

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(Filed: March 30, 2017)

POST ACUTE PARTNERS :
ACQUISITION, LLC :

v. :

C.A. No. WC-2016-0251
(consolidated with)

SOUTH KINGSTOWN ZONING :
BOARD sitting as the South Kingstown :
Planning Board of Appeals, by and :
through its members in their official :
capacities, Robert L. Toth, Douglas W. :
Bates, Igor Runge, Robert John :
Cagnetta, and John R. Bernardo :

521 MAIN STREET, LLC :

v. :

C.A. No. WC-2016-0253

ZONING BOARD OF REVIEW OF THE :
TOWN OF SOUTH KINGSTOWN, ROBERT :
TOTH, In His Capacity as Chairman of the :
Zoning Board of Review of the Town of :
South Kingstown, DOUGLAS BATES, :
ROBERT CAGNETTA, IGOR RUNGE, :
JOHN BERNARDO, and RICHARD :
JURCZAK, In Their Capacities as Members :
of the Zoning Board of Review of the Town :
of South Kingstown, Sitting as The Planning :
Board of Appeal of the Town of South :
Kingstown :

DECISION

GALLO, J. Before the Court are two consolidated appeals of a decision from the Zoning Board of Review of the Town of South Kingstown, Rhode Island (the Zoning Board) upholding a decision by the South Kingstown Planning Board (the Planning Board). The Appellants, Post Acute Partners Acquisition, LLC (Post Acute) and 521 Main Street, LLC (the Owner)

(collectively, the Appellants), ask the Court to reverse the Zoning Board’s decision concerning property at 521 Main Street, South Kingstown, Rhode Island (the Property). The Zoning Board upheld the Planning Board’s denial of Post Acute’s application for master plan approval for the Wakefield Alzheimer’s Care Facility (the Project) on the Property, finding that the Planning Board’s decision was supported by sufficient evidence. The Planning Board found that, although the Project met the Town of South Kingstown Zoning Ordinance (Zoning Ordinance) requirements, it failed to meet a number of provisions of the Town of South Kingstown Comprehensive Community Plan (the Comprehensive Plan). For the following reasons, the Court reverses the Zoning Board’s decision.

I

Facts and Travel

In 2014, Post Acute submitted a proposal to build an assisted living facility on the Property, the site of the former Larchwood Inn which closed for business in 2005.¹ The Property is located in the Commercial Downtown zoning district (the CD Zone). Town of South Kingstown Zoning Ordinance § 101(B). The proposed use for the Property is a residential care and assisted living facility, pursuant to the Zoning Ordinance. The Zoning Ordinance defines that use as follows:

“A publicly or privately operated residence that provides directly or indirectly by means of contracts or arrangements personal assistance, lodging and meals to two or more adults who are unrelated to the licensee or administrator of such a facility; as defined in Rhode Island General Laws, Chapter 23-17.4, as amended from time to time. Medication and nursing services need not be provided.” *Id.* at art. 12, § 104.3.

¹ The Larchwood Inn was razed in 2016.

The use is permitted within the CD Zone. Id. at § 301. The Property is not included in the Town of South Kingstown's Historic Overlay District, and it is therefore not subject to any historic preservation requirements. See id. at § 600; Comprehensive Plan INTRO-17 (noting that only Kingston has been designated as a historic district, subject to zoning restrictions).

The Planning Board was presented with Post Acute's development proposal twice. The first application, initially submitted in November 2014, was approved by a decision issued on March 13, 2015. However, an appeal to the Zoning Board by several abutters led to the approval being nullified due to a notice defect.

As a result, Post Acute filed a new application with the Planning Board that was nearly identical to the first application and only incorporated design changes to the proposed structure's layout in response to the concerns raised at the first public hearings by the Rhode Island Historical Preservation and Heritage Commission. Post Acute reduced the building width by 32 feet and the number of beds from 96 to 72. (Hr'g Tr. 1, 13-15, Jan. 13, 2015; Hr'g Tr. 39-40, Feb. 3, 2015.) The new application was complete on July 14, 2015, and the Planning Board held three public hearings on the proposal in July, August, and September of 2015. At the time of the filing of the second application, the Planning Board had two different members from the time of the first application.

