STATE OF MAINE

YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-08-026

GPB - YOR - 12/16/09

TODD ZAHARES and
DENISE ZAHARES,

Plaintiffs

v.

ORDER

TOWN OF OLD ORCHARD BEACH,
et al.,

Defendants

The Zahares appeal from the Town of Old Orchard Beach's Planning Board's decision to deny their application for a revised or new conditional use permit. Following hearing, the appeal is Denied.

BACKGROUND

Todd and Denise Zahares own property in the Cascade Hilands Addition Subdivision in the Town of Old Orchard Beach. (Pl.'s Compl. ¶¶ 1–2.) The entire subdivision lies in an R-1 zoning district, defined as a "district in which the principal use of the land is for single-family residences in detached dwellings and customary accessory ... uses that contribute to a wholesome residential neighborhood environment." Old Orchard Beach, Me., Code § 78-486 (Sept. 18, 2001); (R. at 2, 11, 134.) The ordinance defines "single-family residences" as "detached residence[s] designed for or occupied by one family only." Old Orchard Beach, Me., Code § 78-1 (Nov. 5, 2003); (R. at 111.) Accessory dwelling units are allowed as conditional uses in the R-1 district, and are defined as "a room or suite of rooms designed and equipped

exclusively for use as living quarters for only one family" that "is contained entirely within the confines of a building which otherwise retains the design and appearance of a detached, single-family dwelling." Old Orchard Beach, Me., Code §§ 78-1, 78-488 (Nov. 5, 2003); (R. at 110–11, 134.)

In 1996 the Zahares obtained a conditional use permit allowing them to construct an accessory dwelling unit in their home to accommodate Todd Zahares' elderly mother. (R. at 1; Zahares' Br. at 1.) The Planning Board issued its approval on April 18, 1996, and placed the following condition on the permit:

> [T]he apartment remains strictly for use as a mother in law/relative apartment not as a rental unit. The conditions of this permit restriction shall remain in effect ad infinitum, unless otherwise permitted by the Planning Board or the Zoning Ordinance.

(R. at 1.) The Zahares did not appeal from the decision, but chose instead to accept the condition and construct the apartment above their garage. (Zahares' Br. at 2–3.)

For twelve years between 1996 and 2008, a succession of the Zahares' family members occupied the apartment. (Zahares' Appeal ¶ 9.) By 2008 the Zahares no longer had relatives interested in renting the unit above their garage. (*Id.*) At the suggestion of their employer they chose to rent the apartment to a non-relative in violation of the permit restriction (*Id.* at ¶¶ 10, 11.) The violation was reported, and on May 2, 2008 the Town Code Enforcement Officer (CEO) issued a violation notice and discontinuance order. (R. at 8.)

The notice stated that the Zahares had violated the terms of their conditional use permit by renting the unit to non-family members, and had violated the Town's Business License Ordinance by renting a year-round rental to non-family members without the required business license. *See* Old Orchard Beach, Me., Code § 78-1266 (Sept. 18, 2001) (violation of condition is violation of ordinance); Code §§ 18-26, 18-28

(Oct. 16, 2007) (requiring business license to operate a year-round rental and establishing penalties for violations). The CEO ordered the Zahares to cease renting the apartment to non-family members until they obtained a revised conditional use permit and obtained the necessary business license. (R. at 8.)

On May 13, 2008, the Zahares received a letter from their neighbor, Alice Leveris, requesting that they cease renting the apartment to non-family members. (R. at 9.) The letter claimed that the Zahares' actions had violated certain restrictive deed covenants limiting their property to one, single-family dwelling, for residential and seasonal rental use only. (*Id.*) Leveris indicated that she would bring an action to enforce the covenants in the event the Zahares succeeding in obtaining a new conditional use permit without the family-member condition. (*Id.*)

On May 15, 2008 the Zahares filed a conditional use application with the Planning Board, requesting that the Board remove the condition restricting occupancy of the apartment to family members so that the Zahares could rent the unit to non-relatives. The application came before the Planning Board at a public workshop on June 5, 2008. (R. at 20.) In July 2008 the Planning Board conducted a site-walk around the Zahares' property and held a public hearing on their application. (R. at 21–22, 30–43.) On July 10, 2008 the Planning Board voted 4-1 to deny the application, and on July 24, 2008 the Board adopted its official findings of fact. (R. at 150–52.)

