STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 25, 2013)

GP ARCADE GARAGE, LLC	:	
	:	
v.	:	**C.A. No. PC-2012-3907**
	:	
MYRTH YORK, ARTHUR V. STROTHER, DANIEL W. VARIN, MARC A. GREENBERG, ENRIQUE MARTINEZ, in their capacities as members of the PROVIDENCE ZONING BOARD OF APPEALS, and 110 PROVIDENCE OWNER, LLC	:	

DECISION

TAFT-CARTER, J. Before the Court is an appeal from a July 16, 2012 decision of the Providence Zoning Board (Board) upholding the issuance of a building permit (No. B-2011-3886, dated November 29, 2011) to 110 Providence Owner, LLC (Providence Owner) to operate a surface parking lot at the property located at 90 Westminster Street, Providence, Rhode Island. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Providence Owner owns real property located at 90 Westminster Street, Providence, Rhode Island,[1] designated as Lots 123, 124, 125, and 126 on Assessor's Plat 20 (Property). (Compl. ¶ 2.) The Property is situated in the Downtown D-1 Central Business District and the Downtown DD Overlay District (A Street). (Compl. ¶ 2.)

[1] There are repeated references throughout the record and in various memoranda submitted to this Court to the address as 110 Westminster Street. However, the original application to the City states the address as 90 Westminster Street.

In May 2006, Providence Owner obtained approval from the Downcity Design Review Committee (DRC) to construct a high-rise residential building on the Property. (Hr'g Tr. at 23.) The economic downturn severely limited the financing available for the project and Providence Owner failed to secure the capital required to construct the structure.[2] (Tr. at 32, 54-55.) As a result, in August 2011, Providence Owner applied for a "transitional use" permit pursuant to § 502.5(F) of the City of Providence Zoning Ordinance (Ordinance). Providence Owner requested a permit to allow the Property to be used as a parking lot. (Tr. at 6-7.) See Ordinance, § 502.2(F) (2009) "Demolition – Transitional Uses." At that time, § 502.5(F) permitted transitional uses including surface parking lots in the Downcity District provided that "the Director find that there has been a delay in starting new construction[] due to no fault of the applicant."[3] Id.

Jeffrey Lykins, the Director of Inspections and Standards for Providence (Director), found that the delay in construction was through no fault of Providence Owner and could be attributed to "adverse economic conditions," which, once abated, would no longer impede development. (Ex. B, Lykins Letter; Tr. at 7-8.) The request for the surface parking lot for a "one time," two-year period was approved contingent upon Providence Owner's acquisition of a Certificate of Design Approval (Certificate) from the DRC and obtaining a building permit. (Ex. B, Lykins Letter; Tr. at 7-8.) Providence Owner received the requisite Certificate on November

[2] At the meeting of the Zoning Board of Review on April 9, 2012, Brian Fallon, Providence Owner's representative, testified that his company's original plan for the Property was a single condominium project; after demolition, the shift in the real estate market forced Providence Owner to adjust its plan and attempt to build a mixed hotel/residential building. Although Mr. Fallon pursued the project through obtaining government agreements and contracts with the hotel, he explained that the economy collapsed in September 2008, and it became impossible to build. (Tr. at 54-55.)

[3] Although § 502.5(F) of the Ordinance was amended in 2012, this Court shall review the action "according to the regulations applicable in the zoning ordinance at the time the application was submitted." G.L. 1956 § 44-24-44.

10, 2011, and Building Permit No. B-2011-3886 later that month. (Ex. C, Certificate; Ex. D, Building Permit.)

GP Arcade Garage, LLC (Appellant) appealed the Director's decision to the Board on December 16, 2011, contending that the transitional use violated §§ 502 and 502.5(F)(3) of the Ordinance. (Compl. ¶¶ 1, 8.) The Board held a public hearing on the appeal on February 23, 2012, which was properly advertised pursuant to § 45-24-69. (Compl. ¶ 9; Resolution at 1.) At the hearing, the Board heard testimony on behalf of Providence Owner by the Director; Thomas Sweeney, a real estate expert; and Brian Fallon, a representative of Providence Owner. (Tr. 2-30, 33-51, 53-59.) Two lay witnesses also testified on behalf of Providence Owner concerning the conditions of the downtown area surrounding the Property: David O'Brian, the owner of a business across the street from the Property, and Robert I. Burke, the owner of a condominium unit abutting the Property. (Tr. 59-68.)

