

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: March 22, 2016]

IMPERIAL INVESTMENTS, INC., :  
Plaintiff, :

V. :

C.A. No. PC 2012-4245

BERNARD FREZZA, Chair, ANTHONY :  
PILOZZI, JOSEPH ANZELONE, :  
RICHARD FASCIA, THOMAS :  
LOPARDO IN THEIR CAPACITIES AS :  
MEMBERS OF THE JOHNSTON :  
ZONING BOARD OF REVIEW, :  
Defendants. :

**DECISION**

**VOGEL, J.** Plaintiff, Imperial Investments, Inc. (Plaintiff or Imperial) appeals from a July 26, 2012 Decision (Decision) of the Town of Johnston Zoning Board of Review (Defendant, Zoning Board or Board), denying Imperial’s application for two dimensional variances. Plaintiff contends that the Zoning Board’s Decision was arbitrary and capricious and clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. Defendant acknowledges that the Decision was insufficient because it did not include the dimensional variance factors under G.L. 1956 § 45-24-41, but requests that the Court remand the case to the Zoning Board to reissue a Decision using the standard in § 45-24-41. The Court exercises jurisdiction pursuant to § 45-24-69. For the foregoing reasons, the Court remands the matter to the Zoning Board.

## I

### Facts and Travel

Plaintiff owns Plat 15, Lot 29, located on Ostend Street in the Town of Johnston in an R-15 zone.<sup>1</sup> The local zoning ordinance allows single family dwellings on lots with a minimum of 15,000 square feet and 100 feet of frontage. Hr’g Tr. 2:23-3:1, June 28, 2012 (Tr.); Town of Johnston Zoning Ordinance § 340-9, Table of Dimensional Regulations. The subject parcel, 12,780 square feet, fails to meet the minimum lot requirements for constructing a single family dwelling. Id. Additionally, Plaintiff proposes to erect a structure with 90 feet of frontage, 10 feet less than the requirements. Id. Plaintiff filed an application for two dimensional variances, seeking relief of 2220 square feet from the lot size requirement and 10 feet from the frontage requirement. Certified Record, Apr. 28, 2012 Appl.

The Zoning Board conducted a hearing on the application on June 28, 2012. Tr. 1:1. Plaintiff’s attorney presented an opening statement explaining that Imperial required a variance because of the unique characteristics of the land and that granting the dimensional variances would not alter the general character of the surrounding area. Id. at 3:2-14. The Plaintiff also submitted maps of the neighborhood which depicted existing homes, over half of which were built on undersized lots. Id. at 3:15-4:15. Imperial’s attorney responded to questions addressed

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<sup>1</sup> At the time of the hearing, Plaintiff did not yet own the property. See Tr. 10:22-24; 17:22-14. At the hearing, counsel for the Plaintiff explained, “We haven’t purchased the lot. I just want to make it clear. We’re contingent—our contract is contingent upon purchasing it.” Tr. 10:22-24. In its Decision, the Zoning Board stated, “Applicant has a contractual relationship with the Owner which allows him to seek this relief.” (Decision 1.) Plaintiff filed his appeal with the Superior Court on August 17, 2012. In its Complaint, dated August 3, 2012, counsel for the Plaintiff states, “Upon information and belief, the Plaintiff, Imperial Investments, Inc. is the owner of the property located on Ostend [sic] Street, Assessors Plat 15, Lot 29. . . .” (Compl. ¶ 2.) In its memorandum in support of the appeal, Imperial contends that, “The Plaintiff is the owner of Plat 15, Lot 29. . . .” (Pl.’s Mem. 1.)

to him by the Zoning Board, including inquiries pertaining to the subject lot and to Plaintiff's specific development plans. Tr. 2:9-16, 5:14-9:8.

In addition, both abutters and town officials testified at the hearing. Abutters Norma Palmieri, Cindy Sousa, and Rose Marcaccio spoke in opposition to the application. They expressed concerns that new construction would exacerbate a preexisting water and rodent problem that plagued the neighborhood. Tr. 20:16-21, 21:1-7, 22:6-24:2, 24:11-25:16. Also, Bernard Nascenzi, the Building Official for the Town of Johnston, testified that the property included wetlands. Id. at 10:11-13.

