STATE OF RHODE ISLAND

NEWPORT, SC. **SUPERIOR COURT**

(FILED: March 21, 2024)

STEPHEN G. FAGAN, CHRISTINE S. FAGAN, SUSAN COHEN CWEIKA, CRAIG W. SCHMIDT, ANNE R. SCHMIDT, ROBERT R. NOVICK, and ALYSON F. NOVICK	:	
Appellants,	:	
v.	:	**C.A. No. NC-2021-0031**
JAMES MILLER, CHRISTOPHER SOUZA, ERIC KIRTON, THOMAS SILVEIRA, and THOMAS HEANEY, in their official capacities as Members of the ZONING BOARD OF REVIEW OF THE TOWN OF MIDDLETOWN; and EUGENE GOLDSTEIN	:	
Appellees.	:	

DECISION

LANPHEAR, J. Before this Court for decision is Appellants' appeal from a January 13, 2021 decision of the Middletown Zoning Board of Review.

The Middletown Planning Board (Planning Board) considered and rejected Eugene S. Goldstein's (Mr. Goldstein) application for preliminary and final plan approval for a proposed eight lot major subdivision. Mr. Goldstein appealed to the Middletown Zoning Board of Review which sat as the Planning Board of Appeals (Zoning Board). The Zoning Board reversed the Planning Board.[1]

The matter was then appealed to this Court by abutting and adjacent property owners who

[1] As background, there are three stages of review for land development and subdivisions: (1) "master plan"; (2) "preliminary plan"; and (3) "final plan." *See* G.L. 1956 § 45-23-39(a).

seek reversal of the Zoning Board decision and thereby denial of the plans.

Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

I

Facts and Travel

Mr. Goldstein is the owner of approximately 9.19 vacant acres of real property located 0.3 miles to the east of the intersection of Prospect Avenue and Aquidneck Avenue (the Property).[2] *See* Zoning Board Hr'g Tr. 6:8-11, Dec. 3, 2020 (Zoning Board Tr.). With desires to develop an eight-lot subdivision on the Property, Mr. Goldstein submitted a proposal for such to the Planning Board in 2016, which approved the master plan in February 2017. *See id.* at 6:8-14, 20-24. However, members raised concerns about the quantity of well water which would be available after the construction of the subdivision, as residents in that area rely on well water. *See id*. at 9:6-17.

To combat concerns, Mr. Goldstein worked with engineers and made changes to his proposal to satisfy the town engineer's feedback. *See id*. at 10:3-14. On October 9, 2019, the Planning Board considered Mr. Goldstein's joint preliminary and final plan. *See generally* Planning Board Hr'g Tr., Oct. 9, 2019 (Planning Board Tr.). There, engineer Lynn Small stated, "the stormwater system for this project will result in an improvement," and engineer Paul Aldinger opined, "based on a reasonable degree of scientific certainty . . . that developing the eight bedrock wells is not likely to cause any negative impacts on the nearby wells because the demand is real low[.]" *Id*. at 21:16-18; 59:1-4.

[2] The property is further identified as Assessor's Plat 121NW, Lot 66-A.

Thereafter, neighbors abutting the Property (neighbors)[3] raised their concerns with the well water. One neighbor stated, "we do have well issues. My direct neighbor abutting me . . . had to dig deeper. . . . The McCarthys across the street from them, their well went dry this year. My neighbor two doors down, their well went dry this summer." *Id*. at 97:17-23. Another expressed concern with the "quality" and "longevity of [his] well" once the eight new houses are built because they will take from the same water supply. *Id*. at 99:12-13. Another neighbor stated, "we noticed a change in our water, the quality of our water. We had it tested and suddenly there was calcium in the water[.]" *Id*. at 101:15-17.

On October 18, 2019, the Planning Board released its written decision (Planning Decision) denying Mr. Goldstein's proposal, reasoning that "the application as presented would not allow the Board to make the required finding that there will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval." (Planning Decision 2.) On November 10, 2019, Mr. Goldstein appealed the Planning Decision to the Zoning Board, asserting "prejudicial procedural error, clear error and the decision lacks support by the weight of the evidence in the record." Notice of Appeal; *see also* Applicant's Mem. in Supp. of Appeal.

In consideration of the appeal, the Zoning Board held a hearing on December 3, 2020. Mr. Goldstein argued that the only competent evidence before the Planning Board was from the two experts and that the neighbors' testimony was speculative; Appellants insisted that the neighbors' testimony was reliable given their firsthand knowledge of the wells; and the Planning Board contended that the expert testimony was based on speculation. (Zoning Board Tr. at 23-

[3] Neighbors who testified include: Appellants Stephen G. Fagan and Christine S. Fagan; Jane Beezer, who lives across from the Property; Kevin McCarthy, who lives at Prospect Avenue; and, Barbara Arrieta, an abutter to the Property. *See generally* PB Tr. 91:12-114:2.

