STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 30, 2013)

SYLVIA M. MORSE	:	
	:	
V.	:	**C.A. No. PC 10-4988**
	:	
CITY OF CRANSTON ZONING BOARD OF REVIEW	:	

DECISION

SAVAGE, J. Before this Court is an appeal from a decision of the Zoning Board of the City of Cranston in which the Board affirmed a decision of the Cranston Zoning Official (Zoning Official) denying Appellant Sylvia M. Morse (Appellant) a zoning certificate. Appellant sought the zoning certificate to establish that the use of her property by her neighbor for the storage and maintenance of construction equipment and vehicles—a use that is not permitted in a residential zone—is nonetheless valid as a legally pre-existing non-conforming use. For the reasons set forth in this Decision, this Court vacates the Zoning Board's decision and remands the matter to the Zoning Board for further proceedings consistent with this Decision.

I

Facts and Travel

Appellant Sylvia M. Morse owns property located at 81 Armington Street, Cranston, Rhode Island, and designated as Plat 2, Lots 674 and 2397 (Property). The Property is located in a B-2 residential zone and Lot 674 faces Narragansett Street. Pursuant to an agreement with Appellant, Peter Yeretsian uses the Property—as did his father, John Yeretsian, before him—in

connection with his construction business on Narragansett Street. Appellant claims that this arrangement commenced in 1962. On December 18, 2008, the City of Cranston issued Appellant a Notice of Violation, claiming that she was using the Property in violation of the Cranston Code of Ordinances. The alleged violations stemmed from the operation of the construction business and the storage of construction equipment and vehicles on the Property which are impermissible uses in a residential zone.

On January 5, 2009, counsel for Appellant sent a letter to the Cranston Zoning Official seeking a zoning certificate that would declare Appellant's use of the Property a legally pre-existing non-conforming use and validate the continued use of the Property for the storage and maintenance of construction equipment. In support of her application for a zoning certificate, Appellant submitted four affidavits, which the City never contradicted, as to the historic use of the Property from 1962 to date for the storage of construction equipment. The affiants included: Appellant; Aranoosh Yeretsian (widow of John Yeretsian and mother of Peter Yeretsian); Terrance Chisholm, a former neighbor of Appellant; and Sherrill Nelson, another Cranston resident.[1]

Under the Cranston Zoning Code, a zoning certificate is a document signed by the Zoning Official "which acknowledges that a use, structure, building or lot either complies with or is legally non-conforming to the provisions of this zoning ordinance or is an authorized variance or modification therefrom." Cranston Zoning Code § 17.04.039. "[T]o provide guidance or clarification, the [Zoning Official] shall, upon written request, issue a zoning certificate or provide information to the requesting party as to [his or her] determination within fifteen (15) days of the written request." Id. § 17.04.070.

[1] These affidavits are not part of the certified record submitted to this Court in this case.

According to the certified record, the Zoning Official took no action with respect to Appellant's January 5, 2009 request for a zoning certificate. Instead, the matter proceeded to hearing in the Municipal Court in Cranston with respect to the Notice of Violation. On February 26, 2009, Appellant and the City entered into a Consent Agreement by which she agreed that certain equipment and vehicles would be removed from the Property, that work would be suspended on the Property and that certain hazardous waste would be removed from the Property. The parties further agreed that Appellant would take an appeal to the Zoning Board for a determination as to whether the storage of construction equipment on the Property is a legally pre-existing non-conforming use.[2]

At a subsequent hearing on July 23, 2009 in the Cranston Municipal Court, Appellant agreed that she had violated the Cranston Code of Ordinances by operating a construction business and storing certain construction vehicles and equipment on her Property. The Court dismissed certain other violations alleged in the Notice of Violation. It also stayed the imposition of any fine until a later hearing date to give the Appellant time to apply for appropriate relief.

On October 26, 2009, Appellant filed a formal request for a zoning certificate, on a form generated by the City of Cranston, seeking a declaration from the Zoning Official that "the construction business and the storage and maintenance of trucks, equipment and materials" on the Property constituted a legal non-conforming use because "the use pre-dated the adoption of the Cranston Zoning Code [in 1966]."[3] On October 28, 2009, the Zoning Official denied her application for a zoning certificate, stating: "business, professional office, [and] storage of

[2] Appellant is of the view that the Municipal Court lacked jurisdiction to determine the existence or non-existence of a legally pre-existing non-conforming use of the Property.

