STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: February 27, 2017)

R. CHAMPLIN CRANE & EXCAVATING, INC.,	:	
Plaintiff,	:	
v.	:	**C.A. No. WC-15-0002**
LINDA BONGIOLATTI, WALTER PAWELKIEWICZ, DAVID GIORNO, MARK DOESCHER, AND THOMAS J. CAPALBO, III, in their capacities as members of the Town of Westerly Zoning Board of Review,	:	
Defendants.	:	

DECISION

MATOS, J. Before the Court is an appeal from a decision of the Town of Westerly Zoning Board of Review (Zoning Board) upholding a determination by the Westerly Zoning Official (Zoning Official) that Appellant R. Champlin Crane & Excavating, Inc. (Appellant) was using its property located at 29-33 Old Carriage Road, Westerly, Rhode Island (Property) in violation of the "Westerly Rhode Island Zoning Ordinance of 1998" (Zoning Ordinance) by filling, dumping, storing, and/or processing sand, loam, gravel, and other construction and earthen materials. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The Property sits on Assessor's Plat/Lot 52-3A, consisting of 6.12 acres of vacant land along an unimproved town road. Zoning Board Decision (Decision) 1; Zoning Board Hr'g

(Hr'g) Ex. F. It is situated in a rural residential RR-60 zoning district, which prohibits commercial soil, sand, and gravel removal, as well as open lot storage of sand and gravel. See Zoning Ordinance §§ 260-17, 260-18; id. at ch. 260 Attachment 11:1, 11:2 (Zoning Use Table). The Property also is located within an Aquifer Protection Overlay District, thereby requiring an Aquifer Protection Permit for certain uses. See Zoning Ordinance §§ 260-15, 260-52; see also id. at § 260-17(G)(4); Zoning Use Table.

In 1974, Roger Shawn (Shawn) sold the Property to Frank Champlin, Jr., (Frank)[1] and his wife. Zoning Board Hr'g Tr. 52:22-53:2, 70:14-17, Dec. 3, 2014 (Tr.). When the parties later discovered that the deed had not been properly recorded, Shawn redeeded the Property to Frank and his wife in December 2005. Id. at 70:18-71:9, 73:1-13; see Hr'g Ex. A. Despite this snag, it is uncontroverted that Frank possessed, used, and, for all intents and purposes, rightfully owned the Property from the original 1974 transfer onward. Tr. 71:18-23, 76:19-77:17. Thereafter, in January 2006, Frank and his wife conveyed the Property to Appellant, a company owned by Frank's nephew, Richard Champlin, Jr. (Richard). Id. at 28:22-29:12, 52:11-16; see Hr'g Ex. 2.

Appellant was incorporated in Rhode Island in 1999 and has its headquarters at 20 Dunns Corner Road, Westerly, Rhode Island. Tr. 27:20-28:4, 31:17-21; see Hr'g Ex. 1. Its stated purpose is to "engage in providing crane service, construction and general trucking." Hr'g Exs. 1, D, E. Appellant uses the Property as a "borrow site": that is, Appellant takes materials from different job sites and stores them at the Property until Appellant brings the materials elsewhere for another project. See Tr. 32:21-34:4, 64:25-65:25. Richard said that he uses the Property ten to twelve times per month to truck in materials from other locations. Id. at 34:11-14. These

[1] The Court means no disrespect by referring to certain individuals herein by their first names. However, the mention of multiple Champlins in this Decision necessitates such.

materials include "basic fill, clean gravel, yellow dirt, [and] topsoil[,]" as well as remnants from demolition work, such as cement foundation and boulders. Id. at 33:22-34:4, 42:8-11.

