STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: December 17, 2013]

ANTHONY CARELLO, JOSE MARTINEZ, CARLOS ZAMBRANO, DENNIS DESOURDY, CHARLES JOHNSON, JACEK DUDA, RAYMOND MARTIN, WALTER GONZALEZ, MAUREEN FUSCO, TRISTAM POIRIER, and ROBERT TONI	:	
v.	:	**C.A. No. PC 2012-5979**
THE ZONING BOARD OF REVIEW OF THE CITY OF PROVIDENCE, MYRTH YORK, SCOTT WOLF, ARTHUR V. STROTHER, DANIEL N. VARIN, MARK GREENFIELD, and ENRIQUE MARTINEZ, in their capacity as Members of the Zoning Board, and SWAP, INC.	:	

DECISION

VOGEL, J. Anthony Carello, Jose Martinez, Carlos Zambrano, Dennis Desourdy, Charles Johnson, Jacek Duda, Raymond Martin, Walter Gonzalez, Maureen Fusco, Tristam Poirier, and Robert Toni (collectively, Appellants) appeal from a decision of Defendant, The Zoning Board of Review of the City of Providence (Zoning Board). In this matter, the Zoning Board sat as the Board of Appeal reviewing a decision of the Providence City Plan Commission (CPC). The CPC granted a preliminary plan approval to Appellee, SWAP, Inc. (SWAP[1]), for a proposed multi-family structure at 66 Huber Avenue. Appellees, owners of neighboring parcels, appealed that approval, and the Zoning Board rejected their appeal. Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

[1] "SWAP" is an acronym for "Stop Wasting Abandoned Properties."

For the reasons set forth herein, the Court remands this matter to the Zoning Board to remand to the CPC so that it may make sufficient findings of fact consistent with this opinion.

I

Facts and Travel

SWAP owns real property situated at 66 Huber Avenue, Providence, Rhode Island, designated as Lots 836, 837 and 854 on Assessor's Plat 80 (Property). (Compl. ¶ 2.) The Property is located in an R-2 Two-Family District. (Zoning Ordinance for the City of Providence, § 101.1.)

In 2003, David Loffredo, who then owned the Property, applied to the Zoning Board for a use and dimensional variance to build a "32,500 square foot, three-story building containing 65 dwelling units" for an age-qualified complex. (Ex. 1A at 1, 4.) At a hearing held on April 15, 2003, the Zoning Board sitting as the Board of Review, not as the Board of Appeals,[2] approved a use and dimensional variance for the construction of a multi-family structure on the Property "provided that the Applicant construct a building containing no more than forty (40) dwellings [sic] units." Id. at 7. In its Resolution, the Zoning Board noted that "section 906 under the Zoning Ordinance requires that any variance or special use permit granted by the Board shall expire six months after the date of the filing of the resolution in the office of the Board unless the Applicant shall, within the six months, obtain a legal building permit." Id.

The following year, on March 16, 2004, Loffredo applied for and received an extension of the use and dimensional variances "for a period of six (6) months from the expiration date of Resolution No. 8696." (Ex. 1E at 1.) Pursuant to that extension, Loffredo obtained a building

[2] In this case, the Zoning Board wore two hats: it sat as the Board of Review when it considered applications for use and dimensional variances and as the Board of Appeals when it considered the appeal from the CPC.

permit on August 18, 2004 for construction of the foundation of the Property. (Ex. 1F, Building Permit No. 00466.) The Building Permit noted that the owner "shall begin work on said building within SIX MONTHS from the date hereof and prosecute the work thereon to a speedy Completion." Id. Within the proscribed timeframe, the Property owner began work on the project by installing building footings and a water, sewer, and storm water drainage infrastructure. (Ex. 1 at 2.) However, after those initial stages of development, the project lay dormant for years. In 2007, SWAP purchased the Property for $900,000 with financing assistance from Rhode Island Housing. See id.

Whereas Loffredo had presented and obtained approval for a specific plan for a single-building age-qualified condominium, SWAP seeks to construct a somewhat different project. SWAP intends to build a "40 unit affordable housing development spread across six three story buildings." (Ex. 3, Agenda Item 2, at 2.) SWAP intends to rent the apartments rather than to sell them as condominium units. (Ex. 4, CPC Minutes at 1, July 17, 2012.)

In August 2007, Thomas Deller, then-Director of Planning for Providence, consulted with Kerry Anderson, a building official, who stated that SWAP's building plans were "indeed vested as the [2004] foundation permit was issued within the 6 month grace period allowed by an extension of the resolution." (Ex. 1F at 1.) Later that year, SWAP also received a Zoning Certification from the Department of Inspection and Standards, which stated that the last legal record for the Property was a building permit for "foundation only." (Ex. 1G at 1.) In January 2009, the Department of Public Works confirmed that the storm drainage system constructed by Loffredo had been completed to the Department's satisfaction. (Ex. 1H at 1.) Finally, on November 18, 2011, in a letter to SWAP from Jeffrey Lykins of the Department of Inspection and Standards, Lykins confirmed his Department's opinion that the 2003 Resolution remained

valid and in effect. (Ex. 1I at 1.) He made that determination "[b]ased upon the work that has been completed on the infrastructure and utilities and the permits taken out to date." Id.

A

CPC Hearing

In 2012, SWAP applied to the CPC for preliminary approval of a plan to build a 40-unit affordable housing building with parking on the Property. (Ex. 3 at 1; Zoning Board Record, Application at 1.) The CPC held a hearing regarding the preliminary plan on July 17, 2012.[3] (Ex. 4 at 2.) Several people appeared at the hearing, including William Landry, SWAP's attorney; Brian Poore, the Project's architect; and Carla DeStefano, a representative of SWAP. Id. at 2-3.

