

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(FILED: December 26, 2019)

JOHN KREKORIAN, LAURA KREKORIAN, :
JOHN HOWLAND AND CAROL HOWLAND, :
Appellants, :

v. :

C.A. No. WC-2016-0464

ZONING BOARD OF REVIEW OF THE :
TOWN OF SOUTH KINGSTOWN, ROBERT :
TOTH, In His Capacity as Chairman of the :
Zoning Board of Review of the Town of South :
Kingstown, DOUGLAS BATES, JOHN :
BERNARDO, ROBERT CAGNETTA, :
RICHARD JURCZAK, STEPHANIE OSBORN :
and IGOR RUNGE, In Their Capacities as :
Members of the Zoning Board of Review of the :
Town of South Kingstown, Sitting as the :
Planning Board of Appeal of the Town of South :
Kingstown; and CAPTAIN WOMBAT, LLC, :
Appellees. :

DECISION

MONTALBANO, J. This matter is before the Court on appeal from an August 18, 2016 decision (Decision) of the Zoning Board of Review of the Town of South Kingstown (Board), reversing the Zoning Enforcement Officer’s April 22, 2016 Notice of Violation (NOV) of the Town of South Kingstown Zoning Ordinance (Ordinance). The Board found that the challenged activities at issue qualify as permitted uses in the R-80 Zoning District. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts & Travel

Captain Wombat, LLC (Captain Wombat) is a limited liability corporation organized under the laws of the State of Rhode Island and is the record owner of 2236 Commodore Oliver Hazard Perry Highway—a 7.46 acre parcel also identified as Assessor’s Map 81-8, Lot 8 (Subject Property)—in South Kingstown. (Decision at 1.) The Subject Property is located in an R-80 Zone. *Id.* An R-80 Zone is a rural residential low density district in which intensive development should not occur. (Ordinance, Appendix A, Article 1, § 101.) This zone is characterized by “low-density residential development, large estates, agriculture and certain low intensity nonresidential activities incidental to a rural environment.” *Id.* Accordingly, a livestock farm is permitted in an R-80 Zone under Use Code 02. *Id.* at Article 3, § 301. Conversely, Use Code 51.3 prohibits the wholesale trade of seafood products—including land based aquaculture support services—in an R-80 Zone. *Id.* Further, a parking lot is prohibited in an R-80 Zone under Use Code 64.1. *Id.*

John Krekorian and Laura Krekorian (the Krekorian) reside on Potter Pond at 115A Succotash Road, South Kingstown Assessors’ Plat 81-1, Lot 9. (Board Tr. 67-68, June 15, 2016; Compl. 1.) John Howland and Carol Howland (the Howlands) own the property on Potter Pond identified as 119 Succotash Road, South Kingstown Assessors’ Plat 81-1, Lot 11. (Board Tr. 45:2, July 20, 2016; Compl. 1.) The Krekorian’s and Howlands’ (collectively, Appellants’) parcels directly abut the Subject Property. (Decision at 2.)

Perry Raso (Raso) is the sole member of Captain Wombat. *Id.* at 1. In 2002, Raso founded Matunuck Oyster Farm on a one-acre commercial aquaculture lease on Potter Pond. (Board Tr. 10, June 15, 2016). In 2007, Raso began using the dock at the Subject Property for his aquaculture operation with the permission of the then-owner, Roy Dubs. *Id.* at 53. Raso continued to use the

dock until Mr. Dubs sold the property. *Id.* at 106. During this time, Raso also used an adjacent dock owned jointly by the Howlands and the Kermes. *Id.* at 54. He used this dock for his aquaculture operation with the permission of the Kermes. *Id.* at 10.

Raso opened Matunuck Oyster Bar in 2009. *Id.* In 2010, Raso purchased the Subject Property from Mr. Dubs while continuing his aquaculture operation on the dock adjacent to the Subject Property. *Id.* at 54. Raso currently uses the dock adjacent to the Subject Property for the transportation of animals to and from the Oyster Farm, to grade the juvenile oysters, and to store farming gear. (Board Tr. 117:15-16; 90:18-20, July 20, 2016.) He also keeps a barge next to the dock, where he frequently keeps many aquaculture accessories. (Board Tr. 12-13, June 15, 2016.)

