

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 29, 2016)

CLYDE DEVELOPMENT CO., LLC :  
and CUMBERLAND FARMS, INC. :

VS. :

C.A. No. PC-2014-1858

TOWN OF SMITHFIELD ZONING :  
BOARD OF REVIEW and ANTONIO :  
S. FONSECA, DAVID GREENE, S. :  
JAMES BUSAM, PETER FOGARTY :  
and STEPHEN WRIGHT, in their :  
capacity as Members of the Town of :  
Smithfield Zoning Board of Review :

**DECISION**

**PROCACCINI, J.** Appellants Clyde Development Co., LLC (Clyde) and Cumberland Farms, Inc. (Cumberland Farms) (collectively, Appellants) appeal a decision (Decision) from the Town of Smithfield Zoning Board of Review (Zoning Board) denying a special use permit for dimensional relief for a side-yard setback (Special Use Permit). Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, the Decision is hereby reversed.

**I**

**Facts and Travel**

Clyde owns a parcel of land located at 945 Douglas Pike in Smithfield, Rhode Island (the Property). Zoning Bd. Hr’g Tr. 3:3-5, Oct. 30, 2013. Cumberland Farms intends to purchase the Property and build a convenience store and gas station. Id. at 3:3-17. The Property is zoned “Highway Commercial.” Decision at 2. At the time, an automotive filling station was not a permitted use in an area zoned Highway Commercial. Id. at 2-3. Consequently, Clyde and

Cumberland Farms appeared before the Zoning Board on October 30, 2013 and January 29, 2014 seeking a special use permit that would permit Cumberland Farms to construct the proposed gas station.<sup>1</sup> Clyde and Cumberland Farms also sought a second Special Use Permit for dimensional relief from Smithfield Zoning Ordinance § 4.4G-3(B), which requires a minimum 50' setback from all property lines for an automotive filling station. Decision at 4. Cumberland Farms proposes to build the gas station 20.4' from the northerly property line. Id. As a result, dimensional relief for 29.8' is required.

The Zoning Board heard testimony from a variety of experts. Eric M. Prive (Mr. Prive), a registered engineer, testified that the Property contains 40,202 square feet of land. Id. He stated that Cumberland Farm intends to build a 4476 square foot building. Id. The proposal also includes six gasoline pumps and two 20,000 gallon storage tanks that will be placed underground. Id. Finally, Mr. Prive indicated that the gas station would have twenty-one parking spaces. Id. Jason T. Adams (Mr. Adams), an expert in traffic engineering, testified that the gas station would not increase traffic in the area. Id. at 5-6. Mr. Adams acknowledged that the area was a very busy thoroughfare. Id. at 6. He stated that a left-hand turn into or out-of the gas station would be quite difficult. Id. Therefore, Cumberland Farms proposed to make a “right-turn out only” exit. Zoning Bd. Hr’g Tr. 20:1-20, Jan. 29, 2014. Mr. Adams also noted that there is another gas station directly across the street. Id. at 24:3-19. As a result, many individuals will likely use the gas station across the street, as opposed to taking the difficult left-hand turn. Id. Finally, Thomas O. Sweeney (Mr. Sweeney), a real estate appraiser and broker, testified that the construction of a gas station on the Property would not have a negative impact

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<sup>1</sup> The proposed convenience store was not of issue, as a convenience store is a permitted use for property zoned Highway Commercial. See Decision at 2.

on the overall characteristics of the surrounding area. Decision at 7. At the conclusion of the January 29, 2014 hearing, the special use permits were taken under advisement.<sup>2</sup>

On March 24, 2014, the Zoning Board denied the special use permits. Id. at 8-9. The Decision primarily focuses on negative traffic impacts. Id. at 5-8. The Zoning Board found that Douglas Pike is a four-lane, two-way roadway with a speed limit of 40 m.p.h. Id. at 5. Moreover, the Zoning Board noted that all of the members of the Zoning Board frequently travel the roadway and that “existing traffic is extremely heavy.” Id. at 6. The Zoning Board made reference to Mr. Adams’ study, explaining that traffic was likely to increase by 22% by 2018. Id. at 5. Emphasis was placed on the fact that the gas station would increase the number of tricky left-hand turns. Id. at 6. Ultimately, the Zoning Board failed to adopt Mr. Adams’ assumption that individuals would use the gas station across the street rather than make a left-hand turn: “The Traffic Study presents no empirical data to support this conclusion. It simply relies on the assumption that Cumberland Farms patrons will seek out the most efficient routes for entering and exiting the site . . . .” Id. Lastly, the Zoning Board concluded that the increase in left-hand turns in the area would increase the risk of accidents. Id.

