STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
NEWPORT, SC. SUPERIOR COURT

(FILED: July 18, 2014)

BELLEVUE-OCHRE POINT NEIGHBORHOOD ASSOCIATION	:	
v.	:	C.A. No. NC 2014-0098
PRESERVATION SOCIETY OF NEWPORT COUNTY	:	

DECISION

GALLO, J. Before the Court is Defendant Preservation Society of Newport County's (the Society) motion to dismiss Plaintiff Bellevue-Ochre Point Neighborhood Association's (BOPNA) declaratory judgment action. Therein, BOPNA seeks judicial interpretation of the City of Newport's Zoning Ordinance. The Society moves to dismiss this action pursuant to Super. R. Civ. P. 12(b)(1), 12(b)(6) and G.L. 1956 § 9-30-6.

I

Facts and Travel

At the center of this litigation is the well-known Newport mansion, the Breakers. Constructed between 1893 and 1895, the lavish, seventy-room Breakers served as a single-family summer cottage to the wealthy Vanderbilt family. The Breakers remained a private residence until 1942, when the youngest Vanderbilt child opened it to the public as a museum in an effort to help raise funds for the Society. In 1972, the Society purchased the mansion from the remaining Vanderbilt heirs and continued to operate it as a museum. [1]

[1] General background information found at the Society's Newport Mansions website, http://www.newportmansions.org/explore/the-breakers (last visited June 26, 2014).

In 1977, the City of Newport Zoning Ordinance (Zoning Ordinance or Ordinance) was amended; as a result of the amendment, the Breakers was located in an R-60 zone. The Ordinance provided that, in R-60 zones, museum uses were permitted by special use permit obtained from the Newport Zoning Board (the Zoning Board); the current Zoning Ordinance provides the same. (Zoning Ordinance § 17.40.020 (B)(4)). The current Zoning Ordinance defines a "museum" as

> "a building having public significance by reason of its architecture or former use or occupancy or a building serving as a repository for natural, scientific, historical or literary collections or objects of interest, or works of art, and arranged, intended and designed to be used by members of the public for viewing, with or without an admission charge, and which may include as an accessory use the sale of goods to the public as gifts or for their own use." (Zoning Ordinance § 17.08.010)

The current Zoning Ordinance also provides that the use of museum premises shall be limited to, inter alia, "[d]isplay, information and sales areas for its museum operations including a gift shop and show room for reproduction items." Id. at § 17.100.220(B)(3).

In 1997, the Society appeared before the Zoning Board requesting a special use permit to erect a shed on the museum premises; the purpose of the twelve-by-twelve shed was to house vending machines to provide refreshments for patrons while they waited in line to visit the museum. The Zoning Board issued a written decision on September 16, 1997 granting the applicant's request. That refreshment shed has been continuously operating on the premises since.

The Society now proposes to replace the shed and construct a "Welcome Center." The Welcome Center would be approximately 3650 square feet and would consolidate the refreshment shed with other visitor facilities currently on the premises, such as restrooms and a ticket booth, into one single building. BOPNA, an incorporated neighborhood association

comprised of individuals who own or reside on parcels of real property located in the same "Bellevue-Ochre Point Neighborhood" as the Breakers, was founded to help preserve the character of the neighborhood and is opposed to the creation of the Welcome Center. (Compl. ¶¶ 2, 5)

The Society has already initiated the administrative process. In May 2013, it filed with the Newport Historic District Commission (HDC) an application for a Certificate of Appropriateness; that application was denied. The Society then appealed the HDC's decision to the Zoning Board, pursuant to Zoning Ordinance § 17.80.110. The Zoning Board reversed the HDC's denial of the application. BOPNA then appealed the Zoning Board's decision to this Court, and the Society has filed a motion to dismiss that appeal.[2]

In its effort to thwart the Society's plan for the Welcome Center, BOPNA initiated this instant declaratory judgment action, in which it requests the Court enter judgment declaring that the Breakers museum is a legal non-conforming use in an R-60 zone, the movement or alteration of which is prohibited, and that the proposed Welcome Center would constitute an accessory use not permitted under the terms of the Zoning Ordinance. The parties submitted memoranda to the Court and argument was heard on June 2, 2014.

