STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: November 21, 2022)

REVITY ENERGY LLC,	:	
Appellant,	:	
	:	
v.	:	**C.A. No. WC-2021-526**
	:	
HOPKINTON ZONING BOARD OF REVIEW; JONATHAN URE; RONNIE SPOSATO; DANIEL HARRINGTON; JOSEPH A. YORK and CHIP HEIL, in their capacities as members of the HOPKINTON ZONING BOARD OF REVIEW,	:	
Appellees.	:	

DECISION

MCHUGH, J. Before this Court is Revity Energy LLC's (Appellant) appeal from the October 21, 2021 written decision (Decision) of the Hopkinton Zoning Board of Review (Zoning Board), sitting as the Board of Appeals, denying Appellant's appeal from the Hopkinton Planning Board's (Planning Board) October 7, 2020 Record of Vote imposing conditions on approval of Appellant's October 16, 2019 application for Development Plan Review (DPR). Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

I

Facts and Travel

A

Development Plan Review

On October 16, 2019, Appellant filed an application for DPR (the Application), proposing the construction of a photovoltaic solar energy system (PSES) within a Manufacturing

Zone in Hopkinton, Rhode Island, on the property located at 15 Frontier Road, Assessor's Plat 7, Lots 62, 62A, and 63. (Appellees' Resp. Mem. Ex. B (Town of Hopkinton Zoning Board of Appeals Decision) 5.) At the time of the Application, PSES was a permitted use in a Manufacturing Zone, and no zoning change was required to accommodate the proposed use. *Id.* The Application "came before the Planning Board for pre-application on November 6, 2019, and for DPR on March 4, 2020, June 3, 2020, July 1, 2020, July 15, 2020, August 5, 2020, September 2, 2020, and October 7, 2020." *Id.* at 6.

March 4, 2020 Planning Board Hearing

At the March 4, 2020 hearing, Appellant's landscape architect, John Carter, provided an overview of the existing vegetation on the subject property as part of his presentation to the Planning Board. (Appellees' Resp. Mem. Ex. F (Mar. 4, 2020 Planning Bd. Mins.) 11-12.)

Later in the hearing, several members of the public spoke out against the Application, voicing various objections, including concerns that the PSES would have a negative visual impact on the surrounding areas. *Id.* at 17. For example, Eric Bibler of Woodville Road "was very concerned about preserving the rural character of the Town . . . [and] spoke about the visual impact of the interconnection apparatus on the neighborhood." *Id.* Patty Debigar of Maxson Hill Road spoke "vehemently" against the proposed solar project, stating that Appellant "'just did not understand the way of life, being out here.'" *Id.* An unidentified woman from Maxson Hill Road stated that "the last thing she wanted to see in the neighborhood would be more solar panels." *Id.* Ken Braiser of Maxson Hill Road "said that these [solar] projects were 'ruining the whole nature of the Town.'" *Id.*

August 5, 2020 Planning Board Hearing[1]

At the August 5, 2020 hearing, the Planning Board and Appellant's representatives—legal counsel, Thomas Moses, and company president, Ralph Palumbo—discussed the extent and nature of vegetation along the property line abutting Maxson Hill Road. (Appellees' Resp. Mem. Ex. L (Aug. 5, 2020 Planning Bd. Hr'g Tr.) 60:7-63:16.) Hopkinton Town Planner Jim Lamphere read from § C.1 of Hopkinton's PSES Ordinance,[2] stating, "[i]t says that clearing of any existing vegetation if in the front, rear and, side yard setback areas, is prohibited unless explicitly approved by the planning board." *Id.* at 64:1-5.[3]

[1] The scheduled hearings for June 3 and July 1, 2020 were continued without consideration of the Application. *See* Appellees' Resp. Mem. Ex. G (June 3, 2020 Planning Bd. Hr'g Mins.) 5-6 (approving one-month continuance at Appellant's request); Appellees' Resp. Mem. Ex. H (July 1, 2020 Planning Bd. Hr'g Mins.) 35-43 (agreeing to defer to special meeting on July 15, 2020 due to late hour). The July 15, 2020 special meeting did not address vegetation clearing or construction hours. *See generally* Appellee's Resp. Mem. Ex. J (July 15, 2020 Planning Bd. Hr'g Tr.).

[2] For purposes of this Decision, "PSES Ordinance" refers to § 5.5 of Appendix A to the Hopkinton Code of Ordinances (the Code); "DPR Ordinance" refers to Chapter 13.5, Article III of the Code; and "Zoning Ordinance" refers to Appendix A and Article III collectively.

[3] At the time of the Application, § C.1 stated as follows:

> "All PSES shall be constructed and operated in a manner that minimizes any adverse visual, safety and environmental impacts. The design of the PSES shall use materials, colors, textures, screening and landscaping that will blend the facility into the natural setting and existing environment. The proposed PSES shall be designed and will be constructed so that ground leveling is limited to those areas needed for effective solar energy collection and so that the natural ground contour is preserved to the greatest extent practical. In instances where a parcel is rezoned from residential to commercial or manufacturing use for the purpose of accommodating a PSES, existing soil conditions will be maintained to the maximum extent practicable. No blasting will be conducted on the parcel in conjunction with any activity related to the construction of a PSES, including land preparation.

