

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: November 7, 2017]

TERRAPIN DEVELOPMENT, LLC, :  
Plaintiff, :  
v. :  
TOWN OF CUMBERLAND ZONING :  
BOARD OF REVIEW, et al. :  
Defendants. :

C.A. No. PC-2017-3707

**DECISION**

**SILVERSTEIN, J.** Before the Court is Plaintiff Terrapin Development, LLC’s (Terrapin or Plaintiff) Motion for Summary Judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure. Terrapin’s Motion follows a decision by the Cumberland Zoning Board of Review (Zoning Board), denying its petition for a dimensional variance in conjunction with its proposal to construct a mixed commercial and residential development within the Town of Cumberland (Cumberland). This Court exercises jurisdiction pursuant to G.L. 1956 §§ 8-2-14, 9-30-1, and 45-24-69.

**I**

**Facts and Travel**

Terrapin is the prospective buyer of property located at 10 Nate Whipple Highway in Cumberland, designated as Assessor’s Plat 45, Lots 22, 23, 51 and 95 (the Property). The Property is currently designated as a “C-1: Limited Commercial District,” pursuant to the Cumberland Zoning Ordinance (Zoning Ordinance).

Terrapin submitted a Petition for Variance or Special Use Permit (Petition for Variance) on June 8, 2017. In its Petition to the Zoning Board, Terrapin proposed to develop the Property by constructing a commercial building, a twenty-four unit apartment building, and forty condominiums. Pursuant to the Zoning Ordinance, “Mixed-use residential” uses are permitted in a C-1 District. See Zoning Ordinance, Use Table. Mixed-use residential is defined by the Zoning Ordinance as a “[b]uilding which contains both residential and commercial uses, each of which is totally separated from the other, and where the residential use is located on an upper story of the building, or in the rear portion of the building with the commercial use facing the street frontage.” See Zoning Ordinance, Appendix A, ¶ 12.

The Cumberland Planning Board (Planning Board) issued a decision on June 14, 2017, conditionally approving Terrapin’s Master Plan for the Property. (Pl.’s Compl., Ex. B). Per the Planning Board’s Decision, approval of Terrapin’s proposal was conditioned on the “Zoning Board grant[ing] approval of the proposed commercial/residential configuration as meeting the definition of ‘Mixed-use residential’ in the Zoning Code.” Id. Further, in a letter to the Planning Board, the Town Solicitor, Thomas E. Hefner, posited that his “earlier reference to a need for a zone change or use variance has changed . . . [and] that any variance from the Zoning Board of Review could be in the form of a dimensional variance.” (Pl.’s Compl., Ex. A).

The Zoning Board held two duly noticed hearings, on July 12, 2017 and July 27, 2017, regarding Terrapin’s Petition for Variance. After the July 27, 2017 hearing, the Zoning Board issued a unanimous decision to deny Terrapin’s Petition. (Pl.’s Compl., Ex. E). In its decision, dated August 3, 2017, the Zoning Board determined that “the appropriate method to grant this variance is via a use variance or via a Town Council zone change.” Id. Further, the Zoning Board found that the “Mixed-Use Residential” use permitted in the C-1 district “is expressly

conditioned on meeting certain dimensional requirements . . . [and] such requirements may not be waived or reduced merely by showing compliance with the standard for granting a dimensional variance or deviation.” Id. Accordingly, the Zoning Board “den[ied] the application of Terrapin Development, LLC as the Board determined it is without authority to grant the requested relief.” Id.

Terrapin timely appealed the Zoning Board’s Decision. In its Complaint, Plaintiff requests declaratory judgment with respect to the jurisdiction of the Zoning Board to consider a dimensional variance for a particular development proposal; appeals the decision of the Zoning Board; and requests further declaratory judgment stating that its due process rights have been violated by the Zoning Board. The Zoning Board responded to Plaintiff’s Complaint on August 22, 2017. Terrapin subsequently moved for summary judgment on its Complaint, and the Zoning Board opposed Terrapin’s Motion. Each party has submitted an accompanying memorandum in support of its respective positions.

