STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: August 27, 2020]

MEDI-GREEN, LLC	:	
	:	
v.	:	**C.A. No. PC-2019-0053**
	:	
CITY OF PAWTUCKET ZONING BOARD OF REVIEW and DOUGLAS MCKINNON, GEORGE SHABO, MARGARET-MARY HOVARTH, RUSSELL FERLAND, AND R. THOMAS MAGILL in their capacities as Members of the City of Pawtucket Zoning Board of Review	:	

DECISION

MCGUIRL, J. Before this Court is an appeal from a December 11, 2018 decision (Decision) by the City of Pawtucket Zoning Board of Review[1] (the Board), denying Medi-Green LLC's (Appellant) Application for a Special-Use Permit under Section 410-12.19(J) for pharmaceutical manufacturing, in conformance with the provisions of the Pawtucket Zoning Ordinance. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the following reasons, this Court affirms the Board's decision.

[1] The Appellant filed the appeal against the Board and Douglas McKinnon, George Shabo, Margaret-Mary Hovarth, Russell Ferland, and R. Thomas Magill (collectively, Appellees) in their official capacities as members of the Board.

I

Facts and Travel

Appellant applied for a Special-Use Permit pursuant to Pawtucket Zoning Ordinance Section 410-12.19(J) for pharmaceutical manufacturing. *See* Application, June 1, 2018. Richard Leary owns the subject property located at 111 India Street, Pawtucket, Rhode Island 02860, Assessor's Plat 26, Lot 646 (the Property). (Decision at 1.) The Property is located in an Industrial Open "MO" zoning district. *Id*. On July 30, 2018, the Zoning Board held a public hearing regarding the special use permit.

In favor of the Application, Appellant offered the testimonies of Craig Willett (Willett) and Richard Leary (Leary). Willett is currently the owner of Discount Hydro, Inc, which is a gardening supply store that predominantly serves medical marijuana cultivation patients and services cultivation facilities in Rhode Island and Massachusetts. (Tr. at 4, July 30, 2018 (Tr.).) Willett is the tenant of Appellant. (Tr. at 6.) GKT Refrigeration was also a tenant in the Property. (Tr. at 7.) Willett is to serve as the head of cultivation for Appellant. (Decision at 1, Dec. 11, 2018.) Willett stated that the Appellant currently has an application pending before the Department of Business Regulation (DBR). *Id*. G.L. 1956 § 21-28-6-16 governs licensed medical marijuana cultivators. Willett explained that the business will be on the first floor of the building, and he will comply with all DBR Regulations, including blacked out windows and state-of-the-art odor elimination technology. *Id*. If approved by the DBR, Appellant plans to hire five to six employees. (Tr. at 6.) Leary, the owner of the Property, also testified in favor of the Applicant. (Tr. at 3.) Leary testified that since 2006, he owned the building and in those 12 years, the building has been vacant. (Tr. at 21.) No objectors appeared to testify against the Application.

On July 26, 2018, the Department of Planning and Redevelopment (Department) recommended denial of Appellant's Application. The Department's Advisory Opinion found that the proposed site abuts a residential two-family district with surrounding residential homes nearby. (Advisory Opinion at 2.) The Department reasoned that utilizing the Property for medical marijuana production and cultivation is inconsistent with the City Comprehensive Plan because it would adversely affect the quality of life and character of the surrounding neighborhood. *Id*. If the Board found a Special-Use Permit permissible, the Department recommended certain conditions to be applied. *Id*.

The Board denied relief to Appellant for not providing sufficient evidence that would aid the Board in determining whether the proposed use would not endanger the neighboring community in any manner. In the absence of such evidence, the Board found that the proposed use would have a detrimental effect upon the public health, safety, morals, and welfare of the surrounding area. The Board voted unanimously to deny the Appellant's Application for a Special-Use Permit. On December 11, 2018, the Board issued a written decision denying Appellant's Special-Use Permit. On January 3, 2019, Appellant filed the instant appeal.