[3] Peter Yeretsian also signed the zoning certificate application, but he is not a party to this action.

material[s], equipment[,] and vehicles having a capacity of more than one ton or having three or more axles are prohibited in a B-2 zone. Zoning Board of Review is required." It is unclear from the certified record underlying this appeal whether the Zoning Official reviewed the affidavits previously submitted to him by Appellant on January 5, 2009, or any other evidence, in denying the request for a zoning certificate. The Zoning Official made no findings of fact or conclusions of law to justify his denial.

On March 24, 2010, Appellant appealed the decision of the Zoning Official to the Zoning Board. She requested that the "matter be remanded to the Zoning Official for him to issue an amended decision that includes reasons which substantiate it," or, in the alternative, that the matter be heard by the Zoning Board so that Appellant can establish that the Property "has been continuously used for the storage of landscaping and construction equipment, materials[,] and vehicles . . . and therefore qualifies as a legal non-conforming use."

On July 14, 2010, the Zoning Board held a hearing on Appellant's appeal. At the hearing, Appellant and the City presented argument, but no testimony or evidence. Appellant's counsel indicated that his research of the Cranston Zoning Code revealed no process for determining whether Appellant's use of the Property was a legally pre-existing non-conforming use. Counsel determined that seeking a zoning certificate appeared to be the best way to resolve the issue, even though the written application for a zoning certificate did not appear to apply to Appellant's situation. Appellant argued that the decision of the Zoning Official to deny her a zoning certificate was not really a decision at all because it did not resolve the issue, as a matter of fact or law, as to whether a pre-existing non-conforming use of the Property made that use lawful; it merely stated the obvious: that Appellant's use of the Property was prohibited in a residential zone. She contended that the Zoning Official either should have indicated that he

lacked the power to adjudicate the issue of a legally pre-existing non-conforming use—if, for example, he had no ability to convene an evidentiary hearing to resolve such an issue—or ruled that Appellant had not presented sufficient evidence to prove the existence of a legally pre-existing non-conforming use. Appellant further asserted that she was not confident that the Zoning Board has the power to declare the existence of a legally pre-existing non-conforming use, complicating the matter further. Appellant suggested to the Zoning Board that if the Zoning Official and the Municipal Court lacked the power to make the requested determination, perhaps her only recourse would be to seek a declaratory judgment in this Court.[4]

In response, the City took the position that Appellant had the right to appeal the Municipal Court decision, seek a zoning certificate from the Zoning Official or ask the Zoning Board to decide the issue. It argued that there was no documentation on file with the City to show the historic use of the Property.

According to the transcript of the Zoning Board hearing submitted to this Court, the Board took no vote as to whether to grant or deny Appellant's appeal. Nonetheless, on August 4, 2010, the Zoning Board recorded a one-page decision, which states, in full, as follows:

> Appeal of the decision of the City of Cranston Zoning Certificate to the City of Cranston Zoning Board of Review sitting as the Platting Board of Review in accordance with the City of Cranston, Rhode Island City Code Title 17 Zoning Section 17.116.010 AP 2, Lot 674 2397 81 Armington Street.
>
> The Zoning Board of Review unanimously voted to deny the appeal of the applicant and uphold the decision of the Building Official on July 14, 2010.

[4] Appellant wondered aloud who she should name as defendants and whether notice of the action to abutters would be required in any declaratory judgment action filed in this Court.

On August 25, 2010, Appellant appealed the Zoning Board's decision to this Court pursuant to § 45-24-69(a), which provides, in pertinent part:

> An 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.[5]

On appeal, Appellant contends that it is "impossible for this Court to engage in a substantive review" of the Zoning Board's decision because neither the Zoning Board nor the Zoning Official set forth any findings of fact or conclusions of law. Accordingly, Appellant requests that this Court reverse the Zoning Board's decision and order the Zoning Official to issue a zoning certificate that recognizes the legal non-conforming use. In the alternative, Appellant requests that this Court remand the matter to the Zoning Board for it to make findings of fact and conclusions of law to justify its decision or for it to remand it to the Zoning Official for that purpose.

The Zoning Board counters that this Court should deny Appellant's appeal because she failed to meet her burden of proving a legally pre-existing non-conforming use. As will be discussed, the parties apparently rely on two different Zoning Board decisions denying Appellant's appeal of the Zoning Official's denial of a zoning certificate as the root of the appeal to this Court. This Court has jurisdiction of this appeal pursuant to R.I. Gen. Laws § 45-24-69.