Counsel for SWAP "introduced the project and said that the project received relief from the zoning board for development of multifamily housing in an R-2 zone." Id. He also stated that the Property had building footings and utilities already installed.[4] Id. Following Mr. Landry's introduction, SWAP's architect spoke about the design of the new proposal. He noted that the new design was "more compact than what was previously presented." Id. In addition, he testified that SWAP planned to create an open courtyard; connect the buildings with a roofline; and use a composite material with clapboards and shingles for the buildings' sheathings. Id.

[3] The hearing was not publicly noticed because it was for a Minor Land Development Project. Compare § 45-23-38 (requiring a public hearing for a minor land development project only "if a street creation or extension is involved") with § 45-23-42 (noting that "[a] public hearing is required for a major land development project").

[4] Following the CPC hearing but prior to the Zoning Board appeal, SWAP obtained a building permit to construct an entirely new foundation on the Property. (Pl.'s Mem. at 3.) Pursuant to that permit, SWAP demolished the existing foundation. Id.

Others voiced concerns regarding the proposed development, including that it would worsen traffic congestion in the area, and that there would not be enough parking. Id. They also noted that the original project was for condominium units while the present proposal was for rental housing. Id. Concerns were raised that neighbors had not been sufficiently involved in the project's planning stages and that neighboring residents had not been contacted to attend SWAP's public meeting regarding the plan. Id. Finally, it was noted that the Property currently was in poor shape. Id.

In response to those concerns, DeStefano stated that "most residents would have one car, which would not cause traffic issues." Id. Moreover, since "[t]he area was walkable with many amenities within walking distance, . . . vehicular traffic would not pose an issue." Id. She also noted that SWAP's development plan included community outreach, as well as "private attention to immediate neighbors." Id. Landry explained that the original design, as well as the new proposal, planned for parking on the sides of the building, and that the relief granted in 2003 was "based on a traffic study presented to the zoning board." Id.

At the conclusion of the July 17, 2012 meeting, the CPC unanimously approved the preliminary plan for SWAP's new development, "subject to the DPD's findings of fact and conditions of approval" which had been read at the meeting. Id. at 3.[5] The approval also contained an amendment requiring SWAP to incorporate a neighborhood outreach plan and present such to the CPC. (Ex. 4, CPC Minutes at 3, July 17, 2012.)

Appellants timely appealed the CPC's approval to the Providence Zoning Board on August 10, 2012. Their appeal contained ten grounds for reversal of the CPC's decision:

[5] That document, prepared by the Department of Planning & Development, is present in the record but is missing Page 2, and lacks any indication of findings relating to the applicability of the 2003 permit. (Ex. 3, at 1, 3.)

> "1. The subject approval is not consistent with the Providence Comprehensive Plan known as Providence Tomorrow.
> "2. The Minor Land Development Project is inconsistent with the land use designation for the area.
> "3. The Minor Land Development Project is not permitted in the R-2 Zone.
> "4. The property owner did not obtain any of the required zoning relief before pursuing the Minor Land Development Project.
> "5. The proposed structure(s) exceeds the use and dimensional regulations of the Zoning Ordinance.
> "6. The proposed density exceeds the applicable density limitations allowed by the Zoning Ordinance.
> "7. The proposed use is not permitted in the zone and the owner did not apply for or receive any variances for this project.
> "8. The proposal is not consistent with the surrounding neighborhood, will negatively impact the surrounding properties, will diminish property values, will create high density in a neighborhood consisting of mostly single-family dwellings.
> "9. The City Plan Commission lacked jurisdiction to hear this matter because it is inconsistent and in violation of the City's Comprehensive Plan and certainly the Zoning Ordinance.
> "10. The conditions set forth in the City Planning Commission Decision constitute issues that should be addressed before final review is made. The Appellants further contend that the Commission did not have the required information at the time that it made its findings."

(Appeal from City Plan Commission Decision at 2-3, Aug. 10, 2012.)

While that appeal was pending, SWAP received a building permit to construct a "three-story, 280'x105' slab on grade wood-framed unit apartment building, that is four buildings connected by roofs and courtyards." (Pl.'s Mem. at 3.) SWAP demolished the existing foundation pursuant to this permit. Appellants allege that the land today is vacant. Id.

B

Zoning Board Hearing

The Zoning Board held a public hearing on the appeal on September 19, 2012. At the hearing, the Zoning Board heard arguments from several individuals, including Appellants Anthony Carello and Ms. Mulcahy; Anthony DeSisto, special counsel to the Zoning Board; and

from Landry. (Zoning Tr. at 226-33, 233-36, 236-49.) The Zoning Board deliberated on the appeal on the same date, immediately after the hearing, and issued Resolution No. 9712: Decision on Appeal from Decision of the Providence City Plan Commission (Resolution), Nov. 1, 2012. (Tr. at 255-70.) In the Resolution, the Zoning Board affirmed the decision of the CPC in its entirety. (Resolution at 3.)