II

Standard of Review

Section 45-24-69 governs zoning board appeals. When an aggrieved party appeals a decision of a zoning board of review to the Superior Court, the Superior 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." Section 45-24-69(d). On appeal, the Superior 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." Section 45-24-69(d).

It is the function of the Superior Court to "examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence." *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978). Substantial evidence is defined as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981). The Court must give deference to the zoning board on findings of fact. *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008). The 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). If the Court "can conscientiously find that the board's decision was supported by substantial evidence in the whole record," the decision must be upheld. *Apostolou*, 120 R.I. at 509, 388 A.2d at 825.

Timely Appeal

As a threshold issue, the Appellant alleges that upon information and belief, the Board's decision was not mailed to them, as the applicant or its counsel, in accordance with § 45-24-61. Compl. ¶ 7. Appellant argues that because the decision was not provided to them or its counsel as required by § 45-24-61, Appellant did not file this appeal twenty days after the decision was filed

with the Pawtucket Land Evidence Records. *Id*. ¶ 8. Appellant argues that because of the Board's failure to comply with § 45-24-61, Appellant's out of time appeal should be deemed timely. *Id*. ¶ 9. The Board neither admits nor denies Plaintiff's allegations. Defs.' Answer ¶¶ 7-9.

Section 45-24-69(a) provides that:

> "[a]n aggrieved party may appeal a decision of the zoning board of review to the superior court for the county in which the city or town is situated by filing a complaint stating the reasons of appeal within twenty (20) days after the decision has been recorded and posted in the office of the city or town clerk. . . ."

An aggrieved party must file his or her complaint stating the reasons of appeal twenty days after the decision has been recorded and posted.

Section 45-24-61(b) provides that:

> "[a]ny decision by the zoning board of review, including any special conditions attached to the decision, shall be mailed within one business day of recording, by any method that provides confirmation of receipt to the applicant, to any objector who has filed a written request for notice with the zoning enforcement officer, and to the zoning enforcement officer of the city or town."

Thus, the zoning board must mail its decision within one business day to the applicant.

"[I]t 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." *Jeff Anthony Properties v. Zoning Board of Review of Town of North Providence*, 853 A.2d 1226, 1230 (R.I. 2004). Moreover, when this Court examines an unambiguous statute, "there is no room for statutory construction and [the Court] must apply the statute as written." *Id*.

Here, on December 11, 2018, the Board issued a written decision and on the same day recorded it with the City of Pawtucket Land Evidence Records at Book 4317, Page 342. *See* Board decision. Appellant filed its appeal in the Superior Court on January 3, 2019. In Rhode Island '"[s]tatutes prescribing the time and the procedure to be followed by a litigant attempting to secure

appellate review are to be strictly construed."' *Rivera v. Employees' Retirement System of Rhode Island*, 70 A.3d 905, 912 (R.I. 2013) (quoting *Sousa v. Town of Coventry*, 774 A.2d 812, 814 (R.I. 2001)). For example, if a statute prescribes twenty days, then the twenty-day requirement must be met.

Moreover, Rule 6(a) of the Superior Court Rules of Civil Procedure provides:

> "[i]n computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a holiday." Super. R. Civ. P. 6(a).

When computing time, Rule 6(a) extends the last day in computing any time period to the next day which is not a Saturday, a Sunday, nor a holiday. Super. R. Civ. P. 6(a). *See McAninch v. State of Rhode Island Department of Labor & Training*, 64 A.3d 84, 86 (R.I. 2013) (applying Super R. Civ. P. 6 and noting if the last day is a Saturday, Sunday, or holiday, the required time period runs to the day which is not a Saturday, Sunday, or holiday). Here, if Saturday, Sunday, and the holidays were computed after December 11, 2018, then Appellant would have until December 31, 2018 to file its appeal. Therefore, the appeal is untimely here.

