STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

[FILED: September 27, 2019]

MIKE'S PROFESSIONAL TREE SERVICE, LLC,	:	
Plaintiff-Appellant,	:	
	:	
v.	:	**C.A. No. KC-2016-1288**
	:	
TOWN OF COVENTRY, COVENTRY ZONING BOARD OF APPEALS;	:	
DENISE DEGRAIDE, Member;	:	
IRENE DREW, Member;	:	
RUSSELL LACAILLADE, Member;	:	
JOHN J. D'ONOFRIO, Member;	:	
VIRGINIA A. SOUCY, Member;	:	
JEANNE KOSTYLA, Member,	:	
***Defendants-Appellees*.**	:	

DECISION

LICHT, J. Mike's Professional Tree Service, LLC (Mike's) appeals the December 7, 2016 decision (Decision) of the Coventry Zoning Board of Appeals (Board), wherein the Board dismissed Mike's appeal because it did not pay a $200 filing fee or provide notice to property owners within two hundred feet of its property. The Board decided that the appeal was not properly perfected within thirty days and therefore, dismissed the appeal. Jurisdiction is pursuant to G.L. 1956 § 45-24-69, and this appeal is properly and timely before the Court pursuant to G.L. § 45-24-69.

I

Facts and Travel

Michael Baird owns Mike's, which is a tree removal company that uses the trees it removes to make mulch at its property located at 75 Airport Road, Unit 3, Coventry, Rhode Island

(Property). Tr. 31, 32-33, July 6, 2016. The Town of Coventry (Town) asserts that the Town Ordinances require a special use permit in order to use the Property "as a commercial woodlot and for firewood storage and sales." Consequently, on April 12, 2016, the Town issued a Notice of Violation (Notice) to Mike's. *See* Notice, Apr. 12, 2016. Mike's filed an appeal of the Notice on April 19, 2016. *See* Notice of Appeal. Thereafter, the Board held hearings on July 6, October 5, and November 2, 2016. *See* Decision. During the July and October hearings, much was discussed regarding the meaning of the term "firewood" and the process Mike's uses for creating mulch. *See* Transcripts. Because of the confusion over Mike's processing of the wood stored on the Property, the Board arranged a site visit for Saturday, October 8, 2016 at noon. *See* Tr. 72-73, Oct. 5, 2016.

After these multiple hearings on this matter, Coventry's solicitor sent counsel for Mike's a letter on October 17, 2016 requesting that counsel provide mail receipts to show that notice had been sent to abutting property owners and a canceled check for the appeal's filing fee. *See* Letter, Oct. 17, 2016. At the next hearing on November 2, 2016, the solicitor gave her opinion that Mike's appeal was not properly before the Board because of Mike's failure to pay the filing fee and give notice and that the Board should dismiss the appeal. *See* Tr. 3-4, Nov. 2, 2016. Ultimately, the Board agreed with the solicitor and voted to dismiss the appeal. *Id.* at 92-93. Since Mike's had thirty days from the recording of the Notice to file an appeal to the Board and that time had already expired by the time the Board had dismissed the appeal, Mike's was precluded from refiling its appeal seeking appellate review of the Notice. *See* Coventry Zoning Ordinance § 412 (Section 412); Tr. 3-4, Nov. 2, 2016.

The Board recorded its Decision on December 8, 2016, and Mike's filed a timely appeal to this Court on December 26, 2016. *See* Decision; Compl. Thereafter, an Amended Complaint was filed on January 4, 2017. Mike's challenges the Board's findings that it was required to pay a

filing fee for its appeal to the Board under Table 3-1 of Section 3130 and Section 412 of Coventry's Zoning Ordinances and that it, as an Appellant, was required to send notice to its abutters under Section 423 of those same ordinances. Mike's requests a remand to the Board for a hearing *de novo* following proper notice being given to the abutters by the Town.

II

Standard of Review

Section 45-24-69(d), which governs this Court's review of a zoning board decision, 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." Sec. 45-24-69(d).

