

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT

Civil Action No. 1777CV00832

consolidated with 1777CV00802

ANN MARIE LINDQUIST

vs.LAWRENCE COSTA & others¹

MEMORANDUM OF DECISION AND ORDER ON
ANN MARIE LINDQUIST'S MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This matter relates to a May 9, 2017 decision (the “Decision”) by the Gloucester City Council (the “City Council”) to approve a special a special permit for the construction of a residential building exceeding thirty-five (35) in height on Wingersheek Road in Gloucester. In response, the plaintiff, Anne Marie Lindquist (“Lindquist”), filed the current action under G. L. c. 40A, § 17, requesting that the court annul the Decision. More specifically, Lindquist argues the Decision is premised upon legally untenable grounds, and that it is arbitrary, capricious, and in excess of the City Council’s authority. The matter is currently before the court on Lindquist’s Motion for Summary Judgment.² After hearing, and for the reasons set forth below, Lindquist’s Motion for Summary Judgment will be **ALLOWED**, and the Decision is **ANULLED**.

¹ Joseph Ciolino, Melissa Cox, Velerie H. Gilman, Steven G. Leblanc, Jr., Paul Lundburg, R. Scott Memhard, Sean P. Nolan, James W. O’Hara, Jr., and Joseph Orlando, Jr. as members of the Gloucester City Council

² Stephen C. Archer filed a separate complaint (Docket No. 2017CV00802-D) against the named defendants on the same grounds as Lindquist asserts, which was consolidated with this action. Thereafter, he filed the Motion to Join Lindquist’s Motion for Summary Judgment, which the court (Karp, J.) allowed on April 12, 2019.

BACKGROUND

I. Undisputed Facts

The following undisputed material facts are taken from the Concise Statement of Undisputed Facts and the exhibits referenced therein.

Lindquist owns and seasonally resides at 101A and 101B Wingaersheek Road in Gloucester. In August 2016, Lawrence Costa (“Costa”) entered into a purchase and sales agreement to purchase neighboring property at 105-107 Wingaersheek Road (the “Property”), contingent upon his obtaining the necessary permits to construct the home he desired. Thereafter, on February 22, 2018, he submitted an application (the “Application”) to the City Council, seeking a special permit to allow him to build a single family residence in excess of the thirty-five-foot height allowed by the Gloucester Zoning Ordinance (the “Zoning Ordinance”).

On March 8, 2017, the City Council’s Planning and Development Committee (the “P&D Committee”) held a public meeting (the “P&D Meeting”) to discuss the Application. Thereafter, Costa made a presentation explaining the reasons for his special permit request.³ Among other things, he discussed the fact that the Property is subject to rules and regulations issued by the Federal Emergency Management Agency (“FEMA”), which require that new construction be built on nine-and-one-half foot-tall pilings. Further, he explained that he did not believe his proposed construction would obstruct views or create overshadowing of abutting properties. Lastly, Costa addressed the six factors the City Council is required to consider under Section 1.8.3 of the Zoning Ordinance.

At the P&D Meeting, several councilors sitting on the P&D Committee asked questions and made remarks in connection with the Application. One councilor, Councilor Lundberg,

³ Costa was represented by counsel when before both the P&D Committee and, later, the full City Council.

addressed the FEMA rules and regulations, observing that, due to FEMA's requirements, it was likely the City Council would start seeing more special permit applications seeking to exceed the thirty-five-foot height restriction set forth in the Zoning Ordinance. Another councilor, Councilor Cox, stated that the City Council could not be responsible for "govern[ing]" views, and pointed out that the City Council had previously approved other special permits for structures exceeding thirty-five feet in height. At the conclusion of the presentation related to the Application, the P&D Committee voted three to zero to recommend that the City Council approve the Application.

On March 28, 2017, the full City Council held a meeting (the "City Council Meeting") to discuss the Application. As he did at the P&D Meeting, thereat, Costa made a presentation, discussing his proposed construction and explaining his reasons for seeking a special permit. Again, he talked about FEMA's regulations and addressed the six factors the City Council is required to consider under Section 1.8.3.

During the City Council Meeting, Councilor Lundberg explained that, in accord with the P&D Committee's view, the sole issue to be considered was the height of Costa's proposed dwelling. Thereafter, he acknowledged that, under the Zoning Ordinance, a special permit allowing the construction of building in excess of thirty-five feet "shall only issue upon a written determination by the [City Council] that such increase in allowable height is consistent with neighborhood character and will not be substantially detrimental to the neighborhood because of obstruction of views, overshadowing of other properties, impairment of utilities or other adverse impacts."

