STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[FILED: August 2, 2019]

Ralph A. Tompkins, Jr., Trust A, *Plaintiff*,	:	
v.	:	**C.A. No. NC-2018-0067**
Frederick G. Buhrendorf, in his capacity as member of The Town of Little Compton Zoning Board;	:	
Mark Sawoski, in his capacity as member of The Town of Little Compton Zoning Board;	:	
Herbert A. Case, in his capacity as member of The Town of Little Compton Zoning Board;	:	
William Ryan, in his capacity as member of The Town of Little Compton Zoning Board;	:	
Franklin Pond, in his capacity as member of The Town of Little Compton Zoning Board;	:	
The Town of Little Compton;	:	
Christopher Hall and Katrinka Hall; *Defendants*.	:	

DECISION

CARNES, J. This matter is an appeal from the Little Compton Zoning Board of Review (Zoning Board) decision sustaining the issuance of a building permit by the Town of Little Compton Building Official (Building Official). Jurisdiction is pursuant to G.L. 1956 §§ 9-30-1 and 45-24-69.

I

Facts and Travel

Applicants Christopher and Katrinka Hall (Halls) own the subject property located at 17B Rockbridge Drive, Little Compton, Rhode Island, 02874, Plat 47, Lot 10-5 (Lot 10-5 or Property). (Zoning Board Decision at 1). Plaintiff Ralph A. Tompkins, Jr., Trust A is the owner of neighboring property located at 9 Whistler Point Road, Little Compton, Rhode Island. (Compl. ¶ 1).

Lot 10-5 was created in 2008 as a result of the subdivision of the Property. In May 2007, Edward and Claire Thompson, the owners of Lot 10-1, submitted a Minor Subdivision Application to the Planning Board of the Town of Little Compton (Planning Board), seeking to subdivide their 5.4 acre lot into two lots under § 2.2.2(a) of the Little Compton Subdivision Regulations, titled "Two-Lot One-Time-Only Compound[.]" *See* June 5, 2007 Planning Board Meeting Minutes at 2. Subdivision Regulations § 2.2.2(a) allows for "the division of land into not more than two (2) lots, without the provision of a street where one would otherwise be required." Little Compton Subdivision Regulations, Appendix C, Art. 2, § 2.2.2(a).[1] On June 5, 2007, the Planning Board unanimously approved of the One Time Only Subdivision, but this was "conditioned upon the Little Compton fire chief inspecting and approving the travel way marked on plan as Lane for

[1] "Two-Lot One-Time-Only Compound ('Compound') [Ed. Note: Prior to December 27, 1995, this was called 'Minor subdivision']. A Two-Lot One-Time-Only Compound Minor Subdivision shall mean the division of land into not more than two (2) lots, without the provision of a street where one would otherwise be required. The requirements for the driveway, which may be by easement, are set forth in Appendix D at Section D.2.2.f. A Compound shall not occur more than once for any property. In the event of any re-subdivision of either of the lots resulting from the Compound, then this classification shall not be available to the applicant, and the re-subdivision shall be considered a Major Subdivision and shall meet all the requirements thereof, including a major subdivision street. No public hearing is required for this classification." Little Compton Subdivision Regulations § 2.2.2(a).

Travel and that it leads to a public street[.]" (June 5, 2007 Planning Board Meeting Minutes at 2). On July 23, 2008, the Planning Board gave the final approval for the subdivision of Lot 10-1 and the approved subdivision plan was recorded in the Town Plan Book at Book 16, Page 36. No appeal was taken within the twenty days following the Planning Board's final approval. (Zoning Board Decision at 3); *see* Little Compton Subdivision Regulations, Appendix C, Art. 8, § 8.11.3.[2]

On August 8, 2017, the Halls purchased the Property for $355,000. Although the Property had exchanged hands several times prior, it was still vacant at the time the Halls took possession of it in 2017. Before applying for the building permit, the Halls made certain improvements to the Property's right of way as required by the approved subdivision plan prior to obtaining a building permit. (Zoning Board Decision at 3).[3] The Halls further prepared architectural and engineering plans for their home and submitted them to the Town for review. On November 1, 2017, the Halls filed their building permit application to construct a residence and a garage on the Property. (Zoning Board Decision at 1). Building Official Daniel P. Joubert, Sr. approved and issued the building permit on November 7, 2017. *Id.* at 2.

