

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(FILED: August 1, 2017)

LISCIOTTI DEVELOPMENT CORP. :  
:  
v. :  
:  
RAYMOND DRECZKO, JR., :  
MICHAEL CHAMBERS, CLIFFORD :  
VANOVER, JOSEPH QUADRATO, :  
JOANN STOLLE, ROBIN QUINN, :  
STEVEN J. WILLIAMS, AND LARA :  
WIBETO in their capacities as members :  
of the CHARLESTOWN ZONING :  
BOARD OF REVIEW :

C.A. No. WC-2016-0600

**DECISION**

**GALLO, J.** Before the Court is an appeal of a decision from the Charlestown Zoning Board of Review (the Zoning Board). The Appellant Lisciotti Development Corporation (Appellant or Lisciotti) requests that this Court reverse the Zoning Board’s decision regarding its proposal to build a Dollar General store located on property in Charlestown, Rhode Island (the Project). The Zoning Board found that the Project was a department store which is not a permitted use under the Town of Charlestown Zoning Ordinance (Zoning Ordinance) in the location proposed. For the following reasons, the Court reverses the Zoning Board’s decision.

**I**

**Facts and Travel**

In 2015, Lisciotti provided a preliminary development plan to the Town of Charlestown (the Town) for land on Old Post Road, Charlestown, Rhode Island to build a 9000 square foot Dollar General store. The area is in the Traditional Village District (TVD), which permits

general stores but does not allow department stores.<sup>1</sup> Town of Charlestown Zoning Ordinance § 218-36. On July 17, 2015, Joseph Warner, the Building Official for the Town (Building Official), issued a decision finding that the Project constituted a department store, not a general store, and was therefore not permitted by the Zoning Ordinance. (Letter from Joseph Warner, July 17, 2015, Certified R. Part I at 65-66.)

Lisciotti appealed the Building Official's decision, and the Zoning Board held a public hearing in November 2015. At the hearing, Lisciotti presented Joseph Lombardo (Lombardo) as its witness, who was qualified as an expert in planning, zoning and land development. Lombardo relied on Dollar General's Mission Statement and the proposed store layout in concluding that the Project was a general store and not a department store. See Tr. 12-16, Nov. 17, 2015.

The Dollar General Mission Statement provides, in pertinent part, as follows:

“We build and run convenient-sized stores to deliver everyday low prices on products that our customers use every day.

....

“We design small neighborhood stores with carefully edited merchandise assortments to make shopping simpler.

....

“Dollar General saves you time by staying focused on life's simple necessities: laundry detergent, toilet paper, soap, shampoo, socks and underwear...maybe a gadget or two that you just can't live without. The average Dollar General customer completes her shopping trip in less than 10 minutes.” (Dollar General Mission Statement, Certified R. Part I at 138.)

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<sup>1</sup> A general store is “[s]pace in a building used for the purpose of serving residents in the immediate vicinity and selling goods necessary to meet day to day needs.” Town of Charlestown Zoning Ordinance § 218-5. A department store is “[a] building in which a variety of merchandise is kept for retail sale in separate parts of such building.” Id.

Lombardo concluded that Dollar General serves the needs of residents in the area. (Tr. 13-14, Nov. 17, 2015.) Lombardo noted that Dollar General would organize items by category not separate departments. Id. at 15-16. He stated that “[t]hey may have an aisle dedicated, for example, pet supplies but right next to it would be drinks and beverages . . . . [s]o there are not separate departments.” Id. at 16; see Proposed Dollar General Layout, Certified R. Part I at 175.

During the hearing, a Zoning Board member asked Lombardo whether he considered Benny’s and Ocean State Job Lot stores to be department stores. Lombardo responded that he would characterize the stores as department stores, as those particular stores with which he was familiar were bigger stores that were “regional” and “clearly attracting a much bigger area [of customers] in order to survive” as compared to Dollar General. (Tr. 21, Nov. 17, 2015.)

The Building Official also testified at the hearing, and he explained that he had struggled to fit Dollar General into one of the categories in the Zoning Ordinance. Id. at 29-32. Ultimately, he determined that the Project fit “more closely into a department store and also more closely fit[] into our Comprehensive Plan and the intent of the Zoning Ordinance.”<sup>2</sup> Id. at 32.

