STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: August 28, 2015)

JAMES DURKIN	:	
	:	
v.	:	**C.A. No. WC-2014-0896**
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GRAVINO REALTY LLC, NARRAGANSETT ZONING AND PLATTING BOARD OF REVIEW, by and through its members, Anthony Brunetti, Robert Ferraro, James Manning, Robert Mulligan, Geraldine Citrone	:	
JOHN M. SANDERS AND ANN H. SANDERS	:	
	:	
v.	:	**C.A. No. WC-2014-0898**
	:	
GRAVINO REALTY LLC, NARRAGANSETT ZONING AND PLATTING BOARD OF REVIEW, by and through its members, Anthony Brunetti, Robert Ferraro, James Manning, Robert Mulligan, Geraldine Citrone	:	

DECISION

THUNBERG, J. Before the Court are two consolidated appeals from an October 31, 2014 decision by the Narragansett Zoning and Platting Board of Review (the Zoning Board) to approve construction of a new Iggy's Doughboy & Chowder House (Iggy's) on Point Judith Road in Narragansett. The Zoning Board granted special use permits to Appellee Gravino Realty LLC (Gravino Realty) to operate a restaurant on the subject property and to grant Gravino Realty relief from the applicable parking and wetland restrictions. Appellants James Durkin, John M. Sanders, and Ann H. Sanders[1] (collectively Appellants) contend that (1) the Zoning

[1] In their memorandum, Mr. and Mrs. Sanders joined in the arguments set forth in Mr. Durkin's memorandum.

Board acted in excess of its jurisdiction in granting the special use permit for a prohibited use; (2) there was insufficient evidence to support the Zoning Board's grant of relief as to the parking regulations; (3) Gravino Realty's site plan failed to comply with landscape and screening requirements; and (4) the site plan fails to comply with the applicable drainage requirements. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth below, this Court affirms the Zoning Board's decision.

I

Facts & Travel

By way of background, David Gravino, the president and owner of Gravino Realty, operates two Iggy's restaurants, one in Warwick and one in Narragansett. His Narragansett location is on Point Judith Road on land leased from appellant James Durkin. Mr. Gravino has operated the restaurant at this location in Narragansett for fourteen years. (Tr. 3, June 25, 2015.)

In 2013, Gravino Realty purchased the subject property designated as Lot 231 on Narragansett Assessor's Plat L (the Property) to build a new Iggy's restaurant. The Property is approximately 20,110 square feet in area and located next door to the current restaurant. The Property is in a B-A zoning district. This zoning district is described in § 3.1 of the Town of Narragansett's Zoning Ordinance (Ordinance) as "[a] limited business zone" that "is composed of certain land and structures used primarily for the retailing of convenience goods such as groceries and drugs and the furnishing of personal services." A restaurant in the B-A zone that does not serve alcohol is allowed by special use permit. Sec. 6.1, 6.3.

On April 14, 2014, Gravino Realty filed a special use permit application pursuant to § 12.1 of the Ordinance. As required by § 18.1 of the Ordinance, Gravino Realty submitted a site plan, which showed that the proposed restaurant would be about a 2712 square foot, two-

story building with a covered porch and an outdoor dining area. Gravino Realty asked the Zoning Board to grant a special use permit for the restaurant use, pursuant to § 6.3[2] of the Ordinance; a special use permit pursuant to § 4.3[3] of the Ordinance because the property is in the coastal and freshwater wetlands overlay district; and a special use permit pursuant to § 7.17 of the Ordinance to reduce the number of off-street parking spaces required by § 7.9 of the Ordinance.[4] Originally, Gravino Realty also sought two dimensional variances.[5]

During an April 23, 2014 meeting, the Planning Board found Gravino Realty's application to be complete and in conformance with the Comprehensive Plan of Narragansett and recommended the application to the Zoning Board, subject to a number of conditions, pursuant to § 18.5 of the Ordinance.[6] (Tr. 13-14, Oct. 23, 2014.) Subsequently, on May 20, 2014, the Planning Board amended their recommendation of approval to require that Gravino Realty revise its site plan to comply with a November 23, 2012 Zoning Board decision that required a minimum forty-foot setback and appropriate buffers along the eastern property line. Id. at 15.

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[2] Section 6.3 of the Ordinance states that a lunchroom or restaurant that does not serve alcoholic beverages is allowed in a B-A Zone by special permit.

[3] Section 4.3(4) of the Ordinance requires that for lots platted on or after August 7, 1989, "sewage disposal systems and land disturbance shall be set back 150 feet from any wetland edge except for areas subject to storm flowage and areas subject to flooding, which shall have a 50-foot setback." Since the site plan depicts the proposed employee parking area to be approximately thirteen feet from the wetland located partially on the Property, Gravino Realty was required to obtain a special permit pursuant to § 4.3 of the Ordinance. Sec. 4.3(3) of the Ordinance ("A special use permit shall be required for the following activities where the proposed construction does not meet the development standards of subsection 4.3(4) below.").

[4] Section 7.9 of the Ordinance states that "[r]estaurants, theaters and other places of public assembly" must have "[o]ne and a half car spaces for every four seats or for every four persons of capacity."

[5] Gravino Realty ultimately withdrew its request for the two dimensional variances at the public hearing before the Zoning Board on September 4, 2014. (Tr. 22-24, Sept. 4, 2014.) Accordingly, it made a number of changes to the original site plan, discussed further supra, so that the two dimensional variances were no longer required.

[6] Section 18.5 of the Ordinance required the Planning Board to evaluate a proposed project and provide a recommendation to the Zoning Board of review.