The Planning Board found that the 1996 decision to grant the Zahares' initial conditional use permit was final because it was never appealed, and could not be reopened or reexamined in 2008. (R. at 150.) As a result the Planning Board determined that it had to consider the Zahares' current application to remove the 1996 condition in light of the Town's 2008 zoning ordinance governing conditional uses. (*See* R. at 151.) The Board found that the Zahares' only purpose for seeking to remove the condition

was that they no longer had relatives interested in renting their apartment. (R. at 150.) The Board found this reason insufficient to justify "removing the condition which the [Zahares'] accepted when they received their conditional use approval . . . in 1996." (R. at 151.)

Additionally, the Planning Board found that the Zahares' accessory unit did not meet the current zoning requirements for an accessory dwelling unit and would not receive approval if applied for in 2008. (R. at 151.) The Board found as fact that the Zahares' accessory apartment is not accessible through the Zahares' main residence as required by §§ 78-1272(1) and (4) of the zoning ordinance, but is instead reached through a separate breezeway. Old Orchard Beach, Me., Code §§ 78-1272(1), (2) (Sept. 18, 2001); (R. at 149, 151.) The Board also found that the requirements of §§ 78-1272(1) and (4) exist to further § 78-1272's stated purpose of "protecting the single-family character of residential neighborhoods." Old Orchard Beach, Me., Code § 78-1272; (R. at 149, 151.) The Board determined that the 1996 permit condition furthered the same purpose in this case, so that removal of the condition "would be contrary to the goals and purposes of [§] 78-1272." (R. at 151.)

The Zahares filed this appeal pursuant to Rule 80B on August 6, 2008, naming the Town of Old Orchard Beach as appellee and Alice Leveris as party-in-interest. On August 18, 2008 Leveris filed a counterclaim to enforce the deed covenants against the Zahares. A flurry of miscellaneous motions followed. Action on all outstanding motions and on Leveris' counterclaim has been stayed pending the resolution of this 80B appeal.

DISCUSSION

The Zahares first attack the validity of the 1996 Planning Board's decision. They reason that if the condition was an invalid exercise of the Board's power in 1996, it should have no legal effect today. However, this argument must fail, as any attempt to

revisit the propriety of the 1996 decision twelve years after-the-fact is barred by both the zoning law's appeal procedures and the six-year statute of limitations on civil actions.

"[S]trict compliance with the appeal procedure of an ordinance is necessary" so that parties can efficiently rely on the finality of municipal decisions. *Juliano v. Town of Poland*, 1999 ME 42, ¶ 7, 725 A.2d 545, 548 (quoting *Wright v. Town of Kennebunkport*, 1998 ME 184, ¶ 8, 715 A.2d 162, 165) (quotations omitted); *see Upjohn Co. v. Zoning Board of Appeals*, 616 A.2d 793, 796 (Conn. 1992) (failure to challenge conditions by appeal at time of issue precluded attempt to do so three years later). Even the illegality of a decision to grant a permit will not toll the appeal period. *Wright*, 1998 ME 184, ¶ 7, 715 A.2d at 165; *see McBreairty v. Town of Greenville*, 2000 Me. Super LEXIS 135, * 7 (June 14, 2000) (planning board's unappealed decision became final when appeal period ran, and applicant could not later challenge planning board's power to impose a certain condition). Old Orchard Beach's zoning ordinance states that decisions on conditional use permits may be appealed pursuant to Rule 80B, which in turn sets an appeal period of thirty days. Old Orchard Beach, Me., Code § 78-1239 (Sept. 18, 2001); M.R. Civ. P. 80B(b). The Planning Board granted the Zaharas' conditional use application and imposed the condition on April 18, 1996, and the Zaharas did not question the condition's legality until August 6, 2008. Their challenge comes twelve years too late.

