

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: July 9, 2024)

JOHNSTON ASPHALT, LLC, :
Appellant, :

v. :

C.A. No. PC-2022-04663

TOWN OF JOHNSTON ZONING :
BOARD OF REVIEW; THOMAS :
LOPARDO, ANTHONY PILOZZI, :
JOSEPH ANZELONE, RICHARD :
FASCIA, and RICHARD LOBELLO, :
in their capacities as members of the :
Town of Johnston Zoning Board of :
Review; the TOWN OF JOHNSTON, :
as a municipal entity; and JOSEPH :
CHIODO, in his capacity as the :
Finance Director of the Town of :
Johnston, :
Appellees. :

DECISION

LANPHEAR, J. Before this Court is Johnston Asphalt, LLC’s appeal from the March 22, 2022 decision of the Town of Johnston Zoning Board of Review denying its application for a special use permit. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, the Court remands to the Board.

I

Facts and Travel

Johnston Asphalt purchased property located at 100 Allendale Avenue, Johnston, Rhode Island (the Property), which is in an Industrial Zoning District, on May 29, 2002.¹ On the Property, Johnston Asphalt currently operates a hot mix asphalt plant and has a special use permit to do so. On December 29, 2021, Johnston Asphalt filed an application for an additional special use permit, pursuant to Johnston Code of Ordinances Section 340-75, in order to construct two, forty-seven-foot hot mix asphalt silos on the Property (the Application). The Table of Use Regulations specify that “[m]anufacturing, storing, processing, or packaging of cement, asphalt, bituminous asphalt, lime, chalk, or other similar products” is permitted by special use permit in the Industrial District. (Johnston Code of Ordinances, Sec. 340, Attachment 1 (Table of Use Regulations), Sec. 12, Line 4.)

The Board heard the Application on January 27, 2022. At the hearing, Daniel Hartman, the Environmental Engineering Manager for All States Materials, as well as Frank Marinaccio, a consulting engineer for Johnston Asphalt, spoke in support of the Application. Mr. Hartman began by giving a description of the Application, specifically noting that Johnston Asphalt “[is] not asking to increase [its] production at all. [Johnston Asphalt is] going to stay with the current production under the current permits that [it

¹ The Industrial I District “is composed of certain land so situated as to be suitable for industrial development. The purpose of this district is to permit the normal operation of a large number of industries, subject only to those regulations needed to control congestion and to protect nearby residential and business districts.” (Johnston Code of Ordinances, Sec. 340-5(I).)

has]. But, essentially, [it] need[s] a means to store different types of asphalt mixes” Hr’g Transcript (Tr.) 71:5-6, 19-23, Jan. 27, 2022.

When the engineers attempted to explain the Application, the town solicitor immediately reprimanded Mr. Hartman, asserting that because the engineers were presenting on behalf of Johnston Asphalt, they were “committing a felony [and] practicing law without a license.” *Id.* at 72:21-23. When a Board member questioned the need to return for the hearing, a swift recess was called. When the meeting restarted, the solicitor recommended, “I’m going to recommend you let them proceed. If it goes to court for some strange reason, obviously you need a lawyer.” (Tr. 73:20-22.)

The Board proceeded with the hearing without objection from Mr. Hartman and Mr. Marinaccio, and the engineers were peppered with questions. The engineers requested a continuance on multiple occasions. Mr. Marinaccio first requested a continuance to “have counsel put together a formal proposal that’s within the regulations” after the Board asserted that Johnston Asphalt could not expand its preexisting special use permit, even though the engineers reiterated that this was not an expansion of production. (Tr. 76:13-14.) Although acknowledging the continuance request, the Board continued its questioning. Mr. Hartman again requested a continuance “with representation” to which the town solicitor declared:

“I tried to get you to get a lawyer. You wanted to go forward and now you’re going forward. The Board can overrule me if they want. This is not a joke.” *Id.* at 78:7-15.

Though Board members had been inquiring during the presentation, the solicitor for the Board became more assertive, asking

“[SOLICITOR]: Do you have any experts here today?”

