STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. SUPERIOR COURT

(Filed: January 11, 2012)

MICHAEL P. CASSESE and :

JOANNE B. CASSESE :

V. : C.A. No. NC 10-0293

:

ZONING BOARD OF REVIEW FOR
THE TOWN OF MIDDLETOWN, by
and through its members THOMAS
D. SILVEIRA, LUCY R. LEVADA,
STEPHEN J. MACGILLIVRAY,
THOMAS R. NEWMAN, JR. and

PETER VAN STEEDEN and : CHRISTOPHER COSTELLO and :

NANCY COSTELLO and :

DECISION

NUGENT, J. Before this Court is an appeal from a decision of the Zoning Board of Review of the Town of Middletown (the "Board"), which granted Applicants Christopher and Nancy Costello (the "Costellos") two dimensional variances for their residential lot owned in Middletown. Appellants Michael and Joanne Cassese (the "Casseses") had objected to the Application, and they now seek reversal of the Board's decision. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The Costellos are the owners of real property located at 19 Arruda Terrace in the Town of Middletown, identified as Lot 31 on Tax Assessor's Plat 111 (the "Property"). (Compl. ¶ 4.) Arruda Terrace is a small street with six houses off West Main Road, and the Costellos and the

Casseses own adjoining parcels of land on the southern side of the street. (Tr. 4/27/10 at 8; Record, Ex. 3, "Addendum of Facts.") The Costellos own the parcel located at 19 Arruda Terrace and the Casseses own the parcel located at 25 Arruda Terrace. (Decision at 3; Compl. ¶ 1.) The Costellos' parcel measures approximately 70 feet in width and 215 feet in length. (Record, Ex. 3, "Addendum of Facts.")

The Costellos purchased their parcel of land more than twenty years ago and have since resided on the land in a single-family residential dwelling consisting of a one-story, ranch-style home constructed during the 1950s. (Decision at 1; Tr. 4/27/10 at 5.) Mr. and Mrs. Costello occupy the dwelling along with their two daughters and Mr. Costello's mother. (Tr. 4/27/10 at 23.) In its current configuration, the dwelling has 1100 square feet of living space and consists of three bedrooms and one bathroom. <u>Id.</u> at 5, 17.

At its widest point, the house measures approximately fifty-three feet wide with a total of seventeen feet of side setback. (Record, Ex. 6, "Vision Appraisal.") Slightly more than thirteen feet of land rests between the Costellos' dwelling and the western edge of their property, while three feet eight inches of land rests between the Costellos' dwelling and the eastern edge of their property. Id. The eastern edge of the Costellos' property abuts that of the Casseses' property. (Decision at 1.)

Pursuant to Middletown Zoning Ordinances, twenty feet of side setback is required for all dwellings located in R-20 zones. See Middletown Zoning Ordinance § 603. The Costellos' dwelling does not conform to the zoning regulations, specifically the side setback requirements of twenty feet, and therefore, it is a non-conforming dwelling. (Tr. 4/27/10 at 5, 6.) The dwelling maintains its nonconforming status because of its lack of setback on both the east and west borders. Id.

On April 1, 2010, Christopher Costello filed an Application for Variance (the "Application") with the Town of Middletown. (Apr. 1, 2010 Application for Variance.) The purpose of the variances was to maintain the setbacks in their current state and to construct a second floor addition to the dwelling. <u>Id.</u>; Record, Ex.3, "Addendum of Facts." According to Mr. Costello's testimony at the hearing, he would also be "squaring off" the footprint. (Tr. 4/27/10 at 9.) If permitted, the proposed construction by Mr. Costello would change his dwelling from a one-story dwelling to a two-story dwelling. (Record, Ex.3, "Addendum of Facts.")

Meanwhile, five of the Costellos' neighbors submitted letters in support of the Application before the hearing took place. (Tr. 4/27/10 at 10.) The Casseses were the only objectors to the proposed variances and were represented by counsel at the hearing. <u>Id.</u> at 12. The Casseses' objection is that the addition of a second story will invade their privacy: the Costellos' home is three feet eight inches from the shared property line and adding a second floor so close to that line would constitute an invasion of privacy in the Cassese home. <u>Id.</u> at 12, 26. The Costellos attempted to ease the Casseses' concern by changing the design of their proposed addition to include just one window on the side facing the Casseses' property. (Decision at 2; Tr. 4/27/10 at 12.)