Pursuant to § 45-24-69, this Court has jurisdiction to hear zoning matters. Under the doctrine of equitable tolling, this Court also has the equitable authority to determine whether a statute providing for judicial review should be tolled. *See Rivera*, 70 A.3d at 912 (holding that "the Superior Court has the equitable authority to determine whether the statue providing for judicial review of an administrative decision pursuant to § 42-35-15(b) should be tolled in appropriate circumstances"). Equitable tolling was applied in *Rivera* to find an appeal filed out of time to be timely because Petitioner's attorney was provided incorrect information to the effect that the

deadline for seeking judicial review was thirty days from the receipt of the notice of the final decision, and not the mailing of notice. *Id*. at 913.

In the present case, the Appellant alleges the Board did not mail its decision. The record does not contain competent evidence of the mailing of the decision to Plaintiff, pursuant to § 45-24-61(b). Applying *Rivera* and its application of equitable tolling to an administrative decision and its acknowledgment that — " [our Supreme Court has] never indicated that strict construction in this context is an impenetrable bar to venerable concepts of equity"—this Court has the authority to apply equitable tolling to § 45-24-69 and does so here to find said appeal timely. *Id.* at 912.

III

The Board's Decision

A

The General Character of the Surrounding Area

Appellant asserts that the decision was clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. Appellant asserts that the record evidence supports a single conclusion that the proposed use would not alter the general character of the surrounding area. The Board contends that the proposed use would alter the general character of the surrounding area.

A "special use" is a "regulated use that is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42." Section 45-24-31(62). Section 45-24-57(1)(v) permits zoning boards "[t]o authorize, upon application, in specific cases, special-use permits, pursuant to § 45-24-42, where the zoning board of review is designated as a permit authority for special-use permits[.]" The terms "special permits" and "special exceptions" may be used interchangeably. *McNalley v. Zoning Board of Review of City of Cranston*, 102 R.I.

417, 418, 230 A.2d 880, 881 (1967). "When applying for a grant of a special exception, an applicant must preliminarily show that the relief sought is reasonably necessary for the convenience and welfare of the public." *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991). "A zoning board of review, however, may not deny granting a special exception to a permitted use on the ground that the applicant has failed to prove that there is a community need for its establishment." *Toohey v. Kilday*, 415 A.2d 732, 735 (R.I. 1980). "The rule, [is] that satisfaction of a 'public convenience and welfare' pre-condition will hinge on a showing that a proposed use will not result in conditions that will be inimical to the public health, safety, morals and welfare." *Salve Regina College*, 594 A.2d at 880 (citing *Nani v. Zoning Board of Review of Town of Smithfield*, 104 R.I 150, 156, 242 A.2d 403, 406 (1968)).

Section 410-113(B) of the Pawtucket Zoning Ordinance provides:

> "(1)In granting a special use permit, the Board shall require that evidence to the satisfaction of the following standards be entered into the record of the proceedings:
> "(a)That the special use is specifically authorized by this chapter and setting forth the exact subsection of this chapter containing the jurisdictional authorization.
> "(b)That the special use meets all of the criteria set forth in the subsection of this chapter authorizing such special use.
> "(c)That the granting of the special use permit will not alter the general character of the surrounding area or impair the intent or purpose of this chapter or the Comprehensive Plan of the City."

A special-use permit is subject to certain requirements as identified in Section 410-113(B). Here, the Board found that Appellant's proposed use is not in conformance with the City's Comprehensive Plan because it would adversely affect the quality of life and character of the surrounding neighborhood. (Decision at 5.)

The businesses near the Property are Division Street Auto Sales & Service, Pawtucket Patriot Bar & Grill, Packaging Graphics, Ecological Fibers, First Stop Automotive, and Rhode Island Petroleum Equipment. *See* Appellant's Mem. 4. During testimony to the Board, Attorney McBurney stated that if the aerial view was expanded, there are other businesses such as Bliss Manufacturing, Encore Fire Protection, United Metal & Badge, Lambert & Sons Construction, and Palagi's Ice Cream. (Tr. at 28). The Board then discussed the impact of the neighborhood:

> "MS. HOVARTH: For example, the impact on the neighborhood, lot number---what's shown as Assessor's Lot 708, which is the corner of Fern Street and India Street, it's about a quarter-acre lot. Houses on that street, they have pretty good sized yards and are single family homes. If someone wanted to sell a quarter-acre lot across the street from the marijuana factory, it would seem reasonable to believe that it might be worth less than if there was something else in that location and that might be a detriment to the owner of that property.
>
> "MR. MCBURNEY: I don't want to speculate as to real estate values. I would go back to what I've referenced in the past and what Mr. Willett's testified to, is that knowledge of that being a cultivation center will not be had from the general public looking at that building." (Tr. at 39-40.)

