

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(FILED: March 25, 2015)

ROY LACROIX

:

v.

:

C.A. No. WC-2008-0281

:

TOWN OF WESTERLY

:

ZONING BOARD OF REVIEW

:

:

DECISION

**K. RODGERS, J.** This matter is presently before this Court on an appeal by Appellant Roy Lacroix (Appellant or Lacroix) from the August 22, 2013 decision of the Town of Westerly Zoning Board of Review (the Zoning Board or Appellee). That decision was issued after remand from this Court through which the Zoning Board was ordered to issue findings of fact relative to its prior decision dated March 5, 2008, which had denied Appellant’s appeal from a Notice of Violation and Order issued by the Town of Westerly (the Town) Zoning Official on March 29, 2007.

This Court has jurisdiction over this matter pursuant to G.L. 1956 § 45-24-69. For the reasons that follow, this Court reverses the August 22, 2013 decision of the Zoning Board.

**I**

**Facts and Travel**

Appellant is the owner of real property located at 55 Beach Street in Westerly, Rhode Island, designated as Lot 105 on the Assessor’s Plat 86 (the Property). The Property is located in a General Commercial Zoning District (GC Zone). Appellant purchased the Property on January

29, 1996 and, since that time, has maintained and rented out first-floor apartments to various residential tenants.

On February 23, 2007, the Town Assistant Zoning Official sent a letter to Appellant seeking to arrange an inspection of the Property as it had recently come to the Town's attention that Appellant had rented first-floor apartments on the Property, which are prohibited in a GC Zone even where there is "mixed residential commercial use." See Town of Westerly Zoning Ordinance (Zoning Ord.) § 260-64A.<sup>1</sup> That inspection was conducted on March 20, 2007 and revealed that two residential apartments on the first floor—identified as #10 and #11—were both occupied. On March 29, 2007, then-Town Zoning Official Anthony Giordano (Giordano) notified Appellant's attorney in writing that the Property was in violation of the Town's Zoning Ordinance, and Appellant would have until April 22, 2007 to remedy this violation before further action was taken by the Town.

On April 26, 2007, Appellant appealed the Zoning Official's March 29, 2007 letter to the Zoning Board. As grounds for his appeal, Appellant asserted that the residential units existed at the time he purchased the Property and that they have been used as such since that time without interruption. Three hearings took place between January and March 2008. At the first hearing, Appellant testified, as did Mary Ventresca (Ventresca), the former proprietor of "Mrs. V's" restaurant located on the first floor of the Property. Appellant testified that when he purchased the Property there was at least one residential unit on the first floor; within a month of purchasing the Property in 1996, units #10 and #11 became residential units. Appellant also

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<sup>1</sup> Section 260-64A of the Zoning Ordinance appears to have been amended on November 19, 2007, pursuant to Chapter No. 1621. The prohibition of first-floor residential use in a mixed-use development located in a GC Zone, previously set forth in § 260-64A, is presently set forth in § 260-64(D)(2). It is uncontroverted that the substance of this prohibition has remained the same since 1998. For simplicity sake, this Court will refer to the earlier iteration in effect at the time of the Notice of Violation and Order, § 260-64A.

testified that he had no knowledge of there being any use violation at the Property at the time he purchased it and that he never received a notice of violation for residential units until the citation at issue in this appeal. Furthermore, Appellant testified that the residential units occupying first-floor apartments were all openly residential and that no occupants ever attempted to hide the fact that they were residential tenants.

Ventresca operated Mrs. V's on the Property from 1979 until approximately 2006. She testified that prior to Appellant's purchase of the Property, several residential apartment units existed in the area, including at least five different units on the first floor of the Property or in neighboring buildings. When asked what the unit next to her restaurant was used for, Ventresca specifically testified, "[t]hat was an apartment, and it was occupied way before Roy LaCroix took over the property." Tr. 12, Jan. 9, 2008.

Appellant argued to the Zoning Board that the current Zoning Ordinance for which Appellant was given notice of violation, § 260-64A, was adopted in October of 1998, after Appellant purchased the Property and long after residential units occupied the first floor of the Property, including units #10 and #11. Appellant had been unaware that the new Zoning Ordinance prohibited first-floor residential use until he sought an application for a variance in late 2006 for additional construction on the Property. The Zoning Board suspended the hearing to investigate how and when residential units came to be at the Property prior to 1998.