Appellants timely appealed the Decision to the Superior Court on April 11, 2014. The issue before the Court is now much narrower than originally intended. After the Zoning Board denied the special use permits, the Smithfield Town Council amended the Zoning Ordinance to permit automobile filling stations in areas zoned Highway Commercial. As a result, the

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<sup>2</sup> At this point, discussion between the members of the Zoning Board ensued. However, the stenographer and videographer did not continue recording. As a result, a record of the discussion does not exist. Appellants argue that the Zoning Board ultimately denied the special use permits because the lot size did not comport with existing zoning ordinances. However, the Decision focuses on negative traffic impacts. On August 14, 2014, this Court decided that additional evidence was necessary in order to determine exactly what transpired off the record following the January 29, 2014 hearing. Both parties concede that the evidentiary hearing is no longer necessary given that the issues on appeal are now more narrowly focused.

proposed gas station is in substantial compliance with the existing Zoning Ordinance. The Town of Smithfield Zoning Office has issued a zoning certificate, which indicates that aside from the dimensional relief from the northern boundary line, the proposal is in compliance with the Zoning Ordinance. See Appellants' Mem., Ex. P. As a result, the only thing that currently stands between Cumberland Farms and its new location is 29.8 feet. Both parties concede that this is the sole narrow issue before the Court. See Appellants' Mem. at 12; Appellees' Mem. at 1 n.1.

Appellants urge this Court to reverse the Zoning Board and grant the Special Use Permit, because the record indicates that the dimensional relief is in accord with the public convenience and welfare. Appellants claim that there is uncontested testimony that the gas station conforms with the surrounding area. Moreover, Appellants point to the fact that the Smithfield Town Council amended the Zoning Ordinance after the Decision was released, arguing that this action evidences that the gas station is in accord with the public convenience and welfare.

In opposition, the Zoning Board maintains that the record clearly indicates that it weighed the evidence presented and determined that the negative traffic impacts were not in the best interest of the public. The Zoning Board correctly claims that the Court does not have the authority to reassess the evidence, positing that the Zoning Board took the evidence as a whole and found that the traffic impacts were too adverse to grant the Special Use Permit. In reply, Appellants claim that these traffic impacts are no longer relevant, as they related to the special use permit that would permit an automobile filling station in a Highway Commercial zone. Appellants continued by explaining that the record is devoid of any evidence which would indicate that dimensional relief of 29.8' is not in accord with the public welfare.

## II

### Standard of Review

The Superior Court possesses jurisdiction to review a zoning board decision pursuant to § 45-24-69. The statute provides:

“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 Superior Court must “examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.” Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1083 (R.I. 2013) (citation omitted). “Substantial evidence has been defined as more than a scintilla but less than a preponderance.” Id. (internal quotation marks omitted). The Court “may not 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.” Id. (internal quotation marks omitted). In reviewing the record, the Court must “scrutinize the record as a whole to determine ‘whether legally competent evidence exists to support the findings . . . .’” Id. (quoting Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004)). The Court may not weigh the evidence on appeal but must rather review the record to

look for substantial evidence. Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 399 (R.I. 2001).

### III

#### Analysis

As both parties have indicated, the Court’s review of the Decision is limited to the Special Use Permit for dimensional relief for a side-yard setback. Rhode Island General Law § 45-24-42(a) states that all zoning ordinances “shall provide for the issuance of special-use permits approved by the zoning board of review.” Oftentimes, 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.3d at 1085. Smithfield Zoning Ordinance § 10.8(C)(2) provides for the issuance of a special use permit if certain standards are met to the Zoning Board’s satisfaction. Those standards include:

“a) that the Special Use is specifically authorized by this Ordinance, and setting forth the exact subsection of this Ordinance containing the jurisdictional authorization;

“b) that the Special Use meets all of the criteria set forth in the subsection of this Ordinance authorizing such Special Use; and

“c) that the granting of the Special Use Permit will not alter the general character of the surrounding area or impair the intent or purpose of this Ordinance or the Comprehensive Plan of the Town. In so doing, the Board shall consider, where applicable, the following:

“(1) Ingress and egress to property and proposed structures thereon with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and access in case of fire or catastrophe.

“(2) Off-street parking and loading areas where required, with particular attention to the items set out in subsection (1) hereof.

“(3) Required yards and other open spaces.

“(4) Refuse and services areas, with particular reference to the items set out in Subsections (1) and (2) hereof.

“(5) Utilities with reference to location, availability, and compatibility.

“(6) Screening and buffering with reference to type, dimensions, and character.

“(7) Signs, if any, and proposed exterior lighting with reference to glare and traffic safety.

“(8) General compatibility, the pertinent traffic, economic, noise, glare or odor effects of the Special Use Permit on adjoining properties and properties generally in the district.

“(9) Protection of sensitive features.

“(10) The use will not result in or create conditions that will exceed the Performance Standards in §6.3 . . . .” Sec. 10.8(C)(2).

These standards essentially ensure that the special use permit is “in accord with the public convenience and welfare.” Lloyd, 62 A.3d at 1086 (internal quotation marks omitted). Moreover, the Rhode Island Supreme Court has stated that these standards are “conditions precedent to the board’s exercise of its authority to act affirmatively on an application for a special-use permit.” Id. (citing Guiberson v. Roman Catholic Bishop of Providence, 112 R.I. 252, 258, 308 A.2d 503, 506 (1973)). It is an abuse of discretion to deny a special use permit if these conditions are satisfied. See id.; Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 882 (R.I. 1991).