At the end of the hearing, the Zoning Board affirmed the Building Official’s decision. Id. at 43-44. Lisciotti appealed the Zoning Board’s decision, and this Court remanded the case back to the Zoning Board, ordering the Zoning Board to review the Building Official’s decision de

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<sup>2</sup> The Zoning Ordinance describes the TVD as follows:

“This district is to encourage small-scale business and residential uses consistent with the historic and pedestrian-scale characteristics that exist and which are unique to Charlestown village, to preserve the Town’s heritage, to strengthen the local economy, to continue small town character and aesthetics and to promote the general welfare of the Town.” Town of Charlestown Zoning Ordinance § 218-33(F)(3)(e).

novo. See Case No. WC-2015-0615. In accordance with the Remand Order, the Zoning Board held public hearings on August 26, 2016 and October 18, 2016 to reconsider the matter.

At the public hearing after remand, a number of Zoning Board members questioned Lisciotti's counsel regarding the meaning of a "department" within a store. First, Zoning Board member Joseph Quadrato engaged in the following discussion:

"MR. GRIMM: There's no sign saying clothespin department or household goods. They're all separate categories, disparate categories of items on an aisle. . . . They're not organized by departments.

. . . .

"MR. QUADRATO: So you're saying you don't pay any attention to organization of like product lines to make it easier for your customer to shop?

"MR. GRIMM: I did not say that. The products are organized by categories, but they are not within any departments.

"MR. QUADRATO: So it's a category, not a department?

"MR. GRIMM: For example, you'll find all the socks in one location on an aisle somewhere. You might find the underwear in a different location. There are no departments in the store. That's the point." (Tr. 13-14, Aug. 26, 2016.)

Zoning Board member Michael Chambers followed up with some additional questions, as follows:

"MR. CHAMBERS: It sounds like you're saying categories and departments, but when you go into a Dollar General or when you go into Ocean State Job Lot or when you go into Benny's, it doesn't say this department, this is the food department, or this is the battery department, or this is the outdoor furniture department. They're categorized. And it seems to me that you're kind of making a case for the word 'category' that sounds to me a lot like making the same case for 'department.'

"MR. GRIMM: Every store has some organizational structure. A convenience store, which is also a permitted use in this district, has some organizational structure. A supermarket, which is also a permitted use in this district, has some organizational structure. There's no question about that. And the actual organizational structure of the dollar store is contained in the exhibit that was before you in the first hearing which you can review. But you'll

see that there are unrelated products in the same aisles. There are unrelated products across from each other on aisles. There are no departments within this store. There are aisles, and there is some organization, but there are no departments.” Id. at 15-16.

Zoning Board member Lara Wibeto also inquired of Lisciotti’s counsel as follows:

“MS. WIBETO: So are you saying the food is not together and the teaching supplies and the paper are not together --

“MR. GRIMM: I didn’t say that.

“MS. WIBETO: -- in one spot?

“MR. GRIMM: I didn’t say that.

“MS. WIBETO: Are you agreeing they are in one spot in the store?

“MR. GRIMM: I am agreeing that the categories of goods are organized in the store.

“MS. WIBETO: They are organized in departments, correct, sir.

“MR. GRIMM: They’re not organized into departments. They’re organized into aisles. Organization is not the same as a department.

“MS. WIBETO: They’re organized together. The food’s in one section.

“MR. GRIMM: Every store has some organizational structure to it. A supermarket has an organizational structure, but that’s not a department store. A convenience store has an organizational structure, but that’s not a department store. A department store has departments. Organizational structure does not equal department store.

“MS. WIBETO: Department and sections and compartments are the same. They’re synonyms.

“MR. GRIMM: Your ordinance requires it to be organized in separate areas.

“MS. WIBETO: Everything is not scattered at the Dollar General. Everything is not scattered as you described.

“MR. GRIMM: I agree it’s not scattered at the Dollar General.

“MS. WIBETO: It’s clearly labeled in departments.

“MR. GRIMM: It’s not clearly labeled in departments. It’s clearly labeled and organized.” Id. at 19-20.

At the conclusion of the hearing, the Zoning Board requested Lisciotti’s counsel to provide it with additional information, including a list of items sold at Dollar General. Id. at 25-26. The next hearing was held in October, during which the Zoning Board discussed the matter

further and issued a written decision on October 28, 2016 (Decision) affirming the Building Official's decision.

