STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: JANUARY 3, 2013)

WAWALOAM RESERVATION, INC.	:	
	:	
v.	:	
	:	**C.A. No. WC-2009-0556**
RICHMOND ZONING BOARD OF REVIEW, VINCENT RINALDI, JR., HENRY GRAHAM, JR., NOEL NUTINI, ROBERT ORNSTEIN and LARRY VALENCIA, in their capacities as members of the Richmond Zoning Board of Review	:	

DECISION

STERN, J. Before this Court is an appeal from a July 29, 2009 decision of the Town of Richmond's Zoning Board of Review approving the special use permit application of Wawaloam Reservation, Inc. with certain conditions. Appellant filed its timely appeal on August 13, 2009, seeking relief from certain conditions imposed upon it by the Zoning Board's decision. Jurisdiction over that appeal is pursuant to G.L. 1956 § 45-24-69. Subsequently, Appellant filed a Motion to Enforce Decision on July 2, 2012. Respondent filed an objection to that motion on September 5, 2012. This Court will now address only the Motion to Enforce Decision in this Decision.

I

Facts and Travel

Wawaloam Reservation, Inc. ("Appellant") owns approximately 100 acres of land located between Gardiner Road and Hillsdale Road in Richmond, Rhode Island. This land is designated as Lots 17, 10-5, 19-22, and 9 on the Richmond Tax Assessor's Plat 1E and is operated by

Appellant as a recreational vehicle campground (the "Campground"). The Campground has operated since 1969 and currently includes approximately 300 individual campsites, which can be leased from Appellant for either seasonal or short-term occupancy. Additionally, the Campground provides dining and recreational facilities, including a food-service Pavilion, a swimming pool, softball fields, an indoor recreational area, and a camp store.

The Campground was originally situated in an R-80 zoning district, which allowed camping; however, the town revised its zoning ordinance in 1990, thereby making the area part of an R-2 zoning district to be used for residential purposes. This revised zoning ordinance originally prohibited camping in all zoning districts; however, the zoning ordinance was once again revised in 1991 to permit camping in R-2 districts. Camping, however, was only permitted by special exception. Thus, the Campground has been a legal nonconforming use since 1990.

On June 3, 2005, Appellant filed an application with the Town of Richmond's Zoning Board of Review (the "Zoning Board"), seeking to enlarge, expand, or intensify its legal nonconforming use of the Campground. The application contained thirteen (13) changes or additions to the Campground. More specifically, the proposed changes would increase the number of campsites from 310 to 430 while adding significant landscaping and new structures to the Campground. On June 27, 2005, the Zoning Board referred that application to the Richmond Planning Board (the "Planning Board") for advisory review and a written recommendation to the Zoning Board.

Appellant first made a presentation to the Planning Board on June 27, 2006 and the Planning Board conducted a site visit on July 10, 2006. The Planning Board, however, found the information submitted to be insufficient and requested that Appellant submit all information required by Chapter 18.54 of the Richmond Zoning Ordinance. That provision requires

applicants to submit "all of the information required by the development plan review checklist in Article 15 of the land development and subdivision regulations."

The application was considered again at the September 25, 2007 meeting of the Planning Board, at which owners of abutting properties complained of tree and bush removal that allowed those owners to see "straight through to the Campground." As a result, Appellant's plans were revised to provide for, *inter alia*, construction of a berm in the northwest corner of the Campground to increase the buffer between the Campground and abutting neighbors' properties. Upon review of these revised plans, the Planning Board submitted its recommendations to the Zoning Board on June 25, 2008. These recommendations were to approve the special use permits being sought by Appellant, with a number of conditions.

Appellant revised its special use permit application to reflect the recommendations of the Planning Board. Following receipt of Appellant's revised application, the Zoning Board conducted public hearings on three separate dates: March 23, April 27, and May 20, 2009. Additionally, the Zoning Board conducted a public work session on June 7, 2009 to discuss the evidence presented. Subsequently, on June 27, 2009, the Zoning Board voted to approve a written decision. That written decision was recorded and posted in the Town of Richmond on July 29, 2009.

In its nine-page decision, the Zoning Board set forth thirty-four (34) findings of fact and four (4) conclusions of law. The Zoning Board decided—based on those findings of fact and conclusions of law—to conditionally grant the special use permit subject to the satisfaction of sixteen (16) conditions. Appellant filed the instant appeal on August 13, 2009. The appeal

challenges two (2) conclusions of law[1]—including subparts—as well as four (4) of the conditions[2] placed on the approval and asks this Court to reverse or modify the challenged portions of the Zoning Board's decision.