A hearing was scheduled for April 27, 2010, and proper notice was sent to all interested parties. At the hearing, the Costellos submitted a plan for the home they wished to construct—one that would double the living space of their dwelling as currently constructed—if the variances were granted. (Tr. 4/27/10 at 18.)

Mr. Costello was the sole witness in support of the Application. Mr. Costello testified at the hearing that the unique shape of his property and the placement of the dwelling on the land created a hardship with respect to Mr. Costello's desire to build an addition. Tr. 4/27/10 at 6, 7.

Mr. Costello went on to say that the proposed expansion was the least relief necessary because an addition anywhere else would not be "functional." <u>Id.</u> at 8, 9. According to Mr. Costello, the only way to get "the full use of [the] property" was to put an addition on the second floor. <u>Id.</u> at 6. Mr. Costello based this assertion on conversations with architects and contractors. Id.

When asked by the Casseses' attorney about other possibilities for an addition, Mr. Costello testified that while there were other possibilities, they were impractical. <u>Id.</u> at 24, 25. Mr. Costello testified that in order to enjoy the "full benefit" of his property in its current configuration, the only possibility was to add a second story. <u>Id.</u> at 25. Mr. Costello concluded his testimony by acknowledging that no variances would be needed if an addition was made to either the front or the back of his home because such an addition would conform to the Middletown Zoning Ordinances. <u>Id.</u> at 31.

At the conclusion of the hearing, Board member Stephen MacGillvary made a motion to grant the Costellos' Application. <u>Id.</u> at 40. The Application was granted by a vote of five to zero. <u>Id.</u> at 42. On May 26, 2010, the Zoning Board of Review issued a formal written decision granting the Costellos' request for two dimensional variances from the side setback requirements. On June 8, 2010, the Casseses timely filed an appeal to this Court for review.

II

Standard of Review

Section 45-24-69(a) grants the Superior Court jurisdiction to review a local zoning board's grant of a variance application. Such Superior Court review of zoning board decisions is governed by § 45-24-69(d). That section provides:

"The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the 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." Sec. 45-24-69(d).

In reviewing questions of law, this Court conducts a <u>de novo</u> review. <u>Tanner v. Town</u> Council, 880 A.2d 784, 791 (R.I. 2005). In reviewing questions of fact, the trial justice must "examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." <u>DeStefano v. Zoning Bd. of Review of City of Warwick</u>, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979). "Substantial evidence is relevant evidence that a reasonable person would accept as adequate to support the board's conclusion and amounts to 'more than a scintilla but less than a preponderance." <u>Lischio v. Zoning Bd. of Review of the Town of North Kingstown</u>, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting <u>Caswell v. George Sherman Sand and Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981)).</u>

If this Court "can conscientiously find that the board's decision was supported by substantial evidence on the whole record," it must uphold that decision. <u>Mill Realty Assoc. v.</u> Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting <u>Apostolu v. Genovesi</u>, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)); see Monroe v. Town of East Greenwich, 733 A.2d 703 (R.I. 1999).

Meanwhile, the applicant bears the burden of persuasion to demonstrate why relief should be granted. See DiIorio v. Zoning Bd. of Review of City of East Providence, 105 R.I. 357, 252 A.2d 350 (1969). The legal standards that a zoning board is required to apply when

deciding to issue a dimensional variance are set forth in § 45-24-41(c) of the State Zoning Enabling Act and § 904 of the Middletown Zoning Ordinance:

"In granting a variance, the zoning board of review shall require 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;
- (2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;
- (3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and
- (4) That the relief to be granted is the least relief necessary." § 45-24-41(c).

Section (d)(2) further provides that the zoning board must enter evidence into the record "that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience. The fact that a use may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief." § 45-24-41(d)(2).