On November 30, 2017, the Plaintiff timely appealed the issuance of the building permit. (Zoning Board Decision at 1).[4] Therein, the Plaintiff claimed the building permit should not have

---

[2] "Time Period and Standing. An appeal to the Board of Appeal from a decision or action of the Board or Administrative Officer may be taken by an aggrieved party. Such appeal must be taken within twenty (20) days after the decision has been recorded and posted in the office of the Town Clerk." Little Compton Subdivision Regulations, Appendix C, Art. 8, § 8.11.3(a).

[3] In their memorandum to the Zoning Board, the Halls explain they "completed the access improvements in accordance with the requirements and specifications set forth on Notes 9 and 10 of the approved subdivision plan." (Halls' Zoning Board Mem. at 2).

[4] Section 14-9.7 of the Little Compton Zoning Ordinances states in part:

> "An appeal to the Board from a decision of any other zoning enforcement agency or officer, or the Planning Board, may be taken by an aggrieved party. Such appeal shall be taken within thirty (30) days of the date of the recording of the decision of the officer or

been issued because the Property did not have the 175 feet of "minimum street frontage" pursuant to § 14-4.1 of the Little Compton Zoning Ordinances. In a memorandum submitted to the Town Solicitor shortly thereafter, the Plaintiff's attorney, Paul Ryan, further explained that the different definitions of a "street" found in Little Compton's Zoning Ordinances[5] and Subdivision Regulations[6] conflicted with each other as well as the mandatory definitions found in the Rhode Island Zoning Enabling Act of 1991 §§ 45-24-27 *et seq.*, and the Rhode Island Land Development and Subdivision Review Enabling Act of 1992, §§ 45-23-25 *et seq.* (Subdivision Review Enabling Act). As a result, Mr. Ryan asserted that Lot 10-5's private right of way, created as part of Subdivision Regulations § 2.2.2(a), does not constitute a street.

The Little Compton Zoning Board of Review, acting as the Board of Appeals, held a hearing for the Plaintiff's appeal on January 17, 2018. (Tr. at 2, Jan. 17, 2018.) At the outset of the hearing, the Halls' attorney, Gerald Petros, moved to dismiss this appeal because the Zoning Board could not deny the issuance of the building permit on the basis that the Plaintiff provided. *Id.* at 4. Since the Property was created through the subdivision of Lot 10-1 as permitted by Subdivision Regulations § 2.2.2(a), providing for the creation of a two-lot subdivision "without the provision of a street where one would otherwise be required[,]" Mr. Petros explained that the Property did not require 175 feet of street frontage as required by § 14-4.1 of the Little Compton

---

> agency, or within thirty (30) days of the time when the aggrieved party knew or should have known of the action or decision of such officer or agency." Sec. 14-9.7(a).

[5] "Street shall mean a public right-of-way established by or maintained under public authority, a private way open for public uses, and a private way plotted or laid out for ultimate public use, whether or not constructed." Little Compton Zoning Ordinances § 14-10(98).

[6] "Street" is defined as "[a] public or private thoroughfare used, or intended to be used, for passage or travel by motor vehicles." Little Compton Subdivision Regulations, Appendix C, Art. 10, § 10.40. "Private Way" is defined in part as "[a] road providing legal frontage for no more than two (2) lots. . . . Driveways are excluded from this definition." Little Compton Subdivision Regulations, Appendix C, Art. 10, § 10.34.

Zoning Ordinances. *Id.* at 4-5. Because no appeal was taken within the twenty days following the Planning Board's final approval of the subdivision on July 23, 2008, Mr. Petros asserted that the Planning Board's 2008 decision was no longer challengeable or appealable as of August 13, 2008. *Id.* at 6. Mr. Petros further explained that the Halls had already made the improvements to the Property necessary to obtain a permit and had put down the foundation before the Plaintiff's appeal was filed. *Id.* at 7. Additionally, Mr. Petros contended that the Zoning Board did not otherwise have the authority to assess the validity of Subdivision Regulations § 2.2.2(a), and therefore could not deny the issuance of the building permit on this basis. *Id.* at 8-9. Mr. Petros asserted that any potential challenge to the validity of Subdivision Regulations § 2.2.2(a) could not be used to retroactively challenge the Planning Board's approval of this subdivision from ten years ago. *Id.* at 9-10.

