NATIONAL LEGAL RESEARCH GROUP, INC.
Serving The Legal Profession Since 1969
2421 IVY ROAD (22903)
POST OFFICE BOX 7187
CHARLOTTESVILLE, VIRGINIA 22906-7187
www.nlrg.com

TOLL-FREE: 800-727-6574 FACSIMILE: 434-817-6570
TELEPHONE: 434-817-6574 E-MAIL: research@nlrg.com

John M. Stone jstone@nlrg.com

April 19, 2011

Attorney Name, Esquire[1]
Address

Re: RI/Zoning/Nonconforming Use/Residential Use

File: 50-xxxxx-015 Your File: Tin Man v. Town of Oz

Dear Name:

With this letter I am sending a draft memorandum for the Town of Oz Zoning Board of Review in the above-referenced matter.

I have enjoyed working on this assignment. Thank you for using our services again, and please let me know whenever I can be of further assistance.

Sincerely,

John M. Stone
Senior Attorney

JMS:teg
Enclosure

[1]**Names, addresses, and other identifying information have been redacted to protect privacy.**

STATE OF RHODE ISLAND
TORNADO, SC. **SUPERIOR COURT**

TIN MAN,

Appellant,

v. **C.A. NO.: 08-xxxx**

THE TOWN OF OZ ZONING BOARD OF REVIEW et al.,

Appellees.

MEMORANDUM OF THE TOWN OF OZ ZONING BOARD OF REVIEW

NOW COMES the Town of Oz Zoning Board of Review ("Board") and submits this memorandum in opposition to the appeal by Appellant Tin Man from the Board's denial of his appeal of the Notice of Violation and Order, dated Date, 2007, from the former Zoning Official for the Town of Oz.

INTRODUCTION

This appeal concerns a zoning violation by Tin Man consisting of his having residential units, that is, apartments, on the first floor of his property situated at 555 Yellow Brick Road, Oz, Rhode Island, contrary to applicable provisions in the 1998 Zoning Ordinance for the Town of Oz. The property is zoned General Commercial ("GC"), under which classification first-floor residences are not permitted for properties like Tin Man's property.

The Board does not dispute Tin Man's statement of the background for this case (Tin Man Mem. 1-2), except that the Board denies that the only competent evidence at the hearing before the Board came from Tin Man, and further denies that the entire record for this matter has not been provided.

ARGUMENT

THE CONTESTED USE OF THE PROPERTY DOES NOT ENJOY NONCONFORMING-USE STATUS, BECAUSE SUCH USE WAS UNLAWFUL WHEN IT BEGAN.

As noted by Tin Man (Tin Man Mem. 7), a superior court is prohibited by statute from substituting its judgment for that of the Board as to the weight of the evidence on questions of fact. RIGL 45-24-69(d). As also noted by Tin Man, the court may reverse a board only when the substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions that are

> (1) in violation of constitutional, statutory, or ordinance provisions;
>
> (2) in excess of the authority granted to the zoning board of review by statute or ordinance;
>
> (3) made upon unlawful procedure;
>
> (4) affected by other error of law;
>
> (5) clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
>
> (6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

RIGL 45-24-69(d)(1)–(6). Contrary to assertions by Tin Man, none of these statutory bases for overturning the Board's decision is present in this case.

A superior court gives deference to the findings of a local zoning board of review when reviewing the board's decision; this is due, in part, to the principle that a zoning board of review is presumed to have knowledge concerning those matters that are related to the effective administration of a zoning ordinance. *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855 (R.I. 2008). On review of such a decision, a superior court does not consider the credibility of witnesses, weigh evidence, or make its own findings of fact; rather, its review is confined to a search of the record to ascertain whether the board's decision rests upon competent evidence or is affected by error of law. *Munroe v. Town of E. Greenwich*, 733 A.2d 703 (R.I. 1999).

A reviewing court may not set aside a zoning board's decision that has been based on some evidence before it unless the decision is clearly arbitrary and unreasonable. *Hall v. Pawtucket Zoning Bd. of Review*, 93 R.I. 65, 170 A.2d 912 (1961). In addition, a presumption exists that official actions of a city zoning board were properly performed. *Wyss v. Warwick Zoning Bd. of Review*, 99 R.I. 562, 209 A.2d 225 (1965). In this case, there was more than sufficient competent evidence to support the decision of the Board and the decision of the Zoning Official before that, and the Court should give due deference to the findings of the Board.

The statutory authority for recognition of nonconforming uses in local zoning provides that

> [a]ny city or town adopting or amending a zoning ordinance under this chapter shall make provision for any use, activity, structure, building, or sign or other improvement, *lawfully* existing at the time of the adoption or amendment of the zoning ordinance, but which is nonconforming by use or nonconforming by dimension.

RIGL 45-24-39(a) (emphasis added).

Courts strictly construe the scope of legal nonconforming uses because they are detrimental to a zoning scheme and because the overriding public policy of zoning is aimed at their reasonable restriction and eventual elimination. *Town of Richmond v. Wawaloam Reserv., Inc*., 850 A.2d 924 (R.I. 2004). Likewise, courts impose a heavy evidentiary burden on one who asserts a nonconforming use, because nonconforming uses are necessarily inconsistent with the land-use pattern established by an existing zoning scheme. *Duffy v. Milder*, 896 A.2d 27 (R.I. 2006). In fact, the Supreme Court of Rhode Island has called nonconforming uses "a thorn in the side of proper zoning." *RICO Corp. v. Town of Exeter*, 787 A.2d 1136, 1145 (R.I. 2001). Here, Tin Man simply did not meet the heavy burden he carries in order to establish that the contested use of his property should be accorded nonconforming-use status so as not to be deemed in violation of current zoning restrictions.

