STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: June 16, 2015)

DANNY D. FOLCO	:	
	:	
V.	:	**C.A. No. PC 2013-3267**
	:	
ZONING BOARD OF REVIEW OF THE TOWN OF SMITHFIELD, and GEORGE D. McKINNON, ANTONIO S. FONSECA, DAVID GREENE, S. JAMES BUSAM, and PETER FOGARTY, in their capacities as Members of the Zoning Board of Review of the Town of Smithfield	:	

DECISION

MCGUIRL, J. Before the Court is an appeal from a decision of the Zoning Board of Review of the Town of Smithfield (Zoning Board). Danny D. Folco (Applicant) seeks reversal of the Zoning Board's June 13, 2013 decision (Decision) denying his request for dimensional relief from the Town of Smithfield Zoning Ordinance (Ordinance) Section 5.3.4, Buffers, as well as Section 5.4.1, Minimum Front Yard. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth in this Decision, this Court upholds the Zoning Board's Decision.

I

Facts and Travel

The subject premises are designated as Lot 23 on Assessor's Plat 23 in Smithfield, Rhode Island and are owned by Applicant. The premises are located at 8 Cross Street in the Town of Smithfield in a Residential R-20 District and total 22,090 square feet.

The Applicant filed a petition with the Zoning Board seeking dimensional variances to construct a single-family dwelling with an attached garage and deck on the premises. In order to

construct a 32' x 24' dwelling, a 24' x 18' garage, and a 10' x 10' deck, the Applicant requires: (1) a 21.66' variance from the required 30' front yard setback, resulting in an 8.34' front yard setback; and (2) a 77.48' variance from the required 100' wetland setback requirement, resulting in a 22.52' wetland setback. The Department of Environmental Management (DEM) issued a Permit to Alter Freshwater Wetlands to Applicant in 2009 upon determining that the proposed location for the dwelling was the best location to provide protection to the freshwater wetlands on the premises. (Bd. R., Ex. 4, DEM Permit.)

A properly advertised public hearing on the application for dimensional relief was heard by the Zoning Board on April 24, 2013. All members of the Zoning Board viewed the premises. The Zoning Board's view of the location revealed that development of the premises would "be an enormous challenge." (Bd. Decision at 2.) The Zoning Board observed that the Woonasquatucket River (River) bisects the premises and some of the lot is submerged beneath it. Id. Furthermore, the lot slopes steeply down toward the River, and much of the premises are undevelopable due to its location in the floodplain. Id.

At the hearing, Applicant himself did not appear or testify, but his attorney presented three witnesses to testify in favor of the proposal: Joseph A. Casali (Mr. Casali), a Rhode Island registered civil engineer; Scott Rabideau (Mr. Rabideau), a wetlands biologist; and Donald Morash (Mr. Morash), a real estate broker. While Mr. Morash was allowed to proceed with his planned testimony, the Zoning Board declined to formally accept his testimony because Mr. Morash is not a licensed appraiser. In 2010, The Rhode Island Department of Business Regulation (DBR) sent the Zoning Board a letter requesting that individuals without an appraiser's license not be permitted to provide either sworn testimony or written opinions

"regarding the value, nature, or utility of real property located in your municipality." (Bd. R., Ex. 9, May 25, 2010 Letter from DBR.)

Mr. Casali was accepted by the Zoning Board as an expert witness in the field of civil engineering. (Hr'g Tr. at 5:7-8.) He explained that the premises are a triangular piece of land located at the intersection of Cross Street and Whipple Avenue. Id. at 6:1-8. Mr. Casali testified that the DEM has a 200 foot jurisdictional buffer for the wetlands that encompasses all of Cross Street and Whipple Avenue. Id. 6:22-7:5. Thus, any house to be built on the premises would require relief in the form of a dimensional variance, as well as a permit from the DEM. Id. 7:10-15. Because of the slope on the premises, Mr. Casali testified that the dwelling would have to be designed as a walkout, which is what Applicant is proposing. Id. 9:16-20. Mr. Casali described the proposed dwelling as "relatively modest," and that a lot designated as R-20 is meant to be used for a residential single-family dwelling. Id. at 10:2, 12:7-11. The first floor elevation of the proposed dwelling would be 134.67 feet, which would be approximately 4.5 feet about the base flood plain elevation. Id. at 14:3-4. Mr. Casali testified that the garage factored into the DEM issuing a permit because it is "an important feature when you talk about environmental sensitivity." Id. at 18:18-22.

