STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: DECEMBER 6, 2012)

CAROL D. CHARRON-PERRY	:	
	:	
v.	:	**C.A. No. KC-2011-0542**
	:	
ZONING BOARD OF REVIEW OF THE CITY OF WARWICK	:	
	:	

DECISION

NUGENT, J. Before the Court is an appeal from a decision of the Zoning Board of Review of the City of Warwick (the "Board"), denying an application for a use variance. Carol D. Charron-Perry ("appellant") applied for a use variance to allow her to keep five hens and one rooster on her property after she received a Notice of Violation ("NOV") from the Warwick Building Inspection Department. Appellant seeks a reversal of the Board's decision. Jurisdiction of the appellant's timely appeal is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Appellant is the owner of certain property at 100 Washington Street, Warwick, Rhode Island, delineated as Tax Assessor's Plat 293, Lot 404 ("property"). The property consists of approximately 10,000 square feet of land and supports a two-family dwelling unit. (Decision at 1.) Appellant has owned the property since 2006, and it is located in an A-7 Residential Zoning District. (Decision at 1.)

Sometime in the year 2006, appellant's husband, Anthony Perry, gave appellant a gift of six "baby chickens" comprising five hens and one rooster.[1] (Appellant's Br. 3.) Appellant cared for the chickens, fed them by hand, gave them fresh water, and sheltered them in her home from inclement weather. In fact, appellant grew so attached to the chickens that she considered them domestic pets. (Appellant's Br. 3.)

In or around October 2007, appellant received a NOV from the Warwick Building Inspection Department in response to a complaint filed with the City. The NOV stated that appellant's maintenance of the chickens on the property violated Warwick Zoning Ordinance § 200.121.[2] In response, appellant filed an application for a use variance with the Board on October 31, 2007, seeking approval to keep her hens and rooster. (Decision at 1.) As the Board noted in its decision, the proposed application required relief for both a special use permit and a dimensional variance. (Decision at 1.) The special use permit was required for the keeping of the chickens, and the dimensional variance was required because the subject property contained 10,000 square feet of land—the minimum lot size required for the maintenance of animals and livestock on a property zoned Residential A-7 is five contiguous acres. See Warwick Zoning Ordinance § 300.204, Table 1, n.5.

At the time, the Board was unable to hear the application due to a pending change to the Zoning Ordinance before the Warwick City Council. (Decision at 1.) That change reflected the

[1] The Court notes that there is a discrepancy between appellant's brief and appellant's testimony at the March 8, 2011 Zoning Board hearing ("hearing"). Appellant's brief asserts that she received the chickens as a gift sometime in 2007, but appellant testified at the hearing that she had the six chickens when she moved into the property in 2006. (Compare Appellant's Br. 3 with Tr. 3/8/11 at 7.) The Board accepted the appellant's hearing testimony under oath that she first received the baby chickens in 2006.

[2] The ordinance, entitled "Residential occupancy," excludes the keeping of livestock and fowl and proscribes the keeping of more than three household pets on any given lot. See Warwick Zoning Ordinance, § 200.121 "Residential occupancy."

City Council's response to the Rhode Island Superior Court's decision in Colbea Enterprises L.L.C. v. Alliance Energy Corp., No. KC-06-0604, 2007 WL 324446 (Super. Ct. Jan. 17, 2006), regarding the Board's authority to grant a special use permit in conjunction with a dimensional variance. Therefore, the application was placed on hold pending the ordinance change. (Decision at 2.) The Board stated at the hearing and in its decision that the subsequent ordinance change required that appellant apply for a true use variance because her lot did not meet the minimum dimensional standard required for a joint special use permit/dimensional variance. (Tr. 3/8/11 at 5; Decision at 2.) Accordingly, appellant updated her application, and the Board scheduled a hearing for March 8, 2011.

