STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 22, 2013)

KRIKOR S. DULGARIAN TRUST	:	
	:	
v.	:	**C.A. No. PC-2012-5114**
	:	
ZONING BOARD OF REVIEW OF THE CITY OF PROVIDENCE, MEETING STREET ASSOCIATES, LLC, and FLATBREAD PROVIDENCE, INC.	:	

DECISION

MONTALBANO, J. This matter is before the Court on appeal from a decision of the Zoning Board of Review of the City of Providence (Board), which approved an application by Flatbread Providence, Inc. (Flatbread) and Meeting Street Associates, LLC (Meeting Street Associates) for a special use permit. That special use permit authorized Flatbread both to increase the seating capacity of the proposed restaurant from 150 to 191 and to reduce the number of off-site parking spaces provided to a total of 17. The Krikor S. Dulgarian Trust (Dulgarian Trust), a real estate trust that owns nearby property, appealed. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts & Travel

Meeting Street Associates is a limited liability corporation in Rhode Island, which owns and operates 236 Meeting Street and 157 Cushing Street, adjoining lots also identified as Assessor's Plat 13, Lots 31 and 32 (the Property). (Defs.' Ex. A, Resolution No. 9684, Board, Sept. 13, 2012.) These two adjoining lots, which are located in a

General Commercial C-2 Zone, make up approximately 13,500 feet and contain a two-story building. Id. The building on the Property fronts Meeting Street; the parking lot on the Property is accessible from Cushing Street. Id.

Although the building was originally used as a commercial auto and truck garage, in 1987 it was converted to a retail mall. (Board Tr. 44:3-11, May 14, 2012.) Then, in 1993, Meeting Street Associates received a special permit to use the 7700 square foot second story as a restaurant with 112 seats for food and beverage service and 38 seats for waiting. Id. at 44:12-20. In 1994, the Board permitted a probationary expansion—allowing the restaurant to provide full service to 120 seats and all service except entrees to another 30 seats. Id. at 44:21-45:4. That expansion of the special use permit was made permanent in 1997. Id. at 45:2-8.

Around 2005 or 2006, the restaurant occupying the second story of the building relocated. Id. at 45:8-13. Since that time, the second story has remained vacant. Id. According to Joseph Mardo (Mardo), a principal of the owner of the Property, part of the reason why the space has been difficult to lease is that the 7700 square feet is not easily divisible into smaller spaces and is awkwardly shaped—the space is 50 feet wide by 156 feet deep. Id. at 55:10-22.

John Meehan (Meehan), part-owner of Flatbread restaurants, expressed an interest in leasing the second floor of the building, contingent on an increase in the indoor seating capacity. Meeting Street Associates and Flatbread (collectively, Applicants) filed an application with the Board. In that application, Applicants sought a special use permit under Section 303, Use Code 57.1 of the Zoning Ordinance (the Ordinance) to increase the interior seating capacity within the existing restaurant from 150 to 191 seats;

additional outdoor seating proportional to the grant of additional indoor seating; and a special use permit under Sections 303, Use Code 57.1, 703.2, and 401.1 of the Ordinance for a reduction in the total number of on-site parking spaces.

On May 14, 2012, the members of the Board made a site inspection of the Property and the surrounding properties. Further, they took notice of the recommendation submitted by the Department of Planning and Development requesting that relief be granted subject to the conditions that "outdoor seating shall be limited to 30 seats and the applicant shall install a planting strip between the parking area and the public right of way." In addition, on May 14, 2012, the Board held a public hearing. At that hearing, Applicants presented the history of the Property and the testimony of Joseph Mardo, John Meehan, Peter Casale, Joseph Lombardo, James Cronan, and Tom Sweeney. (Board Tr. 42:19-43:2, May 14, 2012.)

Mardo, a principal of the owner of the Property, testified that the 7700 square foot space has been difficult to lease, and that it has remained vacant since the original restaurant closed. Id. at 54:21-55:12. He further testified that, although there has been some interest in the space, that interest has been primarily by smaller tenants who have been looking for 2000-3000 square foot spaces. Id. at 55:10-19. Yet, because of the space's shape, and because the landlord would not be able to subdivide the spaces while providing two means of egress, the landlord has been unable to fill the space. Id. at 55:19-25.

The Applicants also presented the testimony of John Meehan, co-owner of the Flatbread Company. Id. at 58:19-67:20. Meehan described the concept of the restaurant and described the clientele of other Flatbread restaurants. Id. at 60:10-17. He noted that

in other locations between 80 and 90 percent of the clientele were local and lived within a mile of the restaurant. Id.

