STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 4, 2014)

RONALD A. DWIGHT and SOPHIE MULLIGAN REVOCABLE TRUST	:	
v.	:	**C.A. No. PC 13-2883**
MYRTH YORK, SCOTT WOLF, DANIEL VARIN, MARC GREENFIELD and ARTHUR STROTHER, in their capacities as members of the Zoning Board of Review of the City of Providence, and WALTER L. BRONHARD	:	

DECISION

VOGEL, J. Ronald A. Dwight and the Sophie Mulligan Revocable Trust (collectively, Appellants) appeal the decision of the Zoning Board of Review for the City of Providence (the Board), which granted Walter L. Bronhard (the Applicant) several dimensional variances for a proposed building project and denied his request for a home occupation special use permit. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons below, the Board's decision is affirmed, in part, and vacated and remanded, in part, for further factual findings.

I

Facts and Travel

The Applicant proposes to construct a four-story, two-family residential building on his property at 157-159 Benefit Street, Providence, Rhode Island (the Property). (Tr. at 8-9, 28.) The Property is located in an R-2 zone, which is "intended for low density residential areas comprising single family dwelling units and two family dwelling units"; however, the Property is currently being used as a parking lot. (Tr. at 7, 28-29); City of Providence Zoning Ordinance

§ 101.1. The Property has a dramatically uneven grade, as it is divided into two tiers by a nine-foot retaining wall. (Tr. at 12). Because the Property is located in a historic district, the Providence Historic District Commission (HDC) has the authority to regulate the construction of any structure on the Property. (Tr. at 5); City of Providence Zoning Ordinance § 501.3.

In order to construct the building he proposes, the Applicant requested variances to allow him to deviate from the dimensional provisions of the City of Providence Zoning Ordinance (the Ordinance) in the following ways: 1) the Applicant proposes to build a four-story building, whereas § 304 of the Ordinance permits up to only three stories in R-2 zones; 2) the Applicant's building proposal leaves no space for a side yard between it and the adjacent building on the south side of the parcel, in violation of § 304, which requires side yards of at least six feet each, totaling thirty percent of the lot width; 3) the Applicant proposes to install an architectural feature on the building that would protrude more than permitted under § 416.2; and 4) the entire rear yard would be paved in violation of § 704.2(C), which permits no more than fifty percent of the rear yard to be paved.[1] (Tr. at 6, 8, 25, 31.) In addition, the Applicant also requested a special use permit pursuant to § 419.2 of the Ordinance to allow the future residents of the proposed building to conduct home occupations, i.e., businesses run out of the home, in the first floor of the structure.[2] (Tr. at 8-9.)

A

The Zoning Board Hearing

The members of the Board individually visited the Property prior to holding a public hearing on April 3, 2013 on the Applicant's requested variances and home occupation special

[1] The Applicant also requested, and the Board granted, a variance from the minimum lot area requirements of §§ 101.1, 204.3 and 304. Appellants, however, do not challenge those variances.
[2] Section 419.2 of the Ordinance provides that "[o]ne home occupation is permitted per dwelling unit by special use permit from the Board."

use permit. (Bd. Dec. at 2.) At the hearing, the Board heard arguments and testimony from several individuals, including Attorney Timothy More, on his own behalf and as legal counsel to the Appellants; Applicant's land use expert, Edward Pimentel; the Applicant's architect, James Marshall; and the Applicant's legal counsel. (Tr. at 4-32, 33-38.)

Counsel for Applicant explained that in designing the proposed plan, the Applicant had attempted to incorporate and harmonize the preferences of the HDC, the Providence Preservation Society, and the nearby property owners. To proceed with the plan, the Applicant required the requested variances and special use permit. (Tr. at 4-8.) Counsel noted that the HDC had suggested that the first floor be used for commercial purposes, in keeping with the mixed-use character of the rest of the historic district. (Tr. at 7.) Such commercial use, however, is not permitted in the R-2 zone in which the Property is located. Ordinance § 101.1; (Tr. at 7). Attempting to satisfy both the parameters of the Ordinance and the recommendation of the HDC, counsel explained, the Applicant sought pre-approval of home occupation special use permits for both dwelling units on the Property, even though he was unsure whether the future occupants would avail themselves of home occupation. (Tr. at 9-10.)

