STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: MAY 1, 2012)

MARIE ISSA and LOUIS PAOLINO,	:	
V.	:	**C.A. NO. PC: 11-2294**
RONALD L. WUNSCHEL, in his Capacity as the City of Pawtucket's Finance Director, and RAYMOND GANNON, JAMES KAREEMO, LISA KELLY-PINSONNEAULT, DOUGLAS S. McKINNON, and GEORGE SHABO, in their capacities as members of the City of Pawtucket's Zoning Board of Review,	:	

DECISION

Gallo, J. Before this Court is an appeal from a decision of the Zoning Board of Review of the City of Pawtucket ("Board"), which denied Marie Issa and Louis Paolino's (collectively "Appellants") application for a special-use permit relating to an electronic sign on a commercial property owned by the Appellants in Pawtucket. Appellants seek reversal of the Board's decision. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Appellants have owned a parcel of land located at the intersection of Lonsdale Avenue and Mineral Spring Avenue for twenty-six years. (September 27, 2010, Hearing Tr. at 9.)

According to the Tax Assessor's Plat Map, the parcel is described as plat number 45, lot number 458. The land is located in an area zoned as Commercial General.

The Appellants operate Lifetime Medical on the property in question. (Sept. 27, 2010, H'rg Tr. at 9.) Lifetime Medical provides home nursing services to area residents and nursing staff to area hospitals and nursing homes. Id. Lifetime Medical employs 250 people. Id. at 10.

The subject of this dispute is an electronic sign that was erected in 2006 on the roof of the Appellants' building. (Decision at 1.) Louis Paolino, the president of Lifetime Medical, testified that the sign serves the important function of attracting nursing personnel and informing the public about the availability of Lifetime Medical's services. (Sept. 27, 2010 H'rg. Tr. at 18.) The sign is approximately ten feet in width and three feet in height. Id. at 2. Throughout the day the sign displays various messages. In addition to advertising the Appellants' business, it, at times, displays messages cautioning drivers about pedestrians and school children in the area. Id. at 6, 16. Before the current sign was erected, the Appellants had an electronic sign of similar size in the same location. The previous sign had been there for more than fifteen years. Id. at 23. The sign was replaced with the current one which is more energy efficient and less expensive to maintain. Id. at 2.

In 2010, Pawtucket adopted a new zoning ordinance that specifically addressed electronic signs.[1] See Pawtucket, RI Zoning Ordinance § 410-60(w). The new ordinance required that

[1] Section 410-60(w) provides:

> "Electronic messaging centers.
> (1) Only one electronic messaging center (EMC) per site is permitted.
> (2) Each message is displayed for a minimum period of 60 seconds.
> (3) Signs cannot contain or display animated, moving video, scrolling advertising or pictures.
> (4) A uniform background must be provided, and a maximum of two colors may be displayed at the same time for maximum legibility.
> (5) The intensity of the LED display shall not exceed the levels specified in the chart below:

signs, such as the one maintained by the Appellants, classified by the ordinance as electronic message centers, (EMCs) meet specifications and other requirements set forth in the ordinance and that they be allowed by special-use permit. The Appellants' EMC complied with all requirements of the new ordinance except the requirement that it be situated at least 200 feet from the nearest residential district.[2] (Nov. 29, 2010 H'rg Tr. at 2.) Shortly after enactment of the ordinance, the Appellants received notification from the City of Pawtucket stating that Appellants needed to obtain a special-use permit to maintain their sign. (Appellants' Ex. A.)

After receiving notice, the Appellants applied for a special-use permit and dimensional variance from the Pawtucket Zoning Ordinances. (Appellants' Ex. B.) In their application, the Appellants informed the City that it was Appellants' position that the sign was a valid nonconforming sign which predated the new ordinance and that the application was not to be construed as a waiver of their rights in that regard. (Zoning Bd. Record.)

