

STATE OF MAINE
CUMBERLAND, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO: AP06-042 ✓

RECEIVED

MORRILLS CORNER, LLC

AUG 1 2007
STATE OF MAINE
CUMBERLAND, ss. Clerk's Office
SUPERIOR COURT
Plaintiff

**ORDER ON PLAINTIFF'S
RULE 80B APPEAL**

v.

CITY OF PORTLAND

Defendant

This matter comes before the Court on Morrills Corner, LLC's 80B appeal of administrative action taken by the City of Portland. For the reasons stated below, the appeal is DENIED.

BACKGROUND

Plaintiff Morrills Corner, LLC ("Morrills Corner") is a Delaware limited liability company that was formed for the purpose of handling a development project in Portland, Maine. To initiate the project, Packard Development, LLC, Morrills Corner's predecessor in interest, entered into a Conditional Zoning Agreement ("CZA") with Defendant City of Portland ("the City") in 2004, which was revised in May 2005.¹ The CZA was intended to govern development of twenty acres of land in the vicinity of 33 Allen Avenue in Portland, to be called Morrill's Crossing.

According to the CZA, the project must comply with and be subject to the City's Land Use Code. The project consists of a redevelopment of apartments

¹ The May 2005 version is recorded in the Cumberland County Registry of Deeds at Deed Book 23341, Page 114.

and townhouses and adds more residential units, a grocery store, walking trails, a playing field, and a boxing/ health club facility. The CZA incorporated several exhibits, including Exhibit B, a site plan drawing, and Exhibit D, architectural renderings of the proposed development. Also, Paragraph 13 of the CZA states that the agreement is subject to restrictions imposed by the City Council.

As required by the CZA, Morrills Corner submitted an application for site plan and subdivision approval in July 2005. These applications were supported by traffic and parking studies, and notice of the project was provided to residents in the neighborhood. A neighborhood meeting was held on December 15, 2005 to discuss the project. The Community Development Committee ("CDC"), a subset of the City Council, also participated in numerous workshops and evaluations of the project. The developer also represented to the CDC that the boxing facility would not exceed 15,000 square feet. The full City Council extensively discussed the project and analyzed the site plan that was incorporated into the CZA.

In October 2005, the City's zoning administrator, Marge Schmuckal, issued an opinion that the site plan complied with zoning regulations. The dimensions on Exhibit B initially had been listed as 4,000 square feet for the existing boxing facility, with an expansion of approximately 10,000 square feet. No mention of the number of stories was made on Exhibit B, although the number of stories was listed for other buildings on the plan.

The administrator issued a revised opinion in January 2006, again stating that the project complied with zoning regulations, including setbacks, permitted uses, and the height limit. But, she also stated that consistency with the CZA remained at issue and would have to be reviewed by the Planning Board.

Specifically, she noted that CZA paragraph 3 requires that the development occur "substantially in accordance with the Site Plan shown on Exhibit B." The CZA provides that it may allow minor deviations and that each phase of development remains subject to site plan review.

In February 2006, Morrills Corner submitted a revised site plan, reducing the footprint to 14,000 square feet and showing a single-story building. By June 2006, however, another revised plan was submitted, depicting a three-story, 42,484 square foot building due to the terms of Morrills Corner's lease. The new plan listed a ground floor area of 15,090 square feet, a second floor area of 11,922 square feet, and a third floor area of 15,462 square feet.

The Planning Board ("the Board") held a public hearing on July 11, 2006, after which it determined, by a vote of 6-0, that the application complied with the CZA. The Board also granted subdivision and site plan approval, subject to a condition that the boxing facility would not exceed 14,000 total square feet. It also stated that it would have to review and approve an amended plan incorporating the reduction in size. The Board issued findings and conclusions to that effect on August 3, 2006. As the condition of approval would become final and binding absent an appeal, Morrills Corner filed this 80B appeal, solely contesting the condition limiting the boxing facility to 14,000 square feet.

