STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: July 26, 2016)

LINEAR RETAIL SMITHFIELD #1, LLC Plaintiff/Appellant,	:	
v.	:	**C.A. No. PC-2014-2361**
THE ZONING BOARD OF REVIEW OF THE TOWN OF SMITHFIELD, and GEORGE D. McKINNON, ANTONIO S. FONSECA, DAVID GREENE, S. JAMES BUSAM, and PETER FOGARTY, in their Capacities as members of the Zoning Board of Review of the Town of SMITHFIELD Defendants/Appellees.	:	

DECISION

LICHT, J. On February 26, 2014, the Zoning Board of Review of the Town of Smithfield (Zoning Board) denied Appellant Linear Retail Smithfield #1, LLC's (Linear Retail or Appellant) appeal from the Town Building Official's issuance of a violation notice which required the Appellant to remove a sign on its property and replace it with a smaller one. Linear Retail has appealed that decision of the Zoning Board and its members pursuant to G.L. 1956 § 45-24-69. For the reasons discussed below, this Court affirms the Zoning Board's decision.

I

Facts and Travel

Located at 400 Putnam Pike, Smithfield, Rhode Island 02917 (the Property), at the intersection of Route 5 and Route 44, is a retail shopping plaza containing several commercial outlets, including a bank and various restaurants. The Property is zoned for commercial use and

is designated as Assessor's Plat 43, Lot 120-1. Restaurants are a permitted use, but a restaurant's accessory drive-through service and accompanying window requires a special use permit.

Linear Retail wished to locate a Starbucks[1] restaurant on the Property in space formerly occupied by Rite-Aid Pharmacy. Linear Retail and Starbucks sought to erect a drive-through window associated with the Starbucks restaurant. Pursuant to the Town of Smithfield Zoning Ordinance §§ 4.3.F.3[2] and 4.4.F-3[3] (the Ordinance), Linear Retail filed an application with the Zoning Board seeking a special use permit to allow Starbucks to have a drive-through window that would be associated with its permitted restaurant use. See ZBR Application at 1-2, ¶ 8. The application also sought permission to erect signage for Starbucks. The Starbucks sign located at the Property's Route 44 entrance is at issue here. The Court notes that Linear Retail and Starbucks refer to this sign as a "direction" or "directional" sign, whereas the Zoning Board refers to it as a "monument," "advertising," or "identification" sign. For purposes of this Decision, the Court will refer to the sign in question as "the Sign."

---

[1] As a threshold matter, although Linear Retail's appeal involves a petition for a special use permit for a new Starbucks coffee shop—and more particularly, the proposed signage for said location—Starbucks has not intervened in the instant case and is not a proper appellant before this Court. Rather, Linear Retail acted on behalf of Starbucks throughout these matters.

[2] Section 4.3.F.3 **"Table of Uses"** allows "Restaurant with Drive-Thru" only in Commercial Districts, Highway Commercial Districts, and Planned Development. See Town of Smithfield Zoning Ordinance, Article 4 – Use Regulations.

[3] Section 4.4.F-3 states: "**Restaurant with Drive-Thru** - Restaurant with drive-thru service, provided that the provisions of F-1 (A) through (H) shall be met, and provided further that the Zoning Board of Review must find prior to granting a special use permit for a drive-thru, that there is sufficient credible evidence in the record of the proceedings to establish that any queue resulting from the drive-thru will not extend onto a street." See id.

A

August 29, 2012 Hearing

On August 29, 2012, Linear Retail presented its application for this special use permit to the Zoning Board.[4] In support of its application, Linear Retail offered testimony[5] from Bryan Furze, Linear Retail's Vice President of Asset Management (Mr. Furze), and three expert witnesses—Edward Pimentel (Mr. Pimentel), a land use and zoning expert; Philip Cordeiro (Mr. Cordeiro), a professional engineer registered in Rhode Island; and James P. Cronan, III (Mr. Cronan), a professional engineer and traffic expert. Tr. 5:11-12; 21:16-18; 47:2-10, Aug. 29, 2012.

