

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: April 11, 2014)

CAROL LaCOURSE

:

:

v.

:

C.A. No. PC 2013-3469

:

BERNARD FREZZA, ANTHONY PILOZZI,

:

JOSEPH ANZELONE, RICHARD FASCIA,

:

THOMAS LOPARDO, DENNIS CARDILLO,

:

and ALBERT COLANNINO in their capacities

:

as Members of the Johnston Zoning Board of

:

Review; and JOSEPH CHIODO, in his capacity

:

as the Finance Director of the Town of Johnston

:

DECISION

VAN COUYGHEN, J. The matter before this Court is an appeal from a decision of the Town of Johnston Zoning Board of Review (Board) denying Carol LaCourse’s (Appellant) application requesting dimensional relief. In its decision, the Board denied Appellant’s request for dimensional relief from lot frontage and building height requirements. The Board held that Appellant’s claim of hardship was based upon economic reasons; that the proposed house did not fit the general character of the neighborhood; and that the requested relief was not the least relief necessary. For the reasons set forth herein, this Court vacates the Board’s decision.

I

Facts and Travel

The application submitted to the Board by Appellant sought dimensional relief from the lot frontage requirement for her property located at 19 Bishop Hill Road in the Town of Johnston (Property). (Appellant’s Ex. B.) Specifically, Appellant requested 87.92 feet of lot frontage

relief on her application.¹ Id. The public hearing for the Appellant's request for dimensional relief was advertised by the Board and was consistent with the relief sought in the application. (Appellant's Ex. E.) The notice of the hearing provided that Appellant was requesting dimensional relief solely from the frontage requirements of the ordinance. Id.

At the hearing held before the Board on May 30, 2013, Appellant's request for relief deviated from the relief sought in the original application. In addition to relief from the frontage requirement, Appellant also requested dimensional relief from the building height requirements of the ordinance. (Tr. at 2.) Specifically, Appellant requested a dimensional variance of four feet from the building height requirement, as the proposed home would be thirty-four feet in height. Id. The Town's table of dimensional regulations limited a building's height to a maximum of thirty feet in an R-40 zone.² See Article III, § 340-9, "Table of Dimensional Regulations for the Zoning Ordinance of the Town of Johnston." The Board was apparently unaware that the height relief was not requested in the original application because Appellant was allowed to proceed on that basis. Thereafter, in support of her application, Appellant presented testimony and produced evidence with respect to her request for dimensional variances for both lot frontage and building height. See generally Tr.

After the hearing, the Board voted to deny Appellant's request for relief from both the lot frontage and the building height requirements. (Decision at 2.) Aggrieved by the Board's decision, Appellant timely filed the instant appeal.

¹ Article III, § 340-9, "Table of Dimensional Regulations of the Zoning Ordinance of the Town of Johnston," requires a minimum of 140 feet for lot frontage. In the instant matter, the Property had only 52.08 feet of lot frontage.

² Appellant's application represented the building height of the proposed home to be twenty-five feet, which was well within the thirty foot maximum provided in the ordinance. (Appellant's Ex. B.)

II

Standard of Review

Prior to conducting a hearing, a zoning board of review is obliged to give public notice and due notice to all parties in interest. G.L. 1956 § 45-24-41; Ryan v. Zoning Bd. of Review of New Shoreham, 656 A.2d 612, 615 (R.I. 1995). Compliance with such notice requirements is a prerequisite to the exercise of the jurisdiction of zoning boards of review. Id. (citing Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303, 307 (R.I. 1980)). Therefore, any decision made by a zoning board that has not provided adequate notice to the public is a nullity. Corporation Serv., Inc. v. Zoning Bd. of Review of East Greenwich, 114 R.I. 178, 180, 330 A.2d 402, 404 (1975).

