

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: August 31, 2015)

BAIRD PROPERTIES, LLC

:

v.

:

C.A. No. KC-2015-0313

:

:

TOWN OF COVENTRY, ZONING

:

BOARD OF APPEAL, ROBERT

:

CROWE, Member; DENISE

:

DEGRAIDE, Member; RUSSELL

:

LACAILLADE, Member; VIRGINIA A.

:

SOUCY, Member; JOHN J.

:

D'ONOFRIO, Member

:

:

DECISION

**RUBINE, J.** Baird Properties, LLC (Appellant) takes this appeal from a decision by the Zoning Board of Review of the Town of Coventry (the Zoning Board or Board) denying Appellant's appeal to the Board from two Notices of Violation issued by the Town of Coventry's (the Town) Zoning Official. This Court exercises its jurisdiction over this matter pursuant to G.L. 1956 § 45-24-69.

I

**Facts and Travel**

The Appellant is a Rhode Island limited liability company that owns a large building of self-storage units on property located in an industrial zone (the I-1 zone) in Coventry, Rhode Island. Appellant rented out the self-storage units to individual tenants, two of whom were growing medical marijuana as licensed caregivers inside of their rented storage units.

On November 24, 2014, Jacob Peabody, a zoning enforcement officer, issued two Notices of Violation with respect to the marijuana growing operations he found to be taking

place in the storage units at the Appellant's property.<sup>1</sup> The Notices of Violation alleged that tenants within Appellant's building were growing marijuana, and that agriculture and horticulture were prohibited activities in the I-1 zone. The Notices of Violation set a compliance date of December 1, 2014.

Appellant did not comply with the notices, but instead appealed the Notices of Violation to the Zoning Board. The Town was stayed from enforcing the terms of the violation notices while the appeal to the Zoning Board was pending in accordance with the automatic stay provisions of § 45-24-65. The hearing on Appellant's appeal to the Zoning Board took place in March 2015. At the hearing, the Appellant argued that growing medical marijuana constitutes the manufacture of pharmaceuticals, a permitted use in the I-1 zone. The Town acknowledged that pharmaceutical manufacture is permitted in the I-1 zone, but claimed that growing medical marijuana does not fall within the definition of manufacturing of pharmaceuticals.

In support of its argument, Appellant produced three witnesses: Jeffrey Frizzle of West Warwick, Rhode Island, who rents a storage unit at 21B Reservoir Road and holds two RI

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<sup>1</sup> At the time the zoning enforcement officer issued the Notices of Violation, the Coventry Zoning Ordinance did not include any provision relating specifically to growing medical marijuana. Upon discovery of the Appellant's marijuana, and after the issuance of the Notices of Violation, the Coventry Town Council amended its Zoning Ordinance to impose a moratorium on compassion centers. On April 13, 2015, the Town passed an amendment to the Coventry Zoning Ordinance clarifying that "marijuana cultivation" was permitted only for "personal medical use" by a "patient cardholder" in residential zones. Marijuana cultivation of any kind, for any reason, is now prohibited in industrial zones, including the I-1 zone where Appellant's property is located. However, this amendment was passed almost five months after the Notices of Violation were issued. Therefore, this Court will not consider the Town's recent amendment in connection with the outstanding notices of violation. See E. Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Barrington, 901 A.2d 1136, 1144 (R.I. 2006) (deciding to review the town's appeal from State Housing Appeals Board decision under the pre-amendment version of the Low and Moderate Income Housing Act, as amendments to the Act became effective after developer submitted its comprehensive permit application to the zoning board). This Court notes that there is nothing in the Coventry Zoning Ordinance which indicates that the amendment was meant to be applied retroactively. See id. ("For this Court to interpret a statute as retroactive, the General Assembly must make a clear expression of retroactive application.").