At the first series of hearings, the Planning Board heard testimony from the applicant, Dr. Jeffrey Rubin, regarding the economic benefit of the proposed development to the Town of South Kingstown (Town) and the benefit to those members of the Town who have family members who suffer from Alzheimer's disease. (Hr'g Tr. 3-4, 14-15, Nov. 13, 2014.) The architect for the project, Christopher Mazzier, also testified about the development's design, operational aspects, and compliance with the Zoning Ordinance and the Comprehensive Plan.

Id. at 4-7; Hr’g Tr. 2-12, 31-32, Dec. 9, 2014; Hr’g Tr. 5-17, 25, Jan. 13, 2015; Hr’g Tr. 3-14, 39-40, Feb. 3, 2015.)

The following professionals also testified on behalf of Post Acute: Landscape Architects Thomas Tavella and Jenn Judge, on the plan to save as many trees as possible and maintain the historic stone walls of the Property (Hr’g Tr. 7-10, Nov. 13, 2014); Engineer Brandon Carr, on the environmental aspects of the project, id. at 10-11; Traffic Engineer Paul Bannon, on the traffic conditions near the Property, id. at 17-18, 37-38; and Construction Manager Richard George, on the construction schedule details, id. at 21.

A number of members of the public testified against the proposed development, citing the large size of the proposed building and the lack of historic preservation. Id. at 18, 39-40; Hr’g Tr. 33, 35, Dec. 9, 2014; Hr’g Tr. 17-23, Jan. 13, 2015. On the other hand, there were a number of members of the public who testified in favor of the project. (Hr’g Tr. 22, Nov. 13, 2014; Hr’g Tr. 19, Dec. 9, 2014; Hr’g Tr. 15-16, Feb. 3, 2015.)

At the second set of hearings, the Planning Board, with agreement of the applicant, Post Acute, incorporated the file from the first set of hearings. (Hr’g Tr. 3, July 14, 2015.) Witnesses for Post Acute put forth very similar testimony to that offered at the first hearings. Id. at 10-20. The planner for Post Acute, Joseph Lombardo, also presented his report, discussing the Project and its compliance with the Zoning Ordinance and the Comprehensive Plan. Id. at 5-10. Members of the public also testified, and many of the objectors were the same people who had testified at the first hearings, offering similar testimony regarding concerns of historic preservation, traffic, and the large scale of the Project. Id. at 27-40. The Planning Board considered nine of the objectors that testified at the hearings as experts, based on their training

and experience in planning and historic preservation.² (Planning Bd. Decision 2, Nov. 17, 2015, Appellee’s Ex. A.)

On November 17, 2015, the Planning Board issued its second decision, denying master plan approval of the Project. The Planning Board found that the Project met the Zoning Ordinance requirements, the necessary environmental standards, and the required parking standards. Id. at 3; see Town of South Kingstown Zoning Ordinance § 401. However, the Planning Board found that the Project did not meet various requirements of the Comprehensive Plan as it generally failed to preserve historical features of the Property. (Planning Bd. Decision 3-4, Nov. 17, 2015, Appellee’s Ex. A.) Specifically, the Planning Board found that the Project did not meet a number of policies under the Land Use Action Plan and the Natural and Cultural Resources Action Plan. Id. The Planning Board noted that, on balance, it found the testimony of the objector “experts” “particularly relevant to its decision” that the application for master plan approval did not comply with the Comprehensive Plan. Id. at 2.

Post Acute and the Owner filed separate appeals to the Zoning Board, which were consolidated by agreement of the parties. The Zoning Board, acting as the Planning Board of Appeal, held a public hearing on March 16, 2016 and issued a decision on April 27, 2016, denying the appeal. (Zoning Bd. Decision 4, Apr. 27, 2016, Appellee’s Ex. B.) The Zoning Board found that the weight of the evidence supported denying the appeal, giving great

² The Planning Board considered the following objectors to be experts: Nancy Letendre, Esq., AICP, Mason & Associates; Richard Youngken, Community Planner, Historic Preservation Consultant, National Trust for Historic Preservation Advisor; Shantia Anderheggen, Administrator, Law Department, National Trust for Historic Preservation, M.A. Preservation Studies, President, New England Vernacular Architecture Forum; Karina Burston, Master’s in Regional Planning; Susan Marcus, Economic Development Specialist; Claudia Philbrick, Mott & Chace, Rhode Island Licensed Realtor; James O’Neill, Coastal Properties, Rhode Island Licensed Realtor; Valerie Talmage, Executive Director, Preserve Rhode Island; and Virginia Hesse, Principal Architect, Rhode Island Historical Preservation and Heritage Commission. (Planning Bd. Decision 2, Nov. 17, 2015, Appellee’s Ex. A.)

deference to the Planning Board's witness credibility determinations and upholding its decision. Id. at 3-4. Appellants appealed the Zoning Board's decision to this Court.