27, 42-44, 54-56.)

On January 13, 2021, the Zoning Board issued its decision reversing the Planning Decision. *See generally* Zoning Board Decision (Board Decision). The Zoning Board explained:

> "While the conclusions of [expert witnesses] differed in several respects, they both testified that in their opinion, there would be no significant negative environmental impacts from the installation of the proposed wells. There was no contrary expert testimony in the record. Said expert testimony outweighed the lay testimony of abutting property owners regarding the condition of their existing wells." (Board Decision 2.)

Appellants, abutters to the Property, appealed the Board Decision to this Court on two grounds: (1) that the Planning Decision was supported by competent or substantial evidence and (2) that the Zoning Board substituted its own judgment for that of the Planning Board, in violation of § 45-23-70. *See* Appellants' Mem. in Supp. of Appeal (Appellants' Mem.) 6, 11. This Court agrees.

II

Standard of Review

Section 45-23-71(a) grants the Superior Court jurisdiction to review decisions from a zoning board of review, sitting as a board of appeals. Review is governed by § 45-23-71(d):

> "The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of appeal 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 that are:
>
> "(1) In violation of constitutional, statutory, ordinance, or planning board regulations provisions;
>
> "(2) In excess of the authority granted to the planning board 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 45-23-71(d).

The Court must "'examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). Substantial evidence is "more than a scintilla but less than a preponderance." *Mill Realty Associates*, 841 A.2d at 672 (internal quotation omitted).

Section 45-23-70(a) provides that "[t]he board of appeal [the Zoning Board] shall not reverse a decision of the planning board or administrative officer except on a finding of prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record." Section 45-23-70(a).[4] In reviewing an appeal from a decision of a board of appeal, "[t]he Superior Court gives deference to the findings of fact of the local planning board." *West v. McDonald*, 18 A.3d 526, 531 (R.I. 2011). "[T]he Superior Court does not consider the credibility of witnesses, weigh the evidence, or make its own findings of fact." *Munroe v. Town of East Greenwich*, 733 A.2d 703, 705 (R.I. 1999). "[I]ts review is confined to a search of the record to ascertain whether the board's decision rests upon competent evidence or is affected by an error of law." *Id*. (internal citations omitted).

[4] Section 45-23-70 was repealed by P.L. 2023, ch. 308, § 3 and P.L. 2023, ch. 309, § 3, effective January 1, 2024. However, the appropriate standard for an appeal is "the law in effect at the time when the applicant . . . submitted its application for a permit to the zoning board[,]" absent a "clear expression of retroactive application." *East Bay Community Development Corporation v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1144 (R.I. 2006). Hence, § 45-23-70 is applicable.

III

Analysis

On appeal, Appellants assert that the Planning Decision is supported by substantial evidence, whereas Mr. Goldstein maintains that the Planning Decision was not supported by such. *See* Appellants' Mem. 6-11; Appellee's Mem. in Opp'n to Appeal (Appellee's Opp'n) 5-7. As summarized above, the Planning Board heard testimony from both experts and neighbors (lay witnesses).

Our Supreme Court "intended to restrict the reliance on lay witness testimony to . . . limited circumstance[s]." *RBSE Properties, LLC v. Zoning Board of Review of Town of Lincoln*, No. CA PC 05-2591, 2006 WL 572817, at *8 (R.I. Super. Mar. 7, 2006). For example, it will not give probative force to lay testimony as to issues regarding the effect of a proposed use on property values or traffic conditions. *See Smith v. Zoning Board of Review of City of Warwick*, 103 R.I. 328, 334, 237 A.2d 551, 554 (1968); *see also Baker v. Zoning Board of Review of City of Providence*, 102 R.I. 134, 135, 228 A.2d 859, 860-61 (1967) ("This bare statement [that action by the board 'would increase property values'] given without other supporting evidence or any qualification in the record as to the expertise of this witness represents a conclusion completely lacking in any probative force[.]"); *Richardson v. Zoning Board of Review of City of Warwick*, 101 R.I. 194, 201, 221 A.2d 460, 465 (1966) ("The petitioner's bare assertion that she felt the proposed use would depreciate her property is a lay judgment unsupported by any factual data or background and is not competent evidence[.]").