It is well settled that this Court follows the so-called <u>Viti</u> doctrine when deciding lot-line regulations. <u>Viti v. Zoning Bd. of Review of City of Providence</u>, 92 R.I. 59, 166 A.2d 211 (1960). Under the <u>Viti</u> doctrine, variances "are addressed to the sound discretion of boards of review whose authority to act favorably is limited to the extent of relief demonstrated to be reasonably necessary to the enjoyment of the permitted use sought to be served." <u>Lincoln Plastic</u> Prods. v. Zoning Bd. of Review of the Town of Lincoln, 104 R.I. 111, 115 242 A.2d 301, 303

(R.I. 1968). Furthermore, "[i] It is well established that one seeking a variance . . . has the burden of proving to the satisfaction of the board that such relief would not be contrary to the public interest and that a literal enforcement of the terms of the ordinance would result in unnecessary hardship." <u>Pistachio v. Zoning Bd. of Review of Town of North Providence</u>, 88 R.I. 285, 288, 147 A.2d 461, 463 (1959) (emphasis in original).

III

Analysis

The Casseses challenge the sufficiency of the Board's decision pursuant to § 45-24-69, arguing, inter alia, that the Zoning Board's decision violated ordinance provisions, constituted unlawful procedure, and is clearly erroneous in view of the evidence of the whole record. Specifically, they contend that in reaching its decision, the Board impermissibly relied upon Mr. Costello's testimony in the absence of expert testimony or other evidence.

A

The Board's Decision

Section 45-24-61(a) of the Rhode Island General Laws states that a Zoning Board must issue a written decision which affirms or denies a request for zoning relief. § 45-24-61(a). That decision must include "all findings of fact and conditions, the vote of each participating member, and the absence of a member or his or her failure to vote." <u>Id.</u> "When 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 [under] the circumstances." <u>Bernuth v. Zoning Bd. of Review of Town of New Shoreham</u>, 770 A.2d 396, 401 (R.I. 2001).

The record reveals that the Board heard testimony at the April 27, 2010 hearing and actively participated in the questioning of Mr. Costello before putting the Application to a vote.

It considered substantial documentary evidence in the form of plans, boundaries, elevations, and the like. In its written decision, the Board listed twelve findings of fact. (Decision at 2-3). In particular, the Board found "there are special circumstances and conditions associated with the configuration of the Subject Premises in that the existing structure is non-conforming as to both side yard setbacks, lot area and lot width and pre-dates modern zoning." <u>Id.</u> at 3. The Board also discussed the special conditions and circumstances, "especially [the] lack of living area," which persuaded the Board that a literal application of the Middletown Zoning Ordinance would result in unnecessary hardship to the Costellos. <u>Id.</u> Additionally, the Board found that the Costellos' requested variances were the "least relief necessary give[n] the property constraints, existing footprint and standard building practices." Id.

To that end, the Court finds that the Board's Decision complies with § 45-24-61(a) because it sets forth in sufficient detail the findings of fact that the Board relied on in granting the Costellos' request for dimensional variances. As such, the Court has the necessary information to evaluate the Board's Decision and can reach the substantive merits of the instant appeal. See Bernuth, 770 A.2d at 401 (determining that a zoning board of review must make findings of fact and conclusions of law in support of its decisions to enable effective judicial review).

В

Sufficiency of the Evidence

At issue in this case is the propriety of the Board's Decision to grant the Costellos' request for dimensional variances. The Cassesses assert that there was no evidence to support the Board's finding that hardship would result in more than a mere inconvenience, or that the Application was the least relief necessary.

Section 45-24-31(61)(ii) defines a dimensional variance as

"[p]ermission to depart from the dimensional requirements of a zoning ordinance, where the applicant for the requested relief has shown, by evidence upon the record, that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations. However, the fact that a use may be more profitable or that a structure may be more valuable after the relief is granted are not grounds for relief."

Middletown Ordinance § 904 sets forth the four-prong standard which an applicant must satisfy to obtain a dimensional variance:

- "(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 primarily due to a physical or economic disability of the applicant;
- (2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;
- (3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the Zoning Ordinance or the Comprehensive Plan upon which this Ordinance is based; and
- (4) That the relief to be granted is the least relief necessary."¹

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

- (1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(16);
- (2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;

¹ Section 904 is very similar to R.I.G.L. § 45-24-41(c), which states:

Overall, the Costellos must demonstrate "that the hardship the applicant would suffer if the dimensional relief is not granted amounts to more than a mere inconvenience." <u>Lischio</u>, 818 A.2d at 691; <u>see also Middletown Ordinance § 903(A)(7)</u> (stating that the hardship which will be suffered by the owner of the subject property if the dimensional variance is not granted shall amount to more than a mere inconvenience). Here, the Casseses argue that the Costellos failed to present sufficient evidence that their hardship amounted to more than a mere inconvenience. Essentially, they maintain that there was no legal evidence offered to corroborate Mr. Costello's hearsay allegations that denial of the Application would amount to more than a mere inconvenience.