Councilor Orlando echoed Councilor Lundberg's assessment of the City Council's role relative to the Application and the factors the City Council is required to consider; however,

thereafter, in response to an objection from Lindquist regarding the Application, he stated “there is very little doubt that no one has a right to a view.” In addition, as was the case during the P&D Meeting, several councilors addressed FEMA’s regulations and the burden those regulations place on property owners looking to build near the coast.

On May 9, 2017, the City Council issued the Decision, granting Costa a special permit to construct a single family residence on the Property in excess of thirty-five feet. The Decision incorporates the findings and vote of the P&D Committee, which had recommended approval of the Application. The Decision also incorporates the minutes from the City Council Meeting on March 28, 2017. The Decision contains a section entitled “**FINDINGS OF THE CITY COUNCIL**.” In its entirety, this section reads as follows:

MOTION: The City Council voted by ROLL CALL 6 in favor, 1 opposed, 1 absent, 1 abstained to grant the Special Council Permit for a building height in excess of thirty-five feet for a home to be thirty-nine feet six inches tall on the basis of the plans and elevations dated February 22, 2017 by Robert Gulla Architecture submitted to the City Clerk on February 23, 2017 pursuant to Sec. 1.5.3(c), Sec. 1.8.3, Sec. 3.1.6(b), and Sec. 3.2 of the Zoning Ordinance.

II. The Gloucester Zoning Ordinance

The current matter involves a dispute about what section of the Zoning Ordinance applies to Costa’s special permit request and whether the City Council complied with the requirements of the proper section. Consequently, below, the court sets forth the provisions in dispute.

The section of the Zoning Ordinance that applies to applications for special permits in connection with unauthorized uses, i.e., Section 1.8.3, states, in relevant part, as follows:

1.8 USE TABLE SPECIAL PERMIT

....

1.8.3. Standard to be Applied

A special permit pursuant to this section shall be granted only upon a written determination by the SPGA that the proposed use will be in harmony with the general purpose and intent of this ordinance, and that it will not adversely affect the neighborhood, the zoning district or the city to such an extent as to outweigh the beneficial effects of said use. In reviewing special permit applications, SPGA shall consider, but not be limited to, the following six factors:

- (a) the social, economic and community needs that will be served by the proposed use;
- (b) traffic flow and safety;
- (c) adequacy of utilities and other public services;
- (d) neighborhood character and social structure;
- (e) qualities of the natural environment;
- (f) potential fiscal impact.

Meanwhile, the section of the Zoning Ordinance that applies to special permits relative to excessive heights, i.e., Section 3.1.6(b), states, in pertinent part, as follows:

3.1.6 Special Permit for Building Heights in Excess of Section 3.2 Limits

Building heights in excess of the limits set forth in Section 3.2 may be authorized pursuant to the following special permit procedures; provided, however, that in no case shall such increase in allowable height be greater than allowed by the State Building Code and other state and municipal regulations.

....

(b) Building Heights in Excess of 35 Feet: Building heights in excess of 35 feet may be authorized by special permit issued by City Council. Said permit shall contain such conditions as the council deems necessary, and shall only issue upon a written determination by the council that such increase in allowable height is consistent with

neighborhood character and will not be substantially detrimental to the neighborhood because of obstruction of views, overshadowing of other properties, impairment of utilities or other adverse impacts.

LEGAL STANDARDS

I. Summary Judgment

Summary judgment may be entered if the “pleadings, depositions, answers to interrogatories, and responses to requests for admission . . . together with affidavits . . . show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” Mass. R. Civ. P. 56(c); see also *Barrows v. Wareham Fire Dist.*, 82 Mass. App. Ct. 623, 625 (2012), citing *Cassesso v. Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The moving party “need not prove that no factual disputes exist, only that there is no genuine dispute of material fact.” *Norwood v. Adams-Russell Co.*, 401 Mass. 677, 683 (1988). The party opposing summary judgment must respond and allege specific facts establishing the existence of a genuine issue of material fact for trial. *Barron Chiropractic & Rehab., P.C. v. Norfolk & Dedham Group*, 469 Mass. 800, 804 (2014), citing *Drakopoulos v. U.S. Bank Nat’l Ass’n*, 465 Mass. 775, 777-778 (2013). The Court views the evidence in the light most favorable to the non-moving party, but does not weigh evidence, assess credibility, or find facts. *Drakopoulos*, 465 Mass. at 788, quoting *O’Connor v. Redstone*, 452 Mass. 537, 550 (2008).