At the hearing, the Director testified concerning his process of approval of the transitional use of the Property. (Tr. at 6.) The Director stated that in approving Providence Owner's request, he relied on Providence Owner's letter citing poor economic conditions, as well as the Ordinance. The Director considered the general economic conditions in the area as opposed to Providence Owner's individual finances as a basis of his findings. (Tr. at 27-29.)

Mr. Sweeney, recognized by the Board as a real estate expert, testified that 1) it was his opinion that the economic downturn beginning in 2006 and peaking in 2008 rendered the development of the Property "economically impossible," and it was not the fault of Providence Owner; and 2) the transitional use of the Property as a surface parking lot would not adversely impact the surrounding real estate. (Ex. K, Real Estate Survey; Tr. at 34-37.) In reaching these

conclusions, Mr. Sweeney reviewed the history of the area, prior Providence Owner projects, and the effect of the economy on commercial real estate projects across the country. (Tr. at 34-35.)

Mr. Fallon provided additional testimony on behalf of Providence Owner. He averred that the company had made repeated attempts to adjust its development plans, but no modification had proved economically viable in the current economy. (Tr. at 53-55.) He further asserted that Providence Owner fully intended the transitional use to be temporary and anticipated developing the Property as soon as economic conditions allowed. (Tr. at 59.) At the time of the hearing, Mr. Fallon could not provide a timeline for construction plans for the Property. He did state that Providence Owner was "actively involved in . . . design studies, engineering studies, feasibility studies, and [was also] monitoring the market" for an indication of when development would become feasible. (Tr. at 59.)

Mr. O'Brian addressed the deteriorating economy of Providence over the past five years, and stated that the development of the Property as a parking lot would significantly help his business located across the street. (Tr. at 59-63.) Finally, Mr. Burke testified that, in his opinion, the economy of downtown Providence had essentially completely collapsed, and the surface parking lot was the best and highest use of the Property in order to support nearby businesses in their rebuilding efforts. (Tr. at 63-68.)

At the conclusion of the hearing, Appellant made four legal arguments opposing the transitional use. (Tr. at 68.) Appellant first argued that the transitional use was incorrectly labeled and was a de facto variance that the Director lacked authority to grant under the Rhode Island Zoning Enabling Act of 1991 (Enabling Act). (Tr. at 68-71.) Second, Appellant contended that it was improper to grant a transitional use because the building permit lapsed, and therefore, there was no permitted use to transition from. (Tr. at 71-72.) In support of this

argument, Appellant noted that transitional uses under the Ordinance "are only permitted when a DRC approved construction project cannot immediately follow demolition." (Tr. at 73.) Third, Appellant suggested that Providence Owner failed to demonstrate that the development delays were attributable to the economy, and not its own actions. (Tr. at 73-74.) Finally, Appellant argued that the DRC Certificate issued for the parking lot was insufficient in that it did not actually reference the parking lot. (Tr. at 74-75.)

Both parties submitted post-hearing memoranda. The Board deliberated the appeal on April 9, 2012. (Resolution at 2.) On July 16, 2012, the Board rendered its decision, issuing Resolution No. 9679: Appeal from the Decision of the Director of the Department of Inspection and Standards (Resolution). In its decision, the Board determined that 1) an application for a transitional use under § 502.5(F) is not a request for a variance and the Director had the requisite authority to grant the request; 2) the proposed use of the Property was consistent with § 502.5(F); 3) Providence Owner was not at fault for the delay in construction at the Property; and 4) the DRC was not required to review the design plans for the Property. (Resolution at 2-4.) Thus, the Board concluded that the Director had complied with all Ordinance requirements and that Providence Owner had met all its requirements for a transitional use permit. (Resolution at 4.) Appellant filed a timely appeal of the Board's decision.

II

Standard of Review

The Superior Court has jurisdiction over appeals from a zoning board pursuant to § 45-24-69(d), which provides as follows:

> "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."