On April 22, 2016, the Zoning/Building Official, Jeffrey T. O’Hara (O’Hara), sent a NOV to Raso regarding his use of the Subject Property. (Decision at 1.) The NOV states, “An inspection of your property has revealed that you are using a portion of your premises, specifically, the dock area as a land based aquaculture support service to your wholesale seafood product business in an R-80 Zoning District . . . in violation of Section 301, Use Code 51.3 of the South Kingstown Zoning Ordinance.” NOV from O’Hara to Raso (Apr. 22, 2016). The NOV further states, “[I]t is evident that you are using another portion of the premises as a parking lot for the employees of your aquaculture and restaurant business . . . in violation of Section 301, Use Code 64.1 of the Zoning Ordinance.” *Id.*

Raso filed a timely appeal of the NOV to the Board on April 28, 2016. *Id.* at 2. The Board held an initial, advertised public hearing on June 15, 2016. *Id.* Raso offered legal memoranda and affidavits from Raso, Roy Dubs, Robert Rheault, Ph.D. (Dr. Rheault), and Michael A. Rice, Ph.D. (Dr. Rice). *Id.* The Board also heard oral testimony from Raso and Dr. Rheault. *Id.* The Board first inquired as to whether Raso was familiar with the Ordinance, which permits livestock as an

allowed use in an R-80 Zone. (Board Tr. 11, June 15, 2016.) Raso replied in the affirmative, and the Board asked him to indicate whether, in his opinion, oysters were livestock. *Id.* Raso testified that because oysters are animals grown in his aquaculture operation, they are thereby livestock. *Id.* Raso further explained the activities performed as part of the aquaculture operation at the Subject Property: the transportation of the oysters, the sorting and grading of oysters, and the storage of equipment including a barge. *Id.* at 11-13. Finally, Raso articulated, based on his understanding of Use Code 51.3, that the subject of that section pertains to the processing of market-size animals, whereas Raso performs maintenance to juvenile-size oysters on the Subject Property/dock—not market-size animals. *Id.* at 96.

Dr. Rheault, Executive Director of the East Coast Shellfish Growers Association, described his background as an advocate for the shellfish industry. *Id.* at 38. Based on his experience, research, and expertise, he opined that farmed shellfish are livestock. *Id.* at 42. Further, Dr. Rheault cautioned the Board that the Subject Property is not being used for wholesale sales or sorting of final product before sale so that the activities prohibited under Use Code 51.3 were not applicable to this type of use. *Id.* at 45. Dr. Rheault further opined that the work being performed on the dock is a Coastal Resource Management Council (CRMC) permitting issue. *Id.* Summarizing his opinion, Dr. Rheault stated that “the commercial farming of shellfish for sale for food conforms to every definition of agriculture, and since the crops of the shellfish farmer are animals and not plants, they must be considered livestock.” *Id.* at 43-44. With regard to parking, Dr. Rheault suggested that if the Subject Property was considered a farm, and farming was permitted on the Subject Property, then it follows that the farm workers should be allowed to park on the Subject Property when they go to work. *Id.* at 50.

Roy Dubs, the prior owner of Lot 8, through counsel for Raso, submitted an affidavit indicating that he allowed Raso to use his dock for aquaculture operations in 2007. *Id.* at 53. Counsel for Raso argued that because Raso’s use of the dock predated the enactment of Use Code 51.3, said activity would be a nonconforming use and thus permitted under this section. *Id.* Counsel’s primary argument, however, is that Raso’s use of the Subject Property for a livestock farm is a permitted use in an R-80 Zone under Use Code 02. (Board Tr. 86:3-21, July 20, 2016.)

Dr. Rice submitted an affidavit setting forth his opinion that he considered oyster farming a form of agriculture that should be considered an extension of Raso’s land-based vegetable farming operations, and therefore is a protected form of farming under the Right to Farm Act. (Board Tr. 55-56, June 15, 2016.) Dr. Rice further stated in his affidavit that, based upon his education, training, and significant experience in aquaculture, it was his opinion that “Matunuck Oyster Farm is an agricultural operation extending out into Potter’s Pond from the Matunuck Vegetable Farm and that the accommodation for the Oyster Farm employees and their vehicles is an agricultural use of . . . Raso’s property.” *Id.* at 56.