Three properly advertised hearings before the Zoning Board were held on June 25, 2014; July 10, 2014; and September 4, 2014. At the hearing on Gravino Realty's application, Mr. Gravino testified that he bought the Property for the purpose of building a larger and more efficient Iggy's restaurant than the one he currently operates next door on appellant Mr. Durkin's property. (Tr. 5-8, June 25, 2014.) Mr. Gravino explained that while the new site will have less seating overall, there will be more indoor seating in new building. Id. at 5. Mr. Gravino stated that the proposed restaurant would have twenty-three parking spaces, including two handicap parking spots. Id. at 12-13. He further explained that Iggy's current site only allows for six parking spots, none of which are handicap accessible. Id. at 13. Mr. Gravino testified that the menu and hours of operation would be the same at the proposed restaurant. Id. at 13. He further explained that the new facilities will include a basement and attic, both of which will be used for storage purposes. Id. at 9-10.

Next, Amy Sonder, the land surveyor who prepared the site plan, testified for Gravino Realty. She explained that when the application was before the Planning Board for site review, Gravino Realty became aware that a forty-foot setback from the easterly property line was imposed as a condition of the 2012 subdivision approval that created the lot. She stated that to satisfy that forty-foot setback requirement, the original building site layout was revised at the recommendation of the Planning Board. Id. at 28-30. She testified that the revised proposed site plan satisfies all of the required setbacks. Id. at 29-30

Scott P. Rabideau, a wetland biologist, also testified for Gravino Realty. He stated that the Coastal Resources Management Council (CRMC), which has jurisdiction over wetlands on the Property, verified that the freshwater wetlands identified on the site plan were accurately

represented.[7] Id. at 51. He explained that CRMC verified that the wetland on the Property was an "emergent plant community" which "is not subject to a [fifty foot] regulatory buffer zone from the CRMC." Id. at 53. Pursuant to § 4.3 of the Ordinance, in the coastal and freshwater wetlands overlay district, an applicant who proposes development within 150 feet of the edge of a wetland whose lot was platted on or after August 7, 1989, must acquire a special use permit from the Zoning Board. Mr. Rabideau testified that in his professional opinion, the project will satisfy all the other applicable standards for development in the coastal and freshwater wetlands overlay district.[8] Id. at 55-59.

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[7] This Court notes that the General Assembly recently made a number of changes to the regulation of wetlands and the jurisdiction of the CRMC. See generally 2015 R.I. Laws Ch. 15-218 (15-S 737B).

[8] The complete list of development standards under § 4.3(4) of the Ordinance are as follows:

> "a. For lots platted prior to August 7, 1989, in areas serviced by both sewers and water, structures, roads and land disturbance shall be set back 100 feet from the wetland edge;
> "b. In all other areas, sewage disposal systems and land disturbance shall be set back 150 feet from any wetland edge except for areas subject to storm flowage and areas subject to flooding, which shall have a 50-foot setback;
> "c. The proposed project will not obstruct floodways in any detrimental way, or reduce the net capacity of the site to retain floodwaters;
> "d. The proposed project will not cause any sedimentation of wetlands, and will include all necessary and appropriate erosion and sediment control measures;
> "e. The proposed project will not reduce the capacity of any wetlands to absorb pollutants;
> "f. The proposed project will not degrade the biological, ecological, recreational, educational, and research values of any wetlands;
> "g. The proposed project will not directly or indirectly degrade water quality in any wetlands or waterbody;
> "h. The proposed project will not reduce the capacity of any wetlands to recharge groundwater;
> "i. The proposed project will not degrade the value of any wetlands as spawning grounds and nurseries for fish and shellfish or habitat for wildlife and wildfowl."

Wilfrid L. Gates, the landscape architect who designed the site layout and landscaping, testified for Gravino Realty. He stated that on the eastern property line, the property line abutting appellant Mr. Durkin's property, "there will be a screen fence, approximately 6 feet high, and a heavy evergreen screen of upright white pines, Columnar spruce and a heavy planting of giant western arborvitaes to create . . . a solid buffer or solid evergreen buffer." (Tr. 7, July 10, 2014.) Mr. Gates explained that he proposed a thick evergreen buffer on the eastern property line because the site plan does not meet the ten-foot required planted buffer for that property line. Id. Section 7.8 of the Ordinance entitled, "Supplementary landscaping and illumination requirements," states that "[l]andscaped buffer areas at least ten feet wide shall be provided along all property lines of multifamily and nonresidential uses which abut residential zones . . . . Where existing topography and/or landscaping or vegetation adequately screens a multifamily or nonresidential use from abutting residential uses, the zoning board of review may modify the requirements for landscaped buffer areas." Mr. Gates further testified that, in his professional opinion, the current landscape plan provided better screening than a typical ten-foot buffer because the Gravino Realty's site plan called for "planting much taller, thicker, heavier more mature plant materials to compensate for the narrowing of the buffer. . . ." (Tr. 10, July 10, 2014.)

Thereafter, Ernest George, P.E., the engineer who designed the stormwater management facilities on the site, testified for Gravino Realty. He explained that he calculated the drainage for the site plan by accounting for the difference between the runoff volume of the Property as a vacant lot and the projected runoff volume from the developed Property during a twenty-five year storm. Id. at 22. He testified that the Narragansett Engineering Department approved his drainage calculations and stormwater management design. Id. at 23-24.