Mr. Rabideau was accepted as an expert witness in the field of wetlands biology. Id. 23:21-22. He emphasized that Applicant seeks to alter only 6170 square feet of the property, which is a 22,000 square foot lot. Id. at 26:7-12. Mr. Rabideau testified that the DEM permit was conditioned on Applicant's taking precautions both during and after construction to prevent and control erosion on the premises. Id. at 27:5-22. He explained that, in his opinion, dimensional relief was necessary because of the premises' configuration. Id. at 29:1-7. Mr. Rabideau testified that the proposed dwelling is "a standard house" at twenty-four feet wide. Id.

at 29:10-11. He also stated that building close to the River was in keeping with the surrounding area because the other houses in the area have "developed very close to the river throughout this portion of Smithfield." Id. at 29:20-25, 30:1-6.

In opposition to the application, Donald Brown (Mr. Brown), vice-chairman of the Smithfield Conservation Commission (Commission), and Linda Steere (Ms. Steere), a wetlands biologist, both offered testimony. Mr. Brown testified about his concerns over erosion, specifically the "sharp dropoff of the land. If you look at the house, it is 20-foot wide and in that 24 feet it drops off 8 feet. So that's pretty steep as far as controlling erosion and so on." Id. at 42:8-11. He offered testimony regarding his personal knowledge that the land in the area had been filled over the years, and he has observed "various types of soil, including even sand." Id. at 42:14-18. Mr. Brown also testified about Applicant's first proposed dwelling, which was 36' x 24' with a 24' x 24' garage. Id. at 46:13-15. The application for this dwelling came before the Commission a few years prior, and the Commission made its recommendation to the Smithfield Town Council that the application should be denied. Id. at 41:4-13. Mr. Brown pointed out that the new dimensions proposed by Applicant do nothing to mitigate the dwelling's proximity toward the wetland. Id. at 46:18-22. Mr. Brown testified that approval of the application would result in a 77% reduction in the wetland setback and a 67% reduction in the front yard setback requirement, and these reductions were major variances. Id. at 49:1-6.

Ms. Steere was accepted as an expert witness in wetland biology. Id. at 53:22-24. She testified about her concern over "the erosion sediment controls," and how construction will disturb and destabilize the premises. Id. at 55:9-24. Ms. Steere commented that borings should be performed along with additional work to determine if the proposed construction is feasible. Id. at 56:7-12. She also raised her concerns about flooding and the potential for FEMA to

increase the base flood plain. Id. at 57:1-6. Ultimately, Ms. Steere testified that her main concern was the size of these variances, which she felt would set precedent for the Town of Smithfield allowing unusually large variances. Id. at 60:15-16.

On June 13, 2013, the Zoning Board issued its Decision denying Applicant's requested variances because (1) the hardship is due to the general character of the surrounding area based on the Smithfield Comprehensive Community Plan (Plan); (2) the hardship is caused by Applicant's desire to construct too large a home too close to the River; (3) to grant the request would alter the general character of the surrounding area and impair the intent or purpose of the Ordinance or the Plan; (4) the relief sought was not the least relief necessary due to the inclusion of the garage; and (5) no evidence was submitted to show that the hardship suffered would be more than a mere inconvenience.

The Zoning Board in its Decision properly considered all testimony and evidence presented at the hearing, along with its own examination of the Plan, specifically Objectives NR-1.2, NR-1.5, and NR-1.7. These Objectives focus on preserving water quality and wetlands, as well as protecting flood zones.

The Applicant timely appealed the Zoning Board's Decision on July 2, 2013. On appeal, Applicant raises various issues: (1) the hardship is due to the unique characteristics of the land itself, not the general characteristics of the surrounding area; (2) the hardship is not a result of any prior action taken by Applicant or by his desire to realize financial gain; (3) granting the request would not alter the general character of the surrounding area or impair the intent or purpose of the Ordinance or Plan; and (4) the relief sought is the least relief necessary. Thus, Applicant argues that the Decision was arbitrary and capricious, made in error of law, unsupported by substantial evidence, and that Applicant's rights have been prejudiced. The

Applicant also requests reasonable litigation expenses under the Equal Access to Justice for Small Businesses and Individuals Act.

II

Standard of Review

Pursuant to § 45-24-69, "[a]n aggrieved party may appeal a decision of the zoning board of review to the superior court . . . ." In reviewing the zoning board's decision, the

> "court shall not substitute its judgment for that of the zoning board . . . as to the weight of the evidence on questions of fact. The court may affirm the decision . . . 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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> "(1) In violation of constitutional, statutory, or ordinance provisions;
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> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
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> "(3) Made upon unlawful procedure;
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> "(4) Affected by other error of law;
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> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
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> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."
>
> Sec. 45-24-69(d).

