

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: October 7, 2014)

CROSSROAD CONDOMINIUM  
ASSOCIATION, FRANK DOHANUE,  
ALDO TESTA, JAMES LANTINI, and  
JOSEPH LAPOLLA

v.

CITY OF CRANSTON ZONING BOARD OF  
REVIEW, by and through its members,  
STEVEN MINICUCCI, STEVEN CARRERA,  
ADAM SEPE, LORI CARLINO, and CRAIG  
NORCLIFFE; and 1075 SCITUATE  
AVENUE, LLC; AND NICO  
ENTERPRISES, LLC

C.A. No. PC-2013-4896

**DECISION**

**NUGENT, J.** Before the Court is an appeal from a decision of the City of Cranston Zoning Board of Review (the Zoning Board) granting an application for a use variance. NICO Enterprises, LLC and 1075 Scituate Avenue, LLC (Applicants) applied for a use variance to allow an existing expanded farm stand to expand its menu to include restaurant fare for breakfast and lunch only. Crossroad Condominium Association and the named Plaintiffs (Plaintiffs) own abutting property and seek reversal of the Zoning Board's decision. Jurisdiction of the Plaintiffs' timely appeal is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, this Court remands the case to the Zoning Board for additional findings of fact and to then apply those findings to the use variance standard.

## **I**

### **Facts and Travel**

## **A**

### **The Property**

Applicants are the owner and tenant<sup>1</sup> of the property at 1105 Scituate Avenue, Cranston, Rhode Island 02911, delineated as Tax Assessor's Plat 36/4, Lot 43. (Tr. at 3, Sept. 11, 2013 (Tr.).) The property is approximately 199,940 square feet and is located in an A-80 zone—residential with single-family dwellings allowed on lots consisting of at least 80,000 square feet. (Pls.' Ex. A at 1.) Currently, the property contains one main building and two greenhouses. Id.

Historically, the property has been the site of a farm, nursery, and farm stand.<sup>2</sup> (Applicants' Mem. at 2.) In 2003, the property was sold to Frank Paolino who applied for and received a use variance to sell ice cream, dairy products, and seasonal foods at the existing farm stand. (Tr. at 20; Applicants' Ex. C at 1.) That first use variance included conditions that the parking lot remain gravel "to maintain the rural flavor" and that food sales remain limited to ice cream, seasonal fruits and vegetables, and limited dairy products. (Applicants' Ex. C at 1.) Prior to receiving the use variance, Mr. Paolino executed a conservation easement agreement<sup>3</sup> with the City of Cranston that restricted the use of the property to open space unless obtaining prior approval from the city. (Tr. at 19-20.)

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<sup>1</sup> The owner of the property is 1075 Scituate Avenue, LLC and NICO Enterprises, LLC is the current tenant. (Tr. at 8, Sept. 11, 2013 (Tr.).)

<sup>2</sup> The original "Mike's Farm Stand" also sold several typical convenience store items, such as milk, bread, and soda. (Pls.' Ex. C at 1.)

<sup>3</sup> The conservation easement agreement was entered into as a condition of Mr. Paolino's nearby condominium development project, not in relation to the expansion of the farm stand at the subject property. (Tr. at 23-24.)

In 2008, Mr. Paolino sold the property to Scituate Avenue Realty, LLC, who rented the property to JMJ Enterprises, Inc., d/b/a The Inside Scoop, which continued to operate the ice cream and farm stands. (Tr. at 21.) In February 2008, Scituate Avenue Realty, LLC received a second use variance which permitted it to add clam cakes, chowder, and doughboys to its menu. Id.

Early in 2013, Scituate Avenue Realty, LLC sold the property to 1075 Scituate Avenue, LLC. (Applicants' Mem. at 2.) NICO Enterprises, LLC became a tenant at the property in March of 2013 and continued to operate the ice cream stand, renaming it The Frosty Dog. (Tr. at 8-9.) On July 1, 2013, Applicants applied<sup>4</sup> to the Zoning Board for a use variance to allow expansion of the food service at the property. (Pls.' Ex. A. at 1-2.) The application requested expansion of the menu to fare associated with a restaurant.<sup>5</sup> (Tr. at 3.) The Applicants sought relief from the zoning requirements under Cranston, R.I. Code of Ordinances §§ 17.20.030<sup>6</sup> (schedule of uses), 17.88.030<sup>7</sup> (extension of nonconforming use), and 17.92.010<sup>8</sup> (variance). (Tr. at 3.) The Applicants later stated that the provision relating to nonconforming use was inapplicable because the existing use was permitted by way of a prior variance and not a prior nonconforming use. (Applicants' Mem. at 6.) The City Planning Commission evaluated the application and stated that "the application for a full-service restaurant is not consistent with the

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<sup>4</sup> NICO Enterprises, LLC was the official applicant. However, 1075 Scituate Avenue, LLC was also named on the application as the owner of the subject property.

