STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: April 3, 2014)

DAVID MACBAIN, MARY ELIZABETH MACBAIN, THOMAS WHITTINGTON and JUDY A. WHITTINGTON	:	
v.	:	**C.A. No. NC-2009-0430**
TOWN OF PORTSMOUTH ZONING BOARD OF REVIEW, ET AL.	:	

DECISION

MATOS, J. This matter arises before the Court on appeal from a decision of the Portsmouth Zoning Board of Review (the Board). In that decision, the Board upheld the issuance of a building permit to Michael and Maureen Antonellis (the Antonellises) for the construction of a single-family home on property identified as Lot 30A (Lot 30A or the Lot) on Portsmouth Tax Assessor Plat 40. Plaintiffs David and Mary E. MacBain (the MacBains), who own abutting property to the north, and Plaintiffs Thomas and Judy A. Whittington (the Whittingtons, collectively, Plaintiffs), who own abutting property to the south, filed a Complaint against the Board and the Antonellises (collectively, Defendants) seeking a reversal of the Board decision. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The Antonellises own Lot 30A, which is located on Prospect Lane in Portsmouth, Rhode Island in an R-20 Zoning District. The property, which is 11,800 square feet in area and which has 54.5 feet of frontage, does not conform to requirements of the Zoning Ordinance, which

mandate that lots in R-20 districts have a minimum lot area of 20,000 feet and minimum frontage of 110 feet. The parties do not dispute that the Lot fails to meet minimum dimensional requirements for size and frontage. Rather, Plaintiffs argue that Lot 30A is not a legal non-conforming lot of record under the Portsmouth Zoning Ordinance (Zoning Ordinance).

A

Regulatory History of Portsmouth Zoning Ordinances

Prior to August 3, 1959, the Town of Portsmouth (Portsmouth or the Town) had no land use regulations, and all lots were legal, buildable lots. Although the Town had previously enacted an ordinance on April 1, 1958, establishing the Planning Board (the 1958 Ordinance), that ordinance carefully circumscribed the powers granted under it. The 1958 Ordinance specifically enumerated the Planning Board's power and limited the Planning Board's authority to control platting or subdivision of land to instances in which it was directed to do so by the Town Council. Under the 1958 Ordinance, the Planning Board did not have direct authority over subdivision and platting.

On August 3, 1959, the Town enacted a new ordinance (the 1959 Ordinance), which authorized the Planning Board to restrict the subdivision of land. Although the 1959 Ordinance authorized the Planning Board to control the subdivision and platting of land, that control could only be exercised through the enactment of rules and regulations. Further, the 1959 Ordinance provided that before any rules or regulations enacted under it would have effect, those rules and regulations had to be submitted to the Town Council and be subject to a public hearing, preceded by three weeks of advertisement. The 1959 Ordinance did not contain any immediate restrictions on the right of any person to subdivide his or her property. Accordingly, although the enabling ordinance was adopted on August 3, 1959, the first date on which the Planning

Board's rules or regulations were effective in restricting an individual's right to subdivide land was August 28, 1959.

Approximately six years later, in 1965, Portsmouth adopted its first comprehensive Zoning Ordinance (the 1965 Ordinance). The 1965 Ordinance stated, in pertinent part, that it would not "prevent or be construed to prevent the continuance of the use of any building or improvement for any purpose to which such building or improvement or land is lawfully devoted at the time of enactment of this Ordinance." The 1965 Ordinance further provided that "a dwelling is permitted on . . . any plat duly recorded in the records of Land Evidence of the Town of Portsmouth prior to the passage of this Ordinance even though said lot may have been less than the required area and/or frontage." The 1965 Ordinance did not make any reference to August 3, 1959—the date on which the 1959 Ordinance was enacted—or August 28, 1959—the date on which the first regulations under the 1959 Ordinance took effect.