Further, Peter Casale (Casale), an expert witness in zoning code and building code matters, testified that due to the unique structure, size, and construction of the building, the current space "really has to be used as one tenant for the entire space." Id. at 68:4-10, 70:10-13. Casale testified that under the building and fire codes, the size of the building necessitates two means of egress for any tenant on the second story. Id. at 69:9-23. According to Casale, the layout of the building renders the second floor nearly undividable, and it would not be possible, due to the narrowness of the building, to create multiple spaces for smaller tenants. Id. at 69:24-25, 70:1-9. Casale additionally noted that the rated capacity under the building or fire code is far under the seating requested. Id. at 70:19-71:5. The maximum allowable occupant loading with the existing fire protections would be approximately 300 people. Id. Casale further opined, based on his thirty plus years of experience in the area, that "parking plus or minus is really moot." Id. at 71:21-25. He noted that Thayer Street experiences a great deal of foot traffic. Id. at 72:1-10.

Applicants also presented the testimony of Joseph Lombardo (Lombardo), who was accepted without objection as a land use expert. Id. at 75:9-19. Lombardo testified that the granting of the special use permit would be consistent with the Comprehensive Plan. Id. at 80:9-21. Lombardo noted that the Property is zoned as C-2, which is intended for commercial areas serving citywide needs and characterized by traditional pedestrian-oriented uses. Id. at 76:11-12, 77:7-9.

In addition, James Cronan (Cronan), a professional traffic engineer, who was accepted as a traffic expert without objection, testified that the special use permit, if granted, would not substantially change the situation with traffic and parking in the area. Id. at 81:4-82:20. Cronan opined that the proposed restaurant would have little impact on the neighborhood because of the high percentage of pedestrian traffic on Thayer Street. Id. at 82:13-20. Specifically, he noted that "most of the customers will be college students, neighborhood families, people living nearby that would walk." Id.

Finally, Applicants presented the testimony of Thomas Sweeney (Sweeney), who was recognized as an expert without objection. Id. at 85:3-22. Sweeney stated that it was his opinion that the granting of the special use permit would not have any injurious impact on the surrounding properties or their value. Id. Rather, Sweeney stated the use would be consistent with the Property's historical use and would positively impact the neighborhood and its property values, as the proposed use would fill in a vacant property that has not been occupied for approximately six years. Id. at 85:23-86:4.

After presentation of the Applicants' witnesses, Grant Dulgarian (Dulgarian), the trustee of the Dulgarian Trust, testified. Id. at 89:14-98:8. He opined that granting the application would be detrimental to the existing businesses on Thayer Street. Id. at 90:2-8. He stated that, in his personal experience, parking on Thayer Street was problematic. Id. at 93:1-11. He also introduced the College Hill parking task force findings and recommendations from April 2008, in which various stakeholders noted that "[t]here is a significant shortage of short-term parking spaces within a reasonable walking distance to support Thayer Street businesses based on industry standards for on-street and off-street parking." Id. at 94:1-22. Although the report noted that Thayer Street derives a

significant portion of its business from students and employees within walking distance, it noted that patrons and business owners have long complained of inadequate parking. Id. at 94:17-95:4.

William Touret (Touret) also testified in opposition to the grant of the special use permit. Touret opined that the restaurant would attract people from a wide area, and that the effect would be more noise and danger to the surrounding residential area. Id. at 100:3-25. Further, Touret stated that the lack of parking in the area is already a hardship on merchants and residents. Id. at 101:7-23.

The Board additionally heard from Barbara Harris (Harris), a nearby property owner. Harris objected to the grant of a special use permit, noting that the nearby residential area would be bothered by the outdoor dining and the strain on limited parking. Id. at 107:2-25. She further disagreed with the earlier testimony that the clientele of Thayer Street is primarily pedestrian. Id. at 109:1-4. Notwithstanding her disagreement with the characterization of the pedestrian culture of Thayer Street—and her admission that she typically walks to Thayer Street, rather than drives—Wolf, a Board member, strenuously disagreed with her. Id. at 109:1-25.

After considering the application, the testimony presented, the record before the Board, and its observations of the Property, the Board voted four to one to approve the request for special use permits. The Board found that the existing legal use of the second story of the Property was that of a restaurant of 150 seats (of which 30 seats were limited service), with 21 off-street parking spaces. (Defs.' Ex. A, Resolution No. 9684, Board ¶ 1, Sept. 13, 2012.) The Board further found that the proposed special use permits comply with conditions in the Ordinance. Id. ¶ 3. The Board recognized that although

there was a condition that the recommendation of the City Traffic Engineer be sought, failure to do so in this instance did not abrogate that condition because (1) the position for City Traffic Engineer is currently vacant; (2) any opinion by the City Engineer would be lay testimony; and (3) it received the recommendation of an expert traffic engineer. Id.