Edward Pimentel (Pimentel), the Applicant's land use expert, provided extensive testimony in which he opined that the Applicant had satisfied the four criteria set forth in the statute and Ordinance for granting the requested dimensional variances. (Tr. at 19-24.) Pimentel testified that the proposed building would conform with the character of the surrounding neighborhood because it would be similar in size, design, and use to the neighboring properties. (Tr. at 11.) In addition, Pimentel testified that the proposed building would further the goals of the city's comprehensive plan, which seeks to encourage denser, pedestrian-friendly development since the proposed building would add to the number of residences and businesses

within walking distance of many of the city's other amenities. (Tr. at 20-21.)

Pimentel then testified as to the Property's unique characteristics, specifically, its division into two tiers by a nine-foot retaining wall, giving it a dramatically uneven grade, and its location in a historic district. (Tr. at 19, 22.) Pimentel did not explain what hardship the Applicant faced from the Property's uneven grade. He did, however, express his belief that the Property's location in a historic district would cause the Applicant hardship unless the Board granted him the requested dimensional variances because, according to Pimentel, compliance with both the Ordinance and the HDC's exacting standards would be nearly impossible. (Tr. at 19, 22.)

Additionally, Pimentel testified that the Applicant's requested dimensional variance relief was the least relief necessary because, in his opinion, allowing the Applicant to make deviations from the zoning regulations was the only way to balance the competing demands placed on the development of the Property by the HDC and the Ordinance. (Tr. at 22-23.) Finally, Pimentel testified that the Applicant did not create his own hardship from which he sought dimensional relief because the Property was in its current condition when the Applicant purchased it. (Tr. at 22.)

Mr. More spoke on his own behalf, as an owner of land near the Property and as counsel for abutting property owners. (Tr. at 33.) Primarily, More argued that the Applicant's proposal for the Property "is just too much for the site." (Tr. at 34.) Specifically, More expressed concern that the addition of two businesses and two residences on the Property, combined with the loss of the parking lot that is currently on the Property, would result in overcrowding of the area and traffic congestion. (Tr. at 35-36.) To that end, More requested that the Board deny the Applicant's request for a home occupation special use permit. (Tr. at 37, 38.) Additionally, More called into question Pimentel's representation that the HDC's standards take precedence

over the Ordinance's zoning regulations, arguing instead that the HDC has no authority to require the Applicant to violate the Ordinance in order to maintain the historic character of the neighborhood. (Tr. at 37-38.)

In addition to the above arguments and testimony, the Board also considered photographs of the Property and the dimensions of the neighboring buildings; a written report from Pimentel explaining how the Applicant's proposed building would blend in with the existing character of the neighborhood and contribute to the goals of the city's comprehensive plan; a letter from the Providence Preservation Society recommending that the Property be developed with several departures from the dimensional requirements of the Ordinance in order to retain the historic character of the surrounding neighborhood; and a report from the Department of Planning and Development recommending conditional approval of the Applicant's proposal. (Bd. Dec. at 2.) Immediately after the hearing, the Board deliberated on the variance and special use permit requests. (Tr. at 44-52); (Bd. Dec. at 1, 7.) The Board then issued its decision on May 31, 2013, Resolution No. 9739, which granted all the requested variances and denied the special use permit without prejudice.

Appellants timely filed an appeal with this Court, seeking review of the Board's decision to grant the above variances. Additionally, Appellants assert that the Board erred by approving fewer dimensional variances than would be required for the Applicant to construct the proposed building on the Property. Lastly, Appellants seek review of the Board's decision to deny the special use permit without prejudice, instead of with prejudice.

II

Standard of Review

This Court may remand, reverse or modify a zoning board 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." Sec. 45-24-69(d).

In keeping with this statutory grant of authority, this Court's task on an appeal from a zoning board decision is to determine whether substantial evidence—meaning "'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion'"—exists in the certified record to support the board's findings. Iadevaia v. Town of Scituate Zoning Bd. of Review, 80 A.3d 864, 870 (R.I. 2013) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). This Court, however, "shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact." Sec. 45-24-69(d). Accordingly, this Court's review "'is confined to a search of the record to ascertain whether the [B]oard's decision rests upon 'competent evidence' or is affected by an error of law.'" West v. McDonald, 18 A.3d 526, 531 (R.I. 2011) (quoting Kirby v. Planning Bd. of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993)).