George Daglieri, certified appraiser and licensed real estate broker, testified that the proposed development will not substantially or permanently injure the appropriate use of property in the surrounding area, alter the general character of the neighborhood, or adversely impact the public health, safety or welfare because the use is consistent with the existing development on that portion of Point Judith Road. Id. at 31-32. He stated that since the Property is zoned for commercial development, the project would not further adversely affect property values. Id. at 35.

After Mr. Daglieri's testimony, a number of abutting property owners testified against the project. See id. at 50-87. These property owners voiced concerns over the traffic, noise, and littering related to Iggy's current operation. Most testified that they feared that a larger restaurant would exacerbate their concerns, especially with respect to increased traffic in the area.

Joseph Casali, an expert in the field of civil engineering, testified on behalf of appellant Mr. Durkin and against the project.[9] Mr. Casali testified that he reviewed Gravino Realty's site plan and had a number of concerns with respect to the drainage calculations. Id. at 102. Specifically, Mr. Casali testified that the drainage calculations were arrived at using the "rational method" while the Ordinance requires calculations to be based on the "Technical Release 55" or "TR 55" method. Id. at 103-04. He explained that TR-55 is a method of hydrologic calculation and is required by § 7.7 of the Ordinance. Id. at 125. Mr. Casali also admitted that he had only

[9] Prior to Mr. Casali's testimony, Mr. Durkin's counsel called Edward Pimental, an expert in the field of land use planning and zoning, to testify against the project. (Tr. 88-89, July 10, 2014.) Mr. Pimental testified that under Rhode Island law, Gravino Realty could not request a special permit and two dimensional variances in the same application. Id. at 91-92. In response to Mr. Pimental's testimony, as well as the concerns expressed by abutting landowners, Gravino Realty revised its site plan so that the originally requested dimensional variances were no longer required.

reviewed the drainage calculations already performed and that he did not perform any calculations for the site himself. Id. at 121.

Next, Paul Bannon, a traffic engineer, testified on behalf of Mr. Durkin. He stated that, in his expert opinion, the parking lot on the site plan would be difficult to maneuver because the lane is not wide enough. Id. at 138-46. He also testified that the parking spaces did not comply with "industry standard stalls." Id. at 148. However, Mr. Bannon admitted that the Ordinance did not require these "industry standard stalls," but instead requires a minimum of 280 square feet per parking spot. Id.

When the public hearing resumed on September 4, 2014, Appellant James Durkin testified against the project. He stated that he owns the present location of Iggy's, which he has rented to Mr. Gravino for about thirteen years. (Tr. 8-9, Sept. 4, 2014.) The majority of Mr. Durkin's testimony concerned Iggy's current location. Id. at 9-13.

After Mr. Durkin's testimony, Gravino Realty withdrew its request for a front yard variance and its request for a dimensional variance for a fence on the rear retaining wall since it had revised its site plan to eliminate the need for either variance. Id. at 22-24. Mr. Gravino testified that to accommodate these changes, the size of the proposed building had been reduced. Id. at 24. Additionally, Ms. Sonder testified that the size of the building had been reduced by forty-eight square feet and the size of the covered porch was reduced by 166 square feet. Id. at 50. Ms. Sonder also stated that the revised plan called for thirty-two seats inside and forty-eight seats outside, for a total of eighty. She stated that the revised site plan provided for twenty-three on-site parking spaces. Id. at 56.

At its meeting on October 23, 2014, the Zoning Board voted unanimously to approve the three special use permits. The Zoning Board's written decision was recorded in the Narragansett

land evidence records on October 31, 2014. In its detailed decision, the Zoning Board credited Mr. Gravino's testimony that the provided parking spaces on site would be sufficient for his business. (Decision at 3.) The Zoning Board also found that based on its "own knowledge and [] viewing of parking areas in the Narragansett and Wakefield areas," the parking lot design was appropriate and consistent with other similar establishments in the surrounding area. Id. at 6. With respect to the drainage calculation, the Zoning Board credited the testimony of Mr. George and Mr. Rabideau that the drainage systems were in compliance with development standards set forth in the Ordinance. Id. The Zoning Board also noted that the drainage calculations for the site were reviewed and approved by the Town Engineering Department. Id. at 4, 6.

The Appellants filed timely appeals of the Zoning Board's decision. On February 24, 2015, this Court denied their motions for a preliminary injunction and a stay pending a decision on the merits of the appeal.

II

Standard of Review

This Court's review of a zoning board's decision is governed by § 45-24-69(d), which provides, in pertinent part, 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." Sec. 45-24-69(d)

The Court gives deference to the findings of the zoning board "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)). "It is the function of the Superior Court to 'examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). "'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.'" Pawtucket Transfer Operations, 944 A.2d at 859 (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)).

Specifically, Appellants challenge the Zoning Board's grant of three special use permits. A special use "[b]y definition . . . is one which the local legislature has conditionally permitted and has thereby, at least implicitly, found to be harmonious with those uses which are permitted in the district." Nani v. Zoning Bd. of Review of Smithfield, 104 R.I. 150, 155, 242 A.2d 403, 406 (1968). Section 45-24-42 provides that "[a] zoning ordinance shall provide for the issuance of special-use permits approved by the zoning board of review." Pursuant to this authority, § 12.5 of the Ordinance describes the standard for granting a special permit as follows:

> "(1) That the use will comply with all applicable requirements and development and performance standards set forth in sections 4 and 7 of this ordinance; except that the board may grant a variance

> from dimensional setbacks incorporated in the development standards of section 4.3(4) of the coastal and freshwater wetlands overlay district, and section 4.4(c) of the coastal resources overlay district, in accordance with the requirements of section 11 of this ordinance;
> "(2) That the use will be in harmony with the general purpose and intent of this ordinance and the comprehensive plan of the Town of Narragansett;
> "(3) That the granting of the special use permit will substantially serve the public convenience and welfare;
> "(4) That the use will not result in or create conditions inimical to the public health, safety, morals, and general welfare;
> "(5) That it will not substantially or permanently injure the appropriate use of surrounding property;
> "(6) In addition to the above, the zoning board of review shall consider:
>
> "a. Access to air, light, views, and solar access.
> "b. Public access to water bodies, rivers and streams.
> "c. The conservation of energy and energy efficiency.
>
> "The zoning board of review may not extend or enlarge a special use permit except by granting a new special use permit."