The Plaintiff's attorney, Paul Ryan, argued that Subdivision Regulation § 2.2.2(a) is not in compliance with state law because it creates a lot with no lawful "frontage" abutting a "street." *Id.* at 13-14. More specifically, Mr. Ryan claimed that the Property's private right of way, created as part of Subdivision Regulations § 2.2.2(a), does not constitute a "street" under the § 14-10(98) of the Little Compton Zoning Ordinances or the Subdivision Review Enabling Act. *Id.* However, when asked directly, Mr. Ryan conceded that the essence of the appeal was the argument that Subdivision Regulations § 2.2.2(a) is invalid for it conflicts with the Zoning Ordinance and the Subdivision Review Enabling Act. *Id.* at 20. Although he further conceded that no one appealed the Planning Board's approval of this subdivision in 2008, Mr. Ryan argued that the building permit itself was "the real notice of what had happened with this subdivision." *Id.* at 15-18. In support of this argument, Mr. Ryan points to the fact that the Property remained vacant for the ten years following the approval of the subdivision. *Id.* at 18.

In response to Mr. Ryan's acknowledgment that the sole basis of this appeal was to challenge the validity of Subdivision Regulations § 2.2.2(a), Mr. Petros argued the purpose of this appeal was an attempt to collaterally attack the Planning Board's original approval of the subdivision in 2008. *Id.* at 21. Mr. Petros explained that the Zoning Board should not reconsider the Planning Board's 2008 approval of the subdivision as part of the instant appeal because the Zoning Board has no role in determining the legality of the Subdivision Regulations. *Id.* at 21-22. At one point before the Board of Appeals, Mr. Petros stated that the actual posting of the Planning Board's decision was the legal notice required under the Planning Board Regulations in 2008 and, therefore, the question of personal knowledge or actual knowledge of the subdivision was not the standard to apply. *Id.* at 22. Mr. Petros claimed that the instant building permit appeal is effectively an appeal of the Planning Board's approval of the subdivision in 2008 because the Plaintiff raised no issues relating to the substance of the building permit. *Id.* at 23.

After brief deliberation, the Board of Appeals granted Mr. Petros's oral motion to dismiss the appeal because the Plaintiff's sole argument pertained to the legality of what happened before the Planning Board in 2008 and not the building permit at issue on this appeal. *Id.* at 25-28.

On February 8, 2018, the Board of Appeals issued its written decision, recorded in the Little Compton Land Evidence Records at Book 317, Page 309. The Decision states:

> "The Appellants only challenge is that the Building Official should not have issued the building permit because the Property does not have 175' of frontage on a 'street.'
>
> "The Building Official correctly and properly issued the Building Permit because the 2008 subdivision approval that created the Property provides for and approves access to the Property. In fact, Appendix C Article 2.2.2.a of the Code specifically permits subdivision 'without the provision of a street where one would otherwise be required.'

> "The Building Official correctly and properly issued the Building Permit for the Property because the Halls' application met all of the necessary requirements for a building permit." (Zoning Board Decision at 2).

The Zoning Board further found that "[t]he frontage and access issues raised in the Appeal are the same issues that the Planning Board considered and decided in their July 23, 2008 subdivision approval." *Id.* at 3. The Decision further states "Appendix C Article 8.11.3 of the Code requires that an appeal of a Planning Board decision be appealed to the Board within 20 days after that Planning Board decision is posted and recorded." *Id.* Having determined that "[t]he time for any challenge to the Planning Board's decision that created the subdivision/buildable lot expired in August of 2008[,]" the Zoning Board found it did "not have jurisdiction to reconsider or review the July 23, 2008 Planning Board decision because the Appeal is untimely." *Id.* The Decision further states:

> "The Board recognizes that "[Subdivision Regulation § 2.2.2(a)] is in accord with the remainder of the Code, The Town Comprehensive Plan, the Rhode Island Zoning Enabling Act and the Rhode Island Land Development and Subdivision Review Enabling Act of 1992.
>
> "The Board presumes that any Regulation enacted by the Planning Board is valid and enforceable. *D'Angelo v. Knights of Columbus Bldg. Ass'n*, [89 R.I. 76, 83] 151 A.2d 495, 498-99 (R.I. 1959).
>
> "The Board does not have authority to adopt, amend, invalidate, or repeal Subdivision Regulations; that authority lies with the Planning Board. R.I. Gen. Laws § 45-23-72; LC Town Code Appendix C Article 9.2." *Id.* at 3-4.

Accordingly, the Zoning Board found it "does not have the jurisdiction or authority to determine the validity of a Planning Board Regulation in an appeal from a building permit." *Id.* at 4.

The Plaintiff filed a timely appeal with this Court on February 27, 2018. In addition to the administrative appeal, the Plaintiff included a declaratory judgment claim to have this Court make a determination as to the Plaintiff's right to a public hearing before the Zoning Board on the

question of whether Lot 10-5 is a buildable lot and a legal determination on whether the issuance of a building permit is proper. Furthermore, the Plaintiff seeks a declaration that "Section 2.2.2(a) of Little Compton Subdivision Regulations as applied to the Division of Lot 10 of Assessor's Plat 47 in 2008 is in conflict with the town's Zoning Ordinance provisions requiring frontage on a street[]" and that it violates State Law. Compl. at 5.

II

Standard of Review

The Superior Court had jurisdiction over appeals from a zoning board pursuant to § 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:
>
> > "(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).

III

Analysis

A

Building Permit Appeal

Upon review of the record, this Court recognizes that the sole basis of this appeal is to challenge the validity of Subdivision Regulations § 2.2.2(a) as it was relied upon by the Planning Board to approve of the subdivision of Lot 10-1 in 2008 which created the Property. The Plaintiff contends that the Planning Board should not have approved of this subdivision creating Lot 10-5 because Subdivision Regulations § 2.2.2(a) is invalid as it conflicts with the Zoning Ordinances and the Subdivision Review Enabling Act. It is clear this challenge should have been raised as either part of an appeal from the Planning Board's approval of the subdivision creating the Property in 2008 or as part of an appeal from the enactment of Subdivision Regulations § 2.2.2(a) in 1995. In order to approve of the subdivision in 2008, the Planning Board had to make a positive finding that "[t]he proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance[.]" Sec. 45-23-60(a)(2). To appeal the Planning Board's approval of the subdivision, it must have been "taken within twenty (20) days after the decision has been recorded in the city's or town's land evidence records and posted in the office of the city or town clerk." Sec. 45-23-67(a); *see* Subdivision Regulations § 8.11.3. Furthermore, Subdivision Regulations § 2.2.2(a) did not require the Planning Board to hold a public hearing on the Thompsons' application for the subdivision of Lot 10-1 in 2007, or when the Planning Board acted in 2008. *See* § 45-23-38(a) ("Minor plan review consists of two (2) stages, preliminary and final;

provided, that if a street creation or extension is involved, or a request for variances and/or special-use permits are submitted, pursuant to the regulation's unified development review provisions, a public hearing is required.").[7]

Moreover, the Plaintiff could have made this argument on appeal from the original enactment of Subdivision Regulations § 2.2.2(a) in 1995 under § 45-23-72(b), when the Plaintiff could have asserted that Subdivision Regulations § 2.2.2(a) "is not consistent with the Comprehensive Planning Act, chapter 22.2 of this title; the Rhode Island Zoning Enabling Act of 1991, §§ 45-24-27 *et seq.*; the municipality's comprehensive plan; or the municipality's zoning ordinance." However, "[a]ny appeal of an enactment of or an amendment of local regulations may be taken to the superior court for the county in which the municipality is situated by filing a complaint, as stated in this section, within thirty (30) days after the enactment, or amendment has become effective." Sec. 45-23-72(a), (b); *see* Little Compton Subdivision Regulations, Appendix C, Art. 9, § 9.4.1. If the Plaintiff did own property in Little Compton at the time in 1995, the Plaintiff would have been entitled to notice of the hearing as a member of the public. *See* Little

