

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(Filed: April 28, 2015)

SHELTER COVE PROPERTIES, LLC, :  
Plaintiff/Appellant, :

v. :

C.A. No. WC 2014-0278  
(Consolidated with)

TOWN OF CHARLESTOWN ZONING :  
BOARD OF REVIEW, MICHAEL J. :  
RZEWUSKI, RONALD CROSSON, :  
RAYMOND DRECKO, JR., RICHARD :  
FRANK, AND AMANDA MAGEE, in their :  
Official capacities only as Members of the :  
Zoning Board of Review of the Town of :  
Charlestown, :

Defendants/Appellees, :

AND :

TOWN OF CHARLESTOWN, :  
Intervenor. :

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TOWN OF CHARLESTOWN, :  
Plaintiff/Appellant, :

v. :

C.A. No. WC 2011-0667

TOWN OF CHARLESTOWN ZONING :  
BOARD OF REVIEW and :  
SHELTER COVE PROPERTIES, LLC, :  
Defendants/Appellees. :

DECISION

TAFT-CARTER, J. Before this Court is an appeal from a decision of the Town of Charlestown Zoning Board of Review (Zoning Board). The Town of Charlestown appealed the Zoning Board’s decision, finding that Shelter Cove Properties, LLC’s (Shelter Cove) use of commercial property was a legal pre-existing, nonconforming use.

The matter was remanded to the Zoning Board by this Court on July 3, 2013. After remand, the Zoning Board determined that Shelter Cove's use of the property was a legal nonconforming use and made additional findings of fact that Shelter Cove had decreased the parking on the property. Shelter Cove filed a timely appeal.<sup>1</sup> Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

## I

### Facts & Travel

Shelter Cove is the owner of property located at 523 Charlestown Beach Road, identified as Assessor's Plat 9, Lot 131, Charlestown, Rhode Island (the Property). (Pl.'s App. 2, Appl. for Appeal, July 20, 2011.) Shelter Cove operates a marina and leases a portion of the Property to lessees who operate a restaurant and kayak center. (Pl.'s App. 11 at 11:1-15.) An additional portion of the Property is used for commercial parking. Id. at 11:15-19.

On or about July 1, 2011, the Charlestown Zoning Official issued a Notice of Violation to Shelter Cove, citing Shelter Cove for violating Article VI, Section 218-36 of Charlestown's Zoning Ordinance (Zoning Ordinance). That section of the Zoning Ordinance governs the permissible uses of property in a C2 zoning district. (Pl.'s App. 1, Letter from Joseph L. Warner Jr., Building and Zoning Official, to Shelter Cove Properties, LLC, c/o Bruce Gardner, July 1, 2011.) The violation cited Shelter Cove for operating a commercial parking lot without a special use permit. Id. Shelter Cove appealed the Notice of Violation to the Zoning Board, alleging that the commercial

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<sup>1</sup> These cases were originally filed as two separate matters. Town of Charlestown v. Town of Charlestown Zoning Board of Review and Shelter Cove Properties, LLC, WC-2011-0667 was consolidated with the current matter by order of the Court on June 23, 2014.

parking lot was a legal nonconforming use and therefore permitted. (Pl.'s App. 2, Appeal Form.)

The Zoning Board held a public hearing on the appeal on September 20, 2011. At the hearing, the manager of Shelter Cove, Mr. Richard Lavigne, testified as to the operations of the marina, as well as the parking on the Property. (In re Petition #1228 Shelter Cove Properties, LLC, Town of Charlestown Zoning Board of Review Tr. 10-20, Sept. 20, 2011.) A patron of the marina, Mr. Ronald Mouchon, also testified to Shelter Cove's history of commercial parking on the Property. Id. at 21-23. Mr. Joseph Warner, a building official, further testified to the parking availability on the Property. Id. at 26-44. After reviewing the evidence presented, the Zoning Board concluded that the commercial parking on the Property was a legal pre-existing, nonconforming use.

The Town of Charlestown filed a timely appeal of the decision to this Court on October 14, 2011. The Court issued a decision and determined that there was "relevant" evidence of the existence of nonconforming use of the property as a commercial parking lot; however, the Court determined that the Zoning Board "failed to state sufficient findings of fact to support its decision." Id. at 7. Thus, the case was remanded "for further proceedings to determine whether the use of the property for commercial parking had been altered, intensified, or expanded since the implementation of the zoning regulation and to submit a decision with the appropriate findings of fact." Id.

After remand, the Zoning Board held a meeting on March 18, 2014. Shelter Cove was not notified of the meeting in enough time to send the required notice to the abutters. (Pl.'s App. 18, Town of Charlestown Zoning Bd. of Review Open Meeting and Public Hearing, Mar. 18, 2014.) As a result, the matter was continued to April 15, 2014, and

notice was sent. At the meeting on April 15, 2014, counsel for Shelter Cove asked the Zoning Board to reopen the public hearing. (In re Petition #1228 Shelter Cove Properties, LLC, Town of Charlestown Zoning Board of Review Tr. 7-8, Apr. 14, 2014.) The Zoning Board determined that it was unnecessary to hold a hearing. Id. at 26-28. Subsequently, zoning board member Mr. Raymond Dreczko (Mr. Dreczko) read into the record findings of fact, based on the previous hearing of September 20, 2011. Id. at 18-21. The Zoning Board voted 4 to 1 to support Mr. Dreczko's findings that the parking lot was a legal nonconforming use and that the amount of parking had decreased since the implementation of the zoning regulation. Thereafter, Shelter Cove filed the instant appeal.

