STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: November 25, 2016)

JORDAN CARLSON	:	
	:	
	:	
v.	:	**C.A. No. WC-2014-0557**
	:	
ZONING BOARD OF REVIEW OF THE TOWN OF SOUTH KINGSTOWN, ROBERT TOTH, STEPHANIE OSBORN, IGOR RUNGE, ROBERT CAGNETTA, DOUGLAS BATES, and JOHN BERNARDO, in their official capacities only as MEMBERS OF THE ZONING BOARD OF REVIEW OF THE TOWN OF SOUTH KINGSTOWN	:	

DECISION

GALLO, J. Before the Court is an appeal of a decision from the Zoning Board of Review of the Town of South Kingstown, Rhode Island (the Zoning Board). Appellant Jordan Carlson (Carlson) asks the Court to reverse the Zoning Board's decision concerning property at 17 Columbia Street, South Kingstown (the Property). The Zoning Board found that Carlson's medical marijuana grow operation constituted agricultural products manufacturing under the South Kingstown Zoning Ordinance, and it upheld the Building Official's Notice of Violation. For the following reasons, the Court reverses the Zoning Board's decision.

I

Facts and Travel

The Property is owned by Campus Cinema, LLC and is located in the Commercial Downtown (CD) Zoning District in South Kingstown. The Property was formerly a movie theater, but Carlson currently rents the premises. He grows marijuana at the Property, in accordance with his medical marijuana license.

On March 12, 2014, the South Kingstown Fire Department responded to a fire alarm at the Property, and the responding firefighters found a marijuana grow operation inside the building. (Police Reports, Appellant App. 9). Subsequently, police arrived at the Property, and officers spoke with Carlson, who demonstrated that he was a licensed medical marijuana patient. Id.

As a result, on April 8, 2014, Jeffrey O'Hara, the Building Official and Zoning Enforcement Officer for the Town of South Kingstown (Building Official), sent a Notice of Violation to Campus Cinema, LLC. (Notice of Violation, Appellant App. 1). The Notice of Violation provided as follows:

> "It has come to the attention of this office that there is an agricultural products manufacturing process taking place at your property on 17 Columbia Street. Be advised that this is in violation of Section 301, Use Code 74.1, of the South Kingstown Zoning Ordinance and is prohibited in a CD Zone. Upon receipt of this ***Violation Notice***, you must cease this practice within ***fifteen (15) days***. Failure to do so will result in legal action to be taken against you and fines may be levied." Id. (emphasis in original).

On April 21, 2014, Carlson appealed the Notice of Violation to the Zoning Board. (Appeal, Appellant App. 3).

On July 16, 2014, the Zoning Board held a public hearing on the appeal. At the hearing, the Building Official testified that the Notice of Violation was a result of the police reports regarding the March 12, 2014 fire alarm response. (Tr. 6, July 16, 2014, Appellant App. 5).

The Building Official issued the violation based on the police reports of four officers, and he testified that he did not enter the building, but rather relied "solely on the report . . . from the police department." Id. The police report of Patrolman Andrew S. Hopewood, dated March 13, 2014, (Police Report) provided as follows:

> "Inside one of the old movie theaters that was two doors north of the building's northwest corner, the marijuana grow operation was located inside an independent heat insulated structure. Inside the structure, 15 small to medium sized healthy marijuana plants were located. No other plants or seedlings were found. A large number of unused high powered halogen lights were observed still in their shipping boxes along with other grow equipment that was not necessary for this grow site.
>
> "The interior of the old theater and the marijuana grow were photographed for documentation."[1] (Police Reports, Appellant App. 9).

Three other police reports reported similar findings. Id.

The Building Official also testified, explaining the reasoning behind the Notice of Violation:

> "I selected Agricultural Products Manufacturing, where they're taking an agricultural type product, grinding it, processing it, or whatever they do, to make it a usable product for the consumer or for whomever is the end user, and that's what I based my determination on . . . ." (Tr. 21, July 16, 2014, Appellant App. 10).

[1] These photos were not included with the record transmitted to this Court, and it is unclear whether they were made available to the Zoning Board.

While agricultural products manufacturing is not permitted in any zones in the Town of South Kingstown, some agricultural activities, such as crop farms, are permitted in all zones.[2] South Kingstown Zoning Ordinance § 301.0.0 Agricultural, Use-01.