The evidence before the Board was that the Property would be subject to strict DBR requirements, which would essentially shield the business from the public's view. (Tr. at 8.) Pursuant to DBR regulations, the Property would have windows that are boarded or blocked. (Tr. at 7.) Appellant claims that state-of-the-art odor elimination technology would be implemented. *Id*. Currently there is a bar directly next to the Property. Willett testified that in the neighborhood there is GKT Refrigeration, a petroleum oil company, an auto repair shop, a fabric company, and then a vacant lot. (Tr. at 9.)

Article 410-12(J) of the Pawtucket Zoning Ordinance specifically deals with compassion centers. Section J authorizes a special use permit for a compassion center in an "MO" and "MB"

area. The Property is located in a "MO" Industrial Open Zone. (Decision at 1.) However, the hearing record and other evidence show that the Property is also located near a residential zone. Members of the Board made an inspection of the Property and the surrounding properties in the neighborhood. *Id*. The Board found that the Property abuts a two-family residential (RT) district. (Decision at 3.) "[E]vidence gleaned from the personal observations of zoning board members constituted 'legally competent evidence upon which a finding may rest . . . if the record discloses the nature and character of the observations upon which the board acted.'" *Restivo v. Lynch*, 707 A.2d 663, 666 (R.I. 1998).

1

Lack of Expert Testimony

The Board avers that Appellant did not present any experts to testify in support of approving a Special-Use Permit. Appellant does not dispute that no expert witness was presented to the Board. Appellant argues that the Board gave too much importance to the lack of a testifying expert. Appellant maintains that when the Board was presented with eight other applications that did not have expert witnesses, it approved every single one**.**

"[I]f 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." *Murphy v. Zoning Bd. of Review of Town of South Kingstown*, 959 A.2d 535, 542 (R.I. 2008). "[T]here is no talismanic significance to expert testimony. It may be accepted or rejected by the trier of fact." *Restivo*, 707 A.2d at 671.

Board member Ferland emphasized that if there are no expert witnesses, then the Board becomes the experts. (Tr. at 26.) It is true that the zoning board has special knowledge. *Kelly v. Zoning Board of Review of City of Providence*, 94 R.I. 298, 303, 180 A.2d 319, 322 (1962).

However, the Court will not presume that special knowledge "in making a challenged decision the board acted pursuant to such special knowledge in the absence of some disclosure in the record as to the circumstances on which it relied." *V.S.H. Realty, Inc. v. Zoning Board of Review of City of Warwick*, 103 R.I. 16, 19, 234 A.2d 355, 357 (1967). In *Toohey*, 415 A.2d at 738, the Court held that Board must disclose on the record the observations or information upon which it acted.

Here, in his lay opinion, from observing the neighborhood, Willett believes that the medical marijuana cultivation center would not have a negative impact on the neighborhood because of the regulations that the DBR put in place. (Tr. at 12.) Board member Ferland emphasized "[s]o he's not qualified to testify on whether it would affect the neighborhood." (Tr. at 13.) In regard to affecting the neighborhood, Willett testified that the "small piece of residential . . . it's completely blocked off with trees." (Tr. at 13.) Board member Ferland asked how far away the Property was from the school. (Tr. at 14.) Willett informed the Board that according to Google Maps, the Property was 1,287 feet away. *Id.* The Board inquired about Pariseau Field. Appellant argues that Pariseau Field is not part of the neighborhood. Further, Appellant asserts that the Board has previously approved applications for properties located 400 feet away from parks and fields. See Appellant's Mem. at 5. A discussion regarding the trees and field around the area occurred:

> "MR. FERLAND: How about the track and field where the kids play football, soccer, and walk around the track?
>
> "WILLETT: I'm not sure because that's not part of -- there's no ordinance in Pawtucket restricting that, nor is there an ordinance with the State restricting that.
>
> "MR.FERLAND: But kids are still frequenting that place closer than 1,000 feet.
>
> "WILLETT: But it's not a school, and how does -- the law reads K through 12.

