STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 9, 2017)

KRIKOR S. DULGARIAN TRUST; and SETH KURN	:	
v.	:	**C.A. No. PC-2016-2543**
ARTHUR STROTHER, SCOTT WOLF, MARC GREENFIELD, VICTOR CAPELLAN, AMY CRANE, and ENRIQUE MARTINEZ; in their capacities as members of the City of Providence's Zoning Board of Review, JIM LOMBARDI, in his capacity as the Treasurer for the City of Providence; and FARVIEW, INC. and BROWN UNIVERSITY	:	

DECISION

CARNES, J. Before the Court is an appeal from a City of Providence's Zoning Board of Review (Board) decision. The Krikor S. Dulgarian Trust and Seth Kurn (Appellants) appeal the decision of the Board granting a two-year special use permit to Farview, Inc. and Brown University for a parking lot on property near Thayer Street. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Farview, Inc. (Farview) is a wholly-owned subsidiary of Brown University (Brown) and the record owner of property recorded as Assessor's Plat 12, Lots 25, 28, 33, 36, 37, 39, and 41, located at 450 Brook Street and 167 and 169 Cushing Street, Providence, Rhode Island. All properties are zoned in an I-3E Overlay District, which combines educational and commercial

use buildings. The Krikor S. Dulgarian Trust is the recorded owner of the property identified in city records as Assessor's Plat 10, Lots 276 and 300, located at both 254 and 260 Thayer Street, Providence, Rhode Island. Seth Kurn (Kurn) is the recorded owner of property identified as Assessor's Plat 13, Lot 103, located at 248 Bowen Street, Providence, Rhode Island.

Before Brown purchased the above-mentioned properties, the previous owner had rented the seven houses on the property to students. Tr. 188:8-12, Apr. 13 2016. Attorney Andrew Teitz (Attorney Teitz) stated that the previous owner did not "put any money into maintaining them at all." Id. The buildings, according to Brown and Farview, were in disrepair, and the owner had only been issued one electrical permit for repair during his ownership. Id. at 188:12-15.

When the opportunity presented itself, Brown purchased all seven properties. Id. at 188:19-20. At the time of purchase, Brown represented that it did not have an immediate plan for what type of permanent structure it intended to build on the land. Id. at 189:23-190:5. Attorney Teitz stated that Brown would use the land to build "some sort of educational building, it could be housing, it could be classrooms, it could be some combination." Id. Before deciding on what to build on the property, Attorney Teitz stated that Brown wished to use the property as a pay parking lot for two years. See id.

Currently, Brown does not exclusively control the property. Id. at 193:16-21. Instead, Farview, the for-profit, wholly-owned subsidiary of Brown, holds the property. Id.

On January 19, 2016, Brown and Farview went before the Providence City Plan Commission (CPC) to gain approval of an amendment to its Institutional Master Plan (IMP). Id. at 188:20-25; see also Letter from Choyon Manjrekar, Administrative Officer, Providence

Department of Planning and Development, to Lori Hagen, Providence City Clerk (May 11, 2016) (hereinafter, CPC Letter) at 1.

The City of Providence Zoning Ordinance (Ordinance) requires all colleges and universities in Providence to have an IMP. The Ordinance states:

> "[a]n institutional master plan is required to promote the orderly growth and development of health care institutions and university or college educational facilities while preserving neighborhood character, historic resources, and consistency with the city's comprehensive plan and adopted land use policies. The institutional master plan is a statement in text, maps, illustrations, and/or other media that provides a basis for rational decision-making regarding the long-term physical development of the institution." Ordinance § 1910(A).

At the CPC meeting, Brown sought approval of the amendment to the IMP, which accommodated the parking lot and several other institutional objectives. The CPC approved Brown's amendment to the IMP. In its decision, the CPC stated that "[t]he Comprehensive Plan requires educational institutions to provide five year IMPs to ensure that there is limited growth and [no] negative impacts on neighborhoods." CPC Letter at 2-3. The CPC stated that it "found that a statement about the provision of parking and its effect on traffic management to be consistent with Objectives M-1 and M-6 of the plan, which promote provision of varied transportation options and parking." Id. at 3.

The CPC "granted final plan approval to the IMP" amendment, subject to Brown's "return to the CPC in 2017 with a revised IMP that includes information on the use, density and design of the development that will occur on the site of the parking lot," and approval of a special use permit from the Board. Id.

On April 13, 2016, Attorney Teitz presented Brown and Farview's case for a special use permit to the Board. Tr. 187, Apr. 13, 2016. A surface parking lot is a use in a C-2 commercial

district that requires the Board to issue a special use permit. See Ordinance T12-1; Ordinance § 1901. The Board noted in its decision that "prior to the hearing, the Members of the Board individually made inspections of the Property and of the surrounding neighborhood." Resolution No. 2016-08 (Resolution) at 2.

