SUPERIOR COURT
STAMFORD-NORWALK
JUDICIAL DISTRICT
2024 MAY -6 A 10:20

DOCKET NO: FSTCV-22-6058191 S : SUPERIOR COURT

ROBERT Y. PELGRIFT, JR. ET AL. : JUDICIAL DISTRICT
: STAMFORD/NORWALK

V. : AT STAMFORD

PLANNING AND ZONING BOARD OF APPEALS
OF THE TOWN OF GREENWICH ET AL. : MAY 6, 2024

MEMORANDUM OF DECISION

NATURE OF PROCEEDINGS:

This is an administrative appeal by the plaintiffs, Robert Y. Pelgrift, Jr. and Susan Pelgrift against the defendants, the Planning and Zoning Board of Appeals of the Town of Greenwich (Town or PZBA) concerning the issuance of a certain zoning permit to the defendants, Stephen Keyes and Kristen Keyes.

PRELIMINARY MOTIONS:

There were two preliminary matters to address at the commencement of trial. First, the plaintiffs were not fully prepared to offer evidence that they were aggrieved parties, which was necessary for the court to find their standing. The plaintiff bears the burden of both pleading and proving aggrievement. In land use cases, the plaintiff must present evidence of aggrievement. *Fox* v. *Zoning Board of Appeals*, 84 Conn. App. 628, 636-37 (2004). After some discussion, all counsel and the court agreed that the matter of aggrievement could be taken up at a subsequent hearing if, after trial, the court concluded that the plaintiffs' appeal to this court should otherwise be sustained.

128.00

Second, the defendants claimed that the court lacked subject matter jurisdiction because under Gen. Statutes § 8-7 the plaintiffs' appeal to the PZBA had been untimely. That statute provides, in relevant part that:

> "The concurring vote of four members of the zoning board of appeals shall be necessary to reverse any order, requirement or decision of the official charged with the enforcement of the zoning regulations or to decide in favor of the applicant any matter upon which it is required to pass under any bylaw, ordinance, rule or regulation or to vary the application of the zoning bylaw, ordinance, rule or regulation. An appeal may be taken to the zoning board of appeals by any person aggrieved or by any officer, department, board or bureau of any municipality aggrieved and shall be taken within such time as is prescribed by a rule adopted by said board, or, if no such rule is adopted by the board, within thirty days, by filing with the zoning commission or the officer from whom the appeal has been taken and with said board a notice of appeal specifying the grounds thereof. Such appeal period shall commence for an aggrieved person at the earliest of the following: (1) Upon receipt of the order, requirement or decision from which such person may appeal, (2) upon the publication of a notice in accordance with subsection (f) of section 8-3, or (3) upon actual or constructive notice of such order, requirement or decision."

The plaintiffs' application was filed on July 7, 2022. That would mean that if the plaintiffs had actual or constructive notice of the zoning enforcement action prior to June 7, 2022, their appeal to the PZBA would be untimely.

The trial court (Lee, *J.*) had granted (117.01), motions filed by the parties to submit documents to supplement the existing return of record (ROR) (110.00, 117.00, 122.00 and 123.00 (partially)).[1] The defendants submitted documents to support their claim that the plaintiffs' appeal to the PZBA had been untimely; the plaintiffs submitted documents to rebut that same claim.

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[1] General Statutes § 8-8 (k) allows additions to the record of documents and transcripts that were improperly omitted from the administrative record as filed with the court by the agency. Section 8-8 (k) also allows the court based upon equitable principles and in its discretion to accept additional papers into the record, or allow for additional testimony, for a complete determination of the facts of the case.

The defendants highlight certain documents regarding their jurisdictional challenge. One of these is a May 9, 2022, email (Defendants' supplemental ROR, 123.00, date stamped 0001), from Susan Pelgrift, (a.k.a. Susan Curtis) to the Greenwich zoning enforcement officer, Jodi Couture and other Town officials. There she references, in part, an "approved 80 Birch Lane Zoning permit." There are other email messages, of the same ilk, prior to June 7. However, the plaintiffs maintain that on June 7, as well as thereafter, the Town continued to advise that the permit was "on hold." Therefore, they argue that there was nothing to appeal and, indeed, the Town stated it was still waiting for a final survey. Further, it was only on June 9 that the plaintiffs were advised that the permit had been approved because it met all applicable zoning requirements.