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[1] The challenged Conclusions of Law read as follows:

> "D. The site will be able to accommodate a total of 430 campsites, and the proposed buffer areas and vegetative screening will be adequate to minimize the impacts of the intensified nonconforming use on surrounding property, only if the proposed alterations described in Paragraph 9(4), and 9(11) are revised in the following manner:
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> . . .
>
> "2. The applicant's landscaping plans are approved with the following changes:
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> "a) A 100-foot-wide buffer shall be maintained on the northern boundary of Lot 17, extending from the northwest corner of Lot 17 to the existing campsite identified as #276 on the applicant's site plans. No individual campsite described in Paragraph 9(11)(a) shall be located in the 100-foot-wide buffer.
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> "b) The proposed berm shall be extended by 50 feet . . . and shall begin at the northwest corner of Lot 17. The northwest beginning point of the berm shall remain the same even if the lot line between Lot 17 and Lot 17-1 is relocated to accommodate the accessory structure on Lot 17-1.
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> "c) The proposed stockade fence on the boundary of Lot 17 and Lot 2-5, parallel to the berm, also shall be extended by 50 feet, to 350 feet long.
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> "3. The nine utility poles to serve proposed new individual campsites on the northern boundary of the property described in Paragraph 9(4) must be relocated consistent with the changes to the landscaping plans described above." Zoning Bd. Decision at 7.

[2] The challenged conditions read as follows:

> "1) No individual campsite shall be constructed closer than 100 feet from the property boundary, except for campsites abutting Lot 19-21 on Assessor's Plat 1E.
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> "2) The applicant shall obtain approval of an administrative subdivision to relocate the boundary between Lot 9 and Lot 17 so that no party of the new entrance road is on Lot 9.
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> "3) The applicant's land surveyor shall determine whether any portion of the garage on Lot 17-1 is actually on Lot 17, and, if so, shall obtain approval for an administrative subdivision to relocate the boundary between Lot 17 and Lot 17-1 so that the garage is not on the Campground property and instead is entirely on Lot 17-1, with the ten-foot setback from the property line that is required by the zoning ordinance.

More specifically, Appellant challenges the portions of the Zoning Board's "Conclusions of Law" that revised Appellant's proposed plan to provide for: (1) a 100-foot-wide buffer along the Campground's northern boundary; (2) extension of the proposed berm by fifty (50) feet; (3) extension of the proposed stockade fence by fifty (50) feet; and (4) relocation of the nine utilities poles to serve the proposed new individual campsites. Furthermore, Appellant objects to the "Approval with Conditions" insofar as those conditions require that: (1) no individual campsite be located closer than 100 feet from the property boundary; (2) Appellant must obtain approval of an administrative subdivision to relocate the boundary between Lots 9 and 17; (3) Appellant must obtain approval of an administrative subdivision, if necessary, to ensure that the garage is entirely on Lot 17-1 rather than on the Campground; and (4) Appellant maintain a gate on the existing road providing access to Hillsdale Road so that it may be used only for emergencies.

After filing this appeal, Appellant sought to move forward with nine projects, pursuant to the Zoning Board's approval of those projects in its decision. These projects included, *inter alia*, installation of bathrooms in the recreation hall, construction of a pedestrian bridge and multiple buildings or additions, and installation of additional approved campsites in the southeastern portion of the Campground. The local building inspector, however, refuses to process building permit applications for these items while this appeal is pending.

For this reason, Appellant filed a Motion to Enforce Decision and memorandum in support thereof on July 2, 2012. That motion seeks to have this Court clarify that no stay of the Zoning Board's decision has been issued and the building inspector must accept and process the

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". . .

"12) The existing road providing access to Hillsdale Road shall be used only for emergencies. The applicant shall maintain a gate at the street frontage to prevent non-emergency use of the road for access to Hillsdale Road." Id. at 7-8.

applications for building permits. The Town of Richmond (the "Town") filed an objection to Appellant's motion and memorandum in support thereof on September 5, 2012. The Town argues that the conditions found in the Zoning Board's decision that are being appealed are pre-requisites that must be satisfied prior to any construction taking place and, furthermore, that this Court should issue a stay until a final determination is made on the merits of the appeal.

II

Standard of Review

R.I. Gen. Laws 45-24-69 governs Superior Court review of zoning board decisions. In conducting its review, the Superior Court must consider the entire record, including both "the record of the hearing before the zoning board of review" and evidence presented in open court by any party to the appeal, as permitted by the court. G.L. 1956 § 45-24-69(c). The appeal does not "stay proceedings upon the decision appealed from;" however, the Court has broad discretion to grant such a stay if "necessary for an equitable disposition of the appeal." Id. § 45-24-69(a).

During its review, the Court "may 'not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.'" Curran v. Church Community Housing Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting G.L. 1956 § 45-24-69-(d)). The review of questions of fact "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." Munroe v. Town of East Greenwich, 733 A.2d 703, 705 (R.I. 1999) (citing Kirby v. Planning Board of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993)). However, the Court reviews all questions of law *de novo*. See Pawtucket Transfer Operations v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008).