To briefly summarize the parties' positions, BOPNA argues that its claim is properly before this Court pursuant to The Uniform Declaratory Judgment Act, § 9-30-1, et seq., because it is seeking a determination regarding purely legal issues, subject only to the jurisdiction of this Court and the Rhode Island Supreme Court's appellate review. The Society, on the other hand, argues that the issues presented in BOPNA's Complaint are clearly issues the Zoning Board has authority to determine. The Society contends that BOPNA is attempting to improperly bypass the

[2] That appeal is currently pending as case number NC-2014-0116.

appropriate municipal procedures and put the issues before this Court by fashioning its Complaint as a declaratory judgment action. Also, the Society asserts that BOPNA lacks the proper standing to initiate this action.

II

Analysis

The standing requirement is "satisfied when a plaintiff has suffered some injury in fact, economic or otherwise." N & M Props., LLC v. Town of W. Warwick ex rel. Moore, 964 A.2d 1141, 1145 (R.I. 2009). Although BOPNA's Complaint may sufficiently allege standing to withstand a Super. R. Civ. P. 12(b)(6) motion, this Court lacks the factual development needed to determine whether the alleged injury in fact—a decrease in the members' enjoyment of their property and a deleterious impact on property values due to an increase of traffic and the number of visitors to the area—would constitute an injury that is "[]concrete and particularized . . . and [] actual or imminent, not 'conjectural' or 'hypothetical.'" Narragansett Indian Tribe v. State, 81 A.3d 1106, 1110 (R.I. 2014) (internal citations omitted); (Compl. ¶ 27). However, this Court need not resolve the instant standing issue because, after consideration of the parties' arguments, the Court finds that the issues raised by BOPNA's Complaint may, and should, be addressed and resolved by the Zoning Board and, thus, are inappropriate subjects of a declaratory judgment action.

Ordinarily, failure to exhaust one's administrative remedies is a bar to instituting a declaratory judgment action. See Nardi v. City of Providence, 89 R.I. 437, 449, 153 A.2d 136, 143 (1959) (finding that "where complainant has failed to pursue and exhaust his available administrative remedies he is not entitled to equitable relief"); see generally McKart v. United

States, 395 U.S. 185, 195, 89 S. Ct. 1657, 1663, 23 L. Ed. 2d 194 (1969). The primary purposes of the exhaustion doctrine have been identified as follows:

> "'First, it carries out the congressional purpose of granting authority to the agency by discouraging the frequent and deliberate flouting of administrative processes [that] could . . . encourage[e] [sic] people to ignore its procedures. Second, it protects agency autonomy by allowing the agency the opportunity in the first instance to apply its expertise, exercise whatever discretion it may have been granted, and correct its own errors. Third, it aids judicial review by allowing the parties and the agency to develop the facts of the case in the administrative proceeding. Fourth, it promotes judicial economy by avoiding needless repetition of administrative and judicial factfinding, and by perhaps avoiding the necessity of any judicial involvement at all if the parties successfully vindicate their claims before the agency.'" Southern Union Co. v. R.I. Dep't. of Envtl. Mgmt., No. PC-07-2056, 2007 WL 2173829, at *9 (R.I. Super. July 13, 2007) (quoting Andrade v. Lauer, 729 F.2d 1475, 1485 (D.C. Cir. 1984) (citing McKart, 395 U.S. at 193-95).

The Rhode Island Supreme Court, however, has recognized an exception to the exhaustion of remedies doctrine only "insofar as the complaint seeks a declaration that the challenged ordinance or rule is facially unconstitutional or in excess of statutory powers, or that the agency or board had no jurisdiction." Kingsley v. Miller, 120 R.I. 372, 374, 388 A.2d 357, 359 (1978). BOPNA is not purporting to challenge the Ordinance as facially unconstitutional or as being in excess of its statutory powers. BOPNA does argue that the Zoning Board lacks the authority to determine the issues presented in the Complaint. This Court disagrees.