"[W]ithout notice that a decision has been reached, the right to appeal from that decision is meaningless." (Internal quotation marks omitted.) *Munroe et al.* v. *Zoning Board of Appeals of the Town of Branford et al.*, 261 Conn. 263, 271 (2002);" *Wilzius et al.* v. *Zoning Board of Appeals of the Town of New Milford et al.*, 106 Conn. App. 1, 22-23 (2008). The court is not prepared to say it has been established that the plaintiffs had actual or constructive notice of the permit approval. In the instant matter, the PZBA itself did not consider the appeal as untimely filed. Therefore, the motion to dismiss based upon jurisdictional grounds is denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The court now goes on to the merits of the plaintiffs' appeal to this court. Based upon the pleadings and the record, as supplemented, the court finds the following facts for purposes of this appeal.

The PZBA is the administrative agency in the Town of Greenwich that has authority, pursuant to General Statutes §8-7 and §6-19 of the Building Zone Regulations ("Regulations"),

to hear and decide appeals from orders, requirements and decisions from the official charged with enforcement of the zoning regulations. In Greenwich, that official is the zoning enforcement officer (ZEO).

The plaintiffs purchased their home at 76 Birch Lane in 1977. ROR Ex. 101 at 7. The Keyes purchased 80 Birch Lane in March 2021. ROR Ex. 94.

Both properties were part of the same subdivision of land, along with twenty additional lots. Said subdivision is shown on map entitled "Property of Mary R. Bridge, Greenwich, Conn." All properties had been approved as legally conforming lots of at least one-acre in size in a one-acre (RA-1) zoning district by the Planning and Zoning Commission in April of 1953; the map was subsequently filed on the land records as map #2972. The lots conformed to the Town Regulations including, but not limited to, a lot area of one (1) acre or more, and setbacks from property boundaries. The required setbacks in a RA-1 zone are fifty (50) feet from the rear property line, fifty (50) feet from the front property line, and twenty-five (25) feet from the side property line.

76 Birch Lane fronts on Birch Lane. 80 Birch Lane is a northwestern rear lot. ROR Ex. 61. It is accessed by a one-lane driveway that extends from the street along the northeastern property line of 76 Birch Lane in a northwesterly direction. To the west of 80 Birch Lane and 76 Birch Lane lots is the Birch Lane Pond, which is part of Brothers Brook, a tributary of Long Island Sound. To the west and northwest of 80 and 76 Birch Lane and on the western side of 76 Birch Lane are significant areas of wetland vegetation, as well as a swamp. ROR Ex. 7. 80 Birch Lane has a small area of wetland vegetation and a smaller area of swamp. Brothers Brook is to the west, flowing into the Birch Lane Pond.

On or about September 10, 2021, the Keyes applied for and received a Zoning Permit for a "full gut remodel to existing home, plus 1,950 square foot addition." ROR Ex. 17. The application showed a proposed rear setback of 60.41 feet. Id. In December 2021, the Keyes demolished the existing house without a demolition permit. The Town issued a stop-work order. ROR Ex. 101 at 32-33. In March 2022, the Keyes filed a new zoning permit application for a "rebuild of existing home from foundation up" with, again, a rear setback of 60.41 feet. ROR Ex. 18.

The original house had been a rectangle of approximately 67 feet by 28 feet. The new house included a structure perpendicular to the foundation of the original house that is approximately 90 feet long. ROR Ex. 10. The new structure, including a new "screened porch," has a setback of approximately 15 feet on the rear north side of the property. The Keyes designated this as the "side yard." It did not conform to the side yard requirements of the RA-1 zoning district. However, according to the Regulations then in effect,[2] and because the lot size was then nonconforming at 0.985 acres in size, the Keyes asked that the permit application be

[2] Regulation section 6-131 "Minimum Frontage Exceptions" was adopted in 2001. It states in relevant part that: "A rear lot not fronting on a street, whether or not in separate ownership and whether or not the rear or front lots are presently built upon, may be improved in accordance with requirements of the particular zone provided that: 5.) The area of access way shall be excluded from lot area calculation for Zoning Lot Area (as defined in Section 6-5(a)(57) and FAR (Floor Area Ratio)). Zoning Lot Area is determined to begin at a point where the lot shape requirement of the zone can be demonstrated." The current lot shape requirement for the RA-1 Zone is a one hundred and fifty (150) foot circle.