"[A] zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review." *Thorpe v. Zoning Board of Review of North Kingstown*, 492 A.2d 1236, 1236-37 (R.I. 1985). The Court

must then "examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence." *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (internal quotations omitted). Further, a decision will not be reversed "unless it can be shown that the [Zoning Board] 'misapplied the law, misconceived or overlooked material evidence, or made findings that were clearly wrong."' *Bernuth v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396, 399-400 (R.I. 2001).

III

Analysis

A

Filing Fee

The parties each contend that the table governing filing fees within the Town Ordinances (Section 3130, Table 3-1) is unambiguous but have differing interpretations of this "unambiguous" table. Mike's argues that the zoning ordinances do not require a filing fee for the appeal of a notice of violation because the fee schedule outlined in Table 3-1 only provides for two instances of when fees are required for an appeal: an appeal related to a variance and special use permit (§ A.8.) or an appeal from a planning commission decision (§ E.), neither of which is applicable here. The Town counters that the $200 fee listed under Section A.8. applies to more than simply variances and special use permits because it states, "*Each* appeal pursuant to Section 412," which is the section governing all appeals to the Board. *See* Table 3-1 (emphasis added).

The Court must "interpret an ordinance in the same manner in which [it] interpret[s] a statute." *Prew v. Employee Retirement System of City of Providence*, 139 A.3d 556, 561 (R.I. 2016) (internal citations omitted). "It is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the

statute their plain and ordinary meanings." *Waterman v. Caprio*, 983 A.2d 841, 844 (R.I. 2009). Thus, "the Court will give effect to every word, clause, or sentence, whenever possible" because it must assume that the drafter "intended each word or provision . . . to express a significant meaning." *Swain v. Estate of Tyre ex rel. Reilly*, 57 A.3d 283, 288 (R.I. 2012).

The Court does not accept the Town's interpretation, as advocated for by its solicitor, because it disregards the rules of statutory construction. Table 3.1 is designed in an outline format with the main headings designated as A through E, and sections A, C, and D having numerical subsections underneath. The "plain meaning" of any outline is that points listed as a subsection are only applicable to the main section above it in the outline. Because Section A.8. provides for a $200 filing fee for "[e]ach appeal pursuant to Section 412" is a subsection to Section A, entitled, "Variances and Special Use Permits Applied for," this $200 fee can only apply to appeals pursuant to Section A that are related to variance and special use permit applications. For example, if an applicant was denied a building permit by the building inspector because the inspector determined the applicant needed a special use permit or variance, such an appeal would be under Section 412 and be heard by the Board. Any other interpretation would completely disregard the outline structure of Table 3.1, which the Court cannot do because it must assume the drafter intended this structure to have meaning. Furthermore, an ambiguity in the ordinance must be interpreted against the Town, as the drafter. If the Town intends *any* appeal under Section 412 to be subject to the $200 filing fee, it must therefore amend its ordinances. Thus, this Court finds that Table 3-1 contains no fee provision that applies to the appeal at bar. *See* Pl.'s Mem. 8.

B

Notice

Mike's next argues that § 45-24-66 requires the Board to give notice to the abutters, and Section 423 of the ordinances that requires appellants to provide notice is void because it conflicts with the statute. The Board counters that the statute is not clear on who needs to send out the notices, but its ordinance is, and furthermore, it is not improper for the ordinance to require the appellant to send the notices because the Board is empowered by statute (G.L. 1956 § 45-24-48) to promulgate its own rules of procedure regarding appeals.

Section 45-24-66 states:

> "The zoning board of review shall fix a reasonable time for the hearing of the appeal, and shall give public notice, at least fourteen (14) days prior to the date of the hearing in a newspaper of general circulation in the city or town. Notice of the hearing, which shall include the street address of the subject property, shall be sent by first class mail, postage prepaid, to the appellant and to those requiring notice under § 45-24-53. The zoning board of review shall decide the matter within a reasonable time. Upon the hearing, any party may appear in person or by agent or by attorney. The cost of any notice required for the hearing shall be borne by the appellant."