Planning Board members generally adopted the view that Appellant would be required to: (1) maintain the setback area along Maxson Hill Road in its current vegetated state; and (2) plant additional vegetation to lessen the visual impact of the project. *Id.* at 63:22-67:20. Several members also discussed the possible need to remove large specimen trees, although Planning Board member Emily Shumenchia did not believe removal would be necessary based on her personal experience with shade cast from trees on her own property. *Id.* at 60:12-15, 66:8-18, 66:21-24.

Appellant's representatives next objected to the Town Planner's interpretation of the PSES Ordinance as permitting a prohibition on all clearing. *Id.* at 68:5-21, 69:5-12. Attorney Moses stated Appellant would need to remove large trees to prevent shading of the PSES panels, and that interpreting § C.1 as a blanket prohibition on clearing would effectively "reduc[e] the size of th[e] project." *Id.* at 68:5-21. Mr. Palumbo further argued that the Town Planner's invocation of § C.1 of the PSES Ordinance was inappropriate because § C.1 addressed rezoned properties and would therefore "not [be] applicable to this particular property, because we are not in for a rezone from RFR 80 to commercial." *Id.* at 69:5-12.

> "*In instances where a parcel is rezoned from RFR-80 to commercial or manufacturing use for the purpose of accommodating a PSES, clearing of any existing vegetation on the subject parcel for the purpose of constructing, operating and maintaining a PSES shall be limited to a maximum of 40% of the total area of the parcel. Clearing of any existing vegetation within the front, rear and side yard setback areas is prohibited, unless explicitly approved by the Planning Board.* The PSES and equipment shall not have a significant adverse impact upon the soils, water resources, air quality or other natural resources of the land or surrounding area." (Appellees' Resp. Mem. Ex. C (Ch. 246 – Non-Residential Photovoltaic Solar Energy Systems (PSES), as Revised and Dated Jan. 22, 2019 (Ch. 246, 2019 Revisions and Amendments)) (emphasis added).)

In response to these objections, the Town Planner stated that:

> "[Section C.1 is] under the heading of land clearing, land clearing in general. That applies to all projects, and the first sentence that you read, it just calls out that in instances where a parcel is rezoned from RFR 80 to commercial or manufacturing use for the purpose of accommodating a PSES, clearing of any existing vegetation on the subject parcel for the purpose of constructing, operating, maintaining a PSES, shall be limited to a maximum of 40 percent of the total area of the parcel. So, basically, they're saying that in instances of a rezone you can only clear 40 percent of the parcel. That was put in in the amended ordinance that just got passed. I was there throughout all these things. I know how it was constructed, and the next sentence applies to all solar projects as that whole section does. That whole section is devoted to land clearing for all projects." *Id.* at 71:5-23.

Two members of the public spoke at the meeting on the topic of buffer vegetation and clearing. *See generally id.* at 77:7-20, 92:15-25. First, Joseph Moreau stated that "grass is nowhere near what we're looking for" as a buffer. *Id.* at 77:10-11. He also stated that, "I understand the way that the property is laid out, that you are going to see it, but wherever we can control a planting, a buffering, that's what we need to do for our residents, especially the residents on Maxson Hill and Frontier Road[.]" *Id.* at 77:11-17. He also stated that the Planning Board "typically" limits construction hours and that he had not "heard any conversation about that . . . the biggest concern I would have is for the residents, that we would not have construction or any work Saturday or Sunday[.]" *Id.* at 76:21-77:6.

Next, Tammy Joslin—who owns property situated above and "look[ing] out over" the subject development—stated that "any consideration for keeping the existing vegetation or building the berm, and making any kind of plantings higher to appease the view would be great." *Id.* at 95:1-8. She also thanked the members of the Planning Board "for trying to keep the existing vegetation along Maxson Hill Road." *Id.* at 92:15-18.

September 2, 2020 Planning Board Hearing

At the September 2, 2020 hearing, the Planning Board addressed whether it could impose a condition limiting construction to Monday through Friday between the hours of 8 a.m. and 5 p.m. (Appellees' Resp. Mem. Ex. N (Sept. 2, 2020 Planning Bd. Mins.) 61:14-62:5.) In response, Appellant's representative asked, "what does the current ordinance allow right now? Can anyone tell me what the current ordinance is?" *Id.* at 62:12-13. The Planning Board Chairman replied, "I don't believe that appears in the current ordinance. That condition stems from a condition that the Town Council placed upon the zone change for 310 Main Street. That was a special condition put on for the 310 Main Street project by the Town Council." *Id.* at 62:14-19. Mr. Palumbo objected to the proposed work hours restriction, stating that work would need to be performed on Saturdays and "sometimes beyond five o'clock [p.m.]" to stay on track with the projected timeline for completion of the PSES. *Id.* at 63:1-9.

The Planning Board consulted its solicitor, who opined that the Planning Board did not have "any legal ability . . . to place that type of restriction on the Applicant and on this project in terms of the construction hours." *Id.* at 64:4-8. The Planning Board solicitor later wrote to Appellant, however, revising that position and stating that it was "the legal position of the Town of Hopkinton that the Planning Board has the authority to restrict the hours of construction of solar projects to include restricting construction between the hours of 8:00 a.m.-5:00 p.m. weekdays, with no construction work allowed on weekends." (Appellees' Resp. Mem. Ex. Q (e-mail exchange dated September 29 and 30, 2020).)