The Board found credible the testimony of Cronan, the traffic expert, and Meehan, and relied on "its own extensive knowledge of the area that parking spaces can be found within a few blocks of the Thayer Street commercial corridor and a majority of the patrons will be pedestrians." Id. ¶ 5. Moreover, it concluded that "the overall reduction in parking is not significant in comparison to the overall commercial activity and traffic volume in the area" and that the area is an "'urban walk-able' neighborhood and not a 'suburban drive-able' neighborhood."

The Board granted the special use permit to increase the indoor seating capacity from 150 to 191 seats and to reduce the total number of on-site parking spaces to 17. Id. at 4. That relief was conditioned on (1) the number of outdoor seats not exceeding 48; (2) the patio not having any live entertainment; (3) the outdoor patio closing at 10 P.M. on weekdays and 11 P.M. on weekends and holidays; (4) the applicant providing at least 17 parking spaces and a landscaped planting strip; and (5) the canopy coverage requirement being met. Id. This appeal followed.

II

Standard of Review

Section 45-24-69 vests the Superior Court with jurisdiction to review a zoning board's grant or denial of an application for a special use permit. Specifically, § 45-24-69(d) provides:

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

"The Superior Court reviews the decisions of a plan commission or 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). That is, 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.'" Id. at 666 (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). Rather, the trial justice "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979).

"'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) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). In short, a reviewing court may not

substitute its judgment for that of the board if it "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)). It is well settled that if there is some evidence to support the board's findings, [the Court] will not disturb them. May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 92 R.I. 442, 444, 169 A.2d 607, 608 (1961) (citing Laudati v. Zoning Bd. of Review of Barrington, 91 R.I. 116, 123, 161 A.2d 198, 202 (1960)). In contrast, when a question of law is presented, the Court conducts its review of that issue de novo. Tanner v. Town Council, 880 A.2d 784, 791 (R.I. 2005).

III

Analysis

A

Recommendation of the City Traffic Engineer

The Dulgarian Trust alleges that the Board's conclusion was "improper" and constituted error of law because the Board failed to request a recommendation from the City Traffic Engineer. In failing to do so, the Dulgarian Trust argues, the Board failed to comply with the conditions of Section 707 of the Ordinance. In contrast, the Board and the Applicants (collectively, Respondents) argue that the absence of the City Traffic Engineer's ecommendation does not constitute error because the City Traffic Engineer's recommendation is merely advisory, the Board relied on an expert traffic engineer's opinion, the section at issue does not prohibit the Board from considering an application absent such a recommendation, and the position of City Traffic Engineer is currently vacant, rendering futile any request for a recommendation.

The Board is only permitted to act within the authority granted to it under the Rhode Island Zoning Enabling Act (the Enabling Act). See § 45-24-27; Am. Oil Co. v. City of Warwick, 116 R.I. 31, 35, 351 A.2d 577, 579 (1976). The Enabling Act provides that "[z]oning regulations shall be developed and maintained in accordance with a comprehensive plan[.]" Sec. 45-24-30. This Court gives deference to a zoning board's interpretations of those zoning regulations, provided that the board's construction is not clearly erroneous or unauthorized. Cohen v. Duncan, 970 A.2d 550, 562 (R.I. 2009).

Article VII, Section 703 of the Ordinance provides that for an "Eating and Drinking" establishment, the minimum number of off-street parking spaces required is one per four seats or people accommodated, whichever is greater. Nonetheless, Section 707 gives the Board authority to grant a special use permit modifying parking and loading requirements. Specifically, Section 707.1 provides that the Board may, upon application, modify the parking requirement when "the conditions or circumstances provide substantial reasons to justify such action." Section 707.1 further states: "The recommendation of the traffic engineer shall be requested in each case but such recommendation shall be only advisory." Notably, this language is part of an ordinance—for which a zoning board's interpretation is given deference—rather than a statute—under which the zoning board's authority would be limited. See Am. Oil Co., 116 R.I. at 35, 351 A.2d at 579; Cohen, 970 A.2d at 562.