The Board then heard testimony from Appellant John Krekorian. Mr. Krekorian¹ testified as to his personal observations of the Subject Property. He noted that the aquaculture activity on the dock occurs daily and that he can easily hear the operations taking place from his home. *Id.* at 72. He further testified that the operations on the dock have intensified since Raso purchased it in 2010. *Id.* at 74-75. Mr. Krekorian stated that he, along with several other families, including the Howlands, funded the 2007 Conservation Easement in favor of the South Kingstown Land Trust, which does permit the owner of the Subject Property to conduct farming operations and the raising

¹ For clarity, the Court has included prefixes to indicate which of the Krekorian is testifying. The Court intends no disrespect in not including prefixes for other parties.

of livestock. *Id.* at 80-81. Mr. Krekorian clarified that the Conservation Easement was set up “to protect the viewscape [sic] of the field.” *Id.*

Counsel for Raso asked the Board to allow additional testimony by Dr. Rheault regarding the concept of shellfish processing. *Id.* at 90. Dr. Rheault stated that the activities at the Subject Property constitute the sorting of juvenile oysters as part of the farming process, and that these activities did not involve harvesting. *Id.* at 91. Further, Dr. Rheault stated that, based on his observations, none of the end-use-to-market activities prohibited in Use Code 51.3 occur at the Subject Property. *Id.* at 93-94.

The Board continued the June 15, 2016 hearing to July 20, 2016. (Board Tr. 3:1-9, July 20, 2016.) In the interim, the Board received supplemental memoranda from Raso and the Appellants, as well as a memorandum from its own counsel. (Decision at 3.) Counsel for the Appellants called Laura Krekorian as their first witness. (Board Tr. 9:20-23, July 20, 2016.) Mrs. Krekorian testified that during 2009 and prior thereto, all of the activity on the dock at the Subject Property was water-based. *Id.* at 12:11-15. One member of the Board then sought to keep all questioning pertinent to land-based activities, rather than to the dock, as all activities below the Mean High Water line are subject to CRMC jurisdiction. *Id.* at 16:10-23. Mrs. Krekorian further testified that a road was constructed from the dock to Raso’s home on the Subject Property and that she witnesses two to three trucks travel on the road down to the dock each day. *Id.* at 21:9-13. Mrs. Krekorian further testified that loaded trucks with workers go back and forth from the dock area to the road early in the morning—“[s]ometimes they stay; sometimes they don’t.” *Id.* at 27:18-23. She has witnessed the cleaning of mats on the dock and heard noise from the tumbling machine on the dock. *Id.* at 28:3-7. Mrs. Krekorian concluded her testimony by mentioning that the “most offensive” issue is the tumbler on the dock and the lights and noise associated with that activity. *Id.* at 29:23-24.

O'Hara briefly clarified the basis of his issuance of the NOV to the Board. *Id.* at 38:3-15.

The NOV states in relevant part:

“An inspection of your property has revealed that you are using a portion of your premises, specifically, the dock area as a land based aquaculture support service to your wholesale seafood product business in an R-8-0 [sic] Zoning District. This is in violation of Section 301, Use Code 51.3 of the South Kingstown Zoning Ordinance. Also, it is evident that you are using another portion of the premises as a parking lot for the employees of your aquaculture and restaurant business. This is in violation of Section 301, Use Code 64.1 of the Zoning Ordinance.” (Decision at 1.)

Specifically, O'Hara explained to the Board that he cited Raso for land-based operations pertaining to black vinyl mats on the land and a pickup truck with ropes and rigging inside. (Board Tr. 38:3-9, July 20, 2016.) Further, O'Hara noted that when he cited the “dock area,” he did not specifically say “dock,” and only meant to include that area of the property, and not the fields “where the vegetation is.” *Id.* at 10-12.

Next, John Howland (Mr. Howland) testified before the Board. *Id.* at 44:22-23. Mr. Howland echoed Mrs. Krekorian's testimony regarding the intensification of daily activity on the dock. *Id.* at 48:14-16. Mr. Howland further stated that the aquaculture support activities on the Subject Property are not located near the aquaculture farm, which is at the south end of Potter's Pond, and consequently there has been a significant increase in daily commercial activity on the dock. *Id.* at 48:17-49:16. Mr. Howland found the increased traffic and activity on the fully constructed road on the Subject Property to be the most egregious violation. *Id.* at 50:19-22. Mr. Howland raised additional concerns about the cited activities in question polluting Potter's Pond. *Id.* at 55:5-23.