This Court may remand a case to a zoning board for reconsideration when the board has failed to resolve "the evidentiary conflicts, [make] the prerequisite factual determinations, [or]

appl[y] the proper legal principles" or when "[t]he infirmities and deficiencies of the decision make judicial review impossible . . . ." May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239-240, 267 A.2d 400, 403 (1970). In addition, remand is appropriate when the board's decision was based on a mistaken interpretation of the law. Ctr. Realty Corp. v. Zoning Bd. of Review of Warwick, 96 R.I. 76, 84, 189 A.2d 347, 352 (1963).

III

Analysis

A

Dimensional Variances

Broadly, Appellants contend that the Board's decision to grant the Applicant's height, side yard, architectural projection, and paving variances should be reversed because the record contains insufficiently probative evidence to support the Board's finding that the Applicant satisfied all of the statute's and the Ordinance's criteria for granting each of these variances. Arguing that the Ordinance's zoning regulations would not preclude the Applicant from developing the Property with a smaller than proposed structure, Appellants insist that the Applicant failed to demonstrate, as a necessary threshold matter, that compliance with "the literal requirements of a zoning ordinance" would cause him "hardship . . . amount[ing] to more than a mere inconvenience." Secs. 45-24-41(a), (d)(2); Ordinance § 902.3(B)(2). Moreover, Appellants argue that the Applicant has failed to put forth, as required under the dimensional variance provisions of the statute and the Ordinance, "evidence to the satisfaction of the following standards":

> "(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); . . . .
>
> "(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." Sec. 45-24-41(c); Ordinance § 902.3(A).

In contrast, the Applicant argues that the Court must affirm the Board's decision because the Board based its decision on the reliable, probative, and substantial evidence submitted in Pimentel's testimony and supplemental report.

1

Maximum Height and Minimum Side Yards

First, Appellants maintain that there is insufficient evidence in the record to support the Board's decision to grant the Applicant variances from the height and side yard requirements of § 304. This provision limits buildings in R-2 zones to three stories, instead of the Applicant's proposed four stories, and requires all parcels to have minimum side yards of at least six feet. Ordinance § 304. Appellants contend that the evidence on the record fails to show either that the Applicant would suffer hardship if he were denied these height and side yard variances or that granting the requested variances will not alter the general character of the surrounding area or that the relief granted was the least relief necessary. See § 45-24-41(c), (d)(2); Ordinance § 902.3(A). In response, the Applicant maintains that the Board's decision to grant him these variances was sufficiently underpinned by evidence establishing that the Property has a severely uneven grade and is located in a historic district, both of which, he argues, are unique characteristics of the subject land that created his hardship. (Tr. at 12, 22.) The Applicant maintains further that the height and side yard variances will allow him to develop the Property

in keeping with the existing character of the neighborhood and that these variances are the least relief necessary to allow him to develop the Property while balancing the competing constraints of the Ordinance and the HDC. (Tr. at 18-20.)

a

Hardship due to Unique Characteristics of the Subject Land

In determining that the Applicant suffered a hardship due to the unique characteristics of the Property, the Board first found that "[t]he Property is unique because of the precipitous decline in the land, a ten (10) foot elevation change." (Bd. Dec. at 4.) However, the Board's findings fail to address how the grading of the Property poses any hardship to the Applicant. See May-Day Realty Corp., 107 R.I. at 240, 267 A.2d at 403 (remanding a case to the zoning board when it had failed "to tie [its legal] conclusion to any evidentiary matter"). Much to the contrary, the record shows that the unusual grade will not likely pose an impediment to the Applicant in building a structure on the Property, as the Applicant plans to build a four-story residence there, despite the uneven grade. (Tr. at 8-9.) The Board did not make findings regarding how the "literal requirements" of the Ordinance would pose no hardship to the Applicant in building a four-story structure with inadequate side yards but would pose a hardship in building a three-story structure with adequate side yards. Sec. 45-24-41(a). Consequently, the Board's decision that the Applicant faced a hardship resulting from the uneven topography of the Property was arbitrary and capricious because by citing the uneven topography as evidence in support of this finding, the Board "'offered an explanation for its decision that runs counter to the evidence before the agency.'" See G.L. 1956 § 42-35-15(g). Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

