STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 2, 2013)

KENLIN PROPERTIES, LLC, and TLA-PROVIDENCE,	:	
Appellants	:	
	:	
v.	:	**C.A. No. PC-2011-7249**
	:	**(as consolidated with**
CITY OF EAST PROVIDENCE, ZONING BOARD OF REVIEW OF THE CITY OF EAST PROVIDENCE, and EUGENE SAVEOURY, TONY CUNHA, PIER-MARIE TOLEDO, JOHN BRAGA, and MICHAEL BEAUPARLANT, in their capacities as members of the Zoning Board of Review of the City of East Providence,	:	**PC-2011-6540, and PC-2012-0052)**
Defendants	:	
	:	
and	:	
	:	
ATTORNEY GENERAL PETER F. KILMARTIN,	:	
Intervenor Defendant.	:	

DECISION

TAFT-CARTER, J. This matter arises before the Court on appeal from an October 19, 2011 decision of the Zoning Board of Review of the City of East Providence (Board). The decision affirmed a May 27, 2011 Notice of Violation (NOV) issued by the East Providence Zoning Officer (Zoning Officer) finding that Plaintiff Kenlin Properties, LLC, (Kenlin Properties) and Plaintiff TLA-Providence (TLA and, collectively, Appellants) were in violation of a use variance issued by the Board in 1998. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.[1] For the reasons set forth in this Decision, this Court reverses the decision of the Board.

[1] Pursuant to the Briefing Schedule and Orders dated May 31, 2012, July 19, 2012, and October 12, 2012, this Decision addresses Count I of Plaintiffs' Complaint in PC-2011-7249.

I

Facts and Travel

This case began in 1998 when Appellants' predecessor, Pond View Recycling (Pond View), requested and obtained a use variance to operate a construction and demolition facility at One Dexter Road, East Providence, Rhode Island (Property). (Compl. at 1-2.) At the time, Pond View was owned and operated by the current principal of Kenlin Properties. (Compl. at 1-2, 5; Ex. A, Application.) The Property was in an Industrial-3 Zoning District, which allowed for heavy industrial use. (Compl. at 3-4; Ex. A, Application; Ex. B, Decision; Ex. D, NOV at 175.) Processing and recycling were unpermitted uses.[2] Id.

The Board conducted a hearing and, on February 11, 1998, unanimously approved the request for a variance, subject to four (4) enumerated conditions:

> Use Variance GRANTED 5-0, subject to the petitioner obtaining all necessary permits, and with the stipulations: Grinding of 150 ton limit per day, Grinding hours 8 am to 4 pm daily Monday thru Friday, 8 am to Noon Saturday, Berm in place before operations

[2] In its Application, Pond View applied for a use variance with respect to outside limited metal reclamation and cited the East Providence ordinances, Sections 19-1 and 19-98, which provided that limited metal reclamation is a permitted use and defined it as "the salvaging and reclamation of used metals of all types when carried on in a completely enclosed building without outside storage of any kind." (Compl. Ex. A, Application.) Pond View applied for a use variance to operate the Facility but did not mention that recycling was not contemplated by the East Providence zoning ordinances. Id. The Board considered the Application as seeking "permission to operate a recycling/limited metal reclamation facility." (Compl. Ex B, Decision at 54.) The Zoning Officer's Notice of Violation provides, in pertinent part, that Pond View:

> [W]as approved for a 150-ton recycling and C & D facility, said operation being deemed a prohibited land use due to the fact that outside processing and recycling was not permitted and there was not explicit land use designation pursuant to Section 19-98 'Schedule of Use Regulations,' of the City of East Providence Zoning Ordinance. (Compl. Ex. D, NOV at 175.)

Subsequently, the ordinances were amended such that "the disposal, processing or recycling of solid waste in any manner within the city" is a prohibited use. City of East Providence Land Use Regulations, Art. III, § 19-96, Prohibited Uses.

> begins grinding, and building must be built within eighteen months, Should these stipulations as discussed not be met as granted by this variance in accordance with all applicable codes and regulations this variance shall immediately expire and be null and void. [sic] (Compl. at 4-5; Ex. B, Decision.)

The Decision was recorded at Book 1328, pages 54-58, of the East Providence Land Evidence Records (Decision). (Compl. at 4; Ex. B, Decision.)

