

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[FILED: December 13, 2013]

123 ASSOCIATES, LLC

:

V.

:

C.A. No. PC-2012-4189

:

FGX INTERNATIONAL, INC.,  
ZONING BOARD OF REVIEW OF  
THE TOWN OF SMITHFIELD, AND  
GEORGE D. MCKINNON, ANTONIO S.  
FONSECA, DAVID GREENE, S. JAMES  
BUSAM, AND THOMAS HEENAN,  
IN THEIR CAPACITIES AS MEMBERS  
OF THE ZONING BOARD OF REVIEW  
OF THE TOWN OF SMITHFIELD

:

:

:

:

:

:

:

:

:

:

:

:

**DECISION**

**TAFT-CARTER, J.** This matter is before the Court on the appeal of abutter 123 Associates, LLC (Appellant) from a Resolution of the Town of Smithfield’s Zoning Board of Review (Zoning Board) granting special use permits with respect to property at 500 George Washington Highway in Smithfield, Rhode Island. Appellant filed a timely appeal to this Court on August 15, 2012. Jurisdiction of this appeal is pursuant to G.L. 1956 § 45-24-69.

**I**

**Facts and Travel**

FGX International, Inc. (FGX) sells sunglasses, non-prescription reading glasses, optical frames and accessories. (Tr. at 3:25-4:2, June 27, 2012.) FGX’s global headquarters, warehouse, and distribution center are located on approximately thirty-two acres at 500 George Washington Highway (Route 116) in Smithfield, Rhode Island, designated as Lot 17B on Assessor’s Plat 48 (the Property). (Tr. at 4:2-3; 80:16.) The Property is located within

Smithfield's planned corporate zone. (Tr. at 79:8-13.) FGX proposes the following improvements to the Property:

"a) Construction of an extension off Reservoir Road #1 to the northwest end of the existing building;

"b) Construction of a new surface parking area to the northwest of the existing building;

"c) Reconstruction and resurfacing of the existing loading dock area to the west of the existing building;

"d) Construction of the following four additions to the existing building:

"i. 25,500 square foot two-story warehouse to the east (with 800 square feet of exterior ramps and stairs);

"ii. 3750 square foot employee cafeteria to the east with 1000 square foot covered outdoor eating area;

"iii. 40,000 square foot two-story office space to the south; and

"iv. 1800 square foot covered entranceway to the south.

"e) Construction of a new internal access roadway and surface parking area to the east;

"f) Re-striping on Route 116 to create new turning lanes proximate to the main entrance of the Property."

(Zoning Board's Resolution Granting Special Use Permits (Resolution) at 2.) FGX seeks special permits for this proposed expansion to transfer the business from a recent business acquisition in Florida to FGX's Smithfield facility. (Tr. at 4:7-10.) Upon completion of the expansion project, FGX will employ approximately one hundred additional employees at the Property. (Tr. at 4:14-17.)

After a hearing held on May 24, 2012, the Smithfield Planning Board (Planning Board) granted master plan approval for the proposed expansion and recommended that the Zoning Board approve the project as well. (Smithfield Planning Board's Resolution Granting Master Plan Approval of a Major Land Development Assessor's Plat 48, Lot 17B (Planning Board

Resolution).) The Planning Board made specific findings of fact, including that FGX's proposed expansion is consistent with the Smithfield Comprehensive Community Plan (Comprehensive Plan).

