

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC

SUPERIOR COURT

(FILED: June 17, 2013)

DAVID ROTONDO

:

V.

:

C.A. No. PC-2011-3415

:

:

TOWN OF WARREN ZONING

:

BOARD OF REVIEW, by and through

:

its members, BENEDICT L.

:

FERRAZZANO, III, MICHAEL

:

GERHARDT, PAUL ATTEMANN ,

:

STEVEN P. CALEND A and ALDEN

:

HARRINGTON

:

**DECISION**

**TAFT-CARTER, J.** Before the Court is an appeal from a decision of the Zoning Board of Review of the Town of Warren (the Zoning Board), granting Kenneth and Ann Morrill’s (the Morrills) petition for a dimensional variance. The Appellant, David Rotondo, an abutting landowner, asks this Court to reverse the Zoning Board’s decision. Jurisdiction of this appeal is pursuant to G.L. 1956 § 45-24-69.

**I**

**Facts and Travel**

The Morrills are the owners of real estate located at 48 Laurel Lane, Plat 13D, Lot 341, in Warren, Rhode Island. (R., Ex. 1.) On or about March 18, 2011, the Morrills filed a petition for a dimensional variance pursuant to § 32-25 of the Town of Warren Zoning Ordinance (the Ordinance). Id. The Morrills requested a dimensional variance from the Zoning Board to construct a 16’ x 30’ detached garage. Id. The construction of the proposed garage would violate the 10-foot setback requirement set forth in the Ordinance, as well as exceed the lot

coverage. (Tr. 7, Apr. 20, 2011.) The petition sought relief from §§ 32-88(c) and 32-77 of the Ordinance. (R., Ex. 1.)

On April 20, 2011, the Zoning Board held a hearing and heard testimony from the Morrills and two objectors, including the Appellant. Id. at 13-30. At the conclusion of the hearing, the Zoning Board unanimously voted to approve the Morrills' petition for variance. Id. at 30-31. The Zoning Board recorded a written decision granting the Morrills' requested relief on May 31, 2011, subject to conditions. (R., Ex. 10.) The Appellant filed a timely appeal with this Court on June 16, 2011.

## II

### Standard of Review

Rhode Island General Laws § 45-24-69(a) provides this Court with the specific authority to review decisions of town zoning boards. This Court's review is governed by § 45-24-69(d), which 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.”

Judicial review of an administrative action is “essentially an appellate proceeding.” Notre Dame Cemetery v. R.I. State Labor Relations Bd., 118 R.I. 336, 339, 373 A.2d 1194, 1196 (1977); see also Mauricio v. Zoning Bd. of Review of Pawtucket, 590 A.2d 879, 880 (R.I. 1991). A justice of the Superior Court may not substitute his or her judgment for that of the zoning board if he or she conscientiously finds that the board’s decision was supported by substantial evidence. Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 825 (1978). “Substantial evidence as used in this context means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion and means an amount more than a scintilla but less than a preponderance.” Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981) (citing Apostolou, 120 R.I. at 507, 388 A.2d 824-25). The reviewing court “examines the record below to determine whether competent evidence exists to support the tribunal’s findings.” New England Naturist Ass’n, Inc. v. George, 648 A.2d 370, 371 (R.I. 1994) (citing Town of Narragansett v. Int’l Ass’n of Fire Fighters, AFL-CIO, Local 1589, 119 R.I. 506, 380 A.2d 521 (1977)). Thus, this Court’s review of a zoning board’s factual findings is undertaken to ensure that a reasonable mind might accept them as adequate to support a conclusion. See Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003); Caswell, 424 A.2d at 647.

### III

#### Law and Analysis

A dimensional variance will be granted only after an applicant satisfies the requirements of both R.I.G.L. 45-24-41(c) and (d)(2). See Lischio, 818 A.2d at 692. Applicants, therefore, must present evidence to a zoning board of review demonstrating:

“(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.” Id.

In addition, an applicant must submit evidence establishing 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.” Sec. 45-24-41(d)(2). The burden of proof which must be met is “that the effect of denying dimensional relief amounts to more than a mere inconvenience.” Lischio, 818 A.2d at 691.

It is undeniable that “[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.” Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996). The Zoning Board of Review was required to make findings of fact with respect to §§ 45-24-41(c) and (d)(2). Here, the record is void of any findings or conclusions with respect to the standard set forth in § 45-24-41(d)(2).

In such absence, judicial review of the Zoning Board’s decision is “impossible.” See Von Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 401-402 (R.I. 2001). The court will not search the record for supporting evidence or decide for itself what is proper in the circumstances if the Zoning Board fails to make required findings. Id. at 401. For proper judicial review, the decision must contain “the making of findings of fact and the application of legal principles in such manner that a judicial body might review a decision with a reasonable understanding of the manner in which evidentiary conflicts have been resolved and

the provisions of the . . . ordinance applied.” Thorpe v. Zoning Bd. of Review of Town of North Kingstown, 492 A.2d 1236, 1237 (R.I. 1985).

This Court is unable to conclude that the Zoning Board properly considered § 45-24-41(d)(2) at the time it granted the Morrills’ petition for variance. The Court therefore remands the matter to the Zoning Board for further proceedings. See § 45-24-69(d). On remand, the Zoning Board shall determine whether the Morrills satisfied § 45-24-41(d)(2) and further indicate the findings of fact and conclusions of law in support of its decision.

This Court will retain jurisdiction.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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et al.

**CASE NO:** PC-2011-3415

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** June 17, 2013

**JUSTICE/MAGISTRATE:** Taft-Carter, J.

**ATTORNEYS:**

For Plaintiff: Alfred Ferruolo Jr., Esq.

For Defendant: Stephanie L. Federico, Esq.