"[A]n appeal from a decision of the zoning board is not a civil action but is essentially an appellate proceeding." Mauricio v. Zoning Bd. of Review of City of Pawtucket, 590 A.2d 879, 880 (R.I. 1991); see also Notre Dame Cemetery v. Rhode Island State Labor Relations Bd., 118 R.I. 336, 338, 373 A.2d 1194, 1196 (1977). The Superior Court gives deference to the findings of a local zoning board of review, in part, because they are "'presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.'" Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009) (quoting Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008)). Therefore, "[t]he trial justice may not 'substitute [his or her] judgment for that of the zoning board if [he or she] can conscientiously find that the board's decision was supported by substantial evidence in the whole record.'" Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting Apostolou v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). "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." Lischio v. Zoning Bd. of Review of Town of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (citing Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). Thus, "a reviewing court

merely examines the record below to determine whether competent evidence exists to support the tribunal's findings." New England Naturist Ass'n, Inc. v. George, 648 A.2d 370, 371 (R.I. 1994) (citing Town of Narragansett v. International Ass'n of Fire Fighters, AFL-CIO, Local 1589, 119 R.I. 506, 380 A.2d 521 (1977)).

Nonetheless, this Court will consider questions of statutory interpretation de novo. Tanner v. Town Council, 880 A.2d 784, 791 (R.I. 2005). "[A] zoning board's determination of law is not binding on this Court, and we may review such determination as to 'what the law is and its applicability to the facts.'" Cohen, 970 A.2d at 561-62 (citing Pawtucket Transfer Operations, 944 A.2d at 859).

III

Analysis

A

Appellant's Challenge to the Validity of the Ordinance

On appeal, Appellant challenges the validity of § 502.2(F) of the Ordinance on the ground that it is ultra vires of the Enabling Act. Providence Owner and the Board mount three objections to this argument. Providence Owner contends that Appellant does not have standing to challenge the Ordinance and, in the alternative, that Appellant did not challenge the Ordinance under the proper statute. The Board argues that this Court does not have jurisdiction to hear a challenge to the Ordinance on appeal from a zoning board decision. The Court will address these arguments in seriatim.

1

Standing

Providence Owner contends that Appellant lacks standing to challenge the Ordinance. "Standing is an access barrier that calls for the assessment of one's credentials to bring suit." Blackstone Valley Chamber of Commerce v. Public Util. Comm'n, 452 A.2d 931, 932 (R.I. 1982). "A party acquires standing either by suffering an injury in fact or as the beneficiary of express statutory authority granting standing." Tanner, 880 A.2d at 792. The Enabling Act grants statutory standing to "aggrieved parties" in all instances in which it provides a right of appeal in a zoning matter. See § 45-24-63 (stating that "an appeal from any decision of an administrative officer or agency charged in the ordinance with the enforcement of any of its provisions may be taken to the zoning board of review by an aggrieved party" and that "an appeal from a decision of the zoning board of review may be taken by an aggrieved party to the superior court for the county in which the city or town is situated"); § 45-24-64 (stating 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"); § 45-24-69 (outlining the procedure by which "[a]n aggrieved party may appeal a decision of the zoning board of review to the superior court"); § 45-24-71 (outlining the procedure by which an aggrieved party may appeal an enactment of or an amendment to a zoning ordinance). Section 45-24-31(4) defines an "aggrieved party" as "(i) Any 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; or (ii) Anyone requiring notice pursuant to this chapter." In granting parties the ability to challenge a zoning ordinance itself, the Enabling Act expands its

statutory grant of standing by permitting "any legal resident or landowner of the municipality" to take such appeal to the Superior Court. See § 45-24-71(a).

Under the "plain and unambiguous language" of § 45-24-69 of the Enabling Act, Appellant has standing to appeal the Board's decision. Tanner, 880 A.2d at 792; see also Murphy v. Zoning Bd. of Review of S. Kingstown, 959 A.2d 535, 539 (R.I. 2008) (noting that property owners' neighbors had standing to appeal to Superior Court a zoning board's decision, where neighbors were entitled to notice of board's public hearing given that they lived within 200 feet of the property). Moreover, under the express directive of the Enabling Act itself, Appellant is an aggrieved party under § 45-24-71 because it is a landowner within the City of Providence. See McCain v. Town of N. Providence, 41 A.2d 239, 243 (R.I. 2012) (noting that when "statutory language is 'clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings'") (quoting State v. Gordon, 30 A.3d 636, 638 (R.I. 2011)). Therefore, Appellant has standing to bring this action.