B

Conditional Approval of the Application

On October 7, 2020, the Planning Board approved Appellant's DPR Application subject to twenty-six conditions, two of which are the subject of the instant dispute—i.e., condition five (Condition Five) and condition twenty-six (Condition Twenty-Six). *See generally* Compl. Ex. A (Town of Hopkinton Planning Bd. R. of Vote for Oct. 7, 2020 Regular Meeting) 2-6. Condition Five states:

> "The existing vegetation within the hundred feet setback area along Maxson Hill Road will remain in place and be supplemented with additional planting of evergreen trees of a minimum of six feet of height at the time of planting, as set forth in the approved landscape plan." *Id.* at 2.

In addition, Condition Twenty-Six requires that "[a]ll site work shall be performed Monday through Friday, between the hours of eight a.m. and 5 p.m., eastern standard time." *Id.* at 6.

C

Appellate Travel

1

Appeal to the Zoning Board of Review

On November 10, 2020, Appellant appealed the Planning Board's decision to the Zoning Board, sitting as the Board of Appeals, and argued that Condition Twenty-Six was "imposed without any legal authority" and that Condition Five was "based on a fundamentally flawed interpretation of Section C.1 of Hopkinton's PSES Ordinance." (Appellant's Mem. of Law in Supp. of Appeal of Decision of Hopkinton Zoning Bd. of Review) (Appellant's Mem.) Ex. 9 (Appeal of Decision from Hopkinton Planning Bd. Granting Development Plan Approval for PSES for Revity Energy System at AP 7, Lots 62, 62A & 63 – 15 Frontier Road) (summary of

argument contained on pages one and two of enclosed document titled "Applicant's Notice of Appeal").)

On July 15, 2021, the Zoning Board conducted a hearing to review Appellant's appeal. *See generally* Appellees' Response Mem. Ex. P (Zoning Bd. of Appeals July 15, 2021 Hr'g Tr.). Appellant argued that the Planning Board lacked the legal authority to impose Condition Twenty-Six because the Zoning Ordinance makes no specific and objective reference to construction work hours. *Id.* at 9:2-3; 10:23-11:11. In response, the Planning Board argued that § 9 of the PSES Ordinance authorized the work hours restriction to "mitigate negative impacts as deemed necessary and appropriate." *Id.* at 53:14-17. The Zoning Board Chairman commented that the Planning Board members are "planning experts of the town" who may formulate conditions "based on testimony and facts in evidence," such as information known from past projects, even in the absence of testimony from abutters. *Id.* at 69:2-70:17.

As to Condition Five, Appellant acknowledged that Condition Five was unlike Condition Twenty-Six because the PSES Ordinance explicitly addresses setbacks and vegetation. *Id.* at 14:17-24. Appellant contended, however, that: (1) Section C.1 of the PSES Ordinance applied only to rezoned properties; and (2) Section 6 of the Zoning Ordinance was the appropriate ordinance to be applied to a by-right use in a Manufacturing Zone, requiring only that setback areas abutting residential boundaries be "maintained" in a vegetated condition. *Id.* at 16:12-17:12. As such, Appellant reasoned that "maintaining a setback area in a vegetated condition is markedly different than a flat prohibition on all clearing." *Id.* at 17:13-15.

On October 21, 2021, the Zoning Board conducted a second public hearing and rendered its Decision unanimously upholding Conditions Five and Twenty-Six. (Appellees' Resp. Mem. Ex. B (Town of Hopkinton Zoning Bd. of Appeals Decision) 9-10.) The written Decision was

recorded with the Hopkinton Land Evidence Records on November 1, 2021. *Id.* at 10. The Decision contained twenty-one findings of fact, including a recitation of § C.1 of the PSES Ordinance and the following findings:

> "6.) The area to the east and southeast of the subject property on Maxson Hill Road is zoned RFR-80, a residential zone.
>
> ". . .
>
> "11.) The Zoning Ordinance addressing dimensional regulations requires that 'where Commercial or Manufacturing property abuts a residential zone district boundary, the side and rear yard setback area abutting said residential boundary shall also be maintained in a vegetated condition'. Hopkinton Zoning Ordinance, sec. 6, footnote 2.
>
> ". . .
>
> "14.) Section 15(A) [of the Zoning Ordinance] requires DPR 'shall' only be based on the specific and objective guidelines set forth in the DPR Ordinance, Section 13.5 of the Town Code.
>
> ". . .
>
> "18.) Subsection D of Section 13.5-75, entitled Landscape, provides that '[t]he landscape shall be preserved in its natural state insofar as practicable by minimizing tree removal, disturbance of the soil, and retaining the existing vegetation during and after construction.' Hopkinton Code of Ordinances, Article III, Section 13.5-75.D.
>
> ". . .
>
> "21.) Subsection 9 of Section 13.5-76.A provides for '[m]itigation of negative impacts as deemed necessary and appropriate in accordance with all federal, state and local regulations.' Hopkinton Code Ordinances Section 13.5-76.A.9." *Id.* at 6-8.

