

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

Filed May 17, 2007

SUPERIOR COURT

JOSEPH BAGINSKI

V.

THE TOWN OF JOHNSTON
ZONING BOARD OF REVIEW

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C.A. No.: 2005-4783

DECISION

MCGUIRL, J. Before this Court is an appeal from the Town of Johnston Zoning Board of Review (“Board”). Joseph Baginski (“Baginski”) seeks reversal of the Board of Review’s denial of his application for a dimensional variance. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

FACTS AND TRAVEL

Baginski entered into a purchase and sale agreement for an undeveloped property at 25 Hedley Avenue in Johnston, Rhode Island. The property is designated as Assessor’s Plat 14, Lot 260 and is recorded as a prior substandard lot of record. Baginski’s lot is located in a residential area which is designated as a Residential R-15 Zoning District. In order for one to erect a one-family home in this location, zoning regulations require that the lot be at least 15,000 square feet in size. Baginski’s Lot is only roughly 4,000 feet. He seeks to build a single-family house on the property which will be of colonial design, having two and one-half floors, and three bedrooms. No other changes to the property are planned.

Baginski requested a dimensional zoning variance from the Board in order to build this structure. An advertised hearing was held on April 25, 2005. Baginski was represented by Attorney Paul McCarthy. At the hearing, testimony was introduced of Baginski's intent to maintain the character of the neighborhood. Issues of water runoff and where vehicles affiliated with the dwelling would park were also raised.

In a two-page response from the Board dated August 22, 2005, Baginski's application was denied. Baginski timely appealed the Board's decision to this Court.

STANDARD OF REVIEW

The standard for judicial review of a zoning board decision gives significant discretion to the board. It is found in Section 45-24-69(D) of the 1956 Rhode Island General Laws, which directs that

(D) 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 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.

As a general rule, in order to uphold the Board's ruling, this Court is required to find that the decision is backed by "substantial evidence." Salve Regina College v. Zoning Board of Review, 594 A.2d 878, 880 (R.I. 1991). For purposes of evaluating the record, "[s]ubstantial evidence . . . means 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." Caswell v. George Sherman Sand and Gravel Co., Inc. 424 A.2d 646, 647 (R.I. 1981) (citing Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824-25 (1978)). If it finds substantial evidence, the Court is required to affirm the Board's ruling. Mendoza v. Corey 495 A.2d 257 (R.I. 1985). However, the matter may be sent back to the Board for further proceedings, but only if there is "a genuine defect in proceedings in the first instance." Roger Williams College v. Gallison, 572 A.2d 61, 62-63 (R.I. 1990).

DECISION OF THE ZONING BOARD

After denying his request for a dimensional variance, the Board submitted a two-page written decision to Baginski. The Board's ruling set forth the following facts and drew the following conclusions:

After completion of testimony and evidence at the public hearing for which due notice was given and a record kept, and after having considered the premises and surrounding area, the Zoning Board of Review of the Town of Johnston taking into consideration its knowledge and expertise and after taking into consideration all of the testimony at the public hearing, makes the following findings and decision:

1. The subject property in [sic] known as Assessor's Plat 14, Lot 260 and contains approximately 4,000 sq. ft.
2. The petitioner is not the owner of the property.
3. The petitioner is proposing to construct a single-family home on the premises.

4. A variance is required for [the] proposed use.
5. The area surrounding the subject property contains single-family residence use parcels.
6. The premises in question are located in an R-15 zone.

Based on the foregoing, the Board denies the petitioner's application for a variance. As to the relief requested:

1. The hardship is the result of action of the applicant and results primarily from the desire of the applicant to realize greater financial gain;
2. The granting of the requested variance will alter the general character of the surrounding area.
3. The petitioner has failed to show that the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the Johnston Zoning Ordinance;
4. The petitioner has failed to show that the hardship that will be suffered by the owner of the subject property if this variance is not granted amounts to more than a mere inconvenience;
5. That granting of this variance will result in or create a condition that will be inimical to the public health, safety, morals and general welfare of the community. The petitioner acknowledges a water run-off concern on the subject property. The petitioner has failed to satisfy his burden regarding the control and dissipation of ground water on the subject property[.]

The above text amounts to the entire substantive content of the letter Baginski received. Baginski appealed the Board's ruling, arguing that its decision was not based on substantial evidence. The Board submitted a reply brief providing a basis for each of the five grounds on which the variance had been denied.

This Court notes that the Zoning Board makes issue of the fact that Baginski does not own the property. However, a purchaser of a property has standing to request a zoning variance, even when title to the property has not yet formally passed to him or her. See Annicelli v. Town of South Kingston, 463 A.2d 133, 139 (R.I. 1983) (citing Packman

v. Zoning Board of Review of Cranston, 103 R.I. 467, 472, 238 A.2d 387, 389-90 (1968)). Accordingly, because Baginski has entered into a purchase and sale agreement for the property in question, his lack of formal ownership is irrelevant in this case.

Beyond this issue, this Court finds that the merits of the Board's argument and rationale are not to be considered at this time. As Roger Williams College v. Gallison makes clear, remand or reversal is to be based on a defect in proceedings in the first instance, not upon the Board's actions when the matter is appealed to the judiciary subsequent to a defective proceeding. Roger Williams College v. Gallison, 572 A.2d 61, 62-63 (R.I. 1990). In this case, the first instance is the Board proceeding and its subsequent very short decision to Baginski.

In producing their extremely terse opinion, the Board failed to provide any real rationale for its decision, let alone come close to meeting the substantial evidence test that the Rhode Island Supreme Court requires. This Court cannot be deferential to a Board decision where the Board has merely set forth a few facts from the case and then restated the required standards for denying a zoning variance. The fact that the Board later produced reasons for its ruling in its memorandum to this Court does not cure this defect in its initial opinion. Furthermore, the Board has incorrectly applied the test of whether "granting . . . this variance will result in or create a condition that will be inimical to the public health, safety, morals and general welfare of the community." Under Johnston zoning rules, this standard is reviewed with respect to consideration of a special use permit, and is inapplicable to Baginski's petition, which seeks only a dimensional variance. See Johnston Town Ord. § 26-19 and § 26-20. Because the Board has failed to provide any support for its conclusions in its decision, and because it

erroneously applied the special use permit standard in lieu of the dimensional variance standard, this Court remands the case back to the Board for findings and an application of the proper legal standards for determining whether to grant a dimensional variance.

In making this decision, this Court notes that this is not the first time the Board has followed this completely inadequate path. In Dicon Construction, Inc. v. The Town of Johnston Zoning Board of Review (R.I. Super. Ct. 2005), C.A. No. 04-3051, the trial justice remanded the Board's decision for the identical reasons that this Court remands its decision here. That opinion, like this Court's here, is clear. Simply restating the standard for denying a variance, and deciding that a party has failed to meet that standard without any application of the facts, does not provide an adequate review. Nor is it permissible for the Board to wrongly apply the special use standard when a dimensional variance is sought. The Board must perform the required analysis each and every time it hears a case and record its rationale within its written decision. This error cannot be cured by providing reasons to the Court after an applicant has been denied a variance without any rationale being given to him or her. In addition, the correct standard must be applied when determining whether or not to grant a dimensional variance. Both of these requirements are absolutely mandatory.

CONCLUSION

After review of the entire record, this case is remanded to the Johnston Town Zoning Board of Review for further proceedings.