The hearing resumed on February 6, 2008, at which time Appellant's attorney was provided a copy of a memorandum prepared by Giordano for the Zoning Board which revealed that in 1977 the Property had been zoned as "B-2," or Business-2. Giordano Mem. at 1, Feb. 6, 2008. Giordano's memorandum also disclosed that in 1994, prior to Appellant's purchase of the Property, residential use was prohibited in the B-2 zone. Id. The Zoning Board continued the

hearing in order for Appellant's counsel to respond to the research and conclusions in Giordano's memorandum.

On March 5, 2008, Appellant presented evidence that two residential units on the Property were granted permits for renovations in 1983 and 1984. Application No. 2372 (Aug. 8, 1983); Application No. 2688 (Apr. 2, 1984). Appellant argued that all residential use was not prohibited in a B-2 Zone, but rather it was detached residential dwellings that were prohibited. Appellant further argued that the B-2 Zone did not address what is now commonly known as mixed-use development, a concept not introduced in the Town until 1998. Appellant asserted, then, that at the time he purchased the Property in 1996, the residential units then existing on the first floor were not prohibited and were legally nonconforming residential units when the Zoning Ordinance was amended in 1998.

The Board disagreed and the appeal from the Notice of Violation and Order was denied by the Zoning Board on March 5, 2008, by a vote of four to one. A copy of the Zoning Board's decision was recorded in the Town's Land Evidence Records on March 24, 2008. The Zoning Board's decision stated, in full, is as follows:

**“BOARD DECISION:**

“The Westerly Zoning Board of Appeals on March 5, 2008 denied an Administrative Appeal of the decision of the Zoning Official that Mixed Commercial Residential Use in a “GC” Zone **does not** permit residential use on the first floor.

“Based on the evidence presented at the public hearing on March 5, 2008 the Board finds that the current use of the residential apartments on the first floor is not an allowed use according [to] the Ordinance and the appeal is denied and the notice of violation remains in effect.

**“VOTE OF THE BOARD:**

**“Approve:** Giorgio Gencarelli

Frank Verzillo  
Mark Doescher  
Harrison Day, Chairman

**“Dissenters:** Robert Ritacco

**“Appeal Denied:** 4 in favor- - 1 opposed.”

Appellant timely appealed that decision to this Court on April 11, 2008.

The Zoning Board did not certify the record of the proceedings before the Zoning Board to this Court until December 5, 2008.<sup>2</sup> Accordingly, Appellant filed a Motion to Sustain Appeal on November 20, 2008, which was subsequently denied by a justice of this Court in a written decision on May 1, 2009. See Lacroix v. Town of Westerly Zoning Bd. of Review, C.A. No. WC-2008-0281, 2009 WL 3328547 (Super. Ct. May 9, 2009). Thereafter, this Court issued a decision on June 6, 2013, remanding the matter to the Zoning Board for findings of fact as required by § 45-24-61(a). See Lacroix v. Town of Westerly Zoning Bd. of Review, C.A. No. WC-2008-0281, 2013 WL 2735828 (Super. Ct. June 6, 2013).

Since the remand order, one member of the Zoning Board who participated in the March 5, 2008 decision, Chairman Harrison Day (Day), has passed away. The Zoning Board presently consists of the four original members and the new Town Zoning Official, Jason A. Parker (Parker). In an effort to comply with this Court’s remand order and facilitate the Zoning Board in issuing its findings of fact, Parker drafted a summary of events as compiled from the Zoning Board’s file, Giordano’s memorandum, and the information and testimony at the hearings contained in the hearing minutes. The original four Zoning Board members reviewed Parker’s

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<sup>2</sup> Section 45-24-69(a) requires the Zoning Board to file the record with the Superior Court within thirty days after being served with an appeal. Sec. 45-24-69(a). While the Town purported to file a certified record with this Court on December 5, 2008, transcripts of various public hearings were not filed by the Town. Unofficial transcripts for those three hearings were subsequently filed with this Court by Appellant on September 28, 2011.

summary and, at a public hearing on August 20, 2013, had the opportunity to agree, disagree, and/or edit the summary. The four Zoning Board members, Giorgio Gencarelli, Mark Doescher, Frank Verzillo and Robert Ritacco, voted unanimously to adopt the findings of fact set forth in Parker's summary. On August 22, 2013, the Zoning Board recorded its decision, dated the same day, which essentially incorporated the findings of fact stated in Parker's summary and concluded that "the current use of residential apartments on the first floor is not an allowed use according to the Zoning Ordinance." Thus, the Board again decided to deny Lacroix's appeal to the Zoning Board.