This Court's review of a zoning board's decision is "circumscribed and deferential . . . ." Restivo v. Lynch, 707 A.2d 663, 667 (R.I. 1998). Our Supreme Court has held that "judicial scrutiny of an agency's factfinding . . . is limited to a search of the record to determine if there is any competent evidence upon which the agency's decision rests. If there is such evidence, the decision will stand." E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977). Competent or substantial evidence ". . . 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." Lischio v. Zoning Bd. of Review of N.

Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (citing Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). A zoning board's "essential function is to weigh the evidence." Bellevue Shopping Ctr. Assocs. v. Chase, 574 A.2d 760, 764 (R.I. 1990). Thus, a board's factual conclusions should be reversed "only when they are totally devoid of competent evidentiary support in the record." Milardo v. Coastal Res. Mgmt. Council of R.I., 434 A.2d 266, 272 (R.I. 1981).

Section 45-24-41(c) dictates that to grant a dimensional 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."

Additionally, there must be evidence entered into the recording showing that "in granting a dimensional variance, 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). The applicant "bears the burden of demonstrating to the satisfaction of the zoning board that there is evidentiary support for the proposition that there are no reasonable alternatives that allow the applicant to enjoy a legally permitted beneficial use of his or her property." Lischio, 818 A.2d at 693.

III

Analysis

A

Hardship and Unique Characteristics of the Land

To grant a dimensional variance, the zoning board must first have evidence that the hardship from which the applicant seeks relief is due to the "unique characteristics of the subject land or structure." Sec. 45-24-41(c)(1); see also Lischio, 818 A.2d at 691. The Applicant argues that the Zoning Board improperly disregarded the expert testimony of Mr. Casali and Mr. Rabideau that the size and placement of the proposed dwelling was due to the unique characteristics of the land.

Here, the Zoning Board gave this prong rather short shrift in its Decision, stating that, "The hardship from which the applicant seeks relief is not due to the unique characteristics of the subject land and structure and is due to the general character of the surrounding area . . . ." (Bd. Decision at 4.) No further facts were included to support this finding.

At the hearing, there was extensive testimony from both Mr. Casali and Mr. Rabideau about the unique characteristics of the lot. Mr. Casali testified that "any house on this parcel is going to need to seek relief from both this Board, not to mention a relief from the wetlands, and it's also going to need to seek and procure a permit from DEM." (Hr'g Tr. at 7:11-15.) Mr. Rabideau further stated that "it's the property configuration that's really causing this" need for variances. Id. at 29:6-7. Ms. Steere offered no testimony in opposition to this; her concerns were over flooding and erosion. She did not offer any substantive testimony to suggest the relief was not due to the "unique characteristics of the subject land." See § 45-24-41(c)(1). Flooding and erosion are problems for the entire neighborhood, not just this particular lot. (Hr'g Tr. at

55:9-15; 56:13-20.) Mr. Brown testified about another lot where the house appears to be "crumbl[ing] towards the water," and all the experts agreed that flooding occurred throughout the area previously. Id. at 47:2.

While a zoning board may choose to believe one expert over another, it is an abuse of discretion to reject such testimony where it is "competent, uncontradicted, and unimpeached." Murphy v. Zoning Bd. of Review of N. Kingstown, 959 A.2d 535, 542 (R.I. 2008). Here, however, the expert testimony of Mr. Casali and Mr. Rabideau regarding this prong was not contradicted by Ms. Steere's testimony. She never testified that the hardship was not due to the unique characteristics of this piece of land or the surrounding area. Rather, Ms. Steere's testimony focused exclusively on erosion and flooding. Thus, the Zoning Board abused its discretion in disregarding Applicant's proffered expert testimony in regard to this prong, and the decision was "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record." Sec. 45-24-69(d)(5). However, this prong was not the only basis for the Zoning Board's decision to deny the variances. The Zoning Board relied on extensive testimony in finding that the hardship was a result of Applicant's desire for financial gain, that granting the variance would impair the intent or purpose of the Ordinance or Plan, and that the relief sought was not the least relief necessary. Therefore, the substantial rights of the Applicant have not been prejudiced.

