

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[FILED: June 16, 2015]

PLF, LLC, PAUL FORMAL and DEBRA :  
FORMAL, and 1172 NORTH MAIN ST., LLC :  
V. :  
THE ZONING BOARD OF REVIEW OF THE :  
CITY OF PROVIDENCE, MYRTH YORK, :  
SCOTT WOLF, ARTHUR V. STROTHER, :  
MICHAEL R. EGAN, and DANIEL N. :  
VARIN, in their capacity as MEMBERS OF :  
THE ZONING BOARD, BOTVIN REALTY :  
COMPANY, and JAMES MARTINS :

C.A. No. PC 2011-4854

**DECISION**

**MCGUIRL, J.** Before the Court is an appeal from a decision of the Zoning Board of Review of the City of Providence (Zoning Board), granting the application of James Martins (Mr. Martins or Applicant) and Botvin Realty Company (Botvin Realty) for a special-use permit. The instant appeal is brought by PLF, LLC; Paul and Debra Formal; and 1172 North Main St., LLC (collectively Appellants), who are abutting landowners within the 200 foot radius of the subject lots. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

**I**

**Facts and Travel**

The subject premises are designated as Lots 172, 173, 174, and 175 on Assessor’s Plat 75 in Providence, Rhode Island and are owned by Botvin Realty. The premises are located at 85-99 Nashua Street (the Property) in a Heavy Commercial C-4 Zone and total approximately 17,000 square feet.

In May of 2011, Mr. Martins and Botvin Realty filed a petition with the Zoning Board seeking a special-use permit under Section 303 – Use Code 52, Wholesale Trade and Outdoor Storage, pursuant to Section 200 of the Providence Zoning Ordinance (Zoning Ordinance).<sup>1</sup> Mr. Martins plans to purchase the Property to use for vehicle storage as part of his towing business.<sup>2</sup> (Bd. Tr. at 9:14-22.) He has already entered into an agreement with the City of Providence to tow vehicles. Id. at 10:3-5.

On June 13, 2011, the Department of Planning and Development (DPD) made its recommendation to the Zoning Board that Applicant's application should be denied because it found that (1) it was foreseeable there would be junk car storage; (2) the chain link fence would further suggest it was a junkyard; (3) Strategy B-4 of Objective LU-1 of Providence Tomorrow: The interim Comprehensive Plan (Providence Tomorrow) would be frustrated by the planned development; and (4) the development would be at odds with the revitalization of North Main Street. That same day, the Zoning Board performed a site inspection of the Property and held a properly noticed public hearing regarding the application.

Mr. Martins testified on behalf of his application, along with Peter M. Scotti (Mr. Scotti), a real estate expert, and Evegina Skodras (Ms. Skodras) and Dale Kelleher (Mr. Kelleher), neighbors of Applicant's Pawtucket tow lot. Mr. Martins also supplied an affidavit from James Botvin (Mr. Botvin), an authorized agent of Botvin Realty, which currently owns the Property.

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<sup>1</sup> In the application, Mr. Martins also indicated he was applying for relief under Section 410 of the Zoning Ordinance, but this section of the application was withdrawn at the beginning of the Zoning Board hearing.

<sup>2</sup> Mr. Martins already owns one tow lot located in Pawtucket, Rhode Island.

In opposition to the application, the Appellants<sup>3</sup> offered testimony from Edward Pimentel (Mr. Pimentel), an expert in land use. Furthermore, thirteen individuals with ties to the neighborhood in which the Property is located testified regarding their objections to the application. The Zoning Board also received letters in opposition to the application.

Mr. Martins testified about his plans for the Property. As part of his agreement with the City of Providence, Mr. Martins must have a property that is at least 15,000 square feet, and it must have a fence with locks and proper lighting. Id. at 10:11-15. Mr. Martins testified that he plans to install a stockade fence around the Property and to put plantings on the outside of the fence. Id. at 14:16-25; 15:1. He also plans to install a kiosk on the Property to house employees and as a place for paperwork to be performed. Id. at 21:3-10. As for security, Mr. Martins testified that there will be lights and a camera system. Id. at 21:20-24.

