STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: March 4, 2015)

CHARLES DWELLY and MARIA QUINTAL	:	
v.	:	**C.A. No. NC-2014-0276**
ZONING BOARD OF REVIEW OF THE TOWN OF LITTLE COMPTON, sitting as the BOARD OF APPEALS, FREDRICK G. BUHRENDORF, JR., JANE P. CABOT, GRAEME BELL III, MARK SAWOSKI and HERB CASE, in their capacities as Members of said Zoning Board and JOSEPH R. MARION III	:	

DECISION

STONE, J. Charles Dwelly (Mr. Dwelly) and Maria Quintal (Ms. Quintal, jointly, Appellants) appeal from a decision of the Zoning Board of Review of the Town of Little Compton (the Zoning Board). That decision—dated June 27, 2014—reversed the Town of Little Compton Building Official, William Moore's (Building Official), decision to issue a building permit to Appellants in January 2014.

This Court has jurisdiction over this matter pursuant to G.L. 1956 § 45-24-69. For the reasons that follow, this Court remands the decision to the Zoning Board.

I

Facts and Travel

Mr. Dwelly is the owner of real property located at 9 Peckham Road, Little Compton, Rhode Island, which is designated as Lot 18 on Assessor's Plat 27 (the Property). (Zoning Board Hr'g Tr. (Tr.) 3, June 18, 2014.) Defendant/Appellee, Joseph R. Marion III (Mr. Marion) is an

abutting neighbor to the Property. Id. at 10. The Property is located in a residential zone. Id. Mr. Dwelly has been previously granted a kennel license under Little Compton Code 4-13-10, allowing him to keep up to ten dogs on the Property. Id. at 27-28; Zoning Board R. Ex. 11. He estimated that he started obtaining kennel licenses in the early 1990s. (Tr. at 27.) Mr. Dwelly owns approximately eight dogs on the Property. Id. at 17, 39.

Starting in 2012, Mr. Dwelly's neighbor, Mr. Marion, began making complaints to the Little Compton Police regarding the kennel. Mr. Marion's primary complaint was the smell of the dogs' waste and the dogs' loud barking. He hoped to establish that the configuration and condition of the kennel rose to the level of a nuisance. Because of the continuous complaints, Police Chief Wordell wrote a letter to the Town Clerk recommending the denial of Mr. Dwelly's license to maintain a dog kennel. (Zoning Board R. Ex. 9.) Mr. Dwelly's application to renew his kennel license was subsequently denied. (Zoning Board R. Ex. 10.)

On October 9, 2012, Joseph Warzycha, Special Agent of Rhode Island's Society for the Prevention of Cruelty to Animals (RISPCA), began an investigation after receiving a complaint via email stating that several Labrador Retrievers were with insufficient shelter and living in insanitary conditions on the Property. (Zoning Board R. Ex. 7.) On his first visit to the Property back in June 2011, Mr. Warzycha had found no criminal violation. Id. Mr. Warzycha's only concern was the condition of the kennels, and he instructed Mr. Dwelly to provide better maintenance. Id. On his second visit, in 2012, Mr. Warzycha made similar observations, but noticed that the kennels were slightly improved from the last time. Id. The dogs appeared in good condition and had access to water. Id. However, he informed Mr. Dwelly that pursuant to new legislation, Section 4-13-42 of the Rhode Island General Laws, caging of the animals for more than a fourteen-hour period on a daily basis was prohibited. Id. Consequently, Mr.

Warzycha stated that he would suggest that the appropriate Little Compton authority grant Mr. Dwelly the ability to continue his current practices under three conditions:

> "(1) He erect some form of structure consisting of a roof and at least three sides to protect from the wind. (2) Each dog has access to their own individual shelter that is sufficient to protect them from the inclement elements. (3) Mr. Dwelly allow Little Compton Police and/or the RISPCA access to his property at any time, to inspect the cleanliness of the kennels." Id.