The Rhode Island Supreme Court has made clear that "these standards essentially are conditions precedent to the board's exercise of its authority to act affirmatively on an application for a special-use permit." Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1086 (R.I. 2013).

III

Analysis

1

Use of the Property

First, Appellants argue that the Zoning Board erred in granting Gravino Realty a special permit to operate a restaurant because, according to Appellants, Iggy's is actually a fast food restaurant, which is a prohibited use under the Ordinance. In response, Gravino Realty maintains that Appellants waived this argument since they did not raise it before the Zoning Board.

The Court notes that "[t]he terms 'drive-in,' 'drive thru,' and 'fast food' are not terms of art, and where they are not specifically defined their construction may be uncertain." 3 Salkin, American Law of Zoning § 18:77 (5th ed.). In the present case, the Ordinance defines "restaurant, fast food" as follows:

> "A business enterprise primarily engaged in the retail sale of food and beverages served in disposable containers and selected by patrons from a limited number of prepared, specialized items, including but not limited to hamburgers, chicken, fish and chips, tacos and hot dogs, for consumption either on or off the premises, in a facility where all or a substantial portion of the sales is by standup service at a counter or drive-through service. Such use, however, shall not include bakeries, delicatessens or such similar types of retail establishments selling pizza, grinders and/or submarine sandwiches." Sec. 2.2.

By contrast, "restaurant" is defined as follows:

> "A business enterprise engaged in serving and preparing food and beverages selected from a full menu by patrons seated at a table or counter, usually served by a waiter or waitress, and consumed on the premises. Alcoholic beverages may also be served for consumption on the premises. Id.

While a "restaurant" is permitted in a B-A Zone by special permit, a "fast food restaurant" is a prohibited use in all zoning districts. Sec. 6.3.

Gravino Realty maintains that Appellants have waived this issue since they did not raise it before the Zoning Board. Indeed, typically a party cannot raise, for the first time on appeal, issues not raised before the zoning board. See Ridgewood Homeowners Ass'n v. Mignacca, 813 A.2d 965, 977 (R.I. 2003) ("After applying for a variance to the board and after arguing in favor of a variance at a hearing before the board following the planning commission's determination that a variance was required to maintain a horse on their land, the [defendants] cannot, for the first time on an appeal before the Superior Court, disclaim the need for a dimensional variance."). However, the zoning board is without authority to grant a special permit for use that

is prohibited under its Ordinance as opposed to a use that is conditionally permitted. See § 45-24-42 ("A zoning ordinance shall provide for the issuance of special-use permits approved by the zoning board of review. . . .The ordinance shall: (1) Specify the uses requiring special-use permits in each district. . . ."); see also Guiberson v. Roman Catholic Bishop of Providence, 112 R.I. 252, 259, 308 A.2d 503, 507 (1973) ("The board is without authority to grant an exception unless the proposed use meets the intents and purposes set forth in . . . the ordinance and . . . our state enabling act."). Accordingly, if Iggy's is a fast food restaurant, as Appellants claim, the Zoning Board acted in excess of its authority in granting Gravino Realty the special use permit. See Matteson v. Zoning Bd. of Review of Warwick, 79 R.I. 121, 122, 84 A.2d 611, 612 (1951) (holding that a zoning board acted in excess of its powers in granting a special use permit for the operation of a lumberyard on residential property when the relevant zoning ordinance only authorized such use in an industrial district).

In granting Gravino Realty the special use permit to operate a restaurant, the Zoning Board made a number of findings with respect to Gravino Realty's proposed use. As the Rhode Island Supreme Court has stated, a special use "[b]y definition . . . is one which the local legislature has conditionally permitted and has thereby, at least implicitly, found to be harmonious with those uses which are permitted in the district." Nani, 104 R.I. at 155, 242 A.2d at 406. In complying with the standards set forth in the Ordinance,[10] the Zoning Board found

[10] As cited above, § 12.5 of the Ordinance describes the standard for granting a special permit as follows:

> "(1) That the use will comply with all applicable requirements and development and performance standards set forth in sections 4 and 7 of this ordinance; except that the board may grant a variance from dimensional setbacks incorporated in the development standards of section 4.3(4) of the coastal and freshwater wetlands overlay district, and section 4.4(c) of the coastal resources overlay

that "[t]he use of the property as a restaurant is a conditionally permitted use by special use permit and is appropriate for the property." (Tr. 17-18, Oct. 23, 2014.) The Zoning Board also found that "the use will be in harmony with the general purpose and intent of this ordinance" and that the "granting of the Special Use Permit will substantially serve the public convenience and welfare." In support of these findings, the Zoning Board noted that the proposed use was consistent with the Ordinance and with the surrounding area. See Decision at 7.

