applied for the permit in order to operate a dog and cat daycare/boarding facility on his property. The property was zoned for agricultural use and a kennel was a permitted use on the property with a special

use permit. See Cumberland Code of Ordinances, Part II, Appendix B, §§ 3-1(b), 4-4, Use Code 61. Stanton testified regarding the extensive measures he took to prevent any issue with the noise generated by barking dogs, including: construction of a new building; plans to keep all animals inside at night and to move any barking animals inside; contracting with a waste removal company for weekly waste removal; soundproofing of the building; and the hiring of a dog behaviorist to train his family and their staff. Abutting landowners offered only their personal concerns about the noise of barking dogs, the possibility of the neighborhood becoming a business district, and the increase in traffic. The Board denied the application on the grounds that the noise issue constituted a change in the general character of the neighborhood. See Cumberland Code of Ordinances, Part II, Appendix B, §18-3(a)(3) (requiring the Board to find that granting the special use permit would not alter the "general character of the surrounding area").

On appeal, this Court vacated the Board's decision and remanded the case, finding that the Board's denial of the special use permit was clearly erroneous in view of the reliable, probative and substantial evidence on the record, and was arbitrary, capricious, and characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. See G.L. 1956 § 45-24-69(d)(5)-(6); Stanton v. McCoy et al., No. 11-4105, Jan. 2, 2013, Procaccini, J. at 17. The Court declined to determine whether, if the special use permit were granted, it would be limited to only ten dogs under the terms of Cumberland Code of Ordinances, Part II, §§ 4-36, 4-178, as this issue had not been addressed by the Board and, consequently, was not properly before the Court. See Stanton, No. 11-4105 at 16-17. The facts surrounding Stanton's application for a special

use permit, the Board's denial, and the subsequent appeal to this Court are provided in more detail in this Court's January 2013 Decision.

Since the Decision was issued, the Papineaus have filed a Motion to Intervene in this case, which was granted on May 1, 2013. Both Stanton and the Papineaus then filed memoranda regarding their request for clarification. The confusion is over whether the Board should conduct a de novo hearing on remand, or whether the Decision of this Court entitled Stanton to a special use permit and only requires the Board to address whether there is any limit placed on that permit.

The Papineaus argue that the Decision vacated and remanded the Board's denial of the special use permit but did not grant a special use permit and, as such, a de novo review on remand was what this Court ordered. Additionally, the Papineaus point out that the membership of the Board has changed since its first decision on Stanton's application. According to the Papineaus, this change necessitates a de novo review. On the other hand, Stanton argues that the language of the Decision indicates that the Court felt he had done everything one could do to ensure that his dog and cat daycare/boarding facility would not change the general character of the neighborhood. Thus, according to Stanton, by vacating the Board's decision this Court granted his application for a special use permit. Stanton contends that the issue on remand is limited to whether his proposed use fits the definition of a kennel and thus, is limited to ten dogs under Cumberland Code of Ordinances, Part II, §§ 4-36, 4-178.

II

Standard of Review

It is unclear from the parties' memoranda in what procedural posture they are seeking clarification of the Court's Decision. As such, this Court will treat this as a Motion for Clarification of its previous Decision. See Sch. Comm. of City of Cranston v. Bergin-Andrews, 984 A.2d 629, 649 (R.I. 2009) (stating that a Court should "'look to substance, not labels'") (quoting Sarni v. Meloccaro, 113 R.I. 630, 636, 324 A.2d 648, 651 (1974)); see, e.g., Gagnon v. State, 570 A.2d 656, 658 (1990) (discussing a trial justice's decision on a motion for clarification asking for a determination on whether a motion to dismiss was granted pursuant to Rule 12(b)(6) or Rule 56).

III

Analysis

Initially, the Court must address the Papineaus' contention that there was a change in the membership of the Board and that this change necessitates a de novo hearing on remand. The five members of the Board who addressed Stanton's application for a special use permit in the first instance were Edmund M. McGrath, Robert Chaput, Tara Capuano, Carl Zoubra, and John McCoy. (Board's decision 3.) Ms. Capuano is no longer a member of the Board. See Zoning Board of Review, Town of Cumberland Rhode Island, http://www.cumberlandri.org/boards/zoning.htm (last visited May 15, 2013). Presently, the Board consists of Edmund M. McGrath, Robert Chaput, Carl Zoubra, Peter Vosdagalis and John McCoy. Id. Consequently, the five members of the Board who heard the evidence and testimony in Stanton's case first hand are not all available to consider the case on remand.