Mr. Martins further testified about how the tow lot will operate. His business is on a rotation list, resulting in the Providence Police Department requiring his towing services once approximately every twenty-four to thirty-eight hours. Id. at 12:11-17. The vehicles Mr. Martins tows are not abandoned; rather, he tows vehicles that are located on City property and are in violation of a parking regulation. Id. at 13:18-25. The vehicles remain in the tow lot for approximately one to two days, but after the fourteenth day, Mr. Martins begins the process of notifying the owner and removing the vehicle. Id. at 13:6-12. Thus, a vehicle might remain on the lot for thirty days, but after thirty days, Mr. Martins would dispose of it. Id. at 13:12-17.

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<sup>3</sup> PLF, LLC owns real estate that abuts the Property and is within the 200' radius, as do Paul and Debora Formal and 1172 North Main St., LLC. PLF, LLC owns 1158-1160 North Main Street, Providence, Rhode Island. Paul and Debora Formal own 1166-1168 North Main Street, Providence, Rhode Island. 1172 North Main Street, LLC owns 1172-1178 North Main Street, Providence, Rhode Island.

Cars may be towed at any time, day or night, but Mr. Martins testified that the vehicle unloading process is relatively short, taking anywhere from one minute to two-and-a-half minutes. Id. at 16:10-23.

Occasionally his business will tow an accident vehicle; Mr. Martins testified that the vehicles may be drivable, but the police want them to be towed. Id. at 16:24-25, 17:1-5. Furthermore, although not usually required by law, each of Mr. Martins' tow trucks is equipped with spill kits used to contain any fluids. Id. at 17:6-22, 18:3-15. He also testified that he rarely tows accident vehicles because the auto body shops almost always arrive at the scene first. Id. at 18:16-25. At his tow lot in Pawtucket, Mr. Martins has an identical agreement with the Pawtucket Police Department. Id. at 16:1-4. That lot has 75 spaces for vehicles, and of those, only five were towed from an accident. Id. at 19:5-13.

In support of Mr. Martins' application, two neighbors from the Pawtucket location testified about their experience living next to the tow lot. Ms. Skodras and Mr. Kelleher testified that Mr. Martins keeps his Pawtucket lot in excellent condition. The Property is landscaped attractively, and Mr. Martins is vigilant about trash removal. Id. at 23:5-11. Ms. Skodras, despite being a very light sleeper, testified that she does not wake up when a car is towed late at night. Id. at 23:20-24. Mr. Kelleher testified that he was firmly against the Pawtucket tow lot, but that Mr. Martins has "been a great neighbor." Id. at 24:13-17. When Mr. Kelleher had an issue with a light from the lot shining into his home, he testified that Mr. Martins "turned the lights, rewired them and moved them into the property instead of facing out." Id. at 25:4-9. Mr. Kelleher confirmed Applicant's testimony about how long vehicles usually stay at the lot and that there is minimal disruption to the neighborhood. Id. at 25:15-24.

In an affidavit that was read into the record, Mr. Botvin testified that the Property was a vacant lot when acquired by Botvin Realty in 1972. Id. at 27:2-3; Bd. Ex. C. During the course of their ownership, Mr. Botvin's family has used the lots to store excess automobile inventory from its car dealership. (Bd. Tr. at 27:6-9.) Other local businesses were also permitted to store vehicles and tractor trailers on the lots. Id. at 27:9-11. To the best of Mr. Botvin's knowledge, previous owners of the Property used it for similar purposes. Id. at 27:12-15.