The Board had before it substantial evidence that supported the Costellos' claim that the property was unique and the current configuration would not allow for a conforming addition due to the "[d]ramatically undersized" lot's narrowness (Tr. 4/17/10 at 18-19, 38). It further found that to satisfy the zoning restrictions, the Costellos would need to add on strictly within the permissible but restrictively small setback range (twenty feet by thirty feet) or raze the dwelling altogether and begin anew—both of which would amount to a hardship due to the unique characteristics of the plat. (Tr. 4/27/10 at 6, 19, 20, 24, 38.) In granting the Application, the Board stated that "tear[ing] down a house to get a house that fits or is the right size" is unreasonable and essentially renders it "unmarketable." (Tr. 4/27/10 at 39.) As such, the Board determined a hardship existed which amounted to more than a mere inconvenience. (Decision at

(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."

3.)

Essentially, the Casseses contend that the inconvenience here is of a personal nature. However, the mere inconvenience language announces a minimal standard for relief, designed to test the genuine necessity of any given variance application. Thus, rather than granting variance applications to facilitate plans designed to correct mere personal inconvenience and implement preferable alternatives, the goal is to grant relief to those whose inconvenience surpasses those levels in the form of inescapable and unworkable lot-line restrictions. See, e.g., H.J. Bernard Realty Co. v. Zoning Bd. of Review of the Town of Coventry, 96 R.I. 390, 394, 192 A.2d 8, 11 (1963) (stating that an applicant's burden is not simply to show that "the varying of the proscribed regulation is for him a preferable alternative to compliance therewith, where compliance might be had, albeit with some inconvenience," but rather an applicant must show an adverse effect amounting to more than mere inconvenience); Lincoln Plastic Products Co., v. Zoning Bd. of Review of Town of Lincoln, 104 R.I. 111, 114, 242 A.2d 301, 303 (1968) (denying variance relief when applicants established that they simply desired to construct "in a manner and place deemed by them as best suited for their purposes" but did not demonstrate that it was necessary to the enjoyment of the land).

In <u>DiDonato v. Zoning Bd. of Review of Town of Johnston</u>, for example, an applicant listed his reason for seeking a variance as his family's growing numbers, and he sought to construct a larger house than permitted by zoning requirements. 104 R.I. 158, 164, 242 A.2d 416, 420 (1968). In denying zoning relief, the <u>DiDonato</u> Court reasoned that that relief from the personal inconvenience imposed by lot-line restrictions could not be granted where that applicant did not introduce evidence that "more than a mere inconvenience" was causing him hardship. <u>Id.</u> Here, however, there is no undeveloped land, but rather there is a preexisting nonconforming

structure. (Record, Ex. 2, "Application for Variance.") Furthermore, the Costellos did not list family size as their reason for seeking a variance. See id.² The Costellos have presented competent evidence to support the Board's conclusion that the hardship amounts to more than a mere inconvenience.

In addition, "[i]t is well recognized that the irregular shape or other peculiar characteristics of a parcel may constitute a hardship unique to the property which justifies the granting of a variance." See 3 Rathkopf, The Law of Zoning & Planning § 58:11. Here, the small and uniquely narrow parcel, juxtaposed against the currently operative zoning ordinance, results in a hardship that amounts to more than a mere inconvenience. The Board acknowledged the unique characteristics of the Costellos' property: an out-of-date home built on an undersized lot which predates the Middletown Zoning Ordinance. The Board went on to conclude that the expansion is "necessary as a result of a hardship . . . and said hardship is due to the unique characteristics of the subject land and structure." (Decision at 3.) Therefore, the Court finds that competent evidence supports the Board's conclusion as to the first prong of the standard.