If a zoning board complies with the statutory notice requirement, this Court has jurisdiction to review the merits of the zoning board's decision pursuant to § 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.” Sec. 45-24-69(d)

Therefore, “[t]he trial justice may not ‘substitute [his or her] judgment for that of the zoning board if [he or she] can conscientiously find that the board’s decision was supported by substantial evidence in the whole record.’” Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting Apostolou v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). “Substantial evidence . . . means 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) (citing Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). Thus, “a reviewing court merely examines the record below to determine whether competent evidence exists to support the [board]’s findings.” New England Naturist Ass’n, v. George, 648 A.2d 370, 371 (R.I. 1994) (citing Town of Narragansett v. Int’l Ass’n of Fire Fighters, AFL-CIO, Local 1589, 119 R.I. 506, 380 A.2d 521 (1977)).

III

Notice

Rhode Island General Law § 45-24-41 states, in relevant part, that a

“zoning board shall hold a public hearing on any application for variance in an expeditious manner, after receipt, in proper form, of an application, and shall give public notice at least fourteen (14) days prior to the date of the hearing in a newspaper of general circulation in the city or town.” Sec. 45-24-41(b)

Our Supreme Court has held that “[i]n zoning matters, just as in other legal proceedings, notice is a jurisdictional prerequisite.” Carroll v. Zoning Bd. of Review of Providence, 104 R.I. 676, 678, 248 A.2d 321, 323 (1968); Zeilstra, 417 A.2d at 307. Moreover, it is well-settled that “an

applicant can invoke the jurisdiction of the board to grant a particular kind of relief only by requesting the kind of relief he [or she] desires” in the application. See 3 Salkin, American Law of Zoning § 40:14 (5th ed.); see also E.C. Yokely, Zoning Law and Practice, § 18-6 at 149 (4th ed. 1979) (“[f]or a board to take jurisdiction, the notice of the hearing must specify that a variance is sought” and give specific details of the precise relief requested).

The notice requirement mandates that a zoning board of review give notice of the hearing before it to the parties in interest and to the public. Ryan, 656 A.2d at 615; Zeilstra, 417 A.2d at 307. In Paquette v. Zoning Bd. of Review of West Warwick, 118 R.I. 109, 111, 372 A.2d 973, 974 (1977), our Supreme Court held that in order to be sufficient, the notice sent “must be reasonably calculated, in light of all the circumstances, to apprise the interested parties of the pendency of the action, of the precise character of the relief sought and of the particular property to be affected.” Likewise, our Supreme Court has acknowledged that “[m]erely to advise of the date, time, and place of a proposed meeting without more, however, is a mere gesture, and will be of little significance unless in addition some advice is given of the purpose for which the meeting has been called.” Carroll, 104 R.I. at 679, 248 A.2d at 323. Thus, any decision made by a board that has not satisfied the notice requirements is a nullity. Corporation Serv. Inc., 114 R.I. at 180, 330 A.2d at 404. Furthermore, in Corporation Serv. Inc., our Supreme Court disregarded appellant’s contention that lack of prejudice obviated the effect of the lack of notice and held “that proper and adequate notice of a zoning board hearing is a jurisdictional prerequisite . . .” 114 R.I. at 180, 330 A.2d at 404.

The determination of whether notice in a given case is adequate will turn on the facts. See Paquette, 118 R.I. at 111, 372 A.2d at 974; see also Gardiner v. Zoning Bd. of Review of Warwick, 101 R.I. 681, 688, 226 A.2d 698, 702 (1967). In Gardiner, the Court recognized that it

is vital that the application, and the information provided within, disclose the dimensions pertinent to the relief requested and such other details necessary to tell “the whole story.” See id. A lack of adequate notice can result from either a failure to identify the subject property with exactitude or to provide details of “the precise character of the relief sought.” Paquette, 118 R.I. at 111, 372 A.2d at 974.