The Property originated as a gravel bank for the purpose of excavation. See Tr. 16:14-17:7, 42:1-6, 56:9-10, 64:11-15. According to Richard, however, there is not much gravel left on the Property to excavate. Id. at 34:15-23. Town of Westerly (Town) records, including files within the Tax Assessor's office dating back to the 1980s, indicate that the Property consists of a "[g]ravel bank, dug out." Decision 1 (emphasis added); see Tr. 16:23-17:7; Decision 3. Since approval from the Westerly Planning Board in 2009, the Property has also housed a "100' monopole communication tower with nine (9) antennas."[2] Decision 2; see also Hr'g Ex. F. In a memorandum to the Westerly Town Council regarding its authorization of the cell tower, the Planning Board relayed that the Property "is used to mine sand and gravel" and "is the home of heavy equipment that is in use or in an abandoned state." Hr'g Ex. F.

Furthermore, in 2010, Appellant granted the Town an easement on the northeast corner of the Property so that the Town could comply with state regulations by creating the requisite buffer zone around a new well inserted nearby.[3] See Tr. 34:24-36:14; Hr'g Exs. 3, 4. In order to

[2] A project summary included with submittal documentation regarding construction of the tower described the Property as "[a]n approximately 6.13-acre lot that is predominantly occupied by woodland with no structures or other development. Some cleared areas exist as part of soil excavation activities by the landowner. Surrounding properties also consist of primarily undeveloped wooded land." Decision 2.

[3] The easement provides,

> "The purpose of this easement is to provide a restricted area for the protection of the water quality of a well which is to be developed as a source of public drinking water. The described easement area shall remain subject to those restrictions required by Section 3.0, or its successor, of the Rules and Regulations Pertaining to Public Drinking Water promulgated by the Rhode Island Department of Health, as a condition to the development of a well which will serve as a source of public drinking water. Said

protect the water quality of the well, which serves as a source of public drinking water, certain uses are prohibited only within the easement on the Property. See Tr. 36:17-38:13; Hr'g Exs. 3, 5. The area of the Property outside that buffer zone radius is subject only to the restrictions normally associated with the rural residential RR-60 zoning district and the Aquifer Protection Overlay District within which the Property sits.

In August 2014, the Zoning Official noted "there were activities taking place in the area that were of concern due to the close proximity to the nearby municipal water supply well at the end of Old Carriage Road." Decision 1; see Tr. 8:7-13. He observed:

> "During Site inspections made on September 5, 2014 and September 10, 2014 dump trucks were observed entering and exiting the Site and piles of gravel, loam, urban fill material, and rubble were observed at the Site. Discarded pressure treated timbers and used/damaged drain pipes were also noted to be present amongst the fill material. A bucket loader and a piece of screening equipment were also observed to be present on the [P]roperty." Decision 1; see also Zoning Board Record (Record) (photographs taken during inspections).

The Zoning Official was of the opinion that the Property "was clearly being used as a storage processing facility[,]" and he "could come up with no conclusive evidence that this activity ever existed prior to [his] observing it." Tr. 8:24-25, 9:8-10.

Thus, on September 10, 2014, the Zoning Official issued Appellant a "Notice of Apparent Zoning Violation Request for Compliance" (Notice of Violation). It set forth the following violation:

> "Filling, grading, backfilling, and/or dumping in an Aquifer Protection Overlay District and the 'open lot storage of sand and

---

> restrictions shall include but not be limited to the activities set forth in Appendix four (4) or its successor of said regulations." Hr'g Ex. 3; see also Hr'g Ex. 5 (restricted activities set forth in Appendix 4, List of Potential Sources of Groundwater Contamination).

> gravel' without an Aquifer Protection Permit in violation of Section 260-18 (Standard Zoning District Use Tables) and Section 260-52 (Aquifer Protection Overlay District)." Notice of Violation.

The Zoning Official mandated, "Operations must CEASE & DESIST IMMEDIATELY and an Aquifer Protection Permit must be applied for and received prior to continuing any activities on the Site." Id.