## II

### Standard of Review

Under the Uniform Declaratory Judgments Act (UDJA), this Court possesses the “power to declare rights, status, and other legal relations whether or not further relief is or could be claimed.” Sec. 9-30-1. A decision to grant or deny relief, however, is purely discretionary under the UDJA. Sullivan v. Chafee, 703 A.2d 748, 751 (R.I. 1997). The stated purpose of the UDJA is “to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” Sec. 9-30-12; see also Millett v. Housing Eng’rs’ Licensing Div. of Dep’t of Labor, 119 R.I. 285, 291, 377 A.2d 229, 233 (1977) (“The purpose of declaratory judgement actions is to render disputes concerning the legal rights and duties of parties justiciable without

proof of a wrong committed by one party against another, and thus facilitate the termination of controversies.”). Factors to be considered when determining whether declaratory judgment relief is appropriate include “the existence of another remedy, the availability of other relief, the fact that a question may readily be presented in an actual trial, and the fact that there is pending, at the time of the commencement of the declaratory action, another action or proceeding which involves the same parties and in which may be adjudicated the same identical issues that are involved in the declaratory action.” Berberian v. Trivisono, 114 R.I. 269, 273, 332 A.2d 121, 123-24 (1975).

In the present matter, the Court will examine the question of declaratory judgment relief in light of the concurrent appeal of the Zoning Board’s decision. It is well established that “zoning boards are statutory bodies whose powers are legislatively delineated.” Bellevue-Ochre Point Neighborhood Ass’n v. Pres. Soc’y of Newport Cty., 151 A.3d 1223, 1229 (R.I. 2017) (quoting Duffy v. Milder, 896 A.2d 27, 36 (R.I. 2006)) (internal brackets omitted).

With regard to its review of the Zoning Board’s decision, the Court is granted jurisdiction pursuant to § 45-24-69(d) which states that:

“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.”

This Court is obliged to accord deference to the decision of the zoning board, the members of which are “presumed to have knowledge concerning those matters which are related to effective administration of the zoning ordinance.” Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). The rules of statutory construction, however, are used to interpret a zoning ordinance when questions of law are at issue. See Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008); see also Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981) (“It is a well-settled principle in this jurisdiction that the rules of statutory construction apply equally to the construction of an ordinance.”). The Court may modify a decision of the Board if, inter alia, the findings are clearly erroneous or otherwise affected by legal error. Sec. 45-24-69(d)(5).

### III

#### Discussion

In moving for summary judgment on its claim for declaratory judgment, Terrapin argues that the Zoning Board erroneously determined that it does not possess jurisdiction to grant the requested dimensional variance. Terrapin maintains that the Zoning Board does have the authority to grant the requested variance, that a dimensional variance is a proper method to advance the proposal, and that the Zoning Board erred when it found that Mixed-use residential use in a C-1 district is expressly conditioned on specific dimensional requirements. Conversely, the Zoning Board argues that either a use variance or zoning change is the proper relief and that Mixed-Use Residential use is expressly conditioned on meeting certain dimensional requirements.

## A

### Declaratory Judgment<sup>1</sup>

Terrapin first asks this Court to declare that the Zoning Board has jurisdiction to grant a dimensional variance in connection with an application that requests relief from the spatial requirements detailed in the Zoning Ordinance. This request arises from the Zoning Board's decision in this matter which states "[t]hat the Zoning Board . . . does hereby deny the application for dimensional relief pursuant to applicable provisions of the [Zoning Ordinance], and does hereby deny the application of Terrapin Development, LLC as the Board determined it is without authority to grant the requested relief, as noted herein." (Pl.'s Compl., Ex. E). Moreover, the Zoning Board also determined that "it is clear the applicant seeks a true variance . . . and that the appropriate method to grant this variance is via a use variance or via a Town Council zone change." Id.

The powers of the Zoning Board are "legislatively delineated." Bellevue-Ochre, 151 A.3d at 1229 (internal quotations omitted). The Rhode Island Zoning Enabling Act (RIZEA) and the Zoning Ordinance clearly set forth the Zoning Board's jurisdiction and grants the responsibility of interpreting the Zoning Ordinance to local officials. See Sec. 45-24-57; Zoning Ordinance, art. 17. The Zoning Board additionally has express authority to authorize variances from the Zoning Ordinance in cases of hardship. Zoning Ordinance, § 17-8; see also sec. 45-24-57. Thus, the