After hearing, this Court remanded the matter to the Board for further fact finding, ordering it to clarify its rationale for the limitation. On July 10, 2007, the Board called a public hearing for the purpose of discussing and adopting findings of fact regarding the limitation. After the Board adopted findings as requested by the Court, the City and Morrills Corner agreed that the matter should be decided on the parties' written submissions.

DISCUSSION

1. Standard of Review.

Review of board findings is “for an abuse of discretion, error of law, or findings unsupported by substantial evidence in the record.” *O’Toole v. City of Portland*, 2004 ME 130, ¶ 8, 865 A.2d 555, 558. This Court is “limited to determining whether the record contains evidence to justify the Board’s determination.” *Lewis v. Maine Coast Artists*, 2001 ME 75, ¶ 14, 770 A.2d 644, 650. The Court will uphold the decision of the Planning Board unless the record evidence compels a contrary conclusion. *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶¶ 16-18, 868 A.2d 161, 166. The party appealing the zoning board’s decision bears the burden of persuasion. *Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1996).

2. Did the City Err By Adding a Condition to Morrills Corner’s Approval?

The issue presented by this appeal is whether the Board’s approval of the project, subject to a condition limiting the size of the boxing facility, was supported by substantial evidence in the record.

The Portland Land Use Ordinance (“LUO”) states that when any site plan approval is conditional, the Board will issue a written decision that clearly explains its rationale. LUO § 14-256(c). Accordingly, at its July 2007 hearing, the Board officially adopted findings, explaining that its limitation of the square footage to 14,000 was based on the site plan attached to the CZA as Exhibit B. On the site plan, the square footage for the boxing facility is listed as approximately 14,000 (4,000 existing and 10,000 proposed). Nothing on the plan indicated that the building would be more than one story.

Morrills Corner had argued that the Board's prior decision did not explain whether the condition was solely based on the size restrictions in the CZA, or whether there were other reasons for it, such as non-compliance with the LUO. After remand, the Board clarified that the initial square footage was 14,000, and the subsequent increase to over 42,000 was inconsistent with the site plan. It further explained that the CZA requires the development to be built "substantially in accordance with the site plan." CZA ¶ 3. Because the site plan listed the boxing facility at 14,000 square feet, the Board's position is that any expansion would have to be pursued in the City Council via a proposed amendment to the CZA.

Morrills Corner correctly notes that "minor deviations" from the site plan are allowed. In its July 2007 findings, however, the Board explicitly states that, in its view, the proposed increase to over 42,000 square feet constituted a "substantial deviation" from the site plan because it would amount to an increase of approximately 400% in the facility's size. July 2007 Findings of Fact, ¶ 2. Additionally, the new findings stated that the proposal for a substantially larger boxing facility "represented a substantial change in proportion and relation of the boxing facility to the other buildings on the site plan." July 2007 Findings of Fact, ¶ 3.

The Board has clarified that it based the condition on its interpretation of the CZA, which requires alterations to be substantially in accordance with the site plan. It explicitly determined that the proposed alterations to the square footage and height of the boxing facility were not substantially in accordance with the site plan. Given this Court's deferential review of the Board's factual findings, the Court finds that the record and the July 2007 findings support the

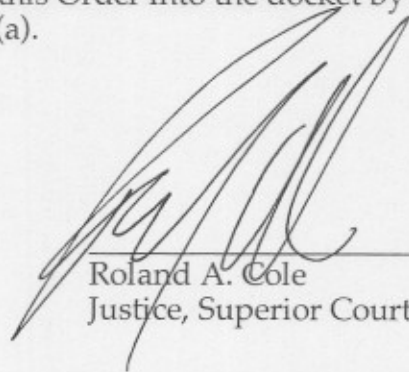
Board's conclusion that the condition was warranted. This project has undergone careful scrutiny at the municipal level and this Court will not disturb the Board's imposition of a condition to its approval in light of the substantial evidence supporting it.

The entry is:

Plaintiff's 80B appeal is DENIED. The decision of the Portland Planning Board to conditionally approve the project with the square footage limitation is AFFIRMED.

The clerk shall incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATE: August 1, 2007



Roland A. Cole
Justice, Superior Court