

STATE OF RHODE ISLAND

WASHINGTON, SC.

SUPERIOR COURT

(FILED: December 4, 2024)

BLUFF HEAD, BLOCK ISLAND, LLC :
Appellant, :

v. :

C.A. No. WC-2022-0335

SUSAN BUSH, JUDITH CYRONAK, :
STEVEN FILIPPI, ROBERT :
CLOSTER, and ALISON WARFEL :
In their capacity as Members of the :
ZONING BOARD OF REVIEW FOR :
THE TOWN OF NEW SHOREHAM :
Appellees. :

DECISION

LANPHEAR, J. Before this Court is Bluff Head, Block Island, LLC’s (Bluff Head) appeal from a Town of New Shoreham Zoning Board of Review Decision, which allowed a fence to be constructed without a permit and then allowed the fence to remain on property adjacent to Bluff Head’s property. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Bluff Head is the title owner of property situated at 1423 SW Point Road, Plat 14, Lot 20-11, in the Town of New Shoreham, Rhode Island. (Compl. ¶ 1.) Adjacent to Bluff Head’s property is Plat 14, Lot 31 owned by Phillip Trahanas and Jennifer A. Trahanas as Co-Trustees of the Jennifer A. Trahanas Revocable Trust. *Id.* ¶ 11. On or around February 24, 2021, Marc Tilson submitted a demolition permit to Tom Risom, who was the Building Inspector for the Town of New Shoreham. *Id.* ¶ 12. The application requested permission to remove structures on the property. The application was not signed and did not identify the property owner, but the

demolition permit application was approved and signed by the Town of New Shoreham through David Murphy. Mr. Murphy was hired by the Town of New Shoreham to provide services such as reviewing, approving, and denying building permit applications, but he was not the Zoning Official for the Town of New Shoreham. Appellees' Ex. A, Tr. 12:1-8, May 25, 2022.

Subsequently, the three structures on the property were demolished. After the structures were demolished, a fence was constructed on the property without a building permit application being filed with the Town.

In April 2021, Tom Risom, the Town Building Inspector, discovered that a fence was built on the Trahanas' property without a building permit. Mr. Risom prepared and sent a letter to Mr. and Mrs. Trahanas on May 14, 2021 informing them that Rhode Island Dwelling Code section R105.2 "does not exempt compliance with municipal ordinance provisions," that a "fence is a 'structure,'" and "our local Zoning Ordinance requires a permit for structures." Appellant's Ex. 4. He then issued a building permit for the "construction of [their] fence" and stated that "not permitting this construction was an error on our part[.]" *Id.*

Bluff Head timely appealed to the New Shoreham Zoning Board of Review claiming the titled owner of the property failed to file an application for a building permit with the Town to construct the fence prior to the fence being constructed.

A hearing was held on May 25, 2022. At the hearing, Bluff Head was precluded from presenting witnesses in support of its appeal by the Chair of the Zoning Board. The Zoning Board issued a decision on August 5, 2022 allowing the fence to remain. Appellant's Ex. 1.

On August 22, 2022, Bluff Head appealed the Zoning Board decision to the Superior Court alleging that (1) it was not allowed a fair hearing and its due process rights were violated, (2) the Zoning Board's decision was arbitrary and capricious, and (3) the Zoning Board's

decision was made contrary to the facts and the law. In appealing, Bluff Head asks the Court to reverse and modify the August 5, 2022 Zoning Board decision, order the fence be removed, order that the title owner of Plat 14, Lot 31 be precluded from filing for a fence permit application for two years, order that the title owner comply with Town Zoning Ordinances that a construction permit is required to construct a fence, and award Bluff Head attorneys' fees and expenses pursuant to the Equal Access to Justice for Small Businesses and Individuals Act, G.L. 1956 chapter 92 of title 42 (EAJA).

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 [Bluff Head] 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.”

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

Whether Due Process Rights Were Denied

Bluff Head contends it was denied its due process at the Zoning Board hearing when it was precluded from presenting witnesses to testify in support of its appeal. In response, the Zoning Board suggests a building permit was not required to erect a fence under six feet by

either the State Building Code or by Town Zoning Ordinance, and, thus, Bluff Head's contention that a building permit was improperly issued for the fence was moot.