At the outset of the hearing, Carello first challenged the plan approval on the grounds that the Property is located in an R-2 zone, and the Zoning Ordinance does not permit anything larger than a two-family home in that zone. (Tr. at 227.) He questioned the lack of community outreach regarding the Project and noted that all of the neighboring landowners opposed the development. (Tr. at 229-30.) Finally, he asked the Zoning Board for proof of a permit or variance allowing Appellee to build a large development on the Property. (Tr. at 230-31.) The Zoning Board Chair responded that the 2003 variance was vested because the previous owners had obtained a foundation permit for the property. (Tr. at 231.) Mulcahy argued that a foundation permit is not the same as a building permit, and that since SWAP did not own the property in 2003, the variance was no longer valid. (Tr. at 231.) Moreover, Mulcahy argued that the CPC committed clear error in finding that the 2003 permit had vested. (Tr. at 232.) DeSisto attempted to clarify Appellants' arguments, noting that "the crux of their appeal" is that the 2003 zoning approval was no longer valid in 2012, when SWAP applied to the CPC for preliminary plan approval. (Tr. at 233.)

Mulcahy also noted that Appellants were challenging the CPC's finding that the plan was consistent with Providence's Comprehensive Plan.[6] (Tr. at 234.) Specifically, she noted that the

[6] All cities and towns in Rhode Island are required to prepare comprehensive plans pursuant to the Rhode Island Comprehensive Planning and Land Use Regulation Act. See § 45-24-30. Providence enacted its most recent Comprehensive Plan, Providence Tomorrow, in 2010.

neighborhood was zoned as a low-density area, and it is not consistent with the Comprehensive Plan "[t]o double, to triple the population . . . by putting a 40-unit complex on a side street off a side street in a heavy traffic area to begin with." (Tr. at 234.) Moreover, she argued that the 2003 approval was for a building with one foundation, which SWAP had demolished with the intention of building six buildings on the land.[7] (Tr. at 234-35.) Therefore, she concluded that Appellees "should have to start this whole thing all over again." (Tr. at 235.) Carello added that the plan involved a reflection pond, which he contended would worsen the chances of contracting EEE in the neighborhood. (Tr. at 235.) No expert opinion was offered on the subject. He also voiced concerns about additional traffic on the road, including buses, with a nearby playground. (Tr. at 235.)

At the conclusion of Appellants' statements, the Zoning Board asked DeSisto to summarize the objectors' arguments. (Tr. at 236.) He articulated their objections as follows: that the variance granted in 2003 was not vested when SWAP filed its application to the CPC in 2012; and that the CPC's decision did not conform to Providence's Comprehensive Plan. (Tr. at 236.) Carello noted that the Appellants wanted SWAP to apply for its own variance and "go through all the proper channels" to do so. (Tr. at 236-37.)

Landry reviewed the history of the 2003 variance, including the due diligence SWAP conducted in 2007 prior to purchasing the Property. (Tr. at 238-43.) He specifically noted that the final approval in 2003 for 40 units was "the practical equivalent of approximately 80 units in multiple building[s] that could have been built on the site." (Tr. at 238.) In addition, he reviewed the zoning certificate that SWAP obtained prior to closing, which certified that the

[7] As noted above, after receiving approval from the CPC but prior to the Zoning Board appeal and hearing, SWAP obtained a building permit for a new foundation on the Property and demolished the existing foundation. (Pl.'s Mem. at 3.)

foundation permit obtained in 2004 "was still a live, active permit." (Tr. at 241.) Landry also quoted Lykins' 2011 letter stating that the Department of Inspection and Standards found the 2003 Resolution to be still valid and in effect. (Tr. at 244.) At the CPC hearing, Landry stated that the only concerns voiced were regarding outreach to neighbors and that these concerns were addressed in the decision which included a condition that there be a neighborhood communication program. (Tr. at 245.)

Mr. Landry proceeded to argue why the 2003 variance had vested. He outlined four ways in which vesting can occur: obtaining permits; doing work in pursuit of permits; legislation that keeps permits alive; and people spending substantial amounts of money in reliance on permits. (Tr. at 246.) He argued that all four conditions existed regarding the 2003 variance. (Tr. at 246.) He also addressed Appellant's argument that the preliminary plan did not conform to the Comprehensive Plan. (Tr. at 247.) Specifically, he noted that the CPC had addressed the issue and it was their judgment that the plan was in conformance—an issue that on appeal should not be challenged. (Tr. at 247.)

Finally, Mr. Landry compared the 2012 plans for the Property with the 2003 plans as submitted to the Zoning Board and argued that they were substantially similar. (Tr. at 249.) He noted that both designs incorporated a "T-shaped" building, and, in fact, the 2012 plans were more compact and did not require one of the 2003 dimensional variances granted for a parking lot. (Tr. at 249.) In response to a Board member's inquiry as to whether or not the new plan involved multiple buildings or a single building, Mr. Landry stated that "[t]his is one building." (Tr. at 250.)

In its findings of facts and conclusions of law, the Board determined that the CPC's reliance on the 2003 Resolution and its vesting through the foundation permit was not clear error

and that the CPC's finding that the proposed plan was consistent with the Comprehensive Plan was not clear or prejudicial error. (Resolution at 2-3.) Thus, the Board concluded that the decision of the CPC should be affirmed in its entirety. (Resolution at 3.) Appellants timely appealed the Board's Resolution.

II

Standard of Review

The Superior Court has jurisdiction over appeals from a decision of a board of appeal pursuant to § 45-23-71(d), which provides as follows:

> "The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of appeal 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:
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> "(1) In violation of constitutional, statutory, ordinance or planning board regulations provisions;
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> "(2) In excess of the authority granted to the planning board by statute or ordinance;
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> "(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."