2

Challenge to Ordinance under § 45-24-69

Providence Owner next contends that Appellant's challenge to the validity of the Ordinance was not properly brought under § 45-24-69, which provides for appeals of "a decision of a zoning board of review to the superior court." The challenge to the enactment of § 502.2(F) should have properly been brought under § 45-24-71, not § 45-24-69. This failure, however, is not automatically fatal to Appellant's claims.[4] As noted above, Appellant is an "aggrieved

[4] Providence Owner's reliance on R.I. Home Builders v. Hunt is misplaced. In that case, the Rhode Island Supreme Court noted that zoning ordinances are "clearly legislative and in no sense judicial." 74 R.I. 255, 259, 60 A.2d 496, 498 (1948). Therefore, "[u]nless the act gives the petitioner such right this court will not review by certiorari the purely legislative action of a

party" under § 45-24-71 and its "failure to include [a correct statement of jurisdiction] does not necessarily require that [an] action be dismissed." Moore's Federal Practice, § 8.03[2].

Notwithstanding, the Court finds that the challenge to the Ordinance was untimely. The Enabling Act clearly states that the time frame to attack the validity of the Ordinance is thirty days. Sec. 45-24-71. Here, § 502.2(F) of the Ordinance was enacted on June 19, 2009. The appeal was taken on July 30, 2012, which is well beyond the thirty day time limit. As the claim was brought more than three years after the enactment of § 502.2(F), it is clearly time-barred. This Court is required to construe "[s]tatutes prescribing the time and the procedure to be followed by a litigant attempting to secure appellate review" strictly. Seibert v. Clark, 619 A.2d 1108, 1111 (R.I. 1993). Our Supreme Court has rejected a challenge to a zoning ordinance brought four months after the amendment of the zoning ordinance in question. See Sousa v. Town of Coventry, 774 A.2d 812, 814 (R.I. 2001). Thus, even though Appellant is an "aggrieved party," to bring this appeal it must comply with the timing directives of the relevant statute. Here, this is not the case, and the appeal is time-barred.

3

Zoning Board's Jurisdiction to Determine the Validity of the Ordinance

Finally, the Board argues that, because it did not have jurisdiction to determine the validity of the Ordinance, the issue is not properly before the Court on this appeal. It is well settled that zoning boards of review lack the authority and the jurisdiction to "pass on the validity of zoning ordinances or amendments thereto." Town & Country Mobile Homes, Inc. v. Zoning Bd. of Review of Pawtucket, 91 R.I. 464, 468, 165 A.2d 510, 512 (1960); see also Annicelli v. S. Kingstown, 463 A.2d 133, 138 (R.I. 1983) ("[W]hen [an] ordinance is challenged as patently

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city or town council." Id. The Enabling Act, as enacted in 1991, now gives Appellant "such right," and therefore this holding has been implicitly overruled by statute.

invalid . . . the issue must of necessity be resolved in court rather than at the administrative level."); Frank Ansuini, Inc. v. Cranston, 107 R.I. 63, 73, 264 A.2d 910, 915-16 (1970) ("[T]he board of review . . . lacked authority to declare as being a nullity a provision of the regulation which, like the board of review itself, was a creature of the municipal legislature."); Arc-Lan Co. v. Zoning Bd. of Review of N. Providence, 106 R.I. 474, 476, 261 A.2d 280, 282 (1970) ("[A] zoning board of review may not, either directly or indirectly, act so as to, in effect, amend the provisions of a zoning ordinance"); cf. § 45-24-71 (granting the Superior Court jurisdiction over appeals of enactments of zoning ordinances).[5]

Rhode Island courts have consistently held that a party cannot challenge the validity of an ordinance on appeal from a zoning board decision involving a party that applied for relief under that same ordinance. Russell v. Zoning Bd. of Review of Tiverton, 100 R.I. 728, 731, 219 A.2d 475, 476 (1966) ("It is well established that if there were requests asking the board to exercise its discretion under applications for exceptions or variances under the ordinance, petitioners were precluded from raising any question as to the validity thereof.") (citing Sweck v. Zoning Bd. of Review of N. Kingstown, 77 R.I. 8, 10, 72 A.2d 679, 680 (1950)); accord Allen v. Zoning Bd. of Review of Warwick, 75 R.I. 321, 323, 66 A.2d 369, 370 (1949). Such reliance on the ordinance at the board hearing is prohibited because that party "necessarily admit[ted] the validity of the very ordinance upon which [he or she] relied." Russell, 100 R.I. at 731, 219 A.2d at 476.