Before calling witnesses to testify before the Board, Attorney Teitz explained the reasons for his client's request for a special use permit. Tr. 187, Apr. 13, 2016. Attorney Teitz first made clear that Brown was "not seeking any approval from [the] zoning board to demolish the seven houses that are there." Id. at 187:19-21. He explained that the buildings on the property were not part of a city historic district and therefore were not under the Board's jurisdiction. Id. at 187:22-25.

Attorney Teitz expressed that the land on which Brown and Farview wished to build a parking lot was in "an [I]-3 overlay zone." Id. at 191:2-3. If Brown made the parking lot exclusive to those with Brown parking permits, they could do so without a variance, he noted. Id. at 191:10-14. Attorney Teitz continued, adding that Brown wished the parking lot to be "a benefit to the neighborhood and the commercial uses on Thayer Street and provide it as a public lot." Id. at 191:14-17. Attorney Teitz summarized Brown's position during the hearing, maintaining that Brown asked the Board

> "to approve the difference between a parking lot where people drive in with Brown parking stickers on their windshield and park there all day, to a parking lot where people who are going to be shopping and eating in restaurants, and so forth, on Thayer Street, will come in and use this parking lot and pay for it. That's the gist of relief that [we are asking] for with the special use permit." Id. at 191:24-192:8.

Collette Creppell (Creppell), Brown's university architect, testified as Brown's first witness. Id. at 192:9-17. Before working at Brown, Creppell "served as planning director for the

City of New Orleans . . . and also worked as a city planner in New York City for a short while before that." Id. at 192:22-25. Creppell also worked "as a university architect for Tulane University in New Orleans." Id. at 193:1-2.

Creppell first addressed the buildings that were to be demolished at the property. Creppell testified that the houses that Brown "purchased in July of 2014 . . . [were] not inhabited and [were] uninhabitable because of the level of fire code hazard[s], city code violations, [and] lead asbestos." Id. at 193:23-194:3. Creppell also asserted that "[w]e do intend to have this site developed for academic or residential uses." Id. at 194:3-4. Creppell also addressed the two-year "time frame" of the special use permit. Id. at 197:15-16. "[P]lanning, design and construction of academic buildings typically take several years." Id. at 194:8-10. Creppell added, "we wanted to propose an interim use that would be supportive . . . [of] our own institutional master plan but also in support of the Thayer Street merchants." Id. at 194:13-16.

Creppell further explained that "part of the acquisition of the property was to be consistent with our institutional master plan which as a sort of overall principle is to concentrate at the core of our campus of which this is a part[.]" Id. at 196:18-22. Whatever the new building is, Creppell told the Board, it will "be oriented toward active university uses while we also move some . . . [university] supportive administrative functions to the jewelry district." Id. at 196:23-197:1. "I would rush to say that the university doesn't in general seek to create surface parking lots. In fact, we have on our campus, removed 500 surface parking [spaces] in the last 12 years." Id. at 195:14-18. Creppell also stated that local business owners are aware that this parking lot is temporary. Id. at 195:3-6. She stated that "the goal is to get to an academic and university supportive use on this site." Id.

Jonathan B. Stabach (Stabach), a civil engineer for Vanasse Hangen Brustlin, Inc. (VHB), testified briefly during the hearing. Id. at 198:16-17.[1] Stabach presented the parking lot plans to the Board. Id. at 198:19-21. He testified that the plan met all buffer, setback, dimensional, landscape, and tree canopy coverage requirements. Id. at 198:21-199:4. Stabach also described the drainage system for the parking lot, which would be integrated into the landscape. Id. at 200:1-11.

Robert Clinton (Clinton), a traffic engineer for VHB, testified next. Id. at 201:23-202:17. He testified that "[w]e performed a traffic study of the surrounding roadways." Id. at 202:18-19. Clinton asserted that the parking lot "is not a traffic generator. It may actually reduce traffic by reducing the circulating traffic." Id. at 203:23-25. Clinton concluded after conducting the traffic study, "if you were to . . . instantaneously build this overnight and do counts before and after, there would be no substantial change in the statistical daily traffic on the roadways surrounding the site." Id. at 204:8-12.

