STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[Filed: March 4, 2020]

MARGARET F. PALMER, Trustee,	:	
***Plaintiff*,**	:	
VS.	:	**C.A. No. NC-2017-0251**
	:	
CITY OF NEWPORT ZONING BOARD OF REVIEW, REBECCA MCSWEENEY, CHRISTOPHER KIRWIN, ROBERT BUZARD, HEIDI BLANK, RICHARD B. RUDD, CHARLES ALLOTT AND BARTHOLOMEW GRIMES, in their capacities as members of the City of Newport Zoning Board of Review, 183 OLD BEACH ROAD, LLC and HORAN BUILDING COMPANY, INC.,	:	
***Defendants*.**	:	***- Consolidated with –***

MARGARET F. PALMER, Trustee,	:	
***Plaintiff*,**	:	
VS.	:	**C.A. No. NC-2019-0322**
	:	
CITY OF NEWPORT ZONING BOARD OF REVIEW, CHRISTOPHER KIRWIN, ROBERT BUZARD, CHARLES ALLOTT, WICK RUDD AND BART GRIMES, in their capacities as members of the City of Newport Zoning Board of Review, 183 OLD BEACH ROAD, LLC, HORAN BUILDING COMPANY, LLC, and DONNA R. MORVILLO, TRUSTEE OF THE DONNA R. MORVILLO REVOCABLE TRUST, u/d/t dated June 27, 2014,	:	
***Defendants*.**	:	

DECISION

VAN COUYGHEN, J. This case is before the Court after remand to the City of Newport Zoning Board of Review (the Zoning Board) for further findings of fact and conclusions of law on the question of whether a driveway area (the Subject Area) adjacent to Margaret F. Palmer, Trustee's (Appellant) property is required to meet the ten (10') foot accessory use setback provided in §17.100.080(B) of the City of Newport Zoning Ordinance (Ordinance).[1] After rehearing, the Zoning Board issued a decision concluding that regardless of whether the Subject Area is considered a driveway, a turnaround, or a parking area, it is not required to meet the ten foot accessory use setback. For the reasons stated herein, this Court affirms the Zoning Board's decision. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

A detailed recitation of the facts of this case can be found in *Palmer v. City of Newport Zoning Board of Review*, No. NC-2017-0251, 2018 WL 4001531 (R.I. Super. Aug. 14, 2018). This Court will discuss only those pertinent factual developments since its remand. This Court remanded NC-2017-0251 to the Zoning Board, with instructions to provide adequate findings of fact and conclusions of law for its Finding of Fact No. 5, which provided as follows:

> "5. That the portion of what the Appellant's [sic] have claimed is a parking area and the Appellee's [sic] have claimed is part of the driveway adjacent to the west property line is not required to comply with the 10 foot accessory use setback requirement in the Zoning Ordinance."

Because the composition of the Zoning Board had changed since the date of the original hearing, the Zoning Board held a *de novo* hearing on December 10, 2018 to determine whether the

[1] The other issues raised by Appellant were resolved in the Court's decision in CA No. NC-2017-0251.

Subject Area must comply with the ten-foot accessory use setback. The first witness to testify at the hearing in support of Appellant was Derick Hopkins (Mr. Hopkins), whom the Zoning Board qualified as an engineering expert. Mr. Hopkins testified that based on his review of the "Proposed Site Plan" and "Existing Conditions Plan," which were accepted as Appellant's Exhibits C and D, respectively, the plan showed zero feet between the driveway area and the rear property line of the property at 183 Old Beach Road, Newport, Rhode Island (the Property). (Tr. at 7-11, Dec. 10, 2018 (Tr.).) Mr. Hopkins testified that in his opinion, driveways are just the portion of pavement that takes one from the road to a final destination, and that a turnaround is not part of a driveway. Mr. Hopkins noted that although turnarounds are not unusual, an area 10' to 12' deep is the usual depth for a turnaround for a residential property and that he had never seen a 20' deep turnaround at a residential property. He concluded that the Subject Area is not a driveway or part of a driveway but rather is a parking area large enough to park two cars. (Tr. at 12-13.)

