

STATE OF RHODE ISLAND

WASHINGTON, SC.

SUPERIOR COURT

[FILED: April 5, 2024]

TOWN OF NEW SHOREHAM

:

:

:

v.

:

C.A. No. WC-2023-0234

:

TOWN OF NEW SHOREHAM

:

ZONING BOARD OF REVIEW;

:

KATE ATWATER BUTCHER,

:

STEVEN FILIPPI,

:

JUDITH CYRONAK,

:

ROBERT CLOSTER, JR., and

:

MARK MAGUIRE, in their capacities

:

as members of the TOWN OF

:

NEW SHOREHAM ZONING

:

BOARD OF REVIEW; ALDO LEONE;

:

ALDO'S BAKERY; and

:

ANDIAMO ZEKE LLC

:

DECISION

LANPHEAR, J. Before this Court is the Town of New Shoreham's appeal of the Town of New Shoreham Zoning Board of Review's May 12, 2023 Decision to overturn a Notice of Violation issued by a Zoning Official on August 15, 2022. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, the Town's appeal is denied, and the Board's decision is affirmed.

I

Facts and Travel

Appellee Aldo's Bakery¹ (Aldo) owns and operates a children's carousel outside of Aldo's Bakery located at 130 Weldon's Way, New Shoreham, Plat 6, Lot 89. On June 6, 2021, Aldo applied for a game license for a "horse carousel" which the Town Council granted. On May 2, 2022, Aldo applied to renew the game license, which was denied at the Town Council meeting on June 15, 2022.

On May 24, 2022, Mark Emmanuelle filed a zoning complaint with the Town of New Shoreham located in Block Island alleging an "illegal carousel/amusement ride[.]" On August 15, 2022, Jennifer Brady, a New Shoreham Zoning Official, issued a Notice a Violation to Aldo for violating New Shoreham Zoning Ordinance, Article I, Section 111, General Prohibitions, No. 9, which prohibits "[a]musement parks or rides." The Notice of Violation also notified Aldo that it was in violation of the Zoning Section 317 for "install[ing] the amusement ride without the required Certificate of Appropriateness from the Historic Commission." Finally, the Notice of Violation notified Aldo that it was in violation of New Shoreham Zoning Ordinance Section 319 because the ride is not a permitted use in the Planned Development Zone.

On September 6, 2022, Aldo filed a notice of appeal. On March 22, 2023, the Board heard the appeal and again, discussed the definition of "amusement ride." The Board held another meeting on April 26, 2023 and, again, discussed the definition of "amusement ride," voting 5-0 to overturn the Notice of Violation; *see also* R. Ex. 22. On May 12, 2022,

¹Aldo Leone filed this administrative appeal on behalf of Andiamo Zeke LLC and Aldo's Bakery. Hereinafter, these parties will be referred to jointly as Aldo. No disrespect is intended by use of Mr. Leone's first name.

the Board subsequently issued a decision overturning the Notice of Violation and made the finding of fact that “the carousel operated at Petitioners’ Property is not an amusement ride.”² On May 31, 2023, the Town filed a timely appeal to this Court.³

II

Standard of Review

Section 45-24-69(a) grants the Superior Court jurisdiction to review decisions of local zoning boards. Such 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.”

²The Decision is at Stipulation of Record, REC0136.

³This Court will not address the issue of whether the Town Council has standing to challenge a zoning board ruling—each being entities of the town but having separate functions under statute and charter. See generally, § 45-24-56(a) and Town of New Shoreham Charter Article IX Section 903. The issue is not clearly raised by the parties. That said, the Court does not intend to limit the rights of litigants to bring actions to the courts, but query whether this issue should be before the courts or could not be resolved by the town itself.

In other words, this Court “reviews the decisions of a plan commission or 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). The Court is “limited to a search of the record to determine if there is *any competent evidence* upon which the agency’s decision rests. If there is such evidence, the decision will stand.” *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977) (emphasis added). The Court may not substitute its judgment for that of the zoning board’s with respect to the weight of the evidence, questions of fact, or credibility of the witnesses. *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986). However, this Court conducts a *de novo* review of questions of law. *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 791 (R.I. 2005). The burden is on the applicant “seeking relief . . . to prove the existence of the conditions precedent to a grant of relief.” *DiIorio v. Zoning Board of Review of City of East Providence*, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969).

The Court must consider “the entire record to determine whether ‘substantial’ evidence exists to support the board’s findings.” *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). “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.” *Caswell v. George Sherman Sand & Gravel Company, Inc.*, 424 A.2d 646, 647 (R.I. 1981).

III

Analysis

A

Timeliness

The Town argues that Aldo failed to appeal the decision of the Zoning Official to the Board within the timeline required pursuant to Section 709(2)(a) of the New Shoreham Zoning Ordinance, because Aldo appealed the decision more than twenty days from the date the Board issued the decision. The Town argues that the Board did not have the authority to hear the matter. *Id.*

Pursuant to state law, an appeal to a zoning board “shall be taken within a reasonable time of the date of the recording of the decision.” Section 45-24-64. A “reasonable time” for an appeal starts to run when the appellant becomes “chargeable with knowledge of the decision from which he was appealing.” *Hardy v. Zoning Board of Review of Town of Coventry*, 113 R.I. 375, 377, 321 A.2d 289, 291 (1974). Under Section 709(2)(a) of the Zoning Ordinance, “[a]n appeal shall be brought within twenty (20) days of the date the appellant received the decision or the date which the appellant knew or should have known of the decision.”