The next day, the Zoning Official advised Richard that gravel bank extraction was allowed as a legal nonconforming use. See Tr. 14:20-15:9; Record (September 11, 2014 note from Zoning Official's file). However, Appellant was not permitted to bring any material or filling onto the Property from off-site; an Aquifer Protection Permit would be required to process and/or store the outside materials on the Property. Tr. 15:14-16; Record (September 11, 2014 note from Zoning Official's file). The Notice of Violation, therefore, stemmed from Appellant's bringing materials onto the Property for storage and/or processing, not Appellant's extracting gravel from the Property. See Tr. 15:5-16:13.

As grounds for seeking the within appeal, Appellant claimed "a pre-existing legal nonconforming use of record and [the] Zoning Official's letter dated September 10, 2014 is in error." Application for Appeal to the Zoning Board of Review (Application for Appeal). In the Application for Appeal, Appellant described its present use of the Property as a "[p]re-existing legal nonconforming use as an excavation and gravel operation, including but not limited to the processing of outside organic materials." Id. This includes using the Property as a "loading and unloading site." Id. Appellant brought its appeal under Zoning Ordinance § 260-32: "Any structure or the use of any structure or land which structure or use was lawful at the date of enactment of this Zoning Ordinance and which is nonconforming under the provisions of this Zoning Ordinance, or which will be made nonconforming by any subsequent amendment, may

be continued . . . ." The Zoning Ordinance was adopted in 1998; the Aquifer Protection Overlay District section was amended in 1999. See Zoning Ordinance §§ 260-1, 260-3, 260-52; see also Tr. 24:16-26:10.

The Zoning Board held a public hearing on Appellant's appeal on December 3, 2014. The hearing elicited testimony from several interested individuals, and the Court will summarize that which is pertinent to this appeal. First, the Zoning Official testified to his findings and determination—namely, that Appellant was in violation of the Zoning Ordinance. See Tr. 8:7-10:18. The Zoning Official also read into the record his Zoning Narrative dated October 16, 2014, which essentially laid out his observations while inspecting the Property and his research into Appellant's use of the Property historically. See Tr. 11:3-13:17; Zoning Narrative.

Richard first spoke on behalf of Appellant. Richard is the President of Appellant, and his father, Richard Champlin, Sr. (Richard Sr.), is the Vice President. See Tr. 27:20-22, 28:10-12; see also Hr'g Ex. 1. Richard explained that when Appellant purchased the Property, it consisted of "[r]ocks, gravel, general fill, [and] some depressions from previous digging." Tr. 29:20-21. Richard testified that he was familiar with the Property prior to purchasing it from his uncle, Frank, in January 2006. Id. at 29:22-24. During the time Frank owned the Property, Richard continued, Richard and Richard Sr. used it for their business, doing "basically the same thing that [Appellant does] now." Id. at 30:2-5, 30:21-31:6. That is, they used it as a borrow site for loading and unloading materials from their assorted jobs. Id. at 30:6-12.

Richard further testified that he and Richard Sr. have been involved in business together for thirty-five years, dating back to before Appellant's incorporation in 1999; they began as a crane business when Richard worked for his father, but graduated to more excavation and trucking as Richard became more involved. Id. at 30:21-31:13. Frank was a trucker, and he

worked in conjunction with Richard and Richard Sr. on certain jobs. Id. at 32:5-23. Frank let Richard and Richard Sr. "use [the Property] pretty much like it was [their] own." Id. at 32:24-33:9. In so doing, they excavated, extracted gravel, hauled materials in to the Property, and screened them. Id. at 42:1-14. Again, Richard testified that Appellant now uses the Property ten to twelve times per month to truck in materials—including fill, gravel, dirt, topsoil, cement, and boulders—from other locations before bringing them back out for use on jobs elsewhere. Id. at 34:11-14, 33:22-34:4, 42:8-11. Richard concluded that Appellant simply wants to be able to continue using the Property for its function as a borrow site. Id. at 40:6-9, 40:17-18.