The Decision focused on whether the Project was a general store or a department store under the definitions of the Zoning Ordinance. (Decision 1, Oct. 28, 2016.) The Zoning Board pointed to Lombardo's testimony that he would describe Benny's and Ocean State Job Lot stores as department stores. The Zoning Board agreed with Lombardo that Benny's and Ocean State Job Lot stores are department stores, and, further, determined that "the proposed layout of the [Dollar General] store and the proposed merchandise sold are very similar to that of Benny's and [Ocean State Job Lot] stores." Id. at 2. Specifically, the Zoning Board compared the stores as follows: "All three stores have been stand-alone buildings and located in mall type settings; organize like merchandise in aisles; do not have registers or cashiers located throughout the store in departments; and sell a vast array of merchandise, some of which are non-essentials." Id. The Zoning Board concluded that the Project is a department store and therefore not permitted in the TVD. Id. Now Appellant has filed the instant appeal asking this Court to reverse the Zoning Board's Decision.

## II

### Standard of Review

This Court's review of a zoning board appeal is governed by G.L. 1956 § 45-24-69, which provides as follows:

"(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 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).

After conducting a review of the entire record, this Court determines “whether substantial evidence existed to support” the decision of the zoning board. Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 (R.I. 2003) (quoting OK Props. v. Zoning Bd. of Review of Warwick, 601 A.2d 953, 955 (R.I. 1992)) (internal quotation marks omitted). Substantial evidence refers to evidence that is “more than a scintilla but less than a preponderance.” Lloyd v. Zoning Bd. of Review for City of Newport, 62 A.3d 1078, 1083 (R.I. 2013) (quoting Apostolou v. Genovesi, 120 R.I. 501, 508, 388 A.2d 821, 824-25 (1978)). This Court “may not substitute [its] judgment for that of the zoning board if [it] 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) (internal quotation marks and citations omitted).

### III

#### Analysis

Lisciotti argues that the Zoning Board’s determination that the Project is a department store is not supported by substantial evidence in the record. Lisciotti also contends that the

Zoning Board improperly disregarded the uncontradicted expert testimony of Lombardo, relying instead on personal knowledge. Additionally, Lisciotti argues that any ambiguity in the Zoning Ordinance should be construed in its favor as the landowner.

The Zoning Board maintains that its Decision is supported by substantial evidence in the record, and it was not improper for the Zoning Board to use their personal knowledge in arriving at their decision. The Zoning Board argues that it relied heavily on Lombardo's characterization of Benny's and Ocean State Job Lot as department stores, as the Zoning Board members had personal knowledge of those stores, which they found to be similar to the proposed Dollar General.

At issue is whether the Zoning Board erred as a matter of law when it determined that Dollar General is a department store rather than a general store due to the "wide variety of products" sold and the proposed layout of the store. (Decision 2, Oct. 28, 2016.) However, there is simply no support in the record for the determination that the proposed Dollar General is a "department store" as contemplated by the Zoning Ordinance. See Lloyd, 62 A.3d at 1083.

A general store is "[s]pace in a building used for the purpose of serving residents in the immediate vicinity and selling goods necessary to meet day to day needs." Town of Charlestown Zoning Ordinance § 218-5. The Dollar General Mission Statement provides that the store "deliver[s] everyday low prices and products that our customers use every day." (Tr. 14, Nov. 17, 2015.) The Mission Statement also states that Dollar General sells "life's simple necessities, such as laundry detergent, toilet paper, soap, shampoo, socks and underwear, a gadget or two that you just can't live without." Id. at 16. Lombardo testified that this Mission Statement indicates that the Dollar General plans to sell items to residents in the local area. Id. at 17. The only evidence before the Zoning Board regarding the plans for Dollar General indicate that Dollar



General will sell products relating to daily needs of local citizens in the area, satisfying the definition of general store in the ordinance. Town of Charlestown Zoning Ordinance § 218-5.

Furthermore, the only evidence before the Zoning Board regarding the layout of Dollar General indicated that the store is separated into aisles, not departments. (Tr. 15-16, Nov. 17, 2015.) The Zoning Ordinance defines a department store as “[a] building in which a variety of merchandise is kept for retail sale in separate parts of such building.” Town of Charlestown Zoning Ordinance § 218-5. Lombardo testified that while different categories of products are organized in separate *aisles*, they would not be considered “in separate parts of such building.” Id.

