STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 26, 2012)

DANIEL R. TERRIEN and FLORENCE E. TERRIEN	:	
V.	:	**C.A. No. PC-11-7208**
DOUGLAS S. McKINNON, JOHN P. ASERMELY, RAYMOND M. GANNON, GEORGE SHABO, and MARTHA HOLT, In their capacities as Members of the Zoning Board of Review for the City of Pawtucket, Rhode Island and ARAX REALTY, LLC	:	

DECISION

PROCACCINI, J. Before this Court is an appeal from a decision of the Zoning Board of Review of the City of Pawtucket ("Board") granting an application for a use variance and dimensional variances. Arax Realty, LLC, which is solely owned by Aram Sarkisian (collectively "Applicant"), applied for the variances to allow use of an existing structure for a car wash facility. Daniel and Florence Terrien ("Appellants") seek reversal of the Zoning Board's decision. Jurisdiction is pursuant to Rhode Island General Laws 1956 Section 45-24-69. For the reasons set forth below, this Court vacates the Board's decision and remands the matter to the Board.

Facts and Travel

Applicant owns real property situated at 1101 Newport Avenue, Pawtucket, Rhode Island, designated as Lot 738 on Assessor's Plat 12A ("Property"). The Property is located in a Residential Two-Family Zone ("RT"), which is "intended for neighborhoods consisting of interspersed one- and two-family dwellings." (City of Pawtucket Zoning Ordinance, Art. I § 410-

2(C) (1997), Art. II § 410 Table of Use Regulations (2011)). On the Property is a structure that for many years housed a gas station, and then for about a decade housed an Enterprise Rent-A-Car ("Enterprise"). The car rental business operated pursuant to a use variance granted by the Board on June 3, 1999. Enterprise ceased operations on the site around 2009; the Property subsequently went unused for about three years, during which time the Applicant unsuccessfully sought a use variance to open a restaurant on the Property.

The instant appeal arises from the Applicant's August 3, 2011 application for a use variance to operate a car wash facility on the premises; per Section 410-12(11)(E) a car wash facility is not a permitted use in an RT zone. (City of Pawtucket Zoning Ordinance, Art. II §§ 410-12(11)(E), 410 Table of Use Regulations (2011)). The Applicant also applied for dimensional variances under Sections 410-86 and 410-78 for signage and parking relief, respectively. In his application, the Applicant indicated that the "[e]xisting commercial building is not adaptable to any residential use" and that the car wash would operate by appointment. (City of Pawtucket Zoning Ordinance, Art. X § 410-86 (2010), Art. IX § 410-78 (2006)).

On September 20, 2011, the Department of Planning and Redevelopment ("Planning Board") issued its Zoning Board Advisory Opinion ("Advisory Opinion") regarding the car wash facility application. The Planning Board found that: 1) the lot has an existing commercial structure; 2) car wash facilities are allowed by right only in Commercial General Zones; 3) the commercial reuse at issue should be relatively low impact because it is in a residential zone and adjacent to residential uses; 4) a car wash at the site likely would cause additional traffic; 5) the request for a car wash is not consistent with the Comprehensive Plan; 6) the Enterprise operation had different impacts on the neighborhood, including a finite number of cars on site and no risk of spillage onto nearby residential streets; and 7) unlike the appointment-oriented Enterprise, car

wash customers would more likely result from driving by the business. The Planning Board concluded that the use is not consistent with Pawtucket's Comprehensive Plan.

The Board issued public notice pursuant to Section 45-24-69, and a public hearing was held on September 26, 2011. At the hearing, the Board heard testimony on behalf of the Applicant from his attorney, John Shekarchi; a retained expert, Edmund Pimentel; the proposed proprietor of the car wash, Benjamin LeMaire; and the Applicant himself. The Appellants, who reside in the adjacent lot, also testified to their objections and submitted a notarized petition with signatures regarding the same.

The Board reached a decision when it convened the following week, on October 3, 2011, and rendered its written decision, numbered 11-042, on December 21, 2011. In its decision, the Board first noted that it had inspected the subject premises, then recounted evidence from the hearing. Counsel for the Applicant testified as to the Property's size, characteristics, prior uses, and current disuse. Counsel further stated that the car wash would utilize no machines or mechanized pulleys; all washing would be done by hand; washing would occur outside only as weather permits; the interior of the facility would generate no noise; and the business would operate by appointment only with no more than three employees on site. He also testified that two garage doors would be installed on the front of the building and that hours of operation would be limited to 8:00 A.M. to 6:00 P.M. daily. Counsel finally indicated that the dimensional variances were requested for parking on the left side of the building and signage identical to what Enterprise had employed. Mr. Sarkisian and Mr. LeMaire later briefly reiterated this testimony.

The Board recognized Edmund Pimentel as a land use planning expert. In advance of his testimony, Mr. Pimentel drafted a lengthy analysis regarding the proposed use. Mr. Pimentel testified that the building has been commercial since its construction; the building is unsuitable

for residential use; a car wash would be consistent with previous uses of the Property; and the Applicant would lose all beneficial use of the Property if the application were denied. Mr. Pimentel further asserted that the Planning Board's Advisory Opinion rested on a lack of understanding of the application. In its decision, the Board took administrative notice of the Advisory Opinion without additional comment.