MR. HARTMAN: I'm a registered professional engineer, as is Frank.

“[SOLICITOR]: Do you have a land use expert?

“MR. HARTMAN: No, I don't have a land use expert with me today, but I can consult one.

“[SOLICITOR]: Tonight is the night, guys. Tonight is the night. We put notice out Certified Mail.² You know, tonight's the night for your hearing. Is there anything else you would like to add to the record.

“MR. HARTMAN: Just that—

“[SOLICITOR]: I don't want to stop you. Do your whole presentation.” (Tr. 79:8-22.)

During the hearing, members of the Board voiced concern with the Application, specifically that Johnston Asphalt was expanding the operation and thus expanding the preexisting special use permit. The Board also noted its reluctance in granting the relief due to the Property's location near a residential area. Mr. Hartman testified that “there will not be an increase in any decibel levels for sound nor vibration” and that the odors “wouldn't be any different than how the hot mix plant operates now,” but the Board was still concerned, stating that the Application “clearly impacts the free enjoyment of the abutting owners' properties.” *Id.* at 80:2-4, 6-8, 84:11-12. The chairperson expressed concern

“with a previous asphalt plant where our Public Works Department sits now. This goes back 20 years ago or more with problems with asphalt with the neighbors in the neighborhood with fumes and odors and things of that nature.” *Id.* at 82:18-22.

Board member Fascia, referencing a *different* asphalt plant, mentioned that

“from time to time, as far away as I am, I can smell an odor of petroleum that comes my way. So I can only imagine

² There is no indication that any objectors or abutters were present. No one else asked to be heard.

how this would adversely impact the surrounding neighborhood.” *Id.* at 84:15-18.³

The town solicitor noted that Johnston Asphalt “chose to go in [the residential] area for whatever reason” *Id.* at 85:18-19. At the conclusion of the hearing, Mr. Fascia made a motion to deny the Application. *Id.* at 90:1-2.

On March 22, 2022, the Board issued its written decision denying the Application. *See* R. (Decision). In its decision, the Board stated that it “does not know if the Applicant is seeking to expand a non-conforming use or give testimony under a specially permitted use per the Table of Uses” after which it found that “Applicant testified . . . [t]hey would not be producing more asphalt just giving itself the ability to store different mixes” *Id.* ¶¶ 3-4. In the section titled “Findings of Fact and Decision of the Zoning Board of Review,” the decision quotes Board member Fascia’s motion to deny the Application. In his motion, he reiterates that the structures would not be “in conformance with the neighborhood,” would “adversely impact the peaceful enjoyment of people’s property,” and would create a “slippery slope.” *Id.* at 2. He added that the abutting property owners had the right to live and enjoy their property without “visual . . . [and] odorous type of impact.” *Id.*

On July 29, 2022, Appellants appealed the Board’s decision.

II

Standard of Review

When reviewing local zoning board decisions, the Court is governed by § 45-24-69(d).

³ The chair later concluded: “And then Richard [Fascia] is saying he can smell the asphalt plant up near him.” (Tr. 87:8-9.)

“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.”
Section 45-24-69(d).

Thus, this 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) (internal quotation omitted). In its review, the Court may not “substitute its judgment for that of the zoning board if it can conscientiously find that the board’s decision was supported by substantial evidence in the whole record.” *Apostolou v. Genovesi*, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978). Substantial evidence is “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 Company, Inc.*, 424 A.2d 646, 647 (R.I. 1981).

III

Analysis

In its brief, Johnston Asphalt contends that the Board prejudiced it in the way it utilized procedure, and the Board erred in the substance and structure of its findings. The Court will first address the Board's procedure and then turn to the Board's decision.

A

The Hearing

It is troubling that after the solicitor cast the accusation of felony prosecution, the lure was left dangling. The solicitor and the Board pressed on with the hearing, peppering questions and apparently ignoring the requests for continuance.

The solicitor, after alleging the crime, became integrally involved in the process, not only sidetracking any discussion of a continuance, but asserting "this is your night," and involving himself with the interrogation and debate. The proceeding became unnecessarily intimidating.