Generally, courts limit review of cases to those involving issues in dispute and avoid "moot, abstract, academic, or hypothetical questions." *H.V. Collins Co. v. Williams*, 990 A.2d 845, 847 (R.I. 2010) (internal quotation omitted). The court will "review an otherwise moot case only when the issues are of extreme public importance, which are capable of repetition but which evade review." *Campbell v. Tiverton Zoning Board*, 15 A.3d 1015, 1022 (R.I. 2011) (internal quotations omitted). A case is moot if "there is no continuing stake in the controversy" or "if the court's judgment would fail to have any practical effect on the controversy." *Blais v. Rhode Island Airport Corp.*, 212 A.3d 604, 612 (R.I. 2019).

The Court affords the local board some discretion in controlling its own procedures, but an issue arises when the Zoning Board does not follow its own procedures, as is the case here. In allowing the fence to be constructed, the Zoning Board did not follow its own procedures because it allowed the fence to be built without a permit, contrary to Town Ordinances and state law. Upon realizing its error, the Town issued a permit without application or review after the fence was already built. Then, after Bluff Head appealed the fence permit, the Zoning Board stated that a building permit was not needed, contrary to the Town's assertions that a fence was a structure and that a building permit was required to construct the fence.

The Court does not find the fence issue moot where the Town and the Zoning Board ignored their own rules in allowing the fence to go in without a permit and without a structure associated with the fence. There is a continuing stake in this controversy, both for Bluff Head and for future applicants who may face the same improper procedures in future dealings with the Zoning Board.

Next, the Court finds that Bluff Head was denied its due process rights at the Zoning Board hearing because it was precluded from presenting witnesses in support of its appeal. The Town avers that Bluff Head's alleged due process violations are without merit because the witnesses Bluff Head sought to present would have been irrelevant to the zoning appeal because the Zoning Board alone was to decide on the issue of whether or not the building permit was properly issued.

“Procedural due process guards against the modalities of state action, addressing itself to the task of rectifying perceived procedural deficiencies.” *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1153 (R.I. 2006). “[P]rocedural due[]process requires certain minimal standards of notice, hearing, and opportunity to respond adequately before a governmental agency may effectively deprive an individual of life, liberty, or property.” *Id.* (quoting *State v. Manocchio*, 448 A.2d 761, 764 n.3 (R.I. 1982)). “Due process is a flexible concept and the degree of protection afforded to an individual may vary with the particular situation.” *Barber v. Exeter-West Greenwich School Committee*, 418 A.2d 13, 20 (R.I. 1980). “It is well established that due process within administrative procedures requires the opportunity to be heard at a meaningful time and in a meaningful manner.” *Millett v. Hoisting Engineers’ Licensing Division of Department of Labor*, 119 R.I. 285, 296, 377 A.2d 229, 235-36 (1977) (internal quotations omitted).

Here, Bluff Head was denied a meaningful opportunity to appeal the Zoning Board decision because the Zoning Board precluded witnesses from testifying fully. Town of New Shoreham Zoning Ordinance § 709(A) requires the Zoning Board schedule a public hearing for appeals to the Zoning Board, but here precluded cross-examination and the presentation of evidence. The point of a hearing is for the adverse parties to present their case so the facts and

law may be clearly determined. Bluff Head could not present its case at the hearing level and was preempted from establishing facts to support any appeal. Bluff Head was limited in presenting evidence regarding the demolition, was not able to ask certain questions to witnesses, and was prevented from cross-examining witnesses.¹ Bluff Head was deprived of a fair and impartial hearing before the Zoning Board.

The Town alleges a “solicitor’s legal opinion on the ultimate issue to be decided by an appellate body is simply irrelevant – the opinion does not prove or disprove any determination to be made by the Zoning Board.” (Appellees’ Mem. at 4.) Appellees’ supporting case law falls short of this contention. *See Migliaccio v. Zoning Board of Review of City of Providence*, 99 R.I. 101, 205 A.2d 841 (1964) (quashing the granting of a variance application with orders to the board to reconsider the application and hear more evidence as necessary).