Section 423 of the Ordinances reads as follows:

> "The Board shall hold a public hearing on all appeals and on applications for special-use permits or variances. Such hearing shall not be held later than forty-five (45) days after receipt, in proper form, of an appeal or application. Public notice thereof shall be given at least fourteen (14) days prior to the date of hearing in a newspaper of general circulation in the Town. In addition, the applicant shall give written notice by certified mail, ten (10) days before such hearing, to all property owners of record of land within two hundred (200) feet of the perimeter of the subject property excluding road right-of-ways including owners of real property in an adjacent city or town. Notice shall be sent to the Clerk of the adjacent city or town whose boundary lies within two hundred (200) feet of the subject property. A list of the names and addresses of these persons shall be determined from public record. Proof of such mailing shall be established by the applicant's filing an affidavit of

> such notice with the Town Clerk. The Board shall render a decision on any matters before it within forty-five (45) days after the termination of the public hearing."

Zoning ordinances must comply with the statutes that comprise the Zoning Enabling Act. *See* § 45-24-28. Furthermore, a "state statute preempts municipal ordinances when either the language in the ordinance contradicts the language in the statute or when the Legislature has intended to thoroughly occupy the field." *Coastal Recycling, Inc. v. Connors*, 854 A.2d 711, 715 (R.I. 2004) (internal quotations omitted).

The Court applies the principles of statutory construction to determine if the ordinance conflicts with the statute. The specific sentence of the statute, "Notice of the hearing . . . shall be sent by first class mail, postage prepaid, to the appellant and to those requiring notice . . ." is at issue. The preceding sentence specifies that it is the zoning board that must give public notice, and, reading these sentences together, it is the zoning board that must also give individual notice. *See* Roland F. Chase, *Rhode Island Zoning Handbook* § 140 (3rd ed. 2016) ("For the hearing of an administrative appeal, the zoning board of review must give public notice plus notice by first class mail to the appellant and to all owners of property located within 200 feet of the appellant's property.") (citing § 45-24-66). Moreover, the statute specifies that notice must be sent to the appellant, and it is therefore illogical to conclude that the appellant is the one who must send notice. *See* § 45-24-66. The Board sets the hearing date, not the appellant, which is why notice must be sent to an appellant at all. Without such notice, the appellant would not know when the hearing was scheduled, which is exactly what happened in this case when the Board failed to send notice to Mike's, and Mike's failed to appear for the first hearing that was scheduled for June 1, 2016, because it did not know that was the scheduled hearing date. *See* Tr. 3-5, June 1, 2016. Finally,

to interpret the statute to find that the General Assembly would have required the Applicant to send notice to itself would constitute an absurd result.

Although § 45-24-58 gives towns the ability to create their own application procedures, notice is a jurisdictional prerequisite that is beyond a mere application procedure and beyond what is permitted to be included in an ordinance under § 45-24-32, and beyond the purposes of ordinances found in § 45-24-30. *See Corporation Service, Inc. v. Zoning Board of Review of Town of East Greenwich*, 114 R.I. 178, 180, 330 A.2d 402, 404 (1975) ("[P]roper and adequate notice of a zoning board hearing is a jurisdictional prerequisite, and that action taken by a board which has not first satisfied the notice requirements is a nullity."). The Board admits that without proper notice, it had no jurisdiction to hear the appeal. Defs.' Mem. 8. Thus, the matter of notice is not a procedural issue, as the Board contends, but one of jurisdiction.

Section 423, as it pertains to appellants' sending of notice, is void because it conflicts with § 45-24-66. The Board must send notice to the abutters in compliance with the statute.

IV

Conclusion

The Court finds that Mike's complied with requirements to perfect an appeal to the Board, and thus his appeal should not have been dismissed. Additionally, because the Court finds that the Board misapplied the law, it need not reach the issue of whether the Board's actions estop it from dismissing Mike's appeal. The Board's Decision is vacated as substantial rights of the Appellant have been prejudiced. The matter is remanded to the Board for proceedings consistent with this Decision. Counsel shall present the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	Mike's Professional Tree Service, LLC v. Town of Coventry, et al.
CASE NO:	KC-2016-1288
COURT:	Kent County Superior Court
DATE DECISION FILED:	September 27, 2019
JUSTICE/MAGISTRATE:	Licht, J.
ATTORNEYS:	
For Plaintiff:	Albert E. Medici, Jr., Esq.
For Defendant:	Nicholas Gorham, Esq.