STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: July 3, 2013)

TOWN OF CHARLESTOWN **Plaintiff**	:	
v.	:	**C.A. No. WC 2011-0667**
TOWN OF CHARLESTOWN, ZONING BOARD OF REVIEW and SHELTER COVE PROPERTIES, LLC **Defendants**	:	

DECISION

TAFT-CARTER, J. This matter arises before the Court on appeal from a decision of the Town of Charlestown Zoning Board of Review (Board). The Board determined that the finding of Joseph L. Warner Jr., the Building and Zoning Official for the Town of Charlestown (Charlestown Zoning Official), that Shelter Cove Properties, LLC (Shelter Cove) violated the zoning ordinance by carrying on an illegal use of the property for commercial parking was erroneous. The Town Solicitor, on behalf of the Town of Charlestown (Town), filed a timely complaint. Jurisdiction is pursuant to Rhode Island General Laws 1956 § 45-24-69.

I

Facts & Travel

Shelter Cove is the owner of property located at 523 Charlestown Beach Road, identified as Assessor's Plat 9, Lot 131, Charlestown, Rhode Island (the Property). (Def. App. 2, Appl. for Appeal, July 20, 2011.) Shelter Cove operates a marina and leases a portion of the Property to lessees who operate a restaurant and kayak center. (Tr., In re Petition #1228 Shelter Cove Properties, LLC, Town of Charlestown Zoning Board of

Review, Aug. 16, 2011, at 11:1-15.) An additional portion of the Property is used for commercial parking. Id. at 11:15-19.

On or around July 1, 2011, the Charlestown Zoning Official issued a Notice of Violation to Shelter Cove. (Def. App. 1, Letter from Joseph L. Warner Jr., Building and Zoning Official, to Shelter Cove Properties, LLC, c/o Bruce Gardner, July 1, 2011.) In the Notice of Violation, the Charlestown Zoning Official concluded that Shelter Cove's use of the Property for commercial parking violated two provisions of the Town's Zoning Ordinance. Id. The Notice of Violation stated that Shelter Cove was in violation of Article VI, Section 218-36 of Charlestown's Zoning Ordinance, which governs permissible uses of property in a C2 zoning district. Id. The Notice of Violation also cited Shelter Cove for violating Article XI of the Charlestown Zoning Ordinance, which limits signage on the Property. Id. Shelter Cove was directed to immediately remove the signs and cease all use of the Property as a commercial parking lot. Id. Shelter Cove appealed the Notice of Violation to the Charlestown Zoning Board, alleging that the commercial parking lot was a legal nonconforming use and therefore permitted. (Def. App. 2, Appeal Form.)

The Board held a public hearing on the appeal on September 20, 2011. At that hearing, Shelter Cove presented documentary and testimonial evidence to establish that a portion of the Property had been used as a commercial parking lot prior to 1998. (Tr., In re Petition #1228 Shelter Cove Properties, LLC, Town of Charlestown Zoning Board of Review, Aug. 16, 2011, at 6:8-10.) Shelter Cover presented certified copies of two deeds transferring the Property to Shelter Cove; a certified copy of the code regulations from the 1996 version of the Charlestown Zoning Ordinance; a certified copy of the Sunday

sales license issued to a prior owner of the Property in 2004; a Superior Court complaint, dated December 4, 1998, concerning a private right of way issue with neighbors; a certified copy of the Board's minutes from September 15, 2009, in which the Board granted a special use permit allowing Shelter Cove to increase the number of boat slips at its marina operation; an affidavit from Joseph Flacko Jr. (Flacko) an employee of the marina in the 1970's, in which affidavit Flacko stated that one of his duties as an employee of the marina was to collect parking fees; and an affidavit from Richard Mouchon, a neighbor and local business owner, in which Mouchon stated that he had observed commercial parking on the Property for over twenty years. Id. at 6:10-10:4.