Therefore, the Court finds that Bluff Head was denied its due process rights at the Zoning Board hearing preventing Bluff Head from presenting its appeal meaningfully. The Zoning Board should be required to enforce its own rules and, at a minimum, allow a fair procedure. Accordingly, the Court remands the case, and the Zoning Board must allow evidence to be presented in a new hearing.

¹ By example, Bluff Head attempted to offer witness testimony that the “permit to construct the subject fence should not have been granted where the applicant had failed to comply with the requirements of section 711 of the zoning ordinances pertaining to the demolition of the structures on the property,” and because of this, “pursuant to section 711(E) ‘...no building permit for construction on the premises shall be issued for a period two (2) years following the date of the unauthorized demolition.’” (Appellant’s Br. at 15.) However, the Zoning Board did not allow Mr. Murphy to testify on this issue. *See id.* The Zoning Board further precluded Bluff Head from calling other witnesses to testify or to testify on certain issues, including Mr. Landry and Ms. Brady, and Appellee confirms that it precluded Bluff Head from calling these witnesses. (Appellees’ Mem. at 4-6.)

B

Whether Zoning Board's Decision Was Clearly Erroneous Because It Was Made Contrary to Facts and Law

Bluff Head contends the Zoning Board's finding that a fence is not a structure and no permit was required is clearly erroneous and contrary to undisputed evidence. Bluff Head avers that the "testimony and evidence taken with the offers of proof made by [Bluff Head's] counsel, clearly support the [Bluff Head's] position that a fence is a structure that requires a permit for construction pursuant to the New Shoreham Zoning Ordinances." (Appellant's Br. at 37.) Bluff Head further avers that the Zoning Board refused to hear Bluff Head's arguments, ignoring its own land use attorney's opinion and ignoring testimony introduced through Mr. Risom regarding his search to determine if permits were required to construct fences. The Town counters the issue was moot, and, even if the Court does not uphold the Zoning Board's decision, the witnesses Bluff Head sought to present were irrelevant to the issue before the Zoning Board.

Pursuant to § 45-24-69(d)(5), a court may reverse or modify a zoning board's decision if the substantial rights of an appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record." A zoning board decision is supported by "substantial evidence" if, considering the record as a whole, the board's decision was reasonable. *SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190 (D.R.I. 2000). "Substantial evidence," as required to support a trial court's zoning decision reviewing the order of a municipal zoning board, "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." *New Castle Realty Company v. Dreczko*, 248 A.3d 638, 643 (R.I. 2021) (internal quotation omitted).

The Court finds that there was not substantial evidence on the record to support the Zoning Board's decision. First, it is clear to the Court that Mr. and Mrs. Trahanas needed a building permit to construct the fence based on Town law. The Town told them so in its letter on May 14, 2021 when it issued a permit after the fence was already built. The Town acknowledged, through Mr. Risom's testimony, that he visited the property to view the constructed fence in April 2021 and the buildings were down. (Appellees' Ex. A Tr. 62:12-21, May 25, 2022.) Testimony from Mr. Risom confirmed a permit was needed to construct a fence. *Id.* at 68:3-6. Cutting the course short, the Zoning Board ignored substantial evidence on the record. Second, the Zoning Board's decision to preclude Bluff Head's witnesses at the hearing and determine the appeal was moot was an error of law and unfair. Third, the Zoning Board's decision stated that a building permit was not needed, which was contrary to law (and inconsistent with the assertions of Mr. Landry, Mr. Risom, and other Town officials that a fence was a structure and a building permit was required for construction).

The Zoning Board's decision was clearly erroneous. The Zoning Board's conclusions were not supported by substantial evidence and were made contrary to law and fact.