At the hearing, counsel for Carlson cross-examined the Building Official:

> "Q: And once, again, you talked about the manufacturing. Is the violation the growing? Is that the manufacturing? That's what I'm trying to figure out. Is the manufacturing the growing of the plants, or is it what you do afterwards with the plants?
> "A: I would say it was what you do afterwards with the plants." (Tr. 24, July 16, 2014, Appellant App. 11).

Additionally, the record appears to indicate that the Building Official issued the Notice of Violation assuming that the marijuana was in some way manufactured on the Property. Id. at 34-35, Appellant App. 12. When questioned, the Building Official responded as follows:

> "MR. BERNARDO: Well, that's what I'm getting at, because it seems like your real objection is to what goes on after the plant reaches maturity and it gets into the manufacturing so-called process, where marijuana is rolled into a marijuana cigarette or placed into something that's eaten, from the manufacturing process, and that's an assumption you're making without any proof, either from a Police Report, which probably is hearsay, or from any personal observation.
> "MR. O'HARA: You're correct. I'm assuming that." Id.

[2] In fact, plant agriculture is permitted in all zones in Rhode Island, pursuant to the Rhode Island Zoning and Enabling Act (Enabling Act). See G.L. 1956 § 45-24-37. In 2012, the General Assembly amended the Enabling Act to add the definition of plant agriculture. P.L. 2012, ch. 342, § 45-24-31. Plant agriculture is "[t]he growing of plants for food or fiber, to sell or consume." Sec. 45-24-31(57). Additionally, the 2012 amendment provided that "plant agriculture is a permitted use within all zoning districts of a municipality, including all industrial and commercial zoning districts, except where prohibited for public health or safety reasons or the protection of wildlife habitat." Sec. 45-24-37(g); P.L. 2012, ch. 342, § 45-24-37.

At the hearing, Carlson testified briefly, but did not offer any information regarding what activities occur at the Property. See Tr. 58-59, July 16, 2014, Appellant App. 15. Two neighbors also testified, Laura Cary (Ms. Cary) and Sue Lahoud (Ms. Lahoud). The Zoning Board decision referred to the testimony of "several . . . neighbor[s]." (Decision, at 1, Appellant App. 19). Ms. Cary was the only neighbor who arguably offered testimony relating to the activity on the Property.[3] Ms. Cary testified that she could smell marijuana coming from the Property on "at least two occasions." (Tr. 60, July 16, 2014, Appellant App. 16). She was questioned at the hearing as follows:

> "MR. BERNARDO: How do you know it was coming from that building?
> "MS. CARY: Because the wind was coming from that direction.
> "MR. BERNARDO: Well, did you see smoke coming from the building, or did you smell something? I'm just trying to figure out –
> "MS. CARY: It was kind of smoky, yes." Id. at 61, Appellant App. 17.

The Zoning Board upheld the decision of the Building Official with a three to two (3-2) vote. The Zoning Board issued a written decision that was recorded in the South Kingstown Land Evidence Records on September 10, 2014. (Decision, Appellant App. 19). In denying Carlson's appeal, the Zoning Board found that the "marijuana cultivation taking place on the Premises constitutes agricultural products manufacturing." Id. at 2. The Zoning Board acknowledged that the South Kingstown Zoning Ordinance does not define agricultural products manufacturing, but it found that the term's "plain and ordinary meaning includes marijuana cultivation and processing." Id. The Zoning Board

[3] Ms. Lahoud testified as to her complaints, generally, regarding the zoning of the historic district, special use permits, and a fear of break-ins in the area. However, her testimony provided no evidence as to the activity that takes place on the Property. (Tr. 62-64, July 16, 2014, Appellant App. 18).

stated that in coming to its conclusion, it relied "on the evidence regarding the processing of the marijuana that is taking place on the Premises." Id. Additionally, it based its interpretation on the understanding that under the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, G.L. 1956 §§ 21-28.6, et seq. (Medical Marijuana Act), marijuana plants and "usable marijuana"[4] are different, therefore, the Zoning Board concluded that "some type of processing is necessary to render useable marijuana from a marijuana plant." Id.

The decision compared marijuana production to canning tomatoes, differentiating between "[g]rowing and canning tomatoes for limited personal use" and "a large-scale tomato canning operation [that] could be considered agricultural products manufacturing." Id. The Zoning Board then concluded that "large-scale processing of marijuana was taking place on the Premises,"[5] which constituted agricultural products manufacturing not permitted in a CD zone. Id. On September 26, 2014, Carlson filed the present appeal asking this Court to overturn the Zoning Board's decision.