As is indicated in the above-quoted statutory authority for nonconforming uses, it is an absolute and essential prerequisite for nonconforming-use status that the use in question was lawful when it was begun. *Town of Scituate v. O'Rourke*, 103 R.I. 499, 239 A.2d 176 (1968). Thus, in *O'Rourke*, where an automobile junkyard ordinance provided that no junkyard could be licensed unless it was a specific distance from a state highway or school; it was more than 300 feet from and not within the ordinary view from any park, bathing

beach, school, church, or cemetery; and it was screened from view by natural objects or fences of at least six feet in height, the failure of landowners to have obtained the required license prior to the zoning of the property for single-family residences prevented their acquiring nonconforming-use status. To the same effect is *Paolella v. Providence Zoning Bd. of Review*, 84 R.I. 163, 122 A.2d 157 (1956). There, the premises were being used as a grocery store when the area was originally zoned residential in 1923. In 1947, new owners began using the premises for the operation of an automatic laundry without having first obtained the permission of the zoning board. Under the original zoning ordinance, a laundry had been accorded a lower classification than had a grocery store and could not have been put into operation in such an area without permission. Accordingly, the zoning board erred in assuming that the laundry had been a lawfully existing nonconforming use which could be extended, and, therefore, the zoning board's decision granting an application for the continued use of the premises as a laundry in a residential zone was quashed.

In the instant case, notwithstanding Tin Man's discussion of extraneous matters at some length in his memorandum, the undisputed and decisive fact in this case is that when the use he claims is protected began, it was not lawful under the then existing zoning ordinance. As a result, the use could not then or at any time thereafter have attained nonconforming-use status, and the Zoning Official and the Board properly so found. Tin Man cannot avail himself of the protection for nonconforming uses provided in section 260-32 of the Oz Zoning Ordinance, because it, like its counterpart in the state statute, applies only to a use that was lawful when it was commenced.

There is competent evidence in the Record that is more than adequate to sustain the Board's determination. As is explained in full in the Date, 2008 memorandum of the Wizard, the Town's Zoning Official at all relevant times, the subject property was rezoned to B-2 status on Date, 1977. Residential dwellings have never been a permitted use in B-2 zones, except for two instances having no application here. As Tin Man concedes (Tin Man Mem. 1-2), the use of the subject property for residential purposes did not begin until approximately 1979, when the property was owned by Tin Man's predecessors-in-interest. Thus, from its outset, the use which Tin Man now claims has nonconforming-use status was, in fact, unlawful, thereby precluding it from having that status as a matter of law.

Apparently realizing how damaging the Wizard's evidence is to his case, Tin Man has made the novel assertion that such evidence, although it comes from the Zoning Official most familiar with the circumstances of this case, has no probative value whatsoever. (Tin Man Mem. 8.) As supposed support for this contention, Tin Man cites *Piccerelli v. Barrington Zoning Board of Review*, 107 R.I. 221, 266 A.2d 249 (1970). In that case, neighbors of property involved in a zoning dispute were not allowed to testify as to matters requiring an expert, because they were not experts. That unremarkable result has no bearing on this case at all. Here, the Wizard's memorandum is simply in the nature of factual evidence concerning the state of the facts and the law when the use in question began. It certainly is not an expert opinion (even though the Zoning Official is likely an expert on zoning) offered by someone who is not an expert.

Competent evidence, within the rule that a zoning board of review must ascertain facts on the basis of reasonably competent testimony, is any evidence that is not incompetent by reason of having no probative force as to the pertinent issue. *Melucci v. Pawtucket Zoning Bd. of Review*, 101 R.I. 649, 226 A.2d 416 (1967). There was more than sufficient competent evidence in this case to sustain the Board's decision. In other words, it is beyond dispute that there was "more than a scintilla" of relevant evidence to support the decision by the Board, under the standard which Tin Man himself acknowledges to be applicable. *See Apostolou v. Genovesi*, 120 R.I. 501, 388 A.2d 821 (1978).

Finally, at least in part, Tin Man also appears to be arguing that his prohibited land use should be allowed because a supposedly similar land use was approved for Red Shoes Tapping Company in Date, 1984. (Tin Man Mem. 5.) Tin Man provides no further information other than saying that the use was "similar," but, in any event, disposition of that application does nothing to strengthen his case. Assuming only for the sake of argument that at some point a similar use was allowed while Tin Man's land use was prohibited, such a difference in enforcement does not entitle Tin Man to engage in an unlawful use. *See Skelley v. S. Kingstown Zoning Bd. of Review*, 569 A.2d 1054 (R.I. 1990) (landowners' equal protection rights were not violated when they were denied variance from merger provisions of zoning ordinance dealing with nonconforming contiguous lots under same ownership, even if town zoning board had previously granted such variances; board's grant of such variances in past did not entitle landowners to a variance on basis of equal protection).

CONCLUSION

For the foregoing reasons, this Court should deny Tin Man's request that it overturn the Board's decision sustaining the Notice of Violation and Order of the former Zoning Official for the Town of Oz.

_____, 2011.

Respectfully submitted,

_____

Attorney Name, Esquire
Address
Telephone
Facsimile
E-Mail

Attorney for Town of Oz Zoning Board of Review

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing memorandum has been served upon the following, by placement in the U.S. mail, postage prepaid:

Opposing Counsel Name, Esquire
Address

_____, 2011.

_____
Attorney Name, Esquire