> "MR. FERLAND: Well, the law doesn't say just because you have trees abutting a residential zone the residential zone disappears." (Tr. at 14.)

The testimony indicates that Willett and Ferland disagreed about whether an abutting residential zone effects an industrial zone. The Board found that the Property is 640 feet away from Pariseau Field. (Appelllant's Mem. at 5; Decision at 2.) The Board's decision conveys that the residential zone and Pariseau Field were factors in denying the Appellant's application on the ground that the cultivation center would alter the general character of the surrounding area or impair the intent or purpose of the Comprehensive Plan of the City. The Board stressed that the Property is about 600 feet from a football/track field utilized by local school children and teams. (Decision at 5.)

In response to whether the Property would affect the general character of the neighborhood, Leary's response was:

> "No. As a matter of fact, a couple of people talked to me about it and asked me a few questions, and they didn't have any problem with it . . . I heard a few people got notices, and they didn't have a problem with it; so I don't believe that it would have a negative impact to the neighborhood." (Tr. at 22.)

However, Leary rendered his opinion as an owner who has had discussions with the neighbors. Though the record does show that no objectors showed up to the hearing, the Board contends that the lay testimony offered by Willett and Leary was not legally probative of the public convenience and welfare and was not sufficient to satisfy the question of whether the special-use permit would alter the general character of the surrounding area or impair the intent or purpose of the City's Zoning Ordinance or the City's Comprehensive Plan. The Board cites to *Smith v. Zoning Board of Review of City of Warwick*, 103 R.I. 328, 334, 237 A.2d 551, 554 (1968), for the proposition that lay testimony is not as probative as expert testimony. In *Smith*, the Court held that "testimony of

the neighboring property owners on the question of the effect of the proposed use on neighboring property values and traffic conditions has no probative force, inasmuch as these were lay judgments. *Id*. In the present case, Leary owns the Property and Willett plans to work at the Property. Both are offering lay opinions. In *Murphy*, 959 A.2d at 543, the Court found that the Board erroneously rejected an expert witness after the Board did not contradict, impeach, or comment on the expert's testimony. Here, Board member Ferland commented that Leary was not an expert witness and questioned his credibility as to giving an expert testimony. This Court "lacks the authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute his or her findings of fact for those made at the administrative level." *Lett v. Caromile*. 510 A.2d 958, 960 (R.I. 1986).

The Board also cites to *DePetrillo v. North Providence Zoning Board of Review*, No. CIV.A. PC2000 5883, 2001 WL 1558773, at *3 (R.I. Super. Nov. 27, 2001) holding "[g]enerally, expert testimony is required during the course of a zoning board hearing to provide information about matters that are central to the Board's decision." *DePetrillo* is a Superior Court case that has no binding authority. *See Whitaker v. State,* 199 A.3d 1021, 1029 n.3 (R.I. 2019). In considering a zoning case, "a board may consider probative factors within its knowledge . . . or may acquire adequate knowledge through observation and inspection on a view." *Toohey*, 415 A.2d at 737. In *DePetrillo,* the Court found that the record reflected that Board members had personal knowledge of and/or visited the proposed site and thus, such knowledge and observations were treated as "legal evidence capable of sustaining a board's decision . . . ." *DePetrillo*, 2001 WL 1558773, at *3. However, the Court reasoned that "while the Board may be guided by its own knowledge in its decision to grant a special use permit . . . it may not disregard the standard it is directed to apply in the statutes and ordinances." *Id*. The Court concluded that because the Board failed to address

whether the special use would comply with the requirements of the Ordinances, the issue must be remanded. *Id*.

