

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

(Filed: January 3, 2013)

NOEL BENNETT ROWE

v.

ZONING BOARD OF REVIEW  
OF THE TOWN OF CHARLESTOWN et al.

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C.A. NO. WC-2010-0868

**DECISION**

**STERN, J.** The Town of Charlestown Zoning Board of Review granted New Castle Realty Company’s applications for a Special Use Permit and a Dimensional Variance. Noel Bennett Rowe appeals from that zoning decision. After reviewing the evidence below, and considering the arguments of counsel and the legal memoranda submitted, this Court makes the following findings of fact and conclusions of law.

**I**

**Facts and Travel**

It is significant to review the history of the lot now owned by New Castle Realty Company (“New Castle”) in Charlestown, Rhode Island. In 1950, Ernest L. Potter transferred an approximately seventy-acre farm to Hiram and Florence Wright. Throughout the following year, Rathskellar Road was laid out, carving off a one-acre lot of the property from the northeast corner of the farm (the “New Castle Lot”). In 1961, the Wrights recorded a subdivision plan with eighteen one-acre lots, leaving the New Castle Lot unnumbered and its composition more than sixty-five percent freshwater wetlands. The lots remained undeveloped until Florence Wright conveyed the property to New Castle Realty Company in 1964. The property was

described in two parcels. The majority of the acreage, more than sixty-nine acres, to the south was one parcel. The second parcel was the lot in the northeast corner which consisted of less than one acre. In February 1989, New Castle Realty Company merged into United Builders Supply Company, Inc., which later conveyed both parcels of land to New Castle on November 11, 2004.

Appellant Noel Bennett Rowe (“Rowe”) owns a 140-acre parcel of real estate, on which he operates an organic farm, which abuts and borders the New Castle property at issue. On December 6, 2004, New Castle submitted a preliminary determination application to the R.I. Department of Environmental Management (“DEM”) which proposed a dwelling on the smaller lot in the northeast corner. The DEM discouraged the application as applied, and instead suggested that the application had a better chance for approval if the dwelling was moved farther away from the wetland. New Castle moved the dwelling closer to the road and filed a formal application to alter the wetland on December 15, 2004. The DEM granted an alteration permit that included an Onsite Wastewater Treatment System (“OWTS”). Subsequently, New Castle requested a Zoning Certificate from the Charlestown Building Official. On July 12, 2007, the Official refused to issue a building permit because the OWTS was within fifty-four feet of a wetland. The Charlestown Zoning Ordinance required a Special Use Permit from the Town of Charlestown Zoning Board of Review (“Board”) for new OWTS systems within one hundred feet of a wetland. Additionally, the Official stated that New Castle would also need a Dimensional Variance because the proposed dwelling was twenty feet from the front property line.

On September 23, 2010, New Castle filed an application with the Board for both a Special Use Permit and a Dimensional Variance. The Board held a hearing on October 19, 2010,

and unanimously voted to grant the Special Use Permit. A majority also voted to grant the Dimensional Variance. A written decision granting New Castle's application was issued on November 19, 2010. Rowe filed a timely appeal of the Board's decision on December 8, 2010.

## II

### Standard of Review

Appeals to the Superior Court of a zoning board decision is governed by R.I. Gen. Laws § 45-24-69. R.I. Gen. Laws § 45-24-69(c) provides:

“The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of appeal or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions or decisions which are:

- “(1) In violation of constitutional, statutory, ordinance or planning board regulations provisions;
- “(2) In excess of the authority granted to the planning board 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.”

Judicial review of board decisions is not *de novo*, and the Superior Court must review using “the ‘traditional judicial review’ standard that is applied in administrative agency actions.” Monroe v. Town of E. Greenwich, 733 A.2d 703, 705 (R.I. 1999). “The Superior Court does not consider the credibility of witnesses, weigh the evidence, or make its own findings of fact.” Monroe, 733 A.2d at 705. “The trial justice must not substitute their judgment for that of the zoning board if they can conscientiously find that the board's decision was supported by ‘substantial evidence’ in the whole record.” Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672

(R.I. 2004). “‘Substantial evidence’ has been defined as more than a scintilla but less than preponderance.” Mill Realty, 841 A.2d at 672. The Superior Court’s review is “confined to a search of the record to ascertain whether the board’s decision rests upon ‘competent evidence’ or is affected by an error of law.” Munroe, 733 A.2d at 705.

### **III**

#### **Analysis**

##### **A**

#### **Violation of Statute and Ordinance**

Rowe asserts that the Board acted in violation of statutory and ordinance provisions by granting a Dimensional Variance and a Special Use Permit. Sec. 45-24-31(61), applicable to Dimensional Variances, requires that an applicant has shown “. . . that there is no other reasonable way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations.” Rowe argues that the necessity of the Special Use Permit in order to install the OWTS creates a legally impermissible use which does not allow for a Dimensional Variance. However, Rowe’s argument is not persuasive.

Reviewing the Board’s decision, it is clear that New Castle applied for the Dimensional Variance and Special Use Permit as two separate requests, and that the Board granted them as such. Without referring to the Special Use Permit, the Board granted New Castle’s Dimensional Variance, allowing for a house to be built within twenty feet of the property line. In its decision, the Board stated that this Dimensional Variance was in fact for a legally permissible use, “. . . a residence in a residential neighborhood.” Decision at 3. The lot is in fact zoned for residential use and, therefore, granting a Dimensional Variance from the required setback requirement to build a residence on the lot would be a legally permitted use.

