STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(Filed: August 5, 2015)

ALBIN MOSER and EILEEN MOSER, Individually and as Trustee of the Eileen M. Moser Trust	:	
VS.	:	**C.A. No. NC 2014-0322**
ZONING BOARD OF REVIEW OF THE TOWN OF LITTLE COMPTON, By and Through Its Members, and DIANE SOUZA, As Trustee of the Diane D. Souza Revocable Trust	:	

DECISION

STONE, J. Albin Moser (Mr. Moser) and Eileen Moser (Mrs. Moser), individually and in her capacity as Trustee of the Eileen M. Moser Trust (jointly, Plaintiffs), appeal from a decision of the Zoning Board of Review of the Town of Little Compton (the Zoning Board). That decision—dated July 29, 2014—dismissed, for lack of jurisdiction, Plaintiffs' appeal that sought to reverse the Town Building Official, William L. Moore's (Building Official), determination that Defendant Diane Souza (Ms. Souza) did not need a building permit to erect an accessory building (a shed).

This Court has jurisdiction over this matter pursuant to G.L. 1956 § 45-24-69. For the reasons that follow, this Court remands the decision to the Zoning Board.

I

Facts and Travel

Ms. Souza is the Trustee of the Diane D. Souza Revocable Trust that holds the real estate located at 21 Ocean Drive, within the subdivision of Indian Rock Acres in the Town of Little

Compton, Rhode Island, which is designated as Assessor's Plat No. 33, Lot 180 (Subject Property). (Zoning Board Hr'g Tr. (Tr.) 3, July 16, 2014.) The Plaintiffs reside at 15 Old Barn Road, also within the Indian Rock Acres subdivision in the Town of Little Compton (the Moser Property). The Moser Property is held by the Eileen M. Moser Trust, of which Mrs. Moser is the Trustee and Mr. and Mrs. Moser are the present beneficiaries.

Beginning in 2012, Ms. Souza undertook major renovations on the Subject Property, including the demolition of a previously existing dwelling and the construction of the now existing residence. In a letter dated June 17, 2013 (2013 Letter), the Building Official informed Ms. Souza that she had reached the maximum lot coverage of ten percent allowed under the Little Compton Town Code (Code) § 14-4.1. Id. at 36. Consequently, the Building Official informed her that nothing could be added to or increased in size on the Subject Property without prior approval of the Zoning Board, namely, that no other structures could be erected. Id.

In November of 2013, Ms. Souza applied for a building permit to build a shed that was ninety-six square feet in size on the Subject Property. Upon review of the application, the Building Official advised that a building permit would not in fact be required and that Ms. Souza could commence the construction of the shed.[1] Id. Ms. Souza went ahead and built the shed. Id. at 37.

On April 16, 2014, after observing that construction had commenced on the Subject Property, Plaintiffs sent a letter to the Building Official communicating their concerns that the Subject Property was already at or beyond its maximum lot coverage under the Code. Id. at 4. Plaintiffs were concerned that Ms. Souza had commenced construction of a shed without any

[1] In a letter to the Zoning Board, after being notified of Plaintiffs' appeal, the Building Official explained that customarily building permits were not required for structures less than 100 square feet in size.

prior approval from the Zoning Board. On May 9, 2014, after the Building Official failed to respond to Plaintiffs' letter within the fifteen days required by § 45-24-54 of the Rhode Island General Laws[2], Plaintiffs filed an appeal of the Building Official's determination that Ms. Souza did not need a building permit with the Zoning Board. Id.

On July 16, 2014, a properly advertised hearing was held before the Zoning Board (the Hearing). Id. at 1. During the Hearing, but before reaching the merits of the appeal, the Zoning Board directed the parties present to address whether Plaintiffs had standing to appeal the determination of the Building Official to the Zoning Board. Id. at 8. More specifically, the Zoning Board requested that the parties argue and present evidence of whether Plaintiffs were "aggrieved parties" as required under § 14-9.7(a) of the Code.[3] Id.

Albin S. Moser (Attorney Moser), acting in his capacity as counsel, argued before the Zoning Board on the Plaintiffs' behalf. Id. at 3. He argued that although the Plaintiffs are not within the 200-feet radius set in § 14-10(b)(6) of the Code (which would give them automatic standing), they are nevertheless proximate to the Subject Property and qualify as aggrieved parties who have standing to appeal the Building Official's determination that no building permit is required. Id. at 7-8. Attorney Moser cited to Rhode Island Supreme Court precedent that recognized that a homeowner who lived within a street or two of the land at issue, and who was

[2] "In order to provide guidance or clarification, the zoning enforcement officer or agency shall, upon written request, issue a zoning certificate or provide information to the requesting party as to the determination by the official or agency within fifteen (15) days of the written request. . . ." G.L. 1956 § 45-24-54.

