



## I

### Facts and Travel

In 2013, Mr. Freij bought the property located at 144 Roffee Street in Barrington, Rhode Island (the Property). The Property contains approximately 7400 square feet of land. Originally, the Property consisted of two separate lots, each of approximately 3700 square feet of land, with a common rear border. In 1986, the lots merged by operation of law when the Town amended its Zoning Ordinance and adopted a merger provision, § 185-26.<sup>1</sup> The current merged Property contains a single-family residence and fronts on two streets, Whipple Avenue and Roffee Street. Because the Property fronts on two different streets and is not a corner lot, the Property is designated as a “through lot” under the Zoning Ordinance.

On or about May 30, 2013, Mr. Freij applied to the Board for a special use permit to unmerge the Property (2013 Application) and thereby create two lots of approximately 3700 square feet each. Appellant’s Ex. 1, at 1. Mr. Freij proposed building a new single-family residence on the lot fronting Whipple Avenue and retaining the original single-family residence on the lot fronting Roffee Street. Id. The Board denied the 2013 Application in a four-to-one vote. Id. at 4. In making its decision, the Board noted that the proposed Whipple Avenue lot house, as well as the existing Roffee Street house, met all the variance and setback requirements of the Zoning Ordinance. Id. However, the Board also determined that both of the proposed lots

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<sup>1</sup> Section 185-26 provides in pertinent part,

“Where land adjacent to a substandard original lot is owned by the owner of said substandard original lot or his or its affiliate, the exemption of § 185-25 shall not apply, and said substandard original lot shall be combined with said adjacent land to establish a lot or parcel having at least the required minimum dimensions and area set forth in Article VI for the applicable district.”

were located in the R-10 zoning district, which requires a minimum lot area of 10,000 square feet. Id. at 3. Thus, the Board found that unmerging the lots would create two substandard lots.

Further, the Board concluded that the unmerged lots did not meet the standard under § 185-29 of the Zoning Ordinance which requires that unmerged substandard lots are “generally in conformance with size of developed lots in the immediate vicinity.” Id. at 4. The minutes of the appeal hearing reflect that only fourteen percent of the properties in the area comply with the R-10 requirements. Id. at 3. However, the average lot size of properties in the area was 7400 square feet. Id. Therefore, the Board found that the proposed unmerged lots of 3700 square feet did not conform to the size of developed lots in the area. Id. Additionally, the Board did not feel that the unmerged lots were in accordance with the Comprehensive Plan because Mr. Freij’s proposal “would not advance the objective of creating more affordable housing in accordance with [Rhode Island] law.” Id. at 4. Lastly, the Board found that unmerging the Property increased the density of the neighborhood and did not satisfy the requirements of § 185-73<sup>2</sup> of the Zoning Ordinance. Id.

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<sup>2</sup> Section 185-73 of the Zoning Ordinance provides,

“A use requiring a special use permit in Article IV and elsewhere in this chapter may be permitted by the Zoning Board of Review following a public hearing only if, in the opinion of the Board, such proposed use and its location on the site meets each of the following requirements:

“A. The public convenience and welfare will be substantially served.

“B. It will be in harmony with the general purpose of this chapter, and with the Comprehensive Community Plan.

“C. It will not result in or create conditions that will be inimical to the public health, safety, morals and general welfare of the community.

On December 19, 2014, Freij once again filed an application for a special use permit seeking to unmerge the Property and create two 3700 square feet lots (2014 Application).<sup>3</sup> On February 19, 2015, the Board held a public hearing on Mr. Freij's 2014 Application. During the hearing, counsel for Mr. Freij argued that his 2014 Application differed from his 2013 Application. Appellant's Ex. 2, at 3. He contended that Mr. Freij intended to deed restrict the existing single-family residence on the proposed Roffee Street lot as affordable housing, which would contribute to Barrington's affordable housing goals. Id. Further, counsel for Mr. Freij contended that the original merger created a through lot and was void because the subdivision regulations prohibit the creation of through lots. Id.