Following its review, the Court may only reverse or modify the zoning board's decision "if substantial rights of the appellant have been prejudiced." Id. § 45-24-69(d). Such prejudice occurs when "findings, inferences, conclusions, or decisions" are found to be:

> "(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." Id.

If no such prejudice is found to have occurred, this Court "must affirm the decisions of the zoning board unless it appears that the board acted arbitrarily or abused its discretion." Apostolou v. Genovesi, 120 R.I. 501, 506-07, 388 A.2d 821, 824 (1978).

III

Analysis

Appellant contends that "[a]bsent a stay, a local building official may not refuse to process building permit applications for items approved by a zoning board merely because someone appealed the board's approval to this Court." Appellant's Mem. at 1. The Town argues, by contrast, that the conditions placed on those approvals were intended as prerequisites to any construction taking place on the Campground. See Town's Mem. at 4.

At the outset, this Court reiterates that an appeal of the Zoning Board's decision does not "stay proceedings upon the decision appealed from;" however, this Court has broad discretion to grant such a stay if "necessary for an equitable disposition of the appeal." G.L. 1956 § 45-24-69(a). Because there is no stay in place, Appellant argues that the building inspector is obligated to issue permits for the portions of its application that were approved by the Zoning

Board. "The issuing of permits has often been held to be an administrative or ministerial act and the person charged with the duty of issuing permits must literally follow the provisions of the ordinance." Arden Rathkopf and Daren Rathkopf, The Law of Zoning and Planning § 69:12 (4th ed. 2004, as amended) (citations omitted). "Thus, where an application and its accompanying plans, surveys, and specifications evidence compliance with all applicable ordinances, the applicant is entitled to a permit." Id.

The Rhode Island Supreme Court has long recognized that zoning boards are vested with "broad discretion in fixing conditions" on grants of variances and permits. Olevson v. Zoning Bd. of Town of Narragansett, 71 R.I. 303, 307, 44 A .2d 720, 722 (1945). It is also true, however, that those conditions "must be reasonable and not arbitrary, unnecessary, or oppressive." Id. In Rhode Island, such conditions are statutorily authorized under R.I. Gen. Laws § 45-24-43. That statute allows the zoning boards to apply special conditions on any grant of a variance or special use permit, provided that the conditions are based on credible evidence. See G.L. 1956 § 45-24-43.

More specifically, the statute states:

> "In granting a variance or in making any determination upon which it is required to pass after a public hearing under a zoning ordinance, the zoning board of review or other zoning enforcement agency may apply the special conditions that may . . . be required to promote the intent and purposes of the comprehensive plan and the zoning ordinance of the city or town. . . . Those special conditions shall be based on competent credible evidence on the record, be incorporated into the decision, and may include, but are not limited to, provisions for:
>
> > "(1) Minimizing the adverse impact of the development upon other land, including the type, intensity, design, and performance of activities;
> > "(2) Controlling the sequence of development, including when it must be commenced and completed;
> > "(3) Controlling the duration of use or development and the time within which any temporary structure must be removed;
> > "(4) Assuring satisfactory installation and maintenance of required public improvements;

> "(5) Designating the exact location and nature of development; and
> "(6) Establishing detailed records by submission of drawings, maps, plats, or specifications." Id.

The Town's Zoning Ordinance contains very similar language allowing for special conditions to be placed on grants of variances and special use permits.[3] These special conditions are separate and distinct from the Zoning Board's ability "[t]o provide for the issuance of conditional zoning approvals where a proposed application would otherwise be approved except that one or more state or federal agency approvals which are necessary are pending." G.L. 1956 § 45-24-57(1)(vii).

Here, the Zoning Board's decision contains sixteen (16) conditions under the heading "Approval with Conditions." See Zoning Bd. Decision at 7-8. Some of these conditions "relate to hours of operation, signage, and building size, and have no meaning until after the project is

[3] Section 18.55.040 of the Richmond Zoning Ordinance governs the placement of special conditions on the grant of a special use permit. That provision states:

> "When granting a special use permit under this chapter, the zoning board of review shall have the authority to impose any special conditions required to promote the intent and purposes of the comprehensive community plan and this title. Failure to abide by any special conditions constitutes a zoning violation. Any such special conditions shall be based on competent credible evidence entered into the record of the public hearing. Such conditions shall be included in the Board's written decision. Such conditions may include, but are not limited to, provisions for:
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> "A. minimizing the adverse impacts of the use or development on surrounding property or uses;
> "B. minimizing adverse impacts on town services and facilities;
> "C. minimizing adverse effects on the environment;
> "D. designating the exact location and nature of development."

