STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: December 15, 2014)

JANE MACDOUGALL	:	
	:	
V.	:	**C.A. No. PM-2013-1185**
	:	
THE ZONING BOARD OF THE TOWN OF WARREN, MICHAEL GERHARDT, ALDEN HARRINGTON, PAUL ATTEMANN, STEPHEN P. CALENDA, MARK SMILEY and ANDREW ELLIS, all in their capacities as members of THE ZONING BOARD OF THE TOWN OF WARREN, WATER STREET DOCK CO., INC. and BLOUNT REALTY COMPANY	:	

DECISION

NUGENT, J. Before the Court is an appeal from a decision of the Zoning Board of the Town of Warren (Zoning Board). Jane MacDougall (Appellant) seeks reversal of the Zoning Board's decisions of February 20, 2013 (Decisions), granting the applications of Blount Realty Company and Water Street Dock Company, Inc. (Applicants) for both a special use permit and a dimensional variance. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth in this Decision, this Court remands the matter to the Zoning Board for further proceedings consistent with this Decision.

I

Facts and Travel

The subject premises are designated as Lots 11, 110, 111, 109, 25, 3, 98, 114, and 107 on Plat 6 of the Tax Assessor's Map in Warren, Rhode Island and are owned by Applicants. The

premises are located at 461 and 463 Water Street in the Town of Warren in an area zoned "W" for Waterfront District. On September 25, 2012, Applicants filed petitions for a special use permit seeking relief from Sections 32-57 and 32-74 of the Town of Warren Zoning Ordinances (Ordinances) and for a dimensional variance seeking relief from Section 32-78 of the Ordinances, with amended petitions being filed on November 29, 2012. The Applicants sought the expansion of legal non-conforming use to allow boat manufacturing in a waterfront district and construction of a building—a tent structure—of non-conforming use. Their dimensional variance proposed a rear setback of 0 feet when the required setback is 20 feet; a proposed building coverage of 34% when the maximum coverage allowed is 30%, and a proposed building height of 44 feet when the maximum allowable height is 35 feet. After a public hearing on January 7, 2013, the Town of Warren Planning Board of Review recommended that the Zoning Board approve both applications.

The Zoning Board then conducted a public hearing on the applications for a special use permit and dimensional variance on January 16, 2013. Three people—Ms. Marsha Blount, president of Applicants; Mr. Richard Fitzgerald, a professional structural engineer; and Mr. Ronald Blanchard, a professional civil engineer—testified in favor of the Applicants. Ms. Blount testified as to Applicants' need for a tent structure; Blount Boats has been building vessels since 1949 and is currently building more boats per year and requires a protected construction space to ensure the company remains "competitive and efficient." (Bd. Hr'g Tr. at 5.) She further testified as to all the lots at issue being used for boat and ship manufacturing, and that the uses on the property were in keeping with neighboring land uses. Id. at 7-8. Ms. Blount next addressed the Town of Warren's Comprehensive Plan, which includes a paragraph suggesting the Waterfront area "must recapture its thriving ship building heritage." Id. at 11.

She then testified about the requested dimensional variances that are necessary to permit the construction of larger vessels regardless of weather. Id. at 15-18. Mr. Fitzgerald testified regarding the need for a zero foot setback for the tent structure. Id. at 20-21. He then explained the need for a tent—rather than a permanent structure—that could be taken down to accommodate construction of 180-foot vessels. Id. at 23.

Two members of the public came forward to address their concerns to the Zoning Board. Ms. Ida Hoffman, a neighbor residing at 492 Water Street in Warren, raised the issue of the right of way to the water, known as Shipyard Lane. Id. at 34-35. She also expressed her opinion that the proposed structure was too large for the shipyard and there were already too many buildings. Id. at 36-38. Mr. Blanchard testified in response to concerns over the right of way; it was determined by Mr. Blanchard and Mr. William Nash, a building inspector, that Plat 6, Lot 25 was not recorded as a public right of way and the Blounts are taxed for it. Id. at 39-40. Mr. Andre Asselin, another neighbor, also expressed concern over the alleged right of way and presented a map showing Shipyard Lane. Id. at 41-42. The Zoning Board noted that it had received extensive communications from Appellant, who lives at 500 Water Street in Warren and did not attend the hearing, as well as comments from Mr. Philip Kirby of 40 Haile Street. Id. at 44.