At a properly advertised hearing, appellant appeared with counsel and proceeded with her application without challenging or contesting the Board's conclusion that the proper form of relief was a true use variance. Appellant testified that she had the chickens when she moved into her home in 2006 and that "[the chickens] follow me around. They recognize my voice. They eat out of my hand. They are just wonderful little pets. Harmless. And I love them." (Tr. 3/8/11 at 7-8.) Appellant further testified that she took steps to mitigate the rooster's noisemaking by sequestering it in a kennel nightly. (Tr. 3/8/11 at 10-12.)

A few individuals testified in support of appellant's application at the hearing. Phil Salko, who lives in a home "kitty-corner" to the appellant's, testified that he has never been awakened by the chickens. (Tr. 3/8/11 at 26-27.) Nadia and Alex Sotski spoke generally on behalf of the appellant's application. (Tr. 3/8/11 at 28-31.) Finally, appellant's husband, Anthony Perry, spoke in support of his wife's petition. (Tr. 3/8/11 at 33-34.) No expert or lay testimony was entered into the record regarding how appellant's inability to keep the chickens on

the property would constitute a denial of all economically beneficial use of the property. (Decision at 2.)

At the conclusion of the hearing, the Board voted 3-2 to deny appellant's petition to allow her to keep the six chickens on the property. (Tr. 3/8/11 at 41-42.) The Board issued a written decision on April 20, 2011, denying appellant's petition. On May 4, 2011, appellant timely filed an appeal to this Court for review.

II

Standard of Review

Section 45-24-69 of the Rhode Island General Laws provides, in relevant part, that when reviewing the decision of a zoning board of review, the Superior 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 zoning 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, or decisions which are:
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> (1) In violation of constitutional, statutory, or ordinance provisions;
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> (2) In excess of the authority granted to the zoning board of review by statute or ordinance;
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> (3) Made upon unlawful procedure;
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> (4) Affected by other error of law;
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> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
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> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." G.L. 1956 § 45-24-69(d).

Judicial review of an administrative action is "essentially an appellate proceeding."

Notre Dame Cemetary v. R.I. State Labor Relations Bd., 118 R.I. 336, 339, 373 A.2d 1194, 1196 (1977); see also Mauricio v. Zoning Bd. of Review of Pawtucket, 590 A.2d 879, 880 (R.I. 1991). 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." Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009) (quoting Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)). Accordingly, a justice of the Superior Court may not substitute his or her judgment for that of the zoning board if he or she conscientiously finds that the board's decision was supported by substantial evidence. Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 825 (1978). "Substantial evidence as used in this context 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 & Gravel Co., 424 A.2d 646, 647 (R.I. 1981) (citing Apostolou, 120 R.I. at 507, 388 A.2d at 824-25). The reviewing court "examines the record below to determine whether competent evidence exists to support the tribunal's findings." New England Naturist Ass'n, Inc. v. George, 648 A.2d 370, 371 (R.I. 1994) (citing Town of Narragansett v. International Ass'n of Fire Fighters, AFL-CIO, Local 1589, 119 R.I. 506, 380 A.2d 521 (1977)). Thus, this Court's review of a zoning board's factual findings is undertaken to ensure that a reasonable mind might accept them as adequate to support a conclusion. See Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003); Caswell, 424 A.2d at 647.

III

Analysis

Appellant bases her appeal of the Board's decision on three grounds: (1) the inclusion of hens and rooster within the meaning of livestock was arbitrary and capricious and characterized by an abuse of discretion by the Board, (2) the provisions contained in Warwick Zoning Ordinance § 300.204, Table 1, n.5 are unconstitutionally vague and violative of the due process protections afforded by the Fourteenth Amendment to the United States Constitution, and (3) the Board's decision is void because of due process violations. The Court will address each argument seriatim.

A

The Board's Decision

Section 45-24-41 of the Rhode Island General Laws codifies the applicable standard of review for a Zoning Board hearing a request for a use variance. G.L. 1956 § 45-24-41. That section reads:

> "(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);
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> (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;
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> (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
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> (4) That the relief to be granted is the least relief necessary.
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> (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: (1) in granting a use variance the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance. Nonconforming use of neighboring land or structures in the same district and permitted use of lands or structures in an adjacent district shall not be considered in granting a use variance." See also Warwick Zoning Ordinance § 906.3(A), (B)(1).