B

Hardship and Financial Gain

The second prong concerns whether the hardship is the result of the prior action of the applicant or of the applicant's desire to "realize greater financial gain." Sec. 45-24-41(c)(2). Generally, in considering whether to grant dimensional relief, "[t]he 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." Sec. 45-24-41(d); see also § 45-24-31(65)(ii). For a zoning restriction to constitute an undue hardship, strict adherence to the requirements must interfere with the reasonably full enjoyment of the permitted use of land. Westminster Corp. v. Zoning Bd. of Review of Providence, 103 R.I. 381, 392, 238 A.2d 353, 360 (1968). Here, the Applicant argues that the hardship in his case is unrelated to any of his actions or desires. He maintains that his goal is to build a home on his property and that there is no financial motive behind this desire.

The record indicates that the Zoning Board observed that a financial motive existed in Applicant's choosing to build a dwelling with a garage when a dwelling without a garage would be more appropriate given the proximity to wetland. Furthermore, the Zoning Board relied upon testimony that "it isn't like it's a meager variance they're looking for; it's a major one. It's almost a whole setback that the town and even the state requires on streams." (Hr'g Tr. at 49:3-6). As such, Applicant's desire for a larger development on the premises—and the higher real estate value due to having a garage—caused the hardship. See Sheppard v. Zoning Bd. of Appeal of Boston, 81 Mass. App. Ct. 394, 400, 401 (2012) (finding that where applicant failed to "demonstrate that he could make a reasonable use of the property only by building a larger house" and the "record reflect[ed] only his understandable preference for a larger home" the variance required to build such a house should not be granted); Gartsu v. Zoning Bd. of Review of Woonsocket, 104 R.I. 719, 720, 248 A.2d 597, 598 (1968) (holding that "the award of a variance was never intended to afford relief from a mere personal inconvenience experienced by a property owner or as a guise to guarantee such an individual a more profitable use of his property"). The Applicant also did not testify at the hearing, offering the Zoning Board no other explanation for why he required the project to include a garage. See id., 104 R.I. at 720, 248

A.2d at 598 (denying application for variance was proper where applicant's request to construct a larger café was not supported by evidence of necessity: "Whatever may be the true financial picture of the applicant, on the record before us, remains a complete mystery"). It is well settled that "the Superior Court lacks the authority to consider the credibility of witnesses, to weigh the evidence, or to make its own findings of fact." Kirby v. Planning Bd. of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993) (citing Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). Therefore, the Zoning Board's denial of Applicant's request for a dimensional variance on this criterion was not clearly erroneous. See Mastandrea v. North, 361 Md. 107, 137 (2000) (superseded by statute on other grounds) (finding that where the zoning board is presented with sufficient evidence, "[the reviewing court] find[s] no reason to question the presumed expertise of the Board in reaching the conclusions it did").

C

General Character of the Area

In granting a dimensional variance, the zoning board must also be presented with evidence that granting the 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." Sec. 45-24-41(c)(3). The first step in analyzing this prong is to determine whether the use underlying the request for a dimensional variance is lawfully permitted. If the parcel has been zoned to permit the underlying use, then "the review should not focus on the use of the parcel because a legislative determination has been made previously that the use is appropriate and does not adversely affect the general character of the area." Lischio, 818 A.2d at 693. However, there may be "situations in which a request for a dimensional variance is such that the size, location or the type of relief sought will alter the general character

of the surrounding area and/or the intent or purpose of the comprehensive plan or zoning ordinance." Id.; cf. Rogers v. Zoning Hearing Bd. of East Pikeland Twp., 520 A.2d 922, 924 (Pa. 1987) (stating "purely esthetic considerations, standing alone, do not constitute a valid basis for rejecting a request to erect a single-family home on an undersized lot in a district where such dwellings are permitted").

The premises in the instant appeal are zoned in a Residential R-20 district; the underlying use proposed by Applicant is, therefore, lawfully permitted. See Lischio, 818 A.2d at 693. However, the situation here is like that in Lischio, where the variances requested will alter the purpose of the town's comprehensive plan, which factored into the Zoning Board's denial of Applicant's proposal here. See id. It was Applicant's burden to present evidence that the variances would not alter the area's character, but the Zoning Board's rejection of the testimony of Mr. Morash, Applicant's witness, because he is not a licensed appraiser was not an abuse of discretion or arbitrary or capricious. See Bd. R., Ex. 9. Thus, Applicant failed to meet his burden regarding this prong of the statutory requirements.

