STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 28, 2017)

WILLIAM BAUMLIN SR. and CLAUDETTE BAUMLIN, *Plaintiffs,*	:	
v.	:	**C.A. No. PC-2012-1077**
BERNARD FREZZA, Chair, ANTHONY PILOZZI, DENNIS CARDILLO, RICHARD FASCIA, THOMAS LOPARDO, IN THEIR CAPACITIES AS MEMBERS OF THE JOHNSTON ZONING BOARD OF REVIEW, *Defendants,*	:	
	:	**consolidated with**
MARVIN HANSON, *Plaintiff,*	:	
v.	:	**C.A. No. PC-2016-4353**
JOHNSTON ZONING BOARD OF REVIEW BY ITS MEMBERS, THOMAS LOPARDO, ANTHONY PILOZZI, JOSEPH ANZELONE, RICHARD FASCIA, RUSSELL CAMPINELLI, DENNIS CARDILLO, ALBERT COLANNINO, WILLIAM BAUMLIN, CLAUDETTE BAUMLIN, and WILLIAM BAUMLIN JR, *Defendants.*	:	

DECISION

LICHT, J. These consolidated cases concern property in the northwest corner of Johnston. The landowners, William and Claudette Baumlin (the Baumlins), and an abutter, Marvin Hanson (Hanson), each appeal decisions of the Johnston Zoning Board of Review (the Zoning Board). Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The travel of this case is convoluted. The Baumlins' property is off Bigelow Road in the far northwest corner of Johnston and has two houses on it—a primary dwelling on the southern half of the property and an accessory in-law dwelling on the northern half. The primary dwelling has a shed to its south, and the in-law dwelling has a garage to its northeast. Road access to the Baumlins' property is via Bigelow Road, a public street bordering to the east. Hanson owns property abutting the Baumlins to the northeast. The Hanson property has no frontage on Bigelow Road—access to the road network is through a permanent, express, appurtenant easement (the Easement) over the servient Baumlins' property.

The Baumlins' goal has been to subdivide their land into four lots. Three of these lots would have single-family homes on them. Two of these homes are existing—the primary dwelling (on Lot 2) and the in-law dwelling (on Lot 3)—and one, on Lot 1, would be built in the future. The fourth, central lot would become an access road, providing access to Lots 2 and 3. Lot 4 is larger than, and encompasses, the Easement. Appended to this Decision are two maps adapted from plans in the record created by Joe Casali Engineering and dated August 25, 2011. The first map shows the property in question after the proposed subdivision, and the second shows an inset focusing on the Easement.

A

The Planning Board

On or about November 6, 2007, the Baumlins began their efforts to subdivide their property by submitting plans to the Town of Johnston (the Town). See Mem. from Lorri Caruso to Johnston Planning Board, Nov. 26, 2007. The Johnston Planning Board (the Planning Board)

conditionally approved the Baumlins' Preliminary Plan for a Minor Subdivision at their December 4, 2007 meeting, see Planning Board Mins. 2, Dec. 4, 2007, issuing a written decision on January 17, 2008. The approval was granted "for a three (3) lot subdivision and construction by Applicant of a public road right-of-way and laid out so that all three (3) lots have the proper frontage along a public improved roadway." Planning Board Decision at 4, Jan. 17, 2008. Further, the Planning Board incorporated the Johnston Department of Public Works' recommendations regarding drainage, as well as the Department of Public Works' requirement that the Baumlins dedicate the right-of-way to the Town but retain responsibility for maintenance of the right-of-way. Mem. from Lorri Caruso to Planning Board, Nov. 26, 2007.

From the record, it seems that the Baumlins spent most of 2008 and 2009 getting the required wetlands permits from the Rhode Island Department of Environmental Management. According to the Planning Board minutes, the Preliminary Plan approval expired on December 3, 2008, but the Planning Board granted the Baumlins a one-year extension on April 7, 2009. By mid-2010, the Baumlins were ready to apply for Final Plan approval for their subdivision and submitted such an application on May 27, 2010. The initial application was deemed incomplete, however. A revised application was certified complete on October 8, 2010.

The Planning Board heard the matter on November 9, 2010. The Planning Board discussed various concerns raised by Town officials. At the Baumlins' request, the hearing on the application was continued until March 1, 2011. The matter was continued at that meeting and several times thereafter, until it was heard on July 12, 2011. According to the minutes of that meeting, the administrative officer reported on a complaint Hanson had filed on July 7, which alerted the Town to the Easement overlapping the proposed roadway, as well as Hanson's other concerns. The Easement is also referenced in a July 1, 2011 letter from the Town Planner to the

Town Solicitor. The matter was continued yet again, to October 4, 2011, while Town officials worked with the Baumlins to assess the situation.