The Decision also set forth the following conclusions of law:

> "6.) The language in the second paragraph of Section C.1 of the PSES Ordinance, when read as a whole, can reasonably be read to limit the language regarding re-zoned properties to the first sentence of that paragraph. Otherwise, the paragraph would be

> read to mean that only re-zoned parcels would be precluded from having 'a significant adverse impact upon the soils, water resources, air quality or other natural resources of the land or surrounding area.'
>
> "7.) The Planning Board's interpretation of the language of Section C.1 of the PSES Ordinance is reasonable, and Section C.1 can reasonably be read to preclude clearing of existing vegetation within the front, rear and side yard setback areas of all PSES projects unless explicitly approved by the Planning Board.
>
> "8.) In light of the specific and objective guidelines set forth in the DPR Ordinance, the Planning Board's imposition of the site work restrictions for construction on the property in Condition No. 26 was reasonable." *Id.* at 9.

2

The Instant Appeal

Following the Zoning Board's Decision, Appellant filed the instant appeal on November 17, 2021. (Docket.) Here, Appellant contends that Condition Five "is legally invalid because it is based on an incorrect interpretation of [§] C.1 of the PSES Ordinance" and violates state law by "confer[ring] upon the Planning Board unfettered discretion to condition development plan approval without any objective guidelines to govern the decision." (Compl. ¶ 48.) Appellant also challenges the propriety of Condition Twenty-Six, arguing that the Planning Board had no legal authority to impose such condition. *Id.* ¶ 49.

II

Standard of Review

When reviewing a zoning board of appeal's decision, the Development Review Act mandates that:

> "The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of appeal 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, ordinance or planning board regulations provisions;
> "(2) In excess of the authority granted to the planning board 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 45-23-71(c).

This Court must "review[] the decisions of a . . . board of review under the 'traditional judicial review' standard applicable to administrative agency actions." *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I. 1998) (quoting *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977)). Where a challenge to a board decision rests on an issue of law, the Superior Court conducts a *de novo* review. *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 791 (R.I. 2005).

As to the review of a board's factual findings, the Superior Court "shall consider the record of the hearing before the planning board." Section 45-23-71(b). This Court "lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute . . . findings of fact for those made at the administrative level." *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986) (citing *E. Grossman & Sons*, 118 R.I. at 285-86, 373 A.2d at 501). The judgment of the board will be affirmed if the Court "'can conscientiously find that the board's decision was supported by substantial evidence in the whole record.'" *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)). "'Substantial evidence [is] relevant evidence that a reasonable mind might accept as adequate to support [the board's] conclusion, and means [an] amount more than a scintilla but

less than a preponderance.'" *Lischio v. Zoning Board of Review of the Town of North Kingstown*, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting *Caswell v. George Sherman Sand and Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981)).

III

Analysis

A

Prejudice to Substantial Rights of the Appellant

As a threshold matter, this Court lacks the statutory authority to reverse or modify the Zoning Board's Decision unless the "substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions or decisions" of the Zoning Board. Section 45-23-71(c). In the absence of such prejudice, it would be unnecessary to reach the merits of Appellant's claims.

The Zoning Board does not substantially challenge Appellant's assertion that Conditions Five and Twenty-Six: (1) adversely impact Appellant's ability to complete construction within the two-year requirement imposed by § 13.5-70 of the DPR Ordinance[4]; and (2) otherwise reduce the amount of energy and revenues that the development project will produce over the lifetime of the facility. *See generally* Appellees' Resp. Mem. Although the Zoning Board argues that Appellant is not without a remedy as to the two-year completion requirement, the mere fact that the ordinance permits a renewal *application* does not guarantee renewal *approval*, nor would such a renewal process replace the energy and revenues lost from implementation delays. *See* Hopkinton Code of Ordinances, ch. 13.5, art. III, § 13.5-70; *see also* Appellees'

[4] Section 13.5-70 states that "[a] development plan shall be void if construction is not started within one (1) year and completed within two (2) years of the date of the final development plan approval, except that such development plan approval may be renewed by the planning board at their discretion." (Hopkinton Code of Ordinances, ch. 13.5, art. III, § 13.5-70.)

Resp. Mem. Ex. P (Zoning Bd. of Appeals July 15, 2021 Hr'g Tr.) 12:18-14:7 (discussing financial harm resulting from project delays). Appellant has therefore established prejudice to its substantial rights because of the Zoning Board's Decision. *See* § 45-23-71(c).

B

Planning Board's Legal Authority to Impose Conditions

1

Condition Five: Setback Vegetation Along Maxson Hill Road

At the time of the Application, § C.1 of the PSES Ordinance provided, in relevant part, that:

> "In instances where a parcel is rezoned from RFR-80 [residential] to commercial or manufacturing use for the purpose of accommodating a PSES, clearing of any existing vegetation on the subject parcel for the purpose of constructing, operating and maintaining a PSES shall be limited to a maximum of 40% of the total area of the parcel. Clearing of any existing vegetation within the front, rear and side yard setback areas is prohibited, unless explicitly approved by the Planning Board." (Appellees' Resp. Mem. Ex. C (Ch. 246 – Non-Residential Photovoltaic Solar Energy Systems (PSES), as Revised and Dated Jan. 22, 2019 (Ch. 246, 2019 Revisions and Amendments).)