The Zoning Board then engaged in discussion and posed additional questions to some of the witnesses. They agreed to condition their unanimous granting of the special use permit on Coastal Resources Management Council's (CRMC) approval, as well as the Department of Environmental Management's (DEM) approval, and the Building Board of Appeal's approval. Id. at 55. Subsequently, the Zoning Board addressed the application for dimensional variance, which they also unanimously approved, granting the rear setback, the height variance, and the lot

coverage variance. Id. at 56-57. The Zoning Board issued its Decisions for both applications on February 20, 2013.

The Appellant timely appealed the Zoning Board's Decisions on March 13, 2013. On appeal, Appellant raises a number of issues, including that the Decisions of the Zoning Board were "defective," affected by errors of law, and in excess of the authority granted to the Zoning Board. Furthermore, Appellant argues that the Decisions were "defective" because the applications were incomplete and that the hearing and the record were also "defective." She also claims that the Zoning Board acted capriciously in a clearly unwarranted exercise of discretion, that the relief granted is in excess of that allowed under the law, and that the Zoning Board failed to make a required finding of fact under Article X of the Ordinances.

II

Standard of Review

Pursuant to § 45-24-69, "[a]n aggrieved party may appeal a decision of the zoning board of review to the superior court . . . ." In reviewing the zoning board's decision, the

> "court shall not substitute its judgment for that of the zoning board . . . as to the weight of the evidence on questions of fact. The court may affirm the decision . . . 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, or ordinance provisions;
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> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
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> "(3) Made upon unlawful procedure;
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> "(4) Affected by other error of law;
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> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
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> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."
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> Sec. 45-24-69(d).

This Court's review of a zoning board's decision is "circumscribed and deferential . . . ." Restivo v. Lynch, 707 A.2d 663, 667 (R.I. 1998). Our Supreme Court has held that "judicial scrutiny of an agency's factfinding . . . is limited to a search of the record to determine if there is any competent evidence upon which the agency's decision rests. If there is such evidence, the decision will stand." E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977). Competent or 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 N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (citing Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). A zoning board's "essential function is to weigh the evidence." Bellevue Shopping Ctr. Assocs. v. Chase, 574 A.2d 760, 764 (R.I. 1990). Thus, a board's factual conclusions should be reversed "only when they are totally devoid of competent evidentiary support in the record." Milardo v. Coastal Res. Mgmt. Council of R.I., 434 A.2d 266, 272 (R.I. 1981). However, a reviewing court may remand a zoning board decision for further proceedings where there is no record of the proceedings upon which the court may act or where there was a defect in the prior proceedings. Sec. 45-24-69(d); Roger Williams Coll. v. Gallison, 572 A.2d 61, 63 (R.I. 1990).

III

Analysis

In writing a decision, a zoning board must include "all findings of fact and conditions" as well as conclusions of law so that the decision "may be susceptible of judicial review." See § 45-24-61(a); Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001). It is the reviewing court's responsibility to ". . . decide . . . whether the board . . . resolved

the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles. . . . These are minimal requirements. Unless they are satisfied, a judicial review of a board's work is impossible." Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986) (citing May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970)). When a board does not include sufficient 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. Furthermore, there must be ". . . specific findings of fact in zoning board decisions. . . ." Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005).

The two Zoning Board Decisions in the instant appeal fall far short of the requirements articulated by our Supreme Court. See id. Each Decision is two pages long, which includes a cursory overview of who testified at the hearing. The Decision for the expansion of the legal non-conforming use includes a paragraph that attempts to analyze the standards required by the Ordinances. See Ordinances § 32-30, General Standards for a Special Use Permit. Very few facts are included in this analysis:

> "The findings have shown the use of the structure will not cause a nuisance and is compatible with the traditional use of this area, consistent with the comprehensive plan, the public convenience will be served through continued employment and through the repetition [sic] of the Town of Warren being a boat building community throughout the world." (Bd. R. File #12-26, Ex. 1).