Next, Michael Cassidy (Cassidy), a Land Use/Zoning Consultant from JEM Services, spoke on Brown's behalf. Id. at 205:7-8. Cassidy testified that the ordinance governing a commercial parking lot in a C-2 zone has several requirements. Id. at 205:17-21. The first requirement demands that the parking lot only be for "temporary parking of motor vehicles." Id. at 205:22-23. He added that the same requirement does not permit "off street loading areas" and that Brown and Farview did not plan to have a loading area in the parking lot. Id. at 205:23-25. He testified that the second requirement states the only structures that can be built within the surface parking lot are "shelters of attendan[ts] or a payment kiosk." Id. at 206:1-3. He added

[1] The Record indicates Mr. Stabach's name is Jonathan Starbuck. However, Mr. Stabach's correct name appeared in his curriculum vitae entered by the Appellees during the Board hearing as Exhibit A.

that "[there] are no structures proposed, but potential[ly] if there is a commercial operator and they need a kiosk, or something, then it will conform to the requirements of the zoning ordinance." Id. at 206:4-8. Cassidy stated that the third requirement demands that parking lots "be screened and landscaped in accordance with requirement of the Zoning Ordinance." Id. at 206:17-20. Cassidy concluded saying,

> "[f]inally, it must be in compliance with the Comprehensive Plan. On January 19, 2016, the City Plan Commission granted additional approval of Brown's application for the amendment to the institutional master plan which included this proposed parking lot as well as all of the components of their plan." Id. at 207:13-19.

Peter M. Scotti (Scotti), of Peter M. Scotti & Associates Real Estate, testified as an expert witness on real estate. Id. at 208:8-17. He testified that he "believe[s] that if the petitioner's request is granted it will not injure the use and enjoyment of the neighboring properties." Id. at 210:20-23. Scotti added that he believes the parking lot

> "will also have a positive effect on surrounding uses and I believe on values. Since the applicant could use the lot for their own purposes, for university purposes without coming before you, denial of this petition to use it for public purposes would amount to more than a mere inconvenience." Id. at 211:2-9.

Scotti added that he could see no harm in the old dilapidated buildings being removed and a parking lot taking its place "for an interim period of time." Id. at 211:15-18. He again asserted that "[t]here would be no harm to the value of the surrounding property." Id. at 211:21-22.

After the closing of Attorney Teitz's presentation, Kurn voiced his opposition to the proposal. Id. at 213:12-16. Kurn cited a letter, written by an attorney who was not present at the hearing, to the Board throughout his testimony. See id. at 214:2-215:19. Kurn stated "that [the] creation of a surface parking lot is in direct contravention" of the Comprehensive Plan, as well as the IMP. Id. at 214:12-18; 215:10-19. He cited Brown's IMP and stated that "Brown's [IMP]

makes a broad statement about development inward towards the core." Id. at 215:10-12. He added that the parking lot "is at the outskirts of where I think most people would [think would] be the core of Brown University." Id. at 215:17-19.

Grant Dulgarian (Dulgarian) also commented about the proposal before the Board. Id. at 215:21. Dulgarian told the Board that Brown's claim it had eliminated 500 parking spaces should be supported by requiring Brown to submit a map. Id. at 215:22-216:1. Dulgarian further asserted that he did not believe that the seven houses Brown purchased "were in disrepair." Id. at 216:1-9. Dulgarian stated, "[t]hat stretches the imagination, and so before any decision is made, this board should request from Brown what those disrepair items are for each of the seven houses." Id. at 216:10-13.

Donna Personeus (Personeus), the Executive Director of the Thayer Street District Management Authority, made a statement. Id. at 216:25-217:2. Her organization, as well as the Thayer Street Merchants Association, supported the parking lot's construction. Id. at 217:10-14. She testified that

> "[w]ith the addition of the meters that we have, there have been some significant businesses that have been hurt by that. One in particular is the Avon Cinema where their movies go longer than two hours and the parking is two hours[.]" Id. at 217:14-19.

She told the Board that "we thank Brown for the thoughtfulness in considering it even though it's a short-term situation[.]" Id. at 218:8-10.

The Board deliberated on the special use permit in an open session. Id. at 224:1-226:7. The Board voted unanimously to "grant the special use permit for the two years from the date of the recording of the decision." Id. at 226:8-24. On May 11, 2016, the Board issued its findings and order, enumerating the facts and testimony that it relied upon to come to its conclusions. Resolution. Appellants filed a timely appeal.

II

Standard of Review

Section 45-24-69 states that an aggrieved party may appeal a decision of a zoning board to the Superior Court. The section also provides the standard by which the Court shall review a zoning board decision:

> "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;
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> "(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).

The Superior Court must "examine 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) (citation omitted). "Substantial evidence has been defined as more than a scintilla but less than a preponderance." Id. (internal quotation marks omitted). The 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." Id. (internal quotation marks omitted). In reviewing the record, the Court must "scrutinize the record as a whole to determine 'whether legally competent evidence exists to support the findings . . . .'" Id. (quoting Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I.