Finally, Mr. Scotti testified in support of the application. He testified that the Property consists of four contiguous lots totaling 17,000 square feet, with 170 feet of frontage on Nashua Street and an average depth of 100 feet. Id. at 28:5-9. Located in a C-4 Heavy Commercial Zone, the Property has been used continuously for vehicle storage since 1972. Id. at 28:9-12. Mr. Scotti observed that Nashua Street and the surrounding area is a classic mixed use area with industrial, commercial, residential, and automotive uses. Id. at 29:5-8. In Mr. Scotti's opinion, Mr. Martins met all requirements for a special-use permit in the area. Id. at 29:10-12. The proposed special-use permit under Use Code 52 is permitted in a C-4 area, and Mr. Scotti testified that allowing the tow lot will not substantially injure the use, enjoyment of, or significantly devalue neighboring property. Id. at 29:12-19. Mr. Scotti also testified that based on the varied uses of surrounding property, as well as Applicant's proposed plan for ensuring minimum disturbance from his business, there would not be a detrimental effect on surrounding properties, and it would not be injurious to the general health or welfare of the surrounding community. Id. at 29:19-25, 30:1-25, 31:1.

In opposition to Mr. Martins' application, the Appellants provided testimony from Mr. Pimentel, an expert in land use. Mr. Pimentel expressed his concerns regarding customer and employee parking at the Property, as well as where employees would reside. Id. at 35:18-25,

36:1-12, 37:8-10. He also testified that in his opinion, allowing Mr. Martins to operate a tow lot on the property would be “esthetically . . . displeasing,” and that there is also a safety issue with such a business. Id. at 41:25, 42:1-3. Mr. Pimentel believed the tow lot would be a “hindrance” to the neighborhood’s development. Id. at 41:20-21.

At the hearing, thirteen people from the North Main Street area testified in opposition to Mr. Martins’ application. These men and women expressed their concerns regarding the effect a tow lot would have on the North Main Street neighborhood, and, in particular, the efforts to improve and revitalize the area. Id. at 69:22-25, 70:1-11. Some of these individuals also argued that the tow yard was contrary to the Comprehensive Plan and that there were much better uses for the Property than the one proposed by Mr. Martins. Id. at 66:13-16, 56:6-9.

On August 4, 2011, the Zoning Board issued Resolution No. 9615, granting Mr. Martins’ application for a special-use permit. The Zoning Board found that the special-use permit was permissible under the Zoning Ordinance, that it would not substantially injure the use and enjoyment of or significantly devalue neighboring property, and that it would not be detrimental or injurious to the general health or welfare of the community. Furthermore, the Zoning Board noted its consideration of the DPD’s recommendation.

The Appellants timely appealed the Zoning Board’s decision on August 22, 2011.

## 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:

“(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.”

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. Inc., 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). Where the decision is supported by evidence in the record and is not “arbitrary or an abuse of discretion,” this Court will uphold the board’s decision. Caswell, 424 A.2d at 648 (upholding the board’s decision to grant a special exception).

### **III**

#### **Analysis**

##### **A**

#### **Zoning Ordinance Section 410**

The Appellants contend that Section 410 of the Zoning Ordinance does apply to the instant application. In his application, Mr. Martins originally applied for relief under two sections of the Zoning Ordinance, but he petitioned to remove his application under Section 410—Requirements for Outside Storage of Vehicles, Transportation Equipment and Materials to be Processed. The Appellants agree that the portion of Mr. Martins’ application related to Section 410 was successfully withdrawn at the hearing, but they would have the Court reverse the Zoning Board’s decision or remand the matter in order for the Zoning Board to consider Mr. Martins’ application under Section 410 because an application under Section 410 would require Mr. Martins to obtain a dimensional variance for the Property.