Department of Health caregiver licenses; Edward Moulton of Warwick, Rhode Island, who rents a storage unit at 31D Reservoir Road and also holds a caregiver license; and an expert witness, Leo Blais, resident of Coventry, Rhode Island, a former State Senator and pharmacist. The tenants testified that they were growing marijuana as authorized by the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, G.L. 1956 § 21-28.6-1, *et seq.*, which provides that the Department of Health may issue documents authorizing “caregivers” to cultivate marijuana plants in order to supply medical marijuana to authorized users. Each of the tenants testified that they had twenty-four marijuana plants each,<sup>2</sup> as is allowed by § 21-28.6-4.<sup>3</sup> Moreover, one of the tenants, Mr. Moulton, testified about the growing process:

“MS. IZZO: You testified and did you say you had plants in flower and infant, is that the word you used?

“MR. MOULTON: Infant or in veg. Baby plants.

“MS. IZZO: Do you start with seeds?

“MR. MOULTON: Yes.

“MS. IZZO: What do you do with those seeds?

“MR. MOULTON: Put them in the soil and let them grow.

“MS. IZZO: You use actual soil, it is not a hydroponic system?

“MR. MOULTON: No, it is soil.

“MS. IZZO: Dirt?

“MR. MOULTON: Yes

“MS. IZZO: Do you use fertilizer?

“MR. MOULTON: All mixed in with it.

“MS. IZZO: And you water?

“MR. MOULTON: Yes.

“MS. IZZO: So, this is a plant growing operation?

“MR. MOULTON: Exactly, yes.

“MS. IZZO: Also known as horticulture?

“MR. MOULTON: I don’t know. I believe so. I don’t know.” Tr. at 32-33.

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<sup>2</sup> Twelve of each of the tenant’s plants are in the seedling stage and twelve are in the mature stage. Tr. at 7, 29.

<sup>3</sup> A licensed primary caregiver, other than a compassion center, is allowed twelve mature plants per patient with a maximum of twenty-four mature plants, and twelve seedlings, regardless of patients a caregiver might have. See § 21-28.6-4.

At the hearing, Mr. Blais presented evidence in an attempt to demonstrate that the cultivation of medical marijuana constitutes the manufacture of pharmaceuticals. Mr. Blais' testimony reflects his opinion that growing medical marijuana should be considered "manufacturing of pharmaceuticals" under the Coventry Zoning Ordinance based on the language of the Hawkins-Slater Act and the Controlled Substances Act. See §§ 21-28.6-4; 21-28-4.01. However, when asked by the Zoning Board, Mr. Blais also testified that medical marijuana does not fall under Rhode Island's Pharmacy Act. See G.L. 1956 § 5-19.1-1, *et seq.* The Zoning Board presented Mr. Peabody to testify as to the issuance of the Notices of Violation. Mr. Peabody testified that he determined that the tenant's activity was not manufacturing for the purposes of zoning because it was "not combining multiple materials to make a new object that is not found in nature, which is normally what we consider manufacturing."<sup>4</sup> Thus, Mr. Peabody concluded that this was a horticultural use not permitted in the I-1 Zone.

On April 2, 2015, the Zoning Board issued two decisions denying Appellant's appeal.<sup>5</sup>

The Zoning Board made the following findings of fact in each decision:

- "1. The subject property is located at 21B<sup>6</sup> Reservoir Road, and is a multi-unit storage facility.
- "2. The property is located in an I1 Industrial zone.
- "3. Use of the unit is exclusively devoted to the growing of marijuana which began approximately in April of 2014.
- "4. In June or July of 2014, police and fire officials responded to an alarm at the premises.

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<sup>4</sup> Black's Law Dictionary (7<sup>th</sup> edition) defines manufacture as "[a] thing that is made or built by a human being (or by a machine), as distinguished from something that is the product of nature."

<sup>5</sup> The Zoning Board issued two decisions, one to each tenant. Apart from the identifying information belonging to each tenant, the decisions mirrored each other. The findings of fact and conclusions of law are entirely identical.

<sup>6</sup> The 21B address appears in the findings of fact in both decisions. It appears that including 21B twice was simply an oversight by the Zoning Board and that the Board had intended to switch out the 21B address for the 31D address in the decision being issued to the tenant at 31D Reservoir Road.

“5. Subsequently in November of 2014, the Zoning Enforcement Officer became aware that the unit was being used to grow marijuana.

“6. After investigation, the Zoning Enforcement Officer issued a notice of violation on November 24, 2014.