In addition, the Board also based its conclusion that the "literal requirements" of § 304 posed a hardship to the Applicant on Pimentel's testimony that a building in conformity with the height and side yard requirements would not meet with HDC approval. (Tr. at 24, 26, 44-45); (Bd. Dec. at 5); (Pimentel Rpt. at 6). Specifically, Pimentel testified the HDC would not approve a building on the Property with compliant height and side yards because such a building would not fit in with the character of the existing buildings in the neighborhood. (Tr. at 24, 26); (Pimentel Rpt. at 6). With this testimony before it, the Board found "[t]he Applicant would suffer more than a mere inconvenience without the requested relief because of the difficulty of obtaining approval for any other design." (Bd. Dec. at 5.) Such finding, however, is in direct contradiction of the plain language of the Ordinance, which prohibits the HDC from requiring property owners to violate Ordinance regulations. See Ordinance § 501.3(D). Rather, the Ordinance empowers the HDC to issue approval only "for projects that conform to the requirements of this Ordinance and the Standards and Guidelines adopted by the HDC."[3] Id. Thus, the Board's finding that the Applicant would suffer hardship resulting from the Property's location in a historic district if he were not granted height and side yard variances was "in violation of . . . ordinance provisions." Sec. 45-24-69(d).

A review of the record reveals that the Applicant's evidence supports the Board's finding that the Property has unique characteristics. Yet, the Board's decision fails to cite any "legally competent" record evidence showing that the Applicant suffers some hardship as a result of these unique characteristics. See Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d

[3] Moreover, nowhere in its Standards and Guidelines does the HDC require newly-constructed buildings in historic districts to be the same height as their neighboring buildings, nor does it preclude the inclusion of side yards between buildings. In fact, contrary to requiring new buildings in historic districts to match their neighbors, the HDC advises that "[n]ew structures should harmonize with existing older structures and at the same time be distinct from the old." Providence Historic District Commission Standards and Guidelines at 48 (emphasis added).

164, 167 (R.I. 2003) (defining "[l]egally competent evidence" as "'relevant evidence that a reasonable mind might accept as adequate to support a conclusion . . . '") (quoting R.I. Temps, Inc. v. Dep't of Labor and Training, Bd. of Review, 749 A.2d 1121, 1125 (R.I. 2000)). Thus, because the Board may only grant "relief from the literal requirements of a zoning ordinance" when such relief is needed "because of hardship," the Board's decision failed to make "the prerequisite factual determinations" necessary to support its conclusion that "the hardship from which the relief is sought is due to the unique characteristics of the subject land." Sec. 45-24-41(a), (d) (emphasis added); May-Day Realty Corp., 107 R.I. at 239, 267 A.2d at 403; (Bd. Dec. at 5); see also § 45-24-41(c); Ordinance § 902.3(A)(1); see also In re Appeal of Boyer, 960 A.2d 179, 184 (Pa. Commw. 2008) (finding that the zoning board improperly granted a variance when the unique topography of the applicant's property did not cause her any hardship in complying with the zoning regulations). As a result, rather than "mak[ing] findings of fact and conclusions of law in support of its decision[]," as required by our case law, the Board instead made only a conclusory statement that "the [Applicant's] hardship is based on [the Property's] location and the . . . grading of the lot." Thorpe v. Zoning Bd. of Review of N. Kingstown, 492 A.2d 1236, 1236-37 (R.I. 1985); (Tr. at 45).

Because the Board has failed "to give a valid ground for its conclusion," it is "impossible for [this Court] either to approve or to disapprove what has been done." Carter Corp. v. Zoning Bd. of Review of Cumberland, 103 R.I. 515, 517, 238 A.2d 745, 747 (1968). To either affirm or vacate the Board's decision on the issue of the Applicant's hardship "would require that [the Court] speculate on how the [B]oard would have resolved the factual disputes or what it would have concluded had it performed its duty." Id. Because such speculation is beyond the scope of this Court's jurisdiction, remand is the appropriate disposition in this case. See id.; Hooper v.