BOPNA's first count requests that this Court declare that the Breakers museum constitutes a legal non-conforming use in an R-60 zone and, therefore, may not be moved or altered. The Court's view is that this is a non-issue. The fact that at one time a museum use was non-conforming is irrelevant because, under the current Zoning Ordinance, museums are now permitted in the area by special use permit. See Campbell v. Tiverton Zoning Bd., 15 A.3d 1015 (R.I. 2011). In Campbell, our Supreme Court dismissed a portion of the defendant zoning

board's appeal from a Superior Court judgment because plaintiff's underlying action for a declaratory judgment—seeking "that the building plans and building permit [to re-build a yacht club] represent an unlawful expansion of a preexisting legal, non-conforming use"—was rendered moot. Id. at 1019, 1021. During the pendency of that appeal to the Rhode Island Supreme Court, the Tiverton Town Council amended its zoning ordinance; the amendment placed a "floating zone" on the yacht club's lot that permitted the challenged operation, thus extinguishing the yacht club's status as a legal non-conforming use. Id. at 1021. Similarly here, the Breakers museum was a non-conforming use prior to 1977, but the current Zoning Ordinance now permits this use by special use permit. Because the Zoning Board is empowered to issue and consider special use permits, any approvals necessary for the development of the proposed Welcome Center present questions for the Zoning Board. See Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1085 (R.I. 2013); see also G.L. 1956 § 45-24-42(a).

The remaining counts of BOPNA's Complaint ask the Court to determine that the proposed Welcome Center contemplates uses including, among others, the operation of a restaurant, which are not permitted as accessory uses associated with a museum under the Zoning Ordinance. Essentially, BOPNA asks this Court to review the Society's proposed development plans and determine whether they fit within, or violate, the terms of the Zoning Ordinance. This is clearly a task more appropriate for the local zoning officials.

The powers of zoning boards are "legislatively delineated." Olean v. Zoning Bd. of Review of Lincoln, 101 R.I. 50, 52, 220 A.2d 177, 178 (1966). The Zoning Enabling Act, set forth in chapter 24 of title 45 in the Rhode Island General Laws, and the Newport Zoning Ordinance specifically grant to the local zoning officials the initial responsibility of interpreting their own ordinances:

> "A zoning ordinance adopted pursuant to this chapter shall provide that the zoning board of review shall:
>
> "(1) Have the following powers and duties:
> "(i) To hear and decide appeals in a timely fashion where it is alleged there is an error in any order, requirement, decision, or determination made by an administrative *officer or agency in the enforcement or interpretation of this chapter, or of any ordinance* adopted pursuant hereto[.]" Sec. 45-24-57 (emphasis added.)

Newport's Zoning Ordinance also makes clear its intention to give the zoning official wide discretion to handle issues of interpretation: "all matters arising in connection with the enforcement or interpretation of this zoning code, except as otherwise expressly provided herein, shall be first presented to the zoning officer." Zoning Ordinance § 17.112.010(A). Where both the Zoning Enabling Act and the local Ordinance sanction the zoning officer's authority to handle matters of interpretation, subject to the review of the Zoning Board, and then, if necessary, this Court's review, BOPNA's requests for such Zoning Ordinance interpretations and determinations are within the purview of the local zoning officers and Zoning Board. See id.; see also § 45-24-57.

The Court is satisfied that all of BOPNA's claims—which essentially raise issues regarding the interpretation of the Zoning Ordinance and its applicability to the Society's proposed development—are within the jurisdiction of the local zoning agency and that, therefore, this matter does not properly fall within any of the narrow exceptions to the exhaustion of administrative remedies doctrine. Further, were the Court to entertain the instant action, the four purposes of the exhaustion of remedies doctrine, as identified by the United States Supreme Court, would be thwarted: the frequent and deliberate flouting of the administrative process would not be discouraged; the agency would be denied the opportunity to apply its expertise and exercise its discretion; further judicial review would be compromised by the inability of the

parties and the agency to fully develop the pertinent facts and record; and, the judicial economy would not be served. See McKart, 395 U.S. at 193-95.

At some point, the zoning officer will review the operations of the proposed Welcome Center to determine whether they constitute a permitted accessory use to a museum, given that the Ordinance defines a museum as including "as an accessory use the sale of goods to the public as gifts or for their own use." Zoning Ordinance § 17.08. Further, the Zoning Ordinance limits the use of museum premises to, inter alia, "display, information and sales areas for its museum operations including a gift shop and show room for reproduction items." Id. at § 17.100.220(B)(3). The duty of the zoning officer is to interpret these provisions, review the Society's building application, and make a determination as to whether the Zoning Ordinance contemplates and permits the proposed operations of the Welcome Center. See § 45-24-54; Zoning Ordinance § 17.112.010(B)(2).