The Zahares' attack on the 1996 decision is likewise barred by the six-year statute of limitations. Municipal zoning decisions are subject to a six-year statute of limitations that begins to run when a cause of action accrues. *Bog Lake Co. v. Town of Northfield*, 2008 ME 37, ¶ 8, 942 A.2d 700, 703–04 (citing 14 M.R.S.A. § 752 (2007)). Any potential illegality or harm in the condition limiting occupancy of the Zahares' accessory unit to family members was readily apparent in 1996 when it was imposed. The Zahares could have foreseen that one day they would not have relatives interested in or capable of

renting the unit. The Zahares nevertheless accepted the condition without complaint for twelve years. Now that the Zahares have "run out of relatives interested in living in the second floor accessory dwelling as tenants," they would like to challenge the validity of the condition. (Zahares Appeal ¶ 9.) The statute of limitations has run, barring their challenge.

Since the Zahares cannot challenge the validity of the of the Planning Board's 1996 decision, the only question before the Court is whether the Planning Board correctly denied the Zahares' application in 2008. When the Court reviews municipal action pursuant to Rule 80B, it examines the record before the municipal body "to determine if it abused its discretion, committed an error of law, or made findings not supported by substantial evidence." *Mills v. Town of Eliot*, 2008 ME 134, ¶ 5, 955 A.2d 258, 261. This Court may not substitute its own "judgment for that of the Board." *York v. Town of Ogunquit*, 2001 ME 53, ¶ 6, 769 A.2d 172, 175. The Zahares' bear the burden of showing that the evidence on the record compels a conclusion different from that reached by the Planning Board. *Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1995). "The Board's decision is not wrong because the record is inconsistent or a different conclusion could be drawn from it." *Id.*

The Zahares argue that Planning Board's decision to deny their 2008 application was arbitrary or was a misapplication of the law. Alternatively, the Zahares' claim that they have a right to have the 1996 condition removed due to changed circumstances, and that its continued maintenance constitutes an unreasonable direct restraint on alienation.

The Town of Old Orchard Beach's zoning ordinance specifies the procedural and substantive requirements necessary to obtain a conditional use permit. Old Orchard Beach, Me., Code §§ 78-1238 to 78-1240, 78-1266, 78-1272 (Sept. 18, 2001). A permit

application is filed with the Planning Board, which issues a decision after a public hearing and site walk. § 78-1238. If the decision is not appealed to the superior court within thirty days, it becomes final. § 78-1239; M.R. Civ. P. 80B(b); *Juliano*, 1999 ME 42, ¶ 7, 725 A.2d at 548.

In this case the Zahares filed an application for a conditional use permit in 2008, but rather than request a new permit they framed the application as a request to have the condition placed on their 1996 permit removed. (R. at 11–19.) In essence, the Zahares' 2008 application is an attempt to reopen or reconsider their 1996 application long after the time for appeal has passed. There is no specified procedure addressing this sort of application because it is foreclosed by the finality of the 1996 decision. Absent extraordinary circumstances, the Planning Board's 1996 decision became final when it was not appealed. *Juliano*, 1999 ME 42, ¶ 7, 725 A.2d at 548; *see Upjohn*, 616 A.2d at 797 (recognizing potential for exceptional circumstances justifying removal of unchallenged, unreasonable condition).

The Zahares claim that their 1996 permit gives them a special right to petition for the condition's removal via the following language:

> The conditions of this permit restriction shall remain in effect ad infinitum, unless otherwise permitted by the Planning Board or the Zoning Ordinance.

(R. at 1.) They read "unless otherwise permitted" as placing them outside the normal procedural boundaries, giving them something akin to a contractual right to reconsideration. This interpretation stretches the language too far. The quoted sentence merely states the obvious, i.e. that the Town is not bound by the permit restriction. At most, it is an invitation to apply for a new conditional use permit at a future date. The Planning Board correctly treated the Zahares' 2008 application as an application for a new conditional use permit.

The Planning Board found that the Zahares' application did not meet the current requirements for a conditional use permit. (R. at 151, ¶¶ 10–11.) Based on their personal observations made during the site walk, a majority of the Board's members found that the Zahares' accessory unit is not "accessed via the living area of the primary structure" and is not "part of the main residence" as required by §§ 78-1272(1) and (4) of the zoning ordinance. (R. at 151.) The requirements set forth in § 78-1272 are mandatory, and the Zahares' failure to meet them constituted an adequate basis for the Planning Board to deny their application.

The Planning Board also found that the "1996 condition of approval limiting occupancy of the accessory unit to family members" furthered § 78-1272's goal of "protecting the single-family character" of the Zahares' neighborhood. Assuming that it had the power to do so, the Board refused to remove the condition in part because doing so would be contrary to the goals of § 78-1272.