Appellant argues that "through Condition [Five], the Planning Board has prohibited any and all clearing in the set-back zone based on a fundamentally flawed interpretation of [§] C.1 of the Town's applicable [PSES] Ordinance." (Appellant's Mem. 2.) Because the second paragraph of § C.1 begins with the restrictive prefatory clause, "[in] instances where a parcel is rezoned," Appellant argues that the paragraph—in its entirety and not just as to its first sentence—applies only to rezoned parcels. (Appellant's Mem. 27.) Therefore, Appellant contends that because the subject parcel was not rezoned, it follows that paragraph two of § C.1 does not apply to this Application. *Id.*

Conversely, the Zoning Board argues that the prefatory rezoning clause applies only to the first sentence of the second paragraph under § C.1. (Appellees' Resp. Mem. 11.) The Zoning Board therefore concludes that when "[p]roperly read . . . the [second] paragraph is broken down into three . . . distinct sentences, the first specific to rezoned parcels, and the latter two of general applicability[.]" *Id.* In support of that position, the Zoning Board relies on the first paragraph under § C.1, arguing that paragraph one also shifts from a specific rezoning restriction to a generally applicable condition within the same paragraph.[5]

"It is a well-settled principle in this jurisdiction that the rules of statutory construction apply equally to the construction of an ordinance." *Mongony v. Bevilacqua*, 432 A.2d 661, 663 (R.I. 1981). "'When interpreting an ordinance, we employ the same rules of construction that we apply when interpreting statutes.'" *Freepoint Solar LLC v. Richmond Zoning Board of Review*, 274 A.3d 1, 6 (R.I. 2022) (quoting *Ryan v. City of Providence*, 11 A.3d 68, 70 (R.I. 2011))

[5] It may be that in focusing exclusively on the alleged ambiguity of § C.1, both parties fail to heed the mandate that an ordinance be considered "in its entirety, not individual sections of it divorced from the whole." *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253, 262 (R.I. 2011). The Zoning Board's written Decision cited not only § C.1 of the PSES Ordinance, but also an alternate provision in the Zoning Ordinance that states, where "Commercial or Manufacturing property abuts a residential zone district boundary, the side and rear yard setback area abutting said residential boundary shall also be *maintained* in a vegetated condition." *See* Appellees' Resp. Mem. Ex. B (Town of Hopkinton Zoning Board of Appeals Decision) 6 (citing Hopkinton Code of Ordinances, App. A, § 6, n.2) (emphasis added).

The Zoning Board, however, has not relied on § 6 in the present action. *See generally* Appellees' Resp. Mem. While the Superior Court may uphold a Zoning Board decision based on a correct alternate ground, *Holmes v. Dowling*, 413 A.2d 95, 99 (R.I. 1980), it is unclear whether the raise-or-waive rule found in Rule 16 of the Supreme Court's Rules of Appellate Procedure applies to administrative appeals brought under § 45-23-71. *See East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1153 (R.I. 2006) (noting the Supreme Court "has not explicitly held that the raise-or-waive doctrine applies to administrative proceedings"). In an appeal like the present action, the reviewing court may give deference, where appropriate, to a zoning board's interpretation of its ordinances. *Cohen v. Duncan*, 970 A.2d 550, 562 (R.I. 2009). Yet, the Zoning Board has declined to rely on § 6 in this appeal; therefore, the Court will not address whether the requirement to maintain side and rear yard setback areas abutting a residential boundary grants the Planning Board authority to prohibit clearing vegetation altogether. *Id.*

(internal quotation omitted). "If the language of a statute or ordinance is clear and unambiguous, it is given 'its plain and ordinary meaning.'" *City of Woonsocket v. RISE Prep Mayoral Academy*, 251 A.3d 495, 500 (R.I. 2021) (quoting *Sauro v. Lombardi*, 178 A.3d 297, 304 (R.I. 2018)).

"Zoning ordinances are in derogation of the common-law right of the owner as to the use of his property and must therefore be strictly construed." *Earle v. Zoning Board of Review of City of Warwick*, 96 R.I. 321, 324, 191 A.2d 161, 164 (1963). "When performing [the] duty of statutory interpretation," courts "consider[] the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections." *In re Brown*, 903 A.2d 147, 149 (R.I. 2006) (internal quotation omitted). Interpretations that avoid statutory transgressions must control. *Ernest G. Pullano, PA v. Rhode Island Division of State Fire Marshal*, No. 20-20-JJM-PAS, 2020 WL 4601668, at *2 (D.R.I. 2020).

"In determining restrictions upon an owner's use of his property in instances where doubt exists as to the legislative intention, the ordinance should be interpreted in favor of the property owner." *Earle*, 96 R.I. at 324-25, 191 A.2d at 164. However, the Court will "give weight and deference to a zoning board's interpretation and application of [a] zoning ordinance, provided its construction is not clearly erroneous or unauthorized." *Cohen v. Duncan*, 970 A.2d 550, 562 (R.I. 2009).