Additionally, the Zoning Board unquestionably possesses the authority to consider and grant special use permits. Sec. 45-24-42; Zoning Ordinance § 17.108.020. The Zoning Board may grant a special use permit if the Zoning Board finds that

> "the proposed use or the proposed extension or alteration of an existing use is in accord with the public convenience and welfare, after taking into account, where appropriate:
>
> "1. The nature of the proposed site, including its size and shape and the proposed size, shape and arrangement of the structure;
> "2. The resulting traffic patterns and adequacy of proposed off-street parking and loading;
> "3. The nature of the surrounding area and the extent to which the proposed use or feature will be in harmony with the surrounding area;
> "4. The proximity of dwellings, churches, schools, public buildings and other places of public gathering;
> "5. The fire hazard resulting from the nature of the proposed buildings and uses and the proximity of existing buildings and

uses;
"6. All standards contained in this zoning code;
"7. The comprehensive plan for the city." Zoning Ordinance § 17.108.020(G); see Lloyd, 62 A.3d at 1085-86.

The current refreshment shed that the Society wishes to move and enlarge exists pursuant to an approved special use permit. The Zoning Ordinance mandates that "any reconstruction, enlargement, extension, moving or structural alteration of an approved special use permit or any building or structure in connection therewith shall require submission of a new special use permit." Id. at 17.108.020(C). Pursuant to the Zoning Board's statutorily granted power to issue special use permits, there is no question that the Zoning Board should be considering the issues raised in BOPNA's Complaint.[3]

All the declarations that BOPNA requests this Court to make are part and parcel of an everyday review of a building application by municipal zoning officials: in the first instance by the zoning officer, then on review by the Zoning Board. See Hein v. Town of Foster Zoning Bd. of Review, 632 A.2d 643 (R.I. 1993) (affirming the zoning board's decision upholding the zoning official's determination of whether a proposed barn would constitute an accessory use under the local ordinance); see also Lauder v. Zoning Bd. of Westerly, 101 R.I. 623, 266 A.2d 135 (1967) (recognizing the zoning board's authority to interpret what type of structure came within the concept of a "charitable recreation building" as used in the local ordinance, but quashing the board's decision after determining on appeal that the decision did not rest upon legally competent evidence).

[3] Notably, BOPNA's Complaint asserts that if the Welcome Center is constructed, it would result in increased traffic in the vicinity, alter the character of the neighborhood, and decrease property values. Complaint ¶¶ 28-30. The Zoning Ordinance specifically instructs the Zoning Board to consider these concerns when deciding whether to grant a special use permit. See Zoning Ordinance § 17.108.020(G), cited above.

"A declaratory judgment is not . . . the appropriate method of obtaining a general interpretation of a zoning ordinance. In general, the method for doing that is to apply for a permit and to appeal, if necessary, the action on the permit to the zoning board." Nyal D. Deems et al., A Practical Guide to Winning Land Use Approvals and Permits § 10.05[1] (LexisNexis 2013). The issues presented in BOPNA's Complaint to this Court will be fully addressed in that process, with the benefit of a full evidentiary hearing with exhibits and testimony. Therefore, this Court finds it would be an inappropriate exercise of its jurisdiction to address the issues presented by the Complaint at this time.

If these issues need to be addressed by this Court, they should be presented in the context of an appeal by an aggrieved party from a Zoning Board decision. The Court would then be in a position to review the Zoning Board's determinations of law and findings of fact with the benefit of a fully developed record. See § 45-24-69(d). When a decision of a zoning board is properly before the Superior Court for review, the Court will give deference to the board's findings of fact, but may review questions of law *de novo*. See Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008). Given that "'a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance,'" this Court finds that the Zoning Board should be given an opportunity to consider the issues presented and to make its own determinations before the Court intervenes. Id. (quoting Monforte v. Zoning Bd. of Review of East Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)).

III

Conclusion

The issues presented in BOPNA's Complaint are within the jurisdiction and authority of the Newport zoning officials to determine, at least in the first instance, and inappropriate for resolution in an action seeking declaratory judgment. Accordingly, this Court exercises its discretion to decline BOPNA's request for declaratory judgment and grants the Society's motion to dismiss. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Bellevue-Ochre Point Neighborhood Association v. Preservation Society of Newport County**
CASE NO:	**NC 2014-0098**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**July 18, 2014**
JUSTICE/MAGISTRATE:	**Gallo, J.**
ATTORNEYS:	
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