On May 29, 2012, FGX filed an application with the Zoning Board for two special use permits pursuant to the Smithfield Zoning Ordinance (Ordinance) Sections 4.3.H.2 (Wholesale Business and Storage) and 4.3.J.3 (Light Industrial) (Application). (Tr. at 2:4-7.) FGX also applied for dimensional variances from Ordinance Sections 5.3.4.A (wetlands buffer zone requirements), 7.4.C.1 and 7.4.F.3 (off-street parking requirements). (Tr. at 2:7-14.) With respect to the dimensional variances, FGX specifically requested:

“a) 50’ of wetlands setback relief due to the construction of the extension off Reservoir Road #1 and the stream crossing;

“b) 50’ of wetlands setback relief due to the rebuilding and resurfacing of the existing loading dock area to the west of the existing building;

“c) 92’ of wetlands setback relief due to the construction of the 40,000 square foot office space addition to the south of the existing building;

“d) 10’ of wetlands setback relief due to the construction of a new access roadway to the east of the existing building;

“e) 70’ of wetlands setback relief due to the construction of new stormwater management structures to the west and north of the existing building; and

“f) Approval for 479 off-street parking spaces rather than the 679 spaces called for by the Ordinance.”

(Resolution at 3.)

On June 27, 2012, the Zoning Board held a public hearing on FGX's Application. At the hearing, the Zoning Board heard testimony from several witnesses, both in support of and against FGX's Application.

First, Gerald Kitchen, the Executive Vice-President of Operations for FGX, described FGX's proposed expansion and reasons therefor. (Tr. at 3:20-4:10.) Mr. Kitchen described the general operations of the FGX facility and answered questions from the Zoning Board regarding the number of trucks entering and exiting the Property during the course of the day. (Tr. at 4:11-7:11; 9:8-22.) Mr. Kitchen testified that FGX has asked the Rhode Island Department of Transportation (RIDOT) to lower the speed limit on Route 116 near the Property from 50 m.p.h. to 40 m.p.h. (Tr. at 7:12-19.) Mr. Kitchen further testified that FGX plans to request a new traffic light at the Route 116/Rocky Hill Road/Business Park Drive intersection and will re-stripe the road to create a new turning lane on Route 116 near FGX's main entrance. (Tr. at 12:13-13:1.) Mr. Kitchen also confirmed that FGX would pay the cost of adding the new traffic light and the new turning lane. (Tr. at 12:13-23.)

Richard Lipsitz, a professional land surveyor, testified on behalf of FGX's Application. He was accepted as an expert by the Zoning Board. (Tr. at 13:18-14:18.) Mr. Lipsitz described the components of the proposed expansion using the site plan he prepared as part of FGX's Application. (Tr. at 14:21-20:10.) Mr. Lipsitz testified that the project will require approval from the Rhode Island Department of Environmental Management (RIDEM) as well as the RIDOT. (Tr. at 17:21-20:16.) Mr. Lipsitz further testified that FGX is requesting a downward departure from the number of parking spaces required by the Ordinance because FGX does not want to unnecessarily impair the wetlands. (Tr. at 20:17-21:16.) To comply with the Ordinance, FGX would have to have 679 parking spaces upon completion of the proposed expansion, but only approximately 360 employees on site. (Tr. at 20:20-21:3.)

The Zoning Board also heard from Andrew P. DiGiammo, a registered architect in Rhode Island and Massachusetts, who was accepted as an expert in the field of architecture. (Tr. at

28:21-22.) Mr. DiGiammo described the proposed five phases of construction and the manner in which FGX is working with the Smithfield Historical Society to use the stones from the foundation of an old barn on the Property as part of the new front entry to the FGX facility. (Tr. at 29:22-33:23.)

Scott Rabideau testified on behalf of FGX as an expert in freshwater wetlands delineation and analysis. (Tr. at 37:16-38:1.) Mr. Rabideau had been working with RIDEM to ensure that the proposed expansion met state and federal standards for wetland delineation. (Tr. at 38:5-40:19.) Mr. Rabideau described the areas where the proposed expansion would encroach into Smithfield's buffer for freshwater wetlands and the specific ways in which FGX plans to address these encroachments. (Tr. at 41:19-43:14.) Mr. Rabideau testified that, in his opinion, the proposed expansion would not further impair the wetlands, which have already been impacted by prior development of the area and the existing roadway. (Tr. at 45:9-11.)