B

The First Zoning Board Decision

At some point—perhaps the July 12, 2011 Planning Board meeting—the Baumlins either decided or were advised to seek variances from the Zoning Board. According to a September 21, 2011 letter from the Town Planner to the Zoning Officer, the Baumlins requested "relief as a prerequisite of Final Plan approval by the Planning Board." Per the Baumlins' Zoning Board of Review Application, the Baumlins sought three forms of relief: (1) Relief from the required 140-foot frontage on an approved town road;[1] (2) Changing the accessory family dwelling (in-law) to a single-family dwelling; and (3) Dimensional relief for the garage on Lot 3, as the garage that was built was 1025 square feet, violating the 150 square-foot maximum size allowed by the regulations.

In a letter dated September 21, 2011, the Town Planner opined that the frontage relief requested "may be appropriate for this location IF the Zoning Board issues a variance and IF the town is assured, through a properly executed and recorded document, that the Town right of way will be privately maintained in perpetuity." Mem. from Pamela Sherrill to Ben Nascenzi, Sept. 21, 2011.

The Zoning Board heard the matter on September 29, 2011. Mr. Baumlin admitted that despite the accessory use being for in-laws, his son moved out "several years prior." Zoning Board Mins. 3, Sept. 29, 2011. Apparently, the Town Solicitor put forth that the house was also built without permits, and, as a result, there were some years where the Baumlins were not

[1] As designed, the Baumlins would dedicate the road parcel to the Town, but only extend the improved road approximately 130 feet. The remaining 250 feet or so would remain substandard as a paper street.

paying taxes on the structure. Id. at 4. Discussion ensued, including testimony from Mr. Hanson as to how the Baumlins had been renting out the accessory house and voicing his concern about poor drainage in front of his house. Id. Although a motion was made to deny the application at this meeting, ultimately the motion was withdrawn and the matter was continued. Id.

The subdivision application remained on the Planning Board's agenda while the Baumlins sought relief with the Zoning Board. At the October 4, 2011 Planning Board meeting, the Town Planner raised significant concerns about the project, recommending denial. Planning Board Mins. 1, Oct. 4, 2011. Counsel for the Planning Board also "conclud[ed] that applicant[s] created [their] own hardship, and call[ed] into question [the] validity of [the] preliminary application to [the] Planning Board." Id. The matter was continued again, being picked up again at the January 10, 2012 meeting, only to be summarily continued once more.

On January 26, 2012, the Zoning Board met again to discuss the project. After approximately two-and-a-half hours of testimony and discussion, the Zoning Board unanimously denied the application in its entirety. Zoning Bd. Tr. 115:22-116:9, Jan. 26, 2012. This denial was memorialized in a written decision dated February 22, 2012 (First Decision), in which the Zoning Board stated that they "based their denial on a finding of fact that the Applicant created his own hardship, is not seeking the least relief necessary, and because of the easement of Mr. Hanson." First Decision 2. Based on that denial, when the Planning Board took the matter up at its February 7, 2012 meeting, they continued the matter temporarily.

On February 29, 2012, the Baumlins filed an appeal in Superior Court (PC-2012-1077, hereinafter, the 2012 case). Based on this appeal, the Planning Board voted on April 3, 2012, to continue the Final Plan application indefinitely. The Town answered the Complaint on March 22, 2012. The case then lay dormant for almost three years. On March 13, 2015, Plaintiffs filed a

memorandum. Over the next few months, the record and memoranda trickled in. The Town of Johnston moved to dismiss the case on procedural grounds—the Baumlins allegedly never complied with the notice provisions—but the Court passed on that on May 18, 2016, once the Baumlins sent out the required notice to the neighbors.

C

The Second Zoning Board Decision

While the case was pending before this Court, the Town and the Baumlins agreed to return to the Zoning Board.[2] The subsequent discussion at the August 25, 2016 hearing focused almost exclusively on drainage issues, the frontage on the street, and potential interference with the Easement. There was no discussion about the accessory use of the house or of the dimensional relief for the garage. At the end of the meeting, the Zoning Board "ma[de] an approval [sic] to go back to the Planning Board," Zoning Bd. Tr. 74:18-19, Aug. 25, 2016, with three recommendations:[3] (1) that they get a water plan to prevent flooding in Hanson's driveway; (2) the cul-de-sac at the end of the road be approved by the fire department; and (3) the road be acceptable to the Town. These recommendations were passed unanimously, and a written decision was issued shortly thereafter (Second Decision).