In its application, Imperial included an Insignificant Alteration Permit from the Department of Environmental Management (DEM), which the previous owner had acquired, giving that owner permission to build on the wetlands. Tr. 10:17-13:2. The permit issued to the predecessor in title stated that the DEM inspected the site and found that alterations to freshwater wetlands would be necessary to build on the property. Certified Record, Apr. 28, 2012 Appl., Insignificant Alteration - Permit. The permit granted the previous owner permission to build by issuing an insignificant alteration as long as certain conditions were met. Id. The permit included these two provisions pertinent to Plaintiff's application for a variance: The DEM permit was nontransferable to subsequent owners; and it would expire four years after it was issued. The four year permit had expired prior to the date of Imperial's appearance before the Zoning Board. Id. at 11:16-12:24. Imperial's attorney suggested that the Zoning Board could approve the application contingent upon the Plaintiff obtaining DEM approval. Tr. 14:9-11. Imperial represented to the Zoning Board that because Imperial did not yet own the property, it could not seek transfer or reapply for a DEM permit, but would do so. Tr. 17:22-24. In response to counsel's suggestion that the Zoning Board could grant the application conditioned on receiving

proper DEM approvals, Board Member Pilozzi replied “I don’t do that, sir. I don’t look in a crystal ball.” Id. at 14:12-13.

Before concluding the hearing, Applicant’s counsel made an uninterrupted closing statement in which he again addressed the dimensional variance requirements by stating that Imperial’s owner is a respected builder who seeks the least relief necessary to construct a home. Tr. 31:5-19. The Zoning Board asked whether anyone else wanted to comment on the record before the Board voted, and counsel for Imperial declined to offer any further evidence or argument on behalf of his client. See id. at 28:24; 30:15-16.

The Zoning Board issued its written Decision on July 26, 2012. The Zoning Board denied the application finding that Plaintiff lacked standing to obtain the relief sought without the proper DEM permit. Johnston Zoning Board of Review Decision File 2012-24 (Ostend Street) dated July 26, 2012 and posted July 31, 2012. Plaintiff filed a timely appeal<sup>2</sup> of the Decision to the Superior Court on August 17, 2012.

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<sup>2</sup> In claiming an appeal to this Court, Plaintiff failed to comply with the statutory notice requirements that “the aggrieved party shall also give notice of the appeal to those persons who were entitled to notice of the hearing set by the zoning board of review.” Sec. 45-24-69.1(a). Plaintiff also failed to file the necessary affidavit to show compliance with the statute. Id. at 69.1(d). The Rhode Island Supreme Court has held that compliance with the requirements of Section 45-24-69.1 is not a “condition[] precedent to jurisdiction.” Jeff Anthony Properties v. Zoning Bd. of Review of Town of N. Providence, 853 A.2d 1226, 1231-32 (R.I. 2004). “[A] party’s failure to so comply does not automatically require that it forfeit its right to appeal an adverse decision of a zoning board” because “the Legislature [did not] intend[] such a draconian result.” Id. at 1232; see also Duffy v. Milder, 896 A.2d 27, 35 n.14 (R.I. 2006). On March 3, 2016, the Court brought this failure to the attention of counsel which triggered action on the part of both parties. Defendant filed a motion to dismiss the appeal while Plaintiff provided notice to the abutting property owners and filed an affidavit of compliance with the Court. On March 15, 2016, after hearing thereon, the Court denied the motion to dismiss after finding that no prejudice had resulted from Plaintiff’s failure to provide prompt notice to the neighboring landowners. See Jeff Anthony Properties, 853 A.2d at 1232. In so ruling, the Court noted that ten days had passed since the abutters received notice and none had come forward to object or seek to join the litigation.

## II

### Parties' Arguments

Plaintiff raises two main arguments in its appeal. First, Plaintiff argues that the Zoning Board erred in denying the application based on standing. Plaintiff asserts that the Zoning Board regularly grants conditional variances, and it acted arbitrarily and capriciously when denying the application merely because Plaintiff had not yet obtained DEM approvals.

Second, Plaintiff contends that the Certified Record in the case supported a favorable decision on its application. As such, Plaintiff argues that the Decision clearly is erroneous in view of the reliable, probative, and substantial evidence of the whole record.