On appeal, Shelter Cove contends that (1) the Zoning Board misconstrued the record in adopting Mr. Dreczko's findings of facts; (2) the Zoning Board erred by failing to open the April 15, 2014 meeting to a public hearing; and (3) the Zoning Board violated the Open Meetings Act by holding an executive session prior to the March 18, 2014 meeting.

## II

### Standard of Review

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

"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 reviews a decision of a zoning board “under the ‘traditional judicial review’ standard applicable to administrative agency actions.” Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998). When reviewing a zoning board decision, the Superior Court “lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level.” Id. at 665-66 (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). The trial justice “must examine the entire record to determine whether ‘substantial’ evidence exists to support the board’s findings.” DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245-46, 405 A.2d 1167, 1170 (1979). Substantial evidence has been defined 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)).

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**

##### **A**

#### **Further Proceedings**

Shelter Cove contends that the Zoning Board procedurally erred when it failed to hold a public hearing on whether the nonconforming use had been altered, intensified, or expanded. Specifically, Shelter Cove argues that in accordance with this Court’s remand order for “further proceedings,” all parties should have had the opportunity to provide evidence and testimony on the issue. The Town of Charlestown counters that this Court did not require a hearing on remand. The Town argues that a meeting was sufficient to satisfy the Court’s order for “further proceedings.”

In determining whether a meeting is a proceeding, this Court looks to substance, not labels. See Keystone Elevator Co. v. Johnson & Wales Univ., 850 A.2d 912, 916 (R.I. 2004) (looking at the substance of a motion rather than the label); see also Hooper v. Goldstein, 104 R.I. 32, 40, 241 A.2d 809, 813 (1968) (looking at the substance rather than the form of the proceeding). Black’s Law Dictionary defines an “administrative proceeding” as “[a] hearing, inquiry, investigation, or trial before an administrative agency.” Black’s Law Dictionary (10th ed. 2014).

The Rhode Island Supreme Court has explained that administrative proceedings include “the presentation of evidence and/or testimony under oath.” Hillside Associates v. Stravato, 642 A.2d 664, 669 (R.I. 1994). In Hillside, the Court held that “proceedings initiated before a zoning board of review bear sufficient judicial attributes.” Id. For example, “a zoning board of review is endowed with the authority to hold a hearing on an appeal by an aggrieved person.” Id. Moreover, the Zoning Board must give public notice of the hearing and due notice to the parties in interest. Id. “The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings. . . .” Anderson Nat’l Bank v. Lueckett, 321 U.S. 233, 246 (1944); see also Cugini v. Chiaradio, 96 R.I. 120, 125, 189 A.2d 798, 801 (1963) (holding that due process contemplates an opportunity to be heard). Furthermore, “[a] zoning board of review must also ‘keep minutes of its proceedings, showing the vote of each member upon each question \*\*\* and shall keep records of its examinations.’” Hillside Associates, 642 A.2d at 669 (quoting § 45-24-15). A hearing with testimony of interested persons is “adequate indicia” to classify the hearing as a “quasi-judicial legal determination.” Id. Thus, proceedings before a zoning board of review “embod[y] sufficient trappings of the judicial process.” Id.

Our Supreme Court has reiterated that zoning boards perform quasi-judicial duties. Roberts v. City of Cranston Zoning Bd. of Review, 448 A.2d 779, 781 (R.I. 1982). The Supreme Court has “stated unequivocally that zoning boards, in exercising their fact finding powers, ‘act judicially on facts lawfully ascertained.’” Id. (quoting Zimarino v. Zoning Bd. of Review of Providence, 95 R.I. 383, 386, 187 A.2d 259, 261 (1963)). This Court has “a broad grant of power \* \* \* to remand, in a proper case, to

correct deficiencies in the record and thus afford the litigants a meaningful review.” Champlin’s Realty Assocs. v. Tikoian, 989 A.2d 427, 448 (R.I. 2010) (internal citation omitted). A remand to a zoning board for “further proceedings should be based upon a genuine defect in the proceedings in the first instance, which defect was not the fault of the parties seeking the remand. . . .” Roger Williams Coll., 572 A.2d at 63.