The entire second paragraph of § C.1 addresses the clearing of vegetation and opens with a prefatory clause limiting the paragraph's application to certain rezoned parcels. *See* Appellees' Resp. Mem. Ex. C (Ch. 246 – Non-Residential Photovoltaic Solar Energy Systems (PSES), as Revised and Dated Jan. 22, 2019 (Ch. 246, 2019 Revisions and Amendments). The second and

third sentences of the second paragraph of § C.1 are not so different or unrelated from the first sentence that they would give this Court reason to believe that they apply to all projects. The language is clear and unambiguous and, as such, must be interpreted literally. *RISE*, 251 A.3d at 500. This Court cannot assume an intent to shift from specific to general prohibitions when language to that effect is lacking from the ordinance. Instead, the Court must give effect to the plain meaning of the second paragraph of § C.1 to prescribe specific clearing rules for rezoned parcels. *Id.*

Even if this Court were to accept the Zoning Board's argument that § C.1 is susceptible to two meanings and is therefore ambiguous, the Zoning Board's interpretation still fails to carry the day. Although "'some deference should be paid' to the 'interpretation placed on [an] ordinance by the municipal official responsible for enforcing it' . . . . in no case may blind deference be paid to the construction given by any official, agency, or board[.]" *Id.* at 502 (quoting *New England Expedition-Providence, LLC v. City of Providence*, 773 A.2d 259, 263 (R.I. 2001)). When the language of an ordinance is ambiguous, this Court must look to evidence of legislative intent as demonstrated in the State Enabling Statute, the Development Review Act, and Hopkinton's Zoning, DPR, and PSES Ordinances, in order to "'adopt the interpretation that will best carry out [the PSES Ordinance's] evident purpose.'" *Id.* at 501 (quoting *Nunes v. Town of Bristol*, 102 R.I. 729, 738, 232 A.2d 775, 780 (1967)); *id.* at 502 ("thorough analysis" includes consideration of the "relevant statute, the opinions of [our Supreme] Court, and the city's zoning ordinance and its comprehensive plan").

Here, the Zoning Board has failed to provide the Court with any explanation of legislative intent to prohibit all clearing in setback areas for all projects. It argues only that, in the event of ambiguity, "the Board's interpretation of the intent of the ordinance should be given

great weight and should be accepted whenever there is a *reasonable basis* for the meaning given by the Board in the ordinance under consideration." (Appellees' Resp. Mem. 16 (quoting Rathkopf, *The Law of Zoning and Planning* § 62:38 (4th ed.) (emphasis added)).)

State law requires, however, that DPR review for a by-right use be conducted "based on specific and objective guidelines which must be stated in the zoning ordinance." G.L. 1956 § 45-24-49(b). The Zoning Board's contention that an interpretation with any "reasonable basis" should be acceptable is in clear tension with the Enabling Act's requirements of specificity and objectivity. *See id.* This tension must be relieved by the directive that a reviewing court "resolve all doubts and ambiguities contained in the zoning laws in favor of the landowner because these regulations are in derogation of the property owner's common-law right to use [its] property as [it] wishes." *Denomme v. Mowry*, 557 A.2d 1229, 1231 (R.I. 1989).

Finally, to the extent the Zoning Board relies on the conclusion in its October 21, 2021 written Decision that "[t]he language of [§§] 13.5-75 and 13.6-76 of the DPR Ordinance and [§] C.1 of the PSES Ordinance indicate a clear policy favoring preservation of natural features, including terrain and vegetation for all projects subject to development plan review," such a conclusory statement of broad and general intent to *preserve* is insufficient to justify a blanket prohibition on *all clearing* in the face of the Zoning Enabling Act's requirement of "specific and objective guidelines." *Compare* Appellees' Resp. Mem. Ex. B (Zoning Bd. Decision) 9, *with* § 45-24-49(b).

Further, it is clear from the record that the Planning Board relied on § C.1 of the PSES Ordinance, not §§ 13.5-75 and 76. *See, e.g.*, Appellees' Resp. Mem. Ex. L. (Aug. 5, 2020 Planning Bd. Hr'g Tr.) 69:1-4. In any event, §§ 13.5-75 and 76 permit the Planning Board to impose conditions for the preservation of natural features based on specific findings of necessity

and practicability—which are wholly absent from this record—and do not otherwise show an intent to enforce a blanket prohibition on clearing. *See* Appellees' Resp. Mem. Ex. B (Town of Hopkinton Zoning Bd. of Appeals Decision) 7-8 (quoting ordinance sections without corresponding factual findings). Thus, absent specific findings of necessity—e.g., due to ecological considerations, soil erosion, or storm water control—the mere recitation of the language of §§ 13.5-75 and 76 is inadequate to show an intent to prohibit *all* clearing. *See Irish Partnership v. Rommel*, 518 A.2d 356, 358-59 (R.I. 1986) (quoting *May-Day Realty Corp. v. Board of Appeals of City of Pawtucket*, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970) ("[F]indings 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.")).

2

Condition Twenty-Six: Construction Hours Restriction

With respect to Condition Twenty-Six, Appellant first argues that "the Planning Board erroneously limited the site work hours for [Appellant's] solar project without any legal authority[.]" (Appellant's Mem. 2.) This Court agrees.

Although the Zoning Board argues that the Planning Board can impose "reasonable" restrictions on construction and development through DPR, *see* Appellees' Resp. Mem. 14, reasonableness is not the statutorily prescribed standard. *See* § 45-24-49(b). As discussed above, the standard dictated by the Zoning Enabling Act requires not mere reasonableness, but "*specific* and objective guidelines which *must* be *stated in the zoning ordinance*." *Id.* (emphasis added).