[3] Code § 14-9.7(a) provides that "[a]n appeal to the Board from a decision of any other zoning enforcement agency or officer, or the Planning Board, may be taken by an aggrieved party." Pursuant to Code § 14-10(b)(6) an "[a]ggrieved party shall mean, for purposes of this chapter, (a) any person or persons or entity or entities who can demonstrate that their property will be injured by a decision of any officer or agency responsible for administering this chapter; or (b) anyone requiring notice pursuant to this chapter. (Notice is required of all property owners of record of land within two hundred (200) feet of the property, which is subject to the application, whether within the Town or within an adjacent city or town . . . ."

in the same established residential district, was an "aggrieved party." Id. at 9.[4] He insisted that because Plaintiffs were only one street removed and part of the same plan/subdivision (Indian Rock Acres), they have standing to appeal. Id. at 9. Attorney Moser pointed to several facts that he believed created an injury necessary to have standing, including: the partial blocking of their view of the ocean; the cluttered appearance of the Subject Property; the effect the cluttered and "overcrowd[ed]" appearance of the Subject Property had on the character of the neighborhood; the effect that said cluttering and "overcrowding" of the Subject Property had on the "open space" of the neighborhood; and, the effect that the Subject Property had on drainage. Id. at 10-13, 34. Additionally, he pointed to the 2013 Letter from the Building Official to Ms. Souza requiring prior approval from the Zoning Board for any additional construction on the Subject Property. Id. at 36.

Furthermore, at the Hearing Mrs. Moser testified, "the view issue of the shed is the least of [her] concerns," conceding that she refused an offer to have the shed moved so that it did not block her view. Id. at 14. She testified that her motivation in opposing the shed was to drawn a line so that neighbors did not get away with building more than was allowed. Id. She also felt that the clutter detracted from her property value. Id. at 16. Attorney Moser submitted photographs into evidence depicting the alleged "cluttered appearance on the [Subject Property] from the Mosers' view." Id. at 17-18; Zoning Board R. Ex. 1-2.

Mr. Girard Galvin, counsel for the Building Official, also spoke at the Hearing and argued that Plaintiffs did not constitute aggrieved parties. (Tr. at 20). Although sympathetic to Plaintiffs' position as long-standing residents in a traditional neighborhood going through

[4] Attorney Moser relied on DiIorio v. Zoning Bd. of Review of City of E. Providence, 105 R.I. 357, 363, 252 A.2d 350 (1969) and Flynn v. Zoning Board of Review of City of Pawtucket, 77 R.I. 118, 73 A.2d 808 (1950).

changes, Mr. Galvin maintained that a slight encroachment on a view from hundreds of feet away would be outside of an injury to a property. Id.; Zoning Board R. Ex. 1-2. He argued that expanding standing to any person who could see the structure could not be the intent of the Code. (Tr. at 20.)[5]

Attorney Kurt Kalberer II spoke before the Zoning Board on behalf of Ms. Souza. Id. at 23. He argued, "to have standing, there had to be an injury and to have an injury there has to be a deprivation of a vested right . . . ." Id. at 24. In his view, because the Mosers do not have a vested right to the view, they do not have an injury or standing. Id. Additionally, Attorney Kalberer objected to photographs submitted as Exhibits 1 and 2 because they did not depict an accurate view of the Subject Property from the Plaintiffs' home. Id. Instead, he highlighted that the picture was a zoomed-in image, which he labeled as self-serving to the Mosers. Id. In response, Attorney Kalberer submitted a different picture as Exhibit 3, not zoomed in. Id. at 25; Zoning Board R. Ex. 3. Relying on the view in Exhibit 3, Attorney Kalberer insisted that any interference of the ocean view was de minimis and, therefore, was an insufficient injury to constitute Plaintiffs as aggrieved parties. (Tr. at 27.)