[5] Precisely because of the specific, legislatively-outlined procedure for appealing ordinances, Rhode Island courts have consistently rejected exhaustion of remedies defenses to challenges to zoning ordinances in the Superior Court. See, e.g., M.B.T. Construction Corp. v. Edwards, 528 A.2d 336, 337-38 (R.I. 1987) (rejecting defendant's argument that plaintiff had not yet exhausted his administrative remedies because, as the plaintiff's challenge was to the face of the ordinance, a zoning board of appeals could not have granted the requested relief); Annicelli, 463 A.2d at 135; Frank Ansuini, Inc., 107 R.I. at 73, 264 A.2d at 915-16.

Appellant attempts to distinguish the specific procedural posture of this appeal from this general rule on the grounds that it did not apply for a permit under the same ordinance provision it is now challenging. Appellant maintains that because it merely challenged the transitional use permit granted to Providence Owner, it has not conceded the validity of the ordinance. This argument is unavailing. Although not applying for a permit, Appellant nevertheless "ask[ed] the board to exercise its discretion . . . under the ordinance" by requesting that the Board revoke the transitional use permit granted to Providence Owner. Id.; Sweck, 77 R.I. at 10, 72 A.2d at 680. By petitioning the Board to revoke the permit with arguments that were premised on the Ordinance's validity[6]—rather than bringing a declaratory judgment action in Superior Court pursuant to § 45-24-71 in the first instance—Appellant waived the ability to challenge the Ordinance itself in this appeal from the Board. See M.B.T. Const., 528 A.2d at 337-38.[7]

4

Extent of the Director's Powers

Although the validity of the Ordinance is not properly before this Court on appeal, under § 45-24-69(d)(3), this Court will inquire as to whether or not the decisions of the Board were

[6] At the Board hearing and in its Memorandum, Appellant argued that the Director should not have issued the transitional use permit because Providence Owner's initial building permit from 2006 had expired and that Providence Owner had not met the requirements of § 502.5(F) in proving that the delay in construction was not its own fault. In making both of these arguments, Appellant relied on § 502.5(F) and impliedly interpreted it as valid for purposes of its arguments before the Board. See Russell, 100 R.I. at 731, 219 A.2d at 476. This Court acknowledges that Appellant also argued that the Enabling Act did not permit the Director to grant a variance—and interpreted transitional use permits as variances—but, as noted above, zoning boards of review lack the authority to consider the validity of an ordinance. See Arc-Lan Co., 106 R.I. at 476, 261 A.2d at 282 (noting that the board "is bound by the plain provisions of the ordinance and any attempt to amend it is clearly beyond the powers expressly delegated to the board"). As Appellant could not have raised the issue of validity before the Board on this appeal, it is not properly before this Court. See id.

[7] This Court refers the parties to a July 15, 2013 Order of this Court, Lanphear, J., pursuant to which Plaintiff retains the right to file a declaratory judgment claim in a separate action. At that time, this Court may consider the merits of its arguments.

"made upon unlawful procedure." Appellant contends that the Director exceeded his authority under the Enabling Act by granting a transitional use permit. Specifically, Appellant contends the sole mechanism available to Providence Owner to circumvent the § 502.5(F)(3) requirement that the parking lot be screened from Westminster Street by a building[8] is a variance. The Enabling Act specifically grants the Board the exclusive power to grant variances; thus, Appellant maintains that the Director's ability to grant transitional use permits—essentially, disguised variances—violates the Enabling Act. See § 45-24-41.

In response, Providence Owner and the Board (collectively, Appellees) contend that under § 502.5(F) of the Ordinance, a transitional use permit is not the same as a variance. While a variance is used to attain relief from the requirements of an Ordinance, Appellees counter that the ability to apply for and receive a transitional use permit is found in the Ordinance itself. Moreover, Appellees argue that the requirements of § 502.2(F) do not apply to a transitional use permit because the language of the section exempts it from the requirements of the rest of the Ordinance.