Within this first element is the requirement that a variance not be granted when relief is sought due to a physical or economic disability. See Middletown Ordinance § 904. While the Casseses have argued that Mr. Costello's mother's physical disability was the impetus for his Application, the record reveals otherwise. Mr. Costello indicated that his mother would enjoy a handicapped-accessible bathroom if the proposed variances were granted, but it is not apparent that his mother's disability provided the motivating factor for seeking relief. Rather, the given

² The <u>DiDonato</u> Court did not hold that family size is an impermissible consideration in zoning applications and does not rule out consideration of growing family size as a factor in any such analysis. <u>See DiDonato</u>, 104 R.I. at 164, 242 A.2d at 420 (observing that the desire for a larger home to accommodate an increase in family size, "is not sufficient to satisfy" the requirement of "showing of an adverse effect amounting to more than mere inconvenience").

reasons for filing the Application included a variety of other, valid grounds—such as, but not limited to, need for additional space, functionality, and betterment of the neighborhood. The hardship from which the Costellos seek relief can be attributed to the unique characteristics of the lot and the house that sits on it; it is not due to any physical disability.

To satisfy the second element, the Costellos must demonstrate that the alleged hardship was not the result of any prior action on their own part and does not result primarily from their desire for financial gain. The Rhode Island 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, 769 A.2d at 584. Here, there is no evidence indicating that the Costellos have violated the Middletown Zoning Ordinance and are now applying for variances to relieve the illegality. Instead, the evidence suggests that the hardship stems from the fact that the lot was configured prior to the enactment of modern zoning laws; likewise, the Costellos' home was constructed prior to the Middletown Zoning Ordinance's enactment. (Decision at 3; Tr. 4/27/10 at 6, 7.) Furthermore, Mr. Costello testified that the purpose of the addition was not for economic reasons, but rather the goal was to increase functionality and to benefit the surrounding neighborhood. (Tr. 4/27/10 at 7-8, 33.) Application represents the Costellos' desire to create additional living space to make the 1100 square-foot dwelling more functional. Accordingly, the Court finds that substantial evidence supports the Board's conclusion as to the second prong.

As to the third prong, the Costellos must show that the requested relief will not alter the general characteristic of the surrounding area, nor will it impair the intent or purpose of the Middletown Ordinance or the Middletown Comprehensive Community Plan. <u>Id.</u> at 8. The purpose of the Middletown Zoning Ordinance is to (1) promote the public health, safety, and

general welfare; (2) provide for a range of uses and intensities of use appropriate to the character of the town and reflecting current and expected future needs; and (3) provide for orderly growth and development. See Middletown Ordinance § 101(C). With respect to land use regulations, the primary objective of the Middletown Comprehensive Plan as it relates to the instant case is to establish a pattern of land use that considers environmental and historical characteristics of the land, as well as the overall impact on infrastructure. See Middletown Comprehensive Community Plan, Land Use Element, ch. IX, at 380. Among the many goals and proposed objectives in the Plan is to "[a]llow for the orderly development of residential areas." Id.

Here, the evidence indicates that the requested variances will neither alter the general characteristic of the area, nor contravene Middletown's Comprehensive Plan. Mr. Costello testified that the neighborhood consists entirely of single-family homes, and of the six homes on Arruda Terrace, three of them are two-story dwellings. (Tr. 4/27/10 at 8). The record evidence reveals that one member of the Board observed that the dwelling is in a "neighborhood that's improving" and which already has several two-story homes. Id. at 38-39. Accordingly, he believed a second-story addition would be an improvement that is both consistent and compatible with the surrounding area. As such, the record contains substantial evidence adequate to support the Board's conclusion as to this element.

Finally, the fourth prong requires the Costellos to demonstrate that the relief provided by the variances was the least relief necessary to alleviate their hardship. The Casseses assert, without support, that the Costellos have "ample area" to build and could construct in alternate areas without any need for zoning relief.