Instead, the Zoning Board was presented with extensive evidence that Applicant's proposal would directly conflict with various sections of the Plan, specifically Objectives NR-1.2, NR-1.5 and NR-1.7, which specifically require the Town of Smithfield to protect flood zones from intensive development. See Sec. III, A, supra. The Zoning Board also could have referred to Ordinance Section 1.1. This section is the Town of Smithfield's Statement of Purpose, and it states:

> "C. To provide for orderly growth and development which recognizes:
>
> > "1. the goals and patterns of land use contained in the aforesaid Comprehensive Community Plan of the Town adopted pursuant to Chapter 45-22.2 of the General Laws of Rhode Island;

> "2. the natural characteristics of the land, including its suitability for use based on soil characteristics, topography, and susceptibility to surface or groundwater pollution;
> "3. the values and dynamic nature of the Town's waterbodies, freshwater ponds, streams, and freshwater wetlands;
> "4. the values of unique or valuable natural resources and features;
> . . .
>
> " D. To provide for the control, protection, and/or abatement of air, water, groundwater, and noise pollution, and soil erosion and sedimentation.
> . . .
>
> " I. To promote safety from fire, flood, and other natural or man-made disasters."

Additionally, Objectives LU-5.5 and Action LU-5.5a call for maintenance of the wetlands "in their current state to the extent possible as critical elements of groundwater recharge, wildlife habitat, flood storage, and for their recreational value" as well as the enforcement of the 100' no-build buffer on all wetlands. The Zoning Board's finding that these objectives were in clear opposition to the application before the Zoning Board was not in violation of Ordinance or statutory provisions.

In response to the objectives, Applicant argues that the term "intensive development" as used in Objective NR-1.7 does not encompass the development he proposes on the property. The Applicant contends that there will not be any "intensive development" based on Mr. Casali's testimony about mitigating the risk of erosion by stabilizing "the site with the foundation and with the vegetation, probably as good if not better than it is now." (Hr'g Tr. at 42:23-25.) However, the Zoning Board noted that "intensive development" is not defined in the Plan, Ordinance or Rhode Island General Laws. It is well established that "in the absence of statutory definition or qualification the words of a statute are given their ordinary meaning." Chambers v.

Ormiston, 935 A.2d 956, 961 (R.I. 2007) (citing Pacheco v. Lachapelle, 91 R.I. 359, 362, 163 A.2d 38, 40 (1960)). Our Supreme Court has held that "the rules of statutory construction apply equally to the construction of an ordinance." Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (internal citations omitted). As a result, "clear and unambiguous language in an ordinance [is given] its plain and ordinary meaning." Id. (internal citations omitted). Alternatively, the court may "apply a common meaning as provided by a recognized dictionary" where a statute does not define a word. Planned Env'ts Mgmt. Corp. v. Robert, 966 A.2d 117, 123 (R.I. 2009). "[W]hen the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency, or board, charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized." Pawtucket Transfer Operations, LLC, 944 A.2d at 859-60.

At the hearing, the Zoning Board was presented with extensive evidence about the impact that Applicant's proposal would have on the property. Mr. Brown and Ms. Steere both testified that the proposed location of the dwelling would put it at risk of flood and soil erosion, presenting a danger to the wetlands as well as to any occupants of the structure. See Hr'g Tr. at 41:22-25, 42:1-11, 55:9-25, 56:1-25, 57:1-18, 59:18-25. The Applicant's own expert, Mr. Rabideau, testified about the "fairly steep slope" and the necessary "appropriate erosion and sedimentation controls" that would be required to protect the wetlands during and after construction of the dwelling. Id. at 27:7-14.

One of the Zoning Board members, Mr. Fonseca, also noted that a 2010 flood "put about 5 feet of water" in the area the premises are located. Id. at 14:22-25. The Applicant's expert, Mr. Casali, did not disagree with this observation. See East Bay Cmty. Dev. Corp. v. Zoning

Bd. of Review of Barrington, 901 A.2d 1136, 1157 (R.I. 2006) (holding that a board member may challenge expert testimony on the basis of personal observations where the record discloses the nature and character of those observations). Thus, it was not clearly erroneous for the Zoning Board to take Mr. Fonseca's observations about past flooding into account in this matter. Objective NR-1.7 is intended to protect flood zones from intensive development, and there was sufficient evidence before the Zoning Board about the serious risks posed by Applicant's development, as well as the property having been flooded in the past, to find that the proposal was directly at odds with this objective.

