STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 13, 2014)

G.B. DONUTS OF RHODE ISLAND, INC.	:	
	:	
v.	:	**C.A. No. PC 2014-584**
	:	
JOHN MCCOY, CARL ZOUBRA, PETER VOSDAGALIS, ROBERT CHAPUT, EDMOND M. MCGRATH, P. RYAN ANTROP, and NICHOLAS GOODIER, in their capacities as members of the Town of Cumberland Zoning Board of Review; BRIAN SILVIA, in his capacity as the Town of Cumberland's Finance Director; and COLBEA ENTERPRISES, LLC	:	

DECISION

PROCACCINI, J. Appellee Colbea Enterprises, LLC (Colbea) moves to dismiss the amended complaint of Appellant G.B. Donuts of Rhode Island, Inc. (G.B. Donuts) for lack of standing, pursuant to Super. R. Civ. P. 12(b)(6). The underlying complaint is an appeal from a decision of Appellee the Town of Cumberland Zoning Board of Review (Board), granting Colbea four special use permits. Appellant objects to the motion. For the reasons stated herein, this Court grants Appellee's motion.

I

Facts and Travel

Chapel Four Corners, LLC is the owner of real property with a mailing address of 2084 Diamond Hill Road, Cumberland, Rhode Island, which property is a portion of 2086 Diamond Hill Road, Cumberland, Rhode Island, Assessor's Plat 21, Lot 4. Compl. ¶ 1. G.B. Donuts leases this property and operates a business on the land. Id. G.B. Donuts' business is located diagonally across the street from—and is within two hundred feet of—2095 Diamond Hill Road,

Cumberland, Rhode Island, Assessor's Plat 21, Lot 490 (Property). Id. at ¶¶ 1, 11. Such Property, owned by Colbea, is the subject of the underlying complaint.

On November 13, 2013, the Board held a hearing regarding Colbea's application for four special use permits for the Property. Id. at ¶¶ 13-14. Specifically, Colbea sought to operate a car wash, fast food restaurant, drive-through, and gas station on the Property. Id. at ¶ 14. At the hearing, the Board heard testimony from witnesses who both supported and opposed the applications. Id. at ¶ 15. Representatives of G.B. Donut testified in opposition to the applications based on the "detrimental impact to the area" and the property which they leased. Id. The Board granted Colbea's applications for all four special use permits and issued a written decision on the matter on January 13, 2014. G.B. Donuts timely appealed the Board's decision on February 3, 2014.

II

Standard of Review

In determining whether to grant a motion to dismiss pursuant to Super. R. Civ. P. 12(b)(6), this Court "assume[s] the allegations contained in the complaint to be true and view[s] the facts in the light most favorable to the plaintiffs." Woonsocket School Committee v. Chafee, 89 A.3d 778, 787 (R.I. 2014). "'Because the sole function of a motion to dismiss is to test the sufficiency of the complaint, [this Court's] review is confined to the four corners of that pleading.'" Mendes v. Factor, 41 A.3d 994, 1000 (R.I. 2012) (quoting Barrette v. Yakavonis, 966 A.2d 1231, 1233 (R.I. 2009)). A motion to dismiss is only granted "'when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief under any set of facts that could be proven in support of the claim.'" Chariho Regional School Dist. v. Gist, 91 A.3d 783, 787 (R.I. 2014) (quoting Siena v. Microsoft Corp., 796 A.2d 461, 463 (R.I. 2002)).

III

Analysis

It is an issue of first impression for this Court whether a lessee has standing to appeal the decision of a zoning board granting special use permits to the owner of a nearby property. While it is uncontested that "[a]n aggrieved party may appeal a decision of the zoning board of review," it is less clear who qualifies as such a party. G.L. 1956 ¶ 45-24-69(a). Under the statute, an "aggrieved party" includes "(i) Any person or persons or entities who can demonstrate that their property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town; or (ii) Anyone requiring notice pursuant to this chapter." Sec. 45-24-31(4) (emphasis added). Those requiring notice pursuant to the statute are defined as "all owners of real property whose property is located in or within not less than two hundred feet (200') of the perimeter of the area proposed for change." Sec. 45-24-53(c)(2).