Mr. Martins originally applied for relief under Section 303, Use Code 52 (Wholesale Trade and Outdoor Storage) as well as under Section 410 of the Zoning Ordinance. Section 410, entitled Requirements for Outside Storage of Vehicles, Transportation Equipment and Materials to be Processed, addresses storage of vehicles “intended to be repaired” and junk vehicles. At the beginning of the hearing, however, Mr. Martins’ attorney requested to withdraw the portion of the application under Section 410 because it did not apply to the intended use for the Property and its inclusion in the original application had been a result of overcautiousness. (Bd. Tr. at 7:12-25; 8:1-2.) The Zoning Board approved the withdrawal under Section 410, but the Appellants’ attorney objected, arguing that Section 410 was applicable. The Zoning Board Chair

found that it was an applicant's prerogative to determine under what sections to apply for relief.

Id. at 8:16-21. In its decision, the Zoning Board found that:

“Section 410, pertaining to Outside Storage of Vehicles, does not apply to this application because the Applicant has credibly testified as to the use of the Property and that use does not include the storage of junked vehicles as defined by Section 15-36 of the Providence Code of Ordinances and no evidence has been introduced to establish that the Property would be used for the storage of junked vehicles.”

Our Supreme Court has long held that proper notice for a zoning board hearing requires more than the date, time, and place of the meeting because without any mention of a meeting's purpose, notice “is a mere gesture.” Carroll v. Zoning Bd. of Review of City of Providence, 104 R.I. 676, 679, 248 A.2d 321, 323 (1968). To satisfy the due process requirement, “notice, if it is to be adequate and sufficient, must in addition advise concerning the precise character of the relief sought and the specific property for which that relief is sought.” Id. (citing Pascalides v. Zoning Bd. of Review, 97 R.I. 364, 197 A.2d 747 (1964); Mello v. Zoning Bd. of Review, 94 R.I. 43, 177 A.2d 533 (1962); Abbott v. Zoning Bd. of Review of City of Warwick, 78 R.I. 84, 79 A.2d 620 (1951)). The most important requirements for notice are that the land is precisely identified and that notice is received by the required parties. See Paquette v. Zoning Bd. of Review of West Warwick, 118 R.I. 109, 112, 372 A.2d 973, 974 (1977) (holding that notice must “contain enough information to sufficiently advise interested parties of the specific property for which relief was sought”). Once a party appears at the hearing, however, concerns over notice diminish. See Champagne v. Zoning Bd. of Review of Town of Smithfield, 99 R.I. 283, 288, 207 A.2d 50, 53 (1965) (holding that even where appellants argued they had learned of the hearing earlier the same day, notice had been sufficient as their attorney did not raise an objection or request a continuance). Furthermore, changes to an application are not necessarily

fatal. In Corporation Service, Inc. v. Zoning Bd. of Review of Town of East Greenwich, 114 R.I. 178, 179, 330 A.2d 402, 403 (1975), while there were other deficiencies with the notice, the applicants had applied for various forms of relief, and the board permitted the applicants to withdraw their request for a dimensional variance while proceeding to address the remaining requested relief.

There has been no suggestion by Appellants that the notice in this matter failed to properly identify the Property or to give notice of what was to be addressed, and the hearing still proceeded under one of the bases for relief. Cf. Mello, 94 R.I. at 50, 177 A.2d at 536 (finding that constructive notice failed where it was unclear whether one or two lots were under consideration for a variance). Nor have the Appellants suggested that Applicant's withdrawal of application under Section 410 was prejudicial to their interests. See Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303, 307 (R.I. 1980) (holding that a petitioner must "demonstrat[e] precisely how he might have been prejudiced by the notice he did receive"). The more common concern with changes at the hearing to the relief sought includes an applicant who plans to ask for relief not included in his application. Even such an addition, however, may not be fatal. See Perrier v. Bd. of Appeals of City of Pawtucket, 86 R.I. 138, 144-45, 134 A.2d 141, 144-45 (1957) (holding that notice was sufficient even where applicant failed to "specify the express provisions of the ordinance on which he was relying" because "[t]here was some evidence in the record to show that a request for specific exception was being made, and inasmuch as petitioner was present at the hearing and presented her objection to the board, we cannot say that she was prejudiced. . . .").