Here, the Board's decision states that the Appellant's requested Special-Use Permit does not comply with Section 410-113(B) of the Pawtucket Zoning Ordinance. (Decision at 5.) Section 410-12.19(J) explicitly permits a compassion/cultivator center in an industrial zone. The Board found that the Property abuts a residential district with surrounding residential homes nearby. (Decision at 3.) The Board's decision conveys that a special-use permit for a medical cultivation center would not comply with the Property that is also located in a residential zone. *See* Section 410-12(J) of the Pawtucket Zoning Ordinance (showing that a marijuana compassion/cultivation center is not available in a residential zone).

2

Proximity to Residential Zone

Appellant argues that based on a review of prior applications, the Board has considered five special-use permit applications for medical marijuana cultivators where the proposed property directly abuts a residential zone. Board member Ferland stated "[b]ecause we've had other properties where there were residences right across the street that were denied just because you're so close to residential properties." (Tr. at 38.) As evidence, Appellant asks this Court to look at the summary table showing that the Board has not once denied an application when it was located in a MO or MB zone and was located greater than 1000 feet from a school, even if it directly abuts a residential zone. The summary table represents special-use permit applications by medical marijuana cultivators located in the MO and MB zones.

The Board asks that this Court not consider the summary table because it was not raised at the hearing. In support, the Board cites *Ridgewood Homeowners Association v. Mignacca*, 813

A.2d 965, 977 (R.I. 2003). In *Ridgewood*, the Court reasoned that although the Mignaccas raised the argument that a variance was unnecessary before the Superior Court, the zoning board of review was the appropriate venue in which this issue should have been presented. *Id*. In contrast, Appellant argues that it is appropriate for the Court to take notice of the summary table because the Board relied on the fact that it had not approved similar applications abutting a residential zone. *See* Tr. at 38.[2]

Here, at the Zoning Board hearing, a discussion of approving other applications occurred. Board member Ferland and the Appellant's representative disagreed about permitting special-use permits being granted close to residential properties. Below is that colloquy:

> "MR. FERLAND: Because we've had other properties where there were residences right across the street that were denied just because you're so close to residential properties.

[2] Below is the summary table that Appellant relies on:

Decision Number	Floor Plan	Expert Witness	Proximity to Residential/Zone	Approve/Deny
17-13	No	No	Abuts	Approve
17-14	No	No	Remote	Approve
17-16	Yes	No	~350 Feet	Approve
17-26	No	No	Abuts	Approve
17-27	No	No	Remote	Approve
17-33	No	No	Remote	Approve
17-34	Yes	No	Abuts	Approve
17-38	No	No	Abuts	Approve
18-4	No	Yes	Abuts	Approve

> "Mr. MCBURNEY: You've also had them where you've approved them, and you've approved them when they've been within 150 feet of a residential zone.
>
> "MR.FERLAND: Yes, but this is right across the street.
>
> "MR.MCBURNEY: I think that you've approved them in multiple cases when they're located in close proximity, including abutting. I was the attorney for one of them that you approved.
>
> "MR. MCKINNON: That's correct.
>
> "MR. WILLETT: That was an occupied location as well; this is an unoccupied "RT" zone.
>
> "MR. FERLAND: It's still residential." (Tr. at 38-39.)

Although Appellant did not bring up the summary table argument to the Board, Appellant raised arguments pertaining to information found in the summary table and the Board acknowledged it. (Tr. at 39.) The Board also relies on their past decisions justifying denial of Appellant's application. *See* Tr. at 38-39. Our Supreme Court has not explicitly held that the raise-or-waive doctrine applies to administrative proceedings. *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1153 (R.I. 2006). Consequently, because Appellant raised information pertaining to the summary table to the Board, the argument is preserved. *See Delbonis Sand & Gravel Co. v. Town of Richmond*, 909 A.2d 922, 925-26 (R.I. 2006) (where landowners sufficiently raised and argued issue to trial court of whether their donation of land to town was an obligation or expenditure that they incurred in reliance on previous zoning ordinance; to preserve issue for appellate review, the stipulated facts stated that the landowners dedicated and deeded a certain number of acres to town, and the memorandum of law expressly asserted that dedication of land represented a substantial obligation in good-faith reliance upon the previous ordinance).