“7. Neither the Appellant nor the owner filed a request for a zoning certificate prior to commencing the activity complained of.

“8. There was not enough information presented at the hearing to enable the Board to find that the use constituted pharmaceutical manufacturing for the purposes of zoning.” (Zoning Board of Review of the Town of Coventry, Decision for 31 and 21B Reservoir Road)

The Board also made the following conclusions of law:

“1. The Zoning Officer’s determination that the use constitutes a horticultural activity is correct, and hence the activity is not a permitted use in this particular zone.

“2. It was incumbent upon the Applicant or owner to obtain a Zoning Certificate from the Zoning Official before commencing this activity.

“The Zoning Board of Review, accordingly, upholds the Zoning Enforcement Officer’s issuance of the violation notice on November 24, 2014.” Id.

The Appellant subsequently filed the instant appeal to this Court.

## II

### Standard of Review

Pursuant to § 45-24-69, this Court possesses jurisdiction of appeals from a zoning board.

Section 45-24-69(d) provides:

“(d) 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.”

When reviewing a zoning board decision, this Court “lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level.” Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986). The Court cannot substitute its judgment for that of the zoning board and must uphold a decision that is supported by substantial evidence contained in the record. Hein v. Town of Foster Zoning Bd. of Review, 632 A.2d 643, 646 (R.I. 1993). “[W]hen reviewing the action of a zoning board of review, [this Court] ‘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 . . . 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.’” 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)). Indeed, “this test is not satisfied by any evidence but only by that which [the court] determine[s], from [its] review of the record, has probative force due to its competency and legality.” Salve Regina, 594 A.2d at 880 (citing Thomson Methodist Church v. Zoning Bd. of Review of Pawtucket, 99 R.I. 675, 681, 210 A.2d 138, 142 (1965)). Finally, this Court gives deference to the Zoning Board as “a zoning board of

review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance,” Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962).

### III

#### Analysis

On appeal, the Appellant presents three arguments. First, the Appellant argues that by addressing and basing its decision, in part, on Appellant’s failure to obtain a “Zoning Certificate,” the Board went beyond the four corners of the Notices of Violation in direct violation of the Coventry Zoning Ordinance and Appellant’s due process rights. In other words, the Appellant questions the authority of the Zoning Board to uphold the Zoning Official’s decision on a ground not contained in the actual Notices of Violation.<sup>7</sup> Second, the Appellant argues that the Board misapplied the Coventry Zoning Ordinance in rejecting Appellant’s contention that growing medical marijuana constitutes the manufacture of a pharmaceutical. Finally, Appellant argues that to the extent that the Coventry Zoning Ordinance prohibits the growing of medical marijuana inside a building in an industrial zone, it runs afoul of the Right to Farm Act, G.L. 1956 § 2-23-1, *et seq.*, and Appellant’s rights as guaranteed by the Rhode Island Constitution, Declaration of Rights, art. I, sec. 17.

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<sup>7</sup> There is no reference in either of the Notices of Violation that the violation was premised upon a determination that the landowner acted contrary to the Coventry Zoning Ordinance by allowing the use of his property for growing medical marijuana without first obtaining a Zoning Certificate.

## A

### Issue of Insufficient Notice

Appellant argues that it was not given sufficient notice of an alleged violation of the Coventry Zoning Ordinance, which the Zoning Board eventually found to be the basis of a zoning violation. That is, the Appellant maintains, the Zoning Board upheld the issuance of the Notices of Violation at least in part because the Appellant and/or tenant failed to obtain a Zoning Certificate from the Zoning Official before growing medical marijuana. However, the Appellant avers, the Notices of Violation never specified that the Appellant and/or tenants were committing a violation by not having obtained such a Zoning Certificate. Nevertheless, the Zoning Board explicitly found in its findings that “[n]either the Appellant nor the owner filed a request for a zoning certificate prior to commencing the activity complained of.” (Zoning Board of Review of the Town of Coventry, Decision for 31 and 21B Reservoir Road). Moreover, in its conclusions of law the Board stated:

“1. The Zoning Officer’s determination that the use constitutes a horticultural activity is correct, and hence the activity is not a permitted use in this particular zone.