The parties submitted memoranda to this Court, pursuant to this Court's decision of June 6, 2013. The case is now before this Court for decision on the merits of the appeal.

## II

### Standard of Review

This Court's review of a zoning board decision is governed by § 45-24-69(d), which provides as follows:

"The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:

"(1) In violation of constitutional, statutory, or ordinance provisions;

"(2) In excess of the authority granted to the zoning board of review by statute or ordinance;

"(3) Made upon unlawful procedure;

"(4) Affected by other error of law;

"(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or

"(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Id.

When reviewing a decision of a zoning board, this Court “‘must examine the entire record to determine whether ‘substantial’ evidence exists to support the board’s findings.’” Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). Rhode Island law defines “substantial evidence” as “‘such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.’” Lischio v. Zoning Bd. of Review of 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)).

Additionally, all decisions and records of a zoning board must comply with the requirements of § 45-24-61. See § 45-24-68. Section 45-24-61 states that a zoning board “shall include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote.” If the record complies with § 45-24-61, then the Court “gives deference to the findings of a local zoning board of review. This is due, in part, to the principle that ‘a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.’” Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (quoting Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)). However, “a zoning board’s determinations of law, like those of an administrative agency, ‘are not binding on the reviewing court; they ‘may be reviewed to determine what the law is and its applicability to the facts.’” Id.

### III

#### Analysis

Appellant argues that the Zoning Board's August 22, 2013 decision is both procedurally and substantively flawed. First, Appellant maintains that the Zoning Board was incapable of complying with § 45-24-61, which requires "all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote," because one Zoning Board member had passed away since the original decision was issued by the Zoning Board in March 2008. Additionally, Appellant asserts that the Zoning Board's decision was procedurally invalid because the summary, as adopted by four of the five Zoning Board members, was drafted by a member of the Zoning Board who was not present for the original hearings. On the merits of the Zoning Board's decision, Appellant contends that the decision is not supported by substantial evidence, is clearly erroneous, arbitrary, capricious, and otherwise constitutes an unwarranted exercise of discretion. See § 45-24-69(d). These arguments will be addressed seriatim.

#### A

##### Procedural Validity

The Rhode Island Zoning Enabling Act of 1991 (the Act), codified at §§ 45-24-27 et seq., provides, among other things, the powers and duties of the zoning boards of review. See § 45-24-57. Among those powers and duties is the power to hear and decide appeals from an alleged error in a decision by an administrative officer in the enforcement of the Act or any ordinance adopted pursuant to the Act. Sec. 45-24-57(1)(i). The Zoning Board is required to have five active members to conduct a hearing and, if a conflict occurs, that member must recuse himself or herself and may not participate in the hearing or vote. Sec. 45-24-57(2)(i). For the Zoning

Board “to reverse any order, requirement, decision, or determination of any zoning administrative officer,” the vote requires the concurrence of three of the five members. Sec. 45-24-57(2)(ii). A vote of only three of the five members, then, is required to uphold a decision or determination by an administrative officer or, in other words, deny an appeal.

Here, because the Zoning Board requires only a majority vote to deny an appeal, the fact that one of the Zoning Board members is no longer available does not render the August 22, 2013 decision procedurally deficient. On March 5, 2008, the Zoning Board voted four-to-one to uphold the Notice of Violation and Order and deny Lacroix’s appeal. One of the four votes to uphold the administrative decision was that of Day, thereby leaving three Zoning Board members who concurred in the vote to deny the appeal at the time that the findings of fact were adopted in August 2013. Those three Zoning Board members, Doescher, Gencarelli and Verzillo, were present at the meeting of August 20, 2013, received and had an opportunity to review Parker’s summary ahead of the hearing, and each voted in favor of adopting the summary as the Zoning Board’s findings of fact to support its earlier decision. Those three votes were sufficient to constitute a decision of the Zoning Board pursuant to § 45-24-57(2)(ii), notwithstanding Day’s death in the interim. Accordingly, this Court is satisfied that the Zoning Board properly responded to this Court’s order on remand by adopting findings of fact to support its March 5, 2008 decision, and its August 22, 2013 decision does not violate § 45-24-61.