II

Standard of Review

This Court reviews zoning board appeals pursuant to § 45-24-69:

> "(d) 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

[4] The Medical Marijuana Act defines "[u]sable marijuana" as "the dried leaves and flowers of the marijuana plant, and any mixture or preparation thereof, but does not include the seeds, stalks, and roots of the plant." See § 21-28.6-3(22).

[5] It is unclear how the Zoning Board measures "large" as the police reports noted that the fifteen small- to medium-sized marijuana plants at the Property were well within Carlson's legal limits as a caregiver. (Police Reports, Appellant App. 9); see also §§ 21-28.6-4(a), (e), (f).

> 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:
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> "(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;
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> "(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).

This Court considers "'the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1083 (R.I. 2013) (quoting Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). "The 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.'" Id. (quoting Apostolou, 120 R.I. at 509, 388 A.2d at 825) (alterations in original). This Court will not necessarily accept any and all evidence, but will consider "only [] that which [it] determine[s], from [its] review of the record, has probative force due to its competency and legality." Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991).

III

Analysis

On appeal, Carlson presents three arguments. First, Carlson argues that the Zoning Board's decision to uphold the Building Official's citation violated the Medical Marijuana Act. Second, Carlson argues that the Zoning Board's interpretation of agricultural products manufacturing, as those terms are unclear in the zoning ordinance, is clearly incorrect as the distinction between growing and processing products would essentially prohibit many agricultural activities that currently take place in South Kingstown. Rather, Carlson suggests, a more common sense interpretation would cover the manufacturing of products used in agriculture, such as fertilizer or farm equipment. Finally, Carlson argues that the Zoning Board's decision that agricultural products manufacturing was taking place on the Property is clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. Because this case can be resolved on Carlson's third argument, this Court need not reach the other two arguments.

Specifically, Carlson contends that there was no evidence presented to the Zoning Board of any manufacturing of marijuana taking place on the Property. Carlson notes that the Building Official testified that he had not been inside the building and was simply assuming that manufacturing took place there. Carlson maintains that the police reports upon which the Building Official and Zoning Board relied do not contain any evidence of any activity that could reasonably be considered the manufacture of

agricultural products.[6] Thus, Carlson argues, the Zoning Board's decision was clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record.

The Town of South Kingstown (the Town) argues that the Building Official was acting appropriately when he relied on the police reports in issuing the Notice of Violation. However, the Town fails to point to specific evidence on which the Zoning Board relied that would demonstrate that the Zoning Board's decision was based on sufficient evidence.

This Court must determine whether the Zoning Board's decision was clearly erroneous in view of the evidence of the whole record in finding that Carlson's activity was prohibited agricultural products manufacturing. "It is well settled that, when [this Court is] presented with an issue regarding the interpretation of an ordinance, [it] appl[ies] the rules of statutory construction." CCF, LLC v. Pimental, 130 A.3d 807, 811 (R.I. 2016); see also Cohen v. Duncan, 970 A.2d 550, 562 (R.I. 2009); Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008). As such, "[this Court] give[s] clear and unambiguous language in an ordinance its plain and ordinary meaning." Cohen, 970 A.2d at 562. Where the ordinance is "subject to more than one reasonable interpretation," the Court will defer to the board's construction of the term "as long as that construction is not clearly erroneous or unauthorized." Pawtucket

[6] At the hearing, and before this Court, Carlson's attorney objected to the admission of the police reports, arguing that the police reports' identification of Carlson as a licensed medical marijuana caregiver violated the Medical Marijuana Act, which provides in part, "It shall be a crime . . . for any person . . . to breach the confidentiality of information obtained pursuant to this chapter." See § 21-28.6-6(k). The police reports were introduced as evidence at the hearing after identifying information was redacted. Since this Court finds the evidence insufficient to support the Zoning Board's findings, even taking the police reports into consideration, this Court will not address the admissibility of the police reports.

Transfer Operations, 944 A.2d at 859-60. If the language of an ordinance is "unclear and ambiguous, [this Court] must 'establish[] and effectuate [] the legislative intent behind the enactment.'" Id. at 859 (quoting State v. Fritz, 801 A.2d 679, 682 (R.I. 2002)). When words in an ordinance are undefined, the terms "should be given their broadest meaning," and "the ordinance[] should be interpreted in favor of the property owner." 1 Arlen H. Rathkopf, The Law of Zoning and Planning, § 5:11 (4th ed.).

