

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

Filed November 20, 2006

SUPERIOR COURT

JAMES R. ANDERSON and NORTHERN :  
RI HOMES, INC. :

v. :

GREGORY MEINERTZ, PETER :  
MATHIEU, RONALD JACKSON, MYLES :  
C. BELTRAN and RICHARD BARROWS, :  
in their capacity as members of the TOWN :  
OF GLOCESTER ZONING BOARD OF :  
REVIEW :

C.A. No.: PC/05-4072

DECISION

VOGEL, J., James R. Anderson (Anderson) and Northern RI Homes, Inc., (Northern) (collectively the Appellants) appeal from a decision of the Zoning Board of Review for the Town of Glocester (Zoning Board). They contend that the Zoning Board failed to make substantive findings of fact, misconstrued the law, and was clearly wrong in light of the evidence presented. The Appellants further assert that the Zoning Board’s decision was beyond the authority of the zoning enabling statute, and was arbitrary and “overly burdensome.”<sup>1</sup> For the foregoing reasons, the Court grants Appellants’ appeal and reverses the decision of the Zoning Board. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

Facts and Travel

On June 22, 2004, Anderson purchased, by single deed, contiguous lots 9-12 and contiguous lots 14 and 15, on Tax Assessor’s Plat AA in the Town of Glocester. See Warranty Deed. Lots 9-12 merged by operation of law, and it is now known as Lot 9. Hearing Transcript

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<sup>1</sup> See Appellants’ Brief at 9.

(Tr.) dated June 23, 2005, at 4-5. Lots 14 and 15, located across the street from Lot 9, also merged by operation of law and are now designated as Lot 15. Anderson's residence is located on Lot 15. Id. at 4.

Lot 9 is an undeveloped piece of property consisting of 15,598 square feet, and measuring approximately 80 feet by 190 feet. Id. and Survey Map dated June 20, 2005.<sup>2</sup> It is located in Airy Acres, which is an A-4 district. Id. at 5; see also Survey Map.<sup>3</sup> The property is bounded on all four sides by roadways: Airy Acres Drive on two sides, Puppy Path and Putnam Pike (Route 44) on the other two sides. Id. The plat was created in 1938 and pre-dates the enactment of the Zoning Ordinance for the Town of Gloucester (the Ordinance). Tr. at 4; see also Airy Acres Plat Map from 1938. Consequently, it is a legal, nonconforming substandard lot of record. Tr. at 4.<sup>4</sup>

Due to the fact that the property is bounded on all four sides by roadways, for setback purposes, the Ordinance considers each side to be a front. Id. at 5. The lot is unable to meet one of the four thirty-foot front setback requirements. Id. Accordingly, on May 23, 2005, Northern submitted a variance application to the Zoning Board seeking relief from one set-back requirement. See Variance Application.<sup>5</sup> The application originally sought a seven-foot variance; however, that amount later was reduced to 5.4 feet. Tr. at 1.

At the June 23, 2005, duly noticed hearing, Appellants' attorney noted that none of the lots in the neighborhood conforms to the A-4 four-acre requirement and that the proposed 1200

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<sup>2</sup> The variance application incorrectly states that the lot measures 80 feet by 100 feet. This typographical error was corrected at the hearing. See Hearing Transcript (Tr.) dated June 23, 2005, at 3-4.

<sup>3</sup> Chapter 350, Article I, § 350-6 of the Zoning Ordinance for the Town of Gloucester (the Ordinance) provides that an A-4 "district is intended for agricultural use and low-density single-family dwellings, detached structures, located on lots containing a minimum of lot area of four acres."

<sup>4</sup> A substandard lot of record is defined as "[a]ny lot lawfully existing at the time of adoption or amendment of a zoning ordinance and not in conformance with the dimensional and/or area provisions of that ordinance." Chapter 350, Article I, § 350-5 of the Ordinance.

<sup>5</sup> Specifically, Northern sought a variance in accordance with Chapter 350, Article VIII, Nonconforming Uses, § 350-65(B), Substandard Lots of Record, Subsection B. See Variance Application.

square foot residence conforms to the neighborhood's character. Id. at 7. He further stated that due to the unique configuration of the land, it is impossible for the property to comply with the Town's dimensional requirements and that there is no reasonable alternative use. Id. at 7 and 10. Counsel argued that the resulting hardship is not due to any prior action committed of his clients. Id. at 7-8.