3

Marijuana

In Rhode Island, the Edward O. Hawkins and Thomas C. Slater Medical Marijuana" Act[3] authorizes medical marijuana cultivation facilities to provide medical marijuana to compassion centers. *See* §§ 21-28.6-3 and 21-28.6-4. Medical marijuana cultivators are subject to the department of business regulation for operation. *Id*. § 28.6-6.16.

Appellant argues that the Board's decision was arbitrary, capricious, and characterized by abuse of discretion or clearly unwarranted exercise of discretion because the decision was impacted by prejudicial beliefs regarding marijuana use. Appellant argues that Board member Ferland's comments regarding the legality of medical marijuana was his response to Willett's comment that a medical marijuana facility is not different from a bar. The Board maintains that Board member Ferland's comments do not show a predisposition against marijuana cultivation centers.

The following colloquies regarding having a cultivation center in a residential zone occurred:

> "MR. FERLAND: One of the reasons probably there wasn't anybody to object to this is because these applications right now are advertised as pharmaceutical. When the ordinance gets changed, it will be advertised as marijuana, and you will see a lot more.
>
> "MR. MCBURNEY: I'd hate to speculate as to why people do or do not show up.
>
> "MR. FERLAND: I wouldn't mind a pharmaceutical place next to me, maybe I'll get some drugs cheaper." (Tr. at 27.)

[3] Section 21-28.6-16.

Here, Ferland's testimony is speculative as to why no objector appeared at the hearing, but the statement alone does not show any animosity to a cultivation center. However, the following colloquy regarding whether the legality of marijuana affected the zoning board's decision occurred:

> "MR. WILLETT: Can I add something? I don't know how it would be much different than that bar being next door either. My facility can't be known; that bar is openly known to everyone. I don't feel that it's any different.
>
> "MS.HOVARTH: I don't think there's any comparison.
>
> "MR FERLAND: Drinking is legal.
>
> "MR. WILLETT: Medical marijuana is legal as well.
>
> "MR. FERLAND: By the Federal Government?
>
> "MR WILLETT: We're not here in a Federal situation.
>
> "MR.FERLAND: It's not legal by the Federal Government.
>
> "MR. MCBURNEY: It's not legal by the Federal Government, it's legal by the State government of which this City is a municipality of.
>
> "MR.FERLAND: Which you could be arrested by a Federal agent.
>
> "MR.WILLETT: That's a risk I take, I guess.
>
> "MR. FERLAND: So we would be condoning something that would be against---well, we've done that in the past, but our concern is more about the residential." (Tr. at 40-41.)

The testimony may suggest that the Board members are prejudicial to marijuana; however, Board member Ferland stated that in the past, they had condoned medical marijuana, but the concern has more to do with whether the residential zone is being affected. *Id*. at 41. At no point during the decision is it implied that the special-use permit was being denied based on personal beliefs of the Federal Government's stance on medical marijuana. There is no evidence that the Federal

Government's position on medical marijuana arbitrarily affected the Board's decision. *See Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1, 10 (R.I. 2005) (in mounting constitutional challenges, litigants, . . . bear the burden of proving that the statute is unconstitutional); *see also* § 21-28.6-18 listing that possessing, using, distributing, cultivating, processing or manufacturing marijuana or marijuana products which do not satisfy the requirements of this chapter are not exempt from arrest, civil or criminal penalty, seizure or forfeiture of assets, discipline by any state or local licensing board or authority, and state prosecution).