[7] For a minor subdivision, a public hearing is only required if the subdivision requires "street extension or creation." Little Compton Subdivision Regulations, Appendix C, Art. 8, § 8.5.2. This is consistent with § 45-23-38 of the Subdivision Review Enabling Act, which states:

> "(f) **Decision**. If no street creation or extension is required, the planning board will approve, deny, or approve with conditions, the preliminary plan within sixty-five (65) days of certification of completeness, or within any further time that is agreed to by the applicant and the board, according to the requirements of §§ 45-23-60 and 45-23-63. ***If a street extension or creation is required***, the planning board will hold a public hearing prior to approval according to the requirements in § 45-23-42 and will approve, deny, or approve with conditions, the preliminary plan within ninety-five (95) days of certification of completeness, or within any specified time that is agreed to by the applicant and the board, according to the requirements of §§ 45-23-60 and 45-23-63." (Emphasis added) Sec. 45-23-38(f).

Compton Subdivision Regulations, Appendix C, Art. 9, § 9.3. Otherwise, if the Plaintiff did not yet own any property in Little Compton as of 1995, the Plaintiff would have bought the property taking Little Compton's Subdivision Regulations as they existed, having no right to appeal from the Little Compton Subdivision Regulations enacted before owning any property.

The Rhode Island Supreme Court has stressed that '"[s]tatutes prescribing the time and the procedure to be followed by a litigant attempting to secure appellate review are to be strictly construed."' *Sousa v. Town of Coventry*, 774 A.2d 812, 814 (R.I. 2001) (quoting *Seibert v. Clark*, 619 A.2d 1108, 1111 (R.I. 1993)). Therefore, while the Plaintiff could have previously argued that Subdivision Regulations § 2.2.2(a) was inconsistent with the Zoning Ordinances under § 45-23-67 or inconsistent with the Subdivision Review Enabling Act under § 45-23-72, this Court is without jurisdiction to consider arguments related to such appeals at this time because they would be untimely.

It is well-settled that the Zoning Board does not possess the authority to assess the validity of Subdivision Regulations § 2.2.2(a) when considering an appeal from the issuance of a building permit. "[T]he authority of [a] zoning board of review is limited in scope to that expressly conferred by statute." *Franco v. Wheelock*, 750 A.2d 957, 960 (R.I. 2000) (citing *Noonan v. Zoning Board of Review of Barrington*, 90 R.I. 466, 471, 159 A.2d 606, 608 (1960)). A zoning board "is wholly a statutory creature which has been assigned a definite, but limited, role in the administration of the zoning laws, and it is without powers, rights, duties or responsibilities save for those conferred upon it by the Legislature." *Hassell v. Zoning Bd. of Review of City of E. Providence*, 108 R.I. 349, 351-52, 275 A.2d 646, 648 (1971) (citing *Reynolds v. Zoning Board of Review of Town of Lincoln*, 96 R.I. 340, 343, 191 A.2d 350, 352-53 (1963)). Pursuant to § 45-24-57(1)(i), a zoning board of review is authorized to hear and decide appeals to determine whether

"there is an error in any order, requirement, decision, or determination made by an administrative officer or agency in the enforcement or interpretation of this chapter, or of any ordinance adopted pursuant hereto." Sec. 45-24-57(1)(i); *see* Little Compton Zoning Ordinances § 14-9.3(a).[8] When acting in this appellate capacity, reviewing the issuance of the building permit, the zoning board "has the powers of the officer from whom the appeal was taken." Sec. 45-24-68.[9] *See* Roland F. Chase, *Rhode Island Zoning Handbook* § 189 at 187 (3d ed. 2016) (citing *Zeilstra v. Barrington Zoning Bd. of Review*, 417 A.2d 303, 309 (R.I. 1980)).