Here, it was Mr. Martins' prerogative, as the Applicant, to determine what relief to apply for. His attorney stated that Section 410 was included "out of an abundance of caution. And I

had a conversation with one of the abutters, and we both agreed that that section did not apply to this particular case. . . .” (Bd. Tr. at 7:14-18.) The Appellants were able to object to this withdrawal and present argument as to why they believed Section 410 was applicable; however, the Board determined based on the testimony presented by Mr. Martins that Section 410 did not, in fact, apply. See Curran v. Church Cmty. Housing Corp., 672 A.2d 453, 454 (R.I. 1996) (holding that the Superior Court “may not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact” (internal citations omitted)).

The Zoning Board’s determination was well supported by the evidence in the record. There was extensive testimony about Mr. Martins’ towing business and that it was not going to be a junkyard. Mr. Martins explained that accident vehicles are rare, and the “car could be drivable but for one reason or another, the police want it towed . . . [and] [e]ach truck has a spill kit on it . . . to absorb oil, antifreezes, any acids or anything from the battery. . . .” (Bd. Tr. at 17:3-13.) Furthermore, he explicitly stated that the contract with Providence does not include towing “abandoned vehicles.” Id. at 12:1-7. Cars will not remain at the lot for longer than thirty days, but “[d]epending on the reason [the car] gets towed in, it could be there from one to two days.” Id. at 13:6-10. The objections raised by Appellants were mere speculation as to what might happen, but there was no testimony presented to show that Mr. Martins intends to operate a junkyard or store junk cars. See Caswell, 424 A.2d at 647 (where there is substantial evidence in the record to support the board’s finding, this court will not substitute its own judgment). Where there is no issue with notice, this Court will not disturb the Zoning Board’s factual determinations or the Applicant’s right to apply for particular types of relief. See id., 424 A.2d at 648.

## B

### The Special-Use Permit

The Appellants argue that the Zoning Board abused its discretion in granting Mr. Martins' application. They contend that there was insufficient evidence before it to support the decision.

A special-use permit requires approval by the zoning board of review. See § 45-24-42(a); see also Lloyd v. Zoning Bd. of Review for City of Newport, 62 A.2d 1078, 1085 (R.I. 2013). “Generally, a special-use permit relates to a specific use the owner wishes to undertake on the parcel—a use that is not allowed under the ordinance absent zoning board approval.” Lloyd, 62 A.2d at 1085 (citing § 45-24-31(57)). “When applying for a grant of a special exception, an applicant must preliminarily show that the relief sought is reasonably necessary for the convenience and welfare of the public.” Salve Regina College v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 881 (R.I. 1991). The zoning board “may not deny granting a special exception to a permitted use on the ground that the applicant has failed to prove that there is a community need for its establishment.” Toohey v. Kilday, 415 A.2d 732, 735 (R.I. 1980). Rather, an “applicant need show only that ‘neither the proposed use nor its location on the site would have a detrimental effect upon public health, safety, welfare, and morals.’” Id. (quoting Hester v. Timothy, 108 R.I. 376, 385-86, 275 A.2d 637, 642 (1971)). The board must make its determination on the basis of “sufficiently substantial” evidence to warrant approval of a special-use permit. Toohey, 415 A.2d at 736.

In the City of Providence, a zoning board, to authorize a special-use permit, must:

“A) Consider the written opinion from the Department of Planning and Development.

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

“1. The proposed special-use permit is set forth specifically in this Ordinance and complies with any conditions set forth therein for the authorization of such special-use permit;

“2. Granting the proposed special-use permit will not substantially injure the use and enjoyment of nor significantly devalue neighboring property; and

“3. Granting the proposed special-use permit will not be detrimental or injurious to the general health, or welfare of the community.” Sec. 902.4 – Special Use Permits.

The Appellants argue that the Zoning Board failed to consider the DPD’s recommendation, that Mr. Scotti’s testimony was insufficient to support granting of the special-use permit, and that the Zoning Board should have given more weight to the testimony of Mr. Pimentel.