Under this statute, this Court "will neither weigh the evidence nor pass upon the credibility of witnesses nor substitute its findings of fact for those made at the administrative level." E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 284-85, 373 A.2d 496, 501 (1977). Rather, § 45-23-71(c) "authorizes the Superior Court to review such decisions utilizing the

traditional judicial review standard that is applied in administrative agency actions." Munroe v. Town of E. Greenwich, 733 A.2d 703, 705 (R.I. 1999). The Superior Court's "'review is confined to a search of the record to ascertain whether the board's decision rests upon 'competent evidence' or is affected by an error of law.'" Id. (quoting Kirby v. Planning Bd. of Review of Town of Middletown, 634 A.2d 285, 290 (R.I. 1993)). Our Supreme Court defines "reasonably competent evidence" as "any evidence that is not incompetent by reason of being devoid of probative force as to the pertinent issues." Restivo v. Lynch, 707 A.2d 663, 668 (R.I. 1998) (quoting Zimarino v. Zoning Bd. of Review of City of Providence, 95 R.I. 383, 386, 187 A.2d 259, 261 (1963)). This Court will "'reverse factual conclusions of administrative agencies . . . when they are totally devoid of competent evidentiary support in the record.'" Baker v. Dept. of Emp't & Training Bd. of Review, 637 A.2d 360, 363 (R.I. 1994) (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)).

In the context of administrative appeals, the two-step procedure outlined above—from the CPC to the Zoning Board—has been likened to a funnel. Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 207-08 (R.I. 1993). Similar to a hearing officer in the administrative forum, the Planning Board sits "as if at the mouth of the funnel" and analyzes all of the evidence, opinions, and issues in order to arrive at a decision. Id. at 207. The Board of Appeal, at the "discharge end" of the funnel, does not receive the information considered by the Planning Board personally. Id. at 207-08. The Rhode Island Supreme Court has held that the "further away from the mouth of the funnel that an administrative official is . . . the more deference should be owed to the fact finder." Id. at 208.

III

Analysis

A

Jurisdiction

As an initial matter, Appellants asserted this Court's jurisdiction under § 45-24-71 of the Zoning Enabling Act. As an appeal from a decision of the Zoning Board acting as the board of appeals from a planning board decision, Appellants should have filed this case pursuant to § 45-23-69 of the Development Review Act.

There are two distinct statutes in Rhode Island addressing the regulation of land use. Rhode Island General Laws 1956 §§ 45-23-25 et seq., the Rhode Island Land Development and Subdivision Review Enabling Act of 1992 (Development Review Act), enables municipalities to enact land development and subdivision review regulations. Local planning boards are charged with enforcing the regulations as enacted. Sec. 45-23-26. A party affected by a planning board's decision may appeal to the local zoning board acting as a board of appeal. Sec. 45-23-66. The aggrieved party may subsequently appeal the zoning board's decision to the Superior Court pursuant to § 45-23-71. The other statute, the Rhode Island Zoning Enabling Act of 1991 (Zoning Enabling Act), requires all towns and cities to develop zoning regulations in accordance with a comprehensive plan. Secs. 45-24-17 et seq.; West v. McDonald, 18 A.3d 526, 533 (R.I. 2011) (summarizing the requirements regarding comprehensive plans and zoning regulations in Rhode Island). Local zoning boards administer and enforce the provisions of the Zoning Enabling Act, which usually involve requests for variances and special-use permits. Secs. 45-24-54—45-24-61. An aggrieved party may appeal a zoning board's decision to the Superior Court pursuant to § 45-24-69. An appeal taken under this Act requires an appellant to provide notice of

the appeal to "those persons who were entitled to notice of the hearing set by the zoning board of review." Sec. 45-24-69.1.

Since this case arises from a planning board decision which was appealed to the Providence Zoning Board acting as a board of appeal, Appellants should have asserted jurisdiction under § 45-23-71. As case law in Rhode Island does not specifically address this particular defect in pleading, this Court will look to local and federal rules of civil procedure and related case law. See Carbone v. Planning Bd. of Appeal of Town of S. Kingstown, 702 A.2d 386 (R.I. 1997) (stating that "those rules of civil procedure which are consistent with the nature of an appellate proceeding may be applied" in administrative appeals); see also Bragg v. Warwick Shoppers World, Inc., 102 R.I. 8, 11-12, 227 A.2d 582, 584 (1967) (applying federal case law interpreting the federal laws of civil procedure to state rules).

Generally, "[w]hile a statement of jurisdiction is required by Rule 8, failure to include one does not necessarily require that the action be dismissed. If a factual basis for jurisdiction existed at the time the complaint was filed, a party may be allowed to amend the complaint to assert those facts."[8] Moore's Federal Practice, § 8.03[2]. In addition, subject matter jurisdiction may be alleged directly or indirectly. "The pleading may either refer to the appropriate jurisdictional statute or contain factual assertions that, if proved, establish jurisdiction." Id. at § 8.04[3]. For example, the First Circuit has rejected arguments to dismiss a case because the plaintiff predicated jurisdiction on an incorrect statute. In a 1999 case, the First Circuit reiterated that "[a]ffirmative pleading of the precise statutory basis for federal subject matter jurisdiction is not required as long as a complaint alleges sufficient facts to establish jurisdiction. In re

[8] Rule 8 of the Federal Rules of Civil Procedure ("General Rules of Pleading") requires a pleading stating a claim for relief to contain "a short and plain statement of the grounds for the court's jurisdiction."