However, the more specific provision that applies to this case is Section 18.48.030(D) of the Richmond Zoning Ordinance. That provision contains nearly identical language and is applicable here because it governs the alteration of nonconforming uses, which may only be enlarged or intensified by the grant of a special use permit. As previously stated in this Decision, the Campground became a legal nonconforming use in 1990.

actually built. . . . These are more accurately labeled 'special conditions' under § 45-24-43, not conditions of approval." Becker v. Joyal, No. PC-2006-3781, 2006 WL 2868657 (Super. Ct. Oct. 5, 2006). For example, Condition 7 is a special condition pursuant to R.I. Gen. Laws § 45-24-43 because it merely dictates the hours, light fixture styles, and types of bats that may be used at the proposed batting cages at the Campground. See Zoning Bd. Decision at 8. Thus, "[t]hese are not conditions of approval of the project. Rather, the 'failure to abide by any special conditions attached to a grant constitutes a zoning violation' . . . and the violator is subject to monetary penalties and injunctive relief." Becker v. Joyal, No. PC-2006-3781, 2006 WL 2868657 (Super. Ct. Oct. 5, 2006) (quoting G.L. 1956 § 45-24-43; citing G.L. 1956 § 45-24-60).

By contrast, other conditions imposed by the Zoning Board are, in fact, conditions of approval of the project pursuant to R.I. Gen. Laws § 45-24-57(1)(vii). For example, Condition 9 requires Appellant to receive approval of its storm water management plan from the Rhode Island Department of Environmental Management "before any building permits are issued and before the start of any construction pursuant to this approval." Zoning Bd. Decision at 8. It is unclear from the parties' memoranda whether or not these conditions of approval have been satisfied.

As previously stated, a building official is typically required to issue permits "where an application and its accompanying plans, surveys, and specifications evidence compliance with all applicable ordinances." Arden Rathkopf and Daren Rathkopf, The Law of Zoning and Planning § 69:12 (4th ed. 2004, as amended) (citations omitted). However, "where there are preconditions such as site plan approval, the permit can be denied. The building inspector has no legislative or quasi-judicial powers; even if he does not agree with the provisions of the ordinance or with the action of another board involved in its administration, he must follow them." Id.

Here, this Court finds that Conditions 9 and 10 imposed by the Zoning Board's decision constitute conditions of approval pursuant to R.I. Gen. Laws § 45-24-57(1)(vii). If Appellant has not satisfied these conditions, the building inspector must deny all permits for construction at the Campground that arise from this application and the decision of the Zoning Board. By contrast, this Court finds that the remaining conditions imposed by the Zoning Board's decision constitute special conditions pursuant to R.I. Gen. Laws § 45-24-43. As such, satisfaction of those conditions cannot be a valid pre-requisite to the issuance of building permits by the building inspector.

In support of its argument, the Town points to Condition 11, which states that "[a]ll of the proposed perimeter buffering and landscaping, as amended by Conclusion of Law D(2), shall be installed before any construction begins." Zoning Bd. Decision at 8. However, based on this Court's findings that Condition 11 is among the special conditions, that condition does not require satisfaction prior to issuance of building permits. This fact is evidenced by a key difference in the language of Conditions 10 and 11. Condition 10, a condition of approval, states that the condition must be satisfied "*before any building permits are issued* and before the start of any construction pursuant to this approval." Id. (emphasis added). By contrast, Condition 11 merely states that the condition must be satisfied "before any construction begins." Id. Thus, that special condition clearly allows permits to be issued prior to completion of the perimeter buffering and landscaping.

If, however, Appellant fails to satisfy that condition by beginning construction of approved structures prior to installation of this perimeter buffering and landscaping, such failure will constitute a zoning violation and the Town will be able to seek any available remedy for that violation. See G.L. 1956 § 45-24-43 ("Failure to abide by any special conditions attached to a

grant constitutes a zoning violation."); Richmond Zoning Ordinance § 18.55.040 ("Failure to abide by any special conditions constitutes a zoning violation.").

IV

Conclusion

For each of the foregoing reasons, Appellant's Motion to Enforce Decision is GRANTED. The Town's building inspector is required to issue permits insofar as the requested permits comply with the Town's zoning ordinances and the approvals found in the Zoning Board's decision.

This Court reiterates, however, that the building inspector may still deny Appellant's permit requests in the event that Appellant has failed to satisfy Conditions 9 and 10 of the Zoning Board's decision, as those two conditions are conditions of approval under R.I. Gen. Laws § 45-24-57(1)(vii). Upon issuance of building permits to Appellant, Appellant must satisfy all special conditions found in the Zoning Board's decision. Failure to comply with those special conditions will constitute a zoning violation.

At this time, this Court does not find a stay of the Zoning Board's decision to be "necessary for an equitable disposition of the appeal" under R.I. Gen. Laws § 45-24-69(a). Accordingly, this Court declines to issue a stay of the Zoning Board's decision pending review of the merits of Appellant's appeal.