When considering an appeal from an administrative determination, the zoning board must "assume the validity of zoning provisions controlling its decision." *See* Roland F. Chase, *Rhode Island Zoning Handbook* § 122 at 117 (3d ed. 2016). Addressing the role of a zoning board when reviewing an appeal from the issuance of a building permit, the Supreme Court stated:

> "It was the clear duty of the board in acting on the petitioner's appeal to assume the validity of the amendment on which the building inspector relied in refusing the use permit, since nothing in the enabling act can be construed as conferring on boards of review jurisdiction to pass on the validity of zoning ordinances or amendments thereto." *Town & Country Mobile Homes, Inc. v. Zoning Bd. of Review of City of Pawtucket*, 91 R.I. 464, 468, 165 A.2d 510, 512 (1960).

---

[8] Section 14-9.3(a) states the Zoning Board is authorized "[t]o hear and decide appeals in a timely fashion where it is alleged there is error in any order, requirement, decision, or determination made by an administrative officer or agency in the enforcement of interpretation of this chapter." Little Compton Zoning Ordinances § 14-9.3(a).

[9] Section 45-24-68 states:

> "In exercising its powers the zoning board of review may, in conformity with the provisions of this chapter, reverse or affirm wholly or partly and may modify the order, requirement, decision, or determination appealed from and may make any orders, requirements, decisions, or determinations that ought to be made, and to that end has the powers of the officer from whom the appeal was taken. All decisions and records of the zoning board of review respecting appeals shall conform to the provisions of § 45-24-61." Sec. 45-24-68.

See Zeilstra, 417 A.2d at 309 (quoting *Arc-Lan Co. v. Zoning Board of Review of North Providence*, 106 R.I. 474, 476, 261 A.2d 280, 282 (1970)) ("When presented with [an] application for a building permit, the [building official] had no authority whatsoever 'other than to determine that the proposed construction conform(ed) precisely to the terms of the pertinent provisions of the zoning ordinance.'"); *Ajootian v. Zoning Bd. of Review of City of Providence*, 85 R.I. 441, 446, 132 A.2d 836, 839 (1957) ("Having acquired jurisdiction of the case by such appeals, the board has the power to exercise its authority in conformity with the provisions of the zoning ordinance.").

The Supreme Court has explained "[i]t is a general rule that local zoning ordinances acquire a presumption of legality[,]" and "[t]his presumption of validity includes the presumption that the zoning enactments were in accordance with a comprehensive plan[.]" *D'Angelo*, 89 R.I. at 83, 151 A.2d at 498–99 (internal citations and quotations omitted). Therefore, "a zoning board of review may not, either directly or indirectly, act so as to, in effect, amend the provisions of a zoning ordinance and that it is without authority to nullify the pertinent provisions of the instant ordinance." *Arc-Lan Co.*, 106 R.I. at 477, 261 A.2d at 282; *see Matteson v. Zoning Bd. of Review of City of Warwick*, 79 R.I. 121, 123, 84 A.2d 611, 612 (1951) ("The board is bound by the plain provisions of the ordinance and any attempt to amend it is clearly beyond the powers expressly delegated to the board. Any such change can be brought about only by the body authorized to enact and amend the ordinance[.]").

Here, the Zoning Board has no authority to consider the validity of a subdivision regulation when reviewing the appeal of this building permit because no such authority was ever delegated to the Zoning Board to do so. "Pursuant to § 45-23-51 of the Development Review Act, control of land development and subdivision projects is required to be conferred upon the planning board." *Munroe v. Town of East Greenwich*, 733 A.2d 703, 706 (R.I. 1999); *see Noonan*, 90 R.I. at 470,

