STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[Filed: November 22, 2016]

LITTLE COMPTON RESORTS, INC., Plaintiff,	:	
v.	:	**C.A. No. NC-2016-0262**
ZONING BOARD FOR THE TOWN OF LITTLE COMPTON; FREDERICK G. BUHRENDORF, JR.; GRAEME BELL; MARK SAWOSKI; HERBERT A. CASE; WILLIAM RYAN; FRANKLIN "PAT" POND; ELISABETH BEDELL CLIVE; DIONYSUS ACQUISITION LLC; BRIAN ELIASON; NATALIE ELIASON; and JOHN P. NELSON, TRUSTEE OF THE LOUISE NELSON ESTATE Defendants.	:	

DECISION

STERN, J: Before this Court is Little Compton Resorts, Inc.'s (Plaintiff or Little Compton Resorts) second amended complaint requesting that this Court declare that the Zoning Board for the Town of Little Compton (the Zoning Board) lacks jurisdiction to hear an appeal from the issuance of a zoning certificate brought by a neighboring landowner, and that any decision emanating from that appeal is null and void. In addition, Little Compton Resorts asks this Court to declare that the Zoning Board lacks jurisdiction to hear appeals from a response to a complaint under section 14-9.1 of the Town of Little Compton Ordinances, when the response indicates that there is no violation of the zoning ordinance. Dionysus Acquisition LLC (Dionysus), a party

to this action by virtue of having an interest pursuant to G.L. 1956 § 9-30-11,[1] asks this Court to grant summary judgment to the same effect. Jurisdiction is pursuant to G.L. 1956 §§ 8-2-13 and 9-30-1.

I

Facts and Travel

Central to this matter is the Stone House Inn (Stone House), a four-story historic inn located at 122 Sakonnet Point Road in the Town of Little Compton, Rhode Island, Lots 3 and 4 on Assessor's Plat 9, which is owned and operated by Little Compton Resorts. Pl.'s Second Am. Compl. ¶ 1; Compl. of Elisabeth Clive and Preserve Little Compton (Aug. 17, 2016). Abutting the Stone House lies the residence of Elisabeth Bedell Clive (Clive), located at 124 Sakonnet Point Road, Little Compton, Rhode Island, Town of Little Compton Tax Assessor's Plat 9, Lot 5. See Pl.'s Second Am. Compl. ¶ 3; Compl. of Elisabeth Clive and Preserve Little Compton (Aug. 17, 2016). Both properties are located in a residentially zoned area of town, but because the Stone House predates local zoning ordinances, its commercial use is considered lawfully non-conforming.

Little Compton Resorts purchased the Stone House in August 2015 relying on the belief that the historic business conducted on the premises constituted a legal nonconforming use, which Little Compton Resorts hoped to continue and see flourish. See Pl.'s Second Am. Compl. ¶ 9. To confirm this belief, Little Compton Resorts claims that it requested a Little Compton Zoning Officer to issue a zoning certificate with respect to the Stone House's commercial operations. See Zoning Certificate, Jan. 29, 2016.

[1] In an action for declaratory relief, § 9-30-11 mandates that "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding."

On January 29, 2016, William Moore (Moore), a Zoning Enforcement Officer/Building Official for the Town of Little Compton, issued a zoning certificate in response to Little Compton Resorts' request, which stated that the Stone House property is composed of two lots in a residentially zoned area of town—one of which is vacant and the other has on it two buildings—and that both lots are considered to be legally nonconforming to the local zoning ordinances. See id. The uses approved for the Stone House buildings were described as: (1) a nine-room inn with a restaurant in the basement; and (2) a three-room inn with a restaurant on the first floor. Id. Further, the certificate described the historical nonconforming uses of these buildings as follows:

> "In the past 5 decades the property and main building as 9 room INN, with a Restaurant in basement. The Barn used for meetings and events and a Restaurant, the Barn basement as a spa. The intensity of use has varied in the past but except for the last 18 months the property has been primarily open for 10-12 months a year with no restrictions on the amount of events. I will add that entertainment or music has been primarily been [sic] held indoors historically." Id.

The certificate concludes with the sentence: "Per Town of Little Compton Zoning Ordinance 14-9.1 any determination of the Building Official may be appealed to the Zoning Board in accordance with subsection 14-9.7." Id. The issuance of the January 29, 2016 certificate has not been challenged.

Thereafter, Little Compton Resorts applied for an entertainment license with the Little Compton Town Council (Town Council). See Pl.'s Second Am. Compl. ¶ 11. In the process of reviewing and approving the application, the Town Council requested that Moore issue another zoning certificate with respect to the nonconforming uses conducted on the Stone House premises. See id.; see also Town of Little Compton Ordinances 6-7.3. This ultimately led to Moore issuing a zoning certificate dated May 2, 2016, which "explain[ed] the historical uses of

the [Stone House] and the existing building uses together with the use of a Temporary Membrane Tent." Zoning Certificate, May 2, 2016. The May 2, 2016 certificate confirmed the uses described in the January 29, 2016 certificate and supplemented the January 29, 2016 certificate to the extent that the Stone House has historically provided "entertainment, [and] gatherings, . . . includ[ing] weddings and similar events," which have historically occurred less than forty-five times per calendar year, each event having no more than 175 people. Id. The May 2, 2016 certificate further stated that the use of a temporary membrane tent "would be considered in conformance with this Zoning Certificate and the historical uses of the property" and provided a specific description of the materials such tents could be constructed of to remain in line with the historic uses of the property. See id.