Appellant’s argument that the summary was inherently invalid because it was compiled by a Zoning Board member who was not a member at the time of the original March 5, 2008 decision is similarly unpersuasive. Each of the Zoning Board members who had been present for the March 5, 2008 decision received the summary in advance of the August 2013 hearings, had the opportunity to comment upon, edit, reject or adopt the summary as the Zoning Board’s

findings of fact. It is unimportant that the summary was authored by an individual who did not serve as a member of the Zoning Board at the time of its earlier decision so long as the remaining Zoning Board members had the opportunity to review, comment upon, and vote upon whether the content of the summary should be adopted as the findings of fact that this Court required be issued. The record is clear that the Zoning Board members indeed did that, and there is no basis for this Court to reject the method utilized to adopt these findings of fact.

## **B**

### **Merits**

Beyond the procedural deficiencies, Appellant argues that the Zoning Board's August 22, 2013 decision, incorporating Parker's summary as its findings of fact, is clearly erroneous, not supported by the substantial evidence of record, and is an unwarranted exercise of discretion. The Zoning Board contends, in turn, that substantial evidence on the record supports its conclusion that first-floor residential use in a GC Zone is prohibited under the current Zoning Ordinance, and that no residential use was ever permitted in a B-2 Zone in which the Property was previously located. Accordingly, the Zoning Board urges this Court to sustain its argument that the two residential units, #10 and #11, on the Property are not legally nonconforming uses and that they presently violate the Zoning Ordinance.

The Rhode Island Supreme Court has "explained that a lawful nonconforming use 'is a particular use of property that does not conform to the zoning restrictions applicable to that property but which use is protected because it existed lawfully before the effective date of the enactment of the zoning restrictions and has continued unabated since then.'" Duffy v. Milder, 896 A.2d 27, 37 (R.I. 2006) (quoting RICO Corp. v. Town of Exeter, 787 A.2d 1136, 1144 (R.I. 2001)). "[T]he 'burden of proving a nonconforming use is upon the person or corporation

asserting the nonconforming use’; it is also a basic principle that that ‘burden cannot be sustained by hearsay or unsworn testimony or when the evidence of such alleged prior use is contradictory.’” Cigarrilha v. City of Providence, 64 A.3d 1208, 1213 (R.I. 2013) (quoting RICO Corp., 787 A.2d at 1144.). “The proponent of a nonconforming use must shoulder that burden because the law views nonconforming uses as ‘thorn[s] in the side of proper zoning [which] should not be perpetuated any longer than necessary.’” Id. (quoting Duffy, 896 A.2d at 37).

Here, there is no genuine dispute concerning the use of units #10 and #11 as first-floor residential units on the Property. Additionally, it is uncontested that the Property is presently characterized as mixed-use, given the commercial and residential units existing thereon, and that first-floor residential use in a GC Zone is prohibited where the property is deemed mixed-use. See Zoning Ord. § 260-64A. In addition to the first-floor residential units, the Property also includes several residential units on the second floor and in a free-standing building toward the rear of the Property. See generally Tr. 32-34, Jan. 9, 2008. The central issue before this Court is whether the record evidence supports Appellant’s contention that the first-floor residential use on the Property is a legally nonconforming use that benefits from grandfathered rights.

The Zoning Board’s August 22, 2013 decision, adopting verbatim former Zoning Official Giordano’s memorandum dated February 6, 2008, concludes that residential dwellings “have never been a permitted use” in a B-2 Zone. Decision at 3, Aug. 22, 2013; Giordano Mem. at 1, Feb. 6, 2008. Notably, at the time of the 1977 zoning when the Property was rezoned as B-2, and up until 1998, there was no “mixed-use” provision in the zoning enactments as it is presently

known. Instead, in the use tables introduced into evidence,<sup>3</sup> the types of “residential and dwelling use” noted as being allowed by right, prohibited or permitted by special use permit were limited to single-family detached dwellings, two-family detached dwellings, multi-family dwellings, lodging house or guest house, dormitory, hotel, motel and home occupation. See Westerly Code, § III, at 2042.

By 1983 and 1984, the then-owner of the Property filed applications to renovate apartments on the Property. See Application No. 2372 (Aug. 8, 1983); Application No. 2688 (Apr. 2, 1984). Both applications clearly reveal that the Property was zoned B-2. Application No. 2372, at 1; Application No. 2688, at 1. The 1983 application sought permission for “renovations for apts” and, more specifically, for the “reconstruction” of “one and two family attached” proposed residential use for two single-family units with two total bathrooms. Application No. 2372, at 1. The 1984 application sought permission for “renovations for apt. building #E” and, more specifically, for the “installation” of “one and two family detached” proposed residential use. Application No. 2688, at 1. Both applications were granted by the Town’s then-building official. Application No. 2372, at 2; Application No. 2688, at 2.