[5]Appellant concedes that her appeal was not timely filed within twenty (20) days of the recordation of the Zoning Board's decision, but she argues that the appeal should not be deemed time-barred because the Zoning Board failed to post the decision as required by § 45-24-69(a) and failed to mail the decision to her pursuant to § 45-24-61(b). Appellant states that she did not receive notice of the decision until August 24, 2010—twenty (20) days after its recordation. The Zoning Board does not contest the timeliness of Appellant's appeal. This Court, therefore, deems the appeal timely.

II

Standard of Review

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

> [t]he 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.

When reviewing a zoning board decision, the Superior Court "lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level." Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986). The court cannot substitute its judgment for that of the zoning board and must uphold a decision that is supported by substantial evidence contained in the record. Hein v. Town of Foster Zoning Bd. of Review, 632 A.2d 643, 646 (R.I. 1993). "Substantial evidence . . . means 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 and Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981); Lischio v. Zoning Bd. of Review of the Town of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003). The zoning board must "disclose the

reasons upon which [it] base[s] [its] ultimate decision because the parties and this [C]ourt are entitled to know the reasons for the board's decision in order to avoid speculation, doubt, and unnecessary delay." Hopf v. Bd. of Review of City of Newport, 102 R.I. 275, 288, 230 A.2d 420, 428 (1967).

III

Analysis

Appellant argues that the Zoning Board's decision is not susceptible of judicial review for want of findings of fact and conclusions of law, while the Board claims that its decision should be affirmed because Appellant failed to prove the existence of a legally pre-existing non-conforming use. The parties, however, cite two different decisions of the Zoning Board as the root of this appeal—one which is part of the record certified by the Zoning Board to this Court and one which is not. The Zoning Board, in filing the record of its proceedings underlying the appeal with this Court, must certify in writing, at the time of filing, that the record is complete. Sec. 45-24-69(a). This requirement ensures that the reviewing court knows that it has before it, on appeal, all of the testimony, evidence and legal arguments that the Zoning Board considered in reaching its decision as well as a complete record of its decision, including its findings of fact and conclusions of law and a recordation of the votes of its members. Id. If documents are filed with the Court and not certified as "constituting the [complete] record of the case appealed from," the reviewing court has no way to determine if those documents were part of the record below or whether they comprise the complete record that is the subject of appeal. Id.The one-page decision attached to Appellant's Complaint was recorded on August 4, 2010 in Book 4239, page 304 of the Cranston Land Evidence Records, faxed to Appellant on August 24, 2010, and included in the record certified by the Zoning Board to this Court on October 19,

2010. In contrast, the Zoning Board attached to its memorandum a four-page decision, dated July 14, 2010, which was not certified to this Court as part of the record.[6] Further, there is no evidence that this decision complies with § 45-24-61, i.e., that the Zoning Board recorded and filed the decision in the City Clerk's Office within thirty working days of July 14, 2010 and mailed it to Appellant. See § 45-24-69(a); see also § 45-24-68 ("All decisions and records of the zoning board of review respecting appeals shall conform to the provisions of § 45-24-61."). Because the Zoning Board duly recorded the one-page decision and certified it as part of the record, and because the provenance of the longer decision is unknown, this Court deems the recorded one-page decision as the decision of the Zoning Board that is the subject of this appeal.

Section 45-24-61(a) provides that a zoning board must issue a written decision that affirms or denies an application for zoning relief. It is well-settled that a zoning board in its decision must set forth findings of fact and conclusions of law so that its decision may be susceptible of judicial review. See § 45-24-61(a); Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001); Thorpe v. Zoning Bd. of Review of Town of North Kingstown, 492 A.2d 1236, 1237 (R.I. 1985). "Findings made by a zoning board 'must of course, be factual rather than conclusional, and the application of the legal principles must be something more than a recital of a litany.'" Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (quoting Irish Partnership v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986)). The failure of a zoning board to meet these minimal requirements renders judicial review of the board's decision impossible. Thorpe, 492 A.2d at 1237 (citing May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239-40, 267 A.2d 400, 403 (1970)). In such an event "the [C]ourt will

[6] This Court is mystified as to the origin of this extensive written decision, as it is date the same day as the Zoning Board hearing and the transcript of that hearing evidences no vote or decision by the Board that day.

not search the record for supporting evidence or decide for itself what is proper in the circumstances." Bernuth, 770 A.2d at 401 (citing Irish Partnership, 518 A.2d at 359).