At issue is the following provision contained in the Ordinance:

> "F. Transitional Uses: The intent of this Ordinance is that new construction shall immediately follow demolition. Therefore, unless the applicant can demonstrate that through no fault of its own, construction cannot immediately follow demolition, no transitional uses shall be permitted. Should the Director find that there has been a delay in starting new construction, due to no fault of the applicant, the Director may permit a transitional use for up to one two-year period, or until a building permit is issued, whichever comes first. Notwithstanding the other provisions of this ordinance, a transitional use may include a surface parking lot,

[8] Sec. 502.2(F)(3) requires that any surface parking lot located in the Downcity District be screened from view from an "A street" by a building. "A streets" receive special protection under the Ordinance in order to preserve historical architecture and promote pedestrian travel. Westminster Street, the street onto which the Property faces, is deemed an "A street" under the Ordinance.

> but the parking lot must be landscaped in conformance with Section 502.2 D) and E). If the Director finds that the applicant is not acting in good faith in pursuing a building permit, permission for the transitional use shall be revoked. Any lot that remains vacant following demolition for a period of more than two years shall be landscaped in conformance with Section 502.2 D) and E)." Providence Zoning Ordinance, § 502.2(F).

A close reading of this subsection shows that it is in harmony with the rest of the Ordinance and conforms to the requirements in the Enabling Act. Appellant's contention that § 502.5(F) conflicts impermissibly with § 502.2(F) is misguided in that § 502.5(F) contains within it an exemption from the requirements found elsewhere in the Ordinance. Section 502.5(F), in contemplating a surface parking lot as a permissible transitional use, states that "[n]otwithstanding the other provisions of this ordinance," a surface parking lot is acceptable as long as it is landscaped per § 502.2(D) and (E). Not only does this language explicitly exempt a transitional surface parking lot from the § 502.2(F) requirements, the inclusion of subsections (D) and (E) evidence an intention to exclude the requirements of subsection (F). See Murphy v. Murphy, 471 A.2d 619, 622 (R.I. 1984) ("[A]n express enumeration of items in a statute indicates a legislative intent to exclude all items not listed."); see also Cohen, 970 A.2d at 562 (applying the rules of statutory interpretation to the construction of a zoning ordinance). Therefore, a transitional use is not, as Appellant contends, a "variance in disguise." There is no conflict within the Ordinance.

B

Compliance with the Zoning Act

Appellant's remaining arguments concern its contention that the Board erred in finding that: 1) § 502.5(F) did not include a time restriction for applications for transitional use permits; 2) Providence Owner had demonstrated it was not at fault for the delay in construction; and

3) transitional use permits granted pursuant to § 502.5(F) were exempted from DRC review required elsewhere in the Ordinance.

1

Time Restrictions in Applying for Transitional Use Permit

Appellant argues that the Board erred in approving the Director's application of § 502.5(F) to Providence Owner's request in 2011 because its DRC approval had expired. Under the Ordinance, transitional uses are permitted when "construction cannot immediately follow demolition." Thus, it is argued that an applicant can only receive a permit during the six-month period of its DRC approval. In response, Appellees argue that there is no time restriction contained in § 502.5(F), and the section does not condition its applicability on the existence of a current DRC approval.

This Court considers questions of statutory interpretation de novo. See Cohen, 970 A.2d at 562; Tanner, 880 A.2d at 791. At the same time, this Court will "give weight and deference to a zoning board's interpretation and application of the zoning ordinance, provided its construction is not clearly erroneous or unauthorized." Cohen, 970 A.2d at 562. In this matter, the Board concluded that:

> "[T]here is no time restriction in the Ordinance that limits the amount of time in which an applicant must file for a transitional use; and further . . . the Board finds that the complexity of the proposed project resulted in a prolonged effort to bring the project to fruition."

Resolution at 4. The Board's finding that § 502.5(F) did not include a time restriction for transitional use permits is neither clearly erroneous or in violation of ordinance provisions.

The Ordinance does not contain an express or implied time limitation regarding when an applicant may apply for and receive a transitional use permit. See Ordinance § 502.5(F). In fact,

the Ordinance contemplates that a party may not apply for this type of permit until after a "delay in starting new construction," and the transitional use cannot continue once a building permit has been issued. See id. (noting that a transitional use is permitted for two years or until "a building permit is issued, whichever comes first"). As it would be exceedingly difficult to predict the inability to obtain a building permit during the six month term of DRC approval, Appellant's interpretation of the Ordinance—that a party must apply for a transitional use permit before its initial DRC approval expires—would render the section meaningless. See Ryan v. Providence, 11 A.3d 68, 71 (R.I. 2011) ("Thus, in interpreting a statute or ordinance, we first accept the principle that 'statutes should not be construed to achieve meaningless or absurd results.'") (citing Berthiaume v. Sch. Comm. of Woonsocket, 121 R.I. 243, 247, 397 A.2d 889, 892 (1979)).