Mailman Steam Carpet Cleaning Corp., 196 F.3d 1, 5 (1st Cir. 1999). The court further noted "that federal subject matter jurisdiction may be established by reading a complaint holistically, even though the jurisdiction expressly asserted was improper." Id. (citation omitted). Moreover, "Rule 8(e) requires that federal district courts construe all pleadings so as to do justice. Therefore, pleadings should not be dismissed for technical defects." Moore's Federal Practice, § 8.10[1].

In reading the complaint "holistically," this Court finds it certainly "contain[s] factual assertions that, if proven, establish jurisdiction," because it outlines the procedural history of the case from the CPC through the Zoning Board to the Superior Court. See In re Mailman, 196 F.3d at 5; Moore's Federal Practice, § 8.04[3]. Appellants' failure to file a Notice of Appeal indicates that they followed the guidelines of the Development Review Act, which does not require such notice, rather than the Zoning Enabling Act. Appellants have, in substance, treated their appeal as if it were actually brought under § 45-23-71. As Appellants have actually invoked the Chapter 23 provision in their appeal, this Court will treat said appeal as one from the Zoning Board acting as the board of appeals.

Moreover, this Court also notes that Appellees have not challenged this mistake and have instead proceeded to defending the merits of the case. See Jeff Anthony Properties v. Zoning Bd. of Review of Town of N. Providence, 853 A.2d 1226 (R.I. 2004) (holding that, in determining whether or not to dismiss an appeal for failing to comply with § 45-24-69.1 of the Zoning Enabling Act, a justice of the Superior Court must consider any prejudice to interested parties). Accordingly, this filing error does not deprive the Court of jurisdiction.

B

Issues on Appeal

On appeal, Appellants make four challenges to the Zoning Board's Resolution upholding the CPC's approval of SWAP's preliminary plan. Appellants first argue that the Zoning Board failed to adequately address the CPC's alleged failure to satisfy statutory requirements found in § 45-23-60, § 45-23-30, and local regulations in its preliminary plan approval. Specifically, Appellants contend that the Zoning Board did not meaningfully address the CPC's finding that the 2003 use and dimensional variances had vested through the previous landowner's acquisition of a foundation permit in 2004. Second, Appellants challenge procedures employed at the Zoning Board hearing, arguing that the Board prevented pro se interested parties from making legal arguments and allowing the attorney for the Board to speak for them without their consent. Third, Appellants challenge Providence Development Review Regulations as unconstitutionally vague in that they allow the CPC to make "arbitrary and capricious" determinations to distinguish Minor and Major Land Development Projects. Finally, Appellants contend that Steven Durkee, the Chairman of the CPC, should have recused himself from the meeting on conflict of interest grounds.

In response, the Appellees argue that most of Appellants' arguments were not raised at the Zoning Board hearing and asks this Court to invoke the "raise-or-waive" rule and refuse to consider the merits of the challenges. The Zoning Board also argues that it properly and adequately found that SWAP had a vested property interest in the dimensional and use variances granted for the subject property, and alternatively that it was equitably estopped from finding they were not vested because of SWAP's reliance on official statements to the contrary.

In addition, SWAP contends that the CPC's findings were adequate and were squarely based on the relevant record; the Zoning Board properly addressed the issue of SWAP's vested rights in the variances; and the transcript of the Zoning Board hearing does not support Appellants' arguments regarding their inability to be heard. Finally, SWAP contends that Appellant's challenge to the Providence Development Review Regulations is misguided as it relies on an outdated version of the Regulations, and no conflict of interest existed at the CPC hearing that would require Mr. Durkee to recuse himself. The Court will address the Appellants' arguments in seriatim.

1

Zoning Board Findings

Appellants initially argue that the Zoning Board failed to address the CPC's failure to satisfy the requirements of §45-23-60, § 45-23-30, and Providence Review Regulation's 39-point checklist for a Minor Land Development in its preliminary approval. Appellants contend that the hearing minutes from the CPC hearing reveal that its preliminary approval was based on conclusory statements which the record did not support—most egregious of which, they contend, relates to a 2003 traffic study that Appellants contend is no longer applicable or valid. Specifically, Appellants contend that the Zoning Board did not adequately address the CPC's finding that the 2003 use and dimensional variances had vested through the previous landowner's acquisition of a foundation permit in 2004.

In response, the Appellees contend that since the Appellants did not raise the majority of this argument at the Zoning Board hearing or in its application for appeal, this Court should not consider its merits. Appellees also argue that the Zoning Board properly and adequately found that SWAP had a vested property interest in the dimensional and use variances granted for the

subject Property, and alternatively that it was equitably estopped from finding they were not vested because of SWAP's reliance on official statements to the contrary.

It is well settled under Rhode Island law that this Court "shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact." Sec. 45-24-71(d). "This deferential standard of review, however, is contingent upon sufficient findings of fact by the zoning board." Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005). The CPC's findings are essential to an accurate review of matters on appeal. Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 401 (R.I. 2001). "Those findings must, of course, be factual rather than conclusional, and the application of legal principles must be something more than the recital of a litany." Irish P'Ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986). If the record contains inadequate findings of fact, judicial review is impossible, and this Court "will not search the record for supporting evidence or decide for itself what is proper in the circumstances." Kaveny, 875 A.2d at 8.

a

"Raise-or-Waive" Doctrine

Both Appellees invoke the "raise or waive" doctrine as a defense to Appellants' arguments regarding the inadequacy of the Zoning Board's findings. As an initial matter, this Court declines to apply the "raise or waive" doctrine. See East Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Town of Barrington, 901 A.2d 1136, 1152-53 (R.I. 2006) (noting that Rhode Island courts have applied the "raise-or-waive" rule regarding issues raised on appeal which were not raised before a trial court). The Rhode Island Supreme Court "has not explicitly held that the raise-or-waive doctrine applies to administrative proceedings," including zoning appeals. Id. at 1153. Moreover, the underlying principle of the doctrine—that the record below must be

sufficient to permit a proper review of the alleged error at the administrative level—still applies. See Charles H. Koch Jr., Administrative Law and Practice § 8.27 (stating that "the administrative record must generally be sufficient in itself to permit review").