In addition to these exhibits, Richard Lavigne (Lavigne), the manager of the Shelter Cove Marina, testified. Lavigne corroborated that Shelter Cove has owned the Property since 2004 and further acknowledged that a marina, restaurant, and kayak rental center are operated on the Property. Id. at 10:20-11:19. He also stated that the Property has been used for commercial parking for approximately ten weeks out of each year during the summer season and accommodates fifty-five to seventy cars. Id. at 11:15-19, 13:11-18, 23:19-24:7. On weekends during the summer months, Shelter Cove is unable to accommodate all who wish to park there and on many occasions turn cars away. Id. at 23:8-14. On weekdays fewer cars are parked. Id. at 14:16-24. According to Lavigne, the number of cars parked on the Property has remained "fairly steady" since Shelter Cove took over the operation in 2004. Id. at 10:13-15, 14:9-18. He testified that since he became manager, Shelter Cove has not expanded the scope of the operation or the dates that it is offered. Id. at 15:1-6.

Shelter Cove also presented the testimony of Ronald Mouchon (Mouchon), a long-time customer of Shelter Cove Marina and local-business owner. Id. at 21:9-22. Mouchon testified that he has kept a boat at the marina for twenty years, that he operates a nearby bait shop, and that in the course of his business, he had occasion to go by the marina every day. Id. at 21:13-22. Mouchon testified that he has been aware of the Property's use for commercial parking on a seasonal basis for "over twenty years." Id. He further stated the commercial parking is seasonal, running from mid-June until Labor Day each year. In addition, the use has been continuous, as he cannot recall a summer in those twenty years when there has been no parking. Id. at 22:10-20.

At the close of the hearing, the Board concluded that the testimonial evidence presented related to the commercial parking was sufficient for it to conclude that commercial parking on the Property was a legal pre-existing nonconforming use. That decision was recorded in the Land Evidence Records on September 23, 2011, and the Town Solicitor appealed on behalf of the Town.

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by Rhode Island General Laws 1956 § 45-24-69(d), which 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:
> (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."

"[T]he Superior Court reviews the decisions of a plan commission or board of review under the 'traditional judicial review' standard applicable to administrative agency actions." Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998). When reviewing a zoning board decision, the Superior Court "lacks [the] authority to weigh the evidence, to pass upon the 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)). The trial justice "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245-46, 405 A.2d 1167, 1170 (1979).

The term "substantial evidence" has been defined as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Apostolou v. Genovesi, 388 A.2d 821, 825 (R.I. 1978) (citing Richardson v. Perales, 402 U.S. 389, 401 (1971); Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

Rhode Island General Laws § 45-24-61 provides that a zoning board of review, in issuing a decision, must "include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or

her failure to vote." Our Supreme Court has long understood this section to require a zoning board to "make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review." Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401-02 (R.I. 2001) (quoting Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996)); see Sciacca, 769 A.2d at 585; Irish P'ship v. Rommel, 518 A.2d 356, 358 (R.I. 1986); May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970).

The Court, in its judicial review, "must decide whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles." Bernuth, 770 A.2d at 401-02. The determinations must "be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany." Id. "[W]hen the board fails to state findings of fact, the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances." Id. (quoting Irish P'ship, 518 A.2d at 359).

III

Analysis

A

Standing

Shelter Cove maintains that the Town does not have standing to appeal the decision of its own zoning board, because the Town is not "aggrieved" by the decision of the Board, because it has not established a threat to a real and legitimate interest of the general public. To support this proposition, Shelter Cover argues that (1) at the public hearing, no member of the public spoke in favor of upholding the Building Official's

decision; (2) the Building Official did not reveal who had made complaints about the parking at the marina; and (3) there was no evidence presented that the use of Property for commercial parking negatively impacted the surrounding properties or created unsafe conditions. The Town's sole "aggrievement," therefore, is that Shelter Cove provides competition for parking revenues. Shelter Cove maintains that interest is insufficient to support standing.

Under G.L. 1956 § 45-23-71(a), standing is "accorded only to applicants who are aggrieved by the judgment to be reviewed." City of E. Providence v. Shell Oil Co., 110 R.I. 138, 142, 290 A.2d 915, 917 (1972); see Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 120 R.I. 470, 474, 388 A.2d 1369, 1372 (1978); Hassell v. Zoning Bd. of Review of E. Providence, 108 R.I. 349, 351, 275 A.2d 646, 648 (1971))). In the zoning context, "aggrievement" can be either personal or public. Shell Oil Co., 110 R.I. at 142, 290 A.2d at 917; Barrington Sch. Comm., 120 R.I. at 474, 388 A.2d at 1372; Hassell, 108 R.I. at 351, 275 A.2d at 648. Aggrievement in the personal sense requires an actual and practical—as opposed to theoretical—interest in the controversy and requires a showing by the "aggrieved" that the use of his or her property will be adversely affected by the decision granting relief from the terms of the zoning ordinance. See Shell Oil Co., 110 R.I. at 142, 290 A.2d at 917; Barrington Sch. Comm., 120 R.I. at 474, 388 A.2d at 1372; Hassell, 108 R.I. at 351, 275 A.2d at 648. Aggrievement in the public sense occurs when "there is a threat to the very real and legitimate interest which the general public has in the preservation and maintenance of the integrity of the zoning laws." See Shell Oil Co., 110 R.I. at 142, 290 A.2d at 917.