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<sup>1</sup> The Court also notes that Count Three of Terrapin's Complaint requests "[a] declaration by this Court . . . that the Zoning Board, by denying Plaintiff the opportunity of a hearing on the merits, violated Plaintiff's due process rights." (Pl.'s Compl. 9.) Terrapin has not properly expanded upon this allegation in its supporting Memorandum, and the Court exercises its discretion to decline Terrapin's request. See Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1131 n.1 (R.I. 2002) ("Simply stating an issue . . . without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue.").

declaration requested by Terrapin—i.e., specific interpretation of the Zoning Ordinance—clearly falls within the purview of the Zoning Board. See id.; see also Bellevue-Ochre, 151 A.3d at 1229-30; Hein v. Town of Foster Zoning Bd. of Review, 632 A.2d 643 (R.I. 1993) (affirming the zoning board’s decision upholding the zoning official’s determination of whether a proposed barn would constitute an accessory under the local ordinance).

It has been recognized “that a party is not precluded from proceeding under the UDJA, particularly when ‘the complaint seeks a declaration that the challenged ordinance or rule is facially unconstitutional or in excess of statutory powers, or that the agency or board had no jurisdiction.’” Tucker Estates Charlestown, LLC v. Town of Charlestown, 964 A.2d 1138, 1140 (R.I. 2009) (quoting Kingsley v. Miller, 120 R.I. 372, 374, 388 A.2d 357, 359 (1978)). Our Supreme Court has further established, however, that a hearing justice is “not obligated to hear and decided [a] declaratory judgment action,” particularly when he or she finds “that this is clearly a task more appropriate for the local zoning officials.” Bellevue-Ochre, 151 A.3d at 1230 (internal quotations and brackets omitted). Therefore, the Court exercises its discretion to decline Terrapin’s request for declaratory judgment. Sullivan, 703 A.2d at 751.

## **B**

### **Appeal of the Zoning Board’s Decision**

Terrapin argues that the appropriate relief in this instance is a dimensional variance. Plaintiff explains that residential uses are permitted by right in a C-1 District. In response, the Zoning Board maintains that the appropriate means of relief would be a use variance, zone change, or creation of a mixed-use special district on the Property. Whether Plaintiff’s proposal for the Property ought to be considered a dimensional variance under the Zoning Ordinance constitutes a question of law.

Section 45-24-31(66) defines the two variances recognized under RIZEA. In seeking a use variance, the applicant seeks permission to employ a prohibited use on a zoned parcel of land; whereas in seeking a dimensional variance, the applicant requests permission to deviate from the dimensional requirements for a permitted use on a zoned parcel of land.<sup>2</sup> Sec. 45-24-31(66)(i)-(ii). Moreover, there is a “distinction set forth in § 45-24-41 between the evidentiary showing necessary for a use variance and the lesser threshold for a dimensional variance . . . .” Lischio v. Zoning Bd. of Review of Town of N. Kingstown, 818 A.2d 685, 692 (R.I. 2003). In order to grant a use variance, the zoning board must find that “the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance.” Sec. 45-24-41(e)(1); see Lischio, 818 A.2d at 695 n.4. When considering a dimensional variance, however, the zoning board must find “that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience.” Sec. 45-24-41(e)(2); see Lischio, 818 A.2d at 691.

Plaintiff’s proposed development envisions a commercial building located at the front of the Property, a twenty-four unit apartment building situated behind the commercial building, and

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<sup>2</sup> The terms “use variance” and “dimensional variance” are defined in § 45-24-31(66)(i)-(ii) as follows:

“(i) Use Variance. Permission to depart from the use requirements of a zoning ordinance where the applicant for the requested variance has shown by evidence upon the record that the subject land or structure cannot yield any beneficial use if it is to conform to the provisions of the zoning ordinance.

“(ii) Dimensional Variance. Permission to depart from the dimensional requirements of a zoning ordinance, where the applicant for the requested relief has shown, by evidence upon the record, that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations. However, the fact that a use may be more profitable or that a structure may be more valuable after the relief is granted are not grounds for relief.”



forty condominium units behind the apartment building. Terrapin’s argument focuses on the definition of “Mixed-use residential,” which it contends merely governs where the residential aspect of the development should be located within the zoned property. In support, Plaintiff points to the Zoning Ordinance, which expressly permits “Mixed-use residential” as an allowed use in a C-1 District, and the provided definition of “Mixed-use residential.” Zoning Ordinance, Use Table; Zoning Ordinance, Appendix A: Use Regulations Definitions ¶ 12.