Raso testified that, to his knowledge, there are no outstanding CRMC violations on any of his properties or aquaculture operations. *Id.* at 72:24-73:3. He then responded to the cited

violations in the NOV by clarifying that the black mats O’Hara documented are actually black plastic bags in which oyster seed and oysters (from juvenile to adult) live. *Id.* at 77:9-12. The bags are fastened to white P.V.C. racks, which was also a subject of the NOV. *Id.* at 77:16-18. Raso further explained that this equipment—used for the raising of oysters—is occasionally on the land to replace “fouled bags with algae” with bags that do not have any algae on them, so that water can flow through the bags. *Id.* at 78:6-12.

After considering the evidence before it and testimony presented, the Board voted four-to-one to grant Raso’s appeal and reverse the decision of O’Hara. (Decision at 3.) The Board relied in part on the expert testimony offered by Raso in the form of affidavits from Drs. Rheault and Rice, as well as testimony from Dr. Rheault to the effect that oysters are livestock. The Board noted that Use Code 02, “[l]ivestock farm,” is not further defined by Appendix A of the Ordinance, and they accepted that oysters are a type of livestock based on their own knowledge of the Ordinance, the expert testimony of Drs. Rheault and Rice, as well as the opinion of Raso. *Id.* ¶¶ 2-4. The Board noted that G.L. 1956 § 11-41-33(a)(1)(ii)—cited by Raso as additional evidence to support his argument that oysters are a form of livestock—prohibits larceny of farm products, and further found that aquacultural operations were included in the definition of “livestock” for purposes of the act. (Decision at 3.) The Board further concluded that since a livestock farm is a permitted use within the R-80 Zoning District, and since the activities taking place on the Subject Property that were the subject of the NOV are part of a livestock farming operation, said activities are a permitted use as a matter of right on the Subject Property. *Id.* at 4, ¶ 5. Finally, the Board found that parking for employees associated with the livestock farming operation on the Subject Property in an R-80 Zone is allowed as a permitted accessory use. *Id.* ¶ 7. The instant appeal timely followed.

II

Standard of Review

Pursuant to § 45-24-69, the Superior Court has jurisdiction to review appeals of zoning board decisions. Specifically, § 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.”

“[T]he Superior Court reviews the decisions of a plan commission or board of review under the ‘traditional judicial review’ standard applicable to administrative agency actions.” *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I. 1998) (quoting *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977)). Specifically, the Court must consider “the entire record to determine whether ‘substantial’ evidence exists to support the board’s findings.” *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)).

“Substantial evidence” in this context refers to “[an] amount more than a scintilla but less than a preponderance.” *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (citing *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647

(R.I. 1981)). Thereby, “[a] trial justice may not ‘substitute [his or her] judgment for that of the zoning board if [he or she] can conscientiously find that the board’s decision was supported by substantial evidence in the whole record.’” *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (citing *Apostolou v. Genovesi*, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). Consequently, if the record is “completely bereft of competent evidentiary support,” the decision must be reversed. *Sartor v. Coastal Resources Management Council*, 542 A.2d 1077, 1083 (R.I. 1988).

III

Analysis

A

Use Codes 02 and 51.3

It is undisputed that the Subject Property is located in an R-80 Zone. (Decision at 1.) The Board found that the following Use Codes and their corresponding definitions, where listed, were pertinent to Raso’s appeal of O’Hara’s April 22, 2016 NOV of the Ordinance: Use Code 51.3 entitled “Wholesale Trade of Seafood Products” and Use Code 02, entitled “Livestock Farm.” *Id.* Use Code 51.3 provides, in pertinent part:

“Wholesale trade of fish, shellfish and related products both wild caught and raised in licensed aquaculture settings, this Use Code may include the retail trade of fish, shellfish including crustaceans, up to 2,000 s.f. GLFA. Includes aquaculture support services: sorting, grading, packaging of fish, shellfish and seafood products for direct sale, pick-up and trans shipment to market. This use code may include dockage and piers to support licensed aquaculture activities and other principal uses permitted in the CW and Ind-1 zoning districts.” (Ordinance, App. A.)