Hanson appealed from this decision of the Zoning Board on September 15, 2016 (PC-2016-4353, hereinafter, the 2016 case). In November 2016, the Baumlins moved to consolidate the two cases, which this Court granted on January 26, 2017.

[2] The parties did not formally submit any stipulation to the Court. However, they did memorialize this agreement in writing. See Order, PC-2012-1077, July 25, 2017.

[3] The Zoning Board was careful to say these were not stipulations. Zoning Bd. Tr. 74:1:6, Aug. 25, 2016.

II

Standard of Review

The Superior Court has jurisdiction to hear appeals from zoning boards of review pursuant to § 45-24-69. The statute provides the standard of review for such appeals:

> "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).

"[A] zoning board of review is required 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." Thorpe v. Zoning Bd. of Review of N. Kingstown, 492 A.2d 1236, 1236-37 (R.I. 1985). "[A] zoning board cannot grant relief by implication; it must state expressly any relief that is being granted . . . ." Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 402 (R.I. 2001). In the face of an inadequate decision, "the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances." Irish P'ship v. Rommel, 518 A.2d 356, 359 (R.I. 1986).

III

Analysis

While the parties argue that various issues entitle them to relief, the Court need only address the matters in Hanson's brief at this time.[4] Hanson essentially argues two points—that the Baumlins' application was defective because of their failure to get his approval and that the decision of the Zoning Board was insufficient.

A

Hanson's Signature

Hanson argues that the application is invalid because he had not consented to it as the grantee of the Easement. He makes this argument in two contexts: first, that he was "an indispensable party to the [Baumlins'] applications for relief," Hanson's Mem. 8; and second, that without Hanson's signature "the [Baumlins'] [zoning petition] was incomplete and defective," Id. at 12-13.

If Hanson's first argument is grounded in joinder as contemplated by the Rhode Island Rules of Civil Procedure, that argument must fail. The procedure before zoning boards is governed by Chapter 24 of title 45 of the Rhode Island General Laws, not the Rhode Island Rules of Civil Procedure. Furthermore, Hanson is now a party to the case and thus is joined as a party. However, if Hanson is indispensable in that he must have been a co-applicant, then this argument is essentially the same as the next: that without Hanson's signature the application was incomplete.

The core of Hanson's argument seems to be that because he has a property interest in the subject property by way of an easement over a portion of it, any applications to change the use of

[4] The parties remain free to raise any argument not addressed in this Decision at a later point in the proceedings, if necessary.

the subject property must obtain his blessing. This misconstrues the nature of Hanson's interest in the property. An applicant is "[a]n owner, or authorized agent of the owner." Sec. 45-24-31(7). An "owner" is "[s]omeone who has the right to possess, use, and convey something" and "may have parted with some interests in it (as by granting an easement or making a lease)." Owner, Black's Law Dictionary 1280 (10th ed. 2014). Thus, an owner is separate and apart from someone with an easement. See State v. Town of Richmond, 1 R.I. 49 (1847) (holding the mere possessor of an easement cannot convey land); see also R.I. Econ. Dev. Corp. v. The Parking Co., L.P., 892 A.2d 87, 107 (R.I. 2006) ("Generally, an easement does not grant its holder the right to exclusive possession of the servient estate or the right to deprive the owner of his or her beneficial interest in the land that is the subject of the easement."); Easement, Black's Law Dictionary 622 (10th ed. 2014) ("An interest in land owned by another person . . . ." (emphasis added)).

There is no need for the owner of property to get permission from all easement holders before submitting a proposal to a planning or zoning board. However, "a municipality has no authority through zoning to abrogate or affect private covenants." 5 Arden D. Rathkopf et al., Rathkopf's The Law of Zoning and Planning § 82:3, Westlaw (database updated June 2017). "Likewise, private covenants cannot be considered on an application for approval of a subdivision, and, conversely, the granting of subdivision approval will not abrogate private covenants affecting the land." Id. While the Baumlins need not obtain Hanson's signature on their applications, any approval from the Zoning Board or Planning Board will not entitle the Baumlins to change or use the land in a manner that is "inconsistent with the paramount right of the owners of such easements of way to make a full use thereof for that purpose." Vallone v. City of Cranston, Dep't of Pub. Works, 97 R.I. 248, 256, 197 A.2d 310, 315 (1964).