II

Standard of Review

This Court reviews appeals from zoning boards of appeal pursuant to G.L. 1956 § 45-23-71:

“(c) The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of appeal 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, ordinance or planning board regulations provisions;

“(2) In excess of the authority granted to the planning board 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. 45-23-71(c).

This Court defers “to the findings of fact of the local planning board.” West v. McDonald, 18 A.3d 526, 531 (R.I. 2011). This Court examines the record “to ascertain whether the board's decision rests upon ‘competent evidence’ or is affected by an error of law.” Id. (quoting Kirby v. Planning Bd. of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993)).

III

Analysis

A

Applicability of the Zoning Ordinance and the Comprehensive Plan

Appellants argue that the Zoning Ordinance controls if there is any conflict between the Zoning Ordinance and the Comprehensive Plan. The Town, relying on West, 18 A.3d at 531, maintains that a comprehensive plan has different purposes from a zoning ordinance, and, as such, may impose different and more restrictive requirements on a proposed development. Further, the Town argues that the determination of whether a project is consistent with the Comprehensive Plan is a case-by-case process, and that this Court must defer to the Planning Board's findings of fact in the matter.

Appellants contend that the Town's reliance on West is misplaced. The Court agrees. This case is distinguishable factually from West. In West, our Supreme Court upheld the denial of the petitioner's application for subdivision of land because, even though it complied with the zoning ordinance's residential zone of the parcels, it did not meet the comprehensive plan requirements for "Low Density Residential." Id. at 539-40. In West, the zoning ordinance required at least 8,750 square feet for a two-family house in an R-4 zone, but it did not provide any density limitations. Id. at 537. The comprehensive plan, however, included a specific provision limiting the density in the R-4 zone to only 5.8 dwelling units per acre. Id. at 530. The provision effectively limited the petitioner to constructing only 3.72 dwelling units on his three combined parcels of land, rather than the six dwelling units he proposed. Id. at 528, 530. The court found that the planning board's denial of the petitioner's subdivision application was not in error as the comprehensive plan requirements were in addition to rather than in conflict with the

zoning ordinance. Id. at 536. That being the case, the court felt it unnecessary to reach the question of whether the zoning ordinance would control in the event of an inconsistency with the comprehensive plan. Id.

However, the question left unanswered by the court in West was subsequently resolved by the General Assembly with the amendment to § 45-22.2-13. See P.L. 2011, ch. 313, § 1. The amended statute reads, in pertinent part, as follows:

“[t]he zoning ordinance and map in effect at the time of plan adoption shall remain in force until amended. In instances where the zoning ordinance is in conflict with an adopted comprehensive plan, **the zoning ordinance in effect at the time of the comprehensive plan adoption shall direct municipal land use decisions** until such time as the zoning ordinance is amended to achieve consistency with the comprehensive plan and its implementation schedule.” Sec. 45-22.2-13(c) (emphasis added).

Therefore, while the statutory scheme contemplates a municipality amending its zoning ordinance to conform to its comprehensive plan, prior to any such amendments, the zoning ordinance controls any conflict in provisions. See id.

Here, the Planning Board found that the Project was not compliant with certain provisions detailed in the Comprehensive Plan: Land Use Element Policy 3.2,³ 3.4,⁴ 4.2,⁵ and

³ Land Use Element Policy 3.2 provides that “[t]he Town shall encourage landscape diversity that creates identity and a sense of place, fosters the creation of distinct neighborhoods and villages, and recognizes the natural, historic, and cultural features of the land and surrounding community.” Comprehensive Plan LU-11.