The Zoning Board next heard from Paul Bannon, who was accepted as an expert in the field of traffic engineering. (Tr. at 51:2-9.) Mr. Bannon conducted a traffic impact study of the proposed expansion and prepared a report to accompany FGX's Application. (Tr. at 51:15-52:10.) Mr. Bannon testified that FGX was concerned about the current access to their Property from Route 116 and the number of vehicles noted to be traveling in excess of the posted 50 m.p.h. speed limit on Route 116. (Tr. at 53:21-25.) Mr. Bannon stated that FGX sought to improve safety on Route 116 for the surrounding properties as well as on its own site. To meet this objective, FGX proposed a new access road into the facilities, re-striping Route 116 to create a turning lane, and installing a new traffic signal. (Tr. at 53:25-54:23.) Mr. Bannon testified that FGX would bear the cost of installing the new traffic signal as well as the re-striping to create a turning lane. (Tr. at 57:11-18.) Mr. Bannon fielded questions from the Board about the

anticipated increase in traffic flow and whether the installation of the traffic signal and reduction of the speed limit would cure the issue. (Tr. 57:11-70:6.) Mr. Bannon believed that the installation of the traffic signal would create a safer and more efficient access to the business. (Tr. at 70:7-14.)

Thomas Andolfo, a certified general appraiser in Rhode Island, also testified. He was accepted as an expert in the field of real estate appraisal and valuation. (Tr. at 75:14-76:8.) Mr. Andolfo prepared the real estate survey included in the FGX Application. (Tr. at 77:15-20.) Mr. Andolfo testified that in his opinion, the proposed expansion would not have any adverse impact on the values of adjacent properties. (Tr. at 77:10-12.) Mr. Andolfo stated that granting the requested special use permits would neither alter the general character of the surrounding area nor impair the intent or purpose of the Ordinance or Comprehensive Plan. (Tr. at 82:2-5.)

Alfred Costantino, the owner of a neighboring property, testified about his concerns relative to traffic on Harris Road. (Tr. at 96-109.) Mr. Costantino sought and received assurances from FGX that it was not asking that Harris Road be converted into a one-way street. (Tr. at 98:17-101:16.) Mr. Costantino praised FGX and the manner in which the company maintains its Property. (Tr. at 97:10-13.)

The Appellant also presented witnesses. Joseph Lombardo, an expert in the field of land use, testified that the project would result in the overdevelopment of the site. (Tr. at 115:25-116:2.) Mr. Lombardo further testified as to his opinion that the proposed expansion would not be in line with the intent and purpose of Smithfield's Comprehensive Plan and that it would alter the general character of the area. (Tr. at 117:8-118:10; 123:23-25.) Mr. Lombardo expressed concern that despite FGX's need for fewer parking spaces than required by the Ordinance, a future owner of the Property may require the maximum spaces allowed. (Tr. at 120:8-19.)

The Appellant attempted to present expert testimony on the impact of the proposed expansion on neighboring property values. The proposed expert was not qualified by the Zoning Board because he was not a licensed real estate appraiser. (Tr. at 127:25-129:17.)

Finally, Jeffrey Campopiano<sup>1</sup>, a professional engineer testified. The Appellant unsuccessfully proffered Mr. Campopiano as an expert on traffic. (Tr. at 130:9-133:25.) Mr. Campopiano did testify, however, based on a review of FGX's Application and personal observations of the traffic flow near the Property. It was his opinion that installing a traffic light at the Rocky Hill Road intersection would divert traffic on to side streets and would lead to an increase in accidents. (Tr. at 140:10-142:18.) Mr. Campopiano also recommended that FGX build the new entrance to the Property along Route 116, instead of creating access from Reservoir Road. (Tr. at 148:12-149:3.)

At the conclusion of the hearing, the Zoning Board took FGX's Application under advisement. (Tr. at 151:17-22.) The Zoning Board subsequently approved the Application by a vote of 5-0. The Zoning Board recorded its Resolution on July 31, 2012. In its Resolution, the Zoning Board summarized FGX's Application and the testimony presented at the June 27, 2012 hearing and made several findings of fact based on the evidence presented on June 27, 2012.