When interpreting an ordinance or a regulation, this Court employs the same rules of construction that it applies when interpreting statutes. Ryan v. City of Providence, 11 A.3d 68, 70 (R.I. 2011); Ruggiero v. City of Providence, 893 A.2d 235, 237 (R.I. 2006); Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981). In construing statutes or

regulations, this Court is guided by the oft-repeated canons of statutory construction. Sugarman v. Lewis, 488 A.2d 709, 711 (R.I. 1985). When a regulation's or statute's language is clear and unambiguous, "there is nothing left for interpretation and the statute must be read literally." Id. (citing Citizens for Preservation of Waterman Lake v. Davis, 420 A.2d 53, 57 (R.I. 1980); North Providence Sch. Comm. v. R.I. State Labor Relations Bd., 122 R.I. 415, 417-18, 408 A.2d 928, 929 (1979)). Nonetheless, this Court will not interpret a statute literally, "even though clear and unambiguous, when such a construction will lead to a result at odds with the legislative intent." Id.; see Carrillo v. Rohrer, 448 A.2d 1282, 1284 (R.I. 1982); Kingsley v. Miller, 120 R.I. 372, 376, 388 A.2d 357, 360 (1978); Town of Scituate v. O'Rourke, 103 R.I. 499, 507, 239 A.2d 176, 181 (1968). Rather, this Court determines and effectuates a meaning "'most consistent with [the Legislature's] policies or obvious purposes.'" Gryguc v. Bendick, 510 A.2d 937, 939 (R.I. 1986) (quoting City of Warwick v. Almac's, Inc., 442 A.2d 1265, 1272 (R.I. 1982)). If the Board supports its interpretation with substantial evidence, this Court will uphold that determination. See Lischio, 818 A.2d at 690 n.5; Caswell, 424 A.2d at 647; see also Cohen, 970 A.2d at 562 ("We 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.").

Although Section 707.1 stipulates that the recommendation of the City Traffic Engineer be requested, this recommendation is only advisory.[1] It is within the Board's

[1] Although the Dulgarian Trust argues that the "shall" language is always mandatory, it failed to support this contention with legal support. In fact, our Supreme Court has interpreted "shall" language to be directory. See, e.g., Robbins v. Tafft, 12 R.I. 67 (1878) (interpreting "shall" to be directory); State v. Sutton, 2 R.I. 434 (1853) (concluding that a

discretion to consider the facts and conclusions presented within such a study. Ordinance, § 707.1. Further, in its decision, the Board noted the language of Section 707 and stated:

> "First, the Board takes notice that the position of Traffic Engineer for the City is currently vacant, and although the City Engineer is temporarily carrying out the duties of said position, his opinion, even if requested, would be only lay testimony. Second, any recommendation would be advisory only, and not binding on the Board. Third, the Board finds that it has received the recommendation of a traffic engineer, in the testimony of James Cronin [sic] who was accepted as a traffic expert. Consequently, the Board finds that the sum of these three elements results in compliance with this condition of Section 707.1[.]"

(Defs.' Ex. A, Resolution No. 9684, Board 4, Sept. 13, 2012.)

Given the advisory nature of the City Traffic Engineer's recommendation, this requirement under the Ordinance is directory in nature, as opposed to mandatory. See Gryguc, 510 A.2d at 939; Town of Tiverton v. Fraternal Order of Police, 118 R.I. 160, 164, 372 A.2d 1273, 1275 (1977); 2A Sutherland, Statutory Construction § 57.03 at 416 (4th ed. Sands 1973). In interpreting the Ordinance, the Board could reasonably conclude that the purposes and policies of requesting the recommendation of the City Traffic Engineer—namely, receiving an expert opinion on traffic patterns—were met in this case, since the Board received expert testimony on that subject and requesting the same from the City Engineer would have resulted only in lay testimony.[2] See Cohen, 970 A.2d at 562; Carrillo, 448 A.2d at 1284; Kingsley, 120 R.I. at 376, 388 A.2d at 360.

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provision requiring that "part of the lease executed by the lessee and the Commissioners shall be transmitted forthwith to the General Treasurer," is directory).

[2] The Dulgarian Trust additionally alleges that "the City Engineer was and is the acting Traffic Engineer," and that "Mayor Taveras has not just gone without traffic advice all this time because the City Engineer is filling in." (Pl.'s Rebuttal Mem., Krikor S. Dulgarian Trust v. Zoning Board of Review of the City of Providence, PC-2012-5114, at 2.) The Dulgarian Trust fails, however, to put forth any evidence to support these assertions.

Here, both Board members and witnesses had personal experience with the traffic flow and parking patterns of Thayer Street. See Stephen H. Burrington, Restoring the Rule of Law and Respect for Communities in Transportation, 5 N.Y.U. Envtl. L.J. 691, 732 (1996) (noting that traffic engineers are tasked with evaluating traffic flow and traffic calming). Thus, the Board's finding that the request of the recommendation of the City Traffic Engineer is advisory and not necessary, as it had before it evidence of a traffic expert, is not clearly erroneous. See Town of Tiverton, 118 R.I. at 164-65, 372 A.2d at 1275-76.