Appellant also testified. She testified that her home, located at 236 Eustis Avenue, Newport, Rhode Island, (the Palmer Property), which was highlighted on a tax plat accepted by the Board as Appellant's Exhibit E, is directly behind the Property to the west and that her family has owned it since 1986. (Tr. at 30.) She testified that her elderly mother resides at the Palmer Property and that she visits quite often. Ms. Palmer claimed that there are an excessive number of cars parked day and night at the Property, including cars consistently parking in the Subject Area. (Tr. at 27-28.) She testified that the lights of the cars parked in the Subject Area shine towards her house, and since her bedroom is on the side of her house closest to the Subject Area, she has experienced a loss of privacy for her home. *Id.*

Appellees' witness was Mark Horan (Mr. Horan), manager of 183 Old Beach Road, LLC that formally owned the Property. Mr. Horan testified that the driveway for the Property was

generally built according to the plans, with the exception that it was built smaller. (Tr. at 45-46.) He claimed that the purpose of the Subject Area is so that you can exit from the garage or from parking in front of it, turn around, and not have to back out all of the way down the driveway. (Tr. at 47.) He also testified that in addition to being a turnaround, cars park in the Subject Area, and that if the Subject Area were 10 feet deep and cars parked in it, those cars would block access to the garage. (Tr. at 49.)

At the conclusion of the testimony, Newport Zoning Officer Guy Weston advised the Board that in his opinion, parking areas for single or two-family dwellings do not have to meet accessory use setback requirements because it is a necessary and inherent part of a single-family residential use. (Tr. at 60.) After closing the hearing, and based on the testimony and evidence presented, the Zoning Board issued a written decision on March 1, 2019 and made the following findings of fact and conclusions of law:

> 1. The Newport Zoning Code requires single family dwellings to have off-street parking. Driveways and/or parking areas are necessary to accommodate such parking; and,
>
> 2. Regardless of whether it is called a driveway, a turnaround or a parking area, the subject area is not a separate use or accessory use of the Property. Rather, it is a necessary and inherent part of the single-family residential use. As a result, it is not required to meet the accessory use setbacks in Section 17.100.080 of the Newport Zoning Code. (Appellant's Mem. 6.)

It was discovered after the December 10, 2018 hearing was held, and after the parties returned to the Superior Court to establish a briefing schedule, that the December 10, 2018 hearing had not been properly advertised. Accordingly, the parties held another hearing on June 24, 2019, this time properly advertised. At the properly advertised rehearing, the transcript and exhibits from the December 10, 2018 hearing were introduced with the agreement of the parties and the Zoning Board, and any other interested parties were given the opportunity to be heard. After the hearing

on June 24, 2019, the Zoning Board issued a decision recorded on July 9, 2019 that was in substance the same as the one that had been recorded on March 1, 2019, including the same conclusion regarding the Subject Area.

II

Standard of Review

Section 45-24-69(a) provides this Court with the specific authority to review the decision of a zoning board. This Court's review 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. Section 45-24-69(d).

Under the "traditional judicial review" standard, this 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.'" *Restivo v. Lynch*, 707 A.2d 663, 665-66 (R.I. 1998) (quoting *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986)). If the Court "'can conscientiously find that the board's decision was supported by substantial evidence in the whole record,'" it must uphold that decision. *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). Legally competent 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.'" *Brindle v. Rhode Island Department of Labor & Training, By & Through Its Director,* 211 A.3d 930, 934 (R.I. 2019), *cert. denied sub nom., Brindle v. Delta Airlines, Inc.*, No. 19-352, 2020 WL 129565 (U.S. Jan. 13, 2020) (quoting *Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review*, 749 A.2d 1121, 1125 (R.I. 2000)).

III

Analysis

Appellant claims that the Zoning Board erred when it concluded that "the [S]ubject [A]rea is not a separate use or accessory use of the Property." Appellant claims that the development of the area for use by motor vehicles is an accessory use that must comply with § 17.100.080(B) of the Zoning Ordinance, which requires that accessory uses be located at least ten feet from side and rear property lines in a R-20 residential district. Appellees object to Appellant's argument and claim that a driveway for a single-family house is not a separate "use" of the Property, accessory or otherwise. Appellees contend that the driveway and parking area are an inherent part of a single family dwelling and that the Zoning Board's decision, along with its findings of fact, are supported by substantial evidence.

Appellant's argument that the Subject Area is an accessory use lacks merit. The Ordinance defines an "accessory use" as "a use of land or of a building, or portion thereof, customarily incidental and subordinate to the principal use of the land or building. An accessory use may be restricted to the same lot as the principal use. An accessory use shall not be permitted without the principal use to which it is related." Ordinance § 17.08.010; § 45-24-31(3). In addition, the Ordinance defines "use" as "[t]he purpose or activity for which land or buildings are designed,

arranged, or intended, or for which land or buildings are occupied or maintained." Ordinance § 17.08.010; § 45-24-31(65).