Specifically, the Zoning Board found that 479 parking spaces would satisfy FGX's needs and that to require more parking spaces would unnecessarily impair the wetlands. (Resolution at ¶ 7.) The Zoning Board also found that the proposed construction is sited as far from the wetlands as feasible. (Resolution at ¶ 8.) The Zoning Board found that all of the requirements in the Ordinance for the required special use permits were met and that granting the requested special use permits would neither alter the general character of the surrounding area nor impair

---

<sup>1</sup> The transcript from the June 27, 2012 hearing spells the name as "Campobiano," but the Resolution and Mr. Campopiano's resume (provided in Ex. 11) spell the name as Campopiano.

the intent or purpose of the Ordinance or Comprehensive Plan. (Resolution at ¶ 13.) The Zoning Board adopted all of the Planning Board’s findings of fact in the Planning Board’s Resolution. (Resolution at ¶ 14.) The Zoning Board rejected Mr. Lombardo’s opinion that the proposed expansion was inconsistent with the intent and purpose of the Comprehensive Plan because the Planning Board had unanimously found the proposed expansion to be consistent with the Comprehensive Plan. (Resolution at ¶ 16.) The Zoning Board also declined to consider Mr. Campopiano as an expert on traffic and rejected Mr. Campopiano’s testimony regarding the creation of additional traffic hazards as not credible. (Resolution at ¶ 17.)

Ultimately, the Zoning Board determined that the requested special use permits were authorized by the Ordinance, that each special use met all of the criteria set forth in the Ordinance authorizing the special use, and that granting these special use permits would not alter the general character of the surrounding area or impair the intent or purpose of the Ordinance or Comprehensive Plan. (Resolution at 6.) However, the Zoning Board conditioned its approval of FGX’s Application on FGX meeting nine conditions related to various building permits and approvals from town and state agencies. (Resolution at 6-7.)

## II

### **Standard of Review**

This Court’s review of a zoning board decision is governed by § 45-24-69(d), which provides in relevant part:

“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[s] 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.”

Our Supreme Court requires this Court to “review[] the decisions of a . . . board of review under the “traditional judicial review” standard applicable to administrative agency actions.” Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998). Furthermore, this 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.” Id. at 665-66 (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). Accordingly, in performing its review, this Court “may ‘not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.’” Curran v. Church Community Housing Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)).

As part of its review, the Court “must examine the entire record to determine whether “substantial” evidence exists to support the board’s findings.” Salve Regina College v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). “Substantial evidence” is defined as “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 North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981)).

### III

#### Analysis

Appellant argues that the Zoning Board's decision to grant the special use permits and accompanying dimensional relief must be reversed because the proposed expansion of the FGX facilities would alter the general character of the surrounding area, and the relief requested from the Ordinance is not the least relief necessary. Appellant further argues that FGX did not produce sufficient evidence to meet the standard for granting a dimensional variance articulated in § 45-24-41(c) and (d)(2).<sup>2</sup> Appellant also argues that the witnesses who testified to the Zoning Board on its behalf prove that the dimensional relief granted will intensify traffic congestion in the area, create a traffic hazard, and adversely affect the public convenience and welfare.

---

<sup>2</sup> Section 45-24-41(c) provides:

“In granting a variance, the zoning board of review requires that evidence to the satisfaction of the following standards is entered into the record of the proceedings:

“(1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant;

“(2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;

“(3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and

“(4) That the relief to be granted is the least relief necessary.”

Section 45-24-41(d)(2) also requires that:

“The zoning board of review shall, in addition to the above standards, require that evidence is entered into the record of the proceedings showing that: . . . (2) the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience.”