At the time of the Planning Board's Decision, the Zoning Ordinance did not address construction hours specifically or even construction limitations generally. *See generally* Art. III,

Hopkinton Code of Ordinances; *id.* at App. A. The Planning Board Chair explicitly acknowledged this absence in the September 2, 2020 hearing. *See* Appellees' Resp. Mem. Ex. N (Sept. 2, 2020 Planning Bd. Tr.) 62:14-19 (stating "I don't believe that appears in the current ordinance").

When the Planning Board imposed Condition Twenty-Six, the Zoning Ordinance addressed topics including but not limited to panel mounting, setbacks, land clearing, screening, and lighting—all of which would therefore be grounds for conditional approval. *See, e.g.*, Appellees' Resp. Mem. Ex. C (Ch. 246 – Non-Residential Photovoltaic Solar Energy Systems (PSES), as Revised and Dated Jan. 22, 2019 (Ch. 246, 2019 Revisions and Amendments)) §§ A.1, A.4, B, C.1, C.3. The Zoning Board's finding that the construction limitation was broadly justified for "mitigation of negative impacts as deemed necessary and appropriate," *see* Appellees' Resp. Mem. Ex. B (Town of Hopkinton Zoning Bd. of Appeals Decision) 8, provides no workable limiting principle and is therefore the antithesis of a specifically stated guideline. *See* § 45-24-49(b). By definition, a condition justified only as necessary for *general* welfare is not *specific* and therefore runs afoul of § 45-24-49(b). *Id.*

Our Supreme Court has held that "in considering an application for a variance a board of review may not be motivated by what in their opinion is best for the community, and that rule applies with equal force where the application is one for a special exception." *Our Lady of Mercy Greenwich, R.I. v. Zoning Board of Review of Town of East Greenwich*, 102 R.I. 269, 273, 229 A.2d 854, 857 (1967) (citing *Bergson Co. v. Zoning Board of Review of City of Woonsocket*, 91 R.I. 134, 161 A.2d 414 (1960)). This rule is no less forceful as applied to DPR approval where both the Legislature and Town code demand "specific and objective guidelines." *See* § 45-24-49(b); Hopkinton Code of Ordinances, App. A, § 15(A).

Because Conditions Five and Twenty-Six were imposed in excess of the statutory authority granted to the Planning Board, this Court reverses the Zoning Board's ruling upholding both conditions. Section 45-23-71(c)(4).

C

Competency of the Evidence Supporting Conditional Approval

Although this Court has determined that the Planning Board lacked the authority to impose Conditions Five and Twenty-Six, it must nevertheless address the competency of the evidence underlying these conditions in the interest of judicial economy. *See Corporation Service, Inc. v. Zoning Board of Review of Town of East Greenwich*, 114 R.I. 178, 180, 330 A.2d 402, 404 n.2 (1975) (recommending trial justices address merits notwithstanding jurisdictional ruling).

1

Condition Five: Setback Vegetation Along Maxson Hill Road

Notwithstanding the Planning Board's clear error of law in imposing Condition Five, there is otherwise substantial evidence in the record to support such a condition, had the Planning Board possessed the necessary authority. *See Mill Realty Associates*, 841 A.2d at 672.

Appellant contends that it worked with the Town's Engineer "to put together a 'selective clearing' regime, based on scientific and architectural principles, that would preserve vegetation in the buffer to the greatest extent possible while also permitting selective clearing to reduce shading[.]" (Appellant's Mem. 6.) The record shows, however, that Appellant's proposed clearing regime as of September 2, 2020 had not identified those trees on the property that would potentially shade the solar array. (Appellees' Resp. Mem. Ex. N (Sept. 2, 2020 Planning Bd. Hr'g Tr.) 38:19-39:8.) The Town's Engineer therefore advised the Planning Board that:

> "[T]he actual trees were never identified, so we don't know—we honestly don't know if all of the trees would be cut within the land between the panels and Maxson Hill Road, because we don't believe, or our understanding is the height of the existing trees were not yet measured, and if they weren't measured, it's unknown which ones have to be cut. The diagram looks good on the plan, but those trees showing may not remain if they're above a certain height." *Id.* at 38:23-39:8.

Appellant requested that clearing be permitted in accordance with its shade matrix and offered that trees marked for clearing could be spray painted in the future so town officials could "see which ones were going to be cut[.]" *Id.* at 39:9-17, 51:8-12. The Town's Engineer described this proposal as giving Appellant future, unilateral authority equivalent to "don't worry about it, it will be determined, we'll let you know which ones we're going to cut after the fact." *Id.* at 40:6-9. Thus, the Town Engineer's opinion was that Appellant's landscape plan afforded the Town no future authority to reject clearing plans. *See id.*

Therefore, in light of the Town Engineer's opinion that Appellant had failed to identify any vegetation that would shade the solar array and the public concern relating to negative visual impact for residents on Maxson Hill Road, the Planning Board did not act arbitrarily when it imposed Condition Five.[6] *See Bellevue Shopping Center Associates v. Chase*, 574 A.2d 760, 764 (R.I. 1990) (When reviewing conflicting expert testimony, "the board is vested with discretion to accept or reject the evidence presented . . . This court, on the other hand, is restrained from weighing the evidence or substituting our judgment for the board's.").