This Court need not consider whether the Town’s then-building official erred in granting Application No. 2688 to install “one and two family detached” proposed residential use.<sup>4</sup> What is important—and dispositive to the issues before this Court—is the approved existence of attached residential units on the Property at the time it was zoned B-2, well before the current

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<sup>3</sup> The effective date of the use table introduced into evidence does not appear to have been disclosed in the course of the hearing and argument before the Zoning Board, nor in Giordano’s February 6, 2008 memorandum. Appellant appears to concede that the use table introduced as evidence is the use table pertinent to the determination of whether all residential units on the Property were prohibited in a B-2 Zone, or whether, as Appellant contends, only detached residential uses were prohibited.

<sup>4</sup> The use table appears to prohibit single-family detached dwellings and two-family detached dwellings in a B-2 Zone. See Westerly Code, § III, at 2042; see also Tr. 9-10, Mar. 5, 2008.

GC Zone and attendant limitations on the Property became effective. In 1977 through 1998, there was no prohibition on what is presently known as mixed-use development in a B-2 Zone. The only prohibited residential use in a B-2 Zone was for single-family detached dwellings and two-family detached dwellings; multi-family dwellings were permitted by special use permit. The Property, and particularly units #10 and #11, is none of these, and therefore is neither prohibited nor requires a special use permit. Indeed, the uncontroverted testimony by Ventresca reveals that, prior to Appellant's purchase of the Property in 1996 and dating as far back as 1979 when she first began to operate her restaurant, Mrs. V's, on the Property, residential units existed on the first floor of the building that housed Mrs. V's.

This Court is satisfied that the first-floor residential units on the Property were not prohibited in a B-2 Zone and that, at the time the Property was zoned GC in 1998, the Property included first-floor residential units among commercial tenants. Although now prohibited pursuant to Zoning Ord. § 260-64A, the first-floor residential units on the Property are protected by grandfather rights as a legal nonconforming use.

To the extent the Zoning Board relies upon the second-floor residential use on the Property as the only permitted residential use in a B-2 Zone, and now a GC Zone, this Court is unpersuaded. See Tr. 26-29, Feb. 6, 2008; Tr. 11-12, 14-15, Mar. 5, 2008. First-floor residential use on the Property was not treated differently from second-floor residential use until the mixed-use development provisions were enacted in or after 1998. Thus, the existence of any second-floor residential units on the Property prior to 1998 supports—rather than debunks—the conclusion that attached residential units amid businesses were not prohibited in a B-2 Zone.

In summary, the Zoning Board's August 22, 2013 decision denying Appellant's appeal from the Notice of Violation and Order is clearly erroneous in view of the reliable, probative,

and substantial evidence of the whole record. Appellant presented the Zoning Board with substantial and uncontradicted evidence that first-floor residential use on the Property existed and was legal prior to 1998 when the GC Zone and its attendant limitations on the Property became effective, including witness testimony of prior existing residential use as early as 1979 and permits for residential use granted by the Town in 1983 and 1984. Appellant therefore carried his burden of proving that the first-floor residential units are a legally nonconforming use. The Zoning Board's decision, insofar as it was based on their interpretation of the prior Zoning Ordinance that absolutely no residential use was permitted in a B2 zone, is clearly erroneous.

#### **IV**

#### **Conclusion**

For all of these reasons, this Court reverses the August 22, 2013 decision of the Zoning Board and grants Appellant's appeal of the Notice of Violation and Order issued by the Town's Zoning Official on March 29, 2007. Appellant has demonstrated that the two existing residential apartment units on the first floor of the Property located at 55 Beach Street in Westerly, Rhode Island are a legally nonconforming use in the General Commercial Zoning District and do not violate § 260-64A of the Zoning Ordinance.

Appellant's counsel shall submit a judgment consistent with this Decision.

**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** Roy Lacroix v. Town of Westerly Zoning Board of Review

**CASE NO:** C.A. No. WC-2008-0281

**COURT:** Washington County Superior Court

**DATE DECISION FILED:** March 25, 2015

**JUSTICE/MAGISTRATE:** Kristin E. Rodgers

**ATTORNEYS:**

For Plaintiff: Michael P. Lynch, Esq.

For Defendant: John R. Payne, Jr., Esq.