In response, FGX argues that the Zoning Board did not err in granting the requested dimensional relief with the approval of FGX's Application for the special use permits. FGX contends that its burden of proof required it to demonstrate that the Application met the standard for special use permits. In addition, FGX argues that there was ample evidence in the record from which the Zoning Board properly made its findings of fact. FGX also argues that the Zoning Board did not err in its decision to reject the testimony from Appellant's witnesses as not credible.

Similarly, the Zoning Board argues that it did not err by applying the special use permit standard, and not the dimensional variance standard, in granting FGX's Application. The Zoning Board contends that it properly weighed the credibility of the witnesses' testimony and that there is substantial evidence on the record to support the findings of fact and decision articulated in its Resolution. The Zoning Board also commented that Appellant failed to provide this Court with any specific argument as to the precise statutory basis for its appeal.<sup>3</sup>

## A

### **Relief from Dimensional Regulations as Part of Granting Special Use Permits**

As a threshold matter, this Court will address whether the Zoning Board properly granted dimensional relief through the special use permits or whether FGX was required to meet the statutory criteria and standard for dimensional variances.<sup>4</sup> Generally, a zoning board's failure to apply the proper legal standard to the relief requested constitutes an error of law that merits

---

<sup>3</sup> As stated in Section II, *supra*, this Court's review of a zoning board decision is governed by § 45-24-69(d), which provides six avenues through which an appellant may challenge a zoning board's decision.

<sup>4</sup> Since Appellant's arguments focus on the statutory criteria and standard for granting dimensional variances articulated in § 45-24-41(c) and (d)(2), it is reasonable to infer that Appellant believes the Zoning Board applied the incorrect standard in granting the dimensional relief as special use permits even though Appellant did not explicitly make this argument.

reversal and remand. See Hugas Corp. v. Veader, 456 A.2d 765, 770-71 (R.I. 1983) (where the Supreme Court held that the trial court erred by upholding a zoning board decision that was based on a variance standard when the case should have been remanded to the zoning board for reconsideration using the town's standard for special exceptions).

FGX and the Zoning Board both argue that the standard set forth in § 45-24-41 does not apply where dimensional relief is granted pursuant to a special use permit. See DeStefano v. Zoning Bd. of Review, 122 R.I. 241, 246, 405 A.2d 1167, 1170 (1979); V.H.S. Realty, Inc. v. Zoning Bd. of Review, 120 R.I. 785, 792, 390 A.2d 378, 382 (1978). FGX asserts that in instances where a special use permit that includes dimensional relief is allowed, it is only required to demonstrate that it met the criteria for the issuance of a special use permit set forth in Ordinance § 10.8(C)(2).

The Zoning Enabling Act is set forth in Chapter 24 of Title 45 of the General Laws. In 2002, the General Assembly amended §§ 45-24-41 and 45-24-42. Lischio, 818 A.2d at 693. These sections govern variances and special use permits. As amended, these statutes supersede the Supreme Court holding in Newton v. Zoning Board of Review of Warwick, 713 A.2d 239, 242 (R.I. 1998), which declared that a dimensional variance could not be granted in conjunction with a use granted by special permit. Lloyd v. Zoning Bd. of Review for City of Newport, 62 A.3d 1078, 1087 (R.I. 2013). In § 45-24-41(d), the General Assembly clarified that “[t]he zoning board of review has the power to grant dimensional variances where the use is permitted by special use permit if provided for in the special use permit sections of the zoning ordinance.”

The General Assembly also amended § 45-24-42(c), which now states:

“[t]he ordinance additionally may provide that an applicant may apply for, and be issued, a dimensional variance in conjunction with a special use. If the special use could not exist without the dimensional variance, the zoning board of review shall consider

the special use permit and the dimensional variance together to determine if granting the special use is appropriate based on both the special use criteria and the dimensional variance evidentiary standards.”

Our Supreme Court has commented that “the General Assembly intended that a use granted by special-use permit may coexist with a dimensional variance only when a municipality’s zoning ordinance so provides.” Lloyd, 62 A.3d at 1087.