⁴ Land Use Element Policy 3.4 provides as follows:

“The Town will continue to require landowners, builders, and developers to address the local impacts of the development or redevelopment of their properties on the community. Such local impacts include, but are not limited to, adequacy of transportation infrastructure, multi-modal transportation opportunities, pedestrian connectivity, design integration of the project with the existing natural and built environment, historic, cultural, and recreational

6.3,⁶ and Natural and Cultural Resources Element Policy 5.4.⁷ (Planning Bd. Decision 3-5, Nov. 17, 2015, Appellee’s Ex. A.) Each policy has a number of corresponding provisions that are future-looking and goal oriented, rather than restrictive in nature and which are intended to guide the Town in regulating land use and development. The regulation of development, however, is a function of the Zoning Ordinance and not the Comprehensive Plan. See § 45-22.2-13. For example, one of the provisions of the Land Use Element Policy 3.2 states that the Town “will evaluate the appropriateness of establishing new Historic District Overlays within the Zoning Map and the use of additional regulatory tools for the purpose of historic preservation planning.” Comprehensive Plan LU-11. Although the Comprehensive Plan contemplates additional areas of South Kingstown being added to the Historic District Overlay Map, Kingston is currently the only official historic district in South Kingstown, as identified in the Zoning Ordinance and the Comprehensive Plan. See Town of South Kingstown Zoning Ordinance § 600; Comprehensive Plan INTRO-17. The Property is not located in an established historic district and, thus, is not subject to any historic preservation regulations in the Zoning Ordinance. See Town of South Kingstown Zoning Ordinance § 600.

resources, and requirements for the provision of municipal services to the site.” Id. at LU-12.

⁵ Land Use Element Policy 4.2 provides that “[t]he Town shall support the revitalization of its historic village areas as vibrant, healthy, walkable communities, with bike paths and transit, and access to appropriately scaled mixed use commercial development. The Town will document, support, maintain and enhance the unique qualities of each village.” Id. at LU-14.

⁶ Land Use Element Policy 6.3 provides that “[t]he Town shall continue to expand its inventory of: a) historic buildings and structures; and b) historic and prehistoric archaeological sites, making sure that all aspects and periods of South Kingstown’s history are identified and preserved.” Id. at LU -17.

⁷ Natural and Cultural Resources Element Policy 5.4 provides that “[t]he Town will preserve the unique identify of the villages that comprise South Kingstown, as well as those cultural features that identify the Town as a whole.” Id. at NCR-13.

In sum, the Planning Board cited two areas of the Project’s non-compliance with the Comprehensive Plan—a failure to preserve the Property’s historic character and the Project’s large mass and scale. (Planning Bd. Decision 3-5, Nov. 17, 2015, Appellee’s Ex. A.) However, the Project complied with the Zoning Ordinance’s dimensional requirements as to setbacks, height, scale, mass, lot coverage, and size. Id. at 3; see Town of South Kingstown Zoning Ordinance § 401. Furthermore, Wakefield is not designated “historic” in either the Zoning Ordinance or the Comprehensive Plan. See Town of South Kingstown Zoning Ordinance § 600; Comprehensive Plan INTRO-17. To the extent that the Planning Board relied on the aspirational language of the Comprehensive Plan, in conflict with the provisions of the Zoning Ordinance that allow such a Project, the Planning Board erred as a matter of law. See § 45-22.2-13(c).

B

Required Findings of the Land Development and Subdivision Review Enabling Act

Appellants also argue that the Planning Board erred in denying the Project’s master plan approval based on its failure to “provide for . . . preservation of natural, historical, or cultural features that contribute to the attractiveness of the community,” as required by Article III of the South Kingstown Land Development and Subdivision Regulations. (Planning Bd. Decision 3, Nov. 17, 2015, Appellee’s Ex. A.)

The enabling legislation under which planning boards operate mandates that a planning board assure that applications for development comply with specified requirements. Sec. 45-23-60.⁸ The statute requires that a project approval be supported by “positive findings” by the planning board as to each requirement.

⁸ Section 45-23-60 provides, in pertinent part, as follows:

The South Kingstown Land Development and Subdivision Regulations mirror the provisions and requirements of § 45-23-60 with the addition of the requirement that, among other things, a project provide for the “preservation of natural, historical, or cultural features that contribute to the attractiveness of the community.” South Kingstown Land Development and Subdivision Regulations, Art. III. The Town contends that municipalities may adopt regulations for approvals in addition to those required by the enabling act. It cites no authority in support of its argument.

“(a) All local regulations shall require that for all administrative, minor, and major development applications the approving authorities responsible for land development and subdivision review and approval shall address each of the general purposes stated in § 45-23-30 and make positive findings on the following standard provisions, as part of the proposed project’s record prior to approval:

“(1) The proposed development is consistent with the comprehensive community plan and/or has satisfactorily addressed the issues where there may be inconsistencies;

“(2) The proposed development is in compliance with the standards and provisions of the municipality’s zoning ordinance;

“(3) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval;

“(4) The subdivision, as proposed, will not result in the creation of individual lots with any physical constraints to development that building on those lots according to pertinent regulations and building standards would be impracticable . . . ; and

“(5) All proposed land developments and all subdivision lots have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered in compliance with this requirement.” Sec. 45-23-60(a).