The matter was scheduled for a hearing before the Board on September 27, 2010. The Appellants were represented by counsel at the hearing. Appellants argued, among other things, that removing the sign would create a hardship that amounted to more than a mere inconvenience

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NOTES:

*Nits are a luminance measuring unit equal to one candela per square meter measured perpendicular to the rays from the source.

**"Nighttime" is defined as sunset to sunrise based upon the determination of the National Weather Service.

(6) EMCs are not permitted within local Historic Districts or National Register Historic Districts.

(7) EMCs cannot be located within 200 feet of a Residential Zone, a Riverfront Zone, a local Historic District or a National Register District. The applicant must provide a site plan which identifies all buildings within 200 feet. The submission of an Assessor's Map is not sufficient. All buildings within 200 feet of the proposed sign must be identified.

(8) EMCs may only operate between the hours of 7:00 a.m. and 11:00 p.m.

(9) Each square foot of the electronic messaging center counts for two square feet toward the calculation of total area of all signs." § 410-60(w).

[2] Appellants' EMC was 90 feet from the nearest residential zoned district. (Decision at 1.)

because it would have an adverse impact on their business. Appellants also argued that the sign did not have a negative impact on the health, safety, and general welfare of the neighborhood.

At the hearing, Douglas McKinnon (hereinafter "McKinnon"), the Chairman of the Board, expressed his concerns with the sign and its effect on the area. McKinnon stated that "the Board has had trouble with these type of signs in a high intensive [traffic] area." (Sept. 27, 2010 H'rg. Tr. at 8.) Specifically, members of the Board were concerned that the sign would distract drivers, which could lead to accidents. McKinnon was concerned that the sign constituted another distraction at an already busy intersection. Id. at 23. Likewise, Raymond Gannon (hereinafter "Gannon"), another member of the Board, also expressed concerns regarding the sign's effect on an already busy intersection. Id. at 32.

At the close of the hearing, Gannon made a motion to continue the matter so that the Appellants may conduct a traffic study of the intersection where their property is located. Id. at 34. The purpose of the study was to address the Board's concerns that the sign created a safety hazard. The motion was approved, and the matter was continued to November 29, 2010.

The Appellants hired Michael Desmond (hereinafter "Desmond"), a traffic engineer, to conduct a traffic study. Desmond testified at the November hearing. The Board, being previously aware of Desmond's credentials, accepted his qualifications as an expert on the subject of traffic conditions. (November 29, 2010 Hearing Tr. at 6.) Desmond began his testimony by describing the intersection and surrounding area where the sign was located. Id. at 8. Desmond noted that due to the sign's positioning on the building, its visibility to traffic approaching the intersection on Mineral Spring and Lonsdale Avenues was limited. Id. at 8-9. Desmond further testified that he compiled and reviewed all reports of accidents at the intersection in question dating back to 2005. Id. at 9. Based on his investigation, which included

review of the accident history of the intersection and an interview of Sergeant Clary, the traffic officer for the Pawtucket Police Department, Desmond concluded that the Appellants' sign caused "no reduction in safety" at the intersection. Id. at 11. Desmond added that Sergeant Clary stated that the Sergeant was unaware of the sign being the cause for any accidents and that if he thought the sign were a problem he "would have brought it to the attention of the appropriate agency within the City." Id. at 11.

On December 6, 2010, the Board ruled on the Appellants' application. McKinnon summarized the evidence presented and testimony heard regarding the application. (December 6, 2010 Hearing Tr. at 1-4.) Before the ruling was made, Gannon offered his observations regarding the intersection in issue. Gannon stated that he received information from the traffic division at City Hall, which summarized the number of cars that passed through the intersection on a daily basis. Id. at 5. Gannon also described the area, highlighting the fact that two schools and a complex for the elderly were in the area. Gannon opined that the sign posed a danger to the area. Id. at 6. He based this determination on the fact that the area was highly travelled by vehicles and pedestrians. Id.