Goldstein, 104 R.I. 32, 44, 241 A.2d 809, 815 (1968) (holding that when an agency fails to explain its basic factual findings, remand is appropriate in order to "avoid[] judicial usurpation of administrative functions"). The Court, therefore, remands this issue "in order to afford the board an opportunity to clarify and complete its decision." Hooper, 104 R.I. at 44, 241 A.2d at 816.

b

Character of the Area

Next, the Board based its decision to grant the Applicant's height and side yard variances on its finding "that the requested [height and side yard] variance[s] will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan." (Bd. Dec. at 6); see also § 45-24-41(c)(3); Ordinance § 902.3(A)(3). In so finding, the Board reasoned that granting the Applicant a § 304 variance would ensure that the new building on the Property would conform to the size and design of existing historic buildings in the neighborhood, which are mostly legally nonconforming structures with four stories and no side yards. (Tr. at 11, 18-19, 44-45); (Bd. Dec. at 5.)

In finding, however, that the Applicant qualified for height and side yard variances because the granting of the variances themselves would preserve the general character of the neighborhood, the Board applied an incorrect standard. Neither the statute nor the Ordinance provides that conformity with the buildings in the surrounding neighborhood is itself one of the reasons for which the Board may grant a variance. Rather, the statute and the Ordinance both provide that if a variance is to be granted because compliance with the literal requirements of the zoning ordinance would impose a hardship on the property owner, then "the granting of the requested variance [must] not alter the general character of the surrounding area." Sec. 45-24-41(c)(3); Ordinance § 902.3(A)(3). In fact, § 202 of the Ordinance provides that "[i]t is intended

that existing buildings or structures that are nonconforming by dimension shall not justify further departures from this Ordinance for themselves or for any other property." Therefore, existing dimensional nonconformities in the vicinity of the Property should have had no bearing on the Board's determination of whether the Applicant had satisfied the prerequisites for obtaining a dimensional variance. See Roland F. Chase, Rhode Island Zoning Handbook § 155 (2006) (explaining that "the fact that there will be no negative impact on surrounding property, or even that abutting property will benefit from the granting of a variance, is not, by itself, sufficient to warrant zoning relief").

Remand is the appropriate remedy when a zoning board's "decision . . . reflects a misunderstanding . . . as to the latitude of its discretion." Ctr. Realty Corp., 96 R.I. at 84, 189 A.2d at 352. Accordingly, because the Board misapplied the statutory and Ordinance provisions on the issue of whether the height and side yard variances were appropriate given the character of the surrounding area, the Court remands the issue for further proceedings.

c

Least Relief Necessary

Finally, the Board found that "[t]he requested relief is the least relief necessary, especially balancing of [sic] the requirements of the HDC, the [Providence Preservation Society], the Ordinance and the character of the neighborhood." (Bd. Dec. at 5.) In so finding, the Board, again, relied on Pimentel's testimony that granting the Applicant's requested dimensional variances was the only way to allow the Applicant to obtain HDC approval to develop the property. (Tr. at 24.)

The Board's authority to grant the Applicant's requested dimensional variance relief "is limited to the extent of relief demonstrated to be reasonably necessary to the enjoyment of [a]

permitted use . . ." Lincoln Plastic Prods. Co. v. Zoning Bd. of Review of Lincoln, 104 R.I. 111, 115, 242 A.2d 301, 303 (1968). In other words, before the Board may grant any zoning relief at all, the Applicant must first demonstrate that he suffers some hardship for which he requires zoning relief in order to enjoy a permitted use of the Property. See id. If such preliminary showing is not satisfied, the Board's decision to grant any zoning relief "is arbitrary and constitutes an abuse of discretion." Id.