In 1980, Portsmouth enacted a comprehensive revision of its Zoning Ordinance (the 1980 Ordinance). That reenactment, like the 1965 Ordinance, stated that no provision in the 1980 Ordinance "shall prevent or be construed to prevent the continuance of the use of any building or improvement for any purpose to which such building or improvement or land is lawfully devoted at the time of enactment of this Ordinance." The 1980 Ordinance also defined a "lot" as the "whole area of a single parcel of land undivided by a street, under one ownership, with ascertainable boundaries established by deed or deeds of record or a segment of land ownership, defined by lot boundary lines on a land division plan duly approved by the Planning Board under the subdivision control statute."

In 1994, Portsmouth again enacted a comprehensive revision of its Zoning Ordinance.[1] The 1994 amendments to the Zoning Ordinance (the 1994 Ordinance) include a table of dates delineating the status of particular substandard lots as "of record" or not, based on the effective dates of the various Zoning Ordinances. Specifically, the 1994 Ordinance provides that a substandard lot of record is one:

> a) approved by the Planning Board and duly recorded after August 3, 1959; or
> b) approved by the Zoning Board of Review and duly recorded after June 13, 1965; or
> c) certified by the Planning Board as "approval not required" and duly recorded after August 3, 1959; or
> d) created by a deed or plat duly recorded prior to August 3, 1959.

The 1994 Ordinance further provides that a substandard lot of record may be considered buildable for single-family residential purposes regardless of the lot frontage or lot area. Although the 1994 Ordinance defines a substandard lot of record as one which was created by deed or plat recorded prior to August 3, 1959, the regulations did not actually come into effect until August 28, 1959.

B

History of Lot 30A

Lot 30A was recorded on August 25, 1959 by William Macomber (Macomber). In relation to the Zoning Ordinances outlined above, Lot 30A was recorded three days before August 28, 1959—the first date on which the Planning Board's rules or regulations were effective in restricting an individual's right to subdivide land—but three weeks after August 3, 1959—the date listed in the 1994 Ordinance as determining whether a particular lot is a non-conforming lot of record. In the original recordation, Lot 30A was registered as a plat of land

[1] Although Portsmouth had also enacted another revision of its Zoning Ordinance in 1989, that revision did not alter the language of the provisions quoted and does not affect the analysis of whether the Lot at issue was a lot of record.

belonging to the Heirs of Isaac Macomber of Portsmouth, Rhode Island. The plan recording Lot 30A identifies the property as being bounded on the east by the Sakonnet River, on the north by the land now owned by the MacBains, and on the South by land now owned by the Whittingtons.

Shortly after Macomber recorded the deed, on September 2, 1959, at a special meeting of the Town Council, the Town Solicitor opined that the plats filed between August 3, 1959 and August 28, 1959 were not legal. Accordingly, at the September 2, 1959 meeting, the Town Solicitor stated that the plats were to be returned to the parties that had filed them. Macomber made a formal request that his plat be accepted. Although the minutes denote that that request was denied, the plat was never returned to Macomber. The recorded plat remains in the Land Evidence Records.

Subsequently, the property was transferred a number of times. On June 2, 1973, the remaining heirs of Isaac Macomber conveyed the Lot to Elizabeth Smiley and recorded the deed in Volume 76 of the Portsmouth Land Evidence Records. On April 17, 1976, the heirs of Elizabeth Smiley conveyed the subject Lot to Foster and Vivian Comstock, which deed was also recorded. Foster and Vivian Comstock conveyed the land to Lawrence and Alison Comstock on April 17, 1976 and recorded the quitclaim deed. On February 2, 2000, Lawrence and Alison Comstock conveyed the subject Lot to Roaring Fork Valley Limited, which deed was recorded. Roaring Fork Valley conveyed the Lot to Joseph M. Furtado, Inc. by warranty deed on July 22, 2002, and recorded the deed. Joseph M. Furtado, Inc. conveyed the subject Lot back to Roaring Fork Valley on August 1, 2002. Finally, Roaring Fork Valley conveyed the Lot to the Antonellises on April 22, 2003. Between its creation in 1959 and the Antonellises' acquisition of the property on April 22, 2003, the property had been transferred at least seven times.