Although Appellants point out that Iggy's (1) utilizes a takeout counter where customers order and pick up their food (Tr. 13, June 25, 2014); (2) has a loudspeaker to announce when a customer's order is ready (Tr. 31-32, Sept. 4, 2014); and (3) Mr. Gravino testified that currently sixty percent of his business is take out (Tr. 13-14, June 25, 2014)—all factors that weigh in favor of finding Iggy's a fast food restaurant, see § 2.2 of the Ordinance—there is still substantial evidence in the record to support the Zoning Board's finding. See Mill Realty Assocs., 841 A.2d at 672 ("The trial justice may not 'substitute [his or her] judgment for that of the zoning board if [he or she] can conscientiously find that the board's decision was supported by substantial

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> district, in accordance with the requirements of section 11 of this ordinance;
> "(2) That the use will be in harmony with the general purpose and intent of this ordinance and the comprehensive plan of the Town of Narragansett;
> "(3) That the granting of the special use permit will substantially serve the public convenience and welfare;
> "(4) That the use will not result in or create conditions inimical to the public health, safety, morals, and general welfare;
> "(5) That it will not substantially or permanently injure the appropriate use of surrounding property;
> "(6) In addition to the above, the zoning board of review shall consider:
>
> "a. Access to air, light, views, and solar access.
> "b. Public access to water bodies, rivers and streams.
> "c. The conservation of energy and energy efficiency.
>
> "The zoning board of review may not extend or enlarge a special use permit except by granting a new special use permit."

evidence in the whole record.'" quoting Caswell, 424 A.2d at 648). Significantly, Mr. Daglieri, a certified appraiser and licensed real estate broker, whom the Zoning Board recognized as an expert, testified that "[a]ccording to the site plan [Iggy's] [is] a full-service restaurant and it's typical of any full-service restaurant that's in the area." (Tr. 29, July 10, 2014.) Mr. Daglieri also testified that Iggy's proposed use was "not an unusual use. It's very typical." Id. at 30. Given that § 6.3 of the Ordinance prohibits fast food restaurants in all zoning districts, that use could not be typical in the area. See Murphy v. Zoning Bd. of Review of S. Kingstown, 959 A.2d 535, 542 (R.I. 2008) (noting that "if expert testimony before a zoning board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony"). The Court also notes that the site plan provides for eighty seats, with thirty-two seats inside the building with a takeout counter; such facts support the Zoning Board's finding that Iggy's is a restaurant. See § 2.2 of the Ordinance (defining restaurant as "[a] business enterprise engaged in serving and preparing food and beverages selected from a full menu by patrons seated at a table or counter. . . ."); see also Burke v. O'Connor, 53 Misc. 2d 669, 671, 279 N.Y.S.2d 633, 636 (Sup. Ct. 1967) (holding that a fully enclosed restaurant with seating capacity for twenty-eight persons with a self-service order counter was a "[f]ull service [r]estaurant" and not a "[d]rive-in [r]estaurant."). Moreover, Iggy's is currently operating as a restaurant on Appellant James Durkin's property.

The Rhode Island Supreme Court has made clear that this Court must "give weight and deference to a zoning board's interpretation and application of the zoning ordinance, provided its construction is not clearly erroneous or unauthorized." Cohen v. Duncan, 970 A.2d 550, 562 (R.I. 2009). Notably, the Zoning Board's approval of Gravino Realty's use of the property as a restaurant was based in part on its local knowledge, and that such a use would be consistent with

the surrounding area. Pawtucket Transfer Operations, 944 A.2d at 859 ("The Superior 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.'" quoting Monforte, 93 R.I. at 449, 176 A.2d at 728). The Rhode Island Supreme Court has held that although "a board may consider probative factors within its knowledge in denying the relief sought or may acquire adequate knowledge through observation and inspection on a view[,]" the board must also "disclose[] on the record the observations or information upon which it acted" Toohey v. Kilday, 415 A.2d 732, 737-38 (R.I. 1980). In the present case, the Zoning Board's special knowledge of the area is reflected in the record. For example, the Chairman of the Board made representations regarding the fact that he drove by Point Judith Road, the location of the proposed project, on his way home. (Tr. 143, July 10, 2014). The Zoning Board's members also indicated their familiarity with the fact that traffic generally increases in the area during the summer months. See Tr. 17, Sept. 4, 2014.

It is well-settled that "the Superior Court shall not substitute its judgment for that of the zoning board as to the weight of the evidence on questions of fact." Caswell, 424 A.2d at 648 (internal quotation marks omitted). Accordingly, the Zoning Board's findings that the use was for a restaurant requiring a special use permit was not affected by an error of law, in excess of ordinance provisions, or clearly erroneous.

2

Parking

Next, Appellants argue that the Zoning Board erred in granting Gravino Realty the special use permit reducing the required number of parking spaces for the site. Section 7.9(5) of

the Ordinance requires "[o]ne and a half car spaces for every four seats or for every four persons of capacity" for the proposed project. Additionally, § 7.17 of the Ordinance requires that an applicant for a special use permit for relief from § 7.9(5)'s parking requirements demonstrate the following:

> "A. That, based upon the projected use and level of activity for a given development proposal, strict application of the parking and/or loading requirements would be excessive.
>
> "B. That the safe and proper operation of the business or any businesses within the proposed development will in no way be compromised by the reduction or modification of the requirements of section 7.9."