Although both statutory sections clearly state that a zoning board may only grant dimensional relief as part of a special use permit when the town zoning ordinance specifically provides this authority, the Supreme Court recognized the two distinct sections governing these situations. See id. One section, § 45-24-42(c), refers to situations in which an applicant is issued a dimensional variance in conjunction with a special use. The other section, § 45-24-41(d), refers to situations in which a use is conditionally permitted by special use permit and provides a zoning board with the power to grant dimensional relief through the special use permit.

Here, FGX applied for special use permits because its proposed expansion included uses conditionally permitted by the Ordinance.<sup>5</sup> FGX also applied for dimensional variances. The Ordinance explicitly provides for dimensional relief as a part of a special use permit in § 4.5:

“In accordance with Article 10 of this Ordinance, the Zoning Board may by Special Use Permit grant relief from the dimensional and intensity regulations of this Ordinance for any use it authorizes by Special Use Permit except for intensity regulations with regard to floor area to lot size ratio and residential density.”<sup>6</sup>

Pursuant to § 45-24-41(d), supra, the Zoning Board did not err by granting FGX’s Application in the form of special use permits because Ordinance § 4.5 explicitly allows the Zoning Board to provide dimensional relief through a special use permit.

---

<sup>5</sup> Specifically, FGX sought special use permits for uses conditionally permitted in Sections 4.3.H.2 (Wholesale Business and Storage) and 4.3.J.3 (Light Industrial) of the Ordinance.

<sup>6</sup> Article 10 of the Ordinance provides the criteria for variances and special use permits.

In granting the special use permits, the Zoning Board is not required to consider the evidentiary standards for dimensional variances because these standards are not intended to apply when the dimensional relief can be obtained through a special use permit pursuant to the Ordinance. See Lloyd, 62 A.3d at 1087 (wherein zoning board’s grant of a special use permit was to expand a dimensionally nonconforming structure and required only that the special use and not the dimensional criteria be applied); see DeStefano, 122 R.I. at 246, 405 A.2d at 1170 (Pre-dating the statutory amendments but stating that the evidentiary standards for granting a dimensional variance were “never intended to operate where the requested relief can be obtained through local zoning ordinances.”).

When both a special use permit and dimensional variance are sought, “the zoning board must decide whether granting the special-use permit conforms with the requirements of § 45-24-42 and further, whether a special-use permit coupled with dimensional relief adversely affects the surrounding area.” Lischio, 818 A.2d at 693. While Lischio involved an application for a dimensional variance only, the Supreme Court briefly discussed the amendments to §§ 45-24-41 and 45-24-42 that provided towns with the authority to grant dimensional relief through a special use permit. With respect to § 45-24-41(d)—affording the zoning board of review the power “to grant dimensional variances where the use is permitted by special use permit if provided for in the special use permit sections of the zoning ordinance”—the Supreme Court explained that the zoning board must ensure: (1) that the criteria for special use permits are met; and (2) that providing dimensional relief as part of a special use permit will not “adversely affect[] the surrounding area.” Id. Since the Ordinance specifically provides the Zoning Board with the authority to grant dimensional relief for “any use it authorizes by Special Use Permit,” the

Zoning Board did not err by considering FGX's Application against the Ordinance's special use permit criteria only. See Ordinance § 4.5; see also DeStefano, 122 R.I. at 246, 405 A.2d at 1170.