C

Board Decisions and Appeals

Shortly after acquiring the deed in April 2003, the Antonellises sought permits to construct a home on Lot 30A and filed applications with the Rhode Island Coastal Resource Management Council (CRMC) for the required CRMC Assent. In May 2005, the Zoning Officer forwarded a letter to CRMC that the Antonellises' plans conformed with the Zoning Ordinance. Plaintiffs appealed the issuance of the letter to the Superior Court, arguing that Lot 30A was not lawfully created and that it was therefore ineligible for permits. The Superior Court denied the appeal on the grounds that the issuance of such a letter was not an appealable action.

The Plaintiffs also opposed the application for CRMC Assent. After lengthy hearings in November 2006, CRMC issued an Assent. Plaintiffs appealed the issuance of Assent to the Rhode Island Superior Court. On January 30, 2008, this Court issued a decision denying Plaintiffs' appeal and affirming the issuance of the CRMC Assent. Plaintiffs sought review of that decision by the Rhode Island Supreme Court, but the Supreme Court denied that petition in February 2009.

After being issued the Assent, the Antonellises applied for a building permit to construct a single-family home. As a result of the contentious nature of the matter, the Building Official sought the advice of the Town Solicitor before issuing a building permit. The Town Solicitor provided an opinion supporting the issuance of the building permit, and the Building Official issued a permit. [2]

[2] Both the Town Solicitor, D. Andre D'Andrea, and his immediate predecessor, Kevin P. Gavin, opined that the August 3, 1959 date in the 1994 Reenactment of the Portsmouth Zoning Ordinance was erroneous, and that the drafter of the regulations had mistakenly failed to account

Plaintiffs appealed the issuance of the permit to the Board. On May 21, 2009, the Board held a hearing on the appeal, at which hearing the Plaintiffs again argued that the process by which Lot 30A had been created in 1959 was improper, and, as a result, the property was an illegal non-conforming lot. At the conclusion of the hearing, the Board determined that the property was a non-conforming lot of record and was, therefore, eligible for a building permit. The instant appeal followed.

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by § 45-24-69(d), which 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).

"[T]he Superior Court reviews the decisions of a plan commission or board of review under the 'traditional judicial review' standard applicable to administrative agency actions." Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998). When reviewing a zoning board decision, the Superior Court '"lacks [the] authority to weigh the evidence, to pass upon the credibility of

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for the period of advertisement and hearing required for the rules and regulations to become effective.

witnesses, or to substitute [its] findings of fact for those made at the administrative level."' Id. at 666 (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). The trial justice "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979).

The term "substantial evidence" has been 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."' Lischio v. Zoning Bd. of Review of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Apostolou v. Genovesi, 120 R.I. 501, 508, 388 A.2d 821, 825 (1978) (citing Richardson v. Perales, 402 U.S. 389, 401 (1971); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

III

Analysis

Plaintiffs argue that the decision of the Board should be reversed because it is devoid of substantial evidence to support the Board's findings. In essence, they argue that because Lot 30A does not fall within the 1994 Ordinance's description of a non-conforming lot of record, it is an illegal non-conforming lot. Thus, they contend, the Lot is not buildable, and the Building Official lacked the authority to issue a building permit for the Lot. In response, Defendants argue that the Board's decision should be affirmed. They contend that there is substantial evidence in the record to support the Board's findings and that the 1994 Ordinance is ineffective

in restricting lots formed before August 28, 1959, because the Planning Board did not have authority to restrict the subdivision or platting of land until that time.