It has long been recognized that an interest in upholding zoning ordinances and maintaining the zoning system constitutes a "real and legitimate interest which the general public has," and that such an interest is sufficient to imbue a Town Solicitor with standing to appeal on behalf of the Town. E.g., Shell Oil Co., 110 R.I. 138, 290 A.2d 915; Hassell, 108 R.I. at 352, 275 A.2d at 649; Warner v. Bd. of Review of Newport, 104 R.I. 207, 211-12, 243 A.2d 92, 95 (1968). Preventing non-conforming uses and ending pre-existing nonconforming uses as soon as is equitable is part of upholding zoning ordinances and maintaining the integrity of the zoning system. See Duffy v. Milder, 896 A.2d 27, 37 (R.I. 2006).

Moreover, our Supreme Court has recognized that a challenge of a zoning determination may originate "with a city or town solicitor acting on behalf of the public in order to protect its interest in the preservation and maintenance of a proper and adequate zoning system."[1] Hassell, 108 R.I. at 352, 275 A.2d at 649; see Day, 119 R.I. at 3, 375 A.2d at 954 ("[A] municipality, acting through its solicitor, may invoke the aid of the Superior Court for the purpose of challenging a zoning board decision granting an exception or a variance."). A solicitor, in the name of the City, therefore is an aggrieved person entitled to appeal a decision of the East Providence Zoning Board. Shell Oil Co.,

[1] Although Shelter Cove relies on Hassell to support its contention that the Town lacks standing, in Hassell it was the zoning board itself seeking to appeal the reversal of its decision rather than the town solicitor acting on behalf of the town. See 108 R.I. at 352, 275 A.2d at 649. In that case, the Court reasoned that a zoning board lacks standing to "challenge a judicial decision reversing one of its rulings." Id., 275 A.2d at 649; see, e.g., Marteg Corp. v. Zoning Bd. of Review of Warwick, 425 A.2d 1240, 1243 (R.I. 1981); Apostolou, 120 R.I. at 505, 388 A.2d at 823; Town of E. Greenwich v. Day, 119 R.I. 1, 2, 375 A.2d 953, 954 (1977). The Court reasoned that the Board lacked standing, at least in part, because a zoning board has "[n]either directly nor by implication . . . the obligation to act as a representative of the public interest[.]" Hassell, 108 R.I. at 352, 275 A.2d at 649. Accordingly, reliance on Hassell or its progeny is misplaced.

110 R.I. at 138, 290 A.2d at 915. In Shell Oil Co., the East Providence Zoning Board granted a special exception permitting a service station to be erected within two hundred feet of a church and cemetery and did so less than a year after that same East Providence Zoning Board had been overturned by the Supreme Court for granting the same applicants a special exception for the same uses on the same tract of land. Id. at 140, 290 A.2d at 916. Under these circumstances, the Court concluded that the East Providence Zoning Board had acted "in complete disregard of the pertinent provisions of the zoning ordinance . . . and that . . . the board deliberately flaunted the authority of [the Rhode Island Supreme] Court." Id. at 140, 290 A.2d at 916. Thus, because of the City's interest in maintaining its zoning laws, it had standing through the town solicitor to appeal the decision of the Board. Id. That conclusion was bolstered by Kirby, in which the Court recognized that "challenges to reversals of zoning-board decisions must be made by those whose land use will be affected by the decision *or by a city or town solicitor acting on the public's behalf*[.]" 634 A.2d at 289 n.3 (emphasis added); see Barrington Sch. Comm., 120 R.I. at 474, 388 A.2d at 1372.