2004)). The Court may not weigh the evidence on appeal but must rather review the record to look for substantial evidence. Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 399 (R.I. 2001).

III

Analysis

Appellants argue that the Board's decision was "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record" and "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 45-24-69(d)(5)-(6); Appellants' Mem. in Supp. of Appeal at 5. Specifically, Appellants argue that the proposed plan did not conform to the City of Providence's Comprehensive Plan, was not an institutional use, and that the Board, Brown, and Farview (together, Respondents) provided no evidence to support findings made by the Board in granting the special use permit. Appellants' Mem. in Supp. of Appeal at 5; 9-10.

Respondents contend that there is substantial evidence in the record that supports the decision that the Board reached. Mem. of Farview and Brown in Opp'n to Appeal at 8. Respondents further argue that despite the extra requirements that the Board considered and addressed in its decision, the Board made those findings "out of an abundance of caution," and Appellants suffered no prejudice from that application. Mem. of Board in Opp'n to Appeal at 7.

i

The Special Use Permit

Brown and Farview sought a special use permit from the Board. "A 'special permit' is one issued for use which the ordinance expressly permits in a designated zone upon proof that certain facts and conditions detailed in the ordinance exist as long as the use is not injurious to

the public interest." 83 Am. Jur. 2d Zoning and Planning § 813. Rhode Island law requires that all municipalities' zoning ordinances allow for "special- use permits." Section 45-24-42 ("A zoning ordinance shall provide for the issuance of special-use permits approved by the zoning board of review, or, where unified development review is enabled pursuant to § 45-24-46.4, the planning board or commission"). Section 201 of the Ordinance provides for "special use permit[s]" and defines "[s]pecial use" as "[a] regulated use that is permitted pursuant to the special use permit issued by the authorized governmental entity." Ordinance § 201. Ordinance § 1901(B) describes the process by which an individual can apply for a special use permit. Ordinance § 1901(B).

A surface parking lot is a conditional use in a C-2 commercial district that requires a special use permit. Ordinance T12-1. Our Supreme Court has held that "any decision by a zoning authority granting or denying a special-use permit must be based on a finding that the proposed use or extension or alteration of an existing use 'is in accord with the public convenience and welfare.'" Lloyd, 62 A.3d at 1085–86 (citations omitted). The Court further required that a finding of "public convenience and welfare" prove "that a proposed use will not result in conditions that will be inimical to the public health, safety, morals and welfare." Nani v. Zoning Bd. of Review of Smithfield, 104 R.I. 150, 156, 242 A.2d 403, 406 (1968).

The lots in question are zoned in a C-2 General Commercial District. See Providence Zoning Map. The lots also have an "overlay district," in this case an I-3E Educational Institutional Overlay District. Id. Section 1106(A) of the Ordinance states that:

> "[t]he I-3E educational institutional overlay district is an overlay district and therefore allows the uses of both the base district and the use of educational facility – university or college. All development in the I-3E educational institutional overlay district is subject to the dimensional standards, design standards,

> development standards, and general standards of applicability of the base district." Ordinance § 1106(A).

Respondents contend that if Brown built the parking lot for student or staff parking, there would be no need to apply to the Board for a special use permit. Ordinance T12-1. However, because the use is not meant for the institution itself, Brown explained it applied for a special use permit, as they believed one is required for a property zoned in a C-2 designation. Id.

Ordinance § 1901(B) describes the procedure by which the Board must consider an application for a special use permit. Ordinance § 1901(B). Generally, after the Board receives an application for a special use permit, it is forwarded to the Providence Department of Planning and Development, which has thirty days to "prepare a written report of the staff's findings and recommendations[.]" Ordinance § 1901(B)(1). The Board must hold a public hearing on the merits of the special use permit and inform interested parties to the proposed change. Ordinance § 1901(B)(2). In order for the Board to authorize a special use permit, the Board must

> "a. Consider the written opinion from the department of planning and development.
> "b. Make specific findings of fact, in writing, with evidence supporting them, that demonstrate that:
>> "i. The proposed special use permit is set forth specifically in this ordinance, and complies with any conditions set forth therein for the authorization of such special use permit, including those listed in article 12.
>> "ii. Granting the proposed special use permit will not substantially injure the use and enjoyment of nor significantly devalue neighboring property.
>> "iii. Granting the proposed special use permit will not be detrimental or injurious to the general health or welfare of the community." Ordinance § 1901(B)(3)(a)-(b).

Ordinance § 1901(B)(3)(b)(i) requires that "[t]he proposed special use permit . . . complies with any conditions set forth . . . including those listed in article 12." Ordinance § 1901(B)(3)(b)(i).