The Appellants contend that there was no record evidence that Gravino Realty's site plan meets the above requirements. Specifically, Appellants contend the Zoning Board erred in (1) applying the per seat standard of calculating the required parking stalls pursuant to § 7.9(5) of the Ordinance; (2) finding that strict application of the parking requirements would be excessive; and (3) rejecting the expert testimony of Mr. Bannon that the parking lot design was unsafe.

However, the Zoning Board's detailed findings with respect to the parking requirements are supported by substantial record evidence. Mill Realty Assocs., 841 A.2d at 672. In its decision, the Zoning Board noted that § 7.9 of the Ordinance lists two ways of calculating the required number of parking spots: one based on capacity, and one based on the number of seats in the restaurant. See § 7.9(5) (stating that for "[r]estaurants, theaters and other places of public assembly" the required number of parking spots is "[o]ne and a half car spaces for every four seats or for every four persons of capacity"). The site plan proposes a total of twenty-three parking spots. The fire marshal's calculations based on the capacity of the building requires fifty-six parking spaces, while the per seat method of calculation requires thirty spaces. See Tr. 56, 64, Sept. 4, 2014; Tr. 5, Oct. 23, 2014. At the hearing, Jill Sabo, an environmental planning

specialist for the Zoning Board, explained that the planning staff "relies upon the fire marshal to provide us the information that we use to calculate seating. And the fire marshal goes by capacity, not by seating." (Tr. 64, Sept. 4, 2014.) As the Zoning Board noted, "a Special Use Permit will be required for 33 parking spaces under the Fire Marshall's calculations or for [the] 7 spaces [under the per seat calculations]." (Decision at 2).

The Zoning Board explicitly found "that the standard for parking spaces that should be used in this situation is the requirement of one and one half parking spaces for every four seats in the restaurant." (Decision at 6.) It then found that the per capacity requirement of fifty-six parking spaces was excessive given that the capacity calculation is based on square foot, which included the proposed building's basement and attic, which "are for storage only." Id. This finding is also supported by the testimony of expert witness Ms. Sonder, who testified that she applied the per seat standard in designing the site plan. (Tr. 56-57, Sept. 4, 2014.)

As cited above, this Court must "give weight and deference to a zoning board's interpretation and application of the zoning ordinance, provided its construction is not clearly erroneous or unauthorized." Cohen, 970 A.2d at 562. Nonetheless, "this Court reviews issues of statutory construction de novo; therefore, a zoning board's determination of law is not binding on this Court, and [it] may review such determinations as to 'what the law is and its applicability to the facts.'" Id. at 561-62 (quoting Pawtucket Transfer Operations, 944 A.2d at 859).

Section 7.9(5) of the Ordinance clearly states that for "[r]estaurants, theaters and other places of public assembly[,]" the required number of parking spots is "[o]ne and a half car spaces for every four seats or for every four persons of capacity." (emphasis added). "[W]hen the language of a statute or a zoning ordinance is clear and certain, there is nothing left for interpretation and the ordinance must be interpreted literally." Mongony v. Bevilacqua, 432

A.2d 661, 663 (R.I. 1981). The Ordinance, by its plain terms, allows for either method of calculation. Therefore, the Zoning Board's application of the per seat method of calculation to Gravino Realty's project was not clearly erroneous. Consequently, the required amount of parking spots for the project was thirty. However, the Zoning Board specifically credited the testimony of Mr. Gravino that "based upon his knowledge of his business, [23 parking spots] would be sufficient parking for the site." (Decision at 3, 6.) See § 7.17(B) of the Ordinance (requiring an applicant for a special use permit for relief from the Ordinance's parking requirements to demonstrate "[t]hat the safe and proper operation of the business or any businesses within the proposed development will in no way be compromised by the reduction or modification of the requirements of section 7.9"); see also Restivo v. Lynch, 707 A.2d 663, 667 (R.I. 1998) ("The Superior Court's review of the decision of a board of review or plan commission is circumscribed and deferential . . . [in] that 'judicial scrutiny of an agency's factfinding . . . is limited . . . to determin[ing] if there is any competent evidence upon which the agency's decision rests.'" quoting E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977)).

With respect to the parking lot design, the Zoning Board specifically rejected the testimony of Mr. Bannon that the parking lot stall design was defective and unsafe. The Zoning Board noted that the parking spaces and the parking lot complied "with the requirements of Section 7.10 in that all the spaces are 8.5 feet by 18 feet and the gross parking area exceeds the requirement of 270 square feet per parking space." (Decision at 6.) The Zoning Board then relied upon its knowledge of the local area to reject Mr. Bannon's testimony:

> Based upon my own knowledge and my viewing of parking areas in the Narragansett and Wakefield areas there are no parking lots in the area which would comply with Mr. Bannon's requirements. There are no travel lanes that are 40 feet in width for cars to back

> into, most parking lots contain travel lanes that are barely the width of two cars. His concern with the circular nature of the driveway I also find misplaced as I have seen numerous parking lots with just such a configuration, most of which are food establishments." Id.

As noted supra, the Zoning Board's special knowledge of the area is reflected in the record. See Toohey, 415 A.2d at 737-38 (holding that although "a board may consider probative factors within its knowledge in denying the relief sought or may acquire adequate knowledge through observation and inspection on a view[,]" the board must also "disclose[] on the record the observations or information upon which it acted").

Still, Appellants maintain the Zoning Board erred in rejecting Mr. Bannon's allegedly uncontradicted expert testimony. Although "there is no talismanic significance to expert testimony [and it] may be accepted or rejected by the trier of fact," this Court is mindful of the fact that "if expert testimony before a zoning board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony." Murphy, 959 A.2d at 542. At the same time, the Rhode Island Supreme Court had made clear "that expert testimony proffered to a zoning board is not somehow exempt from being attacked in several ways" including by observations from the board itself. Id. at n.6.