Unsatisfied with the May 2, 2016 zoning certificate, Clive filed an application to appeal its issuance pursuant to G.L. 1956 § 45-24-54 and section 14-9.1(a) of the Town of Little Compton Ordinances (Ordinances), and on June 15, 2016, the Zoning Board held a hearing during which they ultimately concluded that the Zoning Board had jurisdiction to hear the appeal. See Clive's Appeal of Zoning Official's May 2, 2016 Zoning Certificate (Zoning Bd. Hr'g Tr. 85-86, June 15, 2016). In addition, on August 17, 2016, Clive filed a complaint with Moore pursuant to section 14-9.1(a) of the Ordinances arguing against the scope of the uses outlined in the May 2, 2016 Zoning Certificate. See Pl.'s Second Am. Compl. ¶¶ 15-16.[2] In response, Moore responded with a letter dated September 2, 2016—not labeled as a zoning certificate—reiterating the contents of the May 2, 2016 certificate. See id.

[2] Little Compton Resorts alleges that, "[u]pon information and belief, Clive issued the complaint in order to take advantage of the opportunity to appeal" the responding letter. Pl.'s Second Am. Compl. ¶ 17.

Across town, Dionysus—the owning and operating entity of Carolyn's Sakonnet Vineyard (the Vineyard)—had also requested the issuance of a zoning certificate to confirm its current, legal nonconforming uses. See Zoning Certificate, Mar. 9, 2016. On March 9, 2016, a zoning enforcement officer reissued a zoning certificate originally dated August 24, 2011, which stated in relevant part that: (1) the buildings and uses on the Vineyard's premises are in compliance with Zoning Ordinances; (2) the Vineyard is in a location zoned for residential use; (3) the Vineyard is approved to be used as a Winery; and (4) "due to the fact the [Vineyard] owners have an entertainment license from the Town of Little Compton and the proper State of Rhode Island licenses to serve wine," the Vineyard is permitted to host "larger wedding type functions[, which] is to be considered in compliance with the Town of little [sic] Compton Zoning Ordinance." Id. The certificate concluded with the statement that "[p]er Town of Little Compton Zoning Ordinance 14-9.1 any determination of the Building Official may be appealed to the Zoning Board in accordance with subsection 14-9.7." Id.

Brian and Natalie Eliason (the Eliasons), whose property neighbors the Vineyard, filed a purported appeal from the reissuance of the zoning certificate with the Zoning Board. See Application to Zoning Board, Apr. 8, 2016. The matter was scheduled to be heard on June 15, 2016, and at that hearing, counsel for the Eliasons requested a continuance from the Zoning Board Chairman, Frederick G. Buhrendorf, Jr. See The Eliasons' Appeal of Zoning Official's Mar. 9, 2016 Zoning Certificate (Zoning Bd. Hr'g Tr. 4:13-17, June 15, 2016). Chairman Buhrendorf allowed the Eliasons a one-month continuance to submit to the Zoning Board "a more definitive statement for the appeal,"[3] but the Eliasons submitted no such statement. Id. at

[3] In granting the continuance, Chairman Buhrendorf stated: "Since there is an issue, and actually the way the appeal was written in the case, I think granting a continuance is the right thing to do; and I would suggest that we waive the fee if it needs to be refiled for the next month." The

4:5-17. Instead, the Eliasons filed a new appeal to the Zoning Board on August 22, 2016. See Application to Zoning Board, Undated. Like Clive, the Eliasons also filed a complaint with Moore on July 29, 2016 pursuant to section 14-9.1 of the Ordinances and in response, Moore replied with a letter entitled "Zoning Determination from Complaint," in which Moore further specified the scope of the challenged uses and ultimately concluded that the Vineyard was in compliance with the Town's Zoning Ordinances. See Zoning Determination from Complaint, Aug. 15, 2016.

On July 11, 2016, Little Compton Resorts filed a complaint requesting a declaratory judgment in the Superior Court, asking that this Court declare that the Zoning Board lacks jurisdiction to hear appeals from the issuance of zoning certificates and/or that the Zoning Board's decision emanating from the challenged zoning certificate is null and void. Little Compton Resorts also asks this Court to declare that the Zoning Board lacks jurisdiction to hear appeals from "determinations" made by a zoning enforcement officer in response to a complaint filed under section 14-9.1 of the Ordinances when the response indicates that there is no violation of the town's zoning ordinances. Dionysus requests that this Court enter summary judgment to the same effect. In response, the Zoning Board, Clive, and the Eliasons ask that this Court summarily dispose of Little Compton Resorts' complaint seeking a declaratory judgment, asserting that the Zoning Enabling Act, §§ 45-24-1 et seq. (the Enabling Act), grants the Zoning Board jurisdiction to hear appeals from the issuance of a zoning certificate.[4] As all of these motions raise common legal issues, the Court decides the motions and Little Compton Resorts'

Eliasons' Appeal of Zoning Official's Mar. 9, 2016 Zoning Certificate (Zoning Bd. Hr'g Tr. 4:13-17, June 15, 2016)

[4] Little Compton Resorts also contends that Clive's challenge is moot because she did not challenge the January 29, 2016 Zoning Certificate. However, in light of this Court's declaration, it is not necessary for the Court to address that argument.

request for declaratory judgment simultaneously. Jurisdiction is pursuant to §§ 8-2-13, 8-2-14(a), and 9-30-1. For the reasons set forth herein, the Court grants Plaintiff's request for declaratory relief.