The statute requires that an applicant seeking a use variance present sufficient evidence to satisfy both the four criteria outlined in § 45-24-41(c) and the "deprivation of all beneficial use" standard contained in § 45-24-41(d). See also Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) ("[w]e take this opportunity . . . to caution zoning boards and their attorneys to make certain that zoning-board decisions on variance applications (whether use or dimensional) address the evidence in the record before the board that either meets or fails to satisfy each of the legal preconditions for granting such relief, as set forth in § 45-24-41(c) and (d)"). Thus, an applicant for a variance must present sufficient evidence that he or she satisfied § 45-24-41(c) and (d), and as part of its findings of fact, the Board must declare whether or not the applicant has met this burden.

Appellant claims that the Board's decision to include hens and rooster within the meaning of zoning ordinance provisions for the raising and keeping of animals and livestock was arbitrary and capricious and characterized by an abuse of discretion. Specifically, appellant contends that because section 200 of the Warwick Zoning Ordinance does not define "animal" or "livestock," her possession of five hens and one rooster as "pets" takes her petition outside the ambit of Warwick Zoning Ordinance section 300, Table 1, subsection 204 as modified by

footnote 5, which speaks to special use permits for the raising and keeping of animals and livestock.

Warwick Zoning Ordinance section 200, subsection 121, defines "[r]esidential occupancy" as follows: "[t]hose activities customarily conducted in living quarters in an urban and/or suburban setting, and excludes such activities as the keeping of livestock or fowl . . . and excludes the keeping on any lot of more than three household pets per family." The American Heritage Dictionary defines "fowl" as "[a]ny of various birds of the Order Galliformes, especially the common, widely domesticated chicken (Gallus domesticus)." Thus, by its express terms, § 200.121 forbids the keeping of chickens on Warwick residential property absent a special use permit. See 2A Sutherland Statutory Construction § 46:1 (7th ed.) ("[i]f the [statutory] language is plain, unambiguous and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning.")

In its written decision, the Board concluded that "[t]he City does not look at hens and roosters as domestic pets[:] they are livestock." (Decision at 3.) The Board's conclusion that the City of Warwick does not look at hens and roosters as domestic pets is not arbitrary or capricious, nor is it characterized by an abuse of discretion. In a similar case, Village of Glenview v. Ramaker, a municipal prohibition—"[n]o person shall keep or suffer to be kept any swine or poultry in the Village"—was found to prohibit a resident from keeping a Vietnamese pig on her property as a domestic pet. 282 Ill. App .3d 368 (1996). Noting that nothing in the relevant city ordinance or its legislative history supported a finding that the aim of the ordinance was only a limitation on farming, the court ultimately held that the resident's swine was not a pet and therefore was expressly prohibited under the plain meaning of the statute. 282 Ill. App. 3d at 370-71.

Here, the relevant zoning provision is located in a general "Definitions" section and does not contemplate a ban on farm animals or farming. Instead, § 200.121 contains general norms for residential living, including the ban on the keeping of livestock and fowl. Further, the provision later includes a limitation on the number of household pets that may be kept on a given lot. That such a limitation on household pets follows an express ban on fowl supports the proposition that the Warwick City Council does not view chickens as household pets. See McKinney v. Robbins, 319 Ark. 596, 601, 892 S.W.2d 502, 504 (1995) (examples of domesticated animals listed in statute, including "poultry," were all livestock, which indicated legislative intent to exclude pets from the definition); see also supra Southerland Statutory Construction § 46:1 (plain meaning rule applies where statute is clear and unambiguous).

The Board characterized the appellant's chickens as "livestock" in its written decision. While appellant's chickens could be more properly characterized as "fowl" and "animals"—and not "livestock"—under the terms of Warwick Zoning Ordinances § 200.121 and § 300.204, this mischaracterization does not substantially prejudice the appellant as the chickens may not be considered "pets" under the express terms of § 200.121. Monforte, 93 R.I. at 449, 176 A.2d at 727-28.