4

Requirement of Site Plans

Next, the Board asserts that Appellant did not submit site plans or parking plans in support of its Application, thereby not complying with the City's requirement. The Board maintains that a lack of site plans was sufficient basis for denial of the Application. Appellant contends that a site plan requirement is unnecessary because a review of the prior applications reveals that only two of the nine applications included floor plans. Appellant also argues that the Board has waived any argument that the lack of a parking plan and/or site plan is sufficient basis for the Board's denial of the Application because the decision does not state that the lack of such plans was a basis for denial.

All applications to the Zoning Board of Review under Section 410-60 of the Pawtucket Zoning Ordinance must be submitted to the Board with a list of required materials: a site plan, which shall show the distances between the proposed use and the boundary of the nearest residential zoning district and the property line of all other abutting uses as described within this section; present and proposed parking spaces and landscaping.

Here, the Board reasoned that it was difficult to determine if the proposed use would be a good fit for the neighborhood." (Decision at 6.) The Board inquired as to parking and determined that no parking plan had been submitted. *Id*. at 2. In addition, the Board found that no site plans, no floor plans, no security plans were provided making it difficult to determine if the proposed use would be a good fit for the neighborhood. *Id*. at 6. The Board commented that for almost every application they have received for this kind of use, they have received a floor plan showing cameras and exits for security access. (Decision at 3.)

Willett stated that he does have this current information with him but was instructed not to include it as it was a security risk because it is a public record. *Id*. Willett informed the Board that he could provide the requested materials if needed. The hearing record does not reveal that the Board requested further evidence after the hearing. *Id*. Regarding parking, Willett stated that there were six available parking spaces. *Id*. at 2. No parking plan was provided. Appellant's argument—the Board's waiving the lack of a parking or site plan is sufficient basis for denial of the application—is misplaced. The Board's decision referenced the lack of site plans being provided in regard to the character of the neighborhood. *See* Decision at 6. The ordinance itself requires that site plans be submitted. Irrespective of the Board's opinion, Appellant's Application was not complete as it was missing required parking and site plans.

5

The Decision Includes Reasons for the Denial

Lastly, Appellant argues that the written decision of the Board lacks any application of the facts to legal principles; rather, the Board simply summarized the evidence presented at the hearing and then summarily concluded that the proposed use would alter the general characteristics of the surrounding area. The Board disagrees.

"[A] municipal board, when acting in a quasi-judicial capacity, must set forth in its decision findings of fact and reasons for the actions taken." *Kaveny*, 875 A.2d at 8. The Court must decide: "whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles." *Irish Partnership v. Rommel*, 518 A.2d 356, 358-59 (R.I. 1986). "Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany." *Id*. When the zoning board "fails to state findings of fact, the [c]ourt will not search the record for supporting evidence or decide for itself what is proper in the circumstances." *Kaveny*, 875 A.2d at 8.

Here, the Board's six-page written decision contains a summary of the facts presented, a summary of the testimony, a direct copy of the Planning Board's findings, and the Board's conclusion. The Board maintained that the Appellant failed to provide sufficient probative evidence substantiating a claim for relief. The record of the hearing, and particularly the Board's decision, contain sufficient facts necessary for judicial review. The Board did not fail to state findings of facts or conclusions of law. The Board's decision determined that the Property adversely affected the quality of life and character of the surrounding neighborhood and that Appellant's Special-Use Permit request was not consistent with Section 410-113B of the Pawtucket Zoning Ordinance.

IV

Conclusion

After carefully reviewing the entire record, this Court finds that the Board's denial of the Special-Use Permit was supported by reliable, probative, and substantial evidence of the record, that it was not made upon unlawful procedure, and it did not constitute an abuse of discretion. Substantial rights of the Appellant have not been prejudiced.

Counsel shall submit to an appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Medi-Green, LLC v. City of Pawtucket Zoning Board of Review, et al.
CASE NO:	PC-2019-0053
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 27, 2020
JUSTICE/MAGISTRATE:	McGuirl, J.
ATTORNEYS:	
For Plaintiff:	Patrick J. McBurney, Esq.
For Defendant:	Frank J. Milos, Jr., Esq.