On February 6, 2003, the Rhode Island Department of Environmental Management (RIDEM) granted Pond View a license to increase the processing capacity to 500 tons per day. (TLA Mem. Ex. C, C.A. No. PC-2005-3466, 2005 City Compl. ¶¶ 10-13.) As a result, Pond View was required to apply to the City for a use variance for the increase in processing capacity. Id. ¶¶ 13-15. Pond View also requested a zoning certificate from the City Zoning Officer. Id. On May 7, 2003, the City Zoning Officer denied the request and informed Pond View that such increased processing did not conform to the 1998 Decision or City zoning ordinances. Id. ¶¶ 15-16. The City Zoning Officer also stated that the 2003 application for a use variance nullified the 1998 Decision. (TLA Mem. Ex. G, C.A. No. PC-2005-3466, 2006 Declaratory Judgment Hearing at 7-8.) On June 27, 2003, Pond View withdrew its application to the City for a use variance. Id. ¶ 15.

Two years later, in July 2005, the City filed suit against Pond View seeking declaratory and injunctive relief. (TLA Mem. Ex. C, 2005 City Compl.) The City alleged in the complaint that because Pond View was required to obtain "a variance from the [City] to operate a 500 ton per day construction and demolition facility," it was "legally precluded" from operations until the relief was granted, despite the approval from RIDEM. Id. ¶¶ 20-21. It was also alleged that

Pond View impermissibly accepted and processed concrete debris. Id. ¶ 19. The relief sought by the City, in pertinent part, was as follows:

> (A) A declaration that the receipt of more than 150 tons per day of construction and demolition debris is a violation of the use variance granted by the City of East Providence Zoning Board of Review and therefore a violation of the Zoning Ordinances of the City of East Providence.
> (B) A declaration that Pond View's operations are being carried out under a license issued by the RIDEM to operate a construction and demolition debris processing facility must be in compliance with local zoning ordinances.
> (C) A declaration that Defendant's violation of the conditions of the City of East Providence zoning variance renders said variance null and void.
> (D) A declaration that the processing of concrete by the Defendant is a violation of the Zoning Ordinances of the City of East Providence. (TLA Mem. Ex. C, 2005 City Compl., Count I, Prayer for Relief.)

An Honorable Associate Justice of the Superior Court issued a declaration on November 8, 2006, stating that:

> 1. The original variance issued to Pond View Recycling is valid and intact.
> 2. The principal regulatory authority for this recycling facility is the State of Rhode Island and only those zoning regulations that do not inhibit the state regulatory scheme may be utilized; and
> 3. The City of East Providence is not prohibited from pursuing, through normal administrative procedures, any putative violation of a local zoning ordinance, subject to paragraph 1. (TLA Mem. Ex. H, C.A. No. PC-2005-3466, 2006 Declaratory Judgment Order.)[3]

Thereafter, TLA purchased the business from Kenlin Properties. (Compl. at 3, 5.) Kenlin Properties currently retains ownership of the real estate. Id. On May 2, 2011, TLA

[3] Appellants state that the 2006 Declaratory Judgment is attached as Exhibit C to the Complaint. (Compl. ¶ 13(c).) However, the transcript attached as Exhibit C is from an unrelated matter. Thus, citations herein to the 2006 Declaratory Judgment Hearing and Order are to TLA's Brief Exhibits G and H, respectively.

secured a license from RIDEM "to operate a 1,500 tons per day Construction and Demolition Debris Processing Facility." (TLA Memo. Ex. K, C & D License Approval.)

On May 27, 2011, a City Zoning Officer issued the NOV to Kenlin Properties. (Compl. at 1; Ex. D, NOV.) The NOV was recorded at Book 3264, pages 175-86, of the East Providence Land Evidence Records. Id. The NOV cited numerous inconsistencies between the current operation and the 1998 Decision. Id. The Zoning Officer stated that the 1998 Decision would be voided and "the entire operation" would cease unless Appellants complied with the following:

- Cease from any 'operational activity' and 'open storage' that is located outside the pad-site, illustrated on the approved site plan.
- Cease from any further expansion beyond the approved 150-ton per-day limit [on accepting material].
- Cease from acceptance of unapproved—non-wood—materials, to include:
    - Miscellaneous metals—primarily iron, aluminum, stainless steel
    - Rock, concrete, cinder/concrete block, stone, brick, aggregate, and mortar
    - Street sweepings
- Immediate reduction in hours of operation in accordance with the 'Approved Variance' and refraining from any further increase of said hours.
- Immediate replacement of earthen berm with trees atop
- Removal / non-increase in the number of on-site machinery in accordance with the 'Approved Variance.' (Compl. Ex. D, NOV at 185.)