[6] This Decision relies only on public comment addressing setback vegetation and visual screening specifically. Comments in the March 4, 2020 hearing that took issue with the existence of PSES generally do not constitute competent evidence. *See* Appellees' Resp. Mem. Ex. F (Mar. 4, 2020 Planning Bd. Mins.) 17. The Town's Zoning Ordinance permitting PSES as a by-right use reflects the prior legislative determination that such use is appropriate for the area, and public comments opposing that view are not probative of the issue of setback vegetation. *Accord Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 693 (R.I. 2003).

2

Condition Twenty-Six: Construction Hours Restriction

"The imposition of a site-specific condition or restriction generally need not conform to any precedent, nor should it, itself, constitute a precedent in another case, since the exercise of discretion by the zoning body generally must stand on the peculiar facts and circumstances of each case." Rathkopf, *supra*, § 60:2. The "peculiar facts and circumstances" may include "evidence gleaned from the personal observations of zoning board members" but only "'if the record discloses the nature and character of the observations upon which the board acted.'" *Restivo*, 707 A.2d at 666 (quoting *Perron v. Zoning Board of Review of Burrillville*, 117 R.I. 571, 576, 369 A.2d 638, 641 (1977)).

The evidence on this record pertaining to the work hour restriction includes three separate discussions. First, Joseph Moreau gave public comment at the August 5, 2020 Planning Board meeting, stating that the Planning Board "typically" limits construction hours and expressing that the Planning Board should prohibit weekend construction. (Appellees' Resp. Mem. Ex. L (Aug. 5, 2020 Planning Bd. Hr'g Tr.) 76:21-77:6.)

Second, at the September 2, 2020 hearing, a Planning Board member requested that construction hours be limited to Monday through Friday, from 8 a.m. to 5 p.m. (Appellees' Resp. Mem. Ex. N (Sept. 2, 2020 Planning Bd. Hr'g Tr.) 61:14-16.) The only reasoning or justification given to support the member's request was the following:

> "CHAIR DiORIO: I don't believe that appears in the current ordinance. That condition stems from a condition that the Town Council placed upon the zone change for 310 Main Street. That was a special condition put on for the 310 Main Street project by the Town Council. I don't think—
> "MR. PALUMBO: They needed a zone change. I'm not asking for a zone change. I think that's a horse of a different color. We will need to work on Saturdays.

". . .

> "CHAIR DiORIO: There we go. Listen, the Planning Board has—I'm pretty sure this language is in the Development Plan Review ordinance. We have a responsibility to the neighborhood. And work hours and noise and traffic and all the other stuff that we've been putting up with for years—I'm not criticizing this particular project, but folks in this neighborhood have been putting up with a lot. I see the Planning Board's role as looking out for their best interests, and I don't think it's unreasonable to suggest that a project of this magnitude have some limitations. To say we can't operate without any restrictions at all or the fact that we can't tolerate any restrictions on our ability to build a project, I think that's unreasonable." *Id.* at 62:14-65:13.

Third, the Hopkinton Town Solicitor communicated to Appellant's representatives that "[t]his restriction has been imposed on the vast majority of solar projects—and other construction projects—for years, and that is common knowledge within the Town." (Appellees' Resp. Mem. Ex. Q (E-mail Exchange Dated Sept. 29 and 30, 2020).)

While the Planning Board Chair appropriately concluded that the Planning Board can formulate conditions based on facts in evidence, the mere fact that a condition was imposed in past projects is insufficient, standing alone, to show that the condition is necessary under the "peculiar facts and circumstances" of any subsequent project. *See* Rathkopf, *supra*, § 60:2; *Restivo*, 707 A.2d at 666. Under the Zoning Board's logic, a condition could be erroneously applied to a DPR approval once and then stand as "competent evidence" for all future DPRs with the same condition. This Court need not allow an error to stand uncorrected in perpetuity simply because it is longstanding or previously unchallenged by other less-aggrieved parties.

In the absence of any evidence in the record to show otherwise, the mere occurrence of construction, especially in an area zoned Manufacturing or Commercial, "does not necessarily adversely affect the public convenience and welfare." *Toohey v. Kilday*, 415 A.2d 732, 737 (R.I. 1980) (addressing competency of generalized traffic concerns). Although "a board may consider

probative factors within its knowledge," the Planning Board Chair's opaque reference to "putting up with" other issues in past projects is not an adequate disclosure of observations or information to justify the condition. *See id.* Therefore, not only did the Planning Board lack the legal authority under the Zoning Ordinance to limit construction hours, it also lacked a sufficient evidentiary basis to impose such a restriction. Section 45-23-71(c)(5).

IV

Conclusion

For the reasons set forth herein, this Court grants the appeal and reverses the Zoning Board's Decision upholding Conditions Five and Twenty-Six. The Planning Board lacked the legal authority under the State Enabling Act and the Town's Zoning Ordinance to impose such conditions. Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Revity Energy LLC v. Hopkinton Zoning Board of Review, et al.**
CASE NO:	**WC-2021-526**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**November 21, 2022**
JUSTICE/MAGISTRATE:	**McHugh, J.**
ATTORNEYS:	
For Plaintiff:	**Nicholas L. Nybo, Esq.**
For Defendant:	**Per C. Vaage, Esq.** **James P. Marusak, Esq.**