Mr. Fonseca's personal observations were further supported by Ms. Steere, who testified that "putting a house in this location may jeopardize the health, safety, and welfare of someone who is going to construct and live in this dwelling" due to the possibility of future flooding. (Hr'g Tr. at 57:4-6.) Additionally, the Zoning Board made its own observations about the difficulty of developing the lot due to the location of the River as well as the steep slope and much of the lot being undevelopable. (Bd. Decision at 2.) Personal observations by board members constitute "legally competent evidence upon which a finding may rest . . . if the record discloses the nature and character of the observations upon which the board acted." Restivo, 707 A.2d at 666. In its Decision, the Zoning Board explained what the view of the premises revealed, and, thus, these observations were properly considered as evidence by the Zoning Board. See Dawson v. Zoning Bd. of Review of Cumberland, 97 R.I. 299, 302, 197 A.2d 248, 286 (1964) (holding evidence on the record of "conditions and circumstances" regarding an inspection of the premises by board members to constitute "legal evidence capable of sustaining a board's decision in an appropriate case").

The risk of erosion was also presented to the Zoning Board as a serious danger to both the wetlands and any inhabitants of the house. See Ordinance § 1.1(I); Plan Objective NR-1.7. Mr. Brown testified about the rapidly flowing river and there being a chance of erosion "at any time." (Hr'g Tr. at 41:24.) He stated that an abandoned house north of the property that is also situated along the River "is actually starting to crumble towards the water."[1] Id. at 46:23-25; 47:1-2. Mr. Brown, along with Ms. Steere, expressed further concern over what material Applicant would find upon beginning to excavate; without any testing it is impossible to know what material is present on the premises. See id. at 42:14-18. Ms. Steere testified that:

> "Our basic concern has been the erosion sediment controls, and during excavation particularly if it's found that there is not sufficient stability in the soils on this site due to whatever happened over the years, dumping of materials, dumping of leaves, perhaps trash, who knows what may be there. Currently the site is stabilized by a good canopy of trees and some understory cover. That will be removed in the area of the limits of disturbance of the house. So that once that's gone, it's going to be very difficult to restablilize that site if it turns out that it's not suitable for construction. . . ." Id. at 55:9-21.

While Applicant's experts offered testimony regarding the plans to stabilize the property and import new filler material, such testimony was rebutted by the testimony of Mr. Brown, and the Zoning Board was free to reject the opinions of Applicant's experts. See Restivo, 707 A.2d at 671 (holding that "there is no talismanic significance to expert testimony. It may be accepted or rejected by the trier of fact"); id. (finding that lay testimony may be persuasive where it

[1] Mr. Brown offered this testimony in response to Mr. Casali and Mr. Rabideau's testimony that other houses are similarly situated and require similar relief as that sought by the Applicant. Mr. Casali testified that, in his opinion, "[m]ost houses on this street . . . need that same relief [as Applicant is seeking." (Hr'g Tr. at 12:12-13.) Mr. Brown pointed out in response that these houses "were . . . built many generations ago," and the setbacks have been implemented to "protect the areas." Id. at 48:1, 48:23. Furthermore, the property at issue here is unique in that it is a corner lot, and there is a "sharp dropoff" toward the River; there was no testimony that any of the nearby lots have such a steep slope. Id. at 42:8.

encompasses "physical facts and conditions . . . from which the planning board could fairly draw inferences").

The Zoning Board had before it evidence that demonstrates that Applicant's proposal was contrary to the Ordinance and the Plan. In both the Plan and the Ordinance, the Town of Smithfield made clear that the preservation of wetlands and the protection of residents, their property, and the wetlands from flooding are crucial objectives. See Ordinance § 1.1(C), (D), (I); Plan Objective NR-1.2, NR-1.5, NR-1.7, LU-5.5. Specifically, in Action LU-5.5a, the Town of Smithfield called for protection of the wetlands buffer of 100'. As such, the Zoning Board's decision finding that granting the requested variance would alter the general character of the surrounding area was supported by substantial evidence.

D

Least Relief Necessary

The fourth prong requires that "the relief to be granted is the least relief necessary." Sec. 45-24-41(c)(4). A request for a variance must, therefore, be supported by reliable, substantial, and probative evidence that the proposed plans require the least relief necessary to accommodate the underlying permitted use. "[A]pplications for relief from lot-line regulations 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." Lincoln Plastic Prods. Co. v. Zoning Bd. of Review of Lincoln, 104 R.I. 111, 115, 242 A.2d 301, 303 (1968); § 45-24-31(65)(ii).[2] Thus, in determining