In addition, as noted by the Board, the complexity of large-scale construction projects renders their building timelines unpredictable and lengthy, and it is not uncommon for an owner to take longer than six months to obtain a building permit. See Resolution at 4.[9] The Board found Mr. Fallon's testimony that "multi-faceted, multi-million dollar projects are 'remarkably complex' and are usually developed over a period of years" credible. Id. Holding applicants to a six-month time limit would nullify the purpose of this Ordinance, which is to help accommodate property owners who have been delayed in construction. See § 502.5(F).

Moreover, § 502.5(F) sets forth specific requirements for obtaining a transitional use period which do not include any time frame: "Should the Director find that there has been a

[9] "[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 E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). If a decision was reached in reliance on such knowledge, such as the interpretation and construction of specific provisions of an ordinance, "it is considered by this court to constitute legal evidence sufficient to support such a finding." Id.

delay in starting new construction, due to no fault of the applicant, the Director may permit a transitional use . . . ." (Emphasis supplied.) The exclusion of a time limitation from this Ordinance indicates that the legislature did not intend that one be imposed. See Murphy, 471 A.2d at 622. This Court also notes that the Rhode Island General Assembly has acknowledged the economic downturn in its legislative findings in passing other laws,[10] further bolstering the conclusion that § 502.5(F) was intended as a temporary solution to a depression in the real estate market and, therefore, was not intended to be limited to six-month windows of opportunity. This Court finds that the lack of explicit timeframes within the Ordinance itself, coupled with the fact that a six-month limit would effectively nullify § 502.5(F), indicates that no such requirement exists within the Ordinance, and the Board's finding that Providence Owner was not required to apply for its transitional use permit when its initial DRC approval was still active in 2006 was not affected by error of law or in violation of ordinance provisions.

2

Good Faith of Providence Owner

Appellant also contends that Providence Owner did not sufficiently demonstrate that the delay in construction was "through no fault of its own," as required by § 502.5(F), and that the "extreme adverse economic conditions" cited by Providence Owner is subjective. Appellees

[10] See 2009 Rhode Island Laws Ch. 09-198 (09-S754A):

> "The general assembly hereby finds that the current economic conditions in the real estate market demonstrate that there is little or no demand for new construction. In addition, the banking crisis has made it extremely difficult for real estate developers to obtain financing for new real estate construction. Currently, there are real estate developers who have expended substantial amounts of money to obtain permits and approvals from various local and state agencies. Many of the permits and approvals will expire prior to an improvement in the economy and the financial and banking industries."

respond that Providence Owner had continuously acted in good faith in attempting to develop the Property and that there is substantial evidence in the record supporting the Board's finding.

This Court defers to the Board's findings of fact and credibility determinations which are supported by "substantial evidence." See Mill Realty Assocs., 841 A.2d at 672. In its Resolution, the Board reviewed and analyzed the evidence presented relative to the reason for the delay in construction. The Board unanimously concluded Providence Owner was not at fault. In addition, the Board reviewed the expert and lay testimony presented at the hearing and concluded that the testimony was credible relating to "the cause of delay in commencing construction of the proposed building." Resolution at 3. Specifically, the Board accepted the testimony of Mr. Sweeney that the "economic issues that started to rear their heads in 2006 and reach[ed] their pinnacle in 2008 when the bottom of the market fell out [were] the primary reason why this project did not go forward." (Tr. at 35.) In addition, it found credible the testimony of Mr. Fallon stating "this is a very, very difficult time to finance a new development." (Tr. at 58.)

The Board noted that the Rhode Island General Assembly enacted recent legislation "which specifically cited the economic collapse of the real estate market as the reason for extending the tolling period for permits to allow developers an opportunity to obtain financing; specifically Rhode Island General Law 45-23-63.1." Id. at 4. In reviewing evidence presented by Providence Owner, the Board noted that several applicants under § 502.5(F) had been granted transitional use permits because of the recession, and other projects throughout the city were similarly currently on hold because of the market downturn. Id. Finally, the Board rejected Appellant's argument that Providence Owner's personal wealth should be a "factor in determining the economic feasibility of the project." Id. In sum, the Board found that the

inability to develop the Property could be attributed to the collapse of the real estate market, and not the fault of Providence Owner. Id.