In this situation our Supreme Court has instructed that a de novo review is necessary. See Corderre v. Zoning Bd. of Review of the City of Pawtucket, 103 R.I. 575, 578, 239 A.2d 729, 730-31 (1968). In Corderre, the Supreme Court remanded the case to the zoning board for failure to support its conclusion with facts. Id. at 576, 239 A.2d at 730. The remand instructed the zoning board to clarify and complete its decision. Id. However, when the zoning board considered the case on remand, its composition had changed. Id. at 577, 239 A.2d at 730. Our Supreme Court first pointed out that any application to a board of review must be heard and considered by all five members "before whom the evidence in support of the application was adduced." Id. (citing Kent v. Zoning Bd. of Review of the City of Cranston, 102 R.I. 258, 229 A.2d 769 (1967)). Consequently, the Court held that "where there has been a change in the composition of a board of review made subsequent to the rendering of a decision which . . . [is] remand[ed] . . . a hearing de novo on the application for relief is a jurisdictional condition precedent to a valid decision." Id. at 577-78, 239 A.2d at 730. The Court then quashed the decision made by the zoning board on remand because only four of the members who participated in the decision were present when the evidence was originally adduced. Id. As such, according to the Court, it was the "obligation of the Board [on remand] . . . to consider the case de novo." Id. at 578, 239 A.2d at 730-31. The holding in Corderre has been continuously applied and reiterated in our Supreme Court in the years since. See Pierce v. Providence Ret. Bd., 962 A.2d 1292, 1293 (R.I. 2009). In Pierce, the Court remanded the case for a new hearing due to a change in composition of the Employee Retirement Board of the City of Providence. Id. at 1292-93. The remand was based on the fact that the Court had repeatedly held that a change in composition of a board of

review necessitates a de novo hearing on remand as a jurisdictional condition precedent to a valid decision. Id. at 1293.

Stanton directs this Court to only one case in his memorandum: Roger Williams College v. Gallison. 572 A.2d 61 (1990). Gallison held that where a full hearing before a zoning board had taken place, and the objectors had failed to present persuasive or competent evidence, a trial justice's authority to remand the case to the zoning board should not be exercised "to allow remonstrants another opportunity to present a case when the evidence presented initially [was] inadequate." Id. at 62-63. However, in Gallison, there was no change in the composition of the zoning board on remand and thus, though it may otherwise have been instructive, Gallison does not apply to the instant case. Consequently, in the instant case, this Court must follow the instructions of our Supreme Court in Corderre and Pierce. The Board on remand lacks the five qualified members which are required for it to issue a valid decision without a de novo review because only four of the five members who were present when the evidence was adduced remain on the Board. Accordingly, there must be a de novo hearing before the Board, as newly constituted, on remand.

However, even if the composition of the Board had not changed, the case would still be remanded for a de novo hearing based on the language and holding in the Court's January 2013 Decision. As the Papineaus correctly point out, this Court's Decision vacated and remanded the case. Nowhere in the Decision did it say that Stanton's application for a special use permit had been granted, nor did it say that the decision of the Board was reversed. Moreover, once the Board's decision was vacated and the case remanded to the Board, it was as if no decision had been made. See, e.g., Black's Law

Dictionary 1688 (9th ed. 2009) (defining vacate as "[t]o nullify or cancel; make void; invalidate"). Thus, the Board must conduct a de novo review of the case.

To support his argument that the Court granted his special use permit, Stanton cites to language in the Decision holding that there was no evidence on which the Board could have based a decision that noise from his proposed use would alter the general character of the area. He further cites to language vacating the Board's decision under Section 45-24-69(d)(5)-(6) as arbitrary, capricious, characterized by an abuse of discretion, and clearly erroneous in view of the reliable, probative, and substantial evidence. These conclusions say nothing about granting Stanton's application for a special use permit. Section 45-24-69(d) limits the Court's power to remand, reverse, or modify an appeal of a zoning board decision to situations where: 1) the decision violated "constitutional, statutory, or ordinance provisions;" 2) was in excess of the zoning board's authority; 3) was made by an unlawful procedure; 4) was affected by an error of law; 5) was "[c]learly erroneous in view of the reliable, probative and substantial evidence" of the record; or 6) was arbitrary, capricious, or "characterized by an abuse of discretion or clearly unwarranted exercise of discretion." See Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (stating that "the Superior Court gives deference to the findings of a local zoning board of review"); Johnston Ambulatory Surgical Assocs., Ltd v. Nolan, 755 A.2d 799, 804-05 (R.I. 2000) (stating that the Court's review is limited to examining the record for legally competent evidence to support the zoning board's decision). When reviewing an appeal of a zoning board decision, the Court is specifically looking for any of these defects in the decision, in its effort to determine whether to affirm, vacate and remand, or reverse.

Any language discussing the sufficiency of the evidence behind the Board's decision in this case and thus the application of Section 45-24-69(d) to the Board's decision, was very plainly the Court applying the statute and determining that the Board's decision was clearly erroneous in view of the evidence and was arbitrary, capricious and an abuse of discretion. The statute does not say that such a finding means that the decision of the Board is reversed and nowhere in this Court's decision was that stated. See Sec. 45-24-69(d). After finding the Board's decision to be clearly erroneous and arbitrary and capricious, the Court stated that "the Board's decision is vacated. The case is remanded to the Board for consideration in light of this opinion." Stanton, No. 11-4105 at 17-18. Moreover, when discussing the application of another section of the Cumberland Code of Ordinances, the Court stated that the issue was whether the section applied to any dog and cat daycare/boarding facility which Stanton "may be permitted to operate with a special use permit." Id. at 17 (emphasis added). Thus, the Court clearly vacated and remanded the case for a new decision by the Board, rather than instructing the Board to grant the special use permit.