The rules of statutory interpretation apply to the construction of a zoning ordinance. *Mongony v. Bevilacqua*, 432 A.2d 661, 663 (R.I. 1981). In construing an ordinance, the Court "give[s] clear and unambiguous language in an ordinance its plain and ordinary meaning." *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008). "[W]hen the language of a statute or a zoning ordinance is clear and certain, there is nothing left for interpretation and the ordinance must be interpreted literally." *Mongony*, 432 A.2d at 663. This Court also gives "weight and deference to a zoning board's interpretation and application of the zoning ordinance, provided its construction is not clearly erroneous or unauthorized." *Cohen v. Duncan*, 970 A.2d 550, 562 (R.I. 2009).

Common types of accessory uses in residential zones include the display and sale of farm or garden produce or greenhouse stock raised on the property by the owner and outbuildings and structures customarily incidental to the main use of the property as a residence. *See* 2 Rathkopf's *The Law of Zoning and Planning* § 33:2 (4th ed.) (Dec. 2019 Update). Other types of accessory uses include sheds, tool houses, swimming pools, tennis courts, and greenhouses. *Id.*; *see also LaMontagne v. Zoning Board of Review of City of Warwick*, 95 R.I. 248, 249, 186 A.2d 239, 240 (1962) (interpreting the zoning code to find that accessory buildings and accessory uses including detached garages in a residential district are permitted, because they are clearly incidental to and customarily associated with the principal use.); *Hardy v. Zoning Board of Review of Town of Coventry*, 119 R.I. 533, 382 A.2d 520 (1977) (holding "toilet and washing facilities are not 'accessory' to the permitted use of the area as a campground, within the definition of 'accessory

use' set forth in zoning ordinance . . . a use clearly incidental or subordinate to the principal use on the same premises.").

The Subject Area at issue here is part and parcel of the single-family use, as the Property was not "designed, arranged, or intended" as an area solely for parking, nor is it "maintained" for that purpose. Ordinance § 17.08.010. Instead, the Subject Area was constructed to address the requirements within the Zoning Ordinance, which require that single-family dwellings have off-street parking. Ordinance § 17.104.020(A). As such, off-street parking, which is what the Subject Area is used for, is not an optional accessory use but a mandatory component of a single-family home under the Ordinance. *Id.*

Additionally, Zoning Officer Weston, a member of the Zoning Board, testified that in his opinion, parking areas for single or two-family dwellings do not have to meet accessory use setback requirements because off-street parking is a necessary and inherent part of a single-family residential use. Although Mr. Hopkins testified that the Subject Area is not part of the driveway but instead is a parking area, and thus should comply with the accessory use setback requirements, it is well settled that "there is no talismanic significance to expert testimony. It may be accepted or rejected by the trier of fact." *Restivo*, 707 A.2d at 671 (citing *Kyle v. Pawtucket Redevelopment Agency*, 106 R.I. 670, 673, 262 A.2d 636, 638 (1970)). Testifying as an engineering expert, Mr. Hopkins did not rely on any statute, ordinance or other authority to support his theories regarding the status of the Subject Area. *See Gaglione v. DiMuro*, 478 A.2d 573, 576 (R.I. 1984) (holding that statements which constitute mere unsupported conclusions do not constitute probative evidence).

In delivering their decision, the members of the Zoning Board weighed all of the testimony at the hearing and appropriately drew upon their knowledge of the Zoning Ordinance in evaluating

whether the Subject Area was an accessory use and thus needed to comply with the accessory use setback requirements. Their factual findings merit deference from this Court. *Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1, 8 (R.I. 2005) (The deference this Court gives to the zoning board's decision and findings is, however, conditional upon the board's providing adequate findings of fact that support its decision.). This is due, in part, to the principle that "a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance." *Pawtucket Transfer Operations, LLC*, 944 A.2d at 859 (citing *Monforte v. Zoning Board of Review of City of East Providence*, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)).

In light of the deference the Court must afford the Zoning Board because of its expertise in the administration of the Zoning Ordinance, the Zoning Board's finding that the Subject Area is not an accessory use and thus is not required to meet the accessory use setback, was not clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. Accordingly, the Zoning Board's decision is upheld.

IV

Conclusion

After a review of the entire record, this Court affirms the decision of the Zoning Board because the decision was supported by the reliable, probative, and substantial evidence, was not arbitrary or capricious, and was not in violation of constitutional, statutory or ordinance provisions. The Zoning Board's decision also was not affected by error of law and was not characterized by an abuse of discretion. Substantial rights of Appellant have not been prejudiced.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Margaret F. Palmer, Trustee v. City of Newport Zoning Board of Review, et al.
CASE NO:	NC-2017-0251; NC-2019-0322
COURT:	Newport County Superior Court
DATE DECISION FILED:	March 4, 2020
JUSTICE/MAGISTRATE:	Van Couyghen, J.
ATTORNEYS:	
For Plaintiff:	Matthew H. Leys, Esq.
For Defendant:	Girard Galvin, Esq.