159 A.2d at 608 ("In our opinion a board of review is without authority to divide or to regulate the subdivision of land. . . . We are of the opinion that [§ 45-24-19] neither confers such authority upon boards of review nor authorizes local legislatures to confer such authority upon them."). Through this building permit appeal, the Plaintiff asked the Zoning Board to find that the Planning Board's approval of this subdivision was invalid because the Property's private right of way, established pursuant to Subdivision Regulations § 2.2.2(a), conflicts with what constitutes a street under the Little Compton Zoning Ordinances and the Subdivision Review Enabling Act. However, when considering this appeal, the Zoning Board does not have the authority to determine whether Subdivision Regulations § 2.2.2(a) conflicts with either the Zoning Ordinances or the Subdivision Review Enabling Act. *See Noonan*, 90 R.I. at 470, 159 A.2d at 608 (citing *M. & L. Die & Tool Co. v. Board of Review of City of Newport*, 77 R.I. 443, 446, 76 A.2d 538 (1950)) ("Nothing in the record here indicates that petitioners were prosecuting an appeal from an order or decision of an administrative board or officer or that any such board or officer has been vested with authority to subdivide land in the manner sought."). By making such a determination, the Zoning Board would effectively be attempting to amend the provisions of the Subdivision Regulations over which it has no authority. *See Arc-Lan Co.*, 106 R.I. at 476, 261 A.2d at 282. For the same reasons the Zoning Board must presume the validity of ordinances, it follows that the Subdivision Regulations are entitled to this same presumption and cannot be invalidated by the Zoning Board on appeal. *See D'Angelo*, 89 R.I. at 83, 151 A.2d at 498-99. Therefore, because the jurisdiction of the zoning board of review "is limited in scope to that expressly conferred by the statute[,]" this Court upholds the Zoning Board's dismissal of the appeal because the Plaintiff's argument solely relied on a determination that Subdivision Regulations § 2.2.2(a) is rendered invalid by the Zoning Board. *Arc-Lan Co.*, 106 R.I. at 476, 261 A.2d at 282.

B

Declaratory Judgment

The Plaintiff further requests a declaratory judgment. The Plaintiff asks this Court to determine whether Subdivision Regulations § 2.2.2(a) conflicts with what constitutes a street under the Little Compton Zoning Ordinances and the Subdivision Review Enabling Act.

The Supreme Court recognizes "that the validity or applicability of an agency rule or practice may be decided in an action for declaratory relief, notwithstanding the fact that an administrative hearing was requested." *Town of Richmond v. R.I. Dep't of Envtl. Mgmt.*, 941 A.2d 151, 156 (R.I. 2008) (citing *Newbay Corp. v. Annarummo*, 587 A.2d 63, 65 (R.I. 1991)). The Supreme Court has also 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.'" *Bellevue-Ochre Point Neighborhood Ass'n v. Pres. Soc'y of Newport Cty.*, 151 A.3d 1223, 1231 (R.I. 2017) (quoting *Tucker Estates Charlestown, LLC v. Town of Charlestown*, 964 A.2d 1138, 1140 (R.I. 2009) (internal citations and quotations omitted)). Whether Subdivision Regulations § 2.2.2(a) conflicts with what constitutes a street under the Little Compton Zoning Ordinances and the Subdivision Review Enabling Act is a fundamental issue to be addressed in the first instance. Although the substance of the Plaintiff's administrative appeal is related to the declaratory judgment claim to an extent, this Court's jurisdiction over these claims is distinct and "[a]n administrative appeal and a civil trial differ greatly with respect to governing procedural rules, burdens of proof, and standards of review." *Nickerson v. Reitsma*, 853 A.2d 1202, 1205 (R.I. 2004). Accordingly, the Court will exercise its discretion to hear the Plaintiff's action for

declaratory judgment regarding the prospective application of Subdivision Regulations § 2.2.2(a) separate from the instant administrative appeal.

However, based on the equitable doctrine of laches, this Court will not consider the validity of Subdivision Regulations § 2.2.2(a) as relied upon by the Planning Board to approve of the subdivision creating the Property in 2008. *See Northern Trust Co. v. Zoning Bd. of Review of Town of Westerly*, 899 A.2d 517, 519-20 (R.I. 2006). The Supreme Court recognizes declaratory judgment proceedings as being "sufficiently equitable in nature to justify the application of the doctrine of laches in appropriate circumstances." *Id.* at 520 n.6; *see* 22A Am. Jur. 2d *Declaratory Judgments* § 186 at 749 (2003) ("Since proceedings for declaratory relief have a great deal in common with equitable proceedings, the equitable doctrine of laches has been applied in such proceedings."). "[L]aches is unreasonable delay by the plaintiff in prosecuting a claim or protecting a right of which the plaintiff knew or should have known, and under circumstances causing prejudice to the defendant." *Arena v. City of Providence*, 919 A.2d 379, 396 n.13 (R.I. 2007) (quoting 1 Dan B. Dobbs, *Law of Remedies* § 2.4(4) at 103 (2d ed.1993)).