Robert Shirley testified on behalf of the Appellants. Id. at 11-13. He described the proposed building as a raised ranch with a garage in front. The building would face Airy Acres Drive and would back onto Route 44. Id. at 13. Appellants' counsel acknowledged that Anderson previously had told the Planning Board for the Town of Gloucester (the Planning Board) that he needed to sell the property to raise funds so that he could make improvements to his residence. Id. at 14; see also Unapproved Minutes of the Gloucester Planning Board (Planning Board Minutes) dated June 6, 2005, at 12. He asserted, however, that any financial gain would be incidental, and that the "basis for the hardship here is the fact that this lot just can't meet current standards" because of the unique characteristics of the property. Tr. at 14-15.

Several abutters testified against the application. Walter Blanchette, who lives across the street on a lot that is 8075 square feet in size, complained that the subject property "wasn't made big enough for a home . . . ." Tr. at 18 and Survey Map. Linda Laliberte expressed concerns about the septic systems in the area, and opined that the application was driven by profit motivations. Tr. at 19-20. Eddie Degrandpre, also expressed concern about the septic system. Id. at 22. He further raised questions about the location of the leach field and whether an additional driveway exiting onto Airy Acres Drive might cause a traffic safety hazard. Id. Lesley Poitras raised similar concerns about the septic system, leach field, and the danger of cars exiting from the property. Id. at 25.

At the conclusion of the testimony, the Zoning Board admitted into evidence an advisory opinion from the Planning Board that unanimously recommended rejection of the variance application. Id. at 26-27; see also Planning Board Minutes at 13. The Zoning Board then discussed the application and rejected a motion to grant the variance by a vote of two to three. Tr. at 28-31. Appellants take their timely appeal from this decision.

### **Standard of Review**

The Superior Court's review of a zoning board decision is governed by § 45-24-69(d).

Section § 45-24-69(d) provides:

“The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions or decisions which are:

- (1) In violation of constitutional, statutory, ordinance or planning board regulations 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.”

When reviewing a decision of a zoning board, the trial justice “must examine the entire record to determine whether ‘substantial’ evidence exists to support the board’s findings.”

DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979). The term “substantial evidence” has been defined as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.” Lischio v. Zoning Bd. of Review of North

Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981)).

In conducting its review, the trial justice “may ‘not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.’” Curran v. Church Community Housing Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting G.L. 1956 § 45-24-69(d)). The deference given to a zoning decision is due, in part, to the fact “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.” Monforte v. Zoning Bd. of Review of East Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). With respect to questions of law, however, this Court conducts a de novo review; consequently, the Court may remand the case for further proceedings or potentially vacate the decision of the Board if it is “clearly erroneous in view of the reliable, probative and substantial evidence of the whole record.” Von Bernuth v. Zoning Bd. of Review, 770 A.2d 396, 399 (R.I. 2001); see also G.L.1956 § 45-24-69(d)(5).

### **The Board’s Decision**

The Appellants assert that the Zoning Board failed to make substantive finding of fact, misconstrued the law, and was clearly wrong in light of the evidence. They further contend that they met their burden of proving that “the hardship by denial of the variance would be more than a mere inconvenience and would deprive [them] of all reasonable alternative legally permitted beneficial use” of the property. Appellants’ Brief at 10. In response, The Zoning Board contends that the facts and evidence did not support the granting of a variance. See Appellee’s Brief at 4.

The Legislature has mandated that “[t]he zoning board of review shall include in its decision all findings of fact . . . .” Section 45-24-61. In addition, the Supreme Court has long

held that “a zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review.” Von Bernuth v. Zoning Board of Review of New Shoreham, 770 A.2d 396 (R.I. 2001) (quoting Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996)).

Thus, this Court “must decide whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles.” Von Bernuth, 770 A.2d at 401 (quoting Irish Partnership v. Rommel, 518 A.2d 356, 358 (R.I. 1986)). The findings must be factual rather than conclusional, and the application of the legal principles must be something more than a recital of a litany. Von Bernuth, 770 A.2d at 401. These are minimal requirements and, unless satisfied, judicial review of a zoning board decision is impossible. Id. Furthermore, “[w]hen the board fails to state findings of fact, the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances.” Irish Partnership, 518 A.2d at 359.

In Sciacca v. Caruso, 769 A.2d 578 (R.I. 2001), our Supreme Court cautioned zoning boards and their attorneys to ensure that zoning board decisions on variance applications address the evidence in the record, and determine whether that evidence either meets or fails to satisfy each of the legal preconditions set forth in § 45-24-41 (c) and (d). See Sciacca, 769 A.2d at 585. The Court then noted that such a specification of evidence in the decision would greatly aid the Superior Court in undertaking any requested review of zoning board decisions. Id.