Mr. Pimentel asserted that, as a land use and zoning expert, it was his opinion that the addition of a drive-through window to the proposed Starbucks location conformed with the commercial character of the area. Id. at 7:6-11. In support of his opinion, Mr. Pimentel noted that several of the surrounding establishments were already equipped with drive-through windows. Id. Mr. Pimentel further stated that the addition of a drive-through was consistent with the Town's Comprehensive Land Use Plan. Id. at 8:8-9. Mr. Pimentel also testified that the

[4] The Zoning Board members that were present during this hearing included Chairman George D. McKinnon (Chair), Vice Chairman Antonio S. Fonseca (Mr. Fonseca), David L. Greene (Mr. Greene), S. James Busam (Mr. Busam), and Peter Fogarty (Mr. Fogarty), with Stephan Wright (Mr. Wright) serving as the alternate. Tr. 2:1-7, Aug. 29, 2012. The Smithfield Town Solicitor was also present. Id. at 14.

[5] In support of its application for a special use permit, Linear Retail also submitted plans (the Site Layout Plan) associated with its request. The Site Layout Plan was changed after the Zoning Board issued its decision in August of 2012 in order for Linear Retail to comply with the conditions imposed by the Zoning Board. The plans submitted before and after the Zoning Board's decision were nearly identical, other than Linear Retail changing the entrance to the Starbucks drive-through window from Route 5 to Route 44, as requested by the Zoning Board. Otherwise, all dimensions, diagrams, examples of signs, and the like were exactly the same in both versions of the Site Layout Plan.

proposed project would add fifteen additional parking spaces beyond the requirements of the Ordinance, and thus, would not create any traffic issues. Id. at 13:20-22.

Mr. Cordeiro, who served as Linear Retail's civil engineering expert, commented on the queue capacity of the proposed drive-through and testified that the proposed plans would accommodate eleven cars in its queue, exceeding the minimum requirement of ten cars. Id at 24:2-10. Mr. Cordeiro additionally explained that the proposed traffic pattern into the queue was designed to both allow access to available parking spaces and to address safety concerns relating to pedestrian traffic. Id. at 23:23-25; 26:9-22.

Finally, Mr. Cronan, Linear Retail's traffic engineering expert, testified that based on the traffic studies conducted by him—of the Starbucks location on Route 2 in Warwick, the current traffic through the neighboring Papa Gino's parking lot, and the other drive-through windows in the surrounding areas—the addition of a Starbucks drive-through would have little to no impact on traffic. Id. at 49:17-22. Mr. Cronan also explained that with the additional proposed striping, signage, crosswalks, and speed tables, the internal traffic circulation in the plaza would continue to operate in a safe and orderly manner. Id. at 51:6-11. Mr. Cronan further explained that any concerns with ingress, egress, or conflicting traffic patterns would be alleviated by directing the drive-through traffic around Starbucks via the use of directional signs. See id.

In response to Linear Retail's testimony, the Chair expressed concerns about the amount of signage at the Property and the intent of the design of the shopping center. In order to address the Chair's concerns, Linear Retail's attorney asserted that the applicant was not proposing any free-standing "monument" or "identification" signs. Both Linear Retail's attorney and Mr. Furze further asserted that the proposed signs would be "directional," would be associated with Starbucks' drive-through window, and would be used solely as a means to facilitate traffic to the

drive-through window. Id. at 62:5-63:12; 64:4-8. Mr. Furze further explained that Starbucks would have a panel on the Property's main pylon sign at the Route 44 entrance. Id. at 63:4-8.

At the hearing, no one opposed Linear Retail's application. See id. at 70:19-22. At the close of the August 29, 2012 hearing, the Zoning Board voted 5-0 in favor of approving Linear Retail's application. See August 29, 2012 Decision. The Zoning Board found that "[t]he special use is specifically authorized by Sections 4.4.F.3 and 4.3.F.3 of the Smithfield Zoning Ordinance . . . [it] meets all the criteria set forth in the subsections of the Zoning Ordinance authorizing such special use . . . [and] [t]he granting of the special use permit will not alter the general character of the surrounding area or impair the intent or purpose of the Town of Smithfield Zoning Ordinance or the Comprehensive Plan of the Town." Id. at 3. The approval, however, required Linear Retail to adhere to certain conditions. Id. Specifically, as it relates to the issue before the Court, the Zoning Board required that Linear Retail abide by the following conditions:

> "3. The proposed directional signage shall remain part of the Site Layout Plan. The only Starbucks sign shall be on the Mall sign on Route 44.
> "4. The applicant shall revise its Site Layout Plan in accordance with the requirements of this Resolution and must gain approval for said revised plan from the Town Engineer prior to the issuance of a certificate of occupancy.
> "5. As a condition of approval, the traffic pattern, striping, signage and crosswalks at the site shall comply with the revised Site Layout Plan as approved by the Town Engineer." Id. at 4.

Upon receiving its special use permit, Linear Retail submitted its Site Layout Plan to the Building Inspector and applied for a building permit. The building permit was granted on November 21, 2012, after which Linear Retail moved forward with construction, including erecting the Sign. On January 17, 2013, after the Sign was installed along the Route 44 entrance, the Deputy Zoning Official sent a letter to Linear Retail explaining that the Sign was in

contravention of the August 29, 2012 Zoning Board Decision[6] (August 2012 Decision) and demanding its removal. Another letter, stating the same thing, was again sent to Linear Retail on April 5, 2013.[7]

B

May 29, 2013 Clarification Hearing

Thereafter, on May 29, 2013, Linear Retail appeared[8] before the Zoning Board for clarification of the conditions imposed on the special use permit granted to it.[9] At the clarification hearing, the Zoning Board pointed out that the directional sign approved and the Sign erected varied greatly in size. Specifically, the Zoning Board asserted that pursuant to its August 2012 Decision—granting Starbucks and Linear Retail a special use permit—Starbucks was authorized to construct a 1.2' x 6' Sign on Route 44, which would direct traffic to the Starbucks drive-through window. However, the Sign constructed is approximately 5' x 6'. The Zoning Board further stated that it was their opinion that the approved sign was to be a directional sign, and that the Sign that was actually put up served as an "identification" sign and

---

[6] Specifically, pursuant to the Zoning Board's August 2012 Decision—granting Starbucks and Linear Retail a special use permit—a building permit was issued on November 2, 2012 authorizing the construction of a 1.2' x 6' sign on Route 44, which would direct traffic to the Starbucks drive-through window. The Sign constructed, however, is approximately 5' x 6' and is considered by the Zoning Board to be a monumental, not a directional, sign. Furthermore, all other appropriately constructed directional signs are 1.5' x 6', as outlined by the Site Layout Plan.

[7] The Court notes that Linear Retail did not appeal either the January 2013 or the April 2013 violation letters to the Zoning Board. Instead, both parties seemingly waived such an appeals process by allowing Linear Retail to come before the Zoning Board for a "clarification hearing."

[8] There is some dispute as to whether Linear Retail requested the clarification hearing or it was requested by the Zoning Board. Appellants contend that the Zoning Board requested the meeting. See Tr. 2:24, May 29, 2013. (The Town Solicitor states, "[t]hey're here at our request."). However, Appellee's Mem. in Opp'n to Appellant's Appeal states that "[p]laintiff thereupon requested the Board to clarify Condition #3 of the Resolution. The Board did so as (sic) its May 29, 2013 meeting." Appellee's Mem. in Opp'n to Appellant's Appeal at 5.

[9] Mr. Furze appeared and testified on behalf of Linear Retail. The Chair did most of the speaking on behalf of the Zoning Board.