This Court will not disturb the findings of the Board on this factual issue. There were substantial pieces of evidence, including expert and lay testimony, other legislation enacted around that time citing the recession, and Board members' own personal knowledge to support the Board's conclusion that Providence Owner had sufficiently proved that its inability to pursue development of the Property was not its own fault. See Lischio, 818 A.2d at 690 n.5; Caswell, 424 A.2d at 647.

3

DRC Approval

Appellant's final argument is that Providence Owner did not receive approval from DRC as required under the Ordinance, and, therefore, it should not have been issued a building permit. Under § 502.1(D)(1) of the Ordinance, DRC must approve the design of any improvements made within the Downcity District; therefore, Appellant argues that the building permit for the parking lot was issued in error. In response, Appellees contend that § 502.5(F) does not require DRC approval because transitional use permits are exempted from the rest of the requirements of the Ordinance.

As previously noted, § 502.5(F) permits a surface parking lot as a transitional use "[n]otwithstanding the other provisions of this ordinance"—explicitly indicating that the other provisions of the Ordinance do not apply.[11] Moreover, § 502.5(F) requires that a transitional

[11] The Rhode Island Supreme Court has interpreted the word "notwithstanding"—when used in a statute—to mean "regardless of hindrance by." Sch. Comm. of Cranston v. Bergin-Andrews, 984 A.2d 629, 642 (R.I. 2009) (quoting Planned Env'ts Mgmt. Corp. v. Robert, 966 A.2d 117, 123 (R.I. 2009)). Although "[t]he use of this term in a statute does not automatically imply that a section should be considered in a vacuum," this Court must attempt to harmonize multiple

surface parking lot comply with the landscaping requirements listed in § 502.5(D) and (E), but does not list any other Ordinance provision that applies—implying that no other provision does apply. See Murphy, 471 A.2d at 622 ("[A]n express enumeration of items in a statute indicates a legislative intent to exclude all items not listed."). Thus, § 502.5(F) specifically contemplates the applicability of some requirements found elsewhere in the ordinance, while both implicitly and explicitly excluding others—including § 502.1(D)(1).

In addition, this Court will consider the Board's "interpretation and application of the zoning ordinance, provided its construction is not clearly erroneous or unauthorized." See Cohen, 970 A.2d at 562. Here, the Board properly interpreted § 502.5(F) of the Ordinance in finding that § 502.1(D)(1) did not apply to transitional permits for surface parking lots. In its findings of fact, the Board found that:

> "Section 502.5(F) of the Ordinance allows a transitional use to include a surface parking lot, 'notwithstanding the other provisions of this ordinance,' and requires said lot to be landscaped in conformance with Sections 502.2(D) and (E) but does not specifically require review of the landscaping plan by the Downcity Review Commission; therefore, the Board finds that the question of whether the Applicant has received approval from the DRC for the design of the Property to not be germane to the Applicant's request for a transitional use parking lot for the Property."

Resolution at 4. This conclusion was based entirely on an interpretation of the language in § 502.5(F) permitting surface parking lots "[n]otwithstanding the other provisions of this ordinance." This interpretation of the Ordinance was not affected by error of law and is not clearly erroneous. See Cohen, 970 A.2d at 562. Because the requirements in § 502.1(D)(1) do

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sections "to give full force and effect to the intention of the Legislature." Id. at 642-43. Here, an examination of the entire Ordinance reveals that § 502.5(F) "is in no way 'hindered by' the requirements of the[] other sections." Id. at 643.

not apply to transitional use surface parking lots, this Court finds that Providence Owner was not required to obtain DRC approval under that subsection in order to operate its parking lot.

IV

Conclusion

After review of the entire record, the Court finds that the Board's decision contains reliable, probative, and substantial evidence to support its findings. Further, this Court concludes that the Board's decision was not in violation of constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Substantial rights of the Appellant have not been prejudiced. Thus, the decision of the Board is affirmed. Counsel for the appropriate parties shall submit judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**GP Arcade Garage, LLC v. Myrth York, et al.**
CASE NO:	**PC-2012-3907**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 25, 2013**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**John J. Garrahy, Esq.** **Michael T. Eskey, Esq.**
For Defendant:	**Amy L. Crane, Esq.** **Mitchell R. Edwards, Esq.** **James J. Nagelberg, Esq.**