<sup>5</sup> At the Zoning Board meeting, Alfred Saccoccia, the owner of NICO Enterprises, LLC testified that his plan was to expand the Frosty Dog into a full service breakfast and lunch café. (Tr. at 10.)

<sup>6</sup> Cranston, R.I. Code of Ordinances § 17.20.030 provides a chart enumerating what uses are permitted by right, permitted by special use, and prohibited in each zone.

<sup>7</sup> Cranston, R.I. Code of Ordinances § 17.88.030 provides for extension of a nonconforming use within a building only "into any portion of the building which was arranged or designed for such nonconforming use at the time of passage of this chapter."

<sup>8</sup> Cranston, R.I. Code of Ordinances § 17.92.010 provides the requirements for a variance, which mirror § 45-24-41 nearly verbatim.

Comprehensive Plan. However, as the use is currently a restaurant with a limited menu,” the City Planning Commission declined to make a specific recommendation. (Tr. at 5.)

## **B**

### **Zoning Board Decision**

At the September 11, 2013 Zoning Board meeting, the Zoning Board approved Applicants’ application with certain conditions: (1) hours of operation were limited to 6 AM until 5 PM; (2) sale of ice cream was allowed until 10 PM with a seasonal limitation; (3) maximum seating was set at seventy-four seats, fifty-six table seats and eighteen at the bar; and (4) no beer, wine, or spirits were permitted. (Applicants’ Ex. A at 1.) The approval was memorialized in a Notice of Decision recorded on September 24, 2013. Id.

The decision of the Zoning Board adopted the findings of fact laid out by the City Planning Commission:

“(1) The 2010 City of Cranston Comprehensive Plan’s Future Land Use Map designates this area along Scituate Avenue as Open Space. (2) In November, 2003, a zoning variance was approved to sell ice cream, dairy products, and seasonal fruits and vegetables from the existing farm stand building. The Comprehensive Plan in place at that time designated this area as Residential. (3) The indoor eating area provides a total of 70 seats, requiring 24 parking spaces. The site plan submitted shows 11 paved parking spaces in front of the business, and a gravel parking area to the right of the building, which can provide parking spaces for 16 cars, for a total of 27 spaces. (4) The site plan submitted shows an existing 24’ x 35’ fenced in area to the right of the building, labeled as outside seating. No information on the number of seats in this area was provided in the application, however, Bing Maps as well as the City’s GIS aerials, show 9 tables (36 seats) which would require 12 additional parking spaces. (5) The floor plan submitted shows a separate room in the front of the building with two take out windows, dedicated to ice cream, frozen lemonade, and hot dogs. (6) A zoning variance was granted in February 2008 to expand the menu. As the property is located within a Conservation Easement area, a letter dated December 11, 2007 from the City Solicitor, stated that it is his ‘opinion that the expansion of the menu to

include clam cakes and doughboys can in fact be reasonably construed so as to not violate the outstanding Conservation Easement Agreement.’ (7) A farm stand and nursery is also operated on the same parcel. (8) The application states that the seasonal use of the existing food stand will be altered with the addition of a full service restaurant.” (Applicants’ Ex. B at 2.)

In its untitled conclusions of law, the Zoning Board concluded that the application “involves a hardship that is due to the unique characteristics of the property” rather than the Applicants’ own disability. Id. The Zoning Board also concluded that the hardship was not the result of Applicants’ desire for greater financial gain. Id. Additionally, the Zoning Board concluded that granting the permit would “not alter the general character of the surrounding area or impair the intent or purpose of the Zoning Ordinance or the comprehensive plan” and that the requested relief was the least relief necessary. Id. Based on these findings and conclusions, the Zoning Board held that the Applicants had met their burden and were entitled to a grant of the requested variance, relief from schedule of uses, and extension of a nonconforming use. Id.<sup>9</sup>

## II

### Standard of Review

Under § 45-24-69(a), an aggrieved party may appeal a zoning board of review decision to the Superior Court. In its review, 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:

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<sup>9</sup> The Zoning Board indicated that it was granting relief from §§ 17.92.010 (variance), 17.20.030 (schedule of uses), and 17.88.030 (extension of non-conforming use). However, in effect, the request was solely for a variance, and the Zoning Board’s conclusion exclusively referenced the variance standard. Id.

- “(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).

When reviewing the action of a zoning board of appeals, this Court must ““examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.”” Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1083 (R.I. 2013) (quoting Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). Substantial evidence “is defined as ‘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.’” Iadevaia v. Town of Scituate Zoning Bd. of Review, 80 A.3d 864, 870 (R.I. 2013) (quoting Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008)). To be deemed substantial evidence, the evidence must “ha[ve] probative force due to its competency and legality.” Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991) (citing Thomson Methodist Church v. Zoning Bd. of Review of Pawtucket, 99 R.I. 675, 681, 210 A.2d 138, 142 (1965)).