When confronted with an application for a conditional use permit, the Planning Board is empowered to impose "such conditions [on a permit] as it finds necessary to ensure compliance" with all applicable requirements of the zoning ordinance. Old Orchard Beach, Me., Code § 78-1266 (Sept. 18, 2001). Section 78-1272 requires that accessory dwelling units not impair "the single-family character of residential neighborhoods." Old Orchard Beach, Me., Code § 78-1272 (Sept. 18, 2001). The ordinance also limits uses in an R-1 zoning district to single-family dwellings and customarily incidental accessory uses. Old Orchard Beach, Me., Code § 78-487 (Sept. 18, 2001). A single-family dwelling is defined as a residence "occupied by one family only." Old Orchard Beach, Me., Code § 78-1 (Nov. 5, 2003).

The record shows that the Zahares' home is located in an R-1 zoning district, in a subdivision made up of detached single-family homes. The Planning Board could

reasonably find that the condition limiting occupancy of the Zahares' accessory unit to family members was necessary to maintain the single-family character of the Zahares' neighborhood. This finding is consistent with the applicable zoning law requirements and was not arbitrary, capricious, or otherwise an abuse of discretion.

Finding no error in the Planning Board's handling of the Zahares' application, the Court must address the Zahares' claim that the continued restriction on the occupancy of their accessory unit is an unreasonable restraint contrary to public policy. For support the Zahares cite to *Gangemi v. Town of Fairfield*, 763 A.2d 1011 (Conn. 2001). In *Gangemi*, the homeowners' property had been subject to zoning restrictions that prohibited year-round use and limited occupancy to four or fewer unrelated individuals. *Id.* at 1014. In 1986 the homeowners applied for a variance allowing them to upgrade the dwelling on the property and use it year-round. *Id.* at 1013. The Town granted the variance subject to the conditions that the property not be rented and be used for family purposes only. *Id.* The homeowners did not challenge these conditions. *Id.*

By 1996 the zoning restrictions on the homeowners' property had changed to allow year-round use as a matter of right, rendering the primary benefit conferred by the variance moot. *Id.* at 1014, 1016. While the homeowners remained bound they the conditions of their variance, their neighbors were free to use their property year-round and rent to any group of four or fewer unrelated individuals. *Id.* at 1016. This gave "those other property owners a grossly unfair advantage over the [homeowners] in the marketplace." *Id.* The zoning change also had the effect of transforming a prohibition on seasonal rentals only into "a total loss of the right to rent." *Id.* Given these changed circumstances, the court found that the variance conditions no longer served a "legal

and useful purpose" and their continuation violated the public policy against "the free and unrestricted alienability of property." *Id.* at 1015, 1018.

The Zahares analogize themselves to the homeowners in *Gangemi* and claim that their inability to find relatives interested in renting their accessory unit constitutes a change in circumstance making the continuation of their permit restriction void against public policy. This argument must fail. First, in *Gangemi* the parties could not reasonably foresee in 1986 that the applicable zoning law would change to allow the sought-after use. In this case, when the Zahares applied for and obtained their conditional use permit in 1996 it was entirely foreseeable that they would someday "run out of relatives" interested in living above their garage.

Second, the fact that the Zahares cannot find an eligible tenant for their accessory unit does not place them at an economic disadvantage vis-à-vis their neighbors. On the contrary, it returns them to the status quo of owning a single-family home that may be sold or rented as a single living unit. Nothing prevents the Zahares from altering their accessory unit to conform to the current standards and applying for a new conditional use permit allowing them to rent the unit commercially to non-family members.

Finally, given that the Zahares continue to enjoy the same right to rent their entire home as is held by their neighbors, the permit condition limiting occupancy of the accessory unit to family members is not an unreasonable restraint on the use and alienability of the Zahares' property. The condition continues to serve the legal and useful purpose of protecting the single-family character of the Zahares' neighborhood. Contrary to their present position this appears to be a case where the Zahares are "asking for a change in a bargain they freely made, but now regret after receiving its benefits." (Zahares' Br. at 15.)

CONCLUSION

For the reasons stated above, the decision of the Old Orchard Beach Planning Board is Affirmed.

Dated: 12/1/09

G. Arthur Brennan
Justice, Superior Court