[2]Section 45-24-31(65)(ii) defines a dimensional variance as: "Permission to depart from the dimensional requirements of a zoning ordinance, where the applicant . . . 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

whether the relief granted was the least relief necessary for enjoyment of the property, this Court looks to the reasonableness of the proposed size and character of the building in relation to the surrounding area. See Gardiner v. Zoning Bd. of Review of Warwick, 101 R.I. 681, 690-91, 226 A.2d 698, 703 (1967) (upholding granting of variance where the proposed dwelling was of reasonable size in relation to the neighborhood). A request will not satisfy this prong where the zoning ordinance creates only a "personal inconvenience" for the applicant. DiDonato v. Zoning Bd. of Review of Johnston, 104 R.I. 158, 164, 242 A.2d 416, 420 (1968) (upholding denial of variance where applicant requested dimensional variance to build an oversized home that could accommodate his growing family).

In the instant matter, Applicant had the burden of demonstrating that he was seeking the least relief necessary. See Standish-Johnson Co. v. Zoning Bd. of Review of Pawtucket, 103 R.I. 487, 492, 238 A.2d 754, 757 (1968) (holding that "the burden is on the property owner to establish that the relief sought is minimal to a reasonable enjoyment of the permitted use to which the property is proposed to be devoted"). He therefore had to show that his proposed 13,000 square foot project was "reasonably necessary." The Applicant himself did not testify as to why he needed a garage, so the Zoning Board had only the testimony of his experts upon which to rely. Neither expert testified as to Applicant's personal housing needs that required the project to be this size and include a garage. The Applicant's own expert, Mr. Casali, offered extensive testimony regarding the constraints of building on the premises. See Hr'g Tr. at 7:16-25, 8:1-12. The area outside the floodplain suitable for building a house is limited, but both Mr. Casali and Mr. Rabideau referred to the proposed dwelling using terms such as "relatively modest," "reasonably small," and "a standard house." Id. at 10:2, 18:15-16, 29:11. Mr. Casali

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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."

did state that, in his opinion, "it's as small of a house that can be expected that someone can still live in it and live their life." Id. at 21:4-6. This observation ignores, however, the fact that the proposal also includes a garage. The Zoning Board focused on the potential removal of the garage and relied upon that in its Decision. (Bd. Decision at 4.)

In testifying about the garage, Mr. Casali stated:

> "[I]t's my opinion, and I believe it's the opinion of DEM because of the permit that they issued, that the garage is an important feature when you talk about environmental sensitivity. . . . [T]he garage, when you talk about the least amount of relief necessary, is necessary for environmental protection." (Hr'g Tr. at 18:18-22; 19:3-6.)

Thus, Applicant argues that the garage is crucial to the DEM permit and fits in with the requirement of least relief necessary.

However, the DEM permit contains no mention of the garage being a requirement or of it having any environmentally beneficial purpose. See Bd. R., Ex. 4. The permit does have a list of thirteen "Permit Terms and Conditions for Application No. 04-0209," but the garage is not included. Id. Mr. Casali is also not an environmental expert but rather a civil engineer. Furthermore, Ms. Steere, who was accepted by the Zoning Board as an expert in the field of wetland biology, submitted her report to the Zoning Board, which stated: "[W]e recommend eliminating the proposed garage since that will alleviate some of the unnecessary wetland alterations." (Bd. R., Ex. 8.) "It is well settled that a fact-finder is free to accept or reject the testimony of an expert witness," so the Zoning Board in this matter was well within its authority to rely on the expert testimony offered by Ms. Steere. Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1089 (R.I. 2013) (citing Restivo, 707 A.2d at 671). Thus, Applicant failed to offer sufficient evidence to prove that the relief he sought was the least relief necessary

where his plans included the construction of a garage, and, as such, the Zoning Board's denial of the requested variance regarding this prong was not affected by error of law or clearly erroneous.

E

More than a Mere Inconvenience

In seeking a dimensional variance, the applicant has the burden of presenting evidence to the zoning board that the hardship if the variance is not granted "amounts to more than a mere inconvenience." Sec. 45-24-41(d); see Lischio, 818 A.2d at 691 (citing Viti v. Zoning Bd. of Review of Providence, 92 R.I. 59, 64-65, 166 A.2d 211, 213 (1960)). Essentially, "when the literal enforcement of the pertinent ordinance provisions would preclude a reasonably full enjoyment of the permitted use of the land, and relief, if granted, would not be contrary to those public interests which justify an exercise of the police power," a dimensional variance should be granted. Westminster, 103 R.I. at 392, 238 A.2d at 360.