In the case at bar, the Board's finding that the Applicant's requested height and side yard variances were the least relief necessary was premised on the Board's finding that the evidence on the record established the Applicant would suffer a hardship if no dimensional variances were granted. See Bd. Dec. at 5. As explained above, however, the Board's findings do not sufficiently explain on what evidence the Board relied to determine that the Applicant would suffer any hardship without the height and side yard variances. Because the Board's "failure either to make the prerequisite findings of fact or to give a valid ground for its conclusion . . . make it impossible for [the Court] either to approve or to disapprove what has been done," the Board's decision on this issue is reversed and remanded for further factual findings. Carter Corp., 103 R.I. at 517, 238 A.2d at 747; accord Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986).

2

Architectural Projection into the Yard

Arguing that the Board "made conclusory statements, unsupported by findings of fact," Appellants also challenge the Board's grant of the Applicant's request for a variance from the requirements of § 416.2. This section of the Ordinance provides that "[a] cornice, eaves, belt course, sill, canopy or other similar architectural feature (not including bay window or other

vertical projection) may extend or project into . . . a required front, side, or rear yard not more than 30 inches." (Bd. Dec. at 7.)

The Board made no reference to the architectural projection in either its deliberations or its final decision, and the record, as a result, does not make clear for which architectural feature the Board granted this particular variance. The only indication in the record as to what architectural feature the Applicant intends to project into the yard is the Applicant's architect's testimony that the proposed structure will have "big bay windows that stick out on the front" and that the HDC "suggested . . . that it would be better historically and would be more in character if there was a side light on those windows along the property line." (Tr. at 31.) Thus, it is unclear whether the Applicant requested the § 416.2 variance for the side light, the bay windows—which the provision expressly excludes—or both. In finding that the Applicant satisfied the dimensional variance criteria for the architectural projection, therefore, the Board failed completely to either make any of the findings required by § 45-24-41 and § 902.3 of the Ordinance or to explain its reasoning.

"[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." Thorpe, 492 A.2d at 1236-37. In conducting judicial review of a zoning board's decision, it is the task of this Court to "decide . . . whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles." May-Day Realty Corp., 107 R.I. at 239, 267 A.2d at 403. When the record consists of a board's conclusions that are unsupported by any legal basis or factual findings, however, "a judicial review of a board's work is impossible." Id. When, as here, "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 P'ship, 518 A.2d at 359. Instead, this Court remands this issue for further findings of fact in accordance with the parameters of § 45-24-41 and § 902.3 of the Ordinance. See Carter Corp., 103 R.I. at 517, 238 A.2d at 747.

3

Paving Limitations

Challenging the Board's decision to grant the Applicant a variance from § 704.2(C), which permits no more than fifty percent of the rear yard to be paved, Appellants maintain that the record contains insufficient evidence to show that the Applicant would suffer hardship without this variance. See Bd. Dec. at 7. The Applicant, who proposes to install three parking spaces in the rear yard as well as two sets of stairs going into the building, argues that the lot's size and shape preclude him from complying with both the Ordinance's paving limitations and its minimum parking requirements. (Tr. at 32.) He insists, therefore, that he requires a variance because "the subject land . . . cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance." Sec. 45-24-41(d)(1).

The Board's legal and factual findings on the § 704.2(C) variance satisfy the dimensional variance criteria outlined in § 45-24-41 and § 902.3 of the Ordinance. In particular, these criteria require:

> "(1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land [and amounts to more than a mere inconvenience] . . .
> "(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" . . . ; and
> "(4) That the relief to be granted is the least relief necessary." Sec. 45-24-41(c), (d)(2); Ordinance § 902.3.

First, the Board found that the Applicant would face "hardship . . . amount[ing] to more than a mere inconvenience" unless the Board granted him a variance from § 704.2(C)'s paving limitations. Sec. 45-24-41(c)(1), (d)(2); § 902.3(A)(1). Pimentel testified that the Property's unique characteristics—namely, its substandard size and uneven topography—would make situating both a building and the necessary amount of parking spaces impossible if the Applicant were required to pave no more than fifty percent of the rear yard. (Tr. at 32, 45); (Bd. Dec. at 4). Next, the Board found that the hardship was "not the result of any prior action of the [A]pplicant," nor did it "result primarily from the desire of the [A]pplicant to realize greater financial gain" because "[t]he land's configurations existed before the Applicant's purchase and prior to the current dimensional regulations created for the area." Sec. 45-24-41(c)(2); Ordinance § 902.3(A)(2); (Bd. Dec. at 5); see also Tr. at 22-23.