After all parties had an opportunity to be heard before the Zoning Board, a Board member moved to hold that Plaintiffs were not within the definition of aggrieved parties necessary to establish standing. Id. at 38. The Zoning Board members voted 3-2 in agreement that Plaintiffs lacked standing to appeal the determination of the Building Official. Id. at 47. Consequently, the Zoning Board dismissed their appeal. Id. at 48. In its July 29, 2014 written decision, the Zoning Board outlined who testified at the hearing, the exhibits entered into the

[5] Mr. Galvin also sought to argue that the appeal form submitted to the Zoning Board by Plaintiffs was deficient. (Tr. at 19.) However, the Zoning Board expressed their desire to decide the standing issue first, before addressing other arguments. Id. at 22.

record, and the standards used by the Zoning Board in reviewing the appeal. Next, the decision explained that "[t]he Board [members] . . . all having been in attendance during the entire proceedings and the reception of the evidence in consideration thereof, entertained a motion . . . to dismiss the [Plaintiffs'] appeal for lack of jurisdiction, on the grounds that the [Plaintiffs] failed to prove that they qualified as an aggrieved party under the Code." Five members of the Zoning Board voted on the motion; three members voted in favor of the motion, and two members voted against the motion. The instant appeal followed.

II

Standard of Review

This Court's review of a zoning board decision, governed by § 45-24-69(d), provides 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).

This Court "must examine the entire record to determine whether 'substantial' evidence exists to support the [zoning] 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)). The term "substantial evidence" is defined as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (internal citation omitted).

Additionally, all decisions and records of a zoning board must comply with the requirements of § 45-24-61. See § 45-24-68. Section 45-24-61 provides that a zoning board "shall include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote." The court may remand when the board has failed to resolve "the evidentiary conflicts, [make] the prerequisite factual determinations, [or] appl[y] the proper legal principles" or when "[t]he infirmities and deficiencies of the decision make judicial review impossible. . . ." May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239-40, 267 A.2d 400, 403 (1970).

III

Analysis

It is well settled that in order for this Court to engage in any meaningful analysis of the merits of any appeal from a zoning board decision, the decision itself must include findings of fact and conclusions of law. Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001); Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996); Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986); May-Day Realty Corp., 107 R.I. at 239, 267 A.2d at 403. This Court has the task of deciding:

> "whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles. Those findings must, of course, be factual rather than conclusional, and the application of the legal principles

> must be something more than the recital of a litany. These are minimal requirements. Unless they are satisfied, a judicial review of a board's work is impossible." Bernuth, 770 A.2d at 401 (quotations omitted).

Additionally, the Court will not search the record for supporting evidence, nor decide for itself what is proper in the circumstances when a zoning board fails to state findings of fact. Id. (quotation omitted).

The Zoning Board's decision, currently before this Court on appeal, fails to comply with § 45-24-61(a). The decision merely outlines that a motion was entertained "to dismiss the [Plaintiffs'] appeal for lack of jurisdiction on the grounds that the [Plaintiffs] failed to prove that they qualified as an aggrieved party under the Code." The decision explains that three members voted in favor of the motion and that two voted against the motion. However, the Zoning Board fails to make findings of fact to support its decision that it lacked jurisdiction. Instead, and once again, the Zoning Boards' decision falls short on satisfying the statutory requirements set in § 45-24-61(a).[6]

Consequently, this Court has no basis on which to consider whether there is substantial evidence in the record to support the Zoning Board's decision. Such deficiencies in the decision make this Court's review of the Zoning Board's decision impossible. Therefore, the matter must be remanded to the Zoning Board for findings of fact and conclusions of law. See Bernuth, 770 A.2d at 402; Irish P'ship, 518 A.2d at 358. On remand, the Zoning Board should make findings of fact and conclusions of law regarding whether Plaintiffs are aggrieved parties pursuant to § 14-10(b)(6) of the Code. The Zoning Board must be mindful that merely restating

[6] This Court recently remanded a decision to the Zoning Board, after it failed to make findings of fact and conclusions of law. See Dwelly v. Zoning Bd. of Review of the Town of Little Compton, No. 2014-0276, 2015 WL 1064602 (R.I. Super. Mar. 4, 2015).

the evidence and testimony presented during the Hearing falls short of making its own findings of fact and conclusions of law.

IV

Conclusion

After reviewing the entire record, this Court finds that the decision of the Zoning Board is in violation of statutory provisions. Accordingly, this Court remands this matter to the Zoning Board for further proceedings consistent with this Decision. This Court will retain jurisdiction over this matter.

Counsel shall submit an Order for entry consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Albin Moser and Eileen Moser, et al. v. Zoning Board of Review of the Town of Little Compton, et al.
CASE NO:	NC 2014-0322
COURT:	Newport County Superior Court
DATE DECISION FILED:	August 5, 2015
JUSTICE/MAGISTRATE:	Stone, J.
ATTORNEYS:	
For Plaintiff:	Albin S. Moser, Esq.
For Defendant:	Thomas M. Bergeron, Esq.; Richard S. Humphrey, Esq.; Kurt T. Kalberer II, Esq.