II. Judicial Review of Zoning Appeals

In reviewing a zoning decision, the court must apply a “‘peculiar’ combination of *de novo* and deferential analyses.” *Wendy’s Old Fashioned Hamburgers v. Board of Appeal of Billerica*, 454 Mass. 374, 381 (2009), citing *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 558 (1954). This hybrid-type review requires the court to find the facts *de novo*, and, based on the facts found by the court, to affirm the decision of the zoning authority “unless it is

based on a legally untenable ground, or is unreasonable, whimsical, capricious or arbitrary.”

MacGibbon v. Board of Appeals of Duxbury, 356 Mass. 635, 639 (1970). This review involves two distinct inquiries.

First, the court must determine whether the zoning decision is premised “on a standard, criterion or consideration not permitted by the applicable statutes or by-laws.” *Britton v. Zoning Bd. of Appeals of Gloucester*, 59 Mass. App. Ct. 68, 73 (2003). In resolving this question, “the approach is deferential only to the extent that the court gives ‘some measure of deference’ to the local board’s interpretation of its own zoning by-law.” *Id.*, quoting *APT Asset Mgmt., Inc. v. Board of Appeals of Melrose*, 50 Mass. App. Ct. 133, 138 (2000). “In the main, though, the court determines the content and meaning of statutes and by-laws and then decides whether the board has chosen from those sources the proper criteria and standards to use in deciding to grant or to deny the variance or special permit application.” *Id.*, and cases cited.

After determining that the decision was not based on a legally untenable ground, the court then proceeds to the second, more deferential inquiry, examining whether “any rational view of the facts the court has found supports the board’s conclusion[.]” *Id.* at 75. In answering this question, the court must determine whether the zoning authority “appli[ed] th[e] criteria and standards in an ‘unreasonable, whimsical, capricious or arbitrary’ manner.” *Id.* at 74. This inquiry is “highly deferential.” *Id.* The court is solely concerned with “the validity . . . [and] not the wisdom of the board’s action.” *Wolfman v. Board of Appeals of Brookline*, 15 Mass. App. Ct. 112, 119 (1983). If reasonable minds could differ on the conclusion to be drawn from the evidence, the municipal authority’s judgment is controlling. *ACW Realty Mgmt., Inc. v. Planning Bd. of Westfield*, 40 Mass. App. Ct. 242, 246 (1996).

ANALYSIS

In this case, Lindquist identifies several reasons why she believes the Decision is legally untenable and she is entitled to judgment as a matter of law. In essence, her various contentions can be summed up as follows: first, the City Council used the wrong criteria when considering the Application; second, the City Council unlawfully considered factors outside the applicable ordinance; and, third, the City Council ignored and/or failed to consider factors necessary for its determination. Below, the court addresses each of these arguments.

I. The Zoning Ordinance Applicable to the Application

First, Lindquist argues that, in reviewing the Application, the City Council applied criteria from the wrong section of the Zoning Ordinance.

There is no question that both Costa and the City Council exhibited some confusion about the factors the City Council was required to consider when ruling on the Application. The Zoning Ordinance distinguishes between different types of special permits, and the factors the City Council is required to consider depend on the type of special permit being sought. In particular, Section 1.8.3 of the Zoning Ordinance refers to special permits related to how particular property will be used, while Section 3.1.6(b) refers to special permits for individuals seeking to build a structure that exceeds thirty-five feet in height. In accord with the plain language of these two provisions, since Costa was seeking to construct a residence in excess of thirty-five feet, Section 3.1.6(b), and the factors referenced therein, is the provision that applies to the Application. See *Framingham Clinic, Inc. v. Zoning Bd. of Appeals*, 342 Mass. 283, 290 (1981) (stating ordinary principles of statutory construction apply to interpretation of zoning by-laws).

In filing the Application, Costa did not clearly identify Section 3.1.6(b) as the section applicable to his special permit request, because he sought a special permit under not only Section 3.1.6(b) but also under Section 1.8.3. Despite Lindquist's assertions to the contrary, however, the court concludes this inaccuracy on the Application form is not fatal. The body of the Application makes it clear that Costa was seeking a special permit to construct a single family home in excess of thirty-five feet in height. The onus is on the City Council to ensure an applicant complies with the proper section of the Zoning Ordinance. In reviewing the Application in its entirety (specifically, the identification of both Sections 1.8.3 and 3.1.6(b)), one could conclude that the Application contained more information than necessary. At the very least, the Application was certainly sufficient to put the City Council and the public on notice that Costa was seeking a special permit to construct a home in excess of thirty-five feet.

II. The City Council's Consideration of Factors Not Identified in the Applicable Zoning Ordinance

Next, Lindquist argues that the Decision granting the special permit must be annulled because, in approving the special permit, the City Council considered criteria outside of the factors identified in Section 3.1.6(b). This argument is unpersuasive.