For example, in Mello v. Bd. of Review of Newport, 94 R.I. 43, 50, 177 A.2d 533, 536 (1962), the board of review was found to be without jurisdiction to hear and determine the application because the property that was the subject of the hearing was not identified accurately. In particular, the notice of hearing was limited to an application for a variance to convert a building which was located on lot 52, but the building was located in part on lot 52 and in part on lot 165. Id. The Court found, based on the record before it, that the “advertisement [was] insufficient to constitute the constructive notice to the public that was contemplated by the legislature” Id. Specifically, the Court noted that lot 165 was involved in the application, and, as a result of the omission, the Court held that the defect in notice was of substantial significance and deprived the board of the jurisdiction to hear and determine the application. See id. Similarly, in Boggs v. Zoning Bd. of Review of Newport, 107 R.I. 80, 81-85, 264 A.2d 923, 924-26 (1970), the Supreme Court held that the zoning board lacked jurisdiction to hear an application which sought relief on lots 78 and 79, where notice of the hearing had listed the subject location only as lot 79, because the public could not have known that lot 78 was also involved in the application. See Abbott v. Zoning Bd. of Review of Warwick, 78 R.I. 84, 85, 79 A.2d 620, 622 (1951) (description of “lot 472, plat 350 at intersection of Warwick Ave. & Oakland Beach Ave.,” where the property “was not located at the above-mentioned intersection,” was inadequate notice to confer jurisdiction).

In addition to the subject property being sufficiently identified, as above-mentioned, “the precise character of the relief sought” must be described or the notice to the public is inadequate. See Paquette, 118 R.I. at 111, 372 A.2d at 974. An applicant’s failure to notify a zoning board of the specific type of relief that is requested will preclude the board from properly granting or denying such relief. See Ne. Corp. v. Zoning Bd. of Review of New Shoreham, 534 A.2d 603, 605 (R.I. 1987); see also 83 Am. Jur. 2d Zoning and Planning § 645 (2014).

In the instant appeal, this Court finds that the notice provided to the public was inadequate because it failed to describe “the precise character of the relief sought” by Appellant. See Paquette, 118 R.I. at 111, 372 A.2d at 974. In particular, the notice failed to mention that Appellant was seeking dimensional relief from the height requirements of the ordinance. See Mello, 94 R.I. at 50, 177 A.2d at 536. Upon review of the record, this Court finds that the request for a height variance is inextricably incorporated into the Board’s decision to deny relief. See Decision at 2. The height variance is certainly of “substantial significance” as it was a distinct request for relief by Appellant at the hearing and was part of the Board’s decision to deny relief. See id.; Mello, 94 R.I. at 50, 177 A.2d at 536. Accordingly, it is clear in this case that failure to provide adequate notice for a height variance is fatal to the Board’s authority to act in that regard. See Paquette, 118 R.I. at 111, 372 A.2d at 974; Boggs, 107 R.I. at 85, 264 A.2d at 926; Mello, 94 R.I. at 50, 177 A.2d at 536. Thus, failure to provide proper notice renders the Board’s decision a nullity. See Corporation Serv. Inc., 114 R.I. at 180, 330 A.2d at 404.

This Court is mindful that Appellant precipitated the lack of notice by requesting relief at the hearing that was not contained in the original application. See Appellant’s Ex. B; Tr. at 2. Although the lack of notice was triggered by Appellant’s presentation at the hearing, this Court cannot disregard the fact that the lack of notice deprived the Board of jurisdiction to act in this

regard. See Corporation Serv. Inc., 114 R.I. at 180, 330 A.2d at 404. Based upon the Court's finding that the Board lacked jurisdiction as a result of lack of proper notice, this Court will not address the merits of Appellant's appeal. See Corporation Serv. Inc., 114 R.I. at 179-80, 330 A.2d at 403-04.

IV

Conclusion

After review of the record, this Court finds that the Board's decision was based upon relief not properly noticed and thus rendered upon unlawful procedure. As a result of the inclusion of the relief not properly noticed, the Board's decision is a nullity. Accordingly, the decision of the Board is vacated. Counsel for the parties shall submit the appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: LaCourse v. Frezza, et al.

CASE NO: PC 2013-3469

COURT: Providence County Superior Court

DATE DECISION FILED: April 11, 2014

JUSTICE/MAGISTRATE: Van Couyghen, J.

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