In its decision, the Zoning Board did consider and address the DPD’s recommendations with specific facts and evidence, finding that “the proposal, as testified to by the Applicant, specifically included measures to mitigate the impacts of this proposed development on neighboring residences in accordance with Strategy B-4 of Objective LU-1 of Providence Tomorrow: The Interim Comprehensive Plan.” The DPD raised four concerns in its recommendation: (1) that the storage of junk cars was “foreseeable”; (2) that the chain link fence with privacy slats “would certainly read from the street as a junkyard”; (3) that the impact of the development would be inappropriate based on the objectives of Providence Tomorrow, which seeks to “mitigate the impacts of non-residential uses on neighboring residences”; and (4) that the development would be at odds with the plans to revitalize the North Main Street corridor “with walkable development that provides essential neighborhood amenities.” (Recommendation to the Zoning Bd. of Review, June 13, 2011.)

As to each of these concerns, however, the Zoning Board was presented with testimony demonstrating how Applicant would address them. First, there was testimony from Mr. Martins that the tow yard will not be a junkyard and that towing “junk” accident vehicles is a rare

occurrence: “Q: That car could be drivable but for one reason or another, the police want it towed? A: Yes. . . . Q: . . . would it be fair to say you get very few vehicles from accidents? A: Yes.” (Bd. Tr. at 17:3-5; 18:16-25.) Mr. Martins further testified that he tows very few accident vehicles because the auto body shops usually arrive on scene first. Id. at 18:16-25. Thus, as to the DPD’s concern the development would be more like a junkyard than a tow lot, the Zoning Board did not ignore the issue or the DPD’s recommendation; rather, it chose to grant the special-use permit based on Mr. Martins’ testimony that it deemed credible. See Apostolou v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978) (holding that “the reviewing court is not empowered to substitute its judgment for that of the zoning board if it can conscientiously find that the board’s decision was supported by substantial evidence in the whole record”).

Second, the DPD expressed concern about the fencing Mr. Martins proposed for the development. Originally, the tow yard was to be surrounded by a chain link fence with privacy slats. At the hearing, however, Mr. Martins testified that “[a]fter discussions with one of the abutters, we’ve agreed to put a stockade fence.” Id. at 14:12-18. Thus, the DPD’s recommendation that the special-use permit be denied because the chain link fence “would certainly read from the street as a junkyard” was directly addressed, and the Zoning Board based its decision to grant the special-use permit based on this testimony.

The DPD also had reservations that the tow yard proposed by Mr. Martins would not be in keeping with Providence Tomorrow. Strategy B-4 of Objective LU1: *Protect and Enhance Stable Neighborhoods* states that one goal of the plan is to “Mitigate impacts of non-residential uses on neighboring residential uses.” In keeping with this concern, the DPD also referred to the Hope-Mount Hope-Blackstone Neighborhood Plan (Neighborhood Plan), which seeks to revitalize the North Main Street corridor with walkable development and neighborhood

amenities, and the DPD expressed concern that the proposed development would be at odds with these goals. Again, however, the Zoning Board was presented with testimony from the Applicant, as well as from neighbors from Applicant's Pawtucket tow yard, that mitigated the concerns presented to the Zoning Board by the DPD's recommendation.