Title 45, chapter 22 of the Rhode Island General Laws provides that all cities and towns shall establish a planning board or commission, which shall govern the formulation and adoption of a comprehensive plan regulating land use. Under the authority of that statute, Portsmouth adopted the 1958 Ordinance which established a Planning Board. The Planning Board's authority under the 1958 Ordinance was limited, leaving the Planning Board without power to control platting or the subdivision of land unless it was directed to do so by the Town Council. On August 3, 1959, Portsmouth adopted another Ordinance, expanding the power of the Planning Board and authorizing it to adopt rules and regulations governing the platting and subdivision of land. Before any such regulations were to take effect, however, the proposed regulations were subject to a public hearing, preceded by three weeks of public advertisement. Thus, the date on which the first rules and regulations under the 1959 Ordinance took effect was August 28, 1959. In 1994, Portsmouth enacted amendments to the Zoning Ordinance. Among those changes, the 1994 Ordinance provided a definition of a substandard lot of record as a lot which was:

> a) approved by the Planning Board and duly recorded after August 3, 1959; or
> b) approved by the Zoning Board of Review and duly recorded after June 13, 1965; or
> c) certified by the Planning Board as "approval not required" and duly recorded after August 3, 1959; or
> d) created by a deed or plat duly recorded prior to August 3, 1959.

When interpreting an ordinance, this Court employs the same rules of construction that it applies when interpreting statutes. Ryan v. City of Providence, 11 A.3d 68, 70 (R.I. 2011); Ruggiero v. City of Providence, 893 A.2d 235, 237 (R.I. 2006); Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981). In construing statutes or regulations, this Court is guided by the oft-

repeated canons of statutory construction. Sugarman v. Lewis, 488 A.2d 709, 711 (R.I. 1985). When a regulation or statute's language is clear and unambiguous, "there is nothing left for interpretation and the statute must be read literally." Id. (citing Citizens for Preservation of Waterman Lake v. Davis, 420 A.2d 53, 57 (R.I. 1980); North Providence Sch. Comm. v. R.I. State Labor Relations Bd., 122 R.I. 415, 418, 408 A.2d 928, 929 (1979)). Nonetheless, this Court will not interpret a statute literally, "even though clear and unambiguous, when such a construction will lead to a result at odds with the legislative intent." Id.; see Carrillo v. Rohrer, 448 A.2d 1282, 1284 (R.I. 1982); Kingsley v. Miller, 120 R.I. 372, 376, 388 A.2d 357, 360 (1978); Town of Scituate v. O'Rourke, 103 R.I. 499, 507, 239 A.2d 176, 181 (1968). Similarly, this Court will not enforce a Board's regulation or a Board's decision when that regulation or decision is in excess of the powers conferred on it by the enabling legislation. Colello v. Zoning Bd. of Review of Cranston, 105 R.I. 195, 196, 250 A.2d 520 (1969); see Melucci v. Zoning Bd. of Review of Pawtucket, 101 R.I. 649, 226 A.2d 416 (1967); Thomson Methodist Church v. Zoning Bd. of Review of Pawtucket, 99 R.I. 675, 210 A.2d 138 (1965).

Here, the language of the 1994 Ordinance—which defined a legal non-conforming lot as one that was created by a deed or plat duly recorded prior to August 3, 1959—is clear and unambiguous, and the parties do not contend that its meaning is unclear. See Sugarman, 488 A.2d at 711. If this Court were to interpret the regulation as written, however, it would result in the Court's authorization of a regulation passed in excess of the Board's authority. See id.; Colello, 105 R.I. at 196, 250 A.2d at 520. That is, because the Board did not have authority to regulate the subdivision of land until August 28, 1959, an ordinance that requires Board approval of the subdivision of land before that time purports to give the Board control over subdivisions which were legally formed before the Board was authorized to control their formation. See

Sugarman, 488 A.2d at 711; Colello, 105 R.I. at 196, 250 A.2d at 520. The Board itself recognized that the date listed in the Zoning Ordinance purports to regulate the subdivision of land for lots that were formed before the Planning Board was authorized to do so. Furthermore, both the Town Solicitor, D. Andre D'Andrea, and his immediate predecessor, Kevin P. Gavin, also concluded that the August 3, 1959 date in the 1994 Ordinance was erroneous, and that the rules and regulations limiting the subdivision of land did not take effect until August 28, 1959. This Court agrees: the regulations did not take effect until August 28, 1959, and the Board did not have the authority on August 25, 1959 to limit the subdivision of Lot 30A.