Board member McKinnon also offered his personal observations of the area. He described the area as "pedestrian active" with "a lot of young people" located in the area. Id. at 7. Russell Ferland, also a member of the Board, stated that he thought the Appellants' application should be granted because it could not be shown that the sign was the cause of any accidents. Id. at 7-8. The meeting was concluded with the Board voting to deny the application by a vote of four to one. Id. at 9.

In its written decision that followed, the Board took administrative notice of the advisory opinion of the Planning Board recommending the Appellants' application be granted. (Decision

at 2.) Nevertheless the Board determined that the sign would have a detrimental effect upon the public health, safety, morals, and welfare of the area, and for that reason, it denied the application for a special-use permit. The Board based its decision on its personal knowledge and observations of the traffic in the area and rejected the opinion of Mr. Desmond, the traffic engineer. Finally, in denying Appellants' request for a dimensional variance, the Board held that there was insufficient evidence in the record to demonstrate that the hardship the Appellants would suffer if the sign were removed would amount to more than a mere inconvenience. Id. at 5. Appellants timely filed the instant appeal.

II

Standard of Review

The appellate review of the Superior Court over city or town zoning board decisions is governed by § 45-24-69. Such statute effectively limits the scope of this Court's jurisdiction. Section 45-24-69(d) specifically 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:
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> "(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."

More generally, the reviewing Court must abide by "the 'traditional judicial review' standard applicable to administrative agency actions." Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998). This standard provides that this Court "lacks the authority to weigh the evidence, to pass upon credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level." Id. at 665-66 (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). Thus, this 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.'" Curren v. Church Community Housing Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)). However, this Court may reverse a Zoning Board's decisions concerning uses or variances if it is clear that the board acted arbitrarily and/or abused its discretion. Madden v. Zoning Bd. of Review Warwick, 89 R.I. 131, 134, 151 A.2d 681, 683 (1959).

Notably, deference is afforded to zoning boards on questions of fact because "a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance." Monforte v. Zoning Bd. of Review of East Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). However, this deference is not absolute and conditioned upon a zoning board's providing sufficient factual findings in support of its decision. Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005). In conducting its review, this Court is required to ensure that a zoning board has supplied "substantial evidence" to support its findings. Salve Regina College v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991). "Substantial evidence is 'such relevant evidence that a reasonable mind might accent as adequate to support a conclusion.'" Lischio v. Zoning Bd. of Review of North Kingstown, 818 A.2d 685, 690 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). If this Court "can

conscientiously find that the board's decision was supported by substantial evidence on the whole record," it must uphold that decision. Mill Realty Assoc. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting Apostolu v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)); see Monroe v. Town of East Greenwich, 733 A.2d 703 (R.I. 1999). Conversely, on matters of law, this Court conducts de novo review and therefore may remand a case for further proceedings, or vacate the decision, where there are inadequate findings. von Bernuth v. Zoning Bd. of Review of Town of North Shoreham, 770 A.2d 396, 399 (R.I. 2001).

III

Analysis

Appellants challenge the sufficiency of the Board's decision pursuant to § 45-24-69, arguing, inter alia, that the Board's decision is arbitrary and clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. Also, Appellants argue that the EMC is a valid nonconforming use because the sign predated the zoning ordinance in question. (Appellants' Mem. at 17.) Furthermore, Appellants contend that the Board erred relying on their own personal opinions on matters in the face of uncontradicted expert testimony. Appellants also ask for an award of attorney's fees pursuant to the Equal Access to Justice Act (hereinafter the "EAJA") codified at G.L. 1956 § 42-92-1 et. seq.

A

Sufficiency of the Evidence - Special-Use Permit

Appellants argue that they presented substantial, uncontradicted evidence to support their application. Notwithstanding that evidence, Appellants contend the Board decided to deny the application because of its concerns regarding the EMC's effect on traffic conditions. The

Appellants also argue that the Board's failure to provide a sufficient factual basis for its decision to reject the application amounts to an abuse of discretion.

