

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

[FILED: NOVEMBER 8, 2013]

OLD FARM, LLC

V.

THOMAS D. SILVEIRA, PETER VAN
STEEDEN, LUCY LEVADA, STEPHEN
MACGILLIVRAY and CHARLES
VAILLANCOURT, in their capacities
as members of the Zoning Board of
Review of the Town of Middletown

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C.A. No. NC 2012-0288

DECISION

GALLO, J. Before this Court is an appeal from a decision of the Zoning Board of Review of the Town of Middletown (Board), which dismissed an application for a special use permit without prejudice. Old Farm, LLC (Old Farm) requested special use permits to establish a commercial shopping center on property it owns on West Main Road, Middletown, Rhode Island. The Board dismissed the application after determining that it lacked proper jurisdiction. For the following reasons, this Court vacates the Board’s decision and remands the matter to the Board for a full, advertised, public hearing on the merits. This Court’s jurisdiction of Old Farm’s timely appeal is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

James and Sally Vanicek, the principals of Old Farm, own approximately seventy-one acres of land (the Property) on West Main Road, Middletown, Rhode Island. Since the 1800s, the Vanicek family used the Property agriculturally, doing business as Rhode Island Nurseries. Due to significant changes in the nursery business over the last decade, the Property has become surplus to nursery needs, and Old Farm wishes to develop a large scale shopping center on it.

In March 2012, Old Farm filed a petition with the Board requesting a special use permit pursuant to §§ 602, 605, and 1801 of the Middletown Zoning Ordinance (Zoning Ordinance). Specifically, Old Farm requested a permit that would allow it to develop a shopping center with building footprints exceeding 35,000 square feet in a General Business Zone. The Board is allowed to “hear and decide requests for special use permits” pursuant to § 902 of the Zoning Ordinance. A hearing was duly posted, noticed, and advertised to take place on April 26, 2012.

One day prior to the hearing, the Middletown Town Solicitor (Solicitor) submitted to the Board an eleven page memorandum advising the Board that it should dismiss Old Farm’s application because the Board lacked jurisdiction to hear it. The Solicitor advised the Zoning Board that “the provisions of the Middletown Zoning Ordinance that allow [the development proposed by Old Farm] in a General Business Zone with special use permits are invalid” because, in the Solicitor’s opinion, they were inconsistent with the Town Comprehensive Plan. (Solicitor’s Letter at 10, Apr. 25, 2012.) Because the Solicitor believed that the Zoning Ordinance permitting Old Farm’s proposed development by special use permit was invalid, he felt that the only way Old Farm could proceed with its development was to obtain a use variance and an undetermined number of dimensional variances. However, the Solicitor continued,

because Old Farm failed to request variances, the request for relief in the form of a special use permit, and the notice thereof, was improper. Because proper notice is a jurisdictional requirement, the Solicitor concluded that the Board did not have jurisdiction to hear the application. Over the objection of Old Farm, the Board voted to adopt the Solicitor's position and dismissed the application for lack of jurisdiction. Old Farm timely appealed the Board's decision to this Court.

II

Standard of Review

A Superior Court's 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 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 procedures;
- (4) Affected by 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.”

This Court lacks the authority to consider the credibility of witnesses, to weigh the evidence, or to make its own findings of fact. Kirby v. Planning Bd. of Review of Town of Middletown, 634 A.2d 285, 290 (R.I. 1993). Rather, this Court's review 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." Id. (internal citations omitted). If an error of law is identified, this Court may remand the case to Zoning Board for further proceedings. See § 45-24-69(d)(4). "The remand for further proceedings should be based upon a genuine defect in the [Zoning Board's] proceedings[.]" Roger Williams College v. Gallison, 572 A.2d 61, 63 (R.I. 1990).

III

Analysis

On appeal, Old Farm contends that the Board exceeded its powers and committed an error of law when it dismissed the petition for a special use permit. Specifically, Old Farm argues that the Board exceeded its statutory authority when it determined that provisions of the Zoning Ordinance were invalid.

The Board decided it lacked jurisdiction to act on Old Farm's application by adopting the reasoning in the Town Solicitor's letter. The Solicitor's legal conclusion was "the provisions of the Middletown Zoning Ordinance that allow such a development [as proposed by Old Farm] in a General Business zone with special-use permits are invalid."

The Zoning Board is a statutory creation and its powers and duties are prescribed by the Zoning Enabling Act in § 45-24-57. Among the powers designated to the Board is the power "[t]o authorize, upon application, in specific cases, special use permits." Sec. 45-24-57(1)(v). Middletown's Zoning Ordinance § 602, "SCHEDULE OF DISTRICT REGULATIONS," situates the Property in question in a General Business Zone. Further, § 602 allows for "large-scale shopping centers" by special use permit in this General Business Zone. Additionally, the Zoning Ordinance clearly contemplated the development of large scale shopping centers in General Business Zones when, in § 1801, it allowed that "no building permit shall be granted for

the construction of a shopping center *until the Zoning Board of Review grants a special use permit.*” (Emphasis added.)