In the NOV issued by O’Hara, Raso was cited in violation of Use Code 51.3 for “using a portion of [the Subject Property], specifically, the dock area as a land-based aquaculture support service to [his] wholesale seafood product business in an R-80 Zoning District.”

The Krekorian and the Howlands argue that the applicable Use Code governing the Subject Property is Use Code 51.3 (Brief of Appellants 10-11, June 13, 2018). They further argue that when the South Kingstown Town Council enacted the Use Code 51.3 prohibition on land-based aquaculture support services in 2009, it intended to preclude the aquaculture support activities conducted on the Subject Property from taking place in an R-80 Zone. *Id.* Captain Wombat argues that both livestock farming and crop farming are permitted in an R-80 Zone. *See* Ordinance § 301, Use Codes 01 and 02. The term “livestock farm” is not further defined by the Ordinance. *See* Decision at 4, ¶ 4. Captain Wombat argues that the aquaculture activities taking place on the Subject Property are a permitted use because oysters are livestock and that a livestock farm is a permitted use in the R-80 Zone. (Brief of Appellees 8-9, Aug. 31, 2018.) The record reflects that the aquaculture activities conducted on the Subject Property include the grading of juvenile oysters, transportation of the juvenile oysters between the farm and the Subject Property, the storing of farm gear, and parking for farm employees. (Board Tr. 11-13, 18, June 15, 2016.) When the oysters are ready to be sold at market, they are separated from the juvenile oysters at a floating dock on Potter Pond. *Id.* at 11-13. The mature oysters are packaged for sale and sold directly at the restaurant. *Id.* at 64.

The Board resolved the dispute over the applicable Use Code governing the use of the Subject Property in favor of Raso. (Decision at 4, ¶ 5.)² Specifically, the Board found that a

² Since the Board determined that Captain Wombat’s use of the Subject Property was not in violation of the Ordinance because livestock farming is a permitted use in an R-80 Zone, the Board did not consider the alternative arguments presented by Captain Wombat in support of its appeal

livestock farm is a permitted use within an R-80 Zoning District and that the activities taking place on the Subject Property are part of a livestock farming operation; therefore, those activities are permitted as a matter of right on the Subject Property. *Id.*

The interpretation of a zoning ordinance is ultimately a question of law. *See Bellevue-Ochre Point Neighborhood Association v. Preservation Society of Newport County*, 151 A.3d 1223, 1230 (R.I. 2017). A zoning board has “wide discretion” to construe an ordinance where terms were not adequately defined. *Davis v. Zoning Board of Review of Warwick*, 93 R.I. 484, 488, 176 A.2d 735, 738 (1962). However, a zoning board’s interpretation and application of a zoning ordinance is given weight and deference by the court “provided its construction is not clearly erroneous or unauthorized.” *Cohen v. Duncan*, 970 A.2d 550, 562 (R.I. 2009). While clear and unambiguous language in an ordinance is examined by its plain and ordinary meaning, the court must “establish[] and effectuate[] the legislative intent behind the enactment.” *See Pawtucket Transfer Operations, LLC*, 944 A.2d at 859 (quoting *State v. Fritz*, 801 A.2d 679, 682 (R.I. 2002)); *Park v. Rizzo Ford, Inc.*, 893 A.2d 216, 221 (R.I. 2006).

In this case, the Ordinance is designed to, *inter alia*, “[p]rovide for the preservation and promotion of agricultural production, forestation, silviculture, aquaculture, timber resources, and open space[.]” (Ordinance, Article 1, § 100(J).) This Court finds that the Board’s interpretation of the Zoning Ordinance in question to the effect that the use of the Subject Property by Raso as part of a livestock farming operation is governed by Use Code 02 and therefore permitted should

of the NOV: (1) that use of the Subject Property for aquaculture support services constituted a lawful preexisting use; (2) that the Town of South Kingstown could not regulate such activities because the CRMC retained exclusive jurisdiction over the regulation of aquaculture; and (3) that the Rhode Island Right to Farm Act, G.L. 1956 § 2-23-5(b), specifically prohibits any city or town ordinance to be “enforced against any agricultural operation.” *See* Decision at 4, ¶ 6. Consequently, this Court declines to review those arguments in the context of this appeal.

be given weight and deference, since it is not clearly erroneous or unauthorized. The Board held two hearings, considered the entire record at length, and relied, in part, upon its own knowledge of the Ordinance to support its findings. This Court further concludes that the Board's determination that the activities taking place at the Subject Property fall squarely within the uses permitted by Use Code 02 was neither affected by error of law nor clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record.