**“2. It was incumbent upon the Applicant or owner to obtain a Zoning Certificate from the Zoning Official before commencing this activity.**

“The Zoning Board of Review, accordingly, upholds the Zoning Enforcement Officer’s issuance of the violation notice on November 24, 2014.” Id. (emphasis added).

The Appellant argues that in so finding, the Board made a determination of a zoning violation that was not contained in the Notices of Violation, in violation of the Zoning Ordinance as well as Appellant’s due process rights. According to the Appellant, the Board cannot uphold the Zoning Official’s action on the basis of a perceived violation not contained in the Notices of Violation.

On appeal, the Board argues that it was not required to send Appellant notice of its violation pertaining to Appellant's lack of Zoning Certificate as "[i]gnorance of the law is no excuse." See generally Kenyon v. United Elec. Rys. Co., 51 R.I. 90, 151 A. 5, 8 (1930). The Coventry Zoning Ordinance permits self-storage facilities in the I-1 zone; however, changing the use from "self-storage" to "cultivation of marijuana" or any crop for that matter requires a Zoning Certificate. (Article 3, Administration and Enforcement, § 322) ("Any change of use or tenant in a commercial or industrial building structure or land shall require the issuance of a Zoning Certificate"). As it is undisputed that neither the Appellant nor his tenants obtained Zoning Certificates for agricultural cultivation, the Board concluded that the landowner acted in violation of the Coventry Zoning Ordinance, even though the Zoning Official never cited the absence of a Zoning Certificate as the basis for a violation.

The Zoning Board's argument that Appellant was merely ignorant of the law is misplaced. Whether Appellant actually committed a violation for failure to obtain a Zoning Certificate is not relevant to whether they received *notice* of such a violation. Coventry's Zoning Ordinance explicitly states:

"Upon finding that any of the provisions of this Ordinance are being violated, the Building Inspector or Zoning Enforcement Officer **shall notify in writing** the person responsible for such violation(s), **indicating the nature of the violations, and ordering the action necessary to correct it.**" (Art. 3, § 3104) (emphasis added).

In this case, each of the Notices of Violation states:

"Issues:

"(1) Use taking place on the property that is not specifically listed in the Coventry Zoning Ordinance.

"(2) Horticultural Nursery in I1 Zoning District.

“Specific Code:

“(1) Coventry Zoning Ordinance Article 6 Section 602

“(2) Coventry Zoning Ordinance Article 6 Section 603

Table 6-1 B. Agricultural: line 02

“Compliance Date: December 1, 2014

“It has come to this office’s attention that [unit D of 31/units I, F & H of 21] Reservoir Road [is/are] currently being utilized to grow Marijuana. This use is not specifically listed in the Coventry Zoning Ordinance and furthermore Horticultural Nurseries of any sort regardless of what is being grown is not permitted in the II zoning in which this property is located.” (Notices of Violation.)

A review of the Notices of Violation reveals no reference to Appellant’s lack of Zoning Certificate, nor does it reference Article 3, Sections 320-322, the sections of the Coventry Zoning Ordinance addressing the Zoning Certificate requirements. Moreover, Mr. Peabody conceded at the Board hearing that the Notices of Violation in this case made no reference to the lack of Zoning Certificates as the basis for the violation even though he would typically issue a Notice of Violation if a property owner had failed to obtain a Zoning Certificate. Tr. 74-76

Accordingly, this Court finds that the Board acted in violation of Article 3, Section 3104 of the Coventry Zoning Ordinance by addressing this issue when the Appellant received no notice that the issue would be addressed or form a basis for the Zoning Board to uphold the violation as determined by the Zoning Official. This Court finds that the Zoning Board’s decision was in violation of Coventry Zoning Ordinance provisions, and deprived Appellant of any opportunity to cure as is provided under Article 3, Section 3104 of the Coventry Zoning Ordinance. See § 45-24-69(d)(2). Therefore, the Zoning Board’s conclusion of law that “[i]t was incumbent upon the Applicant or owner to obtain a Zoning Certificate from the Zoning Official before commencing this activity” may not form the basis for upholding the Notices of Violation. See id. The Zoning Board, however, did not solely base its decision upon the finding