In response, the Zoning Board admits that its Decision fails to outline its reasoning with respect to the variance, as required by § 45-24-41. The Board further acknowledges that it erred in its determination that an applicant must have proper DEM permits before coming before the Zoning Board. Although the Zoning Board maintains that it conducted a satisfactory hearing, it requests that the Court remand the Decision to it to cure the aforementioned deficiencies. The Zoning Board requests remand so “that it may grant a variance subject to DEM approvals being subsequently received or if the Board has other reasons to support denial those reasons need to be outlined with supporting findings of fact in accordance with RIGL 45-24-41 [sic] and the Johnston Zoning Ordinance.”

## III

### Standard of Review

Section 45-24-69 establishes Superior Court jurisdiction to review zoning board decisions. The statute provides as follows:

“[t]he 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 a zoning board decision, the judge must “examine the whole record to determine whether” the board supported its findings with “substantial evidence.” Lloyd v. Zoning Bd. of Review for City of Newport, 62 A.3d 1078, 1083 (R.I. 2013) (citing Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). Substantial evidence requires the court to find “more than a scintilla but less than a preponderance” of evidence. Id. The court may not substitute its “judgment for that of the zoning board,” as long as the zoning board supports its decision with “substantial evidence in the whole record.” Id. If the Court finds that the decision prejudices substantial rights of the appellant, then it has the power to remand the case to the zoning board for further proceedings. See Irish P’ship v. Rommel, 518 A.2d 356, 359 (R.I. 1986) (matter was returned to the Zoning Board of Review because the record of the hearing and particularly the “decision of the zoning board of review are lacking sufficient facts that would facilitate our judicial review”).

## IV

### Analysis

#### A

#### Decision of the Board

The Court first addresses the sufficiency of the Zoning Board's Decision. In writing a decision on an application for a dimensional variance, the Zoning Board's decision must procedurally comply with two statutory requirements: § 45-24-61(a) and § 45-24-41.

Pursuant to § 45-24-61(a), regardless of whether the Zoning Board grants or denies an application, the Board must "include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote."<sup>3</sup> Sec. 45-24-61(a). The Rhode Island Supreme Court has held 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." Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 401 (R.I. 2001) (citing Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996)). Section 45-24-61 regulates the form of the decision, not its content. Irish P'ship, 518 A.2d at 359.

Although not pertinent here because the Board denied the application on standing, the Court notes that when a Zoning Board decides to *grant* a dimensional variance<sup>4</sup> (emphasis

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<sup>3</sup> The record demonstrates the vote of each participating member and no member was recorded as absent. (Decision 2.)

<sup>4</sup> The Town of Johnston Zoning regulations define "dimensional variance" as

"[p]ermission to depart from the dimensional requirements of this chapter, 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

added), the Board’s decision must meet additional requirements which are set forth in § 45-24-41 and in the Town of Johnston Code, § 340-74(C)(1). In order to grant a variance, the Zoning Board must find the following facts in the record: 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 this chapter or the Comprehensive Plan upon which this chapter is based”; and 4) “That relief granted is the least necessary.” Town of Johnston, Code § 340-74(B). Additionally, the Zoning Board must find “that the hardship that 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, which shall mean that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one’s property.” Town of Johnston, Code § 340-74(C)(2).

In this case, the Decision quotes Member Pillozzi stating,

“I’m going to make a motion to deny Mr. Chairman based on my finding of fact that the department environmental management, their alteration permit has expired it’s over 6 years old and the it clearly states in the paperwork that I have from the Rhode Island Department of Environmental Management which was provided to me by the Town so that we could reach a consensus and properly vote on this matter, that the permit from D.E.M. has not been properly transferred to a new owner. So I’m going to base my motion to deny on that fact.” (Decision 2) (sic).

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profitable or that a structure may be more valuable after the relief is granted shall not be grounds for relief.” Town of Johnston, Code § 340-4(B).

The Decision concludes, “The Zoning Board of Review based their denial on a finding of fact that the Applicant lacked standing to seek the relief requested as it did not have proper permits and approvals necessary from the DEM in order for the Town to properly consider the petition.”

Id.

Addressing only the requirements of § 45-24-61, the Decision meets the minimum standard set forth in the statute. The Board included findings of fact and conclusions of law. See Bernuth, 770 A.2d at 401. The Zoning Board based its denial of the requested relief on its determination that Plaintiff lacked standing to pursue the application. The Board articulated the factual basis for this determination, to wit, the failure of Imperial to obtain a DEM permit. See Decision 2. Accordingly, the Zoning Board’s Decision included the necessary findings of fact and conclusions of law with respect to its determination. As such, the Decision of the Zoning Board met the minimum standard for an adequate written decision under § 45-24-61.