Appellees insist that this Court follow the rationale from *Polleys v. Ferrazzano*, No. PC-02-5759, 2005 WL 900305, at *1 (R.I. Super. Apr. 18, 2005). In *Polleys*, the appellee proposed to build a twenty-two-residence subdivision on a site that had wetlands and protected areas. *Id.*

Various individuals testified at the planning board hearings as to the proposal. *Id*. at *3. An engineer for the appellee expressed that the proposal "would not contribute in any significant way to the degradation of the pavement." *Id*. A few other experts expressed conclusions in favor of the proposal, opining that the "new wells for the development would not cause neighbors' wells to dry or suffer saltwater infiltration." *Id*. at *4. A resident, whom the planning board accepted as an expert due to almost twenty years of experience as a civil engineer, expressed concerns about the proposal's traffic impacts. *Id*. at *3. Notably, she expressed that "she did not analyze anything that the applicant had actually proposed building." *Id*. Another resident, accepted as an expert in hydrogeology,[5] testified that she found errors in the other engineer's analyses; however, she too conceded "that she had not done any analysis of the direction flow of the groundwater herself." *Id*. at *5. The planning board voted to deny the preliminary plan. *Id*. The zoning board reversed, reasoning that the planning board's decision was "against the overwhelming weight of the evidence[.]" *Id*. at *6.

On appeal to the Superior Court, the Polleys claimed that the zoning board exceeded its authority by substituting its judgment for that of the planning board. *Id*. The Court concluded that "[t]he testimony cited by the plaintiffs did not relate to facts, but instead to the unsubstantiated concerns of the plaintiffs. . . . It is quite clear that the objectors have not directly observed the effects of this yet-to-be built subdivision." *Id*. at *12. The Court further reasoned, "[i]t is equally clear that the Planning Board erroneously relied on lay opinions on matters properly addressed by experts." *Id*. Moreover, the Court distinguished *Polleys* from *Restivo v. Lynch*, 707 A.2d 663 (R.I. 1998), explaining that "[i]n contrast, the lay testimony in *Restivo*

[5] *See* Merriam-Webster Dictionary (defining hydrogeology as "a branch of geology concerned with the occurrence, use, and functions of surface water and groundwater").

consisted of objectors' statements that they had observed the property to be developed, and that it did not drain well." *Id*. (citing *Restivo*, 707 A.2d at 671).

In *Restivo,* the petitioner submitted a proposal for a subdivision to the city planning board. *Restivo*, 707 A.2d at 664.[6] The planning board had concerns about the subdivision's impact on the drainage system for the surrounding properties; therefore, it recommended that the petitioner hire an engineer to address those concerns. *Id*. at 665. The petitioner did so and submitted a revised proposal; the planning board voted to recommend approval subject to various conditions. *Id*. At the city council hearing, experts opined that "this project will not make—*should* not make the drainage situation worse." *Id*. at 670 (emphasis in original). Some council members also testified based on personal observations, explaining they "traveled to the area of the proposed subdivision on an occasion two days after a rainfall" and could see that the land was still wet. *Id*. at 667. Other council members testified as to their "personal knowledge that the area of the proposed subdivision was a high-density water area and that neighbors in the area had experienced flooded basements[.]" *Id*. Another council member was familiar with the problems in the area, including flooded cellars causing basement floor tiles to be lifted, rugs to be curled, and furniture to be destroyed. *Id*. Neighboring homeowners also testified as to

[6] The Court notes that a different appeals procedure existed in March 1995 when the petitioner in *Restivo v. Lynch,* 707 A.2d 663 (R.I. 1998), submitted a proposal to the city planning board. In *Restivo*, the petitioner properly petitioned pursuant to G.L. 1956 § 45-23-19 (1991 Reenactment), which stated:

> "The town council of any town or the city council of any city may act as the plan commission, and, in that event, no board of review need be appointed, and appeals from the decisions of the council acting in the capacity of plan commission shall lie directly to the superior court for the county in which the land is situated. . . ." Section 45-23-19 (1991 Reenactment).

Effective December 31, 1995, § 45-23-19 was repealed. *See* P.L. 1994. ch. 92 § 2. Today, zoning boards of review hear appeals. *See* § 45-23-57. Thus, while the appeals procedure in *Restivo* differs from the procedures in place today, the Court nevertheless relies on *Restivo* for the factual analysis applied by our Supreme Court.

"chronic problems with basement flooding and poor drainage in [their] back yard." *Id*. at 668. The city council, however, denied the petition. *Id*. at 665.

On appeal, the petitioner argued the denial was "arbitrary, capricious, and characterized by an abuse or a clearly unwarranted exercise of discretion[.]" *Id*. The Superior Court affirmed that "there was competent evidence upon which the council rested its decision." *Id*. It explained that "council members may rely on their own expertise to the same degree and under the same conditions as can members of a zoning board." *Id*. at 667. Thereafter, the petitioner, relying on the same claims as before the Superior Court, appealed to the Supreme Court. *Id*. at 666.