Section 45-24-31(57) defines a special-use permit as "[a] regulated use which is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42." G.L. 1956 § 45-24-31(57). A zoning board of review has the authority to grant such a permit when the petitioner satisfies the standards for a special-use permit set forth in the town's zoning ordinance. Monforte, 176 A.2d at 726. Section 410-113(B) of the Pawtucket Zoning Ordinances outlines the governing standard for issuing a special-use permit. See Pawtucket, RI, Zoning Ordinance § 410-113(B). When the determination of use by special exception is left to the zoning board, "it is a condition precedent to the exercise of the board's jurisdiction that a grant of the use sought must be found by said board [to be] not inimical to the public health, safety, morals and welfare." Nani v. Zoning Board of Review of the Town of Smithfield, 104 R.I. 150, 156, 242 A.2d 403, 406 (1968). The applicant must present adequate competent evidence to prove that a zoning ordinance standard for issuing a special-use permit has been met. See Dean v. Zoning Bd. of Review of Warwick, 120 R.I. 825, 390 A.2d 382 (1978).

At the initial hearing, the Board expressed its concerns to the Appellants about their EMC, its effect on traffic, and the lack of a traffic study. Those concerns prompted the Appellants' return for a second hearing during which they presented testimony from Michael Desmond, a traffic engineer, who had studied the intersection where their EMC was located. The Board accepted Desmond as an expert in traffic engineering. After detailing his investigative findings relative to the sign's visibility to motorists approaching the intersection,

and the accident history of the location, he expressed the opinion that the sign caused no reduction in safety at the intersection. (Nov. 29, 2010 H'rg. Tr. at 11.)

The Board ultimately rejected the traffic expert's conclusions regarding the EMC and its effect on traffic conditions and safety. (Decision at 4.) In denying the request for a special-use permit, the Board relied on its own knowledge of the area. The Board found that "[d]ue to high volumes of pedestrian traffic during certain times of the day, the Board is concerned that distraction to motorists caused by the sign could result in injuries to said pedestrians traversing the area." Id. at 3.

While this Court will presume the possession of such special knowledge by zoning boards of review, this Court will not presume that in making a challenged decision the board acted pursuant to such special knowledge unless it is revealed in the record the nature of such knowledge. Perier v. Board of Appeals, 86 R.I. 138, 146, 134 A.2d 141, 145 (1957). To sustain a decision on the basis of the board's acting on knowledge acquired by inspection, the record must contain some reasonable disclosure as to the knowledge so acquired and their action pursuant thereto. Buckminster v. Zoning Board of Review, 68 R.I. 515, 30 A.2d 104 (1943). Also, a zoning board is not free to disregard expert testimony that is the only evidence on an issue without providing a basis for such a rejection. Carter Corp. v. Zoning Bd. of Review of Town of Lincoln, 98 R.I. 270, 273, 201 A.2d 153, 155 (1964); see Toohey v. Kilday, 415 A.2d 732, 738 (R.I. 1980). (If a zoning board rejects uncontradicted expert testimony, the board must "disclose[] on the record the observations or information upon which it acted"). Moreover, the Board should state the reasons on which it bases its decision and not mere conclusions or generalities. Health Havens, Inc. v. Zoning Board of the City of East Providence, 221 A.2d 794 (1966).