The requirements set forth in § 45-24-41 do not apply because the Board denied the variance on the ground of standing. The statute provides that “[i]n granting a variance, the zoning board of review requires that evidence to the satisfaction of the following standards. . . .” Sec. 45-24-41(c). To aid the Court in its review, zoning boards deciding applications for variances must address the pertinent evidence in the record which demonstrates that the applicant “either meets or fails to satisfy each of the legal preconditions for granting such relief, as set forth in § 45-24-41(c) and (d)” Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001). Here, because the Board found that a “lack of standing” precluded it from entertaining the request for relief, it did not address the statutory requirements set forth in § 45-24-41. But see Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255, 1262 (R.I. 1999) (recognizing but “not reach[ing] the question of whether the agency had bound itself to act only after [local zoning] approval has

been obtained”). Therefore, the Zoning Board’s Decision was not in violation of ordinance or statutory provisions or made upon unlawful procedure.

## **B**

### **Arbitrary and Capricious**

Rhode Island and local statutes confer limited authority to the zoning boards of review. See Franco v. Wheelock, 750 A.2d 957, 960 (R.I. 2000). Section 45-24-57(1)(vii) grants zoning boards the ability to “provide for the issuance of conditional zoning approvals where a proposed application would otherwise be approved except that one or more state or federal agency approvals that are necessary are pending. A conditional zoning approval shall be revoked in the instance where any necessary state or federal agency approvals are not received within a specified time period.” Sec. 45-24-57(1)(vii). The Town of Johnston adopted the same standard in its Town Charter at Article XVII, § 340-120(A)(7).<sup>5</sup> Therefore, the Town of Johnston Board of Review can grant zoning approvals conditionally.<sup>6</sup>

In the present case, Imperial requested that the Zoning Board consider its application, conditioned on obtaining a valid DEM permit. However, the Zoning Board refused to address the dimensional variance factors once it determined that Imperial did not have the permit. (Decision 2.) The Zoning Board has not presented to the Court any legal authority in support of

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<sup>5</sup> Article XVII, § 340-120(A)(7) states, “To provide for issuance of conditional zoning approvals where a proposed application would otherwise be approved except that one or more state or federal agency approvals which are necessary are pending. A conditional zoning approval shall be revoked in the instance where any necessary state or federal agency approvals are not received within a specified time period.”

<sup>6</sup> In § 45-23-61, the legislature contemplated the interplay between various local permitting authorities when subdividing land. Id. It provides that when an applicant needs both variances from the local zoning ordinance and planning board, the applicant must obtain an advisory opinion and conditional approval from the planning board, then go to the zoning board, and finally return to the planning board. Id. No similar statute exists in regards to the interplay between the zoning board and DEM.

this position. This Court finds that the Zoning Board's Decision finding a lack of standing was arbitrary and capricious, such that "substantial rights of the appellant have been prejudiced." Sec. 45-24-69. Because the Zoning Board can rule on the merits of Plaintiff's application for dimensional variances conditioned on Plaintiff seeking and obtaining a DEM permit, this Court remands this case to the Board for a decision consistent with the applicable law. See Roger Williams Coll. v. Gallison, 572 A.2d 61, 63 (R.I. 1990) (a remand is appropriate when there is a genuine defect in the proceedings, which is not the fault of the plaintiff).

## V

### **Conclusion**

The refusal of the Zoning Board to consider the merits of Plaintiff's application for dimensional variances was clearly erroneous. The Board erred in finding that Plaintiff lacked standing to seek conditional approval of its application. There is no requirement that an applicant obtain a DEM permit before applying to the Zoning Board for a dimensional variance. Accordingly, the Court remands the case to the Board for a decision, which includes findings of fact and conclusions of law. If the Board grants the application, the decision must meet the standards articulated in § 45-24-41 and the Town of Johnston Zoning Ordinance § 340-74.

Counsel shall submit the appropriate judgment for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Imperial Investments, Inc. v. Bernard Frezza, et al.

**CASE NO:** PC 2012-4245

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** March 22, 2016

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

**ATTORNEYS:**

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For Defendant: Joseph R. Ballirano, Esq.