B

Consistency with the Comprehensive Plan

Further, the Duglarian Trust argues that the Board's grant of the special use permit was error because the issuance of the special use permit was not consistent with the Comprehensive Plan. Specifically, the Dulgarian Trust argues that the location is "not zoned for a restaurant of that capacity" and that the Comprehensive Plan emphasizes the need for increased parking.[3] In contrast, the Respondents argue that the relief sought by the Applicants was consistent with the Comprehensive Plan. Specifically, the Respondents argue that the proposed use fits within the Comprehensive Plan's description of the area, which is characterized by traditional pedestrian-oriented uses that serve local needs, and that the proposed use supports the goals of the land use objectives—retaining business in the area and supporting the neighborhood area.

[3] Although the Dulgarian Trust argues that the Comprehensive Plan emphasizes the need for increased parking availability in mixed use areas, it has failed to provide any citation to the Comprehensive Plan or any specific language from the Comprehensive Plan.

Section 1014 of the Home Rule Charter of the City of Providence and chapter 45-22.2 of the Rhode Island General Laws require that the City of Providence prepare and adopt a comprehensive plan to guide decision-making regarding the long-term growth and development of the City. That plan directs "[a]ll city officials, departments, boards, commissions, authorities, and agencies . . . to carry out [its] provisions[.]" Nonetheless, our Supreme Court has long recognized that boards may authorize deviations from the comprehensive plan by granting exceptions to or variations in the application of the terms of local zoning ordinances. Garreau v. Bd. of Review of Newport, 75 R.I. 44, 63 A.2d 214 (1949); Ralston Purina Co. v. Zoning Bd. of Review of Westerly, 64 R.I. 197, 12 A.2d 219 (1940); see Olean v. Zoning Bd. of Review of Lincoln, 101 R.I. 50, 52, 220 A.2d 177, 178 (1966) (noting that zoning board may authorize deviations from the comprehensive plan by granting special exceptions and variances).

In this matter, the Board concluded that:

> "Pursuant to Section 902.4(B)(3), . . . granting the special use permit will not be detrimental or injurious to the general health or welfare of the community. Rather, the Board finds that the granting of the relief requested will benefit the public health and well being, by providing for the rehabilitation of this aging commercial building which has been vacant for several years. The Board bases this finding on its knowledge as set forth herein, and on unchallenged expert testimony of Mr. Cronin [sic] and Mr. Sweeney. The Board also bases this finding on the unchallenged testimony of Mr. Lombardo with regard to the fact that granting this special use permit will not be inconsistent with the Providence Comprehensive Plan[.]"

(Defs.' Ex. A, Resolution No. 9684, Board 3-4, Sept. 13, 2012.) The Board further found that "the presence of a 150 seat restaurant for over a decade had no negative impact on the neighborhood, and the presence of a 191 seat restaurant in the same space will not be a substantial change." Id. at 3. Accordingly, this Court will not disturb the findings of

the Board because there was substantial evidence—expert testimony, lay testimony, the personal knowledge and experience of the Board members, and the Board members' viewing of the Property—to support the Board's conclusion that the special use permit was consistent with the Comprehensive Plan. See Lischio, 818 A.2d at 690 n.5; Caswell, 424 A.2d at 647.

C

Scrivener's Error

The Dulgarian Trust further argues that the Board committed reversible error by granting different relief than that sought in the application. That is, according to the Dulgarian Trust, the Applicants had checked the box on the application for both a dimensional variance and a special use permit, and did not seek relief under Section 707.[4] Thus, the Dulgarian Trust contends, the notice was deficient because it failed to accurately state the relief requested in the application. In response, Respondents argue that any alleged error was one of form, rather than substance, and that mere scrivener's

[4] Although the Dulgarian Trust argues that the special use permit was not the appropriate mechanism in this case, and that a dimensional variance was required, the Dulgarian Trust failed to support that contention with any citation. Rather, the Dulgarian Trust simply asserts that "[s]ection 707.1's special use permit would not seem to be the appropriate mechanism in this situation," and states, without legal support, that a dimensional variance is required "given Section 707's specific redirect to this standard and the disfavor of nonconforming structures." Moreover, that contention fails to address the fact that Section 700 of the Ordinance states that "[a]ny structure or use existing prior to the effective date of this ordinance or any amendment thereto, with parking space that does not meet the requirements of this section *shall be subject to the requirements of section 205*." That is, because the parking in this matter was subject to a special use permit before this application, article II, rather than article VII applied. Accordingly, this Court will treat this argument as waived and will not examine it in this Decision. See Robideau v. Cosentino, 47 A.3d 338 (R.I. 2012); Rice v. State, 38 A.3d 9, 16 n.10 (R.I. 2012); see also Stebbins v. Wells, 818 A.2d 711, 720 (R.I. 2003); S. Ct. R. App. P. 16(a) ("Errors not claimed, questions not raised and points not made [in a party's brief] ordinarily will be treated as waived and not considered by the court.").

error does not affect the validity of the application or entitlement to relief. According to the Respondents, any error on the application was corrected long before anyone would have been misled—not only because the notice published was clear that the application only involved a special use permit, but also because the relief granted was less than that marked on the application.