Article 12 requires that surface parking lots, like the one sought by Brown and Farview, meet additional requirements. Ordinance § 1202(V)(2). These requirements are

> "a. A parking lot shall be used solely for the temporary parking of motor vehicles and shall not be used as an off-street loading area.
> "b. Only structures for the shelter of attendants or for payment kiosks shall be permitted in a parking lot. Shelters or kiosks shall not exceed ten feet in height and 50 square feet in area.
> "c. The parking lots shall be screened and landscaped in accordance with the requirements of this ordinance." Ordinance § 1202(V)(2).

Appellants maintain that Ordinance § 1901(B)(3)(c) also applies to Brown and Farview's application for a special use permit for the parking lot. Appellants argue that the Board was required to make further findings in order to grant a special use permit. These findings, Appellants argued, were necessary to comply with Ordinance § 1901(B)(3)(c), which states:

> "c. To grant a special use permit for a health care institution or educational facility – college or university in a commercial or downtown district, the zoning board of review shall find that such uses are essential and desirable to the public convenience and welfare, are in conformance with the objectives of the comprehensive plan, and that the following criteria have been met:
> "i. The proposed institutional use adheres to all dimensional requirements.
> "ii. The proposed use cannot be reasonably located on any existing property of the institution within an existing institutional district in which the use is permitted.
> "iii. Parking is provided for the proposed use in accordance with this ordinance.
> "iv. An institutional master plan has been filed and approved, and the proposed use is in conformance with the institution's master plan." Ordinance § 1901(B)(3)(c).

Appellants argue that the parking lot must meet the requirements in part (c), as well as parts (a) and (b), because Brown is an "educational facility – college or university in a commercial . . . district." Id. Appellants cite Brown and Farview's admission that the parking lot was for a

commercial use as proof that § 1901(B)(3)(c) must apply to Brown and Farview's parking lot. Ordinance § 1901(B)(3)(c).

Our Supreme Court has held that "[i]t is a well-settled principle in this jurisdiction that the rules of statutory construction apply equally to the construction of an ordinance." Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981) (citing Town of Warren v. Frost, 111 R.I. 217, 222, 301 A.2d 572, 573 (1973) (citations omitted)). This Court will "give clear and unambiguous language in an ordinance its plain and ordinary meaning." Cohen v. Duncan, 970 A.2d 550, 562 (R.I. 2009) (citing Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008)). However, "[i]f there be any doubt or ambiguity as to its meaning or the legislative intent which led to its enactment . . . it must be considered together with other relevant sections of the zoning ordinance." Earle v. Zoning Bd. of Review of Warwick, 96 R.I. 321, 325–26, 191 A.2d 161, 164 (1963) (citing State v. Haggerty, 89 R.I. 158, 160, 151 A.2d 382, 384 (1959)). The Supreme Court has stated that Courts are to "give weight and deference to a zoning board's interpretation and application of the zoning ordinance, provided its construction is not clearly erroneous or unauthorized." Cohen, 970 A.2d at 562.

Ordinance § 1901(B)(3)(c) states that "[t]o grant a special use permit for a health care institution or educational facility—college or university in a commercial . . . district, the zoning board of review shall" make several additional findings of fact. Ordinance § 1901(B)(3)(c). One interpretation of section (c) would require that any building, constructed by a health care institution, college, or university, must meet the additional criteria set forth in Ordinance § 1901(B)(3)(c). These additional requirements would put a heavy burden on Brown whenever building something that is not meant specifically for educational purposes. Alternatively, section

c could be interpreted as buildings that are built by health care institutions, colleges, or universities that are for institutional use are required to meet the additional criteria. Id.

The wording of Ordinance § 1901(B)(3)(c) leaves ambiguity. As such, this Court must consider the section "together with other relevant sections of the zoning ordinance." Earle, 96 R.I. at 325–26, 191 A.2d at 164 (citing Haggerty, 89 R.I. at 160, 151 A.2d at 384). Considering other relevant sections of the Ordinance requires the Court to first consider the codified purpose of the I-3E Educational Institutional Overlay District. The drafters of the zoning ordinance meant for these overlay districts "to encourage development in downtown and along the city's commercial corridors by permitting higher education institutional uses . . . in addition to a variety of commercial, entertainment, residential, public, and other uses in select areas." Ordinance § 1100(G). Moreover, the purpose section states "[t]his district is intended to encourage the development of educational uses while preserving and fostering the economic vitality of the downtown and the city's commercial corridors." Id.