that the Appellant lacked a Zoning Certificate. The Board also concluded that “[t]he Zoning Officer’s determination that the use constitutes a horticultural activity is correct, and hence the activity is not a permitted use in this particular zone.” This violation is governed by Article 6, Section 602 of the Coventry Zoning Ordinance. Violating Article 6, Section 602 is independently sufficient to merit the upholding of the Notices of Violations in this case. (See Coventry Zoning Ordinance Art. 3, §§ 3101 & 3104; Coventry Zoning Ordinance Art. 6, § 602). Moreover, the Appellant certainly was given proper notice of alleged violations under Article 6, Section 602. Therefore, the Board’s invalid finding relating to the absence of Zoning Certificates was error; however, the error was harmless error, as it did not prejudice substantial rights of the Appellant. As such, this Court cannot overturn the Board’s decision on these grounds alone. See Carlisle Packing Co. v. Sandanger, 259 U.S. 255, 259, 42 S. Ct. 475, 477, 66 L. Ed. 927 (1922) (“[M]ere error, without more, is not enough to upset the judgment, if the record discloses that no injury could have resulted therefrom.”)

## **B**

### **Medical Marijuana and Manufacturing Pharmaceuticals**

The Appellant argues that the Zoning Board erred in failing to consider growing medical marijuana as manufacturing pharmaceuticals within the meaning of the Coventry Zoning Ordinance. Because manufacturing pharmaceuticals is a permitted use of property in the I-1 zone, Appellant argues that the Notices of Violation should not have been upheld. (Coventry Zoning Ordinance Art. 6, Table C Industry (3) Industrial Manufacturing Use-07, at 6-9). Alternatively, the Zoning Board contends that the Appellant’s tenants were not manufacturing pharmaceuticals, but were operating a horticultural nursery, which was expressly prohibited by the Coventry Zoning Ordinance. (Coventry Zoning Ordinance Art. 6, Table B Agricultural Use-02, at 6-5).

The question before this Court is whether the Zoning Board was correct in finding that the Appellant's activity was prohibited horticulture rather than permitted manufacturing of pharmaceuticals. To answer this question, this Court must interpret the language of the Coventry Zoning Ordinance. See Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981). It is well settled that "the rules of statutory construction apply equally to the construction of an ordinance." Id. "Interpretation of zoning ordinances is a question of law to be reviewed by the Superior Court *de novo*." Decaporable v. The Zoning Bd. of Review of Narragansett, WC-2008-934, 2011 WL 486091, \*5 (R.I. Super. Feb. 7, 2011) (Lanphear, J.) (citing Cohen v. Duncan, 970 A.2d 550, 562 (R.I. 2000)). When interpreting the language of an ordinance that is unclear and ambiguous, the Court must establish and effectuate the legislative intent behind the enactment. Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008). Moreover, "when the provisions of [an ordinance] are unclear or subject to more than one reasonable interpretation, the construction given by the agency, or board, charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized." Id. at 859-60. "This is true even when other reasonable constructions of the statute are possible." Id. at 860.

In upholding the Notices of Violation, the Zoning Board held that Appellant's tenants were not manufacturing pharmaceuticals, as only a licensed pharmacist may manufacture pharmaceuticals in Rhode Island pursuant to § 5-19.1-8(a). The Appellant argued that the Zoning Board misinterpreted the law and that it erred in finding that the testimony and evidence

presented by its expert witness, Mr. Blais, was insufficient to form a finding that growing medical marijuana constituted manufacturing a pharmaceutical.<sup>8</sup>

Mr. Blais testified that, in his opinion, marijuana is a pharmaceutical and that the only license required to propagate and cultivate medical marijuana is the caregiver's card. Tr. at 43-44. In support of his opinion, Mr. Blais pointed to the fact that within the Hawkins-Slater Act, "medical use" of marijuana is defined to include its manufacture:

"(7) 'Medical use' means the acquisition, possession, cultivation, **manufacture**, use, delivery, transfer, or transportation of marijuana or paraphernalia relating to the consumption of marijuana to alleviate a patient cardholder's debilitating medical condition or symptoms associated with the medical condition." Sec. 21-28.6-3(7) (emphasis added).<sup>9</sup>