C

Whether Zoning Board's Decision Was Arbitrary and Capricious

Bluff Head argues that the Zoning Board's actions were arbitrary and capricious because the Zoning Board failed to address testimony presented, applicable law, and zoning ordinances, and it instead made findings contrary to testimony and not in accordance with zoning ordinances §§ 202 and 711. The Town again suggests the issue was moot, and, even if the Court does not uphold the Zoning Board's decision, the witnesses Bluff Head sought to present were irrelevant to the issue before the Zoning Board.

Under § 45-24-69(d)(6), a court may reverse or modify a zoning board's decision if the substantial rights of an appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Here, the Zoning Board's decision was arbitrary and capricious. The Zoning Board ignored the town officials' assertions that a fence was a structure. The Town issued its letter to Mr. and Mrs. Trahanas on May 14, 2021 stating that a fence is a structure and a permit was required for the fence to be constructed. (Appellant's Ex. 4.) The Town's hearing on Bluff Head's appeal was on May 25, 2022, and it issued its decision on August 5, 2022. (Appellees' Ex. A; Appellant's Ex. 1.) It remains unclear why the Zoning Board concluded a building permit was not needed.

"[T]he duty of the courts is to protect rights, and innocent complainants cannot be required to suffer the loss of their rights because of the expense to the wrongdoer." *Rose Nulman Park Foundation ex rel. Nulman v. Four Twenty Corp.*, 93 A.3d 25, 33 (R.I. 2014) (internal quotations omitted). Though the Court does not relish in the fact that Bluff Head, Bluff Head's counsel, and other implicated community members must continue the appeal process with a new Zoning Board hearing, the Court finds that the Zoning Board had a responsibility to enforce its own Town laws and limit its findings. Accordingly, this Court finds that the Zoning Board's decision was clearly erroneous because it was not supported by substantial evidence and was made contrary to law and fact.

D

Attorneys' Fees

Finally, Bluff Head seeks attorneys' fees pursuant to the EAJA. Bluff Head avers that it has incurred and will continue to incur legal fees, costs, and expenses as a result of its appeal.

The EAJA was enacted to “mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings.” *Taft v. Pare*, 536 A.2d 888, 892 (R.I. 1988); *see* § 42-92-1. Under § 42-92-3(b), a party has a claim for fees and other expenses if they receive an unfavorable decision on the underlying merits at the administrative level, appeal to the appropriate court, and the party is successful in the appeal. *Rollingwood Acres, Inc. v. Rhode Island Department of Environmental Management*, 212 A.3d 1198, 1205 (R.I. 2019); *see* § 42-92-3(b). “[W]hether a party may recoup litigation expenses hinges on whether the administrative agency was substantially justified in its actions.” *Rollingwood Acres, Inc.*, 212 A.3d at 1205; *see* § 42-92-3. Here, it was not.

It is well established that the court should confine judicial review only to those cases that present a ripe case or controversy. *Riley v. Narragansett Pension Board*, 275 A.3d 545, 556 (R.I. 2022); *City of Cranston v. Rhode Island Laborers' District Council, Local 1033*, 960 A.2d 529, 533 (R.I. 2008). The Rhode Island Supreme Court has explained that, generally, “a claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Riley*, 275 A.3d at 556 (internal quotations omitted). In *Riley*, the Court held that the award of attorneys' fees was not ripe for review because the Court held that the case must be remanded to the pension board for a new hearing and “events may ensue on

remand which affect the attorneys' fees issue." *Id.* at 557. As a remand is ordered here, the issue of attorneys' fees is not ripe for review in the context of this case at this time.

IV

Conclusion

This Court finds that the Zoning Board violated Bluff Head's due process rights, its findings and conclusions were not supported by substantial evidence and were clearly erroneous, and its findings and conclusions were arbitrary and capricious. This Court vacates the Zoning Board's decision of August 5, 2022 and remands the appeal for a new Zoning Board hearing. Sufficient findings of fact shall be made.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Bluff Head, Block Island, LLC v. Susan Bush, et al.

CASE NO: WC-2022-0335

COURT: Washington County Superior Court

DATE DECISION FILED: December 4, 2024

JUSTICE/MAGISTRATE: Lanphear, J.

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