This Court finds that the Ordinance's "meaning or the legislative intent" was to encourage and regulate both commercial and educational uses that coexist, side-by-side, in I-3E overlay districts. Earle, 96 R.I. at 325–26, 191 A.2d at 164 (citing Haggerty, 89 R.I. at 160, 151 A.2d at 384). A parking lot, made for commercial purposes, will not immediately bring a Brown institutional structure into those specific lots. However, in two years, when Brown constructs a building for institutional use, Ordinance § 1901(B)(3)(c) will apply. As this is the case, there is no side-by-side commercial and educational use. Instead, this is simply commercial use. The application of further standards does not appear to be what the authors of the Ordinance intended. Piccerelli v. Zoning Bd. of Review of Barrington, 107 R.I. 221, 229, 266 A.2d 249, 254 (1970) ("when a municipal legislative body adopts a zoning ordinance pursuant to the

provisions of the enabling act, the intention of that body is to be gathered from a consideration of the ordinance as a whole") (citing Taft v. Zoning Bd. of Review of Warwick, 75 R.I. 117, 121, 64 A.2d 200, 201 (1949). Considering Ordinance § 1901(B)(3)(c) together with Ordinance § 1100(G), this Court finds that the overlay district does not require that the Board make the additional findings of fact required by section (c). The temporary construction of a parking lot near Thayer Street by Brown does not implicate the purpose of an I-3E overlay district.

Furthermore, this Court is required to "give weight and deference to a zoning board's interpretation and application of the zoning ordinance" unless the Board's interpretation is "clearly erroneous or unauthorized." Cohen, 970 A.2d at 562. The Board's own interpretation is that the extra requirements are only applicable when the construction is meant for institutional use. Their interpretation, combined with this Court's analysis, requires that the Ordinance only apply to construction meant for institutional purposes.

This Court, having interpreted the Ordinance not to require findings under Ordinance § 1901(B)(3)(c), determines there is evidence supporting the Board's findings under Ordinance § 1901(B)(3)(a) and (b). The Board found that the parking lot met the specific requirements for both a general special use permit, as described by Ordinance § 1901(B), which defines the standards for granting a special use permit, and a special use permit for a parking lot, as described by Ordinance § 1202(V)(2), which describes the specific requirements for a surface parking lot special use permit. The Board found the special use permit satisfied the general requirements and the specific requirements for the surface parking lot. The Board also included findings that the parking lot met the requirements of Ordinance § 1901(B)(3)(c), which creates additional requirements for some institutions. It is clear that the Board's findings were supported by evidence, given the testimony described earlier and hereafter.

The Board made findings that met the requirement set forth in Ordinance § 1901(B)(3)(b)(ii). The Board found that the parking lot would "not substantially injure the use and enjoyment of nor significantly devalue neighboring property" based upon "the testimony of [Mr.] Scotti and [Mr.] Cassidy" and the CPC's resolution. Resolution ¶ 7(e). The record demonstrates that Scotti, an expert witness on real estate, testified that "[t]here would be no harm to the value of the surrounding property." Tr. 211:21-22, Apr. 13, 2016. He also stated that the parking lot "will also have a positive effect on surrounding uses and I believe on values." Id. at 211:2-4. Scotti's overall conclusion was "that if the petitioner's request is granted it will not injure the use and enjoyment of the neighboring properties." Id. at 210:20-23.

Additionally, the Board made findings that met the requirement set forth in Ordinance § 1901(B)(3)(b)(iii). The Board held "that granting the proposed special use permit will not be detrimental or injurious to the general health or welfare of the community." Resolution ¶ 8. The Board held that it "accepts the un-contradicted expert traffic study and testimony of Mr. Clinton, indicating that the proposed parking lot would have a minimal effect on traffic generation and vehicle delays[.]" Resolution ¶ 8(b). The written decision added "that the parking lot will accommodate vehicles that currently park elsewhere in the vicinity." Id. Their decision was based on Clinton's testimony that the parking lot "is not a traffic generator. It may actually reduce traffic by reducing the circulating traffic." Tr. 203:23-25, Apr. 13, 2016. Clinton testified that "if you were to . . . instantaneously build this overnight and do counts before and after, there would be no substantial change in the statistical daily traffic on the roadways surrounding the site." Id. at 204:8-12.

The Board also made findings that met Ordinance § 1901(B)(3)(b)(i) by meeting the requirements set forth in Ordinance § 1202(V)(2). As required by Ordinance § 1202(V)(2)(a),

the Board found that the lot would only be used for temporary parking. Resolution ¶ 6(a)-(b). The Board cited Cassidy's testimony that the parking lot is required and will be only for the "temporary parking of motor vehicles." Tr. 205:21-23, Apr. 13, 2016. Ordinance § 1202(V)(2)(b) requires that any structure in the parking lot will be used only to "shelter . . . attendants or a payment kiosk." Resolution ¶¶ 6(a)-(b). Brown relied on Cassidy's testimony that the lot did not have any plans for loading areas in the parking lot. Tr. 205:23-25, Apr. 13, 2016. Further, the Board found that the kiosk will meet size requirements, and "[t]he parking lot shall be screened and landscaped in accordance with the requirements of the Ordinance." Resolution ¶¶ 6(b)-(c). Finally, the Board's findings addressed Ordinance § 1202(V)(2)(c). The Board's finding relied upon Stabach's testimony that the plan met all buffer, setback, dimensional, landscape, and tree canopy coverage requirements. Tr. 198:21-199:2, Apr. 13, 2016. Stabach also testified that the drainage system complied with the Ordinance's requirements. Id. at 200:1-11.