The Board denied Mr. Freij's 2014 Application. The Board found that Mr. Freij had satisfied the general standards necessary to receive a special use permit under § 185-73 of the Zoning Ordinance. Id. However, the Board ultimately determined that "the standard in § 185-29 ha[d] not been met in that the lots, as unmerged, [would] not be of a size generally in conformance with the size of developed lots in the immediate vicinity." Id. at 4. Mr. Freij now appeals to this Court, requesting reversal of the Board's decision. Mr. Freij also seeks a declaration under the Uniform Declaratory Judgments Act that the original 1986 merger was void because it created a through lot.

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"D. It will not substantially or permanently injure the appropriate use of the property in the surrounding area or district."

<sup>3</sup> Attached to the application were the following documents: (1) a printout showing the subject parcel from above; (2) a Tax Assessor's Map depicting the subject parcel and the surrounding lots as they were in 1980; (3) a Tax Assessor's map depicting the subject parcel and the surrounding lots as they currently are; (4) a printout containing the text of Section 185-29 of the Barrington Zoning Ordinance; (5) a Proposed House Plan for the subject parcel; (6) a list of property owners whose property is within 200 feet of the subject parcel; and (7) a 200' radius map. See Application for Special Use Permit.

## II

### Standard of Review

The Superior Court's review of a zoning board's decision is governed by chapter 24 of title 45 of the Rhode Island General Laws. See Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 (R.I. 2003). Section 45-24-69(d) provides:

“The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:

“(1) In violation of constitutional, statutory, or ordinance provisions;

“(2) In excess of the authority granted to the zoning board of review by statute or ordinance;

“(3) Made upon unlawful procedure;

“(4) Affected by other error of law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

On review of a zoning board decision, “[t]his Court does not weigh the evidence.” Lischio, 818 A.2d at 690 (quoting OK Props. v. Zoning Bd. of Review of Warwick, 601 A.2d 953, 955 (R.I. 1992)). Rather, the Court “is limited to a search of the record to determine if there is any competent evidence upon which the agency’s decision rests.” E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977). Legally competent or substantial evidence is “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.” Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981). In conducting its review of a zoning board’s decision, the trial justice “may not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.” Curran v. Church Cmty. Housing Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d) (internal quotation marks omitted). A zoning board’s factual determinations should be reversed only “when they are totally devoid of competent evidentiary support in the record.” Milardo v. Coastal Res. Mgmt. Council of R.I., 434 A.2d 266, 272 (R.I. 1981).

### **III**

#### **Analysis**

#### **A**

#### **Res Judicata**

As a threshold matter, the Board argues that the 2014 Application was identical to the 2013 Application and that its decision denying Mr. Freij’s 2013 Application was a final decision. Therefore, the Board contends that the doctrine of res judicata bars Mr. Freij’s claims regarding the 2014 Application.

The doctrine of res judicata “precludes the relitigation of all the issues that were tried or might have been tried in [an] original suit.” E.W. Audet & Sons, Inc., v. Fireman’s Fund Ins. Co. of Newark, N.J., 635 A.2d 1181, 1186 (R.I. 1994). A Court will apply res judicata when there is “(1) identity of parties, (2) identity of issues, and (3) finality of judgment in an earlier action.” Id. The doctrine of res judicata has been applied in the context of zoning board decisions. See Town of Richmond v. Wawaloam Reservation, Inc., 850 A.2d 924, 933 (R.I. 2004). However, the Rhode Island Supreme Court has also cautioned that “a strict rule of res

adjudicata in zoning matters could have unfortunate consequences such as denying a landowner once refused relief the right to a reconsideration of an application based upon intervening circumstances . . .” Marks v. Zoning Bd. of Review of Providence, 98 R.I. 405, 406, 203 A.2d 761, 763 (1964). Therefore, “a zoning decision should be given preclusive effect in later proceedings only if the issues in both proceedings were identical.” Town of Richmond, 850 A.2d at 933 n.3.

Mr. Freij is asking for the same relief in his 2014 Application as he did in his 2013 Application. However, the issues in both proceedings are not identical. In denying the 2013 Application, the Board found that unmerging the Property to create additional housing would not “advance the objective of creating more ‘affordable housing’ in accordance with RI law.” Appellant’s Ex. 1, at 4. When Mr. Freij presented his 2014 Application to the Board, he argued that it differed from his 2013 Application because it proposed turning the existing single-family residence on Roffee Street into affordable housing. Appellant’s Ex. 2, at 3. Further, the Board never asserted that Mr. Freij could not submit the 2014 Application or that it was identical to the 2013 Application. See id. Rather, the Board held a hearing and voted on the 2014 Application. See id. Thus, because the issues in the 2013 and 2014 Applications were not identical, res judicata does not apply in this case. See Town of Richmond, 850 A.2d at 933 n.3.