Johnston Asphalt argues in its brief that it was prejudiced by the Board's failure to address the engineer's requests for a continuance and the town solicitor's accusation that the engineers were committing a felony. *See* Appellant's Mem. in Supp. of Appeal, 13-14. In discharging its duties, zoning boards are vested with substantial quasi-judicial power to hear and decide a variety of land use issues. *See* § 45-24-57.

"In the exercise of that power they are called upon to perform the always delicate duty . . . of deciding whether or not a landowner may be granted a special exemption or privilege from compliance with the law which binds all others who own land in the same district. Such a power must be exercised with strict impartiality or there will inevitably result a loss of public confidence in the policy of the zoning ordinance and in the integrity of the officials

charged with the responsibility of administering it.”
Barbara Realty Co. v. Zoning Board of Review of City of Cranston, 85 R.I. 152, 156, 128 A.2d 342, 344 (1957).

Although “[a]n administrative hearing officer is not required to assume a wholly passive role and is free to interrupt and question witnesses when necessary to seek a clarification of testimony,” and the Court will give deference to such choices, “[c]learly a zoning board should not be biased in favor of one side or the other, and should not prejudice the matters that come before it.” Chase, *Rhode Island Zoning Handbook*, § 118 (3d. ed.); see also *Lamothe v. Zoning Board of Review of Town of Cumberland*, 81 R.I. 96, 98 A.2d 918 (1953).

The Court finds the procedure taken by and actions of the Board and the town solicitor troubling. First, as soon as Johnston Asphalt began to present its Application, the town solicitor accused the engineers of committing a felony for presenting the Application without an attorney. The Board spoke off the record, seemingly upset that it would have to postpone the hearing; thus, it chose to move forward regardless. This encounter not only prejudiced Johnston Asphalt by insinuating its actions were felonious, it portrayed the Board’s impatience at the time. On multiple occasions, when the engineers attempted to seek a continuance, they were disregarded, and the Board continued its questioning. The hostile environment persisted as the town solicitor argued with the engineers. The Court finds this behavior unacceptable and it created an environment that was inconducive to a fair hearing. These actions were unfair and instilled fear in the engineers, making them wary of presenting their evidence, and yet the Board required them to answer its questions regardless of requests for a continuance. This Court gives deference to local boards in implementing their procedures, but such

procedure must be fair and reasonable.⁴ The actions were neither fair nor reasonable and could have been. Such a course justifies a remand.

B

The Decision

Notwithstanding the above, Johnston Asphalt next suggests the Board erred in denying the Application not only because it was confused about the nature of the Application, but because the testimony was clear that there would be no increase in production at the current asphalt plant. It further adds that a remand to the Board would be inherently unfair.

A special use is defined as “[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(63). The Town of Johnston’s Code of Ordinances provides,

⁴ This Court not only gives deference to the local board which hears the witnesses and finds the facts, it recognizes the tremendous civic contribution of board members to involve themselves with important proceedings at the local level. As this Court stated on May 30, 2024 in *Jester v. The Zoning Board of Review of the Town of Coventry*, KC-2023-0705 at 12:

“Members of zoning boards, planning boards, historic district commissions, conservation commissions, and similar local state commissions serve an onerous task. They volunteer their time committing themselves to the important but thankless tasks of making key decisions concerning development and preservation of our communities. Homeowners, neighbors, local businesspersons, and community-minded individuals—those who care about our neighborhoods— are often encouraged to accept these unpaid appointments, which require attendance at several monthly meetings and involve complex arguments ranging from groundwater flow to special uses, from rules of evidence to consistency with thick comprehensive plans, to crowded and raucous public meetings.”