ii

Conformance with the Comprehensive Plan

Appellants further argue that according to Ordinance § 1901(B)(3)(c), special use permits must be "in conformance with the objectives of the comprehensive plan[.]" Ordinance § 1901(B)(3)(c); Appellants' Mem. in Supp. of Appeal at 5; 9-10. Appellants explain that Rhode Island law states a zoning ordinance "shall be construed in a manner that will further the implementation of, and not be contrary to, the goals and policies and applicable elements of the comprehensive plan." Section 45-24-34(a); Appellants' Mem. in Supp. of Appeal at 5. Specifically, Appellants contend that the special use permit is in direct contravention of Objective M1 and Objective M6 in Providence's Comprehensive Plan (Plan). Appellants' Mem.

in Supp. of Appeal at 7, 9. Thus, Appellants argue that the finding that the parking lot conformed to the Plan is in error. Id. at 9.

State law requires that all decisions made by a zoning board be made to conform to the town or municipality's Comprehensive Plan. Section 45-22.2-13(b) ("[a]ll municipal land use decisions shall be in conformance with the locally adopted municipal comprehensive plan"). Our Supreme Court has addressed the importance of Comprehensive Plans in Rhode Island. The Court has stated:

> "[w]e believe a comprehensive plan is not simply the innocuous general-policy statement the town contends it is. Instead, the comprehensive plan, comprised of 'text, maps, illustrations, or other media of communication,' establishes a binding framework or blueprint that dictates town and city promulgation of conforming zoning and planning ordinances." Town of E. Greenwich v. Narragansett Elec. Co., 651 A.2d 725, 727 (R.I. 1994) (citations omitted).

Chapter 45, title 22.2 of Rhode Island's general laws requires that all towns and municipalities in the state of Rhode Island have a comprehensive plan. Section 45-22.2-2. The comprehensive plan must meet the following requirements:

> "The comprehensive plan is a statement (in text, maps, illustrations, or other media of communication) that is designed to provide a basis for rational decision making regarding the long-term physical development of the municipality. The definition of goals and policies relative to the distribution of future land uses, both public and private, forms the basis for land use decisions to guide the overall physical, economic, and social development of the municipality." Section 45-22.2-5(a).

The Board made a finding that Brown and Farview's construction of a parking lot "[was] in conformance with the objectives of the Comprehensive Plan." Resolution ¶ 9. Further, in their findings of fact, the Board stated it "accepts and agrees with the testimony of Mr. Cassidy,

and the CPC's findings, that the proposed parking lot is consistent with the objectives of the Comprehensive Plan, which promote a variety of transportation options." Resolution ¶ 9(a).

Objective M1, titled "Diverse Transportation Options," requires that the City of Providence "[p]rovide residents, businesses, employees and visitors with a variety of transportation options that are safe and convenient." City of Providence Plan at 68. If anything, the construction of a new parking lot provides more variation of transportation options to the Thayer Street area. Personeus testified before the Board that the Thayer Street Merchants Association supported Brown and Farview's construction of the parking lot. Tr. 217:10-14, Apr. 13, 2016. Personeus went so far as to thank Brown and Farview for their actions. Id. at 218:8-10. The Appellants may not prefer this parking lot as a transportation option, but this does not mean that the parking lot does not fit within the parameters of Objective M1. West v. McDonald, 18 A.3d 526, 541 (R.I. 2011) ("[t]here is no requirement that the zoning ordinances and comprehensive plan be identical. Indeed, they are meant to address substantively different issues and may contain different, yet non-conflicting, requirements.").

Objective M6 states "[p]arking – [d]evelop a citywide comprehensive approach to parking that addresses parking needs both downtown and in the neighborhoods as adequate parking is crucial to the future economic development of the city." Plan at 71 (emphasis added). Objective M6's salient subsections state:

> "G. Encourage the elimination of surface parking lots and discourage the creation of new surface parking lots as they are a detriment to the city's economic future and its built environment.
> "H. Reduce the amount of surface parking in the city to increase green space and developable land through regulations such as:
> "1. Maximum parking requirements
> "2. Tying parking requirements to proximity to transit facilities
> "3. Allowing on-street parking to be counted by businesses in their parking calculations.