With respect to the Board's decision, it listed sixteen findings of fact and properly applied those facts to the applicable standard of review. (Decision at 1-4.) As to the first prong of § 45-24-41(c)—an applicant must present sufficient evidence that the hardship is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; not a physical or economic disability of the applicant—the Board found that appellant occupies a residential dwelling in a residential zoning district and that the surrounding area similarly consists of residential dwellings. (Decision at 3.) Because a denial of appellant's

requested variance would have no effect on appellant's use of her home as a residential dwelling, the Board concluded that appellant did not meet her burden with respect to the first prong. See 3 Rathkopf, The Law of Zoning and Planning, § 58:20 (2003) ("[h]ardship must relate to some characteristic of the land for which the variance is requested, and must not be solely based on the needs of the owner"); see also Independence Twp. v. Murdoch, 155 Mich. App. 770, 773 (1986) (affirming the denial of a use variance for the keeping of a Siberian tiger and bobcat on a rural residential property where the hardships complained of were personal and not due to any unique difficulty relating to the land).

In reference to the second prong, our Supreme Court has ruled that a self-created hardship "is most properly employed where one acts in violation of an ordinance and then applies for a variance to relieve the illegality." Sciacca v. Caruso, 769 A.2d 578, 584 (R.I. 2001) (quoting 7 Patrick J. Rohan, Zoning and Land Use Controls, § 43.02[6] at 43-66 (1998)) (internal quotation marks omitted). Here, the Board found that appellant "created [her] own hardship" by bringing the chickens to the property before familiarizing herself with the applicable zoning ordinances. (Decision at 3.) Specifically, the Board noted that appellant sought a use variance after receiving a NOV from the Warwick Building Inspection Department. (Decision at 1.) See Sciacca, 769 A.2d at 584; see also Independence Twp., 155 Mich. App. at 777 (hardship self-induced). Again, this type of self-created hardship is disfavored given that the variance should be used only to "correct[] the occasional inequities that are created by general zoning ordinances." 3 Rathkopf, supra, § 58:1.

With respect to the third prong—whether granting the requested variance will alter the general characteristic of the surrounding area and impair the intent and purpose of the relevant zoning ordinance—the Board found that the area surrounding the subject property is "zoned

residential and consists of all residential dwellings." (Decision at 3.) Thus, the Board found that permitting the keeping of chickens in a residential neighborhood did not comport with the character of the surrounding area and that the proposal "diminishe[d] the use, value[,] and enjoyment of the surrounding area." (Decision at 3.) See D'Acchioli v. Zoning Bd. of Review of City of Cranston, 74 R.I. 327, 60 A.2d 707 (1948) (denial of use variance to establish commercial vendor in residential zone was not abuse of discretion given general character of surrounding land).

Finally, with respect to the fourth and final prong—the relief requested is the least relief necessary—the Court finds that the record is devoid of any testimony demonstrating that the relief requested is the least relief necessary. (Decision at 3). Instead, appellant testified to her care and affection for the chickens, stating that "I feed them, take care of them, [shelter] them from the weather," and that she "[j]ust [cannot] part with her pets." (Tr. 3/8/11 at 9, 17.) It is well settled that the burden is on the applicant to meet this prong. See § 45-24-41(c)(4); see also Sciacca, 769 A.2d 578, 585 (R.I. 2001) (the applicant bears the burden of demonstrating by reliable, probative, and substantial evidence that the legal preconditions for relief have been satisfied). Thus, this Court is satisfied that the Board's finding that appellant did not meet her evidentiary burden was not arbitrary or capricious, nor was it clearly erroneous given that appellant failed to produce any testimony demonstrating that the relief requested is the least relief necessary.