was in direct contravention of the August 2012 Decision. Tr. 4:19-5:25, May 29, 2013. On behalf of the Zoning Board, the Chair further explained that because the Sign is so large, it "act[s] as an identification sign," and "even though [Linear Retail] may have put on there, 'Drive-through Enter Here,' the reality is it's an identification sign," which was specifically prohibited. Id. at 5:19-25. In response to the Zoning Board's contentions, Mr. Furze stated that, although Linear Retail "agreed to [have] no more monument signs[,] . . . this is the size [of the] sign [that the Site Layout Plan] show[ed] in that location." Id. at 6:1-7. The Chair pointed out, however, that "[t]hat was the size of the sign that [Linear Retail] showed as an identification sign[.]" Id. at 6:8-10. In response, Mr. Furze claimed that such a labeling was a mistake, as Linear Retail "honestly believed that [they] were putting this here almost at the request of the board to identify this as the primary drive-through entrance" and that it was their "intention [] to identify this as the primary entrance." Id. at 6:11-17. At the close of the hearing, although Mr. Furze continued to disagree with the Zoning Board's interpretation of Condition 3[10] and the Sign, he stated that Linear Retail and Starbucks would replace the Sign in order to be in accordance with the Zoning Board's interpretation of its August 2012 Decision. Id. at 17:24-25. Nonetheless, the Sign was never replaced.[11]

Consequently, on September 12, 2013, the Deputy Zoning Official of Smithfield sent another letter to Linear Retail explaining that the Sign was still not in compliance with the Zoning Board's August 2012 Decision and must be removed. Two subsequent letters asserting

[10] Condition 3 to the Zoning Board's August 2012 Decision states that "[t]he proposed directional signage shall remain part of the Site Layout Plan. The only Starbucks sign shall be on the Mall sign on Route 44.'" August 2012 Decision, 4.

[11] After the hearing concluded, Mr. Furze allegedly communicated what had transpired during the hearing to Starbucks. Upon conducting significant research on the matter, Starbucks insisted on keeping the Sign up, as they found it to be in full compliance with the Zoning Board's August 2012 Decision.

the same principles were mailed to Linear Retail on November 12 and 18, 2013. Linear Retail took no action to remove the Sign. Instead, Linear Retail appealed the Zoning Official's September 2013 violation letters to the Zoning Board.

C

January 29, 2014 Hearing

On January 29, 2014, the Zoning Board held a hearing on the alleged special use permit violation. At the hearing, Linear Retail's attorney explained that the Site Layout Plan included the Sign as it is currently constructed—that being 5' x 6' and positioned at the Property's Route 44 entrance. See Tr. 6:16-25; 8:3-4, Jan. 29, 2014. He asserted that the Zoning Board was made aware, and therefore had notice, of such dimensions as they were specified on the Site Layout Plan. See id. He further argued that the Zoning Board relied on the Site Layout Plan when issuing its August 2012 Decision, and failed to make any note of, or changes to, the dimensions for the Sign. Id. at 9:18-23. In addition, he explained that the construction of the Sign was approved by the Building Official when Linear Retail was issued a permit for the Sign after having reviewed the Zoning Board's August 2012 Decision. Id. at 9:18-10:4. In addition to the Zoning Board's alleged notice of the Sign's dimensions, Linear Retail's attorney contended that Linear Retail and Starbucks acted in good faith when it erected the Sign, based on the properly issued building permit, thus preventing the Zoning Board from now forcing Linear Retail or Starbucks to remove the Sign. Id. at 9:18-10:1; 10:13-22. He additionally asserted that it would cost Linear Retail and Starbucks a significant amount of money—approximately $13,326—to have had built the Sign, remove it, and install a new one. Id. at 17:13-17. Mr. Furze explained that, as a result of the associated costs and their good faith efforts, Starbucks was reluctant to remove the Sign. Id. at 27-28.

In response, the Zoning Board asserted that the Sign erected was not a directional sign that was approved by their August 2012 Decision, but instead was an "advertising," "monument," or "identification" sign, which its August 2012 Decision explicitly prohibited. See id. at 8:7-11. The Chair explained that Linear Retail and Starbucks led the Zoning Board to believe that all directional signs were to be small signs. Id. at 8:14-18. The Chair further asserted that the Sign was not one of the approved directional signs given both its size and the graphics on it. Id. at 8:13-14. On behalf of the Zoning Board, Mr. Fonseca pointed out that the Zoning Board's August 2012 Decision states clearly that the "only [identification] sign we were going to allow was the one on the marquee." Id. at 13:1-4. In addition, Mr. Fogarty noted that the Sign, although labeled by Linear Retail and Starbucks as a directional sign, contains no picture or description indicating where to go to get to the drive-through. Id. at 23:14-23. The Sign does "not direct[] you in any way, shape, or form[,]" but instead, "has the words, enter here," which were not on the directional signs proposed. Id. at 23:25-24:9. The Zoning Board further noted that this exact matter was discussed at the May 2013 clarification hearing, at which Linear Retail agreed to remove the Sign. Id. at 25:2-5.