> "I. Reduce paving of residential properties by expanding Residential Permit Parking throughout the City.
> . . .
> "K. Consider regulatory incentives to discourage the development of surface parking lots throughout the City." Plan at 72.

Objective M6 requires that Providence "[e]ncourage the elimination of surface parking lots and discourage the creation of new surface parking lots." Id. However, this statement does not prohibit the construction of a parking lot; it instead "discourage[s] the creation of new surface parking lots." Id. Further, Objective M6 aspires to "[r]educe the amount of surface parking in the city" and "[r]educe paving of residential properties." Id. Again, these statements set the goal of reduction, not prohibition, of the construction of surface parking lots. Finally, Objective M6 requires Providence to "[c]onsider regulatory incentives to discourage the development of surface parking lots throughout [Providence]." Id. Appellants' argument is essentially that no new surface parking lots can be built in Providence, as they do not conform to Providence's Plan. See § 45-24-42(b)(3) ("[e]stablish criteria for the issuance of each category of special-use permit that shall be in conformance with the purposes and intent of the comprehensive plan and the zoning ordinance of the city or town"). However, again, discouraging surface parking lots does not mean prohibiting them.

Appellants further argued that the Board made findings that show it was required to also apply section (c). Appellants point to Resolution ¶ 9(c), which states:

> "c. Based on the evidence, the recommendation of the CPC, and the record as a whole, the Board finds that the proposed use cannot be reasonably located on any existing property of the institution within an existing institutional district in which the use is permitted. The Property is unique to the Thayer Street area and its use for that area cannot be located elsewhere." Resolution ¶ 9(c).

Appellants argue that this finding that "the Board finds that the proposed use cannot be reasonably located on any existing property of the institution within an existing institutional district in which the use is permitted" is unsupported by evidence presented during the hearing. Respondents contend that the Board's findings in Resolution ¶ 9(c) should be ignored as the statement is "surplusage" and was not required to be addressed by the Board. The Board contends that it included Resolution ¶ 9(c) of its written findings of fact "out of an abundance of caution."

Our Supreme Court has stated that if an error is made by a zoning board that "is not prejudicial to [the] petitioner," then the error does not require reversing the zoning board's decision. Iannuccillo v. Zoning Bd. of Review of Warren, 103 R.I. 242, 245, 236 A.2d 253, 255 (1967) (holding zoning board's failure to keep a transcript was not prejudicial to the petitioner). Here, there was no showing that the inclusion of paragraph 9 in the Resolution prejudiced the Appellants. Despite the additional finding in paragraph 9(c) of the Resolution, the Court finds no prejudicial effect on the Appellants. Therefore, paragraph 9(c) of the Resolution does not give the Court grounds to overturn the Board's decision. Iannuccillo, 103 R.I. at 245, 236 A.2d at 255. Accordingly, this Court need not address the Appellants' argument that the Board did not have evidence before it to find that "[t]he proposed use cannot be reasonably located on any existing property of the institution within an existing institutional district," as that standard is not applicable. Ordinance § 1901(B)(3)(c)(ii).

The Board's findings that all requirements under Ordinance § 1901(B)(3)(a) and (b) were met and comported with the Plan is supported by substantial evidence of record. Lloyd, 62 A.3d at 1083. This Court will "not substitute its judgment for that of the zoning board" after finding "the board's decision was supported by substantial evidence in the whole record." Id. This

Court finds that only Ordinance § 1901(B)(3)(a) and (b) apply to the proposed parking lot. This Court further finds that Ordinance § 1901(B)(3)(c) would only apply when educational facilities or healthcare institutions are constructing institutional specific buildings, and not ancillary construction that is not meant for the organization's specific purpose—like education or healthcare. Accordingly, the Board made a written decisions which is supported by competent evidence and meets Ordinance § 1901(B)(3)(a)-(b) requirements. Therefore, the Board's findings were not "[a]ffected by . . . error of law," "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record," or "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 45-24-69(d).

IV

Conclusion

After a review of the entire record, this Court finds that the Board's decision was supported by the reliable, probative, and substantial evidence and was not arbitrary and capricious, or in violation of statutory or ordinance provisions. Substantial rights of the Appellants have not been prejudiced. Accordingly, this Court affirms the Board's decision to grant the special use permit.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Krikor S. Dulgarian Trust, et al. v. Arthur Strother, et al.**
CASE NO:	**PC-2016-2543**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 9, 2017**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**Joelle C. Rocha, Esq.**
For Defendant:	**Andrew M. Teitz, Esq.** **Lisa Dinerman, Esq.**