In response, Mr. Dwelly decided to apply for a building permit to construct a kennel structure so that his dogs could be free and he could be in compliance with the new law. The Building Official granted the building permit. (Zoning Board R. Ex. 1.) Mr. Marion appealed the Building Official's grant of the building permit on the grounds that Mr. Dwelly's use of the Property was in violation of Little Compton Code 14-3.1(a), Table 1-A, Use C24, which requires a special use permit for the operation of kennels in a residential zone. (Zoning Board R. Ex. 2.)

A properly-advertised hearing was held on June 18, 2014. Mr. Marion appeared before the Zoning Board and testified that in order for Mr. Dwelly to "get a kennel in a residential zone, [he would] need a special use permit [] that was never applied for here." (Tr. at 10.) He also explained that he relied on Little Compton's Town Code 14-9.7,[1] Appeal, relative to getting reasonable notice, because he was not aware of the issuance of the building permit until construction materials arrived on the Property in May 2014. Id. at 10-11; 36. He claimed that Mr. Dwelly was in violation of § 4-13-42, which makes it illegal to keep any dog tethered, chained, or sheltered for more than fourteen hours during a twenty-four hour period. Id. at 15-

[1] Town Ordinance requires that the appeal of the decision of any zoning enforcement agency or officer be taken within thirty (30) days of the date of recording of the decision. Code § 14-9.7. This thirty (30) day limit is not without exception. An aggrieved party has thirty (30) days to appeal from the day he or she knew or should have known of the zoning enforcement agency or officer's decision. Id.

16. The Building Official also spoke, indicating that although he had questions regarding whether the kennel was a "grandfathered" use on the Property and whether such use pre-dated applicable zoning ordinances, he had granted the building permit in good faith in order to allow for the dogs to be protected from the elements and to make the "dog situation better and quieter for the neighborhood." Id. at 22-23.

Mr. Dwelly also testified at the hearing. He claimed that he has had a kennel license since 1989 or the early 1990s and that, as far as he knew, the licenses had always been for a maximum of ten dogs. Id. at 27-28. He stated that the only time he did not have a kennel license was when he received a Cease and Desist letter in 2005. Id. In response to receiving that letter, Mr. Dwelly communicated with the then-Building Inspector, Mr. Earnes, who informed him that he could not have a sign advertising the sale of dogs cemented on the ground on the Property, as he had at the time. Id. Since removing the sign, he claims to have always had a kennel license. Id. at 28-29. He also claimed that the building he proposed would be an overhead above the dogs so that they could get inside and out of the weather, and that it was going to be a garage on the other side and a storage area on the second floor. Id. at 27.

Ms. Quintal also testified. She reiterated what Mr. Dwelly had stated about the Cease and Desist letter and that Mr. Earnes said "[they] didn't need [a] special permit" because they were not a boarding kennel, but instead were raising and selling their own dogs. Id. at 35-36. Ms. Quintal also pointed out that Mr. Marion's argument that his appeal was made within a reasonable time is not accurate, as he had reason to know of the building permit months prior. She claimed that Appellants received a large lumber delivery by Home Depot back in August 2013 and that Mr. Marion had a clear view of the lumber from his residence because it was stacked six-feet high. Id. at 36-38; Zoning Board. R Ex. 15. She claims this placed Mr. Marion

on notice that construction on the Property was underway nine months prior to his appeal in May 2014.

On June 27, 2014, the Zoning Board reversed the decision of the Building Official and revoked Appellants' building permit. In its written decision, the Zoning Board outlined who testified at the hearing, the exhibits that were entered into the record, and the standards used by the Zoning Board in reviewing the appeal. Next, the decision explained that "[t]he Board [members] . . . all having been in attendance during the entire proceedings and the reception of the evidence in consideration thereof, entertained a motion . . . to reverse the decision of the Building Official, on the grounds that Mr. Dwelly failed to obtain the required special use permit for the operation of a kennel in a residential zone."[2] The motion was voted on by five members of the Zoning Board; four members voted in favor of the motion and one member voted against the motion. The instant appeal followed.