Here, FGX applied for both special use permits and dimensional variances. The Zoning Board's Resolution explicitly granted FGX's Application for special use permits. The Resolution is specifically entitled "A Resolution Granting *Special Use Permits* at Lot 17B . . . ." (Emphasis added). Furthermore, the Resolution also contains the following statement: "NOW THEREFORE BE IT RESOLVED . . . that the application *as filed* by the applicant is hereby APPROVED . . . ." (Emphasis added). Since the Zoning Board explicitly granted special use permits and approved FGX's Application "as filed," FGX received the dimensional relief sought as part of the special use permits granted. This action by the Zoning Board was authorized by Ordinance § 4.5, supra. The Zoning Board did not award dimensional variances "in conjunction" with the special use permits. Therefore, the Zoning Board needed only to consider whether FGX met the criteria for special use permits articulated in Ordinance § 10.8(C)(2) and was not required to determine whether the dimensional variance evidentiary standards were met as well. See Lischio, 818 A.2d at 693; DeStefano, 122 R.I at 246-47, 405 A.2d at 1170; see also Roland F. Chase, R.I. Zoning Handbook, § 173 (2d ed. 2006) ("[W]here the local zoning ordinance allows the board of review to grant relief from [] set-back requirements by special-use permit, the "more than mere inconvenience" standard does not apply; rather, the applicant must meet the requirements for a special-use permit.").

## **B**

### **Special Use Permit Criteria**

Smithfield's Zoning Ordinance § 10.8(C)(2) sets forth the criteria for granting a special use permit. Specifically, the Zoning Board must find that the Special Use requested: (1) is

authorized by a particular subsection of the ordinance; (2) has met all of the criteria in the particular subsection of the ordinance that authorizes such Special Use; and (3) “will not alter the general character of the surrounding area or impair the intent or purpose of this Ordinance or the Comprehensive Plan of the Town.” Section 10.8(C)(2) provides twelve criteria that the Zoning Board shall consider, where applicable.<sup>7</sup>

Appellant argues that the Zoning Board erred in its finding that FGX’s proposed expansion would not alter the general character of the surrounding area and would not impair the intent or purpose of the Comprehensive Plan. In support of its argument, Appellant recounts Mr.

---

<sup>7</sup> The twelve criteria are:

“(1) Ingress and egress to property and proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe.

“(2) Off-street parking and loading areas where required, with particular attention to the items set out in subsection (1) hereof.

“(3) Required yards and other open spaces.

“(4) Refuse and service areas, with particular reference to the items set out in Subsections (1) and (2) hereof.

“(5) Utilities with reference to location, availability, and compatibility.

“(6) Screening and buffering with reference to type, dimensions, and character.

“(7) Signs, if any, and proposed exterior lighting with reference to glare and traffic safety.

“(8) General compatibility, the pertinent traffic, economic, noise, glare or odor effects of the Special Use Permit on adjoining properties and properties generally in the district.

“(9) Protection of sensitive features.

“(10) The use will not result in or create conditions that will exceed the Performance Standards in § 6.3.

“(11) After the date at which the Town Council adopts a schedule of impact fees, said fees shall be paid before a Building Permit may be issued.

“(12) After the date on which the Town Council adopts a schedule of vehicle trips per acre, uses shall not result in a greater number of trips per acre than can be calculated from said table.”

Lombardo's testimony and written report (submitted as Ex. 13) that the proposed expansion would constitute an overdevelopment of the land.

"It is well settled that a fact-finder is free to accept or reject the testimony of an expert witness." Lloyd, 62 A.3d at 1089 (citing Restivo, 707 A.2d at 671 ("[T]here is no talismanic significance to expert testimony. It may be accepted or rejected by the trier of fact . . . .")); Murphy v. Zoning Bd. of Review of South Kingstown, 959 A.2d 535, 544 (R.I. 2008) (citing Restivo, 707 A.2d at 671, then adding that "if expert testimony before a zoning board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony"). Here, the Board considered Mr. Lombardo an expert in the area of land use planning, but determined that his testimony was not credible because he had not fully walked the FGX site and was unaware that the Planning Board had unanimously found FGX's proposed expansion to be consistent with the Comprehensive Plan. (Resolution at ¶ 16.) Therefore, the Zoning Board did not abuse its discretion when it decided to reject Mr. Lombardo's testimony. See Restivo, 707 A.2d at 671. Accordingly, this Court will not second-guess the Zoning Board's decision to reject the testimony of Mr. Lombardo and to rely instead on the Planning Board's finding that the proposed expansion is consistent with the Comprehensive Plan and Mr. Andolfo's testimony that the proposed expansion would not impair the value of the surrounding properties. (Resolution at ¶¶ 13, 14, 16.); see also Lett, 510 A.2d at 960 (citing E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977) ("The trial justice lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute his or her findings of fact for those made at the administrative level.")).