The Supreme Court held that the evidence in the record justified denial of the proposal, relying on the fact that several council members and homeowners testified as to their personal observations at the council hearing. *Id*. at 668. It emphasized that "there is no talismanic significance to expert testimony[,] [i]t may be accepted or rejected by the trier of fact, . . . particularly when there is persuasive lay testimony on the actual observed effects of prior residential construction." *Id*. at 671. The Supreme Court concluded that the "lay testimony [was] competent in respect to the presence of water in one's basement and such lay testimony describing physical facts and conditions does constitute evidence from which the planning board could fairly draw inferences." *Id*.

This Court finds that *Restivo* controls in the case at bar. The neighbors' testimony concerning water supply was much more akin to witnesses describing the presence of water in their basement, as opposed to analyzing traffic data or property values. *See id.*; *Smith*, 103 R.I. at 334, 237 A.2d at 554; *Baker*, 102 R.I. at 135, 228 A.2d at 860-61. The neighbors relied upon their own observations and experiences with the well water and disclosed those observations. Indeed, like the residents in *Polleys*, the neighbors here have yet to directly observe the impact of

the eight-lot subdivision on their well water. *Polleys*, 2005 WL 900305, at *12. However, the neighbors testified that the *current* supply of well water cannot meet the residents' demands. Thus, it was not an error to conclude that the record lacked significant evidence that the well water would not meet the water demands for an additional eight residences. It was appropriate for the Planning Board to infer that future water supply would not meet additional demand. The neighbors testified as to current conditions of the well; they were not speculative as to the impact of the proposal, rather they testified on personal experiences and observations as to the current well water.

Ironically, Engineer Aldinger limited his conclusions because he did not drill a test well on the Property. *See generally* PB Tr.; *see also* Appellants' Mem. 6-8. Before the Planning Board, Engineer Aldinger testified that much of his research was based on assumptions and general data. *See* PB Tr. at 40:4-5 ("we're *assuming* the maximum daily demand would be 460 gallons per day"); *id*. at 43:7-8 ("[w]e *assumed* that [the average precipitation] was pretty similar to the climatological station in Kingston"); *id*. at 44:8-9 ("the average annual run off in Middletown is *assumed* to be approximately the same as"); *id*. at 56:7-8 ("we're *assuming* that 35% of the precip [*sic*] actually gets recharged") (emphasis added for all). The other engineers made similar conclusions.

In reviewing the record, this Court concludes that the lay testimony relied upon personally observed events. Thus, the trier of fact, the Planning Board, was welcome to accept or reject the expert's testimony to the contrary. *See Restivo*, 707 A.2d at 671. The Planning Board heard the testimony firsthand and could assess witness credibility. *See Mendonsa v. Corey*, 495 A.2d 257, 263 (R.I. 1985) (explaining that the body that "had before it the individual witnesses and had the opportunity to judge their credibility, was in a better position . . . to resolve

the conflict"). The Planning Board concluded that the proposal should be denied, in accordance with the neighbors' testimony regarding the quantity of water in the wells. This Court concludes that such testimony was sufficient to support its denial of the proposal.

There is a real and important role for neighbors and other witnesses to be heard at the Planning Board hearing. The statutes invite their participation and testimony at the public hearing. Where, as in the case at bar, they testify concerning actual occurrences and known facts, their testimony can be vital in apprising a local board in finding facts and drawing inferences. Their participation is neither a sham nor a façade. It may be vital to allow the local board to perform its fact-finding function.

The Board Decision displayed a clear substitution of factfinding and credibility determinations which was the Planning Board's prerogative. *See* § 45-23-70(a). At the Zoning Board hearing, members explicitly stated that they credited the experts' findings over the neighbors' testimony. *See* Zoning Board Tr. at 92:12-13 ("I'm going to go with the expert witnesses in this case"); Zoning Board Tr. at 92:20-22 ("the expert witness was competent. I'm going to vote in favor of the appeal"); Zoning Board Tr. at 93:6-9 ("I believe that the experts should know what's going on . . . . I believe the expert testimony was valid"). Moreover, the Board Decision highlighted this conclusion, stating, "expert testimony *outweighed* the lay testimony of abutting property owners regarding the condition of their existing wells." (Board Decision 2) (emphasis added). Accordingly, the Court concludes that the Zoning Board substituted its judgment for that of the Planning Board when it gave greater weight to the expert testimony. *See Pawtucket Transfer Operations, LLC v. City of Pawtucket,* 944 A.2d 855, 859 (R.I. 2008); § 45-23-70(a).

IV

Conclusion

For the foregoing reasons, this Court reverses the Board Decision, thereby affirming the Planning Decision and denying Mr. Goldstein's applications. Counsel shall submit an appropriate order for entry. Any requests for attorneys' fees shall be submitted to this Court within fifteen days.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Stephen G. Fagan, et al. v. James Miller, et al.**
CASE NO:	**NC-2021-0031**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**March 21, 2024**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**J. Russell Jackson, Esq.**
For Defendant:	**David P. Martland, Esq.** **Peter B. Regan, Esq.**