The Zoning District Use Table expressly prohibits the use of single family, two family, and multi-family dwellings in a C-1 District. Zoning Ordinance, Use Table. Moreover, the definition of “Mixed-use residential” contained in the Zoning Ordinance plainly envisions both the residential and commercial uses being contained in the same building. See Zoning Ordinance, Appendix A: Use Regulations Definitions ¶ 12 (“Building which contains both residential and commercial uses . . . where the residential use is located on an upper story of the building, or in the rear portion of the building . . .”) (emphasis added). A development which contains multiple buildings with varying uses is also contemplated in the Zoning Ordinance. Pursuant to Article 2 of the Zoning Ordinance, “Mixed-Use” is defined as

“[a] mixture of land uses within a single development, building or lot. Under no circumstances shall a second principal use be regarded as accessory to another. Each use of the property, whether or not combined with another, must be permitted in the zoning district and must each comply with all dimensional and other zoning requirements.” Zoning Ordinance, Article 2: Definitions (emphasis added).

In the present matter, Terrapin’s proposal envisions locating the commercial aspect of the development in an entirely separate building from the residential units. Thus, as stated in Article 2 of the Zoning Ordinance, the proposed uses contemplated by Plaintiff’s proposal—specifically commercial and multi-household dwellings—are not permitted on this lot.

Terrapin further relies on a New Jersey case, Hillsborough Towne Ctr. Assocs., LLC v. Bd. of Adjustment of Twp. of Hillsborough, 2015 WL 5446683 (N.J. App. Div. Sept. 15, 2015), to support its contention that the altered configuration proposed merely requires a dimensional variance. Terrapin’s reliance is misplaced. In Hillsborough, the applicant sought to construct five mixed-use buildings—containing “retail and/or office uses, along with residential apartments.” Hillsborough, 2015 WL 5446683, at \*1-3. The applicable zoning ordinance “permit[ted] mixed use buildings incorporating retail, office and residential uses, simply not in the configuration contemplated by [the applicant].” Id. at \*1. The zoning ordinance, however, “restrict[ed] the location of offices and residences” and permitted these uses “only if they are located above the first floor.” Id. at \*2. Nevertheless, in three of the five proposed buildings, the applicant sought to utilize the first floor space for “retail and/or offices.” Id. at \*3. The Court noted that “[o]ffice use is allowed in the district—in the form of freestanding buildings away from the main roadways, and on second or third floors of mixed use buildings.” Id. at \*11. Ultimately, the Court found that the proposed layout did not require a use variance, as determined by the zoning board, but rather a “conditional use variance . . . was required.”<sup>3</sup> Id. at \*12 (emphasis added). Here, Terrapin is not proposing an analogous layout alteration to the proposal at issue in Hillsborough. Rather, Terrapin proposes locating the residential use in entirely separate buildings, an expressly prohibited use within the zoned district. Zoning Ordinance, Use Table. Freestanding residential uses are simply not permitted in C-1 Districts. Zoning Ordinance, Use Table. Therefore, for the reasons stated above, the decision of the Zoning Board is affirmed.

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<sup>3</sup> The relevant New Jersey Statute defines a “conditional use,” as follows:

“a use permitted in a particular zoning district only upon a showing that such use in a specified location will comply with the conditions and standards for the location or operation of such use as contained in the zoning ordinance, and upon the issuance of an authorization therefor by the planning board.” See N.J.S.A. 40:55D-3.

## **IV**

### **Conclusion**

For the reasons stated herein, the Court declines to grant Terrapin's request for declaratory judgment. Further, after review of the entire record, the Court finds that the decision of the Zoning Board is not affected by error of law or in violation of ordinance provisions. Moreover, substantial rights of Terrapin have not been prejudiced. Accordingly, Terrapin's appeal is denied, and this Court affirms the decision of the Zoning Board. Prevailing counsel shall present an appropriate order consistent herewith which shall be settled after due notice to counsel of record.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Terrapin Development, LLC v. Town of Cumberland Zoning Board of Review, et al.

**CASE NO:** C.A. No. PC-2017-3707

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** November 7, 2017

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

**ATTORNEYS:**

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