Appellants testified as to their reservations about noise, lighting, proposed hours of operation, and the fact that the owner does not live in the community. Appellant Mr. Terrien also opined that the proposed uses would be contrary to the law.

The Board then presented its findings. As to the use variance, the Board reproduced the portions of Section 45-24-21 pertinent to a use variance, outlined the legal standard to be applied, and concluded as follows:

> "The Board finds that based on the testimony offered at the hearing, the applicant has been successful in offering evidence that would tend to show that he would suffer an unnecessary hardship as contemplated by the State Zoning Enabling Act and the Pawtucket Zoning Ordinance. The applicant has offered substantial and probative evidence on the record which has convinced the majority of this Board that the present return on the property is so low that to require its continued devotion either to its present use or to others permitted under the ordinance would be confiscatory. The applicant has successfully established that he will be deprived of all beneficial use of its [sic] property if the application is ultimately denied." (Decision at 4.)

As to the dimensional variances, the Board summarized the dimensional requirements for the RT zone and reproduced the provisions of Section 45-24-21 relevant to dimensional variances, including the "mere inconvenience" standard of review. The Board applied this standard pursuant to its reading of Viti v. Zoning Bd. of Review of the City of Providence, 92 R.I. 59, 166 A.2d 211 (1960). The Board concluded as follows:

> "Based on the facts offered by the applicant at the hearing, and based on the Board's own inspection of the subject parcel, it appears that if a Dimensional Variance is not granted to the applicant, it will suffer an adverse impact amounting to more than a mere inconvenience since the relief being sought is reasonably necessary for the full enjoyment of the permitted use." (Decision at 5.)

The Board voted unanimously to approve the use and dimensional variances, albeit with special conditions that: 1) there shall be no more than four cars on the property at once; 2) the lighting shall be the same as when Enterprise occupied the parcel; and 3) the hours of operation would be limited to 8:00 A.M. to 6:00 P.M. daily with no service on Sundays. The Appellants timely appealed the Board's Decision.

Standard of Review

A Superior Court review of a zoning board's decision is governed by Section 45-24-69(d), which provides:

> "[t]he 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, conclusions, or decisions which 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."

When reviewing a zoning board decision, the Superior Court "lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact

for those made at the administrative level." Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986). The Court cannot substitute its judgment for that of the zoning board and must uphold a decision that is supported by substantial evidence contained in the record. Hein v. Town of Foster Zoning Bd. of Review, 632 A.2d 643, 646 (R.I. 1993). "Substantial 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); Lischio v. Zoning Bd. of Review of the Town of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003). The zoning board must "disclose the reasons upon which they base their ultimate decision because the parties and this court are entitled to know the reasons for the board's decision in order to avoid speculation, doubt, and unnecessary delay." Hopf v. Bd. of Review of City of Newport, 102 R.I. 275, 288, 230 A.2d 420, 428 (1967).

Analysis

Appellants challenge the Board's decision on grounds that the Applicant failed to submit competent probative evidence, the Board applied an erroneous legal standard, the Board's decision contains insufficient findings of fact to support its decision, and the Board failed to enunciate the portions of the expert testimony on which it relied. Appellants request that this Court reverse the Board's decision and deny the application for variances or, alternatively, reverse the Board's decision and remand the matter to the Board for a de novo hearing. The Board asserts that this Court shall not substitute its judgment on questions of fact unless the decision was arbitrary or an abuse of discretion and that the Board did not err in deciding that literal enforcement of the zoning ordinance would deprive Applicant of all beneficial use of the

land. This Court need not address these arguments in detail because errors apparent from the decision warrant remanding this case to the Board for further consideration.

Adequacy of the Board's Decision

Section 45-24-61(a) provides that a zoning board must issue a written decision that affirms or denies an application for zoning relief. It is well-settled that a zoning board in its decision must set forth findings of fact and conclusions of law in order that such decisions may be susceptible of judicial review. Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001); Thorpe v. Zoning Bd. of Review of Town of North Kingstown, 492 A.2d 1236, 1237 (R.I. 1985); § 45-24-61(a). "Findings made by a zoning board 'must of course, be factual rather than conclusional, and the application of the legal principles must be something more than a recital of a litany.'" Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (quoting Irish Partnership v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986)). The failure of a zoning board to meet these minimal requirements renders judicial review of the board's work impossible. Thorpe, 492 A.2d at 1237 (citing May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239-40, 267 A.2d 400, 403 (1970)). Importantly, in such an event "the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances." Bernuth, 770 A.2d at 401 (citing Irish Partnership, 518 A.2d at 359).