Stanton further points to the Court's language discussing whether any dog and cat daycare/boarding facility would fit under the definition of a kennel, in a separate part of the Cumberland Code of Ordinances, and thus, would be limited to ten dogs. He cites language from the Decision stating that the issue "is not properly before the Court and should be addressed by the Board on remand" to support his contention that that was the only issue the Board was to address on remand. Id. This language reflects the Court's effort to lay out the issue and state that it would not be decided because no decision or discussion on the issue was made by the Board. That determination had no effect on the

decision of this Court to vacate and remand the case based on Section 45-24-69(d). It simply reflected the necessity of having the Board, with its expertise regarding the Town of Cumberland and the application of the Cumberland Code of Ordinances, be the first to review any question of their application. See Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009) (stating that the reason for the high level of deference given to a zoning board decision is the zoning board's knowledge of effective administration of the zoning ordinances).

Finally, in support of his argument, Stanton references this Court's discussion of the evidence and the following statements: "In fact, the record reflects substantial evidence, which would have been enough for this Court to uphold the granting of a special use permit[]"; "Moreover, Stanton's testimony regarding the lengths to which he had gone to ensure that the noise resulting from the day care and kennel was kept to an absolute minimum is substantial[]"; and "There is not even a scintilla of evidence that any noise could not be dealt with by the many precautions Stanton took." See Stanton, No. 11-4105 at 10-11, 13. Once again, these statements reflect only the Court's strong belief that the Board had no evidence whatsoever on which to base its denial of the special use permit. Such a conclusion does not automatically mean the decision of a zoning board is reversed. There was no language in the Decision indicating the Court was reversing the Board or granting the special use permit. If that had been its intention it would have explicitly stated that the Board's decision was reversed and the special use permit was granted. Without such language, the case was clearly remanded to the Board for a de novo review.

When the Court remanded the case for consideration "in light of this opinion[,]" it instructed the Board to keep in mind the evidentiary issues discussed in the Decision. That being said, the Court takes this opportunity to reiterate what it said in January 2013; the only evidence presented by the abutters was their own testimony regarding noise and traffic. Testimony of neighbors regarding potential unfavorable results if a special use permit is granted is not enough in the State of Rhode Island to justify denying the application for a special use permit. See Perron v. Zoning Bd. of Review of the Town of Burrillville, 117 R.I. 571, 575, 369 A.2d 638, 641 (1977). This is especially true where the Board itself acknowledges, as it did in this case, that there was nothing more the applicant could have done to qualify for the special use permit. (Tr. at 45-46, June 8, 2011.) As in this case, the allowance of a special use permit for a kennel on land zoned for agricultural use shows an intent by the Legislature to allow such a use. See Center Realty Corp. v. Zoning Bd. of Review of the City of Warwick, 96 R.I. 482, 486, 194 A.2d 671, 673 (1963). If Stanton had done everything he could do to qualify for a special use permit, it would seem that this is when the Legislature envisioned the granting of such a permit. Moreover, in Rhode Island a special use permit may not be denied on the grounds that it would result in a certain condition, if that condition could also be the result of a permitted use. Id. Here, it would seem that Stanton's permitted uses, including livestock, farming, and sale of any food grown on the property, could also pose noise and traffic issues. Thus, to deny a special use permit would certainly require much more evidence than simply the speculative concerns of the neighboring property owners. In the de novo hearing, which will now be conducted by the Board, each side will have the opportunity to present its evidence anew. The Court simply wishes to remind the

Board that should it deny the special use permit based on evidence similar to that which was before it after the first hearing, the decision is likely to meet a similar fate on appeal.

IV

Conclusion

In conclusion, the change in the composition of the Board since the evidence in this case was adduced requires a de novo hearing on review. Additionally, this Court's January 2013 Decision vacated the Board's decision and remanded the case to the Board for a de novo review. Therefore, this Court instructs the Board to conduct a de novo hearing, allowing both parties to resubmit their evidence and to submit new evidence, and then to determine, de novo, whether a special use permit should be granted. This Court will retain jurisdiction.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Robert Stanton & Sylvie Snow v. John McCoy, Carl Zoubra, Tara Capuano, Robert Chaput, Edmund M. McGrath, Kimberly Hawthorne, and Richard C. Barrett, in their capacity as Members of the Zoning Board of Review of the Town of Cumberland, State of Rhode Island
CASE NO:	PC 11-4105
COURT:	Providence Superior Court
DATE DECISION FILED:	May 21, 2013
JUSTICE/MAGISTRATE:	Procaccini, J.

ATTORNEYS:

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