Here, the appeal to the Zoning Board necessarily was premised on a claim that the CPC's preliminary approval was made in clear error, without substantial evidence to support it. See § 45-23-70(a). Moreover, the Zoning Board considered this standard of review during deliberations and made specific findings pursuant to it in its Resolution. (Tr. at 255, 267-70). Specifically, in its Resolution, the Zoning Board found that "[t]he entirety of the record from the City Planning Commission is without clear error or prejudicial error." (Resolution at 3.) It is well settled that judicial review is limited to determining whether there is "sufficient competent evidence" to support findings made by an administrative agency. Johnston Ambulatory Surgical Associates, Ltd. v. Nolan, 755 A.2d 799, 812 (R.I. 2000).

b

Adequacy of Required Findings

Section 45-23-60 of the Development Review Act, which governs a planning board's findings regarding its approval of minor land development projects, provides:

> "(a) All local regulations shall require that for all administrative, minor, and major development applications the approving authorities responsible for land development and subdivision review and approval shall address each of the general purposes stated in § 45-23-30 and make positive findings on the following standard provisions, as part of the proposed project's record prior to approval:
> "(1) The proposed development is consistent with the comprehensive community plan and/or has satisfactorily addressed the issues where there may be inconsistencies;
> "(2) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance;

> "(3) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval;
> "(4) The subdivision, as proposed, will not result in the creation of individual lots with any physical constraints to development that building on those lots according to pertinent regulations and building standards would be impracticable. (See definition of Buildable lot). Lots with physical constraints to development may be created only if identified as permanent open space or permanently reserved for a public purpose on the approved, recorded plans; and
> "(5) All proposed land developments and all subdivision lots have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered in compliance with this requirement."

Section 45-23-60(a) makes clear that in its approval, the CPC "*shall* address each of the general purposes stated in § 45-23-30 and make positive findings on" the five enumerated provisions. (Emphasis added.) "The general rule is that statutory requirements comprising the essence of a statute are mandatory." Town of Tiverton v. Fraternal Order of Police, Lodge # 23, 118 R.I. 160, 164-65, 372 A.2d 1273, 1275-76 (1977). Here, the word "shall" is used as a directive to the CPC to make "positive findings" contemplated to become part of the record; these "positive findings" are clearly the essence of this section, and not merely procedural or "designed to secure order, system and dispatch." West v. McDonald, 18 A.3d at 534 (distinguishing between directory and mandatory language in the zoning statute, and holding that a requirement regarding a procedural matter which was not "the essence of the state" was directory in nature). Therefore, the word "shall" in § 45-23-60 is a mandatory condition.

In granting Appellant's request for a preliminary plan approval, the CPC found in relevant part that "[t]he applicant has obtained relief from the zoning board of review for development of a multifamily dwelling in the R-2 zone." (Ex. 5 at 2.) However, this finding of fact, without more, is merely a conclusory statement—a "recital of a litany"—that does not allow

this Court to meaningfully review the CPC's decision to determine whether or not the Project is "in compliance with the standards and provisions of the municipality's zoning ordinance." See § 45-23-60(a)(2); Bernuth, 770 A.2d at 401. The CPC wholly failed to identify what evidence it relied upon to find that applicant had obtained relief from the Ordinance. See Kaveny, 875 A.2d at 8 (requiring "specific findings of fact" in municipal board decisions); accord Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001). Moreover, the July 17, 2012 CPC hearing minutes simply state that Mr. Landry, SWAP's counsel, "said that the project received relief from the zoning board for development of multifamily housing in an R-2 zone." (Ex. 4 at 2.) It appears undisputed that in 2003, the Zoning Board granted approval for Loffredo's project, but the issue in this case is whether the approval remained in full force and effect in 2007.

This Court cannot determine how the CPC arrived at its conclusion that SWAP's request for preliminary plan approval met the relevant statutory requirements without the required specific supporting evidence relied upon by the CPC. Where a planning board does not state adequate findings of fact, "the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances." Irish P'Ship, 518 A.2d at 359. CPC's findings of fact fail to address what specific evidence led to its findings regarding the Project's compliance with the local Ordinance.

Therefore, after careful review, this Court finds that the CPC failed to make sufficient findings of fact, and therefore the Zoning Board's finding to the contrary was clearly erroneous and in violation of statutory provisions. Sec. 45-23-71(d). Pursuant to § 45-23-71(d), this Court remands this case to the Zoning Board to remand to the CPC for further proceedings consistent

with this opinion.[9] See Kirby, 634 A.2d at 292; Jeffrey v. Platting Bd. of Review of Town of S. Kingstown, 103 R.I. 578, 591, 239 A.2d 731, 739 (1968). On remand, the CPC is directed to adequately set forth each of its findings of fact, directly referring to the specific evidence leading to each conclusion. Kaveny, 875 A.2d at 9; see also Sciacca, 769 A.2d at 585.[10]

2

Zoning Board Hearing Procedures

Appellants' second challenge is to the procedures employed at the Zoning Board hearing. Specifically, Appellants argue that the Board prevented pro se interested parties from making legal arguments and improperly allowed the attorney for the Board to speak for them without their consent. The Zoning Board again invokes the "raise-or-waive" rule in response to Appellants' arguments. SWAP argues that the transcript of the Zoning Board hearing does not support Appellants' arguments regarding their inability to be heard and that all parties were adequately represented and heard at the hearing.