Frank testified next. Frank started "hauling out of [the Property]" in the late 1960s before he bought it in 1974. Id. at 52:24-53:3. He kept a loader on the Property, and he had a screener there, "but not very often, probably a couple of times a year, maybe for a week." Id. at 54:16-24. The Champlins screened mostly top soil; when there was extra loam at a job site, they would "bring it [back] to the [Property], screen it, and then remove it again." Id. at 54:25-55:9. Although Frank's main business was hauling out in the early days, he and Richard Sr. would bring loam and boulders onto the Property. Id. at 56:11-16. For instance, if Richard Sr. was digging a cellar somewhere, he would run into a lot of boulders. Thus, he brought them back to the Property, and Frank and Richard Sr. "would probably take them to the beach for breakwater" a few months later. Id. at 56:16-20. As a trucker, Frank worked in conjunction with Richard Sr.'s crane business, and then when Richard came along they went into excavation and bulldozing. Id. at 56:21-57:7.

Frank further noted that he appeared in a magazine article in 1990, which depicted on the first page his loader dumping into his screener. Id. at 57:12-58:4; see Hr'g Ex. 8. Underneath the picture was the caption, "Champlin Trucking's Michigan 175 loads bank-run gravel on

vibrating screen of model #40 Screenall at company pit in Bradford, R.I." Hr'g Ex. 8; see also Tr. 58:5-20. Frank bought that screener in the late 1980s and used it for a while, but it wore out and was left idle for three years before he and his friend rebuilt it. Tr. 58:21-25. The pile in the background of the photo was the gravel that had been screened already, which would remain until Frank sold it. Id. at 60:1-5.

William Colter (Colter) next testified in support of Appellant. He worked for Richard Sr.'s crane company off and on from 1977 to 1984. Id. at 61:22-62:3. If Richard Sr. did not have work for Colter at some point in time, Colter also would work for Frank. Id. at 62:5-8. Colter was a laborer and worked mostly with cranes for Richard Sr. in the excavating business, and he drove trucks for Frank. Id. at 62:9-14. As a childhood friend of Richard, the two started going to the Property with Richard Sr. and Frank when they were kids. Id. at 62:18-23. Over time, the Property transformed from a gravel bank to a borrow site. Id. at 63:2-4; see also id. at 65:10-16 (describing the term "borrow site" as "tak[ing] material from one place to store it to use someplace else"). The Champlins would bring boulders that they got from their excavation projects, such as digging a cellar, back to the Property and store them there until they were used in the crane business to build something like a breakwater or retention wall. Id. at 62:24-63:18. Colter testified that he personally drove a truck and dumped materials at the Property from the late 1970s into the 1980s. Id. at 63:19-25. He said that he would do so anywhere from four to six times per year for the five or six years that he worked for the Champlins. Id. at 64:1-10. Colter also would then remove the boulders and such that were dumped on the Property and take them to other jobs. Id. at 64:20-24.

Next, Shawn testified in opposition to Appellant's appeal. Shawn, who sold the Property to Frank in 1974, lives just east of the Property and goes by it on a daily basis. Id. at 70:14-17,

71:10-17. From 1974 to 2005—when Shawn redeeded the Property to Frank—Shawn was aware that Frank and Richard Sr. brought rocks and boulders onto the Property before they would haul them back out. Id. at 71:24-72:9. However, Shawn testified that the processing of outside organic materials never happened on the Property from 1974 to 2005 or when Shawn owned it beforehand. Id. at 72:14-24. According to Shawn, piles of loam and fill were dumped on the abutting "Cherenzia property" and processed there. Id. at 74:9-75:5. Eventually, Richard Sr. brought in bucket loaders and bulldozers and pushed all the dirt over onto the Property, apparently to the dismay of Frank. Id. at 75:5-11. The purpose behind this activity was to fill in the 300-foot long, 150-foot wide water hole, upon which the cell tower was eventually erected. Id. at 75:12-76:6. Zoning Board member Thomas J. Capalbo, III (Capalbo) questioned Shawn as to how he was able to delineate between the property lines when he no longer lived there, to which Shawn admitted that he had no proof of the Champlins dumping the piles of loam on the Cherenzia property rather than the Property. Id. at 79:5-80:5.