Additionally, the Board found that granting the paving variance would "not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan." Bd. Dec. at 6; § 45-24-41(c)(3); Ordinance § 902.3(A)(3). In support of this finding, the Board cited Pimentel's testimony and accompanying report establishing that, if the paving variance were granted, the Applicant's proposed development on the Property would be consistent with the character of the neighborhood and would further the purposes of the Ordinance and the comprehensive plan by providing more residential units in the area. (Tr. at 19-20); (Pimentel Rpt. at 7-8).

Lastly, the Board based its finding that "the relief requested is the least relief necessary" on Pimentel's uncontroverted testimony that the Applicant would be unable to develop the Property with the kind of use permitted in the R-2 zone if he were required to strictly comply with the paving limitations of § 704.2(C). Sec. 45-24-41(c)(4); Ordinance § 902.3(A)(4); (Bd.

Dec. at 6); (Tr. at 24). "[I]f expert testimony before a zoning board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony." Murphy v. Zoning Bd. of Review of S. Kingstown, 959 A.2d 535, 542 (R.I. 2008). Thus, the substantial rights of the Appellants have not been prejudiced because the Board's action in granting the paving variance was neither clearly erroneous nor in violation of statutory or Ordinance provisions. See § 45-24-69(d). Accordingly, the decision to grant the Applicant a variance from § 704.2(C) is affirmed.

B

Dimensional Variances Not Requested

Appellants also argue that the Board erred in granting the Applicant's requested variances because the Applicant failed to apply for all the variances that he will eventually need in order to obtain a building permit for the proposed project on the Property. Specifically, Appellants claim that in addition to the variances he did apply for, the Applicant will need variances from § 425.2, which pertains to trees and landscaping in parking areas, and § 427.5, which governs the amount of pervious surface on lots in residential zones. Appellants are concerned that by applying for less zoning relief than he will ultimately require, the Applicant misled the Board into believing that the proposed building on the Property diverges less from the requirements of the Ordinance than it actually will. In response, the Applicant submits that this Court lacks jurisdiction to determine if he has obtained the relief necessary to construct the proposed building on the Property.

In this case, the Board would have exceeded its statutory grant of authority had it denied the Applicant's request for variances on the grounds that he had failed to apply for all necessary variances at once. Instead, the Board's consideration of the Applicant's request for variances

was "confined to whether [the Applicant] had established entitlement thereto under the standards fixed by the local legislature," as enumerated in § 45-24-41(c), (d)(2) and in § 902.3 of the Ordinance. Wyss v. Zoning Bd. of Review of Warwick, 99 R.I. 562, 564, 209 A.2d 225, 226 (1965). Those standards do not allow a zoning board to deny a variance request when an applicant has not yet applied for other variances that will be necessary for a building permit. Consequently, the Board would have exceeded its statutory authority by considering unrequested variances in reaching a decision on the variances that the Applicant did request. See Lamothe v. Zoning Bd. of Review of Cumberland, 81 R.I. 96, 102, 98 A.2d 918, 920-21 (1953) (ruling that a zoning board's "conclusive and comprehensive decision" on an issue that was not before it was arbitrary and erroneous).

The Board, therefore, did not violate Ordinance or statutory provisions and did not exceed its statutory authority in granting fewer variances than may ultimately be necessary for the Applicant to obtain his building permit.[4] This Court, accordingly, will not disturb the Board's decision on the Applicant's variance requests on that basis.