On February 26, 2014, the Zoning Board issued a decision (February 2014 Decision), finding that the Sign violates Condition 3 of the Zoning Board's August 2012 Decision, which states that "[t]he proposed directional signage shall remain part of the Site Layout Plan. The only Starbucks sign shall be on the Mall sign on Route 44.'" See Zoning Board February 2014 Decision at ¶ 3 (referring to Zoning Board August 2012 Decision at 3-4). Consequently, the Zoning Board again ordered that Linear Retail and Starbucks remove the Sign. On May 12, 2014, Linear Retail appealed to the Superior Court.

D

Parties' Arguments

In its appeal, Linear Retail contends that the Zoning Board's February 2014 Decision[12] is in violation of constitutional, statutory, or ordinance provisions; in excess of authority granted to it by statute or ordinance; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; and arbitrary or capricious. Linear Retail contends that the Site Layout Plan that was originally submitted to and approved by the Zoning Board included the Sign as constructed. In support of its contention, Linear Retail asserts that the Sign dimensions and layout were set forth on the Site Layout Plan. Linear Retail further asserts that the record demonstrates that it made the Zoning Board aware of the fact that the Sign would differ from all of the other directional signs in that it would be used to direct traffic through the entrance. In addition, Linear Retail argues that, in order to begin construction, Starbucks submitted, and relied on, the Site Layout Plan when it applied for, and was issued, a building permit by the Building Official. As a result of the Sign's inclusion in Linear Retail's Site Layout Plan, and the reliance on the same, Linear Retail states that the Zoning Board approved the construction and installation of the Sign and cannot now require its removal.

The Zoning Board, however, asserts that Linear Retail's appeal should be denied and dismissed because its erection of the Sign was clearly prohibited by the Zoning Board's August 2012 and February 2014 Decisions, specifically with regard to Condition 3. The Zoning Board contends that Linear Retail was made aware of this violation at the May 2013 clarification hearing, in which it agreed to remove the Sign. The Zoning Board asserts that Linear Retail's

[12] On or about April 24, 2014, the Zoning Board recorded and posted its decision in the Smithfield Town Hall, denying Linear Retail's appeal from its February 2014 Decision.

failure to do so puts it in direct violation of the Zoning Board's August 2012 and February 2014 Decisions. The Zoning Board further contends that Linear Retail violated Conditions 4 and 5 of the August 2012 Decision by failing to obtain approval from the Town Engineer prior to erecting any signage on the Property.

II

Standard of Review

Review of a zoning board decision by the Superior Court is governed by § 45-24-69(d), which provides that:

> "[t]he 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).

In reviewing the decision of a zoning board, a trial justice "'must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). Substantial evidence is "'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 decision may only be vacated upon a finding that it is clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record. von Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 399 (R.I. 2001); see § 45-24-69(d)(5).

As to questions of fact, the court may not "substitute its judgment for that of the zoning board of review[.]" Curran v. Church Cmty. Hous. Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)). Furthermore, during its review of a zoning board decision, the Court "lacks 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." Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986) (citing E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977)). If the findings of the zoning board are insufficient, the court can remand the matter to allow the zoning board to make the proper findings of fact. See Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001).

III

Analysis

A

Failure to Abide by Conditions 4 and 5 of the Zoning Board's August 2012 Decision

In approving a special use permit, Section 10.8(C)(3) of the Ordinance grants the Zoning Board authority to apply "special conditions that may, in the opinion of the Board, be required to promote the intent and purposes of the Comprehensive Plan of the Town and this Ordinance." Smithfield Zoning Ordinance, § 10.8(C)(3). In addition, the Rhode Island Supreme Court has long recognized that zoning boards maintain "broad discretion in fixing conditions" when

granting various variances and permits. Olevson v. Zoning Bd. of Review of Narragansett, 71 R.I. 303, 307, 44 A.2d 720, 722 (1945).