As to Appellants' first argument—that pro se parties were stymied in their efforts to be heard—the transcript of the hearing clearly reveals that the Zoning Board provided ample opportunity for all parties to speak. Moreover, Appellants had an opportunity to present arguments, and did so, in their appeal of the CPC's decision. (Appeal from City Plan Commission Decision at 2-3, Aug. 10, 2012.) Mr. Carello was permitted to make arguments against the preliminary plan approval at the Zoning Board hearing. (Tr. at 227-36.) Appellants

[9] Pursuant to the Development Review Act, any future appeal of the CPC's decision on remand shall be appealed first to the Zoning Board sitting as the Board of Appeal and only then to the Superior Court. Secs. 45-23-66; 45-23-71.

[10] Regarding the insufficient findings of fact, this Court directs the CPC to look to the record in particular for supporting evidence that SWAP possessed "relief" for a multifamily development on the Property, especially in light of SWAP's actions in demolishing the foundation, the permit for which was the basis for its arguments before the CPC.

complain that the chair of the Zoning Board did not permit Ms. Mulcahy to complete the argument she wished to articulate. Ms. Mulcahy, who is not a named party to this appeal but appeared pro se in opposition to the Project, attempted to present a legal argument regarding whether or not a vested interest in a variance can survive a transfer of property ownership. (Tr. at 231.) That issue was not properly before the Board. When the Chair interrupted, it was to refocus the discussion on issues properly before the Board. (Tr. at 231-32 (Madam Chair: "I don't want to debate the facts with you because that's not the purpose and that's not the function of this Board.").) In addition, there is no evidence on the record that, at the conclusion of Appellants' arguments, they attempted to continue speaking and were cut off.

Appellants also contend that Mr. DeSisto, special counsel to the Zoning Board, improperly took on the role of Appellants' attorney by summarizing their arguments to the Board members. The record demonstrates otherwise. At the hearing, Mr. DeSisto identified himself as "special counsel advising the board"—*not* as counsel for Appellants. (Tr. at 234.) In addition, as a special advisor to the Zoning Board, he was certainly permitted to respond to the Board when they asked him for a summary of Appellants' legal arguments. (Tr. at 236.) Finally, after Mr. DeSisto summarized Appellants' two primary arguments for the Zoning Board, rather than correct the attorney or interject a new argument, Mr. Carello merely added that he was "totally okay with them [SWAP] starting again and conforming to the zoning ordinances." (Tr. at 236.) As there is no evidence on the record that either Mr. Carello or any other Appellant was precluded from advancing additional arguments before the Board, the Zoning Board's decision was not made upon unlawful procedure. Sec. 45-23-71(d).

3

Constitutionality of Providence Development Review Regulations

Third, Appellants challenge Providence Development Review Regulations, in an apparent constitutional argument, as vague in that the Regulations allow the CPC to make "arbitrary and capricious" determinations to distinguish Minor and Major Land Development Projects. Specifically, they contend that there is no clear statutory distinction made between a "Minor" and a "Major" Land Development Project, allowing the CPC to arbitrarily define projects as "Minor" and exempt them from the requirement to provide notice to neighboring landowners. See §45-23-32(24). The Zoning Board again invokes the "raise-or-waive" rule in response to Appellants' arguments. SWAP contends that Appellants' challenge to the Providence Development Review Regulations is misguided as it relies on an outdated version of the Regulations.

It is unclear what constitutional standards Appellants are challenging the Development Review Regulations. See Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1131 n.1 (R.I. 2002) (noting that "[s]imply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised"). Nevertheless, under either of the most likely constitutional standards—due process and the nondelegation doctrine—Appellants' argument fails.

Under a due process analysis, Appellants seemingly argue that the Regulations' definition of a minor land development project is unconstitutionally vague in that it allegedly "compels 'a person of average intelligence to guess and to resort to conjecture as to its meaning and/or as to its supposed mandated application.'" Kaveny, 875 A.2d at 9 (quoting Trembley v. City of Central Falls, 480 A.2d 1359, 1365 (R.I. 1984)). The CPC's Development Review Regulations

defines a "Minor land development plan" as "[a] development plan for a residential project as defined in these regulations, provided that the development does not require waivers or modifications as specified in these regulations." (Ex. 2, Providence Development Review Regulations, at 47.) The Development Review Regulations go on to state that "[a]ll nonresidential land development projects are considered major land development plans." While this definition arguably leaves open room for interpretation regarding a minor land development plan, the decision to define this statutory term by negative implication "is enough to take the [definition] out of the realm of those laws that are unconstitutionally vague." Kaveny, 875 A.2d at 10.

Under the nondelegation doctrine, Appellants seemingly argue that the definition of a minor land development plan lacks a coherent standard for determining what residential projects can be considered major or minor. "The Rhode Island Constitution forbids unrestricted delegations of legislative power by the General Assembly." Marran v. Baird, 635 A.2d 1174, 1179 (R.I. 1994). The nondelegation doctrine, while aiming to protect citizens against arbitrary decisions by public actors, does permit "reasonable" delegations of power to public officials. See Kaveny, 875 A.2d at 11. "A delegation is reasonable as long as the Legislature provides 'standards or principles to confine and guide interpretation.'" Id. (quoting Marran, 635 A.2d at 1179).