C

The Special Use Permit

Appellants seek review of the Board's decision to deny without prejudice the Applicant's request for a special use permit to allow a home occupation in the first floor of the proposed building. See Bd. Dec. at 7. Appellants do not argue that the special use permit should have been granted; rather, they maintain that the Board should have denied the special use permit with

[4] It should be noted that this Court's ruling on this matter does not leave Appellants without remedy should the Applicant's ultimate construction project on the Property require variances that he has not obtained. Should such a situation arise, the building inspector must decline to issue a building permit. If, however, the building inspector erroneously issues the permit without these variances, Appellants can seek further review pursuant to § 45-24-64.

prejudice, instead of without. In support of this argument, Appellants suggest that the Applicant would not have requested a dimensional variance from the height limitations of § 304 had he not expected to use the first floor of the proposed building for a home occupation. Therefore, according to Appellants, since the § 304 dimensional variance should not have been granted, the Board should have no reason to ever reconsider granting a special use permit to allow some future resident of the Property to conduct a home occupation. Pointing out, however, that § 45-24-69 allows only "aggrieved" parties to challenge a decision of a zoning board, the Applicant asserts that this Court lacks jurisdiction to consider Appellants' challenge because they cannot be aggrieved by the denial of a permit they never wanted the Board to grant.

As an initial matter, Appellants qualify as the kind of "aggrieved parties" who, pursuant to § 45-24-69, may bring zoning board appeals before this Court. Section 45-24-31(4) defines an "aggrieved party" as, inter alia, "[a]nyone requiring notice pursuant to this chapter." As abutting property owners within 200 feet of the Property, the Applicant was required to provide notice to Appellants of the hearing before the Board on his requested variances and special use permit. Sec. 45-24-42(b)(4); § 45-24-53(c)(2); (Abutter List at 3). Appellants are, therefore, "aggrieved parties" whose appeal this Court has jurisdiction to decide. Sec. 45-24-69.

Turning to the merits of Appellants' challenge, the Court finds that the Board acted within the scope of its authority in denying the Applicant's special use permit without prejudice. The record shows that the Applicant did not yet know what kind of home occupation, if any, the future residents of the Property would conduct on the Property. (Tr. at 9, 27, 47-52.) Accordingly, in order to "retain some control over the eventual use of the first floor" of the Property, the Board denied the special use permit without prejudice, leaving open the possibility that a future resident with a definitive home occupation could reapply for the permit. Id. at 52;

see also Ordinance § 419.2 (listing eight criteria that an applicant must satisfy in order for the Board to grant a home occupation special use permit and excluding certain professions from home occupations altogether). This was not, as Appellants suggest, a situation in which "the special use could not exist without the dimensional variance" and, therefore, the granting of one was dependent upon the granting of the other. Sec. 45-24-42(c). On the contrary, under the clear provisions of the Ordinance, a home occupation may one day be permissible at the Property regardless of whether the dimensional variances are ultimately granted. See Ordinance § 419.2 (allowing one home occupation per dwelling unit with a special use permit).

Consequently, the Board would have abused its discretion and exceeded the authority granted to it by statute and the Ordinance had it completely foreclosed the possibility of any future home occupation at the Property by denying the Applicant's special use permit request with prejudice. Cf. Lamothe, 81 R.I. at 102, 98 A.2d at 920-21 (finding a zoning board's decision that it "would never grant a variance at any time in the future . . . clearly indicate[d] an arbitrary prejudgment" and was "erroneous"); see also Salve Regina College v. Zoning Bd. of Review of Newport, 594 A.2d 878, 882 (R.I. 1991) (finding that the zoning board abused its discretion by denying a request for a special use permit when there was no "probative" evidence on the record to support the denial). Because the Court finds that the Board neither violated the Ordinance or statutory provisions nor exceeded its statutory authority, the Court affirms the Board's decision to deny the Applicant's request for a special use permit without prejudice. See § 42-35-15(g).

IV

Conclusion

After a review of the entire record, the Court affirms the Board's decisions to deny the Applicant's request for a special use permit without prejudice and to grant the Applicant's request for a variance from the paving restrictions of § 704.2(C) of the Ordinance. However, with respect to the height and side yard variances from § 304 and the projection of an architectural feature variance from § 416.2, the Court vacates the Board's decisions and remands the matters to the Board to make further factual findings in accordance with this Decision. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Ronald A. Dwight and Sophie Mulligan Revocable Trust v. Myrth York, et al.**
CASE NO:	**PC 13-2883**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**March 4, 2014**
JUSTICE/MAGISTRATE:	**Vogel, J.**
ATTORNEYS:	
For Plaintiff:	**Timothy T. More, Esq.**
For Defendant:	**John J. Garrahy, Esq.** **Lisa Dinerman, Esq.**