Our Supreme Court has noted that it will liberally construe the scope of applications for variances and special exceptions. Franco v. Zoning Bd. of Review of Smithfield, 90 R.I. 210, 156 A.2d 914 (1959). For example, in Zammarelli v. Beattie, our Supreme Court concluded that the petition, which erroneously stated that it was for a variance rather than a setback modification, was not fatally erroneous. 459 A.2d 951, 954 (R.I. 1983). The Court reasoned that it would be "unjust to send these petitioners back to the zoning board of review" based on this mere technical error. Id. Similarly, in Perrier v. Board of Appeals of Pawtucket, the Court upheld the grant of special exceptions when "petitioner was present at the hearing and presented her objections to the board." 86 R.I. 138, 145, 134 A.2d 141, 145 (1957). Under these circumstances, the Board concluded, the petitioner was not prejudiced by the applicant's failure to specify the express provisions of the ordinance on which he was relying. Id. (citing Winters v. Zoning Board of Review, 80 R.I. 275, 278, 96 A.2d 337 (1953); Taft v. Zoning Board of Review, 76 R.I. 443, 447, 71 A.2d 886 (1950)).

It is well settled that in zoning matters "notice properly advising the public of the date, time and place at which the application for relief is to be acted upon is a jurisdictional prerequisite." Paquette v. Zoning Bd. of Review of W. Warwick, 118 R.I. 109, 111, 372 A.2d 973, 974 (1977) (citing Mello v. Board of Review, 94 R.I. 43, 49-50,

177 A.2d 533, 536 (1962)). To be sufficient, notice must be "reasonably calculated, in light of all the circumstances, to apprise the interested parties of the pendency of the action, of the precise character of the relief sought and of the particular property to be affected." Id. (citing Carroll v. Zoning Bd. of Review, 104 R.I. 676, 679, 248 A.2d 321, 323 (1968)). Nonetheless, notice need not be "letter-perfect." Id.; Pascalides v. Zoning Bd. of Review, 97 R.I. 364, 368, 197 A.2d 747, 750 (1964).

In this case, the notice that was published was not defective, but clearly and unequivocally stated that the only relief being sought was that of a special use permit, rather than a dimensional variance. See Paquette, 118 R.I. at 111, 372 A.2d at 974. The notice correctly identified the particular property affected and advised the public of the date, time, and place at which the application for relief was to be acted upon. See id.; Mello, 94 R.I. at 49-50, 177 A.2d at 536. The fact that the notice was "reasonably calculated, in light of all the circumstances, to apprise the interested parties of the pendency of the action, of the precise character of the relief sought and of the particular property to be affected" is evidenced by the fact that the trustee of the Dulgarian Trust was present at the hearing and presented its objections to the Board. See Paquette, 118 R.I. at 111, 372 A.2d at 974; Perrier, 86 R.I. at 145, 134 A.2d at 145.

The Dulgarian Trust was not prejudiced because it had the opportunity to present arguments in opposition to the grant of the special use exception. See id. In this matter, the Applicants did not ask for dimensional variances, only special use permits. (Board Tr. 47:3-4, May 14, 2012.) ("So we're asking for multiple special use permits, but no variances.")) Further, the notice stated that Applicants sought only a special use permit. Accordingly, checking the box for a variance, in addition to the box for the special use

exception on the application, was a mere technical error. See Franco, 90 R.I. 210, 156 A.2d 914; Zammarelli, 459 A.2d at 954. This Court does not elevate form over substance and liberally construes the scope of zoning applications. See Franco, 90 R.I. 210, 156 A.2d 914; Zammarelli, 459 A.2d at 954. Thus, the Board did not commit reversible error by granting a special use permit even though both a special use permit and variance were listed on the application.

D

Supported by Substantial Evidence

The Dulgarian Trust additionally contends that the Board failed to support its decision with substantial evidence, thereby violating statutory mandates. The Dulgarian Trust argues that the "wildly speculative business plan," failure to seek the advice of the City Traffic Engineer, and the credibility of the testimony of Dulgarian—that there is insufficient parking on Thayer Street and that the proposed restaurant would be more appropriate downtown—all support the conclusion that there was no credible evidence in the record to support the granting of the special use permit. Nonetheless, Respondents argue that its decision was supported by substantial evidence—including the uncontested expert testimony of the traffic engineer, the experience and observations of the Board members, and other testimony presented at the hearing.