II

Jurisdiction and Review

Under the Uniform Declaratory Judgments Act, §§ 9-30-1 et seq., the Superior Court "shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1. "The obvious purpose of the Uniform Declaratory Judgments Act is to facilitate the termination of controversies" or otherwise remove uncertainties. Fireman's Fund Ins. Co. v. E.W. Burman Inc., 120 R.I. 841, 845, 391 A.2d 99, 101 (1978); see § 9-30-5. In addition, the Uniform Declaratory Judgments Act is intended to be remedial in nature, and should be liberally construed and administered. See § 9-30-12; Fireman's Fund Ins. Co., 120 R.I. at 845, 391 A.2d at 101. A court's decision to issue a remedy under the Uniform Declaratory Judgments Act falls within the trial justice's broad discretionary authority. Cruz v. Wausau Ins., 866 A.2d 1237, 1240 (R.I. 2005); Woonsocket Teachers' Guild Local Union 951, AFT v. Woonsocket Sch. Comm., 694 A.2d 727, 729 (R.I. 1997). Preliminarily, the Court must determine whether an actual controversy exists in order to grant Little Compton Resorts its requested relief under the Uniform Declaratory Judgments Act. See Providence Teachers Union v. Napolitano, 690 A.2d 855, 856 (R.I. 1997). As an initial matter, the Court first finds that there exists a justiciable controversy as to whether there exists a right to appeal a zoning certificate under the Enabling Act or a response to a complaint under the Town of Little Compton's Zoning Ordinances.

III

Analysis

The issues this Court faces today come by the crossway of several sections of the Enabling Act governing the enforcement and administrative powers of zoning enforcement officers, the issuance of zoning certificates, the appellate jurisdiction of zoning boards, and the standing requirements for appellants. Additionally, this Court is faced with language in Little Compton's Zoning Ordinances governing a complaint process to a zoning enforcement officer, which is not found within the language of the Enabling Act.

A

Administration and Enforcement

The Enabling Act defines a zoning certificate as "[a] document signed by the zoning enforcement officer, as required in the zoning ordinance, that acknowledges that a use, structure, building, or lot either complies with, or is legally non-conforming to, the provisions of the municipal zoning ordinance or is an authorized variance or modification therefrom." Sec. 45-24-31(70). The power to issue a zoning certificate is granted under § 45-24-54, a subsection of the Enabling Act that also delineates certain "administrative" and "enforcement" duties of a zoning official who is charged with such duties. The statute provides, in full:

> "A zoning ordinance adopted pursuant to this chapter must provide for the administration and enforcement of its provisions pursuant to this chapter. The zoning ordinance must designate the local official or agency and specify minimum qualifications for the person or persons charged with its administration and enforcement, including: (1) the issuing of any required permits or certificates; (2) collection of required fees; (3) keeping of records showing the compliance of uses of land; (4) authorizing commencement of uses or development under the provisions of the zoning ordinance; (5) inspection of suspected violations; (6) issuance of violation notices with required correction action; (7) collection of fines for violations; and (8) performing any other duties and taking any

> actions that may be assigned in the ordinance. In order to provide guidance or clarification, the zoning enforcement officer or agency shall, upon written request, issue a zoning certificate or provide information to the requesting party as to the determination by the official or agency within fifteen (15) days of the written request. In the event that no written response is provided within that time, the requesting party has the right to appeal to the zoning board of review for the determination." Sec. 45-24-54 (emphasis added).[5]

In examining § 45-24-54, the Court first notes that while the issuance of a zoning certificate falls within the same subsection as eight duties constituting the "administration" or "enforcement" of a local zoning ordinance, the General Assembly segregated the issuance of a zoning certificate from those enumerated activities. See id. In addition, the issuance of a zoning certificate, unlike the enumerated duties listed in § 45-24-54, is dependent upon a request "as to the determination by the official or agency within fifteen (15) days," and the power to issue zoning certificates first lies with a zoning enforcement officer. See id.; Franco v. Wheelock, 750 A.2d 957, 960 (R.I. 2000) (per curiam). Moreover, the purpose for which a zoning enforcement officer may issue a zoning certificate is qualified to the extent that an issuance is done "[i]n order

[5] The Town of Little Compton's Zoning Ordinances differs slightly from § 45-24-54 of the Enabling Act, except as it pertains to the ability of a Building Official to issue a zoning certificate. It provides:

> "It shall be the duty of the Building Official to interpret and enforce the provisions of this chapter in the manner and form and with the powers provided in the laws of the State and in the Charter and Ordinances of the Town. The Building Official shall refer all applications for variances, special use permits and other appeals to the Zoning Board of Review. The Building Official shall make a determination in writing, within fifteen (15) days, to any written complaint received, regarding a violation of this chapter. In order to provide guidance or clarification, the Building Official shall, upon written request, issue a zoning certificate or provide information to the requesting party within fifteen (15) days of the written request. Any determination of the Building Official may be appealed to the Board in accordance with subsection 14-9.7 of this chapter." Town of Little Compton Ordinances sec. 14-9.1(a).

to provide guidance or clarification . . . ." Sec. 45-24-54. Finally, the requesting party is entitled to appeal only in the event that the request goes unanswered within fifteen days and the appeal is for the purpose of receiving a determination. See id.