With respect to dimensional variances, § 45-24-41 provides in pertinent part:

“(c) In granting a variance, the zoning board of review requires that evidence to the satisfaction of the following standards is entered into the record of the proceedings:

- (1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area;

and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(16);

(2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;

(3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and

(4) That the relief to be granted is the least relief necessary.

(d) The zoning board of review shall, in addition to the above standards, require that evidence is entered into the record of the proceedings showing that: . . . . (2) in granting a dimensional variance, that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience. The fact that a use may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief. The zoning board of review has the power to grant dimensional variances where the use is permitted by special use permit if provided for in the special use permit sections of the zoning ordinance.”

Pursuant to § 45-24-41, “for an applicant to obtain a dimensional variance (also known as a deviation), the landowner needed to show only an adverse impact that amounted to more than a mere inconvenience.” Lischio, 818 A.2d at 691.

In its decision, the Zoning Board made the following findings:

- “1. The Board finds that it has jurisdiction to hear and consider this matter.
2. The intent and purpose of Chapters 3 and 6 of the Comprehensive Plan urges the Board to be cautious in order to preserve the rural nature of the Town.
3. The evidence presented raises concerns that the variance is requested for profit, which is in violation of the statutory standards.
4. That there is a question whether it is the unique character of the subject property or the general character of the surrounding area.
5. That the facts and evidence the Board has on record do not show that a variance should be granted.

6. The Board considered the recommendation of the Planning Board.”<sup>6</sup>

These findings by the Zoning Board were wholly inadequate, vague and inconclusive. The Zoning Board failed to address the hardship, if any, suffered by the Appellants, and whether such hardship amounted to more than a mere inconvenience. Furthermore, the Zoning Board alludes to “concerns” that the variance application is motivated by profit, but it neither reveals the basis of those concerns, nor makes a definitive finding that the application actually is motivated by profit. Furthermore, the Zoning Board states that there is a “question whether it is the unique character of the subject property or the general character of the surrounding area,” but then fails to answer that “question.” Because the Board failed to make the statutorily requisite findings, judicial review of the Zoning Board’s decision is impossible. Moreover, this Court will not look to the record for evidence either to justify the decision, or to determine whether the Appellants met their burden. See Irish Partnership, 518 A.2d at 359.

### **Statutory Interpretation**

The Appellants assert that the Zoning Board’s decision was beyond the authority of the zoning enabling statute, and is arbitrary and “overly burdensome.”<sup>7</sup> Specifically, they contend that the Ordinance fails to comply with § 45-24-31(43), which requires ordinances to delineate a method for determining the front lot line on properties that abut more than one street. They

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<sup>6</sup> The Planning Board’s advisory opinion stated that “size of the property does not allow for any further dimension relief and is not consistent with the Comprehensive Community Plan **Section 3.2.1** ‘To preserve, enhance and protect Gloucester’s rural character and sense of place’; **Section 3.2.2** ‘To encourage responsible land use decisions by public officials and public bodies’; and **Section 3.2.4** ‘To prevent undesirable suburbanization and its related characteristics from occurring in the Town.’” Planning Board Minutes at 13 (emphasis in the original).

No reasons were given for these findings. The minutes merely stated that “[t]he Planning Board Members do not feel that this lot can withstand a house of this size on this lot and do not want to issue a 7-foot variance especially on such a busy road as Route 44.” Id. at 12. It should be noted, however, that Northern later reduced the amount of relief sought from seven feet to 5.4 feet.

<sup>7</sup> See Footnote 1, Supra.

maintain that as a result of the Town's failure to comply with this mandate, an undue burden was placed upon the property. The Zoning Board asserts that it acted within the scope of its authority because it is required to follow the Ordinance as written. It further contends that if the Appellants believe that the Ordinance violates the zoning enabling statute, then the proper forum to bring that claim is before the Town Council.

This Court reviews issues of statutory interpretation de novo. See Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 711 (R.I. 2000). It is well settled that "the rules of statutory interpretation apply equally to the construction of an ordinance." Mongony v. Bevilaqua, 432 A.2d 661, 663 (R.I. 1981). In this Court's de novo review, a zoning board's determinations of law, like those of an administrative agency's, "are not binding on the reviewing court; they 'may be reviewed to determine what the law is and its applicability to the facts.'" Gott v. Norberg, 417 A.2d 1352, 1361 (R.I. 1980) (quoting Narragansett Wire Co. v. Norberg, 118 R.I. 596, 376 A.2d 1, 6 (1977)).

Where the language of a statute or ordinance "is clear on its face, then the plain meaning of the statute [or ordinance] must be given effect and this Court should not look elsewhere to discern the legislative intent." Retirement Bd. of Employees' Retirement System of State v. DiPrete, 845 A.2d 270, 297 (R.I. 2004) (internal quotations omitted). This means that when "a statutory provision is unambiguous, there is no room for statutory construction and [this Court] must apply the statute as written." Id.