In concluding that TLA violated the Decision, the Zoning Officer reviewed and construed the testimony given at the 1998 hearing. (Compl. Ex. D, NOV.) He also referred to licensure documentation and testimony provided by Kenlin Properties and TLA to RIDEM in conjunction

with the 2011 license application. Id. On July 1, 2011, Appellants appealed the NOV to the Board pursuant to § 45-24-64.[4] (TLA Reply Mem. Ex. Q, Appeal Form.)

On July 1, 2011, the Legislature enacted legislation amending G.L. 1956 § 23-18.9-8, entitled "An Act Relating to Health and Safety—Refuse Disposal." The statute provides, in pertinent part, that "[n]o person shall operate any solid waste management facility or construction and demolition (C & D) debris processing facility or expand an existing facility unless a license is obtained from the director except as authorized by [this chapter]." Sec. 23-18.9-8(a)(1). The statute further provides that a condition to the operation and licensure of a C & D processing facility is receipt of "a letter of compliance from the host municipality that all applicable zoning requirements and local ordinances of the host municipality have been complied with." Sec. 23-18.9-8(d)(1).

The Board conducted hearings with respect to the Appellants' appeal on September 15, 2011, October 13, 2011, and October 19, 2011. (Compl. at 7; TLA Reply Mem. Ex. Q, Appeal Form.) The Board unanimously affirmed the order of the Zoning Officer on October 19, 2011. (Compl. Ex. E, NOV Decision.) The Decision was recorded on December 6, 2011 at Book 3305, pages 226-29, of the East Providence Land Evidence Records. Id. In affirming the decision of the Zoning Officer, the following findings of fact were made:

> 1. The Board has considered the findings of the Zoning Officer;
> 2. The Board has considered the recommendation of the Planning Board;
> 3. The use for which the variance was granted was primarily the recycling of natural and processed wood into mulch products;
> 4. That the operation today is not primarily the recycling of natural and processed wood into mulch products;

[4] Section 45-24-64 provides, in pertinent part, that "[a]n appeal to the zoning board of review from a decision of any other zoning enforcement agency or officer may be taken by an aggrieved party."

> 5. The types of materials being taken in and processed exceed what was applied for and granted in the variance;
> 6. There are presently two grinding machines at the operation;
> 7. The permitted use allows for one grinding machine;
> 8. That material currently processed such as tires, concrete, vinyl siding exceed the use permitted by the variance;
> 9. That the based [sic] upon the testimony presented and the photos entered into evidence, the record shows that the petitioner has open storage on the premises that exceeds the limits of the permitted use;
> 10. Based upon the testimony and the findings from the records, the petitioner is processing in excess of the tonnage that's allowed to be processed. (Compl. Ex. E, NOV Decision at 226.)

On October 26, 2011, in accordance with § 23-18.9-8(d), the City Manager for East Providence issued a letter of non-compliance (LNC) to RIDEM based on the NOV and NOV Decision. (Compl. Ex. F, LNC.) On December 14, 2011, RIDEM provided written notice to TLA of its intent to suspend TLA's operating license. (Compl. Ex. G, Notice of Intent to Suspend License.) On December 23, 2011, Kenlin Properties and TLA appealed the NOV and NOV Decision to this Court pursuant to § 45-24-69.[5] (Compl. at 1-3.) TLA entered receivership in March 2012, and ceased all solid waste activities as of September 10, 2012. (City Opp. Mem. to TLA's Appeal, Exs. 1-3, C.A. No. PB-2012-1475.)

II

Standard of Review

Superior Court review of a zoning board's decision is governed by section 45-24-69(d), which provides:

[5] Section 45-24-69(a) provides, in pertinent part, that:

> An aggrieved party may appeal a decision of the zoning board of review to the [S]uperior [C]ourt for the county in which the city or town is situated by filing a complaint stating the reasons of appeal within twenty (20) days after the decision has been recorded and posted in the office of the city or town clerk.

> [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.

When reviewing a zoning board decision, the Superior Court "lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level." Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986). The court cannot substitute its judgment for that of the zoning board and must uphold a decision that is supported by substantial evidence contained in the record. Hein v. Town of Foster Zoning Bd. of Review, 632 A.2d 643, 646 (R.I. 1993). The zoning board must "disclose the reasons upon which they base their ultimate decision because the parties and this court are entitled to know the reasons for the board's decision in order to avoid speculation, doubt, and unnecessary delay." Hopf v. Bd. of Review of City of Newport, 102 R.I. 275, 288, 230 A.2d 420, 428 (1967); Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (A zoning board "must set forth in its decision findings of facts and reasons for the action taken.").