When interpreting provisions in a zoning ordinance, this Court applies rules of statutory construction. Cohen v. Duncan, 970 A.2d 550, 562 (R.I. 2009). Thus, the Court “give[s] clear and unambiguous language in an ordinance its plain and ordinary meaning.” CCF, LLC v. Pimental, 130 A.3d 807, 811 (R.I. 2016) (quoting Cohen, 970 A.2d at 562) (internal quotation marks omitted). “[W]hen the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the . . . board[] charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized.” Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859-60 (R.I. 2008). However, any ambiguity in a zoning ordinance should be construed in favor of the landowner. City of Providence v. O’Neill, 445 A.2d 290, 293 (R.I. 1982) (reasoning that ambiguities should be read to further a landowner’s interest as “a zoning ordinance is in derogation of the common-law right of a property owner to use her land as she wishes”).

In its Decision, the Zoning Board found that the Dollar General was a department store “[b]ased on the testimony and documents” presented at the public hearings. (Decision 2, Oct.

28, 2016.) The Decision referenced the Building Official's testimony that, in part, his determination that the Dollar General was a department store was based on the Town's comprehensive plan, which includes a policy that "encourage[es] business development maintaining the village character and setting" in the TVD. Id. Yet the Zoning Board failed to base its Decision on the actual definition of department store as provided in the Zoning Ordinance. It is clear from the record that the Zoning Board struggled to understand the meaning of department store as defined in the Zoning Ordinance, and failed to give the unambiguous language of the Zoning Ordinance "its plain and ordinary meaning." See CCF, LLC, 130 A.3d at 811.

At the public hearing held after the case was remanded, a number of Zoning Board members appeared to equate the meaning of "department" with the simple categorization and organization of like items sold in a store. For instance, Mr. Quadrato asked Lisciotti's counsel, "So you're saying you don't pay any attention to organization of like product lines to make it easier for your customer to shop?" (Tr. 14, Aug. 26, 2016.) Additionally, Mr. Chambers indicated that he found "category" and "department" to be synonymous:

"It sounds like you're saying categories and departments, but when you go into a Dollar General or when you go into Ocean State Job Lot or when you go into Benny's, it doesn't say this department, this is the food department, or this is the battery department, or this is the outdoor furniture department. They're categorized. And it seems to me that you're kind of making a case for the word 'category' that sounds to me a lot like making the same case for 'department.'" Id. at 15-16.

Ms. Wibeto also shared with Appellant's counsel her understanding of a "department": "Department and sections and compartments are the same. They're synonyms. . . . Everything is not scattered at the Dollar General. Everything is not scattered as you described." Id. at 20.

The words “department store” evoke a common and familiar image that almost requires no definition. Merriam-Webster offers a definition of “department store” as “a store having separate sections for a wide variety of goods.” Merriam-Webster’s Collegiate Dictionary 334 (11th ed. 2007). In this Court’s opinion, the Zoning Board misconstrued the Zoning Ordinance in determining that Dollar General was a department store, a use prohibited in the TVD. If the definition of a department store, as understood by the Zoning Board members, were to include a store that organizes its products for sale by kind or category then nearly any store could be considered a department store. For example, a CVS would be considered a department store because toothpaste is stocked next to toothbrushes and dental floss, categorized as “oral care” products. Indeed, there would be no need to distinguish between “department store” and “general store” in the Town’s Zoning Ordinance as it is difficult to conceive of any “general store” that does not display items for sale by category. See Town of Charlestown Zoning Ordinance § 218-5; see also Ruggiero v. City of Providence, 893 A.2d 235, 237-38 (R.I. 2006) (“[T]his [C]ourt has long applied a canon of statutory interpretation which gives effect to all of a statute’s provisions, with no sentence, clause or word construed as unmeaning or surplusage.”) (internal quotation marks and citations omitted). The Zoning Board Decision appears to have been based on the misconception that any store which arranges items for sale by kind is a department store under the Zoning Ordinance. This led to an unreasonable and overly restrictive application of the Zoning Ordinance.

#### IV

#### **Conclusion**

After review of the entire record, this Court finds the Decision of the Zoning Board was clearly erroneous in light of the evidence of record and amounted to an abuse of discretion.

Substantial rights of Lisciotti 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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**TITLE OF CASE:** Lisciotti Development Corp. v. Raymond Dreczko, Jr.,  
et al.

**CASE NO:** WC-2016-0600

**COURT:** Washington County Superior Court

**DATE DECISION FILED:** August 1, 2017

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

**ATTORNEYS:**

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