The record demonstrates that Mr. Bannon's testimony was not uncontradicted. Indeed, on cross-examination, Mr. Bannon admitted that his recommendations were based on "industry standard stalls" rather than the requirements listed in the Ordinance. (Tr. 148, July 10, 2014.) The Chairman also questioned Mr. Bannon's testimony that the site plan would exacerbate pedestrian safety issues. Id. at 143. Mr. Bannon stated that he observed pedestrians crossing the street to Iggy's current location at a crosswalk, but with the new site plan, there would be an increased risk that pedestrians would cross in the middle of the road. Id. at 142-43. However, the Chairman questioned Mr. Bannon on this point stating that he drove past the area at issue on

his way home and he had to stop for a couple crossing the street outside of the crosswalk.[11] Id. at 143. Thus, the Chairman questioned whether the new Iggy's location would cause pedestrians to cross in the middle of the street since the Chairman had observed pedestrians already crossing that way. In addition, Mr. Bannon testified that the parking lot was unsafe because "[t]here's no way that any patron can get into the building without crossing a travel lane." (Tr. 85, Sept. 4, 2014.) However, Board Member Robert P. Mulligan questioned Mr. Bannon on this point noting that in "any parking lot," pedestrians typically cross traffic lanes. Id. at 85-86. In sum, the Zoning Board's grant of the special use permit for relief from the Ordinance's parking requirements was supported by substantial evidence. See Pawtucket Transfer Operations, 944 A.2d at 859 ("'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.'" quoting Caswell, 424 A.2d at 647).

3

Setback and Landscaping

Appellants also argue that Gravino Realty's landscaping plan fails to comply with landscaping requirements under § 7.8 of the Ordinance. Section 7.8 of the Ordinance reads in pertinent part as follows:

> "Unless the zoning board of review authorizes otherwise, all areas of multifamily and nonresidential properties which are not used for structures, off-street parking and loading, permitted outdoor storage, sidewalks or similar purposes, and which are not kept in

[11] The Chairman's specific remarks were as follows:

> "Not to make light of it, but this evening on my way home I went by there and a couple crossed, I took the right heading north on Point Judith Road and a couple was right in the middle of the road. I stopped for them. They were not in the crosswalk. But – and there's no question that's going to happen. It happens now." (Tr. 143, July 10, 2014.)

> their natural state, shall be landscaped with grass, shrubs, trees, and other ground cover so as to minimize erosion and stormwater runoff.
>
> "Landscaping plans and specifications must be included in all applications for site plan review.
>
> "Landscaped buffer areas at least ten feet wide shall be provided along all property lines of multifamily and nonresidential uses which abut residential zones . . . . Where existing topography and/or landscaping or vegetation adequately screens a multifamily or nonresidential use from abutting residential uses, the zoning board of review may modify the requirements for landscaped buffer areas."

Specifically, Appellants maintain that since the proposed landscape buffer along the eastern property line is five or six feet rather than the required ten feet mentioned in § 7.8 of the Ordinance, the Zoning Board erred in approving the project.

However, Gravino Realty's landscaping plan was supported by uncontradicted expert testimony. Mr. Gates, whom the Zoning Board recognized as an expert in the field of landscape design, testified that on the eastern property line, the property line abutting Appellant Mr. Durkin's property, "there will be a screen fence, approximately 6 feet high, and a heavy evergreen screen of upright white pines, Columnar spruce and a heavy planting of giant western arborvitaes to create . . . a solid buffer or solid evergreen buffer." (Tr. 7, July 10, 2014.) Mr. Gates explained that he proposed a thick evergreen buffer on the eastern property line because the site plan does not meet the ten-foot required planted buffer for that property line. Id. Mr. Gates further testified that in his professional opinion, the current landscape plan provided better screening than a typical ten-foot buffer because Gravino Realty's site plan called for "planting much taller, thicker, heavier more mature plant materials to compensate for the narrowing of the buffer. . . ." Id. at 10. This testimony was unimpeached. Notably, on cross-examination, counsel for Appellant, Mr. Durkin, questioned Mr. Gates as to whether adding more evergreens

and white pines would provide enhanced screening. In response, Mr. Gates explained that adding any more vegetation to the plan would only increase screening temporarily because the evergreens would eventually "start to grow together so much that they start to lose the bottom foliage." Id. at 18. "[I]f expert testimony before a zoning board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony." Murphy, 959 A.2d at 542. Consequently, it would have been an abuse of discretion for the Zoning Board to have rejected Mr. Gates's testimony.

Moreover, § 7.8 of the Ordinance gives the Zoning Board considerable discretion in approving landscaping plans in that the section's requirements are prefaced by the phrase, "Unless the zoning board of review authorizes otherwise . . . ." Section 7.8 of the Ordinance also states that "[w]here existing topography and/or landscaping or vegetation adequately screens a multifamily or nonresidential use from abutting residential uses, the zoning board of review may modify the requirements for landscaped buffer areas." Thus, the Zoning Board did not err in approving Gravino Realty's landscaping plan, given that their own Ordinance affords them great discretion in approving such plans, and the adequacy of the landscaping plan was supported by competent expert testimony.