Beyond the four-prong showing described above, appellant bore the burden of producing probative evidence at the hearing demonstrating that a literal application of the terms of Warwick Zoning Ordinance § 300.204 would deprive appellant of all beneficial use of the property. See Sec. 45-24-41. Probative evidence to that effect is, of course, a prerequisite to the grant of a

variance. Coupe v. Zoning Bd. of Review of City of Pawtucket, 104 R.I. 58, 59, 241 A.2d 821, 822 (1968) (citing Laudati v. Zoning Bd. of Review of the Town of Barrington, 91 R.I. 116, 124, 161 A.2d 198, 203 (1960)). The Board found that appellant did not sustain her burden because she failed to provide evidence regarding how her inability to keep chickens on the property constituted a denial of all economically beneficial use of the property. See Coupe, 104 R.I. at 59, 241 A.2d at 822 (denying variance where testimony was insufficient to demonstrate that a literal application of the terms of the relevant ordinance would deprive the applicants of all beneficial use of their property). Further, the Board found that the property yielded a beneficial use as a single-family dwelling. Again, as the test is whether a literal enforcement of the ordinance would result in a complete deprivation of all beneficial use of one's land, this Court is satisfied that the appellant's complete failure to meet her evidentiary burden at the hearing, coupled with the Board's conclusion that the property yielded a beneficial use as a single-family dwelling, establishes that the Board's decision to deny appellant's application was not arbitrary or capricious or in violation of ordinance provisions.

B

Constitutional and Due Process Arguments

Appellant also raises two arguments for the first time on appeal. First, appellant contends that section 300, subsection 204 of the Warwick Zoning Ordinance is unconstitutionally vague because it fails to alert the public to the statute's scope and meaning. Secondly, appellant maintains that the more than three-year delay between appellant's filing a petition and the Zoning Board's hearing constitutes a due process violation.

As an initial matter, this Court observes that appellant's assignments of error are not properly before this Court. Indeed, it is undisputed that appellant did not raise either argument at

her March 8, 2011 hearing. It is well settled that "allegations of error . . . are considered waived if they were not effectively raised [below], despite their articulation at the appellate level." State v. Merced, 933 A.2d 172, 174 (R.I. 2007).

This Court acknowledges that our Supreme Court has "not explicitly held that the raise-or-waive doctrine applies to administrative proceedings." East Bay Cmty. Dev. Corp. v. Zoning Bd. of Review, 901 A.2d 1136, 1153 (R.I. 2006). However, it is readily apparent to this Court that the policy implications underlying the raise-or-waive rule—principally the necessity of affording an opposing party and/or administrative tribunal an opportunity to address any objections raised, as well as the importance of developing a sufficient record for review—applies equally to the Superior Court's appellate review of an administrative proceeding. Furthermore, one cannot challenge the constitutionality of an ordinance and simultaneously seek relief thereunder. See Sweck v. Zoning Bd. of Review of N. Kingstown, 77 R.I. 8, 11, 72 A.2d 679, 680 ("by asking the zoning board to exercise its discretion under an application for an exception or variance the applicant precludes himself from raising any question as to the constitutionality of the enabling act or the validity of a zoning ordinance enacted thereunder"). Accordingly, this Court deems appellant's constitutional and due process arguments waived.

For purposes of discussion, however, the Court will assume arguendo that appellant's constitutional challenges are properly before this Court. Appellant first raises a "void-for-vagueness" challenge with respect to Warwick Zoning Ordinance § 300.204, arguing that it fails to alert the public to the statute's scope and meaning. It is a well-established principle of due process "that an enactment is void for vagueness if its prohibitions are not clearly defined." State ex rel City of Providence v. Auger, 44 A.3d 1218, 1232 (R.I. 2012) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)) (internal quotation marks omitted). The void-for-

vagueness doctrine emanates from the due process requirements that a law must be defined "[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." Auger, 44 A.3d at 1233 (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)) (internal quotation marks omitted).