The Board has the authority to grant a special use permit if it is satisfied by legally competent evidence that "the conditions or circumstances provide substantial reasons to justify such action." Sec. 707. To authorize a special use permit, the Board must:

> "(A) Consider the written opinion from the department of planning and development.

(B) Make and set down in writing specific findings of fact with evidence supporting them, that demonstrate that:

1. The proposed special use permit is set forth specifically in this ordinance, and complies with any conditions set forth therein for the authorization of such special use permit;
2. Granting a proposed special use permit will not substantially injure the use and enjoyment of nor specifically devalue neighboring property; and
3. Granting the proposed special use permit will not be detrimental or injurious to the general health, or welfare of the community."

Sec. 902.4.

"[T]he decision of a zoning board of review, based on the exercise of its discretion, will not be set aside by this court unless it is so arbitrary and unreasonable as to show a clear abuse of discretion." Woodbury v. Zoning Bd. of Review of City of Warwick, 78 R.I. 319, 324, 82 A.2d 164, 167 (1951); see Jacques v. Zoning Board of Review, 64 R.I. 284, 12 A.2d 222 (1940). Additionally, the Board is presumed to have special knowledge of matters that are part of their administration of the zoning ordinance. Woodbury, 78 R.I. at 323, 82 A.2d at 167. "[C]redibility of witnesses and weight of the evidence is the sole prerogative of the local board," and this Court will generally not disturb its findings. Coderre v. Zoning Bd. of Review of City of Pawtucket, 105 R.I. 266, 270, 251 A.2d 397, 400 (1969).

Our Supreme Court has further held that a zoning board may base its decision on the personal knowledge or observations of its members, so long as the record discloses the nature and character of those observations. See Restivo v. Lynch, 707 A.2d 663, 666 (R.I. 1998); Perron v. Zoning Bd. of Review of Burrillville, 117 R.I. 571, 576, 369 A.2d 638, 641 (1977); Schofield v. Zoning Bd. of Review of City of Cranston, 99 R.I. 204, 208, 206 A.2d 524, 526-27 (1965) ("It is settled that a board of review, in acting on applications for exceptions and variances, may base its findings on knowledge acquired

by the making of an inspection of the premises."). Evidence gleaned from personal observations—including observations from conducting a site inspection—constitutes legally competent evidence. See Restivo, 707 A.2d at 666; Perron, 117 R.I. at 576, 369 A.2d at 641.

At the hearing, the Board found credible the testimony of Mardo, who testified that space has been difficult to lease and that it has remained vacant since the original restaurant closed. Id. at 54:21-55:25. Further, the Board found credible the uncontested expert testimony of Casale, who testified that due to the unique structure, size, and construction of the building, the current space "really has to be used as one tenant for the entire space." Id. at 68:4-10, 70:10-13. Casale additionally stated that under the building and fire codes, the size of the building necessitates two means of egress for any tenant on the second story, and that the layout of the building renders the second floor nearly undividable, and it would not be possible, due to the narrowness of the building, to create multiple spaces for smaller tenants. Id. at 69:9-25, 70:1-9.

Furthermore, at the hearing, the Board heard the uncontested expert testimony of Lombardo that the special use permit would be consistent with the Comprehensive Plan and found that testimony to be credible. Id. at 80:9-21. It also heard the uncontested expert testimony of Cronan, a professional traffic engineer, that the special use permit, if granted, would not substantially change the situation with traffic and parking in the area. Id. at 81:4-82:20. This conclusion was based, at least in part, on Cronan's observation that "most of the customers will be college students, neighborhood families, people living nearby that would walk." Id. The Board found Cronan's testimony to be credible.

Although the Board heard the lay testimony of Dulgarian regarding traffic congestion, they did not find the testimony to be credible. Id. at 89:14-98:8. Even though Dulgarian testified that it was his personal experience that parking on Thayer Street was problematic, Wolf, a Board member, disagreed. Id. at 93:1-11, 109:1-25. Zoning Board member Wolf opined that the Thayer Street corridor is an urban environment. Id. at 108:12-16. He noted, based on his personal experience of living in the area, that when he drives he can "find a parking space within a block, block and a half of [his] destination no matter what time of day or night." Id. at 109:10-20. Wolf further stated that he frequently walks on the East Side. Id. at 109:10-12. Similarly, Zoning Board member Greenfield also noted that he walks on the East Side. Id. at 121:20-25.

Other members of the Board noted that the expert witnesses' conclusions regarding the traffic and parking situation in the area were consistent with their personal experiences and observations of the area. For example, Chair of the Zoning Board York noted that on occasions when she has driven by the parking lot on the Property, it is "pretty empty all the time" even though, as she pointed out, "it would be a nice time to park there because there is no business going on." Id. at 88:13-18. Members of the Board who live near the Thayer Street commercial corridor noted that they walked, rather than drove, to the shops and restaurants on the East Side. Id. at 109:10-12 (Wolf); Id. at 121:20-25 (Greenfield); Id. at 125:4-11 (Varin).