In its decision, the Zoning Board upheld the Building Official's Notice of Violation based on the finding that the "marijuana cultivation taking place on the Premises constitutes agricultural products manufacturing." (Decision, at 2, Appellant App. 19). According to the Zoning Board, it relied, in part, "on the evidence regarding the processing of the marijuana that is taking place on the Premises."[7] Id. However, the Zoning Board also appeared to rely heavily on the definition of "useable marijuana" in the Medical Marijuana Act as support for its findings. Id. That is, since "[u]sable marijuana" is considered "the dried leaves and flowers of the marijuana plant . . . but does not include the seeds, stalks, and roots," the Zoning Board concluded that marijuana plants, as separately defined in the Medical Marijuana Act,[8] must be altered in some way to become usable marijuana. See § 21-28.6-3(22). On that basis, the Zoning Board found that agricultural products manufacturing was taking place at the Property.

[7] The Zoning Board appears to use the terms processing and manufacturing interchangeably.

[8] The Medical Marijuana Act defines a mature marijuana plant as follows: "a marijuana plant that has flowers or buds that are readily observable by an unaided visual examination." Sec. 21-28.6-3(14).

The South Kingstown Zoning Ordinance does not define "agricultural products manufacturing," a use listed in the Industrial category.[9] When a word is not defined, "courts will often apply a common meaning as provided by a recognized dictionary." Planned Env'ts Mgmt. Corp. v. Robert, 966 A.2d 117, 123 (R.I. 2009); see also 2A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes and Statutory Construction, § 47.28 at 478-79 (7th ed. 2014) ("[D]ictionaries . . . provide a useful starting point to determine a term's meaning . . . ."). Black's Law Dictionary defines manufacture as "[a] thing that is made or built by a human being (or by a machine), as distinguished from something that is a product of nature." Black's Law Dictionary (10th ed. 2014). Manufacturing entails more than simply drying out plants. If an individual grows some plants and then harvests those plants and dries them, that individual has not manufactured anything.

Here, the Zoning Board relied on police reports, testimony from two neighbors, and testimony from the Building Official in making its decision. No evidence in the record demonstrates that any activity occurred at the Property beyond growing marijuana plants. There is no testimony that there was any equipment at the Property beyond the equipment needed to grow plants indoors, namely "halogen lights . . . [and] other grow

[9] Curiously, the Town argues that this Court should defer to the Zoning Board's interpretation of its own ordinance in the same way that the Court deferred to the Coventry Zoning Board's interpretation of its own ordinance in Baird Props., LLC v. Town of Coventry, Zoning Bd. of Appeal, No. KC-2015-0313 (R.I. Super. Aug. 31, 2015) (Rhode Island Supreme Court denied certiorari on April 22, 2016) (upholding the zoning board's decision that a medical marijuana grow operation was not a permitted use in an industrial zone because it was considered horticulture and not the manufacture of pharmaceuticals). However, the Baird decision—a Superior Court decision not binding on this Court—is of no assistance to the Town, particularly since the Court in Baird held a marijuana grow operation to be agricultural in nature. See id.

equipment." (Police Reports, Appellant App. 9). Neither was there evidence of any marijuana products, such as oils or edibles.

In sum, there is simply no reasonable basis in the record for the Zoning Board's finding that Carlson's activities on the Property constituted "agricultural products manufacturing" in a CD zone in violation of the zoning ordinance; and, in defining "agricultural products manufacturing" as used in the ordinance to include Carlson's marijuana grow operation, the Zoning Board, in an exercise in tortured reasoning, erroneously lends an interpretation to the ordinance which ignores the ordinary meaning of its terms. See Cohen, 970 A.2d at 562.

IV

Conclusion

After review of the entire record, this Court finds the decision of the Zoning Board was clearly erroneous based on the evidence of record and amounted to an abuse of discretion. Substantial rights of Carlson have been prejudiced. Accordingly, the decision of the Zoning Board is reversed. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Jordan Carlson v. Zoning Board of Review of the Town of South Kingstown, et al.**
CASE NO:	**WC-2014-0557**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**November 25, 2016**
JUSTICE/MAGISTRATE:	**Gallo, J.**
ATTORNEYS:	
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For Defendant:	**Andrew M. Teitz, Esq.** **Amy H. Goins, Esq.**