In concluding that Lot 30A was a non-conforming lot of record when the August 28, 1959 Ordinance took effect, the Board noted copies of town ordinances, subdivision rules and regulations, and Town Council minutes which had been admitted into evidence, all of which, in combination, established that the rules and regulations for subdivision were not enacted until August 28, 1959. See Lischio, 818 A.2d at 690 n.5; Caswell, 424 A.2d at 647. The Board further noted that the 1959 Ordinance did not imbue the Planning Board with power over subdivision and platting until the rules and regulations were adopted. See Lischio, 818 A.2d at 690 n.5; Caswell, 424 A.2d at 647. The language in the 1959 Ordinance, which required the Board to hold a public hearing preceded by notice before any of the Board's rules or regulations took effect, was mandatory. See West v. McDonald, 18 A.3d 526, 533 (R.I. 2011); Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001); Buckminster v. Zoning Bd. of Review of Pawtucket, 69 R.I. 396, 33 A.2d 199, 202 (1943). Specifically, the Ordinance stated that "[t]he Planning Board *shall*, before adopting, modifying or amending rules and regulations, hold a public hearing of which it shall give notice[.]" See Buckminster, 69 R.I. 396, 33 A.2d at 202 (noting that "shall" constitutes mandatory language in context of zoning

ordinance); West, 18 A.3d at 533 (concluding that the term "shall" within a zoning ordinance constitutes a requirement); Bernuth, 770 A.2d at 401 (noting that the language that "[t]he zoning board of review shall include in its decision all findings of fact" constituted a legislative mandate); see also Brown v. Amaral, 460 A.2d 7, 10 (R.I. 1983) ("'The word 'shall' usually connotes the imperative and contemplates the imposition of a duty, unless the particular context and plan require a contrary meaning.'" (quoting Carpenter v. Smith, 79 R.I. 326, 334-35, 89 A.2d 168, 172-73 (1952)). Therefore, the Board concluded that the Lot was a non-conforming lot of record, because at the time the Lot was formed—August 25, 1959—there was no prohibition against the recordation of the Lot, and the Board lacked the authority to restrict the subdivision of the land until August 28, 1959.

As noted above, this Court will uphold the determination of the Board if that determination is supported by substantial evidence. See Lischio, 818 A.2d at 690 n.5; Caswell, 424 A.2d at 647; see also Cohen v. Duncan, 970 A.2d 550, 562 (R.I. 2009) ("We give weight and deference to a zoning board's interpretation and application of the zoning ordinance, provided its construction is not clearly erroneous or unauthorized."). Here, this Court concludes that the record contains relevant evidence adequate to support the conclusion that Lot 30A is a non-conforming lot of record. See Cohen, 970 A.2d at 562; Lischio, 818 A.2d at 690 n.5; Caswell, 424 A.2d at 647; see also Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 727-28 (1962) ("It is the well-settled law in this state that a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance."). Therefore, notwithstanding the clear and unambiguous language of the Ordinance, this Court concludes that the Board's decision was

supported by substantial evidence to support the conclusion that Lot 30A was a non-conforming lot of record. See Apostolou, 120 R.I. at 508, 388 A.2d at 824-25; Richardson, 402 U.S. at 401.

IV

Conclusion

After review of the entire record, the Court finds that the Board's decision contains substantial evidence sufficient to support the Board's findings. Further, this Court concludes that the Board's decision was not in violation of the constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion. Substantial rights of the Plaintiffs have not been prejudiced. Accordingly, the appeal of the Board's decision is denied.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

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JUSTICE/MAGISTRATE:	**Matos, J.**
ATTORNEYS:	
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