COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-1059

CHERYL RAWINSKI, trustee,[1]

vs.

ZONING BOARD OF APPEALS OF PLYMOUTH & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff appeals from a judgment entered by a Land Court judge affirming a decision by the Plymouth board of appeals (board) upholding the issuance of a building permit to reconstruct a seasonal cottage on a nonconforming lot. We affirm, for essentially the reasons given by the judge.

"We review a grant of summary judgment de novo to determine 'whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.'" DeWolfe v. Hingham Ctr., Ltd., 464 Mass. 795, 799

[1] Of the Rawinski Family Realty Trust. The plaintiff's motion to amend the complaint to designate Rawinski as "co-trustee of the Rawinski Living Trust" was allowed. An amended complaint was not filed.

[2] Robin Wadsworth, trustee of the Robaweka Trust.

(2013), quoting Juliano v. Simpson, 461 Mass. 527, 529-530 (2012). "Because our review is de novo, we accord no deference" to the judge's conclusions of law. DeWolfe, supra. See Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 637 (2012). "With respect to conclusions regarding interpretations of a zoning ordinance and their application to the facts, an appellate court remains 'highly deferential'" to the zoning board's decision even if the facts would support the opposite determination. Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica, 454 Mass. 374, 383 (2009), quoting Britton v. Zoning Bd. of Appeals of Gloucester, 59 Mass. App. Ct. 68, 74 (2003).

At issue is whether the board properly relied on § 203-9(D) of the bylaws in denying the plaintiff's appeal from the building permit that allowed the defendant trustee (owner) to reconstruct a seasonal oceanfront cottage located on a preexisting nonconforming lot. The cottage had been "'essentially destroyed' by a massive storm" on March 2, 2018. Section 203-9(D) allows certain nonconforming single-family dwellings to be "reconstructed, extended, altered, or structurally changed by-right" if (a) the building commissioner has determined that the proposed reconstruction "does not increase the nonconforming nature of the residential structure," or (b) the reconstruction conforms either to the yard

requirements applicable at the time of the building's original construction or to certain minimum requirements set forth in the bylaw.[3] It is undisputed that the proposed reconstruction did not increase the nonconforming nature of the original structure. It is also undisputed that the original structure was a single-family dwelling. The board could accordingly conclude that the proposed reconstruction here fell within the ambit of § 203-9(D).

The plaintiff nonetheless argues that the board should not have relied on § 203-9(D) in allowing the permit, but should have instead determined that the proposed project was governed, and precluded, by § 203-9(F). Provided certain conditions are met, § 203-9(F) permits reconstruction of preexisting nonconforming structures that have been destroyed by "a natural catastrophe or other involuntary destruction."[4] It is undisputed that the seasonal cottage here was destroyed by a natural disaster; we thus accept for the sake of argument that the board could have chosen to evaluate the proposed reconstruction under § 203-9(F) instead of § 203-9(D). But this does not help the plaintiff because the board's choice to allow a permit under one

[3] The minimum yard requirements are twenty feet for the front yard, and ten feet for the side and back yards.

[4] Section 203-9(F) also allows for reconstruction after voluntary demolition in defined circumstances, none of which are pertinent to this appeal.

section of the bylaws as opposed to another, where either could reasonably apply, is one to which we accord deference unless arbitrary, capricious, or whimsical -- a standard that has not been met here. See Wendy's Old Fashioned Hamburgers of N.Y., Inc., 454 Mass. at 381-382; Stevens v. Zoning Bd. of Appeals of Bourne, 97 Mass. App. Ct. 713, 717 (2020). Among other things, it was reasonable for the board to conclude that the reconstruction of the seasonal cottage fell within § 203-9(D), which was reserved for single- and two-family dwellings, rather than § 203-9(F), which more broadly applied to all types of preexisting nonconforming structures destroyed by a storm.

Finally, the plaintiff argues that, under § 203-9(E), the seasonal cottage lost its protected status as a preexisting nonconforming structure because it had not been "used," within the meaning of that section, for a period of two years. This argument is based on the fact that the cottage could not be, and was not, used as a dwelling after the destruction caused by the storm for more than two years.[5] However, in light of the evidence before the board, which included the owner's continued use of (and improvement to) the property to the extent possible

[5] The plaintiff contends that the destroyed cottage was not used as a dwelling from March 2, 2018, onward. The owner was issued a demolition permit on January 14, 2020, but did not demolish the damaged structure until receiving the building permit on May 11, 2020.

while awaiting permits, the prompt and extensive efforts to obtain approvals and permits for the reconstruction, and the lengthy approval process which was outside the control of the owner, the board could easily find that the property had been "used" within the meaning of § 203-9(E). Although it is true that the cottage could not, during the two years after the storm, be used for its protected preexisting use as a single-family dwelling in the sense that no one could live there, see Bartlett v. Board of Appeals of Lakeville, 23 Mass. App. Ct. 664, 669 (1987), the evidence showed that the owner's family had used and improved the property to the extent physically and legally possible while awaiting permission for reconstruction. These uses included those typically associated with a seasonal cottage by the water, including construction of a new deck and shed, placing a grill on the deck, using the beach in front of the cottage, storing kayaks, clearing storm debris, and holding

family gatherings and other events.

For these reasons, we affirm the judgment. We deny the owner's request for appellate attorney's fees and costs.

Judgment affirmed.

By the Court (Wolohojian, Blake & Desmond, JJ.[6]),

Joseph F. Stanton

Clerk:

Entered: November 21, 2022.

[6] The panelists are listed in order of seniority.