The drafting by the General Assembly in crafting this procedure evidences that the issuance of a zoning certificate falls outside a zoning enforcement officer's minimum "administrative" and "enforcement" duties. The General Assembly specifically and unambiguously enumerated eight actions that constitute administration or enforcement of a local zoning ordinance, none of which includes the issuance of a zoning certificate.[6] See id. Although it is without question that this list is not intended to be exhaustive, at the same time the Court has long recognized that "[t]he expression of one or more items of a class and the exclusion of other items of the same class imply the legislative intent to exclude those items not so included." 2A Norman J. Singer, Statutes and Statutory Construction § 47:23 at 313 n.7 (6th ed. 2000); see Terrano v. State, Dep't of Corr., 573 A.2d 1181, 1183 (R.I. 1990); Vanni v. Vanni, 535 A.2d 1268 (R.I. 1988). Applying that principle to § 45-24-54, it is clear that the General Assembly intended to exclude the issuance of a zoning certificate from the minimum enforcement and administrative duties enumerated therein. The clear and unambiguous qualification that zoning certificates only be issued for the sole purpose of "providing guidance or clarification" to a requesting party, as opposed to the enumerated activities requiring no such request or intended purpose, separates the issuance of a zoning certificate from the class of actions that constitute the minimum "enforcement" or "administration" duties of those charged with enforcing or

[6] Section 45-24-54's administrative and enforcement duties require that a zoning enforcement officer only issue "required permits and certificates." The issuance of a zoning certificate, however, is not required under the Enabling Act; rather, it is issued as a convenience to a requesting party. Indeed, the non-issuance of a certificate is specifically contemplated in § 45-24-54.

administering a local zoning ordinance. A conclusion to the contrary would render the language "[i]n order to provide guidance of clarification" mere surplusage, in violation of the "cannon of statutory interpretation which gives effect to all of a statute's provisions, with no sentence, clause or word construed as unmeaning or surplusage." Local 400, Int'l Fed'n of Technical & Prof'l Eng'rs v. R.I. State Labor Relations Bd., 747 A.2d 1002, 1007 (R.I. 2000).

Thus, a zoning certificate issued under § 45-24-54 falls outside a zoning enforcement officer's minimum "administration" or "enforcement" duties. Instead, a zoning certificate is issued to provide guidance or clarification to a requesting party as to the subject matter of the request.

B

Zoning Certificates Are Not Legally Binding

This Court's determination that zoning certificates are issued outside a zoning enforcement officer's minimum "administration" or "enforcement" duties under § 45-24-54, ultimately supports the conclusion that the issuance of a zoning certificate may not be appealed to a zoning board because zoning certificates do not carry with them the force of the law.

By their very nature, zoning certificates are advisory and—as our Supreme Court has opined—are "not legally binding." Parker v. Byrne, 996 A.2d 627, 633 (R.I. 2010). Indeed, the Superior Court has reached this very same conclusion on many prior occasions. See Redwood Realty II, LLC v. Bruce, Nos. PC 2008-1185, 2008-1186, 2008-1187, 2011 WL 997146 (R.I. Super. Mar. 16, 2011); NI, Ltd. v. Duncan, No. 2002-0573, 2004 WL 1541918 (R.I. Super. June 23, 2004); Cohen v. Duncan, Nos. Civ.A 2002-599, Civ.A 2001-380, 2004 WL 1351155 (R.I. Super. June 9, 2004), quashed and remanded on other grounds, 550 A.2d 970 (R.I. 2009); Tompkins v. Zoning Bd. of Review of the Town of Little Compton, No. Civ.A 2001-204, 2003

WL 22790829 (R.I. Super. Oct. 29, 2003). However, as Clive and the Eliasons note, our Supreme Court has not discussed the legally binding nature of a zoning certificate that is issued to confirm whether the current uses of a property falls within the scope of the property's "grandfathered" status. Thus, this Court must address whether a certificate issued to confirm the historic or current legal nonconforming uses of a property—as opposed to a certificate issued to provide guidance pertaining to the legality of a proposed use—is influential to the Court's requested declaration.

The neighboring Defendants seek to draw a distinction between "current use" and "proposed use" zoning certificates: according to the neighboring Defendants, because a zoning certificate pertaining to current uses is a lawful exercise of a zoning enforcement officer's power under § 45-24-54, they amount to a binding determination that may be appealed to the zoning board. In past decisions, trial justices have found that the issuance of a zoning certificate that pertains to a proposed use and purports to be binding is not a lawful exercise of a zoning enforcement officer's power under the Enabling Act. See Tompkins, 2003 WL 22790829, at *4 ("[N]either a zoning official nor zoning board of review may lawfully issue a zoning certificate for the purpose of making a binding or enforceable determination about whether or not a proposed use, structure, building or lot would be legal under a municipal ordinance." (emphasis added)). In such circumstances, purportedly binding decisions by a zoning board that emanated from a proposed use zoning certificate fell outside a zoning board's jurisdiction under the Enabling Act. See Redwood Realty II, LLC, 2011 WL 997146, at *7 ("In light of the fact that the Zoning Board's review was not authorized by the Enabling Act, the Board's decisions stemming therefrom were void ab initio.").