Both New Castle and the Board contend that the applicable statutory law differs from the law relied on by Rowe as it has changed to allow both the Dimensional Variance and Special Use Permit to be granted in conjunction with one another.<sup>1</sup> At this juncture, this Court finds it unnecessary to decide whether a change in the applicable law affects the Board's decision in this instance as the Board granted the variance and permit as two separate requests. The Board found that the Dimensional Variance was for a legally permitted use. Therefore, this Court finds that the Board was not in violation of statutory and ordinance provisions as it granted the Dimensional Variance and Special Use Permit independent of one another and, further, the Board found that the Dimensional Variance was for a legally permitted use as required by § 45-24-31(61).

## **B**

### **Self-Imposed Hardship and Financial Gain**

Rowe's next argument is that the Board should not have granted a Dimensional Variance to New Castle because New Castle created the hardship and is requesting the Dimensional Variance for greater financial gain. Sec. 45-24-41(c)(2) states that, in granting a variance, the Board must require evidence on the record that "the hardship is not the result of any prior action of applicant or owners and does not result primarily from the desire of the applicant to realize

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<sup>1</sup> R.I. Gen Laws § 45-24-41(d) now provides, in part, that "[t]he zoning board of review has the power to grant dimensional variances where the use is permitted by special use permit if provided for in the special use permit sections of the zoning ordinance." Sec. 45-24-42(c) provides:

"The ordinance additionally may provide that an applicant may apply for, and be issued, a dimensional variance in conjunction with a special use. If the special use could not exist without the dimensional variance, the zoning board of review shall consider the special use permit and the dimensional variance together to determine if granting the special use is appropriate based on both the special use criteria and the dimensional variance evidentiary standards."

greater financial gain.” In its decision, the Board specifically addresses this issue, finding that “[t]he fact that this gentleman or corporation has purchased this property and chosen to develop the land isn’t a hardship that he brought on himself. This road was put through the corner of this property by the town.” Decision at 2.

Rowe states that the hardship was created by the original building plans submitted by New Castle which proposed a residence with three bedrooms, instead of less. Rowe asserts that this proposal shows New Castle’s motive for a financial gain because had the company not been worried about a financial gain, they could have proposed a smaller house which would not need a variance. Although the Board does not go into great detail in its finding that New Castle did not create the hardship due to its desire for financial gain, it defers to the DEM’s finding that, “the hardship was not the result primarily from the desire of the applicant to realize greater financial gain.” Decision at 3. However, the Board states that New Castle’s proposal to develop on this lot, which is zoned for residential use and is taxed as a buildable lot, should not be viewed any differently than if a family was to propose these plans. Although the Board’s explanation is limited, this Court “shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact.” See Mill Realty, 841 A.2d at 672. Therefore, this Court must defer to the Board’s finding that the hardship is not the result of any prior action of New Castle and does not result primarily from the desire to realize greater financial gain.

## C

### **Absence of Findings/Litany of Conclusions**

Finally, Rowe contends that the Board conducted no findings of fact and merely recited opinions, beliefs, and conclusions in its decision to grant the Special Use Permit. Additionally,

Rowe asserts that the evidence in the record does not support the grant of the Special Use Permit. After reviewing the Board's decision, this Court is satisfied with the findings of fact that provide the basis for the granting of the permit.

Sec. 45-24-61(a) sets forth the requirement that a Board must include its findings of facts in a written decision. In making its decision, the Board considered evidence about the OWTS, including expert testimony presented by both Rowe and New Castle. Most compelling is the Board's reliance on Rowe's own expert witness' testimony about the proposed system. The Board relied on Rowe's expert's testimony to find that the proposed system is the "best technology in use to preserve the wooded swamp in the back of the property," and that the system "is overseen much more stringently than a conventional system would be." Decision at 1-2. Although its decision could have provided a more detailed analysis, the Board used these findings of fact to support its conclusions that "the public welfare and convenience will be substantially served," and that the use of the OWTS "will not result in adverse impact or result in conditions that will be inimical to the public health, safety, morals, or general welfare of the community." Decision at 1.

Here, the Board's findings of fact can certainly be distinguished from those found in the recent decision in Dolock v. Avedisian, where the court remanded the Zoning Board's decision for lack of findings of fact and conclusions of law. 2012 R.I. Super Lexis 129 (R.I. Super. Ct. 2012). In Dolock, the Zoning Board's decision was less than a page long and included no indication as to what the Zoning Board had concluded. The court harangued that there was "not a single finding of fact" and that the decision failed to "describe how or why the majority of its members decided in the way that they did and why the remaining member dissented." 2012 R.I. Super Lexis at 24. Additionally, the court found that it was of no difference that the Board

included the documents submitted by the applicant because in reviewing a zoning board decision, it is not for a court “to search the record for supporting evidence or decide for itself what is proper in the circumstances.” See id.

The Board’s decision in the case at bar bears no resemblance to the bare bones decision rendered by the Zoning Board in Dolock. Although the Board’s decision could have included more findings of fact, it did describe how the members made their decision and did not cause the Court to search the record for supporting evidence. Additionally, the Board used expert testimony to support its decisions and make findings about the adequacy of the OWTS. Therefore, this Court finds that the Board’s decision sets forth sufficient findings of facts required by § 45-24-61(a).

#### **IV**

#### **Conclusion**

This Court affirms the decision of the Zoning Board of Review of the Town of Charlestown. In accordance with the limited power of the Court to reverse or remand the Board’s decision, this Court finds that the Board did not act in violation of statutory or ordinance law and that its findings were based on substantial evidence to grant both the Dimensional Variance and Special Use Permit.