Albert Clemence (Clemence) also testified in opposition to Appellant. See id. at 86:17-18. Clemence is the owner of property adjacent to the Property. Id. at 86:12-17. According to him, there was "occasional dumping of solid material" at the Property from 1974 to 2006. Id. at 93:7-9. "The significant dumping began around 2006, and that's when the piece of property that now supports the cell tower was established." Id. at 93:9-12. From 2009 to 2013, Clemence did not hear any activity on the Property. Id. at 89:23-25. Beginning in the fall of 2013, however, he began to notice increased dumping there. Id. at 90:1-2. When Clemence went to the Property to investigate, he found a truck from Connecticut dumping on the Property and another truck from in town that had done so. Id. at 90:2-6. At that point, he called the Zoning Board with his concerns, and, by September 2014, the Zoning Official had gone out to the Property and

confirmed Clemence's suspicions about what was going on there. Id. at 90:6-13. When questioned by Capalbo about whether he perceived little activity or no activity on the Property from 2009 to 2013, Clemence clarified that he "[didn't] continuously monitor, and [he] wouldn't know if [the Champlins] were dumping at night, or if [he] was in the house, or [if] [he] had been gone for two or three days." Id. at 92:1-8.

Finally, interested members of the public were afforded the opportunity to speak at the hearing. Two individuals voiced their concerns regarding potential contamination of the drinking water. See id. at 98:7-99:6; 101:16-102:11. A lifelong friend of Richard attested to the preexisting nonconforming use of the Property, as he witnessed Richard haul material in and process it, whether through a mechanized screener or not. See id. at 100:1-16. Two other individuals spoke as to the Champlins' consistent use of the Property over the years. See id. at 103:12-104:5, 105:8-18.

At the close of the hearing, Capalbo made a motion to adopt the Zoning Official's findings of fact outlined in the Zoning Narrative, as well as a summary of the testimony the Zoning Board heard, as the Zoning Board's findings of fact in its Decision. Id. at 114:4-10; Decision 9; see Decision 1-9 (Findings of Fact). The motion passed unanimously. Tr. 115:9-12; Decision 9. Thereafter, Capalbo made the following motion as to the decision of the appeal:

> "Mr. Chairman, I would like to make a motion to reverse the determination of the [Z]oning [O]fficial as sufficient evidence and testimony has been entered into the record to overturn the [Z]oning [O]fficial's opinion as documented in our findings of fact. It's my interpretation from all of the testimony that there's been consistent use for over 35 years on the premises." Tr. 115:14-20; see also Decision 10.

Discussion amongst the members of the Zoning Board ensued.

Linda Bongiolatti (Bongiolatti) expressed her concern regarding what materials were coming onto the Property and the difficulty in policing and containing such activity. Tr. 117:9-11, 117:14-17. She also thought that "there was a period of time that there was nothing done [on the Property]. There was no activity." Id. at 117:12-14. Walter Pawelkiewicz (Pawelkiewicz) voted to deny the appeal and uphold the Zoning Officer's determination because "[he thought] by the own admission of the owners of the [P]roperty that they've been in violation just as the [Z]oning . . . [O]fficer found." Id. at 117:19-118:1. David Giorno (Giorno) simply stated that he "[thought the Zoning Board had] an issue here with the other place that is doing the same thing in the Town." Id. at 118:3-5. There was no further discussion between the Zoning Board members. In fact, Mark Doescher (Doescher) made no comment as to the merits or outcome of the appeal. By a vote of four to one, Capalbo's motion to reverse the Zoning Official's determination failed. Id. at 119:21-120:7.