Regulation section 6-9 states in relevant part: "No building or land shall be used and no building or part thereof shall be erected or relocated except in conformity with this Article, except lots appearing of record in the Greenwich Land Records and made non-conforming in respect of area, lot shape or frontage by the adoption of or any amendment to this Article . . . Building on such a lot in a residence zone may be so designed and erected as to conform to the provisions of this Article as to required yards for the zone immediately below the zone in which such lot is situated as listed in Sections 6-2 and 6-3." This regulation was adopted in 1978 and amended in 2013.

approved as meeting the requirements in the RA-20 zone. ROR Ex. 101 at 48-49. The ZEO agreed. Meanwhile, they sought necessary approvals from the Greenwich Inland Wetlands and Watercourses Agency ("Inland Wetlands") for drainage and other activities. Inland Wetlands approved the permit.

The plaintiffs sought review by the PZBA, which held a public hearing on August 10, 2022. ROR Ex. 101 (transcript). The PZBA denied the plaintiffs' appeal. Legal notice of the PZBA's decision was published on August 24, 2022, in the Greenwich Time, a newspaper with circulation in the Town of Greenwich. The plaintiffs, claiming to be aggrieved persons under General Statutes § 8- 8(a)(1),[3] timely appealed to this Court.[4]

In their complaint (100.31), the plaintiffs allege that the Town's interpretation and application of the Regulations to their property violates "Connecticut common law and State Statutes, including but not limited to, Conn. Gen. Stat. §8-26a." In their opening brief (108.00), the plaintiffs go on to more specifically advance three essential arguments to sustain their appeal. These are, that the PZBA's conclusion that the new structure complies with the applicable setback requirements was contrary to law, that the PZBA improperly failed to require the floor area calculations to comply with the requirements of the zoning regulations, and that the PZBA'S failure to give adequate reasons for its decision was contrary to law.

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[3] The statute states that: "(a) (1) "Aggrieved person" means a person aggrieved by a decision of a board and includes any officer, department, board or bureau of the municipality charged with enforcement of any order, requirement or decision of the board. In the case of a decision by a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, "aggrieved person" includes any person owning land in this state that abuts or is within a radius of one hundred feet of any portion of the land involved in the decision of the board."

[4] The court, again, references its earlier remark regarding the aggrievement issue.

ANALYSIS:

SCOPE OF REVIEW:

The determination that the new structure complied with applicable setback requirements and that the floor area calculations complied with the requirements of the Regulations necessitated factual determinations by experts. They included measurement of the access way, calculation of a 150-foot circle, measurement of required setbacks, measurement of new and old structures, and review of architectural plans to determine the extent of the porch area. These involved mixed questions of fact and law.

A commission is endowed with liberal discretion and is entitled to appropriate, measured deference in interpreting zoning regulations. *Fedorich* v. *Zoning Bd. of Appeals of Town of Torrington*, 178 Conn. 610, 613, 615 (1979); *Lawrence* v. *Zoning Bd. of Town of North Branford,* 158 Conn. 509, 514-15 (1969); *Toffolon v. Zoning Bd. of Town of Plainville,* 155 Conn. 558, 560, 561 (1967). "Although the interpretation of a zoning ordinance is a question of law, and a court is not bound by an agency's interpretations, *Coppola* v. *Zoning Board of Appeals,* 23 Conn. App. 636, 640 (1990); where an agency has previously interpreted an ordinance or regulation, the practical construction placed upon the ordinance in the past is entitled to some consideration." *1315 Hamden, LLC* v. *Town of Hamden Planning and Zoning Commission,* No. CV020471309S, Superior court, Judicial District of New Haven, 35 Conn. L. Rptr. 316 (2003).

Accordingly, the appropriate scope of judicial review is whether the PZBA acted unreasonably, arbitrarily, illegally or in abuse of its discretion.

REGULATIONS:

Prior to 2001, the Regulations had provided that an "access way shall not be included as part of a rear lot." (ROR 62, p.21). At that time, the Town amended Regulations section 6-131(a) by adding two new subsections, subsections (5) and (6). They stated: "5. The area of access way is excluded from lot area calculation. . . Lot size is determined to begin at a point where the lot shape requirement of the zone can be demonstrated (either circle or rectangle) . . .; 6. The access way is considered to end at that point where the front lot line width and the lot shape requirements of the zone are satisfied."