III

Analysis

A

Standing

The City first argues that TLA lacks standing because it is not an aggrieved party within the meaning of § 45-24-69. In so arguing, the City maintains that because TLA entered receivership it lacks a sufficient possessory interest in the Property, and has failed to establish aggrievement through the record. (City Opp. Mem. to TLA's Appeal at 1-5.) TLA avers that it is an aggrieved party because the receivership is ongoing, its lease is intact, and its rights with respect to the Decision and licenses are assets. (TLA Reply Mem. 2-8.)

The issue of what constitutes an aggrieved party for the purposes § 45-24-69 is settled in Rhode Island. An aggrieved party is "[a]ny person or persons or entity or entities who can demonstrate that their property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town." Sec. 45-24-31(4). The party seeking judicial review of a decision of a zoning board has the burden of establishing aggrievement either through the record or in the pleadings. D'Almeida v. Sheldon Realty Co., 105 R.I. 317, 319, 252 A.2d 23, 24 (1969). Our Supreme Court has held that a lessee has a "sufficient interest in the leased premises" to proceed with a zoning appeal. Ralston Purina Co. v. Zoning Bd. of Town of Westerly, 64 R.I. 197, 12 A.2d 219, 220 (1940); see also Paterson v. Corcoran, 100 R.I. 475, 480, 217 A.2d 88, 91 (1966) (construing "aggrieved party" in context of subdivision statute, and stating that it is a "longstanding rule that a person is aggrieved by a decision when it 'operates on his rights of property or bears directly upon his interest'") (quoting Tillinghast v. Brown University, 24 R.I. 179, 184, 52 A. 891, 892 (1902)); 5 Arlen H. Rathkopf, The Law of

Zoning and Planning, § 63:4 (4th ed.) ("aggrieved party" includes "person having a legal right to the possession or use of land in some other capacity").

Although TLA is in receivership and its operations recently ceased, the record and pleadings clearly demonstrate that TLA operated the Facility since 2008, and TLA presently holds a license from RIDEM. (Compl. at 2-3; Ex. D, NOV; Ex. G, Notice of Intent to Suspend License; TLA Reply Mem. at 2-8.) In addition, TLA leases the premises from Kenlin Properties. Id. The instant administrative appeal bears directly on TLA's rights and liabilities with respect to a Facility and the Property. TLA therefore is an aggrieved party within the meaning of § 45-24-69.

B

Conditions

1

The Violations and Parties' Arguments

In 1998, the Zoning Board unanimously approved the application for a use variance, subject to four conditions: 1) "[g]rinding of 150 ton limit per day;" 2) "[g]rinding hours 8 am to 4 pm daily Monday thru [sic] Friday, 8 am to Noon Saturday;" 3) berm in place before operations begin; and 4) "building must be built within eighteen months." (Compl. Ex. B, Decision.)

The basis of the Zoning Official's conclusion that a violation had occurred was after his review and interpretation of the Application, the Site Plan, and the testimony at the 1998 zoning hearing as well as testimony and licensure documentation submitted by Appellants to RIDEM in 2003. (Compl. Ex. D, NOV.) The Zoning Officer concluded that the Facility violated the 1998 Decision because its operations and storage did not conform with the "approved site plan." He

further noted that Appellants accepted more than 150 tons of material and accepted "unapproved—non-wood—materials," including "miscellaneous metals[, . . .] concrete, cinder/concrete block, stone, brick, aggregate, mortar, [and] street sweepings." Also, the "hours of operation" were in excess of the "Approved Variance." Finally, there were a number of on-site machinery that were unapproved. (Compl. Ex. D, NOV at 185.) The Board approved the Zoning Officer's NOV and made several findings of fact with respect to the conclusions of the Zoning Officer. (Compl. Ex. E, NOV Decision at 226.)

The City argues that the Zoning Officer and Zoning Board "properly looked beyond the four corners of the [1998] Decision to determine what use was permitted by the" Decision and in doing so properly concluded the Appellants violated the terms and conditions of the Decision. (City Mem. at 11-29.)

Appellants submit that it was an error for the Zoning Officer and Board to consider documents and testimony outside the Decision. (Kenlin Mem. at 8, TLA Mem. at 16.) Appellants rely on the plain language of the recorded Decision which clearly articulates the conditions. (Kenlin Mem. at 8-17; TLA Mem. 17-51.) The Board did not impose conditions that limit tonnage of material accepted or processed; limit the overall Facility's hours of operation; require an earthen berm with trees atop; limit the types of materials accepted or processed; limit open storage; incorporate or establish a site plan; or permit only one grinding machine on site. Id.