The Zoning Board published its Decision on December 26, 2014, which, in general, recited the comments, concerns, and votes of the Zoning Board members. See Decision 10. On January 2, 2015, Appellant filed a timely appeal of the Zoning Board's Decision to this Court. See § 45-24-69(a). Thereafter, Appellant provided notice pursuant to § 45-24-69.1.

II

Standard of Review

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

> "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."

The Superior Court "lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level." Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986).

In reviewing the Decision of the Zoning Board, this Court "'must examine the entire record to determine whether 'substantial' evidence exists to support the 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)). "'Substantial evidence . . . means 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) (alteration in original) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). To avoid remand, the Zoning Board must "disclose the reasons upon which [it] base[d] [its] ultimate [D]ecision because the parties and this [C]ourt are entitled to know the reasons for the board's [D]ecision in order to avoid speculation, doubt, and unnecessary delay." Hopf v. Bd. of Review of Newport, 102 R.I. 275, 288, 230 A.2d 420, 428 (1967).

III

Analysis

The crux of the issue before the Zoning Board was whether Appellant's use of the Property constituted a legal nonconforming use. Before this Court, Appellant argues that the evidence adduced before the Zoning Board demonstrates Appellant's preexisting use of the Property. The Zoning Board counters that substantial evidence exists to support its Decision.

"A nonconforming use is a particular use of property that does not conform to the zoning restrictions applicable to that property but which use is protected because it existed lawfully before the effective date of the enactment of the zoning restrictions and has continued unabated since then." RICO Corp. v. Town of Exeter, 787 A.2d 1136, 1144 (R.I. 2001). "Thus, '[f]or a nonconforming use to be sanctioned, it must be lawfully established prior to the implementation of the zoning restriction or regulation.'" Id. (alteration in original) (quoting Town of Scituate v. O'Rourke, 103 R.I. 499, 503, 239 A.2d 176, 179 (1968)).

"It is axiomatic that the 'burden of proving a nonconforming use is upon the person or corporation asserting the nonconforming use'; it is also a basic principle that that 'burden cannot be sustained by hearsay or unsworn testimony or when the evidence of such alleged prior use is contradictory.'" Cigarrilha v. City of Providence, 64 A.3d 1208, 1212-13 (R.I. 2013) (quoting RICO Corp., 787 A.2d at 1144). "The proponent of a nonconforming use must shoulder that burden because the law views nonconforming uses as 'thorn[s] in the side of proper zoning [which] should not be perpetuated any longer than necessary.'" Id. at 1213 (alterations in original) (quoting Duffy v. Milder, 896 A.2d 27, 37 (R.I. 2006)). Our Supreme Court has "bluntly stated that '[t]he policy of zoning is to abolish nonconforming uses as speedily as justice will permit.'" Id. (alteration in original) (quoting Duffy, 896 A.2d at 37).

However, the Court need not—indeed, cannot—reach the merits of the parties' contentions, as an examination of the Zoning Board's Decision makes it clear that proper review is impossible. Our Supreme Court "has long held that 'a zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review.'" von Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001) (quoting Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996)). This Court

> "'. . . must decide 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.'" Id. (quoting Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986)).

Here, the Zoning Board did not satisfy those "minimal requirements." See id. First, the evidence of Appellant's preexisting use is mixed. See Cigarrilha, 64 A.3d at 1212-13. There was testimony both supporting and undermining Appellant's claim that it had been using the Property in the same way since before the enactment of the Zoning Ordinance or the amendment of the Aquifer Protection Overlay District section. In reaching its decision to uphold the determination of the Zoning Official, the Zoning Board made no attempt to resolve such evidentiary conflict. See von Bernuth, 770 A.2d at 401. Only Capalbo—who cast the sole vote for reversing the Zoning Official's determination—attempted to weigh the conflicting testimony by "stat[ing] that it was his interpretation from all of the testimony that there's been consistent use for over 35 years on the premises." Decision 10 (emphasis added).