The Zoning Board stated that it "[made] the following findings of fact" and proceeded to list the four standards[1] for granting a special use permit as required by the Ordinances verbatim

[1] "I. That the addition will be compatible with all of the neighborhood land uses.
"II. That the addition is compatible with the Comprehensive Plan.
"III. That the addition will not create a nuisance or a hazard to the neighborhood.

without including any facts. Id. Similarly, in the dimensional variance Decision, the Zoning Board failed to present the facts that supported its findings. (Bd. R. File #12-27, Ex. 1). The Zoning Board copied the Ordinance variance standards[2] but failed to offer any facts to support its findings and merely recited the requested dimensions. See Ordinances § 32-26, General Standards for a Variance; Bd. R. File #12-27, Ex. 1. These Decisions exemplify precisely what the Rhode Island Supreme Court meant when it discussed "conclusional" findings. Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (citing Irish P'ship, 518 A.2d at 358). Furthermore, our Supreme Court has continuously conveyed that a zoning board's "application of the legal principles must be something more than the recital of a litany." Id. The Zoning Board has failed to meaningfully apply the facts to the Ordinance standards in this matter, and, as such, this Court remands both Decisions for further findings of fact and proper application of law. See Roger Williams Coll., 572 A.2d at 63 (holding that remand of a zoning board appeal is proper where there is a "genuine defect in the proceedings in the first instance, which defect was not the fault of the parties seeking the remand").

Additionally, on remand, the Zoning Board must address the issue of legal merger. The Ordinances include a section addressing merger of lots under the same ownership:

> "Notwithstanding the provisions of Section 32-81 above, where adjacent land is in the same ownership, such lot shall be combined

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"IV. That the addition will serve to [sic] the public convenience and welfare." (Bd. R. File #12-26, Ex. 1.)

[2] "I. That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure, and not due to the general characteristics of the surrounding area, and is not due to a physical or economic disability of the applicant;

"II. That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;

"III. That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of this zoning ordinance or the Comprehensive Plan; and

"IV. That the relief to be granted is the lease [sic] relief necessary." (Bd. R. File #12-27, Ex. 1.)

> with adjacent land to form a lot of the required dimensions and area, or to decrease the degree of non-conformity where the required area and dimensions cannot be achieved. Substandard lots of record, in the R-10 and R-6 Districts, which after being subject to the above requirements, deviate by more than twenty five percent (25%) in the minimum lot area, shall have two side yards each having a setback of not less than ten (10) percent of the frontage of the lot, or six (6) feet, whichever is greater, provided that any side yard abutting on a street shall have a setback of not less than fifteen (15) feet.
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> "The merger requirement shall apply to all adjacent land under the same ownership, whether improved or unimproved, except that where both the substandard original lot and the adjacent lot have structures located thereon, it shall apply only if said structures are related to a principal use located on one (1) or more of the lots. For purposes of this article, "under the same ownership" shall apply to a specific owner and to any of the following:
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> > "A. Such owner's spouse or parents, children, grandparents, grandchildren or siblings, blood or adoptive;
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> > "B. A trustee of a trust for the benefit of such owner, or for any person identified in the immediate preceding clause;
> >
> > "C. A corporation, partnership, firm, business or entity of which the majority of the voting interest is owned by such owner, or any person identified in either clause above; or
> >
> > "D. A person who is an officer, director, stockholder (fifteen percent (15%) or more), trustee employee or partner of any entity or person referred to in any of the clauses above." Ordinances § 32-82.

The instant appeal includes nine lots of land owned by Applicants. The proposed tent structure, however, would be on only one of these lots—lot eleven—and it is unclear why all the lots were included in Applicants' application or if legal merger applies. The Zoning Board does not address this question in either of its Decisions nor was it raised at the Hearing. The Appellant argues that it is unclear as to which lots the expansion of the legal non-conforming use and the dimensional variance would apply should any of the lots be sold to a third party. If legal merger

is appropriate, the Zoning Board must address it on remand. If not, then that too should be made clear.

This Court is mindful of the oft-repeated standards required of a zoning board decision. In sum, this Court offers what our Supreme Court has stated several times:

> "It might be appropriate to suggest . . . that, because of the complicated legal questions incident to all zoning hearings, zoning boards should avail themselves of the legal service of their municipal legal departments. This would, in our judgment, aid the boards in the administration of justice to all who come before them." Sciacca, 769 A.2d at 585-86 (citing Souza v. Zoning Bd. of Review of Warren, 104 R.I. 697, 699-700, 248 A.2d 325, 327 (1968)).

IV

Conclusion

Upon reviewing the complete record, this Court finds that the Decisions of the Zoning Board have insufficient findings of fact and conclusions of law. Accordingly, the Decisions of the Zoning Board are remanded for further findings of fact and conclusions of law, as well as to address the question of merger with respect to the nine lots included in Applicants' applications. Counsel for Appellant shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Jane MacDougall v. The Zoning Board of the Town of Warren, et al.**
CASE NO:	**PM-2013-1185**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**December 15, 2014**
JUSTICE/MAGISTRATE:	**Nugent, J.**
ATTORNEYS:	
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