In deciding that Use Code 02 was the applicable Use Code with respect to activities on the Subject Property, the Board relied, *inter alia*, upon the uncontradicted expert testimony of Dr. Rheault, as well as the affidavits from Dr. Rheault and Dr. Rice. Dr. Rheault opined that oysters are livestock (Board Tr. 40-42, June 15, 2016; *see also* Aff. of Dr. Rheault ¶¶ 10-27).

Dr. Rheault further testified that in his opinion the use of the Subject Property was not governed by Use Code 51.3 because it was not being used for wholesale sales or for sorting of final products before sale. (Board Tr. 45, June 15, 2016.) Dr. Rheault also noted the distinction between harvesting and processing: "Shellfish processing is what you do when you land shellfish for sale for consumption and it involves sorting, packaging, and distributing and storing. And none of those activities are occurring at the Raso property . . . , [w]hat is happening at the dock at his property is the sorting of the juveniles . . . as part of the farming process. It has nothing to do with the harvesting. If he was doing processing . . . he would have to have a dealer's permit, a hazard plan, and a three-bay sink and a whole separate operation that is strictly regulated by the Interstate Shellfish Sanitation Conference." *Id.* at 91. The Board found Dr. Rheault's expert testimony to be credible.

Although Dr. Rice did not testify, the Board accepted his affidavit setting forth his opinion that oyster farming is a form of agriculture that should be considered an extension of Raso's land-

based vegetable farming operations. (Rice Aff. ¶¶ 3, 4, 5; Board Tr. 55-67, June 15, 2016). He further opined that Matunuck Oyster Farm is an agricultural operation extending out into Potter's Pond from the Subject Property. (Rice Aff. ¶ 8.) The Board found his affidavit to be credible.

In *Murphy v. Zoning Board of review of Town of South Kingstown*, 959 A.2d 535, 542 (R.I. 2008), our Supreme Court held that “if expert testimony before a Zoning Board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a Zoning Board to reject such testimony.” This Court finds that the unrebutted expert testimony and affidavit of Dr. Rheault and the unrebutted affidavit of Dr. Rice support the Board's conclusion that oysters are livestock. *See* Decision at 3-4, ¶¶ 3 and 4. This Court further finds that the unrebutted expert testimony of Dr. Rheault and the unrebutted affidavit of Dr. Rice support the Board's conclusion that since a livestock farm is a permitted use in an R-80 Zone and since the activities taking place on the Subject Property that were the subject of the NOV are part of a livestock farming operation, those activities are permitted as of right on the Subject Property. (Decision at 4, ¶ 5.) The Board's conclusions are not in violation of constitutional, statutory, or ordinance provisions; not clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record, and not in excess of the authority granted to the Board by statute or ordinance. Furthermore, the Board's Decision to reverse the decision of O'Hara was not made upon unlawful procedure, not arbitrary or capricious or an unwarranted exercise of its discretion. Consequently, for the reasons stated herein, this Court affirms the Board's Decision to reverse the decision of O'Hara citing Raso for the use violations set forth in the NOV.

B

Parking

With respect to parking on the Subject Property, the Board found that Use Code 64.1, entitled “Parking Lot” and its corresponding definitions, where listed, was pertinent to Raso’s appeal of O’Hara’s April 22, 2016 NOV of the Ordinance. (Decision at 1-2.) Use Code 64.1 prohibits the placement of a parking lot, or a “[s]urface parking area as a principal use” in an R-80 Zone. (Ordinance, App. A.) The description of Use Code 64.1 further specifies that commercial vehicles are also prohibited under this section. *Id.* In the NOV issued by O’Hara, Raso was cited in violation of Use Code 64.1 for “using another portion of the [Subject Property] premises as a parking lot for the employees of your aquaculture and restaurant business.” (NOV at 1.)