However, the neighboring Defendants' distinction is one that is without a difference. A zoning certificate that confirms current, nonconforming uses only means that the certificate may be issued in accordance with the zoning enforcement officer's power under § 45-24-54. Indeed, a zoning certificate is defined by the Enabling Act as "[a] document signed by the zoning-enforcement officer, as required in the zoning ordinance, that acknowledges that a use, structure, building, or lot either complies with, or is legally nonconforming to, the provisions of the municipal zoning ordinance or is an authorized variance or modification therefrom." Sec. 45-24-31(70) (emphasis added). The fact that zoning certificates are issued to acknowledge a current legal nonconforming use simply brings them within that definition, and therefore may be lawfully issued by a zoning enforcement officer under § 45-24-54. See id. It does not, however, alter the purpose for which they are issued. Under § 45-24-54, zoning certificates that acknowledge a legally nonconforming use are nevertheless issued by a zoning enforcement officer for the sole purpose of "provid[ing] guidance or clarification . . . to the requesting party as to the determination by the official or agency . . . ." Accordingly, due to the advisory nature of these documents, zoning certificates issued in accordance with the process contemplated under the Enabling Act are nonetheless binding as a zoning certificate that addresses proposed future uses.

Moreover, if the Court were to conclude that zoning certificates addressing the current legal nonconforming use of a property are legally binding determinations, this Court's decision would contravene our Supreme Court's decisions in RICO Corp. v. Town of Exeter, 787 A.2d 1136 (R.I. 2001) and Olean v. Zoning Bd. of Review of Lincoln, 101 R.I. 50, 220 A.2d 177 (1966). As the Supreme Court reiterated in RICO Corp.:

> "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. This it had no right to do."

RICO Corp., 787 A.2d at 1144 (emphasis added) (quoting Olean, 101 R.I. at 52, 220 A.2d at 178). Just as zoning boards are granted their power via statute, so are zoning enforcement officers. Thus, a confirmation by way of issuing a zoning certificate as to the permissible non-conforming uses must be nonbinding and advisory in nature because a purportedly binding certificate would fall outside of the power granted to a zoning enforcement officer under § 45-24-54. A legally binding acknowledgement of a nonconforming, preexisting use may only be issued by the Court's declaration. See id. Accordingly, this Court concludes that zoning certificates—whether issued under § 45-24-54 in response to a request as to the legality of a pre-existing, legal nonconforming use or a proposed use—are only advisory in nature and have no legal effect.

Little Compton Resorts and Dionysus cite to several cases of the Superior Court to emphasize the policy implications that would arise if this Court were to determine that zoning certificates are legally binding. See Redwood Realty II, LLC, 2011 WL 997146, at *7; Tompkins, 2003 WL 22790829, at *2 (describing attempts to gain purportedly binding decisions by way of a zoning certificate to be a "misuse of G.L. 1956 § 45-24-54 [that] has resulted in needless litigation"). This Court also recognizes the practical implications and policy concerns that have been recognized in the past. These concerns are not alleviated in instances where a zoning certificate is requested for current legally nonconforming uses. Indeed, the consequences would be just as unsettling should these certificates carry with them the force of law. In such a

world, virtually any unsatisfied neighbor could request a zoning certificate to "confirm" the legally nonconforming uses of the property next door. Thereafter, the zoning enforcement officer could either (1) conclude that the current use falls outside the property's "grandfathered" status; (2) confirm the use as legally nonconforming; or (3) ignore the request. Should the zoning officer choose the first option, the neighbor would have a legally binding document stating that the property is being used illegally and seek to shut it down. In the second instance, if the zoning officer confirms the use, the neighbor would be permitted to appeal the legally-binding determination to the zoning board, the Superior Court, and then seek review by our Supreme Court. See § 45-24-69(a); AV Realty, LLC v. Smithfield Zoning Bd. of Review, 762 A.2d 803, 803 (R.I. 2000) (order) ("The proper procedure to review a judgment of the Superior Court on appeal from a decision of a zoning board is by writ of certiorari. There is no right of appeal to this court."). Finally, should the officer ignore the request, the neighbor would be permitted to appeal after fifteen days. See § 45-24-54. An interpretation contrary to this Court's would result in a private cause of action that was not explicitly contemplated by the Enabling Act.

C

Zoning Certificates May Not Be Appealed

The Court's determination that zoning certificates are not binding leads the Court's analysis towards whether zoning certificates issued in conformity with § 45-24-54 may be appealed to a zoning board. Appeals to the zoning board are governed by § 45-24-57, which grants zoning boards the authority

> "[t]o hear and decide appeals within sixty-five (65) days of the date of the filing of the appeal where it is alleged there is an error in any order, requirement, decision, or determination made by an administrative officer or agency in the enforcement or

> interpretation of this chapter, or of any ordinance adopted pursuant hereto." Sec. 45-24-57.