Here, the Court remanded this case “for further proceedings to determine whether the use of the property for commercial parking had been altered, intensified, or expanded since the implementation of the zoning regulation and to submit a decision with the appropriate findings of fact.” Town of Charlestown v. Town of Charlestown, 2013 WL 3482695, at 7 (R.I. Super. July 3, 2013). In following the Court’s instructions, the Zoning Board considered the meeting on April 15, 2014 to be a proceeding. (In re Petition #1228 Shelter Cove Properties, LLC, Town of Charlestown Zoning Board of Review Tr. 8, Apr. 14, 2014.) However, the Zoning Board did not hold a proceeding because neither Shelter Cove nor the Town of Charlestown had an opportunity to be heard or to present evidence or testimony. Id. at 26-28; see Anderson Nat’l Bank, 321 U.S. at 246 (holding due process includes an opportunity to be heard); see also Hillside Associates, 642 A.2d at 669 (holding an administrative proceeding includes the presentation of evidence and/or testimony); Roger Williams Coll., 572 A.2d at 63. Looking at the substance of the meeting, the Zoning Board took no action to obtain any new information from the parties. See Keystone Elevator Co., 850 A.2d at 916; see also Roberts, 448 A.2d at 781 (holding “judicial action” is when there is an adjudication of the rights of the parties). Rather, the Zoning Board made their decision based on testimony from the hearing on September 20, 2011, prior to this Court’s remand. See In re Petition

#1228 Shelter Cove Properties, LLC, Town of Charlestown Zoning Board of Review Tr. 18-21, Apr. 14, 2014. Thus, the Zoning Board procedurally erred by failing to hold a proceeding in accordance with this Court’s remand. Accordingly, this Court once again remands this case for further proceedings on the limited issue of whether the use of the Property for commercial parking has been altered, intensified, or expanded since the implementation of the zoning regulation and to submit a decision with the appropriate findings of fact.

## **B**

### **The Open Meetings Act**

Shelter Cove additionally avers that the Zoning Board violated the Open Meetings Act (OMA) by entering into an executive session prior to the March 18, 2014 meeting without voting to go into executive session. Shelter Cove argues the Zoning Board may have discussed the April 15, 2014 decision at the meeting, and those discussions should have been held in a public setting. Conversely, the Town of Charlestown contends that the Zoning Board adhered to all the requirements of the OMA when it held the March 18, 2014 executive session.

It is well settled that the “Legislature enacted the OMA to ensure that ‘public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy.’” Tanner v. Town Council of Town of E. Greenwich, 880 A.2d 784, 795 (R.I. 2005) (quoting § 42-46-1). The OMA provides that a “meeting” is “the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power.” Sec. 42-

46-2. Furthermore, “the term ‘meeting’ expressly includes, without limiting the generality of the foregoing, so-called ‘workshop,’ ‘working,’ or ‘work’ sessions.” Id. “A public body may hold a meeting closed to the public pursuant to § 42-46-4 for . . . [s]essions pertaining to . . . litigation, or work sessions pertaining to . . . litigation.” Sec. 42-46-5. However, in order to hold a closed meeting, the public body must comply with § 42-46-4:

“By open call, a public body may hold a meeting closed to the public upon an affirmative vote of the majority of its members. . . . The vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed, shall be recorded and entered into the minutes of the meeting.” Sec. 42-46-4.

The statute provides that “open call” “means a public announcement by the chairperson of the committee that the meeting is going to be held in executive session and the chairperson must indicate which exception of § 42-46-5 is being involved.” Sec. 42-46-2.

“When the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” Iselin v. Ret. Bd. of the Emps.’ Ret. Sys. of R.I., 943 A.2d 1045, 1049 (R.I. 2008); Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). The language of the OMA is “clear and unambiguous” in describing the requirements for holding a closed meeting or executive session. Iselin, 943 A.2d at 1049; see § 42-46-4. If a matter is exempt from the OMA, pursuant to § 42-46-5, a board can hold a closed meeting only if the majority of the board votes in favor of the meeting,

the vote is disclosed to the public, and the purpose of the meeting is disclosed to the public. See § 42-46-4.

Here, the record illustrates that the Zoning Board met in executive session regarding the remand of this case. (Pl.'s App. 18, Town of Charlestown Zoning Bd. of Review Open Meeting and Public Hearing, Mar. 18, 2014.) No votes were taken, and the minutes were sealed from the meeting. Id. However, the record is devoid as to whether a vote was held to hold the executive session, and if such a vote was disclosed to the public. See id. Moreover, the purpose of the meeting is unclear on the record. See id. Based on Shelter Cove's allegations and the record provided, this Court requires a hearing to determine if an OMA violation occurred.

#### **IV**

#### **Conclusion**

After review of the entire record, this Court finds that the Zoning Board failed to have a proceeding pursuant to this Court's previous remand order. Therefore, this Court once again remands this case for hearing to determine whether the use of the Property for commercial parking has been altered, intensified, or expanded since the implementation of the zoning regulation and to submit a decision with the appropriate findings of fact. Additionally, a hearing shall be scheduled to determine if an OMA violation occurred when the Zoning Board held an executive session on March 18, 2014. This Court will retain jurisdiction. Counsel shall present the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Shelter Cove Properties, LLC v. Town of Charlestown Zoning Board of Review, et al.

**CASE NO:** WC 2014-0278 (consolidated with WC 2011-0667)

**COURT:** Washington County Superior Court

**DATE DECISION FILED:** April 28, 2015

**JUSTICE/MAGISTRATE:** Taft-Carter, J.

**ATTORNEYS:**

For Plaintiff: John F. Kenyon, Esq.

For Defendant: Robert E. Craven, Esq.; Peter D. Ruggiero, Esq.