Void-for-vagueness claims are often made in regard to zoning provisions, but are seldom successful. 1 Rathkopf, supra, § 5:22. To succeed, such a claim must demonstrate that, in the context of the ordinance, any person of ordinary intelligence would necessarily have to guess at the meaning of the term or restriction. Mere ambiguity is not sufficient. Instead, the term or restriction in question must lack intelligibility. Id. The "sufficient definiteness" requirement is intended to equip the ordinary citizen "with the information necessary to conform his or her conduct to the law." Auger, 44 A.3d at 1233 (quoting State ex rel. Town of Westerly v. Bradley, 877 A.2d 601, 605 (R.I. 2005)) (internal quotation marks omitted).

Warwick Zoning Ordinance § 300.204 plainly speaks to the raising and keeping of animals and livestock as an activity that may only be permitted by special use permit in an A-7 residential zone. The terms "animals" and "livestock" are not expressly defined in the statute. However, when read in conjunction with § 200.121, the ordinance excluding the keeping of livestock or fowl on residential lots, the ordinance accurately conveys the scope of the proscribed behavior—specifically, that chickens may not be maintained on residential property absent a special use permit. See Mongony v. Bevilacqua, 432 A.2d 661, 663 (R.I. 1981) ("when the language of a statute or a zoning ordinance is clear and certain, there is nothing left for interpretation and the ordinance must be interpreted literally"); see also Auger, 44 A.3d at 1234 (municipal sound ordinance not vague when read in entirety despite abstract nature of some

terms); Kovacs v. Cooper, 336 U.S. 77, 79 (1949) (terms "loud and raucous" within an ordinance not inherently vague given that they have acquired through daily use a content that conveys to any interested person a sufficiently accurate concept of what is forbidden).

The void-for-vagueness doctrine prohibits enactments that "encourage arbitrary and discriminatory enforcement." Auger, 44 A.3d at 1235; see also Grayned, 408 U.S. at 108-09 ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."). The Warwick Zoning Board applies the standards outlined in G.L. 1956 § 45-24-41(c-d) when it reviews an application for a use variance. The standards are designed to apprise applicants of the evidentiary burden they face in seeking a variance. Concomitantly, the Board is presumed to know the effective administration of the ordinance. Monforte v. Zoning Bd. of Review of City of East Providence, 93 R.I. at 449, 176 A.2d at 727-28. The aforementioned statutory provisions, coupled with the Board's personal knowledge and expertise, serve as a bulwark against arbitrary and discriminatory enforcement. Thus, this Court finds that Warwick Zoning Ordinance § 300.204 is not unconstitutionally vague.

Appellant next contends that the nearly three-year delay between her application and the Board's hearing constituted a violation of her due process protections. In support of her argument, appellant claims that she did not initially request a use and a dimensional variance and that she only intended to challenge the decision of the administrative officer who issued the NOV. Regardless of her stated intention, it is undisputed that appellant submitted an application for a special use permit on October 31, 2007. It is further undisputed that appellant subsequently updated her petition as a true use variance following this Court's decision in Colbea Enterprises L.L.C. v. Alliance Energy Corp., No. KC-06-0604, 2007 WL 324446 (Super. Ct. Jan. 17, 2006).

Finally, at her hearing, appellant did not challenge or contest the Board's consideration of her true use variance request as the proper form of relief.

In its decision, the Board specifically cited the Colbea ruling—and the change to the Warwick Zoning Ordinance that resulted—as the reason for the delay. (Decision at 2.) This delay stemmed from a valid exercise of the legislative process and not from an attempt to stymie appellant's right to a timely hearing. Therefore, the Board did not violate appellant's due process protections by holding her application in abeyance pending a legitimate exercise of the Warwick City Council's legislative power.

IV

Conclusion

After reviewing the entire record, the Court is satisfied that the Board's denial of appellant's use variance was not arbitrary or capricious, or an abuse of discretion, or clearly erroneous. Substantial rights of the appellant have not been prejudiced. Accordingly, this Court affirms the April 20, 2011 decision of the Zoning Board of Review of the City of Warwick. Counsel for the prevailing party shall submit an appropriate Order for entry.