Section 3.1.6(b) definitively requires the City Council to make a determination that an increase in allowable height beyond thirty-five feet is both "consistent with neighborhood character," and is not "substantially detrimental to the neighborhood because of obstruction of views, overshadowing of other properties, impairment of utilities or other adverse impacts." The Decision, which incorporates the minutes from the P&D Meeting as well as the City Council Meeting, undisputedly includes discussions of factors not relevant under Section 3.1.6(b). The fact that, in its decision making, the City Council discussed and considered factors not required

under Section 3.1.6(b) is not determinative, so long as the Decision was based on findings consistent with Section 3.1.6(b).

Lindquist argues that, in making a decision on a special permit application, a local board cannot consider any factors unrelated to the specific factors identified in the applicable zoning ordinance. In support of this contention, she relies on *Britton*, 59 Mass. App. Ct. at 75-77. The court concludes this reliance is misplaced. While a local board must make its determination based on the factors identified in the applicable zoning ordinance, its consideration of other additional unrelated factors is not necessarily fatal. *Id.* In other words, as long as the local board considered the proper factors in reaching its decision, its consideration of additional factors does not require nullification. *Id.*

In *Britton*, the local board considered factors outside of those required by the applicable by-law as well as factors required under the by-law. *Id.* Upon appeal, the plaintiffs argued consideration of these outside factors was improper. The Appeals Court concluded that the additional unrelated factors could not support denial of the special permit; however, because, in denying the special permit, the local board had also considered the proper criteria, its decision was not "legally untenable." *Id.*

Here, discussions at both the P&D Meeting and the City Council Meeting confused Sections 1.8.3 and 3.1.6(b) (and the criteria that must be considered under each) and raised concerns regarding FEMA's regulations. In fact, Costa's own presentation addressed the six factors relevant to Section 1.8.3, which were irrelevant to a special permit issued under Section 3.1.6(b), which is what he needed. In accord with *Britton*, however, the consideration of the FEMA-related issues and the factors applicable under Section 1.8.3, alone, does not nullify the Decision as long as the City Council also considered the proper factors set forth in Section

3.1.6(b), which applied to Costa's request to build a residence in excess of thirty-five feet. This brings the court to Lindquist's last argument.

III. The City Council's Failure to Consider All Factors Identified in the Applicable Zoning Ordinance

Lastly, Lindquist argues that she is entitled to judgment as a matter of law because the City Council failed to consider factors necessary for approving a special permit under Section 3.1.6(b). On this point, the court is forced to agree.

Section 3.1.6(b) is clear that the City Council may allow the construction of a dwelling in excess of thirty-five feet only "upon a written determination by the council that such increase in allowable height is consistent with neighborhood character and will not be substantially detrimental to the neighborhood because obstruction of views, overshadowing of other properties, impairment of utilities or other adverse impacts." General Laws c. 40A, § 15, provides context for the "written determination" requirement, stating: "The board shall cause to be made a detailed record of its proceedings, indicating the vote of each member upon each question, or if absent or failing to vote, indicating such fact, and setting forth clearly the reason for its decision and of its official actions[.]"

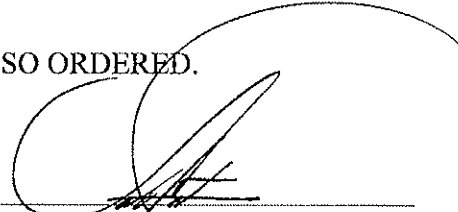
In this matter, the City Council failed to provide a written determination "setting forth clearly" the basis for the Decision. Costa argues that the court should infer from the City Council's vote, as well as the comments of the councilors at the P&D Meeting and the City Council Meeting, that the City Council considered the appropriate factors identified in Section 3.1.6(b) and made specific determinations relative to each. On the record before it, however, the court simply cannot do that. Discussions are not determinations or findings, and comments some councilors made at the P&D Meeting and the City Council Meeting about people not having a right to a view leave the court to question whether some councilors voted in favor of the special

permit without considering whether Costas's proposed construction is substantially detrimental to the neighborhood because of obstruction of views or overshadowing of other properties. In these circumstances, it is impossible for the court to determine whether the Decision was based on legally tenable grounds.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that Lindquist's Motion for Summary Judgment be **ALLOWED**, and the City Council's decision dated May 9, 2017, which granted Costa a special permit, be **ANNULLED**.

SO ORDERED.



Salim Rodriguez Tabit
Associate Justice of the Superior Court

Dated: October 15, 2018