The Zoning Official signed the Notice of Violation on August 15, 2022. (R. Ex. 13.) Aldo filed an appeal on September 6, 2022, which is twenty-two days between sending the Notice of Violation to Aldo and him filing the appeal.

The Town did not establish when Aldo received the decision or had actual or constructive notice of it. In the absence of such evidence and taking into account the time

it takes for mail to arrive; Aldo’s appeal satisfies Section 709(2)(a) of the New Shoreham Zoning Ordinance and § 45-24-64.

B

Findings of Fact

The Town argues that the Board’s decision lacked adequate evidentiary findings. The Town also argues that the verbal exchange between the Board members at the hearing on April 26, 2023 did not include findings of fact. Aldo contends that the Board’s findings of fact address the sole issue on appeal—whether the carousel is an “amusement ride.” The Board references the March 22, 2023 hearing in which members of the Board discussed this definition. *Id.* at 9-10.

“‘[A] zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review.’” *Cranston Print Works Co. v. City of Cranston*, 684 A.2d 689, 691 (R.I. 1996) (quoting *Thorpe v. Zoning Board of Review of Town of North Kingstown*, 492 A.2d 1236, 1236-37 (R.I. 1985)). “‘This [C]ourt has stated on many occasions that a municipal board, when acting in a quasi-judicial capacity, must set forth in its decision findings of fact and reasons for the action taken.’” *Sciacca v. Caruso*, 769 A.2d 578, 585 (R.I. 2001) (quoting *Irish Partnership v. Rommel*, 518 A.2d 356, 358 (R.I. 1986)). “Findings made by a zoning board ‘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.’” *Id.*

The findings of fact by the Board state:

“Petitioners’ asserted at hearing that they are operating a coin-operated kiddy carousel on the Property and according to industry terms it is not considered an amusement ride. Based on the ordinance and the Petitioners’ testimony the

board concludes that the carousel operated at Petitioners' Property is not an amusement ride. Petitioner's Appeal is therefore upheld." (R. Ex. 22.)

This Court on appeal needs to determine if there is substantial evidence to support the Board's findings of fact. *Salve Regina College*, 594 A.2d at 880. It is not the role of this Court in its appellate capacity to substitute its judgment regarding questions of fact or weighing evidence. *Lett*, 510 A.2d at 960. While the Board's findings of fact for this case were brief, it gets to the heart of the issue—whether the carousel is an “amusement ride.”

At the March 22, 2023 and April 26, 2023 hearings, the Board spent a majority of the time engaging in meaningful discourse surrounding the definition of an “amusement ride” and “gaming device,” and looked to the parties' arguments on that issue. *See* R. Ex. 18-22. After discussing the definition of “amusement ride” and applying it the facts of this case, the Board summarized its findings of fact within its decision. *See* R. Ex. 22. Although sparse, the findings of fact in this case differ from the zoning board's decision in *Sciacca*, which “contained neither findings of fact nor conclusions of law.” 769 A.2d at 585. Further, unlike in *Sciacca*, in which the applicants sought a variance, here, the burden was on the zoning official to establish a violation. In conclusion, there is substantial evidence to support the Board's finding that the carousel is not an amusement ride.

C

Error of Law

The Town contends that the Board erred as a matter of law by determining that Aldo's carousel is not an “amusement ride.” The Town asserts that the term “amusement ride” must be given its plain meaning. *Id.* at 11. Conversely, the Appellees argue that the Board's inferential finding that the carousel qualifies as a “gaming device” is clear and

unambiguous. Aldo further argues that the record provides substantial evidence to support the Board’s finding that Aldo’s carousel is not an “amusement ride.”

The Town of New Shoreham’s Zoning Ordinance—contained in Chapter 8, Licenses and Business Regulations—defines a “gaming device” as

“[a] machine, apparatus, computer component or item or items of electronic equipment, connected to an electrical outlet by one cord, which upon the insertion of a coin, slug, token, plate, disc, or card may be operated by the public generally for the use of a mechanical, electronic, video, or other game or amusement, whether or not it registers a score and whether or not the operation involves skill.”

The Town of New Shoreham’s Zoning Ordinance does not contain a definition of “amusement ride.” Collins English Dictionary defines “amusement ride” as “a device at a fair, theme park, etc[.] that people can ride in.”

The Board discussed the feasible definitions of “gaming device” and “amusement ride” during the March 22, 2023 and April 26, 2023 hearings. This Court must afford deference to the Board’s finding absent an error of law. It is not an error of law to determine that it is a gaming device because there is substantial evidence on the record to support the Board’s finding. Consequently, the Town’s argument on this point is unavailing because the Board did not err as a matter of law.

IV

Conclusion

For the foregoing reasons, Appellant's appeal is denied, and the Board's decision to overturn the Notice of Violation is affirmed. Counsel shall submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Town of New Shoreham v. Town of New Shoreham Zoning Board of Review, et al.

CASE NO: WC-2023-0234

COURT: Washington County Superior Court

DATE DECISION FILED: April 5, 2024

JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:

For Plaintiff: James M. Callaghan, Esq.

For Defendants: Nancy O. Dodge, Esq.; Christopher A. D'Ovidio, Esq.