Our Supreme Court has “made clear [its] adherence to the proposition that where in a zoning ordinance a local legislature purports to restate that for which provision is made in the enabling act, any attempt to expand or abridge in the zoning ordinance rights granted by the enabling act is ultra vires of the jurisdiction conferred upon such a local legislature by the General Assembly and, therefore, is void.” Hardy v. Zoning Bd. of Review of Town of Coventry, 113 R.I. 375, 377, 321 A.2d 289, 290-91 (1974) (citing Hartunian v. Matteson, 109 R.I. 509, 516, 288 A.2d 485, 489 (1972)). “[I]f a local zoning ordinance purports to authorize something more or something less than the enabling act, it is a nullity.” Roland F. Chase, Rhode Island Zoning Handbook § 46 (3d ed. 2016).

In the case at bar, the Planning Board required the Appellants’ development application to meet requirements not authorized by the enabling legislation. In doing so, the Planning Board acted in excess of its authority and unlawfully.

C

Attorneys’ Fees under the Equal Access to Justice Act

Post Acute argues that it is entitled to attorneys’ fees pursuant to the Equal Access to Justice Act (the Act) as the Planning Board’s decision had no reasonable basis in law and fact. The Town avers that Post Acute is not eligible under the Act because it is not a small business within the meaning of the Act and it was not registered to do business in Rhode Island at the time of the Planning Board hearings. The Town also contends that the decisions of both the Planning Board and the Zoning Board were substantially justified.

The Act provides that “a prevailing [p]arty . . . may be awarded [r]easonable litigation expenses . . . where the [a]gency . . . was without [s]ubstantial justification . . . in actions that led to an [a]djudicatory proceeding[] . . . or taken in the proceeding itself.” Tarbox v. Zoning Bd. of

Review of Town of Jamestown, 142 A.3d 191, 200 (R.I. 2016) (internal quotation marks and citations omitted); see § 42-92-3. However, the Act also requires that a “party” be

“any individual whose net worth is less than five hundred thousand dollars (\$500,000) at the time the adversary adjudication was initiated; and, any individual, partnership, corporation, association, or private organization *doing business and located in the state*, which is independently owned and operated, not dominant in its field, and which employs one hundred (100) or fewer persons at the time the adversary adjudication was initiated.” Sec. 42-92-2(5) (emphasis added).

Post Acute provided an affidavit from its Treasurer, Warren Cole, stating that Post Acute is the managing member of an entity that owns a Rhode Island nursing home—the Scallop Shell. (Warren Cole Aff. ¶ 6, Appellant’s Reply Mem., Ex. B.) The Town points out that Post Acute was not registered to do business in Rhode Island until May 2016, after the adverse decision of the Zoning Board. On this record, the Court finds that Post Acute is not an organization doing business and located in Rhode Island. See § 42-92-2(5). If the Scallop Shell were the petitioner in this action, then it would likely be considered a party under the Act since it owns and operates as a Rhode Island nursing home. However, Post Acute’s position as a managing member of the entity that owns the Scallop Shell does not by itself qualify Post Acute as a party under the Act. See id. Thus, Post Acute is not entitled to attorneys’ fees. Consequently, this Court need not reach the question of whether the decisions of the Planning Board and the Zoning Board were substantially justified.

IV

Conclusion

After review of the entire record, this Court finds the decision of the Zoning Board, sitting as the Planning Board of Appeals, was clearly erroneous based on the evidence of record and amounted to an abuse of discretion. Substantial rights of the Appellants 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

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consolidated with
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CASE NOS.: **WC-2016-0251, WC-2016-0253**

COURT: **Washington County Superior Court**

DATE DECISION FILED: **March 30, 2017**

JUSTICE/MAGISTRATE: **Gallo, J.**

ATTORNEYS:

For Post Acute Partners: **Jeffrey S. Brenner, Esq.**

For 521 Main Street: **William R. Landry, Esq.**

For Defendants: **Andrew M. Teitz, Esq.**
Amy H. Goins, Esq.