It is clear that the Zoning Board did not "weigh[] . . . the evidence on questions of fact[,]" making it impossible for this Court to review the Zoning Board's judgment. Section 45-24-

69(d); see also von Bernuth, 770 A.2d at 401(quoting Irish P'ship, 518 A.2d at 358-59) (stating that this Court "'must decide whether the board members resolved the evidentiary conflicts [and] made the prerequisite factual determinations'" and, if not, "'judicial review of a board's work is impossible'").

Furthermore, the bases for the Zoning Official's determination and the Zoning Board's Decision are not specified. The Notice of Violation set forth two potential sources of Appellant's violation: §§ 260-18 (Standard Zoning District Use Tables) and 260-52 (Aquifer Protection Overlay District) of the Zoning Ordinance. At the outset of the Zoning Board hearing, the Zoning Official highlighted the difference:

> "In the first instance, though, the appeal, and the use of the [P]roperty, we need to get ironed out first, before discussion on the [Aquifer Protection Permit] going forward. Obviously, it would be an illegal use to continue and actually require the [Aquifer Protection Permit]. So there is a . . . distinction between the two pieces of information that are on the table that have been applied for." Tr. 10:9-17.

However, in voting to uphold the determination of the Zoning Officer, the Zoning Board made no mention of which section of the Zoning Ordinance Appellant had violated.[4] The Court notes

[4] When presenting his argument to the Zoning Board, Shawn's attorney also illustrated the confusion and stressed the necessary distinction:

> "The application that was submitted relative to the appeal is far different than the notice or the proceeding this evening. The notice of appeal identified that there was an excavation and gravel operation including, but not limited to, processing of outside organic materials . . . . [It] identifies that [the Zoning Official] was incorrect relative to his opinion that there was not a legal nonconforming use of record, and specifically cites the processing of outside organic materials. The proceeding tonight, as identified by [Appellant's attorney], is simply limited to the notice of there being the ability to dump on [the Property] for storage of sand and gravel and talks about doing that without an [Aquifer Protection Permit]. So the nature of the appeal as filed is different than the

that it is well settled that "adequate and sufficient notice is a requirement of due process in zoning matters." Ryan v. Zoning Bd. of Review of New Shoreham, 656 A.2d 612, 615 (R.I. 1995) (citing Zeilstra v. Barrington Zoning Bd. of Review, 417 A.2d 303, 307 (R.I. 1980); Carroll v. Zoning Bd. of Review of Providence, 104 R.I. 676, 679, 248 A.2d 321, 323 (1968)).

The source of the violation is a crucial conclusion that the Zoning Board failed to reach. First of all, § 260-18 prohibits Appellant's use of the Property as a borrow site in a rural residential RR-60 zoning district, necessitating that the nonconforming use predated the enactment of the Zoning Ordinance in 1998. See Zoning Ordinance §§ 260-17, 260-18; Zoning Use Table; see also Notice of Violation (indicating Appellant's violation was "[f]illing, grading, backfilling, and/or dumping . . . and the 'open lot storage of sand and gravel'"). Section 260-52, on the other hand, simply requires Appellant to obtain an Aquifer Protection Permit—even for an otherwise permitted use—to be in compliance with the restrictions of the Aquifer Protection Overlay District. See Zoning Ordinance §§ 260-15, 260-52; see also id. at § 260-17(G)(4); Zoning Use Table; § 260-52(D) (emphasis added) ("[I]n addition to the requirements of the underlying zoning district, an aquifer protection permit shall be required . . . ."). Moreover, the Zoning Ordinance was adopted in 1998, and the Aquifer Protection Overlay District section was amended in 1999. See Zoning Ordinance §§ 260-1, 260-3, 260-52; see also Tr. 24:16-26:9. Without clarifying which section of the Zoning Ordinance Appellant violated, the Zoning Board could not have evaluated whether Appellant's use of the Property was "lawfully established prior to the implementation of the zoning restriction or regulation." RICO Corp., 787 A.2d at 1144.