If the only condition on signage were Condition 3, which says that "[t]he proposed directional signage shall remain part of the Site Layout Plan[,]" (August 2012 Decision, 4) then Linear Retail's arguments might be more persuasive[13], as the Court could then look to the record of the hearings to determine what was intended. Kenlin Props., LLC v. City of E. Providence, 2016 WL 3449976 (R.I. June 23, 2016). The Court notes, however, that there were other conditions included in the Zoning Board's August 2012 Decision.

Condition 4 of the Zoning Board's August 2012 Decision required Linear Retail to revise the Site Layout Plan in accordance with the Resolution and then gain the Town Engineer's approval of the Site Layout Plan. Condition 5 of the Zoning Board's August 2012 Decision required Linear Retail to have the signage comply with the revised Site Layout Plan, as approved by the Town Engineer. There is no evidence within the record that Linear Retail ever revised the Site Layout Plan or that the Town Engineer ever approved the Site Layout Plan.

The Zoning Board asserts that if Linear Retail submitted the Site Layout Plan to the Town Engineer before it applied for a building permit, the Town Engineer would have had the opportunity to ensure that the Sign was of proper dimensions, and further, the Appellant would have been aware of this disagreement prior to erecting the Sign. Since the Town Engineer did not approve the revised Site Layout Plan, the Zoning Board avows that the Building Official lacked proper authority to issue the building permit on November 12, 2012. Linear Retail argues that the Building Official issued a permit and it had the right to rely on that.

[13] As the Court will discuss in the next section, however, if Condition 3 were the only condition on signage, Linear Retail's arguments would likely still fail.

In order to carry out a zoning board's decision and coinciding conditions, a building official does have the authority to issue building permits that comply with such resolutions, but "[a] building official may not act beyond the authority granted to him or her by law[.]" Martel Inv. Grp., LLC v. Town of Richmond, 982 A.2d 595, 601 (R.I. 2009). A building-permit applicant, however, "is responsible for ensuring that his or her application [to the building official] conforms to the relevant zoning ordinances." Id. at 600. An applicant's "failure to comply with the zoning ordinance is neither mitigated nor excused by the mere fact that the town building official also erred." Id. Therefore, an applicant's failure to "abide by any special conditions"—regardless of whether at the mistake of the building official—"shall constitute a zoning violation." Smithfield Zoning Ordinance, § 10.8(C)(3).

The Zoning Board's August 2012 Decision specifically required Linear Retail to revise its Site Layout Plan and obtain the approval from the Town Engineer for the Site Layout Plan. August 2012 Decision at 4. The Building Official's authority to grant Linear Retail's building permit was limited by these terms. See Martel Inv. Grp., LLC, 982 A.2d 595. Since there is no evidence that Linear Retail obtained such approval, the Building Official's issuance of a building permit to Linear Retail was in contravention of the Zoning Board's August 2012 Decision. See Martel Inv. Grp., LLC, 982 A.2d 595. Therefore, the Building Official acted ultra vires when he issued the building permit to Linear Retail, making the permit illegally issued, and any subsequent construction in violation of the Zoning Board's August 2012 Decision. Id. at 601 ("issuance of a building permit by the building official in the absence of development-plan review was ultra vires"); Town of Johnston v. Pezza, 723 A.2d 278, 283 (R.I. 1999) ("[the] act of issuing the building permit without first obtaining an approved site plan from the board was ultra vires"); Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303, 308 (R.I. 1980) ("[s]ince

[the building inspector] lacked authority to issue a permit for a use not authorized by the zoning ordinance, the action of the building inspector in granting a permit for the construction of a garage and utility building was illegal and void"). Accordingly, the Zoning Board's February 2014 Decision, finding that Linear Retail violated Conditions 4 and 5 by failing to obtain approval from the Town Engineer before erecting any signage on the Property, is not affected by error of law or clearly erroneous.