In this case, the Town, though the Town Solicitor, has standing to challenge the decision of the Board. See, e.g., Kirby, 634 A.2d at 289 n.3; Day, 119 R.I. at 3, 375 A.2d at 954; Shell Oil Co., 110 R.I. 138, 290 A.2d 915; Barrington Sch. Comm., 120 R.I. at 474, 388 A.2d at 1372. The government is aggrieved and therefore has standing to appeal the Board's decision, because "the public interest is affected by a zoning board's action"; that is, because "there is a threat to the very real and legitimate interest which the general public has in the preservation and maintenance of the integrity of the zoning laws[.]" Shell Oil Co., 110 R.I. at 142, 290 A.2d at 917; see also Town of Charlestown v.

Beattie, 422 A.2d 1250, 1252 (R.I. 1980) ("General Laws 1956 (1970 Reenactment) § 45-24-7 gives standing exclusively to the town solicitor to bring actions for violations of the zoning ordinances . . . . [W]e have never departed from the statutory dictate that only the Town has standing to initiate the action.").

The Town's desire to compel compliance with zoning restrictions against the use of the Lot at issue for commercial parking and "restrain actions inconsistent with its zoning ordinance or to compel compliance with its provisions" is essential to the "preservation and maintenance of a proper and adequate zoning system." See RICO Corp. v. Town of Exeter, 787 A.2d 1136, 1144 (R.I. 2001); Shell Oil Co., 110 R.I. at 141, 290 A.2d at 917; Hassell, 108 R.I. at 352, 275 A.2d at 649. Thus, the Town has standing to appeal the Board's determination. See RICO Corp., 787 A.2d at 1144; Shell Oil Co., 110 R.I. at 141, 290 A.2d at 917; Hassell, 108 R.I. at 352, 275 A.2d at 649.

B

Expansion of a Prior Nonconforming Use

The Town also argues that the Board exceeded its authority by improperly determining that the commercial parking of vehicles at the Property was a pre-existing use and that even if it was a legal preexisting nonconforming use Shelter Cove failed to establish that it had not been altered, intensified, or expanded. The lack of such evidence fails to comport with the legal standards set forth in RICO Corp. for establishing the existence of a nonconforming use and therefore constituted reversible error.

On appeal of a zoning matter, this Court does not weigh evidence, but rather reviews the record to determine whether the Board supported its decision with legally competent evidence. Cranston Print Works Co., 684 A.2d at 691-92; see Simpson v.

Dytex Chem. Co., 667 A.2d 1229, 1231 (R.I. 1995). Judicial review of a board's decision is impossible, however, if the Board fails to make factual determinations or apply appropriate legal principles in such a way that a judicial body can "reasonably discern the manner in which the board had resolved evidentiary conflicts[.] Id. (citing May-Day Realty Corp., 107 R.I. at 239, 267 A.2d at 403. "[W]hen the board fails to state findings of fact, the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances." Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401-02 (R.I. 2001) (quoting Irish P'ship, 518 A.2d at 359). In this case, the Board was required to determine whether the commercial parking was a preexisting nonconforming use, and, if it was, whether that nonconforming use had been altered, intensified, or expanded.

A "nonconforming use is a particular use of property that does not conform to the zoning restrictions applicable to that property but which use is protected because it existed lawfully before the effective date of the enactment of the zoning restrictions and has continued unabated since then." RICO Corp., 787 A.2d at 1144. The "burden of proving a nonconforming use is upon the person or corporation asserting the nonconforming use." Id. That "burden cannot be sustained by hearsay or unsworn testimony or when the evidence of such alleged prior use is contradictory." Id. The proponent of a nonconforming use must shoulder that burden because the law views nonconforming uses as "thorn[s] in the side of proper zoning [which] should not be perpetuated any longer than necessary." Duffy, 896 A.2d at 37.

"Generally, 'the right to continue a nonconforming use does not . . . include the right to expand or intensify that use,' even if the owners had plans to do so." Town of