The Board found, based on its own experience, the testimony presented, and its own viewing of the site that the Thayer Street commercial corridor is pedestrian-oriented. Id. at 72:1-10. It further concluded that a 191-seat restaurant would neither be substantially different nor have a more detrimental impact than the 150-seat restaurant

which had existed on the second story of the property for more than a decade. (Defs.' Ex. A, Resolution No. 9684, Board ¶ 1, Sept. 13, 2012.) The Board found credible the testimony of James Cronan, the traffic expert, and John Meehan, and relied on "its own extensive knowledge of the area that parking spaces can be found within a few blocks of the Thayer Street commercial corridor and a majority of the patrons will be pedestrians." Id. ¶ 5. Moreover, it concluded that "the overall reduction in parking is not significant in comparison to the overall commercial activity and traffic volume in the area" and that the area is an "'urban walk-able' neighborhood and not a 'suburban drive-able' neighborhood." Id.

Therefore, the Board made sufficient findings as to the conditions and circumstances that provide substantial evidence to justify issuance of the special use permits. The Board considered at length the characteristics of the Property, as well as the surrounding area. Further, the Board made the above findings and conclusions after a review of the record presented to the Board, consideration of the application, assessment of witness testimony, and a site inspection. These findings are not in violation of constitutional, statutory, or ordinance provisions; clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion, and satisfy the condition of Section 707.1(1) for authorization of a special use permit.

Moreover, Section 902.4 (B)(2) sets forth additional criteria that must be considered in the issuance of a special use permit. Specifically, the Board must find that granting the special use permit will not "substantially injure the use and enjoyment of nor

significantly devalue neighboring property." Ordinance § 902.4(B)(2). The Board made sufficient findings as to this standard when concluding that granting the parking relief would not alter the general character of the surrounding area. See Defs.' Ex. A, Resolution No. 9684, Board, Sept. 13, 2012. The Board found, based on the evidence as well as the personal knowledge of its members, (1) that the use of a 191-seat restaurant is permitted in a C-2 zone; (2) that the Property was located in the Thayer Street commercial corridor which is characterized by high foot-traffic and a significant mixture of retail, institutional, and residential uses; and (3) that the surrounding area is that of a pedestrian nature with many students and employees traveling to Thayer Street on foot. Id. In addition, the Board found that this use would positively affect the neighborhood, as it would permit a space, which has remained vacant for more than six years, to be occupied. Id.

Section 902.4(B)(3) provides that an applicant must show, and the Board must find, that granting the proposed special use permit will not be "detrimental or injurious to the general health, or welfare of the community." Ordinance § 902(B)(3). Based on the available evidence submitted by the Applicants, the Board concluded that the requested relief posed "neither a detrimental effect upon the surrounding properties nor [would be] incompatible with the surrounding properties." See Toohey v. Kilday, 415 A.2d 732, 737 (R.I. 1980) ("[A]pplicant only must show that 'neither the proposed use nor its location on the site would have a detrimental effect upon public health, safety, welfare and morals'") (quoting Hester v. Timothy, 108 R.I. 376, 385-86, 275 A.2d 403, 406 (1971)). The Board made findings of fact sufficient to support this conclusion. The injury alleged in this matter is the effect of a potential exacerbation of parking shortages on the

community. The Board found that the relief would result in very little impact on the traffic and parking within the neighborhood as the majority of patrons would be walking or biking. (Defs.' Ex. A, Resolution No. 9684, Board, Sept. 13, 2012.) Furthermore, the Board found that the area surrounding the Property was significantly pedestrian-oriented, and that the prior occupant of the space—a restaurant with 150 seats—did not have a negative impact in the neighborhood over its decade-long presence. Id.

IV

Conclusion

After review of the entire record, the Court finds that the Board's decision contains substantial evidence sufficient 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; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion. Substantial rights of the Appellants have not been prejudiced. Thus, the appeal of the Board's decision is denied. Counsel for the prevailing parties shall submit orders in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Krikor S. Dulgarian Trust v. Zoning Board of Review of the City of Providence, et al.**
CASE NO:	**PC-2012-5114**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 22, 2013**
JUSTICE/MAGISTRATE:	**Montalbano, J.**
ATTORNEYS:	
For Plaintiff:	**Nicholas Gelfuso, Esq.**
For Defendant:	**Lisa Dinerman, Esq.** **Andrew M. Teitz, Esq.** **Peter J. Petrarca, Esq.**