The Applicant here argues that the record is clear that denial of the application is more than a mere inconvenience, but Applicant points to no specific testimony. Instead, he refers generally to the expert testimony offered in support of his application. The experts that testified, however, testified as if the only other option was to not build at all. Mr. Casali stated: "In my opinion it does [amount to more than a mere inconvenience if the variance is denied]. What else would you use this lot for? It's a legal lot of record in a residential R20 zone. That's all the applicant is asking, is to put a modest single-family home on this legal lot of record." (Hr'g Tr. at 21:11-15.) He did not, however, address the possibility of reducing the size of the proposed project by removing the garage, and that option is what the Zoning Board relied upon in making its Decision.

The Zoning Board noted that no evidence had been entered into the record by Applicant on the issue of why a smaller project that did not include a garage would be more than a mere inconvenience. See DeStefano v. Zoning Bd. of Review, City of Warwick, 122 R.I. 241, 246, 405 A.2d 1167, 1170 (1979) (holding that applicant must "demonstrate an adverse impact amounting to more than a mere inconvenience). The Applicant himself did not testify, and the Zoning Board was not free to speculate as to his housing needs. As discussed above, Ms. Steere recommended the removal of the garage from the project. (Bd. R., Ex. 8.) The Applicant sought to build a 768 square foot home with a 100 square foot deck and a 432 square foot garage—more than fifty percent of the proposed square footage for the house—and he offered no evidence that removal of the garage would be more than a mere inconvenience. See Gartsu, 104 R.I. at 720, 248 A.2d at 598 (finding that even if an applicant does testify, the Board cannot make inferences about the applicant's needs where his "testimony amounts to a vague, nebulous and inconclusive statement which is of no assistance . . . in establishing the requisite hardship which would entitle it to relief") (emphasis added). The Applicant need not prove that a denial of the variance would result in "loss of all beneficial use," but he must offer at least some evidence that a reduction in the size of the proposed project via removal of the garage would be more than a mere inconvenience. Cf. Gara Realty, Inc. v. Zoning Bd. of Review of S. Kingstown, 523 A.2d 855, 858 (R.I. 1987) (holding that applicant met burden of proof that deprivation would amount to more than a mere inconvenience where he sought to construct a single-family dwelling which would necessitate means for sewage disposal; to lack such a facility would preclude applicant from building on the premises entirely). This same project without the garage would satisfy the test for a dimensional variance. Here, however, the Applicant failed to offer proof to support his need for the garage, and this left the Zoning Board with no choice but to deny the requested

variances based on this prong. That Decision was not clearly erroneous in light of the reliable, probative, and substantial evidence, nor were Applicant's substantial rights prejudiced.

F

Litigation Expenses

Litigation expenses under G.L. 1956 § 42-92-1 may be awarded where an "individual or small business prevails in contesting an agency action, which was without substantial justification." Sec. 42-92-1(b). Success on appeal is a preliminary requirement for a court to consider awarding such expenses.

This Court notes that whether litigation expenses pursuant to § 42-92-1(b) apply to zoning matters is still not clear. Cf. Campbell v. Tiverton Zoning Bd., 15 A.3d 1015, 1023-25 (R.I. 2011) (finding that litigation expenses were not appropriate because the issuance of a building permit was not an adjudicatory proceeding under the act; however, this case did not determine whether a zoning decision where more than a building permit is at stake would constitute an adjudicatory proceeding). Nevertheless, assuming arguendo § 42-92-1(b) applies, Applicant has not prevailed. Thus, in this matter, litigation expenses are inappropriate.

IV

Conclusion

After reviewing the entire record, the Court finds that the Zoning Board's Decision is not in excess of statutory authority, arbitrary, or in violation of ordinance provisions by finding that, due to the inclusion of the garage, the relief Applicant sought was not the least relief necessary. The Decision is supported by the reliable, probative, and substantial evidence of record. Although the Zoning Board did abuse its discretion in finding that the hardship was not due to the unique characteristics of the land, the Zoning Board had before it reliable and probative

evidence to support a denial of the variances on the basis of the other three prongs. Therefore, the substantial rights of Applicant have not been prejudiced. Accordingly, the Decision of the Zoning Board is affirmed. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Folco v. Zoning Board of Review of the Town of Smithfield, et al.**
CASE NO:	**PC 2013-3267**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**June 16, 2015**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
For Plaintiff:	**Mary B. Shekarchi, Esq.**
For Defendant:	**Susan A. Chiariello, Esq.** **Edmund L. Alves, Jr., Esq.**