2

Authority to Impose Conditions

It is well established that the attachment of conditions on the grant of a variance is within the discretion of the zoning board of review. Sec. 45-24-19; Woodbury v. Zoning Bd. of Review

of City of Warwick, 78 R.I. 319, 82 A.2d 164 (1951); Olevson v. Narragansett Zoning Bd., 71 R.I. 303, 307, 44 A.2d 720, 722 (1945). A zoning board has "broad discretion in fixing conditions" but conditions "must be reasonable and not arbitrary, unnecessary, or oppressive." Olevson, 71 R.I. at 307, 44 A.2d at 722. When a variance includes specific conditions, "they are placed upon the premises and run with the land." Strauss v. Zoning Bd. of Review of City of Warwick, 72 R.I 107, 111, 48 A.2d 349, 352 (1946). Conditions must be "specifically and separately enumerated" so that they will not be left to speculation. Strauss, 72 R.I at 111, 48 A.2d at 352 (citing Olevson, 71 R.I. at 307, 44 A.2d at 722). If the conditions require speculation, then the variance amounts "merely to the granting of a personal license." Id.

3

Conditions in the 1998 Decision

In 1998, the Board heard testimony on the use variance application and granted the variance listing four specific conditions which were clearly enumerated. See Strauss, 72 R.I at 111, 48 A.2d at 352; 2 Am. Law. Zoning § 13:37 (5th ed.) ("Conditions imposed by a zoning board of appeals must be expressed with sufficient clarity" to be binding.). The Decision was recorded on March 9, 1998. (Compl. Ex. B, Decision at 58.) The recorded Decision provided notice to the applicant, interested parties, and subsequent owners of its terms and conditions. See Frost, 111 R.I. at 221, 301 A.2d at 574; 5 Arlen H. Rathkopf, The Law of Zoning and Planning, § 58:23 (4th ed.); 8 Patrick J. Rohan, Zoning and Land Use Controls, § 43.03[2] ("Conditions must be sufficiently definite to apprise both the applicant and interested landowners of what can and cannot be done with the land."). As such, the Decision ran with the land. The interpretations of the Zoning Officer and Board are plainly at odds with the long-recognized precept that conditions run with the land; successors in title—such as TLA—are therefore

protected and can rely on the Decision. See Frost, 111 R.I. at 221, 301 A.2d at 574 (citing Strauss, 72 R.I at 111, 48 A.2d at 352).

The conclusion that Appellants violated the terms of the Decision derives from an interpretation of the conditions imposed by the Zoning Board. Compare Compl. Ex. B, Decision at 57-58, with Compl. Ex. D, NOV; Ex. E, NOV Decision at 226; City Mem. at 11-29. The Zoning Officer treated the Decision and the conditions as a personal license to the original applicant. This was error. Our Supreme Court has discussed the nature of conditions. In Olevson, the board of review had granted a variance for property to be used as a rooming house with the condition that the use be granted to a specific person. 71 R.I. at 304-05, 44 A.2d at 720-21. In reversing the board, our Supreme Court held that this condition was unusual, peculiar, was not properly attached to the use of the property, and was an attempt to grant a license. Id. at 305-08, 44 A.2d at 721-22. Similarly, in Strauss, our Supreme Court rejected an applicant's contention that certain conditions were inherent in a decision and reasoned that to hold otherwise would be to leave the board's decision "open to the claim that it amounted merely to the granting of a personal license." Strauss, 72 R.I at 111, 48 A.2d at 352 (citing Olevson, 71 R.I. at 307, 44 A.2d at 722). Likewise in Frost, the minutes from the board meeting merely stated that an application for a variance "to construct a building for boat repair, construction, storage, sale of boats and accessories and other related services was granted." 111 R.I. at 219-22, 301 A.2d at 574-75. The Court held that the board had not anywhere in the record expressly imposed any conditions on the grant of the variance and the Court reiterated its "reject[ion of] the concept of inhering conditions." Id. See also 2 Am. Law. Zoning § 13:37 (5th ed.) (conditions are ineffectively expressed when they limit the use based on the "applicant's verbal statements to the

board"); 8 Patrick J. Rohan, Zoning and Land Use Controls § 44.05[1] (same, in context of special uses).

The preceding cases dictate that conditions "on a grant permitting a use of the land would be effective only when specifically and clearly stated in the record." Frost, 111 R.I. at 221, 301 A.2d at 574. Here, the conditions in the recorded Decision are clear and unambiguous and do not, therefore, amount to a personal license. Furthermore, the Strauss Court held that conditions placed on a variance are placed upon the use of the premises and run with the land. Frost, 111 R.I. at 221, 301 A.2d at 574 (citing Strauss, 72 R.I at 111, 48 A.2d at 352). The recorded Decision likewise provides notice as required by the Zoning Enabling Act, Secs. 45-24-61 and 45-24-68, and such notice and recording is well-established in other contexts. See, e.g., In re Barnacle, 623 A.2d 445 (R.I. 1993) (analyzing types of notice in context of purchasing real property); Sec. 44-9-27 (notice to interested parties of foreclosure petition).