B

The Second Decision

Hanson also avers that the Second Decision "was clearly erroneous, and[] lacked sufficient evidentiary findings in view of the reliable, probative, and substantial evidence of record." Hanson's Mem. 20. Indeed, the Second Decision is woefully inadequate. Most alarmingly, the Baumlins went to the Zoning Board seeking three specific forms of relief—a use variance,[5] a dimensional variance, and the frontage variance—all of which were denied in the First Decision. However, only the frontage variance was discussed at the hearing and is addressed in the Second Decision. This Court cannot tell whether, in "accept[ing] [Baumlin's] attempts to cure his mistakes and allow the project to move forward," the Zoning Board intended to grant the Baumlins all the relief that they initially requested. Second Decision 2.

With respect to the relief the Zoning Board did grant the Baumlins—the limited frontage dimensional variance—the Zoning Board failed to clearly make the required findings on the record. When approving a variance, a zoning board must "make evidentiary findings concerning the requirements" enumerated in § 45-24-41. Bernuth, 770 A.2d at 401. Given the inadequacy of the Second Decision, the Court will remand the matter to the Zoning Board for further consideration.

IV

Conclusion

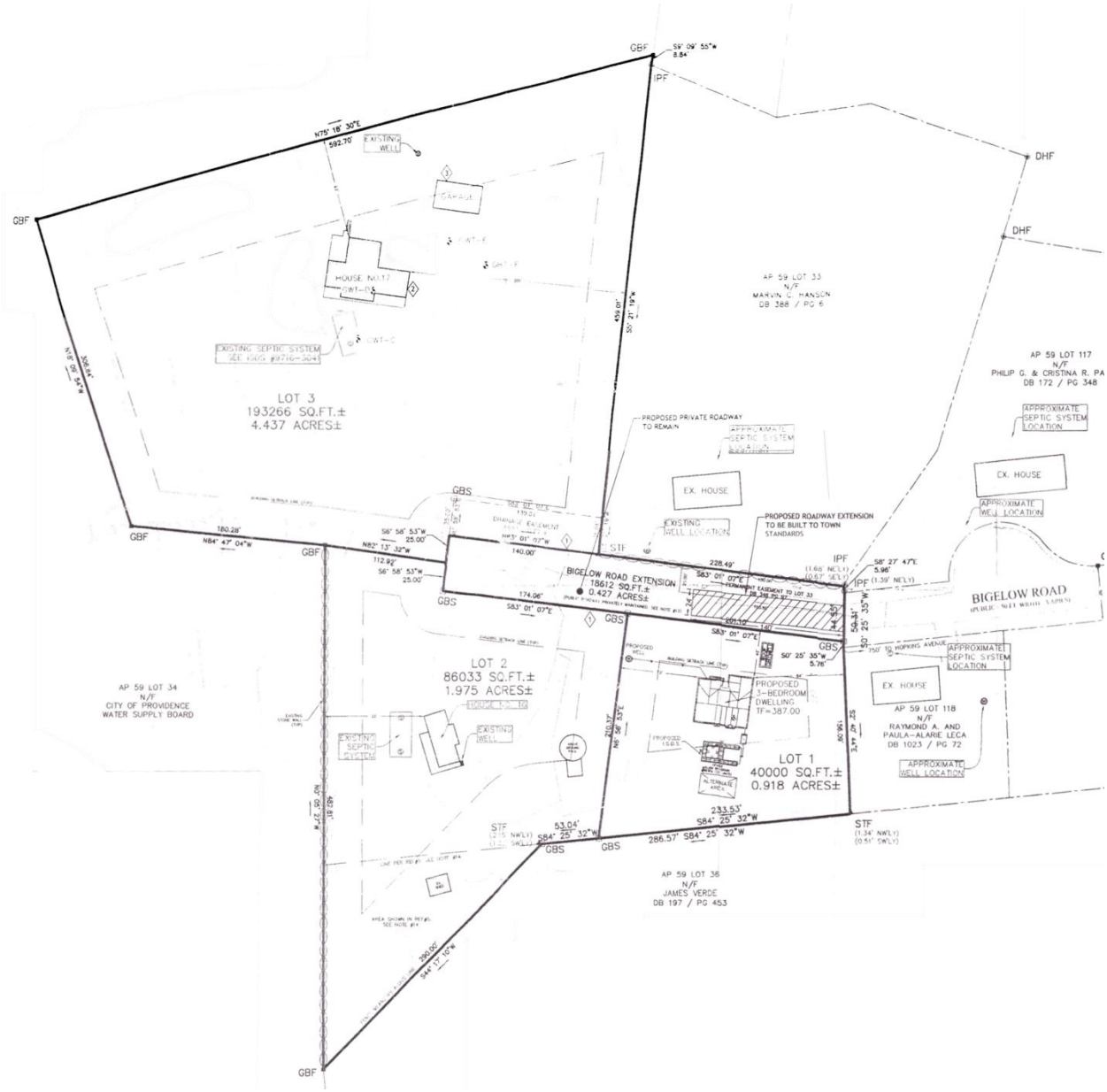
After reviewing the record, this Court finds that the Second Decision failed to address all the relief requested and did not make the findings required for granting a dimensional variance with respect to frontage. This Court therefore remands the matter to the Zoning Board for further