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<sup>8</sup> The Zoning Board accepted Mr. Blais as an expert. Nevertheless, "there is no talismanic significance to expert testimony. It may be accepted or rejected by the trier of fact." Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998). Moreover, the Court does not believe that questions of statutory interpretation are the proper subject of expert testimony. See Benjamin J. Vernia, Admissibility of Expert Testimony Regarding Questions of Domestic Law, 66 A.L.R.5th 135 (Originally published in 1999) ("Although the modern view of expert testimony suggests that it should be available to elucidate a wide variety of questions, courts traditionally have restricted the use of expert testimony to factual, as opposed to legal, questions. Courts have historically refused to admit testimony explaining matters of domestic law, including statutory and regulatory law, as well as the interpretation of contracts and insurance policies.") Statutory interpretation is a question of law for the Court. See Cohen, 970 A.2d at 562.

<sup>9</sup> Mr. Blais also testified about the Taxation of Marijuana and Controlled Substances Act, a tax imposed on marijuana which Mr. Blais said "gave the prosecutors an additional tool for enforcement purposes, people dealing with and selling non-medical marijuana. . . . [prosecutors could] get [marijuana dealers or possessors] for tax evasion if [they] didn't pay the tax to the state for the illegal marijuana." Tr. at 39-40. In that statute, there is an exemption for medical marijuana which reads: "Pharmaceuticals. Nothing in this chapter shall require persons lawfully in possession of marijuana or a controlled substance to pay the tax required under this chapter." G.L. 1956 § 44-49-7. Appellant argues that this statute adds additional support to Mr. Blais' opinion that growing medical marijuana is the manufacture of pharmaceuticals. However, after reviewing the purpose of this statute, this Court concludes that this statute only adds as much support as the Hawkins-Slater Act does. Both are exceptions to punishments for possessing or dealing marijuana and neither deals with the pharmacy industry.

However, during questioning by the Zoning Board, Mr. Blais also testified that the Hawkins-Slater Act did not allow pharmacists to dispense marijuana because to include them would jeopardize their controlled substance registrations because possession and use of marijuana is still a federal crime. Tr. at 44, 46. When delivering its decision regarding the Notices of Violation, the Board reflected on Mr. Blais' testimony:

“Mr. Blais testified that he was extensively involved in the legislation that eventually become [sic] known as the Medical Marijuana Act. He also testified that he previously held a pharmacist's license and that he was familiar and had previous experience with pharmaceuticals in his line of work. Mr. Blais' testimony was accepted as that of an expert.” See note 9, supra.

“Mr. Blais opined that marijuana is a pharmaceutical and that the growing of marijuana is ‘manufacturing’ as defined by §21-28-6.02, (Sec. 27), ‘The Controlled Substances Act’; however he also testified that the Pharmacy Act did not apply here”

“The Board notes that this definition appears in the controlled substances Act, a criminal statute, and that ‘manufacturing’ is not defined in the Coventry Zoning Ordinance.” (Zoning Board of Review of the Town of Coventry, Decision for 31 and 21B Reservoir Road).

After hearing the testimony of Mr. Blais, the Board ultimately found that licensed pharmacists under § 5-19.1-8(a) are separate and distinct from caregivers authorized to grow marijuana under the Hawkins-Slater Act (§ 21-28.6-3(7)). In Rhode Island, a licensed pharmacist cannot be a caregiver, and a caregiver need not be a licensed pharmacist. In its argument to this Court, the Board reasoned that the Hawkins-Slater Act allows caregivers to cultivate medical marijuana as an exception to the Controlled Substances Act (§ 21-28-4.01). However, as the Board stated, an exception to the Criminal Controlled Substance Act does not mean that Coventry's Zoning Ordinance allows marijuana growing as a form of pharmaceutical manufacturing. The Board held that only § 5-19.1-8(a) allows the commercial manufacturing of pharmaceuticals in the I-1

zone. Because the tenants testified at the hearing that they hold caregiver licenses and are not licensed to manufacture pharmaceuticals, the Board upheld the Notices of Violation. Tr. at 31-32; Tr. at 57-59.