In the present case, the Board's decision is deficient as to both the use variance and dimensional variances. In each instance, the Board's decision followed the same format: first, a recitation of the applicable statutory framework and legal standard, then a one-paragraph conclusion devoid of any detail. As to the use variance, for example, the Board concluded vaguely that "the applicant has been successful in offering evidence that would tend to show that he would suffer an unnecessary hardship." The Board also failed to elucidate what "substantial

and probative evidence . . . convinced the majority[1]. . . that the present return on the property is so low" that adherence to the ordinance would be confiscatory. Regarding the dimensional variances, the Board likewise failed to elaborate on the facts underlying its conclusion that "it appears" the Applicant would suffer more than a mere inconvenience were the variance not granted. Indeed, the Board at the beginning of the decision summarized certain testimony but made no findings specifically in reference to the requirements of Section 45-24-41—or to any other legal authority. The decision thus is barren of factual findings, applications of legal principles, or resolutions of evidentiary conflicts. The Supreme Court has made clear

> "[i]t is the obligation of a zoning board of review, when acting upon an application for relief within its authority, to inform this court by way of the record certified to us of the nature and character of the evidence upon which it decided the issue, or if such action resulted from its own inspection of or knowledge concerning the circumstances and conditions, that it disclose to us in that record what it observed and what it knew that caused it to take the action it did."

Diliorio v. Zoning Bd. of Review of City of East Providence, 105 R.I. 357, 362, 252 A.2d 350, 354 (1969); see also Coderre v. Zoning Bd. of Review of City of Pawtucket, 102 R.I. 327, 329, 230 A.2d 247, 248 (1967) ("Decisive in this case is the failure of the decision to set forth in some reasonable manner the ultimate facts upon which it is grounded."). This Court will neither uphold a decision comprised of legal boilerplate and bare conclusions nor will it inspect the underlying record to perform the duty entrusted to the Board. See Irish Partnership, 518 A.2d at 358-59; Sciacca, 769 A.2d at 585 ("because its decision contained neither findings of fact nor conclusions of law, the zoning board completely disregarded its obligation to spell out its conclusions and reasoning").

[1] The decision was unanimous.

With judicial review of the Board's decision impossible, this case is remanded for the Board "to state the reasons for its decision . . . [,] make express findings of fact and . . . pinpoint the specific evidence upon which they base such findings." See Hopf, 102 R.I. at 288-89, 230 A.2d at 428. In particular, if the Board concludes that conformance with the ordinance would be confiscatory by virtue of low return on the property, then it must identify evidence to support its conclusion. See, e.g., Somyk v. Zoning Bd. of Review of Town of Lincoln, 99 R.I. 255, 258, 207 A.2d 34, 36 (1965) (emphasizing the need for evidence pertaining to purchase price and removal cost of building, and noting that "mere inconvenience or additional expense necessary to make the land available for beneficial uses within in [sic] scope of the ordinance is not sufficient to warrant the granting of a variance").

Furthermore, the Board's decision is affected by error because it applied the incorrect legal standard to the request for dimensional variances. It is well-settled that a dimensional variance is granted in conjunction with a permitted use. Northeastern Corp. v. Zoning Bd. of Review of Town of New Shoreham, 534 A.2d 603, 605 (R.I. 1987). With respect to dimensional variances, Section 45-24-41(d)(2) prescribes that a dimensional variance is appropriate where "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 Board duly recited this language in the decision, but it failed to recognize that where use and dimensional variances are sought in conjunction, the statutory standard for use variances—i.e., loss of all beneficial use per Section 45-24-41(d)(1)—applies to *both* types of variance. See Sun Oil Co. v. Zoning Bd. of Review of the City of Warwick, 105 R.I. 231, 233-34, 251 A.2d 167, 169 (1969); Health Havens, Inc. v. Zoning Bd. of Review of the City of East Providence, 101 R.I. 258, 262-64, 221 A.2d 794, 797-98 (1966); Roland F. Chase, Rhode Island Zoning Handbook, § 146 (1999 and Supp.). Thus, the

Board's reliance on Viti v. Zoning Bd. of Review of the City of Providence and Section 45-24-41(d)(2) was misplaced. On remand, the Board must apply the correct standard.

Conclusion

After review of the entire record, this Court finds the decision of the Board is in violation of statutory and ordinance provisions and is affected by error of law. Accordingly, the matter is remanded to the Board for a decision with findings of fact and conclusions of law pursuant to Sections 45-24-41 and 45-24-61 and for an application of the proper legal standards. Because the Board's composition has changed since it rendered its decision, it is "the obligation of the [B]oard as newly constituted to consider the case de novo." Coderre v. Zoning Bd. of Review, 239 A.2d 729, 730-31 (R.I. 1968) (after a remand for clarification, requiring a hearing de novo due to a change in membership of the board); see also Bellevue Shopping Ctr. Associates v. Chase, 556 A.2d 45, 45-46 (R.I. 1989) (remanding for consideration by newly constituted board when original board's decision lacked adequate findings of fact and conclusions of law). The Board is thus ordered to rehear the application within thirty (30) days, and to render a written decision, complete with appropriate findings of fact and conclusions of law, within thirty (30) days thereafter in accordance with this Decision. This Court shall retain jurisdiction. Counsel shall submit the appropriate order for entry.