In the case at bar, the Board's decision rested entirely on its general familiarity with the area in question and the fact that the area has a 'high volume' of vehicle and pedestrian traffic. So informed, the Board concluded that the Appellants' EMC "will have a detrimental effect upon the public health, safety, morals, and welfare of the surrounding area." (Decision at 4.) Absent from the record are any facts upon which the board based its denial other than the Board's conclusory assertions that the EMC has some effect on traffic conditions and safety. Id. The Board's decision to credit their own personal knowledge over the traffic expert was based on the Board's speculation that the EMC was detrimental to the safety of the area. See Barrington East Cluster I Unit Owners' Ass'n v. Town of Barrington, 121 N.H. 627, 433 A.2d 1266 (1981) (the court held the zoning board's decision must be based on "more than mere personal opinion. . .of its members."); see also City Council of City of Reno v. Travelers Hotel, Ltd., 100 Nev. 436, 683 P.2d 960 (1984) (substantial evidence requirement was not met by opinions of council members). The evidence of the Appellant's traffic engineer was uncontradicted. To deny an application that is supported by uncontradicted expert testimony constitutes an abuse of discretion. See Goldstein v. Zoning Bd. of Review of Warwick, 101 R.I. 728, 227 A.2d 195 (1967); see also Murphy v. Zoning Bd. of Review of Town of South Kingstown, 959 A.2d 535 (R.I. 2008).

B

Dimensional Variance Request Unnecessary

Prompted, no doubt, by the fact that the 2010 amendment to the zoning ordinance included a prohibition of EMCs within 200 feet of a residential district, Appellants' application for a special use permit was coupled with a request for a dimensional variance. The Board's denial of the request is also the subject of this appeal. However, consideration of this aspect of

the Appellants' appeal is unnecessary since, in the court's judgment, the Appellants' circumstances did not require dimensional relief.

A dimensional variance is required where "there is no other reasonable alternative way to enjoy a legally permitted beneficial use…" without relief from the dimensional requirements of the zoning ordinance. Sec. 45-24-31(61)(ii) (emphasis added). Dimensional relief is available only with respect to a permitted use. Health Havens, Inc., 221 A.2d 794.

In this case, the Appellants' sign is an accessory use under the Pawtucket ordinance. See § 410-81, Pawtucket, RI, Zoning Ordinance. The enactment of the 2010 amendment to the ordinance rendered electronic signs, like the Appellants', a prohibited use within 200 feet of a residential district. See § 410-60(w), Pawtucket, RI, Zoning Ordinance. A dimensional variance is not available to remove the prohibition. Health Havens, Inc., supra. The Appellants' electronic sign, long situated within 90 feet of a residential zone, owes its continuation as a use to provisions of state Enabling Act and the Pawtucket Zoning Ordinance preserving nonconforming uses. See § 45-24-39(c) (assuring continuation of nonconforming uses absent abandonment); sec. 410-90, Pawtucket, RI, Zoning Ordinance (Nonconforming Signs).

C

Attorney's Fees

Finally, Appellants argue that they are entitled to attorney's fees. The Equal Access to Justice Act "was propounded to mitigate the burden placed on individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings." Taft v. Pare, 536 A.2d 888, 892 (R.I. 1988). The stated purpose of the EAJA is to "encourage individuals and small businesses to contest unjust actions by the state and/or municipal agencies." Sec. 42-92-1(b). It is for this reason that our General Assembly deemed

that the "financial burden borne" by the prevailing party should be shifted to the offending agency. Id. Under the EAJA, an award of reasonable litigation expenses will be made to the prevailing party if the court finds that the agency was not substantially justified in its actions leading to the proceedings and during the proceeding itself. See § 42-92-3; Taft, 536 A.2d at 892.

"Substantial justification" means that the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact." Sec. 42-92-2 (7). Our Supreme Court has held that in applying the substantial justification test, "the Government now must show not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct." Taft, 536 A.2d at 893 (quoting United States v. 1,378.65 Acres of Land, 794 F.2d 1313, 1318 (8th Cir. 1986)). As discussed above, the Board's decision denying the Appellants' application was erroneous. However, this Court cannot say that the Board's decision was unreasonable and had no basis in law or in fact. Therefore, the Appellants' request for attorney's fees is denied.

IV

Conclusion

The Board's decision to deny Appellants' request for a special-use permit was clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record and is in violation of ordinance provisions. Dimensional relief was unnecessary under the circumstances. Substantial rights of the Appellants have been prejudiced. For those reasons, the decision of the Board is hereby reversed.

Counsel shall submit the appropriate Order for entry.