In affirming the Decision of the Zoning Officer, the Board relied on sources outside the Decision to construe the conditions to include items not approved in 1998. The 1998 Decision accordingly does not impose: site plan restrictions; open storage restrictions; limits on daily tonnage receipt or processing; limits on the types of materials that may be accepted or processed; limits on the Facility's hours of operation; a requirement for an earthen berm with trees atop; or a limit to one machine on the Property. The Zoning Officer and Board were without authority to revisit the prior[6] Board's work to create a violation. See Frost, 111 R.I. at 221, 301 A.2d at 574; Strauss, 72 R.I at 111, 48 A.2d at 352. Thus, violations premised on conditions outside those stated in the 1998 Decision are improper.

[6] In addition, where, as here, the membership of a zoning board changes, the board may not reconsider the record upon which a previously granted variance is predicated. See Coderre v. Zoning Bd. of Review, 239 A.2d 729, 730-31 (R.I. 1968).

4

The 1998 Variance Application and Site Plan

The Board also found that Appellants violated the Decision because the Facility's operations exceeded the proposed use as set forth in Pond View's January 7, 1998 Application and accompanying Site Plan; the violations are not premised on ordinances. (Compl. Ex. E, NOV Decision at 226.) The Application described the proposed use as "primarily the recycling of natural and processed wood materials into mulch products" with "incidental metal separation as an accessory use" and stated that the operation would entail "outside processing and recycling of wood including processing of construction and demolition (C & D) material[.]" (Compl. Ex. A. Application.) The Application and Site Plan were not recorded with the Decision. The Decision itself restricts wood grinding but does not restrict—or even mention—the types of materials received and processed by the Facility. The Application also contains the word "primarily," while the Decision is devoid of any such reference. Compare Compl. Ex. A. Application with Ex. E. NOV Decision.

In the NOV, the Zoning Officer concluded, in pertinent part, that the Facility must "[c]ease from any 'operational activity' and 'open storage' that is located outside the pad-site, illustrated on the approved site plan." (Compl. Ex. D, NOV at 185.) In affirming the Zoning Officer's NOV, the Board relied on the Application and Site Plan when it made several findings of fact. (Compl. Ex. E, NOV Decision at 226.) The Board cited no underlying facts to support its conclusions with respect to the primary use of the Facility, the materials,

or the open storage.[7]

The City contends that the Zoning Officer and Board properly looked to the Application and Site Plan because "the only way to determine what use was applied for and granted was to look to the [Application with accompanying Site Plan] for [the] use variance and the use as defined by the applicant." (City Mem. at 11-15, 23-27.) The City also argues that deviation from the original Site Plan with respect to open storage and work areas—as determined by the Zoning Officer through comparison to RIDEM licensure documentation—constitutes a violation of the Decision. Id.

Appellants counter that this was improper because neither document is a part of the recorded Decision and, even assuming the Application could be considered in conjunction with the Decision, the operation did not violate the use applied for in the Application by "primarily" performing a function other than wood recycling or by accepting materials not contemplated in the Application. (Kenlin Mem. at 8-9; TLA Mem. at 16-20, 31-36.) Appellants further argue that the Site Plan did not restrict the use to certain parts of the Property with respect to open storage or work limits, and that the plan used by the Zoning Officer for comparison was inaccurate. (Kenlin Mem. at 8-9, 11-12; TLA Mem. at 36-44.)

In arguing that the Application defines the use in conjunction with the Decision and that the Site Plan is permanent, the City sidesteps our Supreme Court's pronouncements that conditions must be clearly stated and duly recorded to be effective. See Frost, 111 R.I. at 221, 301 A.2d at 574 (citing Strauss, 72 R.I at 111, 48 A.2d at 352). Indeed, in Strauss, the Court

[7] The zoning board must "disclose the reasons upon which they base their ultimate decision because the parties and this court are entitled to know the reasons for the board's decision in order to avoid speculation, doubt, and unnecessary delay." Hopf v. Bd. of Review of City of Newport, 102 R.I. 275, 288, 230 A.2d 420, 428 (1967). "Findings made by a zoning board 'must of course, be factual rather than conclusional[.]'" Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (quoting Irish Partnership v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986)).