Richmond v. Wawaloam Reservation, Inc., 850 A.2d 924, 934-36 (R.I. 2004) (quoting Town of W. Greenwich v. A. Cardi Realty Assocs., 786 A.2d 354, 362 (R.I. 2001)) (internal citation omitted). Our Supreme Court has also been unwilling to extend legal nonconforming use status to uses which property owners have argued are "merely 'the result of natural business growth.'" Wawaloam Reservation, 850 A.2d at 934-36. Indeed, the Court noted that it has "never recognized a general 'natural business growth' exception to the requirement of obtaining a special-use permit for a proposed expansion of a nonconforming use." Id. This Court strictly construes the scope of nonconforming uses, reasoning that nonconforming uses are detrimental to zoning schemes. Wawaloam Reservation, 850 A.2d at 934-36; RICO Corp., 787 A.2d at 1144-45. Accordingly, this Court has long recognized that the overriding public policy of zoning is aimed at reasonable restriction and eventual elimination of nonconforming uses. Wawaloam Reservation, 850 A.2d at 934-36; RICO Corp., 787 A.2d at 1144-45; see Duffy, 896 A.2d at 37 ("The policy of zoning is to abolish nonconforming uses as speedily as justice will permit.").

As a result of these policies, protected status as a legal nonconforming use in this case only encompasses those uses which actually existed on the Property when the Charlestown Zoning Ordinance prohibiting commercial parking took effect. See Wawaloam Reservation, 850 A.2d at 934-36; RICO Corp., 787 A.2d at 1144-45; see also Misner v. Presdorf, 421 N.E.2d 684, 685-86 (Ind. Ct. App. 1981) (limiting nonconforming use of campsite to those uses actually existing when town rezoned campsite property, not uses campsite owners intended).

In this case, Shelter Cove offered testimony that commercial parking was permitted on the Property before the Charlestown Zoning Ordinance took effect. The Board concluded that the presented evidence was sufficient to establish that commercial parking is a legal nonconforming use. Three members of the Board voted in favor of overturning the Charlestown Zoning Official. Each member noted that Mouchon's testimony—that the Property has been used as a commercial parking lot since before the 1998 ordinance took effect—was credible. (Tr., In re Petition #1228 Shelter Cove Properties, LLC, Town of Charlestown Zoning Board of Review, Aug. 16, 2011, at 55:13-57:2.) Such reliance was not error, as the testimony offered by Mouchon was based upon his personal observations of the Property for at least twenty years. As such, it was relevant evidence, which a reasonable mind would accept as adequate to support such a conclusion. See Apostolou, 388 A.2d at 825; Richardson, 402 U.S. at 401.

The Board made partial findings of fact in its decision. The findings were related to the requirements for establishing a legal nonconforming use. The Board made no findings of fact, however, regarding whether the nonconforming use had been altered, enlarged, or expanded over time. See Wawaloam Reservation, 850 A.2d at 934-36; RICO Corp., 787 A.2d at 1141. For example, the Board did not make any determination as to the extent or nature of the commercial parking use on the Property when the Charlestown Zoning Ordinance was passed. Further, the Board did not determine whether the extent or nature of the nonconforming use had been altered, enlarged, or expanded since the Charlestown Zoning Ordinance had been passed.

The failure to identify the underlying nature and extent of the nonconforming use fails to comport with the legal requirements of RICO Corp., which recognizes that even

the continued use of legal nonconforming uses can violate a zoning ordinance if that use seeks to alter, expand, or intensify a pre-existing use. See 787 A.2d at 1141. As noted, "the right to continue a nonconforming use does not . . . include the right to expand or intensify that use,' even if the owners had plans to do so." See Wawaloam Reservation, 850 A.2d at 934-36 (quoting A. Cardi Realty Assocs., 786 A.2d at 362 (internal citation omitted)). The scope of a nonconforming use is strictly limited to the scope of that use at the time the Charlestown Zoning Ordinance took effect. Id.; RICO Corp., 787 A.2d at 1141. Therefore, this Court is unable to conclude that the Board properly considered the nature and extent of the preexisting nonconforming use when the Charlestown Zoning Ordinance took effect.

IV

Conclusion

After review of the entire record, this Court finds that the Board failed to state sufficient findings of fact to support its decision. This Court therefore remands this case for further proceedings to determine whether the use of the Property for commercial parking has been altered, intensified, or expanded since the implementation of the zoning regulation and to submit a decision with the appropriate findings of fact. This Court will retain jurisdiction. Counsel shall present the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Town of Charlestown, Plaintiff v. Town of Charlestown, Zoning Board of Review and Shelter Cove Properties, LLC, Defendants
CASE NO:	WC 2011-0667
COURT:	Washington County Superior Court
DATE DECISION FILED:	July 3, 2013
JUSTICE/MAGISTRATE:	Taft-Carter, J.

ATTORNEYS:

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