The amendments effectively increased the size of what was regarded as an "access way," and reducing the size of what was regarded as "lot area" or "Zoning Lot Area." The term "Zoning Lot Area" was subsequently inserted by amendment in place of the phrase "lot size." (ROR 102). The lot shape requirement is in Regulation section 6-205. For the RA-1 Zone, the shape must be "large enough to contain a circle 150 ft. in diameter." For the R-20 Zone, the shape must be "large enough to contain a circle 100 ft. in diameter." "Front lot line width" does not appear, as such, as a requirement Regulation section in 6-205. Instead, there is a requirement for "frontage," which, in the case of the RA-1 Zone, is 125 feet.

APPLICATION OF REGULATIONS:

However, the Keyes property is a "rear lot" within the meaning of Regulation section 6-131. It is not required to comply with frontage requirements. The zoning lot area of the subject property comprises 0.985 acre. Further, pursuant to Regulation section 6-131(e), the Keyes designated the eastern boundary, not the southerly boundary, of their property as its front line. A reduction in the size of "lot area" or "Zoning Lot Area" would result in a proportionate reduction in the size of a house which can be constructed on a rear lot. This is because the lot

shapes for all of the residential zones required under Regulation section 6-205 require circles or rectangles larger than the maximum width of 35 feet permitted for an access way under Regulation section 6-131(a)(2). Therefore, the shape of all rear lots must be satisfied outside the 35-foot width of a traditional access way. By reducing the lot area of the Keyes' property from 1.073 acres, as measured pursuant to the Regulation section 6-131(a) in effect prior to 2001, to 0.985 acre, as measured pursuant to the addition of subsections (5) and (6), while maintaining the same floor area ratio, the maximum gross floor area of any house on the property was reduced from 6,310 square feet (i.e. 1.073 acre, or 46,740SF x .135) to 5,795 square feet (i.e. 0.985 acre, or 42,907 x .135).[5]

The court gives deference to, and it does find, that the calculation of the zoning lot area of the Keyes property is consistent with that of other rear lots since Regulation section 6-131(a) was amended in 2001. When rendering the decision of the PZBA, the Chairperson stated: ". . . I think in terms of the analysis that Jodi [Couture, the ZEO] went through on the applicable zoning regulations are on point and are consistent with the way those regulations have been applied by this Board in the past, particularly with regard to the circle at the edge of a lot and the access way, and the impact that it has on the computation of various ratios for land use purposes." (ROR 101, p. 82). The evidence in the record buttresses the interpretation given to Regulation section 6-131(a)(5) and (6) by the surveyors and architects, and as approved by the ZEO. It appears consistent with the historic interpretation of the PZBA. The court gives due weight to that interpretation. *Newman* v. *Planning & Zoning Commission of Town of Avon,* 293 Conn. 209, 218 (2009).

[5] The total gross floor area of the new house is 5,285 square feet, (ROR 34; ROR 101, p.49). This is less than either the limitation imposed prior to 2001 or that imposed thereafter.

EXPLANATION OF DECISION BY PZBA:

Finally, General Statutes § 8-7 requires the concurring vote of four members of a zoning board of appeals to reverse a decision of a zoning enforcement officer. Here, the decision of the five members of the PZBA to affirm the ZEO was unanimous. Moreover, where the grounds for a decision are not expressly stated, a court may search the record for the basis thereof. *Bloom* v. *Zoning Bd. of Appeals of City of Norwalk,* 233 Conn. 198, 208 (1995); *Connecticut Resources Recovery Authority* v. *Planning and Zoning Commission of Town of Wallingford,* 225 Conn. 731, 743 (1993); *Patty* v. *Zoning Bd. of Appeals of Town of Wilton,* No. FSTCV136020678S, Superior Court, judicial district of Stamford–Norwalk, 9 Conn. L. Rptr. 746 (2015). In the instant case, each of the five members of the PZBA explained why he voted to affirm the decision of the ZEO. In short, the PZBA expressed that the ZEO's interpretation of regulation section 6-131(a) was consistent with the way the PZBA had previously applied its provisions. *Malone* v. *Zoning Board of Appeals of the Town of Westport*, 134 Conn. App. 716, 724-7 (2012). However, it should be clear that this court has reviewed the entire record, and it finds that the basis for its decision conformed to law and was not arbitrary or in abuse of its discretion.

JUDGMENT:

For the foregoing reasons, the plaintiffs' appeal is dismissed.

Kavanewsky, (183)
KAVANEWSKY, J.

DECISION ENTERED IN ACCORDANCE WITH THE FOREGOING ON 5/6/24.
JDNO SENT 5/6/24