The definition of “manufacture of pharmaceuticals” under the Coventry Zoning Ordinance was clearly subject to more than one reasonable interpretation. Therefore, this Court grants deference to the Coventry Zoning Board’s interpretation. See Pawtucket Transfer Operations, 944 A.2d at 859-60. The Zoning Board used its specialized knowledge and experience to determine the intentions behind Coventry’s Zoning Ordinance and to conclude that only licensed pharmacists may manufacture pharmaceuticals as defined by the Coventry Zoning Ordinance. The Board found that the Appellant’s tenants were not manufacturing pharmaceuticals and were exercising horticultural activity, and horticulture is clearly prohibited in the I-1 zone. This Court grants the Board that deference. Monforte, 93 R.I. at 449, 176 A.2d at 728. While affording weight to the Zoning Board’s interpretation, this Court also finds that “manufacture of pharmaceuticals” as defined by the Coventry Zoning Ordinance did not include the activity of growing medical marijuana. (See Coventry Zoning Ordinance Art. 6, § 602; Art. 6, Table B Agricultural Use-02, at 6-5; Art. 6, Table C Industry (3) Industrial Manufacturing Use-07, at 6-9). This Court finds that growing medical marijuana was a horticulture exercise, made legal in certain circumstances by the Hawkins-Slater Act (§ 21-28.6-3(7)). This Court finds that the Hawkins-Slater Act did not automatically convert medical marijuana into a pharmaceutical as defined by the Coventry Zoning Ordinance. Moreover, this Court finds that the tenants were not licensed to commercially manufacture pharmaceuticals pursuant to § 5-19.1-8(a). Accordingly, this Court finds the Board correctly interpreted the Coventry Zoning

Ordinance; this Court declines to find that the Board erred upholding the Notices of Violation on this basis. See § 45-24-69(d).

## C

### **Right to Farm Act**

The Appellant argues that the Zoning Board's actions are in violation of the Rhode Island Right to Farm Act, § 2-23-1, *et seq.* and the Rhode Island Constitution's guarantee of preservation of land and natural resources. R.I. Const. art. I, § 17. The Zoning Board contends that the Right to Farm Act and R.I. Const. art. I, § 17 do not apply to Appellant's actions.

Article I, § 17 of the Rhode Island Constitution is titled "Fishery rights—Shore privileges—Preservation of natural resources." It reads:

"The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore, to which they have been heretofore entitled under the charter and usages of this state, including but not limited to fishing from the shore, the gathering of seaweed, leaving the shore to swim in the sea and passage along the shore; and they shall be secure in their rights to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values; and it shall be the duty of the general assembly to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of **the natural resources** of the state and for the preservation, regeneration and restoration **of the natural environment of the state.**" R.I. Const. art. I, § 17. (emphasis added).

This constitutional provision has been overwhelmingly interpreted as a protection on an individual's water-related rights.<sup>10</sup> In fact, the provision was first ratified into the Rhode Island Constitution in 1842, and it incorporated the rights of fishery from the Royal Charter. See Riley v. R.I. Dep't of Env'tl. Mgmt., 941 A.2d 198, 208 (R.I. 2008). It was not until the amendment of 1970 that a duty was imposed on the General Assembly to preserve, regenerate, and conserve through resource planning. Id. Our Supreme Court has interpreted the 1970 amendment to mean that the public's right of *fishery*, under R.I. Const. art. 1, § 17, is qualified by the duty of the General Assembly to preserve, regenerate, and conserve through resource planning. Id. at 208-09.