II

Standard of Review

This Court's review of a zoning board decision is governed by § 45-24-69(d), which provides as follows:

> "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:

[2] Town Zoning Ordinance 14-3e, Table 1-A, #C24 prohibits the erection and use of a dog kennel in a residential zone without a special use permit from the Zoning Board. Appellants have not applied for this special use permit because it is Appellants' position that they should be grandfathered, as the ordinance banning dog kennels became effective in 2005 after Appellants maintain they already had the kennel.

> "(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).

This Court "must examine the entire record to determine whether 'substantial' evidence exists to support the [zoning] board's findings." Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). The term "substantial evidence" is defined as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (internal citation omitted).

Additionally, all decisions and records of a zoning board must comply with the requirements of § 45-24-61. See § 45-24-68. Section 45-24-61 provides that a zoning board "shall include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote." The court may remand when the board has failed to resolve "the evidentiary conflicts, [make] the prerequisite factual determinations, [or] appl[y] the proper legal principles" or when "[t]he infirmities and deficiencies of the decision make judicial review impossible. . . ." May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239-40, 267 A.2d 400, 403 (1970).

III

Analysis

It is well settled that in order for this Court to engage in any meaningful analysis of the merits of any appeal from a zoning board decision, the decision itself must include findings of fact and conclusions of law. Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001); Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996); Irish P'ship v. Rommel, 518 A.2d 356, 358 (R.I. 1986); May-Day Realty Corp, 107 R.I. at 239, 267 A.2d at 403. This Court is tasked with deciding

> "whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles. Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany. These are minimal requirements. Unless they are satisfied, a judicial review of a board's work is impossible."

Bernuth, 770 A.2d at 401 (quotations omitted). Additionally, the Court will not search the record for supporting evidence, nor decide for itself what is proper in the circumstances when a zoning board fails to state findings of fact. Id. (quotation omitted). Ultimately, there were no findings of fact described which this Court could consider to determine whether there is substantial evidence that exists in the record to support the Zoning Board's decision.

The decision currently before this Court on appeal fails to comply with § 45-24-61(a). The decision merely concludes that the Building Official's decision to issue the building permit was being reversed "on the grounds that Mr. Dwelly failed to obtain the required special use permit for the operation of a kennel in a residential zone." However, there is no factual finding to support that Mr. Dwelly was *required* to file for a special use permit. In other words, the

Zoning Board fails to address or answer issues raised at the hearing regarding Mr. Dwelly's prior non-conforming use of the Property and denial of the timeliness issue.

The deficiencies in the decision make this Court's review of the Zoning Board's decision impossible. Therefore, the matter must be remanded to the Zoning Board for findings of fact and conclusions of law. See Bernuth, 770 A.2d at 402; Irish P'ship, 518 A.2d at 358. On remand, the Zoning Board should consider the issue of the timeliness of Mr. Marion's appeal. In other words, whether his appeal of the issuance of the building permit was made within a reasonable time after he was placed on notice that such building permit was issued. The Zoning Board should also make findings of fact and conclusions of law regarding the need for Mr. Dwelly to obtain a special use permit. On remand, with respect to the need for a special use permit, the Zoning Board must be mindful that zoning boards lack the statutory authority to issue declaratory judgments on the legality of a pre-existing use. See RICO Corp. v. Town of Exeter, 787 A.2d 1136, 1144 (R.I. 2001).

IV

Conclusion

After reviewing the entire record, this Court finds that the decision of the Zoning Board is in violation of statutory provisions. Accordingly, this Court remands this matter to the Zoning Board for further proceedings consistent with this Decision. This Court will retain jurisdiction over this matter.

Counsel shall submit an order for entry consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Dwelly v. Zoning Board of Review of the Town of Little Compton, et al.**
CASE NO:	**NC-2014-0276**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**March 4, 2015**
JUSTICE/MAGISTRATE:	**Stone, J.**
ATTORNEYS:	
For Plaintiff:	**Per C. Vaage, Esq.**
For Defendant:	**Richard S. Humphrey, Esq.** **Joseph R. Marion, III, Esq.**