Our Supreme Court has recognized that the least relief necessary is that which lessens the hardship which justifies a variance or, in other words, that it is "minimal to a reasonable

enjoyment of the permitted use to which the property is proposed to be devoted." Standish-Johnson Co. v. Zoning Bd. of Review of City of Pawtucket, 103 R.I. 487, 492, 238 A.2d 754, 757 (1968); see also Lincoln Plastic Products Co., 104 R.I. at 114, 242 A.2d at 303 (reasoning that a board's "authority to act favorably is limited to the extent of relief demonstrated to be reasonably necessary to the enjoyment of the permitted use sought to be served"); 3 Rathkopf, The Law of Zoning & Planning § 58:1 (stating "the variance is a means of correcting the occasional inequities that are created by general zoning ordinances").

The burden rests with the applicant to demonstrate that the requested dimensional variance relief is, in fact, the least relief necessary. <u>See Lischio</u>, 818 A.2d at 693; <u>Bernuth</u>, 770 A.2d at 401. It has been observed that

"[t]he inquiry is not whether there are other available uses for the property, but whether the applicant can achieve the benefit of a permitted use through some means other than the variance. Accordingly, if the use is permitted, and the benefit sought cannot be achieved absent the grant of a variance, then the factor weighs in favor of granting the variance. As such, applicants for an area variance should demonstrate that they have considered whether the desired result can be achieved without obtaining a variance. Failure to do so weighs against the applicant and favors denial of the variance." Patricia E. Salkin, 2 American Law of Zoning § 13:25 (5th ed. 2009).

In the instant matter, the razing of the structure was discussed and discarded as a reasonable alternative during the April 27, 2010 hearing. (Tr. 4/27/10 at 19-20, 39.) Furthermore, the Board acknowledged its appreciation of the property constraints, existing footprint, and standard building practices in considering whether the requested variances were the least relief necessary. (Decision at 3.) Thus, the Costellos persuaded the Board that there were no other reasonable means that would allow the Costellos to achieve the sought-after relief. However, the Casseses contend that the Board lacked legal evidence to find that the requested

variances were the least relief necessary because it was based upon Mr. Costello's hearsay testimony concerning the lack of feasibility and prohibitive cost of any other alternatives.

In <u>Pistachio</u>, the Supreme Court was faced with a similar contention. 88 R.I. 285, 147 A.2d 461. There, the applicant testified that he had been advised by a contractor that the cost of converting a building to a residence would be prohibitive. <u>Id.</u> at 287, 147 A.2d 463. Based upon this evidence, the board unanimously found that conversion of the building would not be economical. The court concluded that

"[t]he particular testimony in question was competent evidence. The weight which should be given to such evidence was for the board to decide in its discretion. Moreover, the application itself contained statements by the applicants that the building could not be used for anything but business, industrial, or manufacturing purposes and that the cost of converting it to a residence was prohibitive. No evidence appears in the record contradicting either the testimony of said applicant or the statements in the application on this point." Id. at 289, 147 A.2d at 464.

court then concluded "there was evidence in the record to support the board's finding of unnecessary hardship, and we do not weigh the evidence." <u>Id.</u>

In the present case, the Costellos assessed the viability of other options by speaking to architects and builders—see id. (an applicant's testimony based on his conversation with a contractor did constitute legal evidence and was not hearsay before the zoning board which could determine its weight)—but found that compliance with the ordinance would leave them with only a tiny thirty-foot addition to their house. They also took the neighbors' privacy concerns into account by making changes to the proposed addition. After assessing their very limited options, they concluded such options were not reasonable, efficient, or practical in order for them to achieve their goals of functional living space.

The Board weighed this competent evidence and concluded that the requested relief was

the least relief necessary. Furthermore, there is no expert evidence in the record to contradict Mr. Costello's testimony on this point. See Pistachio, at 289, 147 A.2d at 464 (finding no expert evidence in the record contradicting either the testimony of said applicant or the statements in the application regarding a lack of other viable options). Consequently, this Court finds that there is reliable, probative, and substantial evidence of record to support the Board's finding that the requested relief is the least relief necessary.

IV

Conclusion

After reviewing the entire record, this Court is satisfied that the Zoning Board had competent evidence before it to grant the Costellos' request for a dimensional variance relief. The Court notes that the substantial rights of the Casseses have not been prejudiced. Accordingly, this Court affirms the May 26, 2010 decision by the Zoning Board of Review of the Town of Middletown. Counsel for the prevailing party shall submit an appropriate order for entry.