A review of the record indicates that the dimensional relief requested is in accord with the public convenience and welfare. Therefore, the Zoning Board abused its discretion by denying the Special Use Permit. The crux of the Decision hinges on the fact that the gas station itself will increase traffic in an already busy area. Decision at 5-8. More pointedly, the Zoning Board devoted a sizeable portion of its discussion to the increased risk caused by patrons taking a left-hand turn when entering and exiting the gas station. Id. Not surprisingly, the Zoning Board focuses their argument on these traffic concerns as well, maintaining that the Special Use Permit requested is not in accord with the public maintenance and welfare because the relief would

cause safety issues related to the ingress and egress of the Property. While this concern was relevant and well-considered in the past, potential traffic issues do not relate to the dimensional relief requested.

The Zoning Board condensed its denial by, in effect, combining the two special use permits. Nevertheless, the findings of fact more appropriately relate to the special use permit for the gas station in general. As discussed, this special use permit is now moot given the recent changes in the Smithfield Zoning Ordinance that permit the construction of the gas station on the Property. Accordingly, aside from explaining the Special Use Permit for dimensional relief and stating that the same is denied, the Decision does not expand on the Special Use Permit actually at issue.<sup>3</sup>

The traffic concerns detailed in the Decision are no longer a justifiable reason to deny the dimensional relief. If the gas station will in fact trigger left-hand turn issues, these issues will be present regardless of where on the Property the gas station is situated. Mr. Sweeney testified that the particular positioning of the building was necessary to utilize the Property in a safe and acceptable way. Zoning Bd. Hr'g Tr. 75:3-25, 80:9-13, Jan. 29, 2014; see also 23:5-12 (Mr. Adams testifying: "One of the great benefits of this project site is that fuel trucks are able to enter via the main driveway, circulate in through the project site, and exit cleanly via the right-turn out driveway. Being able to keep the fuel trucks in a, an appropriate path around the site allows the rest of the site to follow suit and operate efficiently."). He summarized the position of the gas station by stating:

"In my opinion, it is based upon specifically the shape of this unit, and the siting of the improvements, and the flow throughout the lot. That's, as I could tell from the board's questions, one of their

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<sup>3</sup> The Court does note that this is not particularly surprising. It would be superfluous to discuss dimensional relief for a building if the building was not a permitted use in the first place.

concerns is safety across this site. The positioning of the building within that side yard allows for a very good flow, and meets the safety requirements.” Id. at 75:19-76:1.

This opinion was uncontested during the administrative hearings. Furthermore, the abutting neighbor on the northerly side of the Property indicated that he did not object to the dimensional relief. Letter from Jackson Despres to Town of Smithfield Zoning Bd. of Review, at 1 (July 30, 2013). There is also a gas station across the street from the Property, and dimensional relief from a setback requirement of seventy-four feet was recently granted to a company seeking to build a hotel across the street as well. See Appellant’s Reply, Ex. A. These facts strongly support the conclusion that the proposed gas station fits squarely within the surrounding area. Lastly, the Smithfield Town Council itself took action after the special use permits were denied, demonstrating that the Town of Smithfield welcomes and supports the gas station to the area. Consequently, a review of the record indicates that the Zoning Board abused its discretion by denying the Special Use Permit for dimensional relief, as the particular Special Use Permit is in accord with the public maintenance and welfare. Lloyd, 62 A.3d at 1086.

The Court exercises its authority to reverse the Decision as it relates to the Special Use Permit for dimensional relief. While remand is appropriate when the administrative agency has made insufficient findings of fact, see E. Greenwich Yacht Club v. Coastal Res. Mgmt. Council, 118 R.I. 559, 568, 376 A.2d 682, 687 (R.I. 1977), the Court finds there is ample evidence to support a reversal. Appellants have made a full evidentiary presentation at multiple hearings. The Court finds reliable, probative, and substantial evidence in the record which indicates that the Special Use Permit is in accord with the public maintenance and welfare. The Court is satisfied that the record demonstrates that the standard for the Special Use Permit has been met. Accordingly, this Court finds it unnecessary to remand the case to the Zoning Board when it can

fashion an appropriate remedy, avoiding the expenditure of additional time and litigation expenses in the future. See Roger Williams Coll. v. Gallison, 572 A.2d 61, 62-63 (R.I. 1990).

#### **IV**

#### **Conclusion**

Based on the findings and conclusions of this Court as stated above, the Decision is reversed as it relates to the Special Use Permit for dimensional relief. The Zoning Board abused its discretion, as the denial of the Special Use Permit is not supported by reliable, probative, and substantial evidence of the whole record. Substantial rights of Appellants have been prejudiced; therefore, reversal is appropriate. Counsel shall submit an appropriate order and judgment for entry consistent with this Decision.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Clyde Development Co., LLC v. Town of Smithfield  
Zoning Board of Review, et al.

**CASE NO:** PC-2014-1858

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** July 29, 2016

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

**ATTORNEYS:**

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**For Defendant:** Sally P. McDonald, Esq.