B

Good Faith and Substantial Construction

Although Linear Retail does not challenge the sufficiency of the Zoning Board's August 2012 Decision on grounds of insufficiency or error of law, Linear Retail urges this Court to reverse the Zoning Board's August 2012 and February 2014 Decisions regarding the violation of the conditions imposed because it relied in good faith on the building permit issued by the Town's Building Inspector and acted in good faith throughout the entire process.

The Zoning Board contends that Linear Retail's good faith argument is misplaced as there is no good faith reliance on the building permit since the permit was issued ultra vires. The Zoning Board additionally asserts that Linear Retail's good faith argument fails because Linear Retail did not act with good faith as it was well aware that the Sign was not permitted as constructed.

Specifically, Linear Retail argues that both Starbucks and it acted in good faith when relying on the consistent practices and procedures of building inspectors in issuing building permits when it erected the Sign. Linear Retail relies on Shalvey v. Zoning Bd. of Review of Warwick, 99 R.I. 692, 699-700, 210 A.2d 589, 593-94 (1965) and Jones v. Rommell, 521 A.2d 543, 546 (R.I. 1987) for the proposition that Rhode Island law favors a property owner who, in

good faith, initiates substantial construction due to the owner's reliance on a building permit, from later revocation of that permit. Linear Retail argues that—based on the Town's procedures in issuing a building permit—it relied on a validly issued building permit. In support of its argument, Linear Retail argues that the application for the building permit, which included the Site Layout Plan, had unmistakable dimensions of where the proposed signage would be erected. Linear Retail further asserts that the Building Inspector had to review both the record and the Zoning Board's August 2012 Decision before granting the building permit. In addition, Linear Retail notes that it was not until the Sign was fully constructed—which cost Starbucks $8529—that it received the violation letters. Furthermore, Linear Retail argues that tearing down the Sign would cost an additional $4797, resulting in a total cost of $13,326, and meets the substantial construction element of Shalvey and Jones. Linear Retail contends that, as a result, in relying on the validly issued building permit and constructing the Sign, Linear Retail and Starbucks acted in good faith and therefore cannot be required to remove the Sign according to Shalvey and Jones.

Linear Retail further argues that it acted in good faith when relying on the Zoning Board's August 2012 Decision. Linear Retail asserts that the dimensions of the proposed Sign were at all times included on the Site Layout Plan submitted to the Zoning Board. Linear Retail contends that the Zoning Board relied on the Site Layout Plan when it approved Linear Retail's special use permit in the August 2012 Decision. Linear Retail notes that after the August 2012 hearing, the Sign was moved to the Route 44 entrance at the Zoning Board's request in order to accommodate the Zoning Board's requirement that the main entrance be moved from Route 5 to Route 44. Linear Retail further notes that the Zoning Board knew of the varying signage sizes because at the August 29, 2012 hearing, Mr. Furze stated that the directional sign along the

Route 44 entrance would be used to direct traffic through this entrance, and the rest of the proposed signs would be small directional signage in the parking lot. Linear Retail contends that Mr. Furze's statement unambiguously displays that there are two different sizes of directional signs, and that the Zoning Board's failure to pose questions in order to clarify this precludes it from now demanding the Sign's removal.

The Zoning Board argues that Linear Retail's good faith reliance argument is misplaced since, as discussed above, the building permit was issued ultra vires. The Zoning Board also contends that the records of all hearings demonstrate that Linear Retail was aware that the Zoning Board did not want the Sign. The Zoning Board argues that it made clear at the August 29, 2012 hearing that the Zoning Board's intent was to not allow Starbucks to have any free-standing identification signs, but instead, Starbucks was to be treated in the same fashion as all the other shopping plaza tenants. The Zoning Board asserts that, during the August 29, 2012 hearing, Linear Retail recognized the requirement that any type of monument or identification signs were all together prohibited from the Property in order to remain consistent with the Town's Comprehensive Plan. In addition, the Zoning Board notes that Linear Retail guaranteed that it was not proposing any free-standing sign. The Zoning Board further asserts that in the May 29, 2013 clarification hearing, it was made clear that "identification sign[s] [were] going to be not allowed . . . [and] all the directional signs were [to be] small[] signs." Tr. 4:25-5:4, May 29, 2013. Moreover, the Zoning Board notes that at this same hearing, Mr. Furze—on behalf of Linear Retail—assured that they would remove the Sign since it was nonconforming.