The Zoning Board's decision in this case is woefully deficient because it is barren of factual findings, the application of legal principles, and the resolution of evidentiary conflicts. The decision consists of a mere two sentences that provided no guidance to the Appellant in crafting her appeal to this Court. There is no indication of what the Zoning Board concluded, aside from upholding the Zoning Official's decision. Moreover, there is not a single finding of fact or conclusion of law; the Zoning Board simply upheld the Zoning Official's decision without any explanation or analysis as to how it arrived at its decision. Neither the decision of the Zoning Official nor the decision of the Zoning Board on appeal addresses the core issue in this case of whether the Appellant's use of the Property is a legally pre-existing non-conforming use.

In addition, the decision indicates that the vote was unanimous, but the record of the hearing reflects no vote and the decision fails to identify which Zoning Board members rendered the decision, as it only lists the members and alternates who comprised the Board at the time. Juxtaposing the decision with the transcript of the hearing reveals that one Zoning Board member at the hearing is not even identified in the decision as a member or alternate.

Our Supreme Court has made clear that:

> [i]t is the obligation of a zoning board of review, when acting upon an application for relief within its authority, to inform this court by way of the record certified to us of the nature and character of the evidence upon which it decided the issue, or if such action resulted from its own inspection of or knowledge concerning the circumstances and conditions, that it disclose to us in that record what it observed and what it knew that caused it to take the action it did.

DiIorio v. Zoning Bd. of Review of City of East Providence, 105 R.I. 357, 362, 252 A.2d 350, 354 (1969); see also Coderre v. Zoning Bd. of Review of City of Pawtucket, 102 R.I. 327, 329, 230 A.2d 247, 248 (1967) ("Decisive in this case is the failure of the decision to set forth in some reasonable manner the ultimate facts upon which it is grounded."). It is not the duty of this Court to inspect the underlying record to perform any duty entrusted to the Zoning Board. See Irish Partnership, 518 A.2d at 358-59; Sciacca, 769 A.2d at 585 ("because its decision contained neither findings of fact nor conclusions of law, the zoning board completely disregarded its obligation to spell out its conclusions and reasoning").

The deficiencies in the Zoning Board's decision, however, are not merely a product of its own failure to perform its review function. The Zoning Board itself had no record to review from the Zoning Official. When the Zoning Official denied Appellant's request for a zoning certificate, he did so without making any factual findings or conclusions of law with respect to the existence or non-existence of a legally pre-existing non-conforming use. In fact, it appears from his decision that he completely side-stepped that issue by stating the obvious: that Appellant's use of the Property is not allowed in a residential zone. There is no indication as to whether he had the authority, or believed he had the authority, to convene an evidentiary hearing to decide this issue. If he did have such authority, his decision fails to make clear whether he considered the uncontradicted affidavits submitted by Appellant as to the historic use of the Property. By stating in his decision that review by the Zoning Board was required, the Zoning Official seemed to telegraph that any evidentiary hearing on the issue of pre-existing use would be the prerogative of the Zoning Board. Yet, such a scenario would render the Zoning Board the tribunal of first resort, rather than an appellate body reviewing the findings of fact and conclusions of law of the Zoning Official.

Further complicating matters is the question of whether the Zoning Board itself possesses the authority to recognize a legally pre-existing non-conforming use or whether a declaratory judgment action in this Court is the appropriate vehicle to adjudicate Appellant's claim. The Zoning Board offered no comment on these legal issues at the hearing, although Appellant raised them, and the parties' memoranda filed below and on appeal to this Court also are silent as to these legal issues. There is no question, based on the absence of findings of fact and conclusions of law in the Zoning Board's decision, not to mention its failure to properly record its members' votes and rationale for their decisions, that this Court must remand this matter to the Zoning Board. In light of the deficiencies in the proceedings leading up to the Zoning Board's decision and the legal questions regarding the extent of the authority of the Zoning Official and the Zoning Board to decide the issue of the legality of a pre-existing non-conforming use, however, the Zoning Board's charge on remand must be broader than simply articulating the factual and legal reasons for its decision.