Therefore, were the Board to rely only on the Zoning Ordinance, its jurisdiction would have been clearly established; Old Farm’s property is in a General Business Zone, and large-scale shopping centers are allowed in this zone by special use permit. See Zoning Ordinance §§ 602, 1801. The Board did not so appropriately rely, however, and instead looked to the Middletown Comprehensive Plan for guidance. The Comprehensive Plan seeks to avoid development of large scale shopping centers in the area in question. The Board essentially determined that the Zoning Ordinance and the Comprehensive Plan were incompatible, that the Comprehensive Plan trumped the Ordinance, and that the petition was impermissible. However, § 902(A)(3) of the Ordinance instructs the Board to consider the compatibility of a requested special use permit with the Comprehensive Community Plan at a public hearing on the merits of the petition.¹ In this case, Old Farm did not have an opportunity for such a hearing because the Board preemptively dismissed Old Farm’s request for a special use permit before reaching the merits of the petition.

The Board’s determination that the Comprehensive Plan superseded the Zoning Ordinance and that the Ordinance was therefore invalid was in excess of its authority. Our

¹ Section 902(A)(3) of the Middletown Zoning Ordinance provides:

“The Zoning Board shall hear and decide requests for special use permits in accordance with the terms of this chapter, according to the following provisions:

(A) A use, categorized as a special use in Article 6 and elsewhere in this chapter, shall be permitted by the Zoning Board following a public hearing if, in the opinion of the Board, such use in its proposed location meets the following requirements:

.....

(3) It will be compatible with the Comprehensive Community Plan of the Town of Middletown[.]”

Supreme Court has instructed that “nothing in the enabling act can be construed as conferring on boards of review jurisdiction to pass on the validity of zoning ordinances.” Town & Country Mobile Homes, Inc. v. Zoning Bd. of Review of City of Pawtucket, 91 R.I. 464, 468, 165 A.2d 510, 512 (1960). Instead, a Board is to “assume the validity” of zoning ordinances. Id. Here, the Zoning Ordinance allows for a special use permit in the General Business Zone at issue; the Zoning Board should have “assumed” that the Zoning Ordinance is valid and held a proper hearing. Section 902(A)(3) of the Ordinance specifies when and where a board may properly consider whether a proposed use and a Comprehensive Plan are inconsistent; that is, at a public hearing on the merits. Pursuant to that same section, the Board should, in passing on a request for a special use permit, consider the compatibility vel non of the request with the town’s Comprehensive Plan. The Board may not, however, make such a determination without affording the applicant the opportunity for a public hearing.

The Board’s adoption of the Solicitor’s opinion in full also incorporated the Solicitor’s opinion that Old Farm should have requested a use variance instead of a special use permit. The Court disagrees. The Ordinance contemplates “large-scale” shopping centers in a General Business Zone. See Ordinance §§ 1801, 1802. Section 602 of the Zoning Ordinance, “SCHEDULE OF DISTRICT REGULATIONS – USES AND DISTRICTS,” clearly permits “large-scale shopping centers” in general business zones by special use permit. Because Old Farm’s proposed plan is to develop a shopping center, and that use is specifically permitted by the Ordinance, a use variance is not needed.

If any dimensional variances are required for an applicant’s proposed development, the Ordinance allows the Board to consider such variances at the same hearing at which it considers the special use permit. See Ordinance § 902(B); see also § 45-24-42(c). The Solicitor was

concerned that, “[w]hile the number of such variances is not clear from the plans submitted, it appears that, at a minimum, one or more dimensional variances will be required.” (Solicitor’s Letter at 6, Apr. 25, 2012.) If any point it becomes apparent that dimensional variances will be required in addition to the special use permit, Old Farm may make those requests at that time.²

IV

Conclusion

After a review of the entire record, this Court finds that dismissing Old Farm’s application before affording Old Farm a hearing was in excess of the Zoning Board’s statutory authority, an error of law, and prejudicial to the substantial rights of Old Farm. Because the Board had no authority to determine the validity of the Zoning Ordinance, which clearly allowed Old Farm to apply for a special use permit, it had no reason to refuse to entertain Old Farm’s request. Pursuant to the Zoning Ordinance, the compatibility of Old Farm’s proposed development and the Town’s Comprehensive Plan, along with the need for any dimensional variances, must be considered on the merits at a public hearing. For the foregoing reasons, the matter is remanded to the Board for further proceedings in conformity with this Decision. Counsel shall submit an appropriate judgment for entry.

² Old Farm informed the Zoning Board in a letter that, although Old Farm was not requesting any variances at the time of its special use permit application, “if, during the course of the development plan review process, it becomes evident that variance relief is necessary, Old Farm, LLC will seek to amend its plans to bring them into conformance.” (Old Farm’s Letter to Zoning Board, 4/10/2012.)



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Old Farm, LLC v. Thomas D. Silveira, et al.

CASE NO: NC 2012-0288

COURT: Newport County Superior Court

DATE DECISION FILED: November 8, 2013

JUSTICE/MAGISTRATE: Gallo, J.

ATTORNEYS:

For Plaintiff: Robert M. Silva, Esq.; David P. Martland, Esq.

For Defendant: Turner C. Scott, Esq.