reached a "reasonable" interpretation of a use variance by examining "the express terms of the application and decision" without consideration of statements made by the applicant at the hearing. 72 R.I. at 109-110, 28 A.2d at 351. Moreover, "courts generally hold that conditions should be expressly set out in a zoning body's order or decision," even when such conditions are derived from an application or site plan. 5 Rathkopf's The Law of Zoning and Planning § 60:8 (4th ed.). Therefore, this Court is constrained to give effect only to conditions in the Application and Site Plan that are clearly expressed and provide notice and protection for the applicant, interested parties, and subsequent owners. See Frost, 111 R.I. at 221, 301 A.2d at 574; see also Gardiner v. Zoning Bd. of Review of City of Warwick, 101 R.I. 681, 687-89, 226 A.2d 698, 703 (1967) (observing that "the board of necessity incorporated the application and the plot plan in its decision" where board's decision granting special exception failed to set forth, as required by statute, the dimensions and location of proposed structure).

The violations with respect to the Application rest on testimony that wood tonnage receipt comprised 35 to 50 percent of the Facility's incoming C & D material. (Compl. Ex. E, NOV Decision at 226; City Mem. at 23-27; City Ex. 11, September 15, 2011 Board Hearing Vol. I at 75-77; City Ex. 12, October 13, 2011, Board Hearing Vol. II at 117-19, 181-82.) The express language of the Application, however, demonstrates that the proposed use would be "primarily" wood recycling—not "exclusively" or "devoid of non-wood materials." (Compl. Ex. A, Application.) First, the percentages on which the City relies are conservative estimates because they fail to account for the wood grinding facet of the operation, i.e., the grinding itself as well as the expansion of the grinding operation from one to two grinding machines. In addition, the City's narrow emphasis on material receipt neglects that "recycling of natural and processed wood materials into mulch products" involves receipt and processing of non-wood C

& D materials. Recycling includes receipt, processing, and grinding, and the Application explicitly mentioned C & D material and sought relief for limited metal reclamation as an accessory use, Compl. Ex. A, Application, which is "subordinate to the principal use" of recycling. 83 Am. Jur. 2d Zoning and Planning, § 570 (defining accessory use); 5 Arlen H. Rathkopf, The Law of Zoning and Planning, § 33:1 (same). Although the Facility may have received and processed materials not in furtherance of wood recycling to render mulch, the Facility's operation as proposed in the Application and described through testimony was primarily, or "of first importance or principally," wood recycling. See Mun. Bond Corp. v. C.I.R., 341 F.2d 683, 687-90 (8th Cir. 1965) (surveying federal and state cases and concluding "[t]he word 'primarily' is unambiguous and has a well-recognized and understood meaning."); 33A Words and Phrases 315-19 (2004 Cum. Supp.).

The Facility processed C & D material, and the Board and the Zoning Officer concluded that the Decision and Application did not permit the Facility to do so. The Application, however, did not restrict materials so as to support the NOV upheld by the Board: by its terms, the Application included processing of C & D material. (Compl. Ex. A, Application.) C & D is a broad category of material,[8] and there is no language in the Decision that narrows the use proposed in the Application concerning the types of materials received or the proportions of such materials.

Lastly, the City avers that deviation from the Site Plan amounts to a violation. (City Mem. at 11-15, 23-27.) Appellants argue that the use authorized by the Decision extends to the

[8] C & D was later defined to mean "non-hazardous solid waste resulting from the construction, remodeling, repair, and demolition of utilities and structures; and uncontaminated solid waste resulting from land clearing." Sec. 23-18.9-7(4); see also City of East Providence Zoning Ordinance, Art. I § 19-1 ("Solid waste means garbage, refuse, and other discarded solid materials generated by residential, institutional, commercial, industrial, and agricultural services" and also includes concrete and scrap tires).

Property, not simply to areas initially designated on the Site Plan. (Kenlin Mem. at 8-9, 11-12; TLA Mem. at 36-44.) Submission of the Site Plan with the Application was required, and the Site Plan served to ensure compliance of the proposed use with applicable law. Town of Johnston v. Pezza, 723 A.2d 278, 284 (R.I. 1999); Wood v. Lussier, 416 A.2d 690, 694 (R.I. 1980) (If "plaintiff's building-permit application conformed to all of the conditions imposed by the building ordinance, then the issuance of the requested permit became a mere ministerial duty."). In 1998, Pond View successfully sought the variance to perform wood recycling, including processing of C & D material, on the Property. There is no indication that Pond View sought the variance to operate the Facility with certain inviolable dimensions and characteristics, and the Decision itself contains no such restrictions. Moreover, there is no allegation that the Facility violated an ordinance with respect to the Site Plan. To the contrary, the Zoning Officer and Board rigidly construed the Site Plan to forbid any alteration of the Property or the Facility's operation and to render any modification a violation. Considering the plain language of the Application and Decision, and in view of the requirement that conditions must be clearly expressed to be effective, the Board erred in upholding the NOV and in finding violations with respect to the scope of the use, materials, and the Site Plan.