It is clear in this case that G.B. Donuts does not own real property within two hundred feet of the Property at issue in the instant appeal. See id. Rather, G.B. Donuts leases the property from Chapel Four Corners, LLC, the owner of the land. The statute clearly and unambiguously states that only owners of real property located within two hundred feet of the subject property require notice. See § 45-24-53(c)(2). Therefore, G.B. Donuts cannot establish standing under the notice prong as it does not own land adjacent to the subject property but is merely a lessee.

The language of the statute at issue specifically provides that an "aggrieved party" will include those who can prove an injury to their property, and, in this case, the question is whether a lessee has sufficient interest in its leased premises to have standing to bring an appeal. See § 45-24-31(4)(i). Our Supreme Court has found that ". . . generally speaking the owner of the

property, the use of which naturally would be affected adversely by a decision granting an exception or variance, is considered to be an aggrieved person having the right to such a review." Flynn v. Zoning Bd. of Review of City of Pawtucket, 77 R.I. 118, 123, 73 A.2d 808, 810 (R.I. 1950).

G.B. Donuts relies heavily on Ralston Purina Co. v. Zoning Bd. of Town of Westerly, 64 R.I. 197, 12 A.2d 219 (1940) to support its argument that a lessee has standing. In Ralston, our Supreme Court found that a lessee did have standing to appeal a zoning board decision denying it a permit to erect a building. However, this case has been limited to its facts. The majority of the Rhode Island Supreme Court decisions disfavor an expansion of standing in zoning appeals.

In Gallagher v. Zoning Bd. of Review of City of Pawtucket, 95 R.I. 225, 186 A.2d 325 (1962), a tenant at sufferance was not found to have standing to apply for a variance or exception, and the Gallagher Court made it clear that its finding of standing in Ralston was distinguishable and pertained only to building permit applications. In two other cases, our Supreme Court found no standing for applicants with various forms of purchase rights with respect to property. In Tripp v. Zoning Bd. of Review of City of Pawtucket, 84 R.I. 262, 266, 123 A.2d 144, 147 (1956), an applicant for a variance, who was merely the holder of an option to purchase, was found not to have standing. In Packham v. Zoning Bd. of Review of City of Cranston, 103 R.I. 467, 472, 238 A.2d 387, 390 (1968), an applicant for an exception to a zoning ordinance had some form of agreement to buy the lot if the exception were granted, but the owner did not join in the application. Our Supreme Court held there was no standing without the "precise nature of the agreement," id. at 472, 238 A.2d at 390, and only the applicant's argument that the agreement was to be binding should the board grant the exception. The Packham Court explained: "the applicant . . . failed to adduce evidence from which its standing to obtain the

exception could be established." Id. at 473, 238 A.2d at 390; see generally Annicelli v. Town of South Kingstown, 463 A.2d 133, 139 (R.I. 1983).

In the instant matter, G.B. Donuts is not the applicant for a variance, but rather a third party that objects to the granting of special use permits to the owner of a property that is within 200 feet of its leased premises. Based on the case law, our Supreme Court is generally unwilling to find that a tenant has standing where the owner does not also submit an application or appeal or where the tenant is a tenant at sufferance.

Furthermore, no evidence was included in the complaint as to what sort of lease exists between G.B. Donuts and Chapel Four Corners, LLC. The Court knows only that there is a lease. (Am. Compl. at 1.) G.B. Donuts could very well be a tenant at sufferance. See Gallagher, supra. Even if G.B. Donuts is not a tenant at sufferance, our Supreme Court has yet to define what interest, if any, a tenant with a current lease must establish to confer standing. As such, this Court is not in a position to determine whether tenancy confers standing and whether the nature or length of the tenancy creates sufficient interest in the property to confer standing.

IV

Conclusion

This Court is mindful of the sometimes arduous process of zoning applications and appeals. This Court is not convinced that a universal grant of standing to all lessees is appropriate or warranted under the law. Thus, the absence of clear precedent, along with the policy implications and potentially significant expansion of standing that would result if the Appellant's position is adopted, constrains this Court to conclude that the Appellant does not have standing under the current State of Rhode Island law. Colbea's Motion to Dismiss is granted. Counsel for the prevailing party shall prepare an appropriate form of judgment.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	G.B. Donuts of Rhode Island, Inc. v. John McCoy, et als.
CASE NO:	PC 2014-584
COURT:	Providence County Superior Court
DATE DECISION FILED:	November 13, 2014
JUSTICE/MAGISTRATE:	Procaccini, J.
ATTORNEYS:	
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