Notably, however, to have the standing sufficient to bring an appeal to a zoning board, the party must qualify as an "aggrieved part[y]" under the Enabling Act. See §§ 45-24-63(a), 45-24-64. It is also a requirement that only aggrieved parties may appeal a decision of the zoning board of review to the Superior Court. See §§ 45-24-63(b), 45-24-69(a); see also Town of Coventry Zoning Bd. of Review v. Omni Dev. Corp., 814 A.2d 889, 896-97 (R.I. 2003). An aggrieved party is defined by the Enabling Act as either

> "(i) [a]ny person, or persons, or entity, or entities, who or that can demonstrate that his, hers, or its 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) [a]nyone requiring notice pursuant to this chapter." Sec. 45-24-31(4).[7]

The party claiming the status as an "aggrieved party" has the burden to establish his or her position as one. See DiIorio v. Zoning Bd. of Review of E. Providence, 105 R.I. 357, 252 A.2d 350 (1969); Roland F. Chase, Rhode Island Zoning Handbook § 219, at 212 (3d ed. 2016).

Due to the intrinsically nonbinding nature of a zoning certificate, its issuance may not be appealed because neighboring property owners lack the requisite standing to bring such an appeal under the Enabling Act. This Court concludes a nonbinding zoning certificate does not give rise to a controversy because the advisory document creates no vested rights in the recipient. The purpose for this conclusion is two-fold: (1) the nonbinding nature of the certificate carries with it no injury because it merely provides the zoning enforcement officer's opinion in order to clarify the existing status of the property; and (2) no provision of the Enabling Act requires that

[7] The Town of Little Compton Ordinances also contains a definition of "aggrieved party" that mirrors the definition provided in the Enabling Act. See Town of Little Compton Ordinances 14-10(a)(6).

neighboring or abutting property owners be given notice upon the issuance of an advisory zoning certificate.

1

The Zoning Certificate Does Not Cause Injury

The zoning certificate that is being "appealed" here specifically sets out "historical facts," and was used to advise the Town Council on the frequency and intensity of the Stone House's nonconforming uses, which the Town Council could take into account when considering Stone House's entertainment license application. This is evident from the very beginning of the zoning certificate, which states that the zoning certificate is being issued "to explain the historical uses of the [Stone House] and the existing building uses together with the use of a Temporary Membrane Tent." Zoning Certificate, May 2, 2016. The building official goes on to state:

> "The [Stone House] is located in a Residential Zone of the Town of Little Compton and approved to operate the business as a Legal Non-Conforming Use. The [Stone House] has an existing Inn (12-13 rooms in 2 existing buildings), 2 Restaurants (1 in each existing building) and provide [sic] entertainment, gatherings, which include weddings and similar events. The historical facts are gatherings or events with entertainment should not happen more than 45 times per calendar year, and no more than 175 people at such gatherings or events. These historical facts also include various temporary membrane tents and portable restroom facilities to help accommodate for preparation and the use of public at these gatherings and events." Id. (emphasis added).

The building official further advised the reader as to which type of tent "will be considered in conformance with this Zoning Certificate and the historical uses of the property . . . ." Id. The building official based this recommendation upon how Rhode Island State Building Codes refer to a tent,[8] ultimately clarifying what type of "tent" would not violate the Stone House's legal nonconforming use. See id. Nowhere in this statement did the building official claim that his

[8] Citing RISBC-1 (2013 definitions), Moore explained that "a TENT [is] a structure, enclosure or shelter, with or without sidewalls or drops constructed of fabric or pliable material supported in any manner except by air or the contents it protects." Zoning Certificate, May 2, 2016.

recommendation came from an interpretation of the ordinance; rather, the building official clarified that a specific type of tent will align with the type of tents historically used in the course of hosting outdoor events at the Stone House. Next, the building official stated that should the Stone House use "[a] structure which gives the appearance of a tent but has been engineered to withstand wind forces, with helix poles and concrete type slabs to support flooring, and semi-permanent walls," then in his opinion it would result in "an expansion of a non-conforming use." Id. Finally, the building official described how previous renovations completed by the previous owners of the Stone House and approved by the Town of Little Compton[9] are also legally non-conforming because "this Zoning Official believes it would be discrimination against the new owner to change the determination of the previous Zoning Official." Id. He further stated that he could find no complaints of record about noise or congestion emanating from Stone House parking. See id.

It is clear upon examination of the certificate that the building officer examined the already-established uses of the Stone House and utilized those historic facts to form his own advisory opinion in order to provide guidance to the Town Council in considering whether the Stone House was eligible to obtain an entertainment license. Additionally, he also provided guidance as to how Little Compton Resorts could continue to use tents as it has historically done. Due to the nonbinding nature of the certificate, a neighboring landowner would not suffer injury

[9] These renovations were stated to include: (1) "[i]n the years 2007-2008, the Town of Little Compton Approved at least 4 Building permits to renovate the then and currently existing Inn and Barn at the [Stone House]"; (2) "[i]n the year of 2007 a new OWTS was designed to accommodate" those renovations and "was completed and conformed in accordance with RIDEM at the [Stone House]"; and (3) "[i]n the year 2009 the Town of Little Compton issued certificates of Occupancy for the Subject Property . . . . The Certificates of Occupancy were issued with indefinite expiration dates." Zoning Certificate, May 2, 2016.

from such an advisory document that merely recites already-established determinations and recommendations in light of historical facts.[10]