It is axiomatic that "[z]oning ordinances are in derogation of the common-law right of the owner as to the use of his property and must therefore be strictly construed." Earle v. Zoning Bd. of Review of City of Warwick, 96 R.I. 321, 324, 191 A.2d 161, 164 (1963). Accordingly, [i]n determining restrictions upon an owner's use of his property in instances where doubt exists

as to the legislative intention, the ordinance should be interpreted in favor of the property owner.” Id. at 324-24, 191 A.2d at 164. Finally, “[t]his Court will not construe a statute to reach an absurd result.” State v. Flores, 714 A.2d 581, 583 (R.I. 1998) (quoting Kaya v. Partington, 681 A.2d 256, 261 (R.I. 1996)).

As noted above, the property at issue is a substandard lot of record. Chapter 350, Article VIII, § 350-65(B) of the Ordinance provides:

“Substandard lots of record are exempt from the minimum lot sizes of the district involved as established by this ordinance as amended. All other district dimensions applicable at the time immediately prior to the lot becoming substandard shall apply, but in no case will less than thirty feet front yard depth, ten feet side yard, and ten feet rear yard depth be allowed.”

Due to the fact that the property at issue is bounded on all four sides by a street, for purposes of the Ordinance, the property was considered to possess four front-yard lot lines.<sup>8</sup> The Appellants assert that such a requirement violates § 45-24-31(43) of the zoning enabling statute because the Ordinance improperly required them to have a thirty-foot front-yard setback on all four sides of the property. They further posit that if only one side of the lot were to be designated the front lot line, then no variance would be needed because the property would satisfy the ten-foot side-yard and rear-yard setback requirements. See Chapter 350, Article VIII, § 350-65(B) of the Ordinance.

Section 45-24-31(43) defines a front lot line as “the lot line separating a lot from a street right-of-way.” That section further decrees that “[a] zoning ordinance shall specify the method to be used to determine the front lot line on lots fronting on more than one street, for example,

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<sup>8</sup> Chapter 350, Attachment 2.1 of the Ordinance provides in pertinent part: “Corner lots shall be required to provide the minimum front depth yard frontage along all streets.” Because the subject property has four corners, it is required to provide the minimum front depth yard frontage on all four sides of the lot.

corner and through lots.” *Id.* (Emphasis added.)<sup>9</sup> Although “G.L. 1956 § 43-3-4 of our General Laws . . . provide[s] that the use of the plural and the use of the singular in our statutes are indistinguishable[,]” (*Brogno v. W & J Associates, Ltd.*, 698 A.2d 191, 193 (R.I. 1997)),<sup>10</sup> application of the plural to the word “line” would produce an absurd result and would not constitute a strict construction of the statute. Furthermore, even if doubt existed, pluralizing the word “line” would be in derogation of this Court’s mandate to interpret the zoning enabling statute in favor of the property owner.

Consequently, this Court finds that the plain and ordinary meaning of § 45-24-31(43) requires zoning ordinances to contain language concerning how to determine which specific side of a lot constitutes the front lot line when the property fronts on more than one street. The Gloucester Ordinance contains no such provision; consequently, it violates the mandate of § 45-24-31(43). This Court finds that but for the lack of such a mandated ordinance provision, the disputed lot would have satisfied Chapter 350, Article VIII, § 350-65(B) of the Ordinance and would not have needed the requested relief.<sup>11</sup> Considering that the Board violated statutory and ordinance provisions, this Court must reverse the Board’s decision.

### **Conclusion**

After a review of the entire record, this Court finds that the Zoning Board’s decision was in violation of statutory and ordinance provisions, was affected by error of law, and was characterized by an abuse of discretion. Substantial rights of the Appellants have been prejudiced. Accordingly, this Court reverses the Zoning Board’s decision.

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<sup>9</sup> A through lot is defined as “[a] lot which fronts upon two (2) parallel streets, or which fronts upon two (2) streets which do not intersect at the boundaries of the lot.” Section 45-24-31(44).

<sup>10</sup> General Laws 1956 § 43-3-4 provides: “Every word importing the singular number only may be construed to extend to and to include the plural number also, and every word importing the plural number only may be construed to extend to and to embrace the singular number also.”

<sup>11</sup> Furthermore, this Court observes that “[a]ny zoning ordinance or amendment of the ordinance enacted after January 1, 1992, shall conform to the provisions of this chapter.” Section § 45-24-28(a).

Counsel shall submit an appropriate order consistent with this decision.