## **B**

### **Denial of Special Use Permit Based on Sufficient Evidence**

Mr. Freij argues that the Board’s decision denying the 2014 Application was not supported by substantial evidence. Mr. Freij points to the existence of three 3700 square foot lots within 400 feet of his Property as evidence that his unmerged property would be generally in conformance with lots in the immediate vicinity. He also argues that his plan designating the

Roffee Street house as affordable housing is in conformance with the Comprehensive Plan, which calls for affordable housing development on substandard lots. Thus, he contends that in light of this evidence on the record, the Board's decision was clearly erroneous. In response, the Board argues that based on the evidence before it, it determined that the proposed unmerged lots were significantly smaller in comparison to the surrounding lots and could not meet the requirements of § 185-29 of the Zoning Ordinance.

The concept of merger “generally requires the combination of two or more contiguous lots of substandard size that are held in common ownership in order to meet the minimum-square-footage requirements of a particular zoned district.” McKendall v. Town of Barrington, 571 A.2d 565, 567 (R.I. 1990). The Town properly enacted a merger provision in its Zoning Ordinance pursuant to §§ 45-24-1 through 45-24-3 in 1986. Id. The provision provides that “[w]here land adjacent to a substandard original lot is owned by the owner of said substandard original lot . . . said substandard original lot shall be combined with said adjacent land to establish a lot or parcel having at least the required minimum dimensions . . .” Zoning Ordinance § 185-26(A). Under § 185-29 of the Zoning Ordinance, the Board may grant a special use permit from the requirements of the merger provision if it finds that the elements of § 185-73 are met and makes an “additional specific finding that the lots, as unmerged, will be of a size generally in conformance with the size of developed lots in the immediate vicinity.” Zoning Ordinance § 185-29.

The Board's decision denying Mr. Freij's 2014 Application was based on substantial evidence. In making its decision, the Board noted that the 2014 Application met the criteria contained in § 185-73 of the Zoning Ordinance. However, the Board ultimately found that the

application violated § 185-29 of the Zoning Ordinance “in that very few of the lots in the immediate vicinity are as small as the proposed lots would be.” Appellee’s Ex. A, at 4.

In making its decision, the Board relied on tax maps and aerial photographs showing Mr. Freij’s current lot as well as surrounding lots. Based on this evidence, the Board determined that the unmerged lots were undersized in comparison to the surrounding lots and could not meet the requirements of § 185-29 of the Zoning Ordinance.<sup>4</sup> See Gardiner v. Zoning Bd. of Review of Warwick, 101 R.I. 681, 688, 226 A.2d 698, 702 (1967) (holding that a plot plan showing the dimensions of a proposed lot and the size and location of nearby lots was legally competent evidence on which the Board could base its decision). The record shows that the Board relied on competent evidence when it made its factual determination that the proposed lots did not meet the requirements of § 185-29 of the Zoning Ordinance. See Milardo, 434 A.2d at 272. Therefore, the Board’s decision denying the special use permit was not clearly erroneous.

## C

### **Declaratory Judgment**

Additionally, Mr. Freij also seeks a declaration under the Uniform Declaratory Judgments Act that the original 1986 merger was void because it created a through lot. Under the Uniform Declaratory Judgments Act, §§ 9-30-1, et seq., the Superior Court,

“upon petition, following such procedure as the court by general or special rules may prescribe, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.” Sec. 9-30-1

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<sup>4</sup> This finding is consistent with the Board’s earlier decision denying the 2013 Application where the Board noted that the unmerged lots would be much smaller at 3700 square feet of land than the size of properties in the immediate vicinity, which on average are 7400 square feet of land. Appellant’s Ex. 2.