Appellant also argues that the Zoning Board erred in approving FGX's Application because the proposed expansion will intensify traffic congestion, create a traffic hazard, and

adversely affect the public convenience and welfare. FGX and the Zoning Board contend that the Zoning Board's finding that the proposed expansion will only have a minimal impact on traffic hazards was supported by the evidence in the record and should be affirmed. As stated above, a zoning board, as trier of fact, has the discretion to accept or reject the testimony and other evidence presented to it. See Lloyd, 62 A.3d at 1089; Restivo, 707 A.2d at 671. This Court will not make its own determinations regarding the credibility of witnesses that testified before a zoning board. See Lett, 510 A.2d at 960. Here, the Zoning Board expressly relied on Mr. Bannon's testimony that the estimated increase in traffic from FGX's construction and expansion would have a minimal effect on Route 116 and that FGX had carefully proposed solutions to possible traffic and access issues on the side streets and at the Property's ingress and egress points. (Resolution at ¶¶ 10, 11.) The Zoning Board clearly rejected Mr. Campopiano's testimony as to the increase in traffic hazards from the installation of a new traffic light. (Resolution at ¶ 16.) Accordingly, the Zoning Board did not abuse its discretion when it afforded different weights to the contradictory opinions presented regarding the proposed expansion's effect on traffic. See Lloyd, 62 A.3d at 1089; Restivo, 707 A.2d at 671; Lett, 510 A.2d at 960.

In its Resolution, the Zoning Board made the necessary determinations for granting an application for special use permits as mandated by Ordinance § 10.8(C)(2). In accordance with the criteria established in § 10.8(C)(2), the Zoning Board concluded that the special uses for which FGX applied are specifically authorized by Ordinance §§ 4.3.H.2, 4.3.J.3 and 4.5 and that all of the criteria set forth in these individual sections have been met. (Resolution at 6.) The Zoning Board also found that granting the special use permits would not alter the general character of the surrounding area or impair the intent or purpose of the Ordinance or

Comprehensive Plan. See § 10.8(C)(2)(c); Resolution at 6. In support of these determinations, the Zoning Board made numerous findings of fact and explicitly referred to evidence in the record. The Zoning Board heard testimony on FGX's Application from a number of expert witnesses who determined that the proposed expansion would not further impact the wetlands, increase the traffic hazards, or impair the value of surrounding properties. Therefore, this Court finds that the Zoning Board's determination that FGX's Application met all of the criteria required for special use permits was supported by competent and substantial evidence in the record. See Lischio, 818 A.2d at 690 n.5; Salve Regina College, 594 A.2d at 880.

#### **IV**

#### **CONCLUSION**

After review of the entire record, this Court finds that the Zoning Board's decision was supported by the substantial and probative evidence on the record and was not clearly erroneous, arbitrary or capricious, made upon unlawful procedure, in violation of ordinance provisions, or an abuse of discretion. Substantial rights of the Appellant have not been prejudiced. Accordingly, the Zoning Board's Resolution recorded on July 31, 2012 is affirmed. Appellant's appeal is therefore dismissed.

Counsel shall submit the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

---

**TITLE OF CASE:** 123 Associates, LLC v. FGX International, Inc., et al.

**CASE NO:** PC 12-4189

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** December 13, 2013

**JUSTICE/MAGISTRATE:** Taft-Carter, J.

**ATTORNEYS:**

For Plaintiff: Susan A. Chiariello, Esq.

For Defendant: Richard A. Sherman, Esq.; Raymond M. Ripple, Esq.;  
Edmund L. Alves, Jr., Esq.