It is well settled under Rhode Island law that this 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." Sec. 45-24-69(d). In addition, this Court '"will not search the record for supporting evidence or

decide for itself what is proper in the circumstances."' Bernuth, 770 A.2d at 401 (quoting Irish P'ship v. Rommell, 518 A.2d 356, 359 (R.I. 1986)). Rather, the Court must only "examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence." Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978). The Court may, however, view the public record in its entirety, including the permit "application and accompanying materials, the testimony at the hearing, and the comments of board members as revealed in the minutes and hearing transcripts" in order to determine "the nature of the limitations and conditions imposed by a board" in granting a special use permit. Kenlin Props., LLC, 2016 WL 3449976 at *10.

The Appellant argues that the dimensions were set forth on the Site Layout Plan, and therefore, everyone knew the size of the sign at the hearing and when the Building Official issued the Building Permit. However, this argument fails because an examination of the Site Layout Plan shows it is inconsistent. On the Site Request Plan, the Sign is described as "1.2' x 6' Freestanding Tenant Identification Sign (See Sign Detail 1)[.]" Sign Detail 1, although practically illegible, seemingly appears to read dimensions of 5' x 5'—not 1.2' x 6'. The Sign constructed, however, is 5'8'' x 6'. Again, had the Site Layout Plan been submitted to the Town Engineer, these inconsistencies could have been addressed.

Moreover, an examination of the August 2012, May 2013, and January 2014 hearings; the Zoning Board's August 2012 and February 2014 Decisions; and the additional evidence in the record show that, from the onset, Linear Retail was aware that the Zoning Board's intent was to prevent the construction of any large, identifying signs like the Sign. In fact, signage was discussed at all hearings. When it granted Linear Retail's special use permit, the Zoning Board expressed its concern that there be no large free-standing, advertising, monument, or

identification signs. To ensure that result, the Zoning Board required that the Town Engineer approve the signage. Moreover, in order to receive its special use permit, Linear Retail promised the Zoning Board that it would not put up any advertising or monument signs. Then, during the clarification hearing on May 29, 2013, Linear Retail said it would remove the Sign. The minutes of that meeting reflect the following,

> "The Board clarified that its resolution granting a special use permit dated August 29, 2012 requires that the existing Starbucks sign on Route 44 must be removed and replaced with a directional sign of the same size as other directional signs at the site. The new directional sign should identify the location of the drive-thru. Brian Furze, a representative of the property owner, indicated that the owner will comply with this clarification." Zoning Bd. May 29, 2013 Minutes, 2.

Accordingly, the Zoning Board's February 2014 Decision is not clearly erroneous in view of the reliable, probative, and substantial evidence on the record and its finding that Linear Retail is in violation of the conditions imposed on the special use permit is affirmed.

IV

Conclusion

After review of the entire record, the Court finds that the Zoning Board's February 2014 Decision was not affected by error of law as the Building Official acted ultra vires in issuing Linear Retail a building permit without the Town Engineer having approved the signage in accordance with the conditions of the special use permit. Moreover, a review of the entire record and the reliable, probative, and substantial evidence on the record demonstrates that it was not clearly erroneous for the Zoning Board to conclude that it had only permitted small, directional signs, and therefore the Sign is in violation of the special use permit. As a result, the substantial rights of Linear Retail have not been prejudiced. For the foregoing reasons, the Court hereby

affirms the Zoning Board's February 2014 Decision. Counsel shall submit an appropriate order and judgment consistent with this opinion.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Linear Retail Smithfield #1, LLC v. The Zoning Board of Review of the Town of Smithfield, et al.**
CASE NO:	**PC-2014-2361**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**July 26, 2016**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Joseph Brennan, Esq.**
For Defendant:	**Edmund L. Alves, Esq.** **Sally P. McDonald, Esq.** **Robert J. Cavanagh, Jr., Esq.**