The Rhode Island Supreme Court has held that under the same interpretation as unconstitutional vagueness, the mere fact that a statute defines a term by a negative implication does not render the statute unconstitutional under the nondelegation doctrine. See Kaveny, 875 A.2d at 11-12. Our Supreme Court recognizes that "[a]lthough this approach may make the work of zoning boards more analytically difficult, they have not been 'set adrift without any

rudder.'" Id. at 12 (quoting Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 749 (D.D.C. 1971)). Accordingly, the Zoning Board's decision is not in violation of constitutional provisions. Sec. 45-23-71(d).

4

Conflict of Interest

Finally, Appellants contend that Steven Durkee, the Chairman of the CPC, should have recused himself from the meeting on conflict of interest grounds. Specifically, Appellants allege that Mr. Durkee's architectural firm at the time was a business associate of SWAP. This close relationship, Appellants contend, required Mr. Durkee to notify the vice chairman of the CPC and recuse himself from the hearing. The Zoning Board again invokes the "raise-or-waive" rule in response to Appellants' argument, as Appellants did not challenge his presence at the Zoning Board hearing on appeal. SWAP argues that no conflict of interest existed at the CPC hearing that would require Mr. Durkee to recuse himself. SWAP explains that the work Mr. Durkee's firm did for SWAP was more than twelve years ago and thus renders the potential conflict de minimis.

The record does not evidence that Appellants inquired into any potential conflicts of interest at the CPC hearing, nor raised such an allegation in their written appeal to the Zoning Board. Moreover, the conflict of interest issue was neither raised at the Zoning Board hearing, nor developed at the Superior Court level. Accordingly, there is no meaningful record for this Court to review. When the Superior Court is reviewing a Zoning Board decision in an appellate capacity, the record below must contain sufficient consideration of this issue as to permit a meaningful review on appeal. See Koch, supra, at § 8.27 ("the administrative record must

generally be sufficient in itself to permit review"). Without a record at either the administrative level or in this Court, the Appellants cannot sustain these allegations.

The Court notes that as the CPC sits in a quasi-judicial setting, the requirement of unbiased decision-makers applies there as it does in court. See Champlin's Realty Assocs. v. Tikoian, 989 A.2d 427, 443 (R.I. 2010) ("When an administrative agency carries out a quasi-judicial function, it has an obligation of impartiality on par with that of judges."); Withrow v. Larkin, 421 U.S. 35, 46-47 (1975). A Commission member "must recuse himself or herself when the [member] possesses 'a personal bias or prejudice by reason of a preconceived and settled opinion of a character calculated to impair his [or her] impartiality seriously and sway his [or her] judgment.'" Champlin's Realty Assocs., 989 A.2d at 443 (quoting Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 185 (R.I. 2008)) (additional quotation omitted).

This within matter is distinguishable from Champlin's Realty Assocs. v. Tikoian, where the Superior Court had granted a request for an evidentiary hearing pursuant to § 42-35-15(f) and conducted such a hearing. 989 A.2d at 434-35. That section provides that in the event of "alleged irregularities in procedure before the agency, not shown in the record, proof thereon may be taken in the court." Sec. 42-35-15(f). Such a hearing only was granted in Champlin's upon a showing of probable irregularities. See Champlin's Realty Assocs. v. Tikoian, PC 06-1659, 2009 WL 3161831 (R.I. Super. Jan. 8, 2007) (Bench Decision); Champlin's Realty Assocs. v. Tikoian, PC 06-1659, 2007 WL 7123353 (R.I. Super. Jan. 16, 2007) (Order).

There is no evidence on the record of Mr. Durkee's alleged "personal bias or prejudice" in this case. Champlin's Realty Assocs., 989 A.2d at 443. Appellees allege that Mr. Durkee's architectural firm worked with SWAP on a revitalization project in 2001-2002—a full ten years prior to the CPC hearing and decision. See Wilkinson, 788 A.2d at 1131 ("Simply stating an

issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue."). The record is devoid of evidence that Mr. Durkee is presently involved in the Project at issue in this case or that Mr. Durkee "publicly prejudged" SWAP's application. Thus, Appellants have failed to provide this Court with evidence sufficient to rebut the presumption of impartiality in favor of Mr. Durkee. See Gorman v. University of Rhode Island, 837 F.2d 7, 15 (1st Cir. 1988) ("Generally, in examining administrative proceedings, the presumption favors the [public officials], and the burden is upon the party challenging the action to produce evidence sufficient to rebut this presumption.").

IV

Conclusion

After review of the entire record, this Court concludes that the CPC's findings of fact amounted to unsupported conclusions, and thus were in violation of statutory provisions. Therefore, the Zoning Board's findings upholding the CPC's findings were clearly erroneous. Accordingly, this matter is remanded to the Zoning Board to remand to the CPC so that it may make sufficient findings of fact consistent with this opinion. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Anthony Carello, et al. v. The Zoning Board of Review of The City of Providence, et al.
CASE NO:	PC 12-5979
COURT:	Providence County Superior Court
DATE DECISION FILED:	December 17, 2013
JUSTICE/MAGISTRATE:	Vogel, J.
ATTORNEYS:	
For Plaintiff:	William R. Landry, Esq.; Celeste Marsella, Esq.
For Defendant:	Anthony DeSisto, Esq.