C

Collateral Estoppel

Appellants also contend that the 2006 Declaratory Judgment precludes relitigation of the issues of daily tonnage limits and the acceptance and processing of concrete because the decision considered the scope of the 1998 Decision as well as the actual use of the Property. (Kenlin Reply Mem. at 3-7; TLA Mem. at 25-30; Compl. at 7.) The City argues that the Board properly affirmed the Zoning Officer's determination that Plaintiffs violated the Decision by processing

over 150 tons of material daily as well as processing materials such as concrete.[9] (City Mem. at 23-27; Compl. Ex. E, NOV Decision at 226.)

Collateral estoppel applies where: (1) the parties are the same, or are in privity with, the parties to the prior proceeding; (2) the issue in the instant proceeding is identical to that in the prior proceeding; and (3) the prior proceeding resulted in a final judgment on the merits. Foster-Glocester Reg'l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1014 (R.I. 2004). The doctrine applies regardless of whether the instant cause of action differs from the prior proceeding. Garganta v. Mobile Village, Inc., 730 A.2d 1, 4 (R.I. 1999); Restatement (Second) Judgments, § 27 (1982).

This Court has reviewed the City's 2005 suit seeking declaratory relief as well as the 2006 Declaratory Judgment. This Court is satisfied that the requirements for collateral estoppel are met because the City again is a party, and Kenlin Properties and TLA are in privity with Pond View; the tonnage and material receipt issues are identical to those in the 2006 Declaratory Judgment; and the prior proceeding resulted in a final judgment. Moreover, the City had a "'full and fair opportunity' to litigate [the] issues in the earlier case." See Casco Indem. Co. v. O'Connor, 755 A.2d 779, 782-83 (R.I. 2000) (quoting Allen v. McCurry, 449 U.S. 90, 95 (1980)). The 2006 Declaratory Judgment bars relitigation of the grinding and concrete

[9] It is also argued that that § 23-18.9-8 superseded the 2006 Declaratory Judgment by "clos[ing] any de facto regulatory no-man's land" between City and State authority to ensure compliance with zoning requirements. (City Mem. at 17; Attorney General Mem. at 5.) In particular, it is contended that the "the City's zoning authority is not preempted" and that "the City, not RIDEM, has the authority to ensure that all C & D" facilities comply with zoning laws. (Attorney General Mem. at 1, 11.) This argument concerns the 2006 declaration that "[t]he principal regulatory authority for this recycling facility is the State of Rhode Island and only those zoning regulations that do not inhibit the state regulatory scheme may be utilized." (TLA Mem. Ex. H, 2006 Declaratory Judgment Order; Attorney General Mem. at 5-11.) It also concerns Appellants' request, in Count II of PC-2011-7249, for a declaration that the State "has preempted the field of solid waste management and thereby precluded municipal regulation of activities in this field." This issue is outside the scope of the instant administrative appeal. See supra, note 1.

processing issues. The Decision did not forbid the Facility from processing 150 tons per day and did not forbid the receipt of concrete.

IV

Conclusion

This Court concludes that Appellants' substantial rights were prejudiced because the Decision of the Zoning Board, affirming the Zoning Officer's Notice of Violation, was clearly erroneous and made upon unlawful procedure. Accordingly, the Plaintiffs' appeal is granted, and the Decision of the Zoning Board is reversed. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Kenlin Properties, LLC, and TLA-Providence, Appellants v. City of East Providence, and Eugene Saveoury, Tony Cunha, Pier-Marie Toledo, John Braga, and Michael Beauparlant, in their capacities as members of the Zoning Board of Review of the City of East Providence, Defendants and Attorney General Peter F. Kilmartin, Intervenor Defendant.
CASE NO:	PC 2011-7249 (as consolidated with PC 2011-6540, and PC 2012-0052
COURT:	Providence Superior Court
DATE DECISION FILED:	August 2, 2013
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
For Appellants:	Brian A. Wagner, Esq.
For Defendants:	Richard Bianculli, Esq. Christian F. Capizzo, Esq. Gina A. DiCenso, Esq. Susan B. Forcier, Esq. Robin Main, Esq. James J. Nagelberg, Esq. Michael Rubin, Esq.