[5] Without deciding the matter, the Court questions whether a use variance is necessary if the Planning Board approves the subdivision, which would automatically convert the in-law accessory use into a primary residence on its own lot.

proceedings consistent with this Decision. This Court will retain jurisdiction. Counsel shall submit an appropriate order for entry.

Appendix

Site Map



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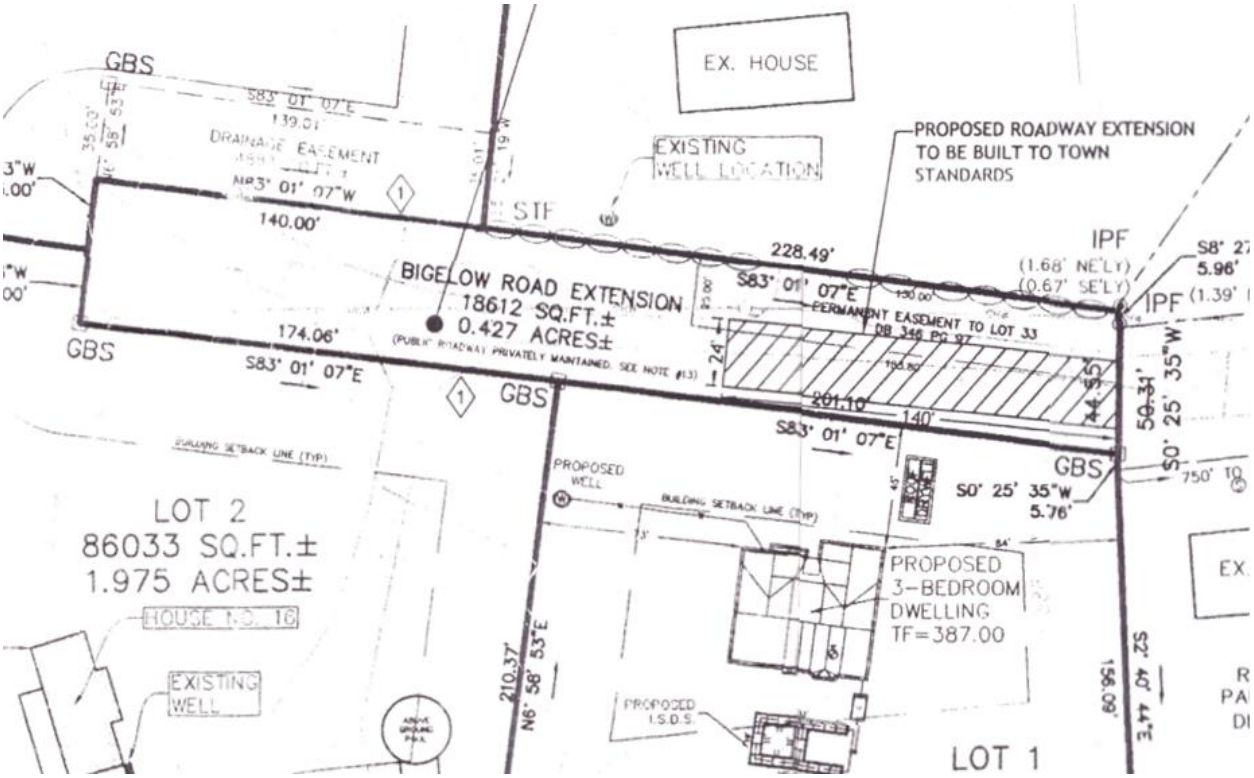

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASES:	**William Baumlin, et al. v. Frezza, et al.** **consolidated with** **Hanson v. Johnston Zoning Board of Review, et al.**
CASE NOS:	**PC-2012-1077 and PC-2016-4353**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 28, 2017**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff Baumlin:	**Alfred Russo, Jr., Esq.**
For Plaintiff Hanson	**Stephen P. Levesque, Esq.**
For Defendant:	**Joseph R. Ballirano, Esq.**