If the zoning board failed to make sufficient findings of fact, this Court should remand the case to the board for additional findings of fact rather than ““search the record for supporting evidence or decide for itself what is proper.”” Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001) (quoting Irish P’ship v. Rommel, 518 A.2d 356, 359 (R.I. 1986)). Additionally, the zoning board is required to reach conclusions of law that apply

the findings of fact to the applicable statutory requirements for the relief sought. See id. at 402. This Court may remand the case if the zoning board makes conclusory statements in regard to the statutory requirements and does not apply the facts found to those requirements. See id.

### **III**

#### **Analysis**

The Plaintiffs challenge the sufficiency of the Zoning Board's decision pursuant to § 45-24-41, arguing that the decision does not reflect facts sufficient to establish that the Applicants met the standards required for a use variance. Specifically, Plaintiffs assert that the Zoning Board's decision fails to cite any facts indicating that there exists evidence of hardship, that the requested relief was not merely for the greater financial gain of the applicant, or that the variance would not alter the character of the surrounding area. Based on the failure to address the factual basis for the statutory requirements, Plaintiffs request that this Court deny the variance application.

Section 45-24-41(c) requires:

“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;

“(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.” See also Cranston Code of Ordinances § 17.92.010(B) (same).

Additionally, evidence must be entered into the record “showing that . . . the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance.” Sec. 45-24-41(d); see also Cranston Code of Ordinances § 17.92.101(C)(1) (same).

A zoning board—in setting forth its decision on a petition for a variance—must make specific findings of fact and provide its reasons for granting or denying the variance. Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (citing Irish P’ship, 518 A.2d at 358). In order to allow a court to review a zoning board’s decision, its reasoning must be factual, not conclusory, and “address the evidence in the record before the board that either meets or fails to satisfy each of the legal preconditions” for granting a variance. Bernuth, 770 A.2d at 401-02 (citing Sciacca, 769 A.2d at 585).

In this present case, the Zoning Board granted the Applicants’ petition for a variance after hearing testimony from witnesses both in support of, and against, the petition. (Tr. at 7, 41, 43, 64, 70.) Despite the extensive testimony heard during the Zoning Board meeting, the Zoning Board merely adopted the findings of fact provided by the City Planning Commission. (Applicants’ Ex. B at 2.) The findings of fact essentially provide a brief history of the site, detail the current use, and state what the Applicants are seeking with the application. Id. The Zoning Board’s conclusion does little more than recite the requirements for a variance without applying any of the facts of the case to those requirements. Id.

In making no findings of fact specifically addressing the variance requirements, the Zoning Board has made it impossible for this Court to review its decision. See Bernuth, 770 A.2d at 402 (holding that judicial review of a zoning board’s decision was impossible because the board had made no findings of fact addressing two of the variance requirements). The

Zoning Board here has not explained how the facts of the case meet the variance requirements, and the findings of fact do not even provide any clear inferences on the matter. See id. (noting that the court “cannot determine what evidence that was presented to the zoning board persuaded it that the requirement of § 42-24-41(d)(2) had been met”).

Our Supreme Court has cautioned zoning boards “to make certain that zoning-board decisions on variance applications . . . address the evidence in the record before the board that either meets or fails to satisfy each of the legal preconditions for granting such relief.” Id. (citing Sciacca, 769 A.2d at 585). Given that this 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,” it is impossible to review the Zoning Board’s decision when the Zoning Board has not clearly explained its reasoning. See § 45-24-69(d); Bernuth, 770 A.2d at 402 (finding that judicial review of a zoning board’s decision was impossible because the board had not made sufficient findings of fact or applied them to the variance standards).

This Court finds that the Zoning Board’s decision failed to provide sufficient findings of fact and failed to apply the relevant facts to the requirements for a use variance set forth in §§ 45-24-41(c), (d). Therefore, this Court remands this case to the Zoning Board for additional findings of fact and conclusions of law consistent with this Court’s Decision. The Zoning Board must address specifically how the conclusions of law—meeting or failing to meet the variance requirements—are supported by the facts in this case. See Bernuth, 770 A.2d at 402.

## **IV**

### **Conclusion**

Upon review of the entire record, this Court finds that the Zoning Board’s decision did not meet the statutory requirements for a decision on a variance application because it failed to

provide adequate findings of fact and conclusions of law that applied the facts to the requirements for a variance. This lack of required findings and conclusions constitutes an error of law, which caused substantial prejudice to the Plaintiffs' rights. For the reasons set forth above, this Court remands the matter to the Zoning Board for additional findings of fact and application of those facts to its conclusions of law. Counsel for the Plaintiffs shall submit the appropriate order for entry.



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

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**CASE NO:** PC-2013-4896

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** October 7, 2014

**JUSTICE/MAGISTRATE:** Nugent, J.

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