2

No Notice Provision for the Issuance of a Zoning Certificate

The conclusion that there exists no right to appeal a zoning certificate or provision of information under § 45-24-54 is further buttressed by the lack of provisions mandating that notice be given to neighboring properties when a zoning enforcement officer issues nonbinding advice. The neighboring Defendants do not contend that they are explicitly entitled to notice under the Enabling Act whenever a zoning certificate is issued with respect to a neighboring or abutting property.[11] Indeed, the Enabling Act does not guarantee that a neighboring or abutting property receive notice on every zoning-related activity sought by his or her neighbor; rather, notice must only be given during the process of the zoning officials or agency making binding determinations. See, e.g., §§ 45-24-41(b), 45-24-42(b)(4), 45-24-46, 45-24-66, 45-24-69.1; see also Sousa v. Town of Coventry, 774 A.2d 812, 815 (R.I. 2001) (discussing notice when a building permit is issued). Surely, the General Assembly could have provided a section in the Enabling Act requiring that notice be given in circumstances where a zoning certificate is issued to confirm the legal nonconforming use of the abutting property if they intended that notice be given in such cases. See, e.g., §§ 45-24-41(b), 45-24-42(b)(4), 45-24-46, 45-24-66, 45-24-69.1.

[10] To be clear, the Court takes no position on whether the advice and clarification provided in the certificate was correct in its scope or accuracy, nor is this Court obliged to do so.

[11] The neighboring Defendants assert, however, that they are aggrieved because section 14-9.8(d)(2)(B) of the Zoning Ordinances requires property owners within a 200-foot radius receive notice of zoning hearings related to the subject property. However, reliance on section 14-9.8 is misplaced, as that section references public hearings pertaining to "any application for variance or special use permit," not a request for a zoning certificate to confirm the legal nonconforming uses of a property.

D

"Determination" Under Little Compton Ordinances Non-Appealable

During the process of adjudicating this case, Clive and the Eliasons also filed separate complaints with the building official pursuant to section 14-9.1(a) of the Ordinances. In response to Clive, the building official sent a word-for-word copy of the May 2, 2016 Zoning Certificate, except that the heading "Zoning Certificate" had been removed and the letter further stated that "the following determination is an answer to your above complaint." See William Moore Letter, Sept. 2, 2016. Moore responded to the Eliasons' complaint in the form of a "Zoning Determination from Complaint," which addressed each assertion in the Eliasons' complaint, ultimately stating that the building official did not find a violation of the zoning ordinances. See Zoning Determination from Complaint, Aug. 15, 2016. Both neighboring Defendants argue that the responses issued by the building official addressing their respective complaints may be appealed to the Zoning Board under section 14-9.3(a) of the Ordinances because they are "determinations."[12] In response, Little Compton Resorts and Dionysus contend that the neighboring Defendants' "complaints" are end-runs around § 42-24-54 and section 14-9.1, and can be equated to requests for zoning certificates. Further, in light of their argument that

[12] Section 14-9.3 of the Town of Little Compton Zoning Ordinances provides, in part:

> "The Zoning Board of Review shall have the powers and duties described as follows:
>
> > "a. To hear and decide appeals in a timely fashion where it is alleged there is error in any order, requirement, decision, or determination made by an administrative officer or agency in the enforcement of interpretation of this chapter.
> >
> > . . .
> >
> > "f. To hear and decide such other matters, according to the terms of this chapter or other statutes, and upon which the Board may be authorized to pass under this chapter or other statutes."

zoning certificates are nonbinding and nonappealable, Little Compton Resorts and Dionysus contend that the building official's responses may not be appealed to the Zoning Board. The Court will consider each of the building official's responses in seriatim.

1

The Building Official's Response to Clive's Complaint

Among other powers granted to a zoning enforcement officer under the Enabling Act, a zoning enforcement officer may "inspect[] . . . suspected violations" and "perform[] any other duties and tak[e] any actions that may be assigned in the ordinance." Sec. 45-24-54(5), (8). In the Town of Little Compton, a zoning enforcement officer is charged with "mak[ing] a determination in writing, within fifteen (15) days, to any written complaint received, regarding a violation of this chapter." Under section 14-9.3 of the Ordinances, the Zoning Board has jurisdiction "[t]o hear and decide appeals in a timely fashion where it is alleged there is error in any order, requirement, decision, or determination made by an administrative officer or agency in the enforcement of interpretation" of the Zoning Ordinances. Thus, the Zoning Board's appellate jurisdiction in this case is dependent upon whether the response issued by the building official constitutes an appealable determination.

The Court is not convinced that the building official's response to Clive's complaint under the Ordinances amounts to an appealable determination because the letter was, in all material respects, equivalent to the issuance of a zoning certificate. Although it was not labeled as a "zoning certificate"—nor is a zoning certificate required to be under the Enabling Act—it was nonetheless a responsive document that was signed by the zoning enforcement officer and acknowledged that the uses complained of are legally nonconforming. See § 45-24-31(70). As this Court has stated, zoning certificates are nonbinding because they are issued for the purpose

of providing guidance or clarification, and are therefore not appealable due to a lack of aggrievement. See Parker, 996 A.2d at 633. Accordingly, Clive lacks the requisite standing to stand before the Zoning Board in its appellate capacity.