The Rhode Island Right to Farm Act protects traditional agricultural lands from nuisance actions that result from the encroachment of developments. “The Right to Farm Act represents a legislative determination that the state’s remaining agrarian land should be preserved and protected to the extent possible, to remain in farming and be ‘safeguarded against nuisance actions arising out of conflicts between agricultural operations and urban land uses.’” Town of

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<sup>10</sup> See generally Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1259 (R.I. 1999) (“Under the public-trust doctrine, ‘the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public.’ . . . The state’s authority over that land is limited by article 1, section 17, of the Rhode Island Constitution, which provides that the people shall continue to enjoy ‘the privileges of the shore,’ including the right to fish, to swim, and to pass along the shore.”) (internal citations omitted); State v. Ibbison, 448 A.2d 728, 732 (R.I. 1982) (holding that for the purposes of the privileges guaranteed to the people of Rhode Island by R.I. Const. art. 1, § 17, the mean-high-tide line is the landward boundary of the shore); Op. to the Senate, 87 R.I. 37, 38, 137 A.2d 525, 525-26 (1958) (interpreting R.I. Const. art. 1, § 17 and finding “[t]he constitution gives the benefits of fishery to all the people in equal measure. This court has recognized that the constitutional guarantee of a continuation of free fishery is for the benefit of all the people and gives no peculiar rights to those resorting to it for commercial purposes.”); Jackvony v. Powel, 67 R.I. 218, 21 A.2d 554, 558 (1941) (holding that at time of adoption of R.I. Const. art. I, § 17, providing that people should continue to enjoy and freely exercise rights of fishery and “privileges of the shore,” one “privilege of the shore” was a public right of passage along the shore).

N. Kingstown v. Albert, 767 A.2d 659, 665 (R.I. 2001); see also Harrison M. Pittman, Validity, Construction, and Application of Right-to-Farm Acts, 8 A.L.R.6th 465 (2005) (“[Right to Farm] Acts are primarily intended to protect agricultural producers from nuisance actions that result from the encroachment of residential developments onto traditionally agricultural lands.”).

A section of the Right to Farm Act titled “Legislative Findings” states:

“The general assembly finds:

“(1) That agricultural operations are valuable to the state’s economy and the general welfare of the state’s people;

“(2) That agricultural operations are adversely affected by the random encroachment of urban land uses throughout **rural areas** of the state;

“(3) That, as one result of this random encroachment, conflicts have arisen between **traditional agricultural land** uses and urban land uses; and

“(4) That conflicts between agricultural and urban land uses threaten to force the abandonment of agricultural operations and the conversion of agricultural resources to non-agricultural land uses, whereby these resources are permanently lost to the economy and the human and physical environments of the state.” Sec. 2-23-2 (emphasis added).

This Court does not find that the Zoning Board’s decision violates the Rhode Island Constitution or the Rhode Island Right to Farm Act. The Appellant has not pointed to—nor has this Court been able to otherwise find—a single authority which would allow this Court to interpret either of these provisions as applying to and protecting Appellant’s activities. The Appellant has failed to demonstrate how growing plants in a warehouse has any implication on the agricultural use of the land. In this Court’s opinion, the right to grow plants inside a storage unit is simply not a use of Rhode Island’s “natural resources” as protected by R.I. Const. art. I, § 17 nor is it a “traditional agricultural land use” as protected by § 2-23-1, *et seq.* See Harvard Pilgrim Health Care of New England, Inc. v. Gelati, 865 A.2d 1028, 1037 (R.I. 2004) (“When

the language of a statute is clear and unambiguous, [this Court] must enforce the statute as written by giving the words of the statute their plain and ordinary meaning.”).

#### **IV**

#### **Conclusion**

After a review of the entire record, this Court finds that the Zoning Board’s decision to uphold the Notices of Violation on the basis that Appellant’s tenants’ uses constituted a horticultural activity and was not permitted where the property was located was not in violation of statutory and ordinance provisions, was not affected by error of law, and was not characterized by an abuse of discretion. The Zoning Board’s failure to specifically inform Appellant that it needed to obtain a Zoning Certificate pursuant to the Coventry Zoning Ordinance and the finding that one was required did not substantially prejudice the due process rights of the Appellant. Substantial rights of the Appellant have not been prejudiced. Accordingly, this Court affirms the Zoning Board’s decision.

Counsel shall submit an appropriate order for entry consistent with this decision.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** **Baird Properties, LLC v. Town of Coventry, et al.**

**CASE NO:** **KC-2015-0313**

**COURT:** **Kent County Superior Court**

**DATE DECISION FILED:** **August 31, 2015**

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

**ATTORNEYS:**

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