Raso has indicated that he has ceased to use the parking lot on the Subject Property for parking for his restaurant employees. (Board Tr. 20, June 15, 2016.) Consequently, the Board, in its Decision, determined that parking for employees of Raso’s restaurant shall not be permitted on the Subject Property. (Decision at 4, ¶ 7). The Board did find, however, that parking for employees associated with the livestock farming operation on the Subject Property is allowed as a permitted accessory use. *Id.*; *see also City of Warwick v. Campbell*, 82 R.I. 300, 305, 107 A.2d 334, 337 (1954).

The Ordinance defines an accessory use as, “[a] use of land or of a building, or portion thereof, customarily incidental and subordinate to the principal use of the land or building. An accessory use shall be restricted to the same lot as the principal use. An accessory use shall not be permitted without the principal use to which it is related.” (Ordinance, Article 12(5).) The term “accessory use” implies a use accessory to an existing structure, such as a garage to a house or a

parking lot to a drug store. *Hein v. Town of Foster Zoning Board of Review*, 632 A.2d 643, 645 (R.I. 1993). Further, Rhode Island law supports the notion of a parking lot as an accessory use when it is on the same premises as the principal use. *See Harmel Corp. v. Members of the Zoning Board of Review of Town of Tiverton*, 603 A.2d 303, 307 (R.I. 1992) (finding that a parking facility on the same premises as a restaurant and banquet facility qualifies as an accessory use).

Appellants argue that utilization of the Subject Property as a parking lot in support of commercial aquaculture activities is a clear violation of Use Code 64.1 of the Ordinance, which specifically prohibits a parking lot in an R-80 Zone. *See Ordinance, App. A, Article 3, § 301.* Captain Wombat argues that the use of the parking area on the Subject Property for aquaculture employees is a permitted accessory use of its livestock farming operation.

“It is an accepted zoning practice to allow certain accessory uses and structures on property that are related to the primary permitted uses.” *Zoning and Land Use Controls*, Rohan, § 40A-01. Since parking arrangements for employees of the aquaculture farm are located on the same premises as and related to the primary principal use, the parking lot qualifies as an accessory use under the Ordinance. *See Harmel Corp.*, 603 A.2d at 307; *see also* 4 Arlen H. Rathkopf, *The Law of Zoning and Planning* § 83:19 (October 2019 Update) (stating, “[i]n the modern era, it seems logical to deem on-site parking to be an accessory use to a broad range of principal uses”). Accordingly, this Court finds that the Board’s Decision with respect to parking on the Subject Property is not in violation of constitutional, statutory, or ordinance provisions; not clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; nor is its Decision arbitrary or capricious, or characterized by abuse of discretion. Neither was the Board’s Decision relating to parking on the Subject Property clearly erroneous or in excess of the Board’s authority established by statute or ordinance. Consequently, for the reasons stated herein,

this Court affirms the Board's Decision to reverse the decision of O'Hara citing Raso for the Use Code 64.1 parking violations relating to accessory use of the parking lot on the Subject Property for the employees of Raso's livestock farming operation being conducted on the Subject Property.

IV

Conclusion

After review of the entire record, the Court finds that the Board's Decision is based upon substantial evidence sufficient to support its findings. Further, this Court concludes that the Board's Decision was not in violation of constitutional or statutory provisions; in excess of its statutory authority; affected by error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion. Substantial rights of the Appellants have not been prejudiced. Thus, the appeal of the Board's Decision is denied. Counsel for the prevailing parties shall submit an order in accordance with this Decision.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: John Krekorian, et al. v. Zoning Board of Review of the Town of South Kingstown, et al.

CASE NO: WC-2016-0464

COURT: Washington County Superior Court

DATE DECISION FILED: December 26, 2019

JUSTICE/MAGISTRATE: Montalbano, J.

ATTORNEYS:

For Plaintiff: William Landry, Esq.

For Defendant: Amy Hall Goins, Esq.

For Interested Parties: Elizabeth M. Noonan, Esq.; Richard R. Beretta, Jr., Esq.; Leslie D. Parker, Esq.