Mr. Martins testified about the use of a more aesthetically pleasing stockade fence around the tow yard, as well as his plans to put plantings and landscaping on the outside of the fence to "help improve the area." (Bd. Tr. at 14:16-25; 15:1-2.) Beyond testimony from the Applicant himself, though, the Zoning Board heard from two neighbors; Ms. Skodras and Mr. Kelleher live next to Applicant's Pawtucket tow lot. Ms. Skodras testified that she has observed Mr. Martins planting shrubbery, and "he has beautified the place with evergreens. He keeps the place immaculate. But people drive through, they'll throw cans and bottles on the sidewalk, and he has people clean up that area constantly. He is an excellent neighbor. It is a pleasure having him there." Id. at 23:4-12. Ms. Skodras also testified that, despite being a light sleeper, she is not disturbed at night when cars are brought to the lot. Id. at 23:22-24. Mr. Kelleher testified that Mr. Martins has his employees "out there cleaning up the trash that is not even on his property on the sidewalk. His parking [lot] is immaculate." Id. at 24:22-25. At one point Mr. Kelleher had a problem with lights from the tow lot shining into his home, but Mr. Martins "turned the lights, rewired them and moved them into the property instead of facing out." Id. at 25:3-9. Ms. Skodras also testified that the cars "don't stay long at all. They're always going." Id. at 25:19-20. Thus, the Zoning Board had before it extensive evidence that Mr. Martins' proposed development would not be at odds with Providence Tomorrow or with the Neighborhood Plan based on the testimony from Applicant himself and the neighbors. The Applicant keeps his Pawtucket lot in pristine condition and is highly sensitive to the surrounding residential area.

The Zoning Board chose to grant Mr. Martins' application for a special-use permit, and this decision was not affected by error of law, nor was it clearly erroneous given the evidence of the record.

Our Supreme Court has held that "credibility of witnesses and weight of the evidence is the sole prerogative of the local board." Coderre v. Zoning Bd. of Review of City of Pawtucket, 105 R.I. 266, 270, 251 A.2d 397, 400 (1969). With expert witnesses, it is accepted generally that "there is no talismanic significance to expert testimony [and it] may be accepted or rejected by the trier of fact." Murphy v. Zoning Bd. of Review of Town of S. Kingstown, 959 A.2d 535, 542 (2008) (quoting Restivo, 707 A.2d at 671)). Here, the Zoning Board was presented with differing expert testimony: Mr. Scotti, the expert for Mr. Martins, and Mr. Pimentel, the expert for Appellants. It was within the Zoning Board's discretion to make a credibility determination between the two men and weigh their testimony. Only where an expert is "competent, uncontradicted, and unimpeached, [would it] be an abuse of discretion for a zoning board to reject such testimony." Murphy, 959 A.2d at 542. Here, Mr. Pimentel's testimony regarding the special-use permit was directly contradicted by Mr. Scotti's. Mr. Scotti testified that Mr. Martins had met the requirements for a special-use permit and that granting the permit "would not substantially injure the use, enjoyment of, nor significantly devalue neighboring property." (Bd. Tr. at 29:10-19.)

Finally, there were thirteen neighbors who came to testify in objection to Mr. Martins' application, but the Zoning Board was well within its purview to discount such testimony. See Smith v. Zoning Bd. of Review of City of Warwick, 103 R.I. 328, 334, 237 A.2d 551, 554 (1968) (holding that "the testimony of the neighboring property owners on the question of the effect of the proposed use on neighboring property values and traffic conditions has no probative

force, inasmuch as these were lay judgments.”). Thus, the Zoning Board’s reliance instead on the testimony of Mr. Martins and Mr. Scotti was not an abuse of discretion.

#### **IV**

#### **Conclusion**

After reviewing the entire record, the Court finds that the Zoning Board’s decision is not in excess of statutory authority, arbitrary, or in violation of ordinance provisions. It is supported by the reliable, probative, and substantial evidence of record. The substantial rights of Appellants have not been prejudiced. Accordingly, the decision of the Zoning Board is affirmed. Counsel shall submit an appropriate Order for entry.



**PLFRHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** PLF, LLC, et al. v. The Zoning Board of Review of the City of Providence, et al.

**CASE NO:** PC 11-4854

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** June 16, 2015

**JUSTICE/MAGISTRATE:** McGuirl, J.

**ATTORNEYS:**

For Plaintiff: Stephen M. Litwin, Esq.

For Defendant: Lisa Dinerman, Esq.; Patrick J. Dougherty, Esq.