4

Drainage Requirements

Lastly, Appellants contend that Gravino Realty's site plan fails to comply with the Ordinance's supplemental stormwater management requirements under § 7.7. Section 7.7 of the Ordinance, entitled "Supplementary drainage requirements," states as follows:

> "The stormwater management system for any site shall be designed to offset the increase in the rate of stormwater resulting from the proposed development. It shall implement the techniques and measures recommended in the most current revision of or

> supplement to 'Urban Hydrology for Small Watersheds, Technical Release No. 55,' prepared by the United States Department of Agriculture, Soil Conservation Service."

Relying on the testimony of their expert, Mr. Casali, Appellants argue that Gravino Realty's "Stormwater Runoff & Converge Calculations" fail to comply with the above requirements because Gravino Realty calculated stormwater runoff based on the so-called "Rational Method" rather than the "Technical Release No. 55" or "TR-55." Mr. Casali testified that TR-55 is a method of hydrologic calculation and is required by § 7.7 of the Ordinance. (Tr. 125, July 10, 2014.)

Here, the Zoning Board was faced with a so-called battle of the experts with respect to the adequacy of the drainage plan. As the Rhode Island Supreme Court has held:

> "[W]here there is conflicting testimony from equally qualified experts and substantial evidence exists on both sides of the controversy, we believe that the better rule is to limit the extent of judicial review. In such circumstances, we believe that the board, who had before it the individual witnesses and had the opportunity to judge their credibility, was in a better position than the court to resolve the conflict." Mendonsa v. Corey, 495 A.2d 257, 263 (R.I. 1985).

While Gravino Realty's engineering expert, Mr. George, testified in support of the adequacy of the calculations, and the Town of Narragansett's own Engineering Department had reviewed and approved the plan as in compliance with § 7.7 of the Ordinance, Appellants' engineering expert, Mr. Casali, testified against the project. However, in its decision, the Zoning Board noted that unlike Gravino Realty's expert, Mr. George, Mr. Casali only reviewed the existing drainage calculations and did not perform any calculations for the site himself. (Decision at 6.)

Further, although Mr. Casali's main objection was that Gravino Realty's "Stormwater Runoff & Converge Calculations" were based on the "Rational Method" rather than the "TR-55" method, subsection (D) of Section XIII of the Town of Narragansett's Subdivision and Land

Development Regulations states that the "Rational Method" "is the preferred method for small systems of three acres or less, where no wetland, ponds, or other storage depressions are present, and where drainage is toward the point of analysis." By contrast, "TR-55" "is the preferred method for calculating runoff volumes, peak discharge rate, and flood storage requirements for site development between one acre and 2,000 acres." Here, despite the presence of a wetland, the Property is only 20,110 square feet, or less than half an acre. Although § 7.7 of the Ordinance states that the stormwater management systems "shall" utilize the "TR-55" method, "[i]n those fields of administrative action where an exercise of discretion is normally intended . . . provisions granting power may be held to be directory." West v. McDonald, 18 A.3d 526, 535 (R.I. 2011) (quoting 3 Singer, Sutherland on Statutory Construction § 57:17 at 70). Reviewing the Town of Narragansett's regulations as a whole, including Subsection (D) which lists the "Rational Method" as the preferred method for small lots, the word "shall" in § 7.7 of the Ordinance is directive rather than mandatory. See Raiche v. Scott, 101 A.3d 1244, 1248 (R.I. 2014) (holding that in interpreting statutes the Court "must 'consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.'" quoting State v. Hazard, 68 A.3d 479, 485 (R.I. 2013)); see also O'Neill v. Carr, 522 A.2d 1213, 1215 (R.I. 1987) (holding that the word "shall" in an ordinance which directed the City Solicitor to institute legal proceedings whenever there is an ordinance violation, was used in the "precatory, rather than [ ] mandatory sense" since "[r]evoking a permit or initiating a suit are matters that involve the discretion of the appropriate responsible official").

Moreover, the Ordinance explicitly gives the Town Engineer the power to approve drainage plans. Section 7.7(4) of the Ordinance states the "[n]o application for site plan approval

shall be granted nor building permit issued unless the town engineer certifies that the proposed development complies with the requirements of this section." In a letter dated January 15, 2015, the Town Engineer explained that "[t]he Rational Method is less complex than 'Technical Release No. 55' and is suitable for small and less hydrologically complex drainage watersheds. . . . . Essentially this is a case where a simpler method results in nominally the same results and provides the same protections to the environment as the more complex evaluation by 'Technical Release No. 55.'" (Gravino Realty's Mem. in Supp. of Obj. to Mr. Durkin's Mot. for Stay, Ex. D). Thus, the Zoning Board's decision to rely on the engineering department's approval of the drainage plan was supported by substantial evidence and was in compliance with the terms of the Ordinance.

IV

Conclusion

After a review of the entire record, this Court finds that the Zoning Board had substantial evidence before it to grant the special permits sought by Gravino Realty. Its decision was not in excess of its authority, in violation of ordinance provisions, or an abuse of discretion. Substantial rights of the Appellants have not been prejudiced. Accordingly, the October 31, 2014 decision of the Zoning Board is affirmed. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASES:	**Durkin v. Gravino Realty LLC, et al.** **Sanders v. Gravino Realty LLC, et al.**
CASE NOS:	**WC-2014-0896** **WC-2014-0898**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**August 28, 2015**
JUSTICE/MAGISTRATE:	**Thunberg, J.**
ATTORNEYS:	
For Plaintiff:	**Patrick J. Dougherty, Esq.** **Donald J. Lally, Jr., Esq.**
For Defendant:	**Donald J. Packer, Esq.** **John J. DeSimone, Esq.** **Mark A. McSally, Esq.**