Further, if the Court were to determine that Moore's response was a binding determination, it would conflict with our Supreme Court's decisions in RICO Corp., 787 A.2d at 1144 and Olean, 101 R.I. at 52, 220 A.2d at 178, which state that binding determinations as to the legally nonconforming status of a property fall within the jurisdiction of the Superior Court. Thus, Clive cannot meet the status of an "aggrieved party" and therefore, lacks the requisite standing in order to stand before the Zoning Board in its appellate capacity.

2

The Building Official's Response to the Eliasons' Complaint

As Moore's response to the Eliasons' complaint under section 14-9.1(a) was not a zoning certificate, the Court must decide whether the response indicating that Moore found no violation of the zoning ordinances was a "determination" that may be appealed under section 14-9.3. In so doing, the Court is mindful that the zoning enforcement officer is not explicitly authorized to respond to "complaints" under the Enabling Act, but is charged with doing so under the Town of Little Compton's Zoning Ordinances. In addition, this Court finds guidance in our Supreme Court's decisions which state that—to the extent a local zoning ordinance grants power to a zoning official or agency beyond those which are contemplated by the Enabling Act—such powers carry with them no force of the law. See Mill Realty Assocs. v. Crowe, 841 A.2d 668, 679-80 (R.I. 2004); Am. Oil Co. v. City of Warwick, 116 R.I. 31, 35, 351 A.2d 577, 579 (1976).

The building official, upon receiving the complaint from the Eliasons, performed the duties charged to him under the ordinance—namely, inspected the alleged violations of the

zoning ordinances and responded to the complaint in a timely fashion. See § 45-24-54(5); Town of Little Compton Ordinances sec. 14-9.1. The responsive "determination" outlined the building official's conclusions that he drew from the inspection—i.e., that the challenged uses were not violative of Little Compton's Zoning Ordinances. In essence, this conclusion is in all material respects tantamount to the building official stating that the challenged uses were legally non-conforming to the zoning ordinances. Thus, this Court perceives a finding of no violation—in response to a complaint that certain uses go beyond those that are legally nonconforming to the zoning ordinances—to be analogous to the issuance of a zoning certificate, the only document contemplated by the Enabling Act by which a zoning enforcement officer may acknowledge that a use is legally nonconforming to local zoning ordinances. See §§ 45-24-54, 45-24-31(70).

While this Court may analogize the document responsive to a complaint under section 14-9.1 to the issuance of a zoning certificate under § 45-24-54, this Court is aware that a party sending a complaint—rather than a request for a zoning certificate—does not necessarily expect a document equivalent to a zoning certificate in response. A property owner sending a complaint to a zoning enforcement officer likely does so out of frustration towards a neighboring property. This Court is certainly sympathetic with those property owners who only seek to resolve such frustrations. However, this Court is constrained in instances where the complained-of uses by the neighboring property are of "grandfathered" status. Our Supreme Court has repeatedly stated that the establishment of nonconforming uses falls within the Superior Court's exclusive jurisdiction. See RICO Corp., 787 A.2d at 1144; Olean, 101 R.I. at 52, 220 A.2d at 178. In addition, the General Assembly has limited the power granted to zoning enforcement officers to issue only advisory documents acknowledging that certain uses are legally nonconforming. See §§ 45-24-54, 45-24-31(70); see also Pitocco v. Harrington, 707 A.2d 692, 696 (R.I. 1998) ("In

Rhode Island the local building official is a municipal administrative officer who is bound to follow the zoning ordinance and applicable statutory provisions pursuant to which he or she is authorized to act.").

Therefore, because a zoning enforcement officer is not authorized to make binding determinations as to the legally nonconforming status of challenged uses, this Court must conclude that a document that responds to a complaint and states that the complained-of uses fall within the scope of the property's "grandfathered" uses is just as nonbinding as a zoning certificate issued under § 45-24-54. As this Court has emphasized throughout this decision, non-binding determinations that acknowledge that a challenged use is legally nonconforming do not cause aggrievement. Accordingly, the Eliasons lack standing to bring an appeal to the Zoning Board. See §§ 45-24-63(a), 45-24-64. Similarly, because a zoning board's appellate jurisdiction is limited to appeals brought by aggrieved parties, the Zoning Board lacks jurisdiction to hear appeals in such circumstances. See §§ 45-24-63(b), 45-24-69(a).

IV

Conclusion

For the foregoing reasons, this Court grants Little Compton Resorts' requested declaration and declares that a zoning board lacks jurisdiction to hear appeals from nonbinding zoning certificates brought by neighboring property owners because such property owners cannot establish that they are aggrieved parties under the Enabling Act. In addition, when a party complains of uses going beyond those which are "grandfathered" under section 14-9.1 of the Town of Little Compton Ordinances, the Court declares that a responsive document to a complainant finding no violation of the zoning ordinances also does not cause the requisite aggrievement for the complainant to stand before the Zoning Board in its appellate capacity.

Counsel is requested to submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Little Compton Resorts, Inc. v. Zoning Board for the Town of Little Compton, et al.
CASE NO:	NC-2016-0262
COURT:	Newport County Superior Court
DATE DECISION FILED:	November 22, 2016
JUSTICE/MAGISTRATE:	Stern, J.
ATTORNEYS:	
For Plaintiff:	*SEE ATTACHED LIST
For Defendant:	*SEE ATTACHED LIST

Little Compton Resorts, Inc. v. Zoning Board for the Town of Little Compton, et al.
C.A. No. NC-2016-0262

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