Additionally, the Zoning Board did not "appl[y] the proper legal principles." von Bernuth, 770 A.2d at 401. The comments made by the Zoning Board members before voting on

---

nature of the proceeding this evening in that regard." Tr. 80:10-81:5; see also Application for Appeal.

Capalbo's motion were "conclusional" rather than factual. See id. After the close of the public portion of the hearing, when Doescher asked the Zoning Officer about the necessity of an Aquifer Protection Permit, the Zoning Officer replied:

> "The [Aquifer Protection Permit] would come in after a determination on legality. So if it's so voted by the [Zoning Board] that the operation is legal, in my opinion, out of an abundance of caution an [Aquifer Protection Permit] should be sought just due to the location and the risk. [Appellant's attorney] may have a point that the operations were in existence before the [Aquifer Protection Permit] was in place. I'd have to look back at the prior [Z]oning [O]rdinances to confirm that there wasn't anything in place at the time, but even then trying to nail down a time-frame as to when the operation began or stopped, whether or not there was abandonment for 12 months that officially closed the nonconforming use. There [are] a lot of the questions that remain unanswered . . . ." Tr. at 118:8-22 (emphasis added).

"In [this Court's] review of the varying expressions of opinion given by the [Zoning Board], it becomes obvious that a majority of the board did not agree on any one reason for [upholding the Zoning Official's determination]." Bellevue Shopping Ctr. Assocs. v. Chase, 556 A.2d 45, 46 (R.I. 1989). Furthermore, the Zoning Board did not "'resolve[] the evidentiary conflicts [and make] the prerequisite factual determinations[.]'" von Bernuth, 770 A.2d at 401 (quoting Irish P'ship, 518 A.2d at 358-59). Without the Zoning Board's "judgment . . . as to the weight of the evidence on questions of fact[,]" the Court cannot determine "if substantial rights of the appellant have been prejudiced" by the Zoning Board's decision. Section 45-24-69(d).

The Zoning Board's Decision "was conclusional and failed to apply the proper legal principles, thereby making judicial review of the board's work impossible." von Bernuth, 770 A.2d at 402. "In the absence of sufficient findings of fact and conclusions of law, 'the [C]ourt will not search the record for supportive evidence or decide for itself what is proper in the circumstances.'" JCM, LLC v. Town of Cumberland Zoning Bd. of Review, 889 A.2d 169, 177

(R.I. 2005) (alteration in original) (quoting Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005)). Therefore, remand to the Zoning Board is necessary. See Hooper v. Goldstein, 104 R.I. 32, 44-46, 241 A.2d 809, 815-16 (1968).

IV

Conclusion

For the reasons set forth above, this Court remands this matter to the Zoning Board for further proceedings consistent with this Decision.[5] Counsel shall submit an appropriate order for entry.

[5] The transcript of the hearing reflects that two members of the Zoning Board recused themselves from Appellant's appeal. See Tr. 2:16-17, 4:22-5:8. If, on remand, the Zoning Board's composition is different, it is "the obligation of the board as newly constituted to consider the case de novo." Coderre v. Zoning Bd. of Review of Pawtucket, 103 R.I. 575, 577, 239 A.2d 729, 730-31 (1968); see also Bellevue Shopping Ctr. Assocs., 556 A.2d at 46.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**R. Champlin Crane & Excavating, Inc. v. Bongiolatti, et al.**
CASE NO:	**WC-15-0002**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**February 27, 2017**
JUSTICE/MAGISTRATE:	**Matos, J.**
ATTORNEYS:	
For Plaintiff:	**Kelly M. Fracassa, Esq.**
For Defendant:	**John A. Caletri, Esq.**