“In granting a special use permit, the Zoning Board shall require that evidence of the satisfaction of the following criteria be entered into the record of the proceedings:

“(1) That granting of the special use permit will be compatible with the neighboring uses and, will not adversely effect the surrounding neighbors’ use and enjoyment of their property;

“(2) That granting of the special use permit will be environmentally compatible with neighboring properties and the protection of property values;

“(3) That granting of the special use permit will be compatible with the orderly growth and development of the Town of Johnston, and will not be environmentally detrimental therewith;

“(4) That the best practices and procedures to minimize the possibility of any adverse effects on neighboring property, the Town of Johnston, and the environment have been considered and will be employed, including but not limited to considerations of soil erosion, water supply protection, septic disposal, wetland protection, traffic limitation, safety and circulation;

“(5) That the purposes of this chapter, and as set forth in the Comprehensive Plan, shall be served by said special use permit;

“(6) That granting of the special use permit will substantially serve public convenience and welfare; and

“(7) That granting of the special use permit will not result in or create conditions that will be inimical to the public health, safety, morals and general welfare of the community.” (Johnston Ordinances, Sec. 340-75(B).)

The burden of proof is on the applicant to present adequate and competent evidence that the standard for issuing a special use permit has been met. *See Toohey v. Kilday*, 415 A.2d 732 (R.I. 1980). A remand would serve to avoid the applicant from meeting its burden.

Oddly, the Board found as a fact that “[t]he Board does not know if the [a]pplicant is seeking to expand a non-conforming use or give testimony under a specially permitted use per the Table of Uses.”⁵ (Decision ¶ 3.) The engineers vehemently stated that the two proposed silos would only be for storage and that production would not increase, they did not appear to contest the claim that this would be an expansion of use as the Board found.

The Board noted in its decision that the Application would produce “very obtrusive structures not in conformance with the neighborhood . . . [and will] adversely impact the peaceful enjoyment of people’s property[.]” (Decision 2.) In support of this conclusion, Board member Fascia stated at the hearing that “as far away as [he is, he] can smell an odor of petroleum that comes [his] way.” (Tr. 84:15-16.) Board members may speak on their knowledge of the community and experiences, but the Board must include in its decision “the basis on which it rests such knowledge.” *New Castle Realty Company v. Dreczko*, 248 A.3d 638, 645 (R.I. 2021). Not only did the Board not do this, but there is no evidence here that such odors came from Johnston Asphalt or that Johnston Asphalt would emanate the same odors as different asphalt plants in the community. As stated above, Johnston Asphalt had the burden to establish that the standard for issuing a special

⁵ Section 45-24-57(1)(vi) gives the zoning board the power “to refer matters to the planning board or commission . . . as the zoning board of review may deem appropriate, for findings and recommendations.” (Section 45-24-57(1)(vi).) Specifically, Johnston Code of Ordinances, Section 340-77(A) states that “[t]he Zoning Board, immediately upon receipt of an application for a special use permit for an industrial use, may request that the Planning Board and/or the Town Planner report its and/or their findings and recommendations in accordance with § 340-27, including a statement on the general consistency of the application with the goals and purposes of the Comprehensive Plan.” (Johnston Ordinances, Sec. 340-77(A).) Although the Court does give deference to the Board in its decision to, or not to, refer a matter to the Planning Board, an application seeking a special use permit to perform a complex industrial use, as is the case here, may be a good candidate for Planning Board review in order to minimize Board confusion.

use permit had been met. *See Toohey*, 415 A.2d 732. It is unclear whether or not it did so. The Board never clearly decided whether the proposed change would be an expansion of use or whether the amended use was compatible with the neighborhood, along with the other factors required for granting relief.

The Decision is scant. There are few findings of fact, and the Board has not applied the standards in the law to the facts to explain why the Application was denied.

Moreover, the Board failed to follow fair and reasonable procedures in conducting the hearing, and the decision must be remanded on that ground alone.

IV

Conclusion

For the foregoing reasons, the Application is remanded to the Board so it may conduct a fair, reasonable, and appropriate hearing.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Johnston Asphalt, LLC v. Town of Johnston
Zoning Board of Review, et al.**

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COURT: **Providence County Superior Court**

DATE DECISION FILED: **July 9, 2024**

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

ATTORNEYS:

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