This Court finds that proceeding with the Plaintiff's declaratory judgment claim, as it relates to the Planning Board's reliance on Subdivision Regulations § 2.2.2(a) in approving of the subdivision in 2008, would unduly prejudice the Halls. Since its creation by subdivision over ten years ago, the Property has been conveyed multiple times to purchasers under the expectation that it was a buildable lot. Since purchasing the Property for $355,000 in August 2017, the Halls further invested their time and money into the Property by preparing the architectural and engineering plans for construction and making the improvements to the right of way, as required by the approved subdivision plan, to obtain a building permit. According to the Halls, they have already laid the foundation and began construction. Based on the investment of time and money the Halls

made in reliance upon the valid existence of this subdivision, a determination from this Court that the Planning Board's 2008 subdivision was improper will cause the Halls undue financial harm. Nothing in the record or otherwise suggests that the Halls would have had any reason to suspect something was wrong with the subdivision which created the Property ten years prior. Meanwhile, as previously explained, the Plaintiff had the opportunity to either appeal from the enactment of Subdivision Regulations § 2.2.2(a) in 1995 or appeal from the Planning Board's approval of the subdivision of Lot 10-1 in 2008.[10] There is no indication that the Plaintiff did not receive the notice required under the Subdivision Regulations.

The facts before the Court evidences why "there be a definite period of time established within which a claim of appeal from such a decision must be made." *Hardy v. Zoning Bd. of Review of Coventry,* 113 R.I. 375, 379, 321 A.2d 289, 292 (1974). In *Northern Trust*, finding "no adequate justification for instituting a declaratory judgment action in order to challenge the legality of a subdivision more than two decades after the fact[,]" the Supreme Court presumed that the "egregious nature of the delay" would prejudice the defendants. 899 A.2d at 519-20. This Court similarly finds that raising the equitable doctrine of laches *sua sponte* in this instance is '"an appropriate remedy that would serve the ends of justice.'" *Arena*, 919 A.2d at 396 (quoting *Blue Cross & Blue Shield of Rhode Island v. Najarian*, 911 A.2d 706, 711 n.5 (R.I. 2006)); *see Northern Trust*, 899 A.2d at 520 n.6 ("[W]e are not troubled by the fact that we are raising the issue of laches *sua sponte*. Other courts have acted similarly when convinced that the public interest would be best served by doing so."); 5 Patricia E. Salkin, *American Law of Zoning* § 45:10 n.2 (5th ed.

[10] Subdivision Regulation § 8.11.3(a) states that an appeal from a decision of the Planning Board "must be taken within twenty (20) days after the decision has been recorded and posted in the office of the Town Clerk." *See* footnote 2, *supra*. On July 23, 2008, the Planning Board gave final subdivision approval, and then the Planning Board Chair signed that approval and recorded it in the Town Plan Book at Book 16, Page 36.

May 2019 update) ("An action for a declaratory judgment will be barred by laches where plaintiffs failed to challenge the zoning ordinance for more than five years and defendants spent large sums of money in reliance upon the ordinance in issue."). Therefore, the Court finds the Plaintiff's requested declaratory judgment regarding the validity of Subdivision Regulations § 2.2.2(a), as it relates to the Planning Board's approval of the subdivision of Lot 10-1 in 2008, is time-barred.

IV

Conclusion

The Zoning Board's decision to dismiss the Plaintiff's appeal is upheld as the Zoning Board was without jurisdiction to consider the basis of the appeal. This Court will exercise its discretion to hear the Plaintiff's action for declaratory judgment regarding the prospective application of Subdivision Regulations § 2.2.2(a) separate from the instant administrative appeal. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Ralph A. Tompkins, Jr., Trust A v. Frederick G. Buhrendorf, et al.
CASE NO:	NC-2018-0067
COURT:	Newport County Superior Court
DATE DECISION FILED:	August 2, 2019
JUSTICE/MAGISTRATE:	Carnes, J.
ATTORNEYS:	
For Plaintiff:	S. Paul Ryan, Esq.
For Defendant:	Richard S. Humphrey, Esq.; Andrew Tugan, Esq.