On remand, the Zoning Board must determine, in the first instance, if the Zoning Official has the authority to decide whether a use is legally non-conforming and, if so, whether this matter should be remanded to him to make that determination, complete with findings of fact and conclusions of law, following an evidentiary hearing or review of the uncontradicted affidavits previously submitted to him by Appellant. In addressing that question, the Zoning Board should further determine whether it has the authority to find that the use of the Property is a legally pre-existing non-conforming use either on review of the decision by the Zoning Official with respect to the request for a zoning certificate or in the first instance following an evidentiary hearing.

Pertinent to this determination is whether such a decision is more properly the subject of a declaratory judgment action filed in this Court.[7]

If the Zoning Board determines that it has the authority to determine in the first instance whether a use is a legally pre-existing non-conforming, it must afford Appellant an opportunity to present evidence in support of her position. As to any decision of the Zoning Board on remand concerning the existence or non-existence of a legal non-conforming use, it must "state the reasons for its decision . . . [,] make express findings of fact and . . . pinpoint the specific evidence upon which [it] base[s] such findings." See Hopf, 102 R.I. at 288-89, 230 A.2d at 428.

[7] In this regard, our Supreme Court has stated:

> Zoning boards are statutory bodies. Their powers are legislatively delineated. They are empowered to hear appeals from the determinations of administrative officers made in the enforcement of the zoning laws and in addition they may authorize deviations from the comprehensive plan by granting exceptions to or variations in the application of the terms of local zoning ordinances [. . .] Notwithstanding that the enabling legislation does not permit nor the ordinance authorize any additional jurisdiction, the respondent board by purporting to confirm the legality of a pre-existing use in substance assumed to itself the power to issue declaratory judgments.

RICO Corp. v. Town of Exeter, 787 A.2d 1136, 1144 (R.I. 2001) (in the course of its decision upholding zoning inspector's cease and desist order, the board, without authority to do so, made additional finding that property at issue was legal non-conforming use) (citing Olean v. Zoning Board of Review of Lincoln, 101 R.I. 50, 52, 220 A.2d 177, 178 (1966)). The Court later reiterated RICO and Olean, stating that "zoning boards are statutory bodies whose powers are legislatively delineated" and boards are '"empowered to hear appeals from the determinations of administrative officers made in the enforcement of the zoning laws,"' but lack authority to confirm the legality of a pre-existing use. Duffy v. Milder, 896 A.2d 27, 35-36 (R.I. 2006) (quoting RICO, 787 A.2d at 1144, and Olean, 101 R.I. at 52, 220 A.2d at 178) (internal quotations omitted); see also Zuena v. Cranston Zoning Bd. of Review, 102 R.I. 299, 300, 229 A.2d 846 (1967) ("The applicants are precluded on a petition for a variance or exception from asserting a claim of right to a non-conforming use.").

The Board's decision also must "show[] the vote of each participating member[] and the absence of a member or his or her failure to vote." Sec. 45-24-61(a).

As noted, therefore, this appeal is replete with legal issues. This Court declines, on this state of the record, however, to resolve these legal issues because they were not addressed by the Zoning Official or the Zoning Board or briefed by the parties in connection with this appeal.

IV

Conclusion

For the reasons set forth in this Decision, this Court vacates the Zoning Board's decision and remands this matter to the Zoning Board for further proceedings consistent with this Decision.[8]

Counsel shall confer and submit to this Court forthwith for entry an agreed upon form of Order and Judgment that is consistent with this Decision.

[8]If, on remand, the Zoning Board's composition has changed since it rendered its decision, it is "the obligation of the [B]oard as newly constituted to consider the case de novo." Coderre v. Zoning Bd. of Review, 239 A.2d 729, 730-31 (R.I. 1968) (after a remand for clarification, requiring a hearing de novo due to a change in membership of the board); see also Bellevue Shopping Ctr. Associates v. Chase, 556 A.2d 45, 45-46 (R.I. 1989) (remanding for consideration by newly constituted board when original board's decision lacked adequate findings of fact and conclusions of law).

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Sylvia M. Morse v. City of Cranston Zoning Board of Review
CASE NO:	PC 10-4988
COURT:	Providence Superior Court
DATE DECISION FILED:	August 30, 2013
JUSTICE/MAGISTRATE:	Judith Colenback Savage, J.
ATTORNEYS:	
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