In order for the Court to exercise its jurisdiction under the Uniform Declaratory Judgments Act, “two elemental components must be present: (1) a plaintiff with the requisite standing and (2) ‘some legal hypothesis which will entitle the plaintiff to real and articulable relief.’” Warwick Sewer Auth. v. Carlone, 45 A.3d 493, 499 (R.I. 2012) (citing Meyer v. City of Newport, 844 A.2d 148, 151 (R.I. 2004)). Standing is met when a plaintiff has suffered an injury in fact, whether economic or otherwise. Id. In order to meet the second element, the plaintiff must have “presented sufficient facts giving rise to some conceivable legal hypothesis which will entitle [them] to some relief.” Id. at 500. Further, the Superior Court has “discretion to grant or deny declaratory relief under the Uniform Declaratory Judgments Act.” Cigarrilha v. City of Providence, 64 A.3d 1208, 1212 (R.I. 2013). Mr. Freij certainly suffered an economic injury when the Board denied his 2014 Application and has met the first element of the test. However, in order to meet the second element of the test, he must also present sufficient facts to support a legal hypothesis that would entitle him to relief.

Mr. Freij contends that § 200-47(B) of the Barrington Land Development and Subdivision Regulations (Subdivision Regulations) prohibits the creation of through lots. In his memorandum, Mr. Freij argues that on “information and belief” the current provision is the same as the 1986 version. Thus, Mr. Freij argues that the 1986 merger, which created a through lot, violated the Subdivision Regulations and is void. However, Mr. Freij’s argument fails for several reasons.

First, the Subdivision Regulations do not prohibit through lots. Section 200-47(B) of the Subdivision Regulations provides that “[i]n **general**, lots shall not extend through a block to another existing or proposed street.” Subdivision Regulations § 200-47(B) (emphasis added). The phrase “in general” usually indicates the existence of exceptions to a general rule. See Sims

v. Scheussler, 64 S.E. 99, 102 (Ga. Ct. App. 1909) (holding that the use of the word “generally” in a civil code imports the existence of exceptions from a general rule). Thus, while the Subdivision Regulations discourage the creation of through lots, it does not appear that through lots are entirely prohibited. Additionally, Mr. Freij has not presented the Court with any evidence that the current Subdivision Regulations are the same as the Subdivision Regulations from 1986.

Even assuming that he is correct, his argument fails because the Zoning Ordinance governs mergers and the Subdivision Regulations are inapplicable in the instant matter. The Rhode Island Supreme Court has held that the concept of merger is not related to the subdivision of land. See McKendall, 571 A.2d at 567 (holding that subdivision, which involves the division of a lot into two or more tracts, is unrelated to the concept of merger, in which substandard lots are combined). Rather, merger is a valid zoning mechanism established under the auspices of a zoning ordinance. See id. (finding that the Town’s merger provision is contained within the Zoning Ordinance). Moreover, zoning boards are not vested with jurisdiction to review applications under subdivision regulations. See Slawson v. Zoning Bd. of Review of Barrington, 100 R.I. 485, 490, 217 A.2d 92, 95 (1966) (“[Zoning] boards of review are not vested with jurisdiction to subdivide land . . . planning commissions [] may be vested with jurisdiction over the subdivision of land . . .”). The case before this Court involves the merging of parcels, not the subdivision of land. Thus, the Town’s subdivision regulations, which discourage, but do not prohibit, the creation of through lots in the context of the division of land, are irrelevant in the instant case. Therefore, Mr. Freij has not alleged sufficient facts to support his hypothesis that the original merger of the Property was void. See Warwick Sewer Auth., 45 A.3d at 500. Accordingly, this Court denies Mr. Freij’s request for declaratory relief.

## **IV**

### **Conclusion**

After review of the entire record, this Court finds that the Zoning Board's decision was supported by substantial and probative evidence on the record. Substantial rights of the Appellant have not been prejudiced. Moreover, this Court finds that Mr. Freij has not presented sufficient evidence to support a legal hypothesis which will entitle him to real and articulable relief under the Uniform Declaratory Judgments Act. Accordingly, the Zoning Board's decision denying the 2014 Application is affirmed.

Counsel shall prepare the appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** Freij v. Kraig, et al.

**CASE NO:** PC-2015-1189

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** January 26, 2016

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

**ATTORNEYS:**

**For Plaintiff:** Paul Ryan, Esq.

**For Defendant:** Michael A. Ursillo, Esq.