

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: October 13, 2015)

GREGORY P. SOLAS and LYNDA A. SOLAS
Plaintiffs/Appellants

v.

C.A. No. KC-2014-0243

ZONING BOARD OF REVIEW OF THE TOWN OF WEST WARWICK, and FRANK GIORGIO, III, PATRICIA MORGAN, ROBERT MESSIER, MICHAEL MCPHILLIPS, and RENE COUTU, in their capacities as members of the Zoning Board of Review of the Town of West Warwick
Defendants/Appellees

DECISION

STERN, J. Before this Court is an appeal from an October 30, 2013 decision (Decision) by the Zoning Board of Review of the Town of West Warwick (Zoning Board¹) denying Gregory P. and Lynda A. Solas (Appellants) a special use permit to convert their single-family home into a two-family home. Appellants contend that they have satisfied the criteria for a special use permit. Alternatively, the Zoning Board contends that its findings were supported by sufficient evidence. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the following reasons, this Court affirms the Decision of the Zoning Board.

¹ In addition to filing against the Zoning Board, the Appellants also filed suit against Frank Giorgio, III; Patricia Morgan; Robert Messier; Michael McPhillips; and Rene Coutu (collectively, Appellees) in their official capacities as members of the Zoning Board.

I

Facts and Travel

In June 2012, Appellants purchased 9 Smith Street in the Town of West Warwick, Rhode Island.² (Hr’g Tr. at 22:5-7.) The property was zoned R-8, which required a special use permit to convert a single-family residence into a multi-family residence. Despite its zoning restriction, the home had the appearance of a two-family residence. Id. at 4:14-21. Prior to purchasing the property, Appellants inspected it and noticed that there were “two kitchens, two, essentially, units.” Id. at 4:18-19. The seller’s agent informed them that the second unit “was an in-law apartment that could easily be converted into a two-family home.” Id. at 4:18-19. Additionally, the home had two driveways and two separate entrances. Id. at 15:9-15. Appellants did not secure a lender for the purchase price and therefore did not conduct an appraisal of the property. Id. at 4:19-21. Appellants also were not represented by a realtor. Id.

Subsequently, after purchasing the property, Appellants filed an “Application for Variance or Special Use Permit” with the Zoning Board seeking relief from Section 5 of the West Warwick Zoning Ordinance (Zoning Ordinance). See Application for Variance or Special Use Permit at 2. On October 30, 2013, an advertised public hearing was held. At this hearing, Appellants were represented by attorney Mary B. Shekarchi and presented testimony from Joseph Lombardo and Robert Boyer.

Mr. Lombardo testified as a land use and planning expert. (Hr’g Tr. at 7:1-4.) Prior to his testimony, he drafted a report³ that analyzed West Warwick’s Special Use Permit Provision⁴

² On the Town of West Warwick Assessor’s map as Plat 2, Lot 9.

³ The full report was introduced as Petitioner’s Exhibit 2 at the hearing.

⁴ The Zoning Board, in reviewing a special use permit, must apply the following criteria:

“10.2.1 The special use permit shall:

“10.2.1.1 Be compatible with neighboring land uses;

(Special Use Provision) and investigated the fitness of Appellants' property for a special use permit. Id. at 7:22-25. At the hearing, Mr. Lombardo testified to the findings of this report as it pertained to the enumerated criteria of the Special Use Provision. See supra, n.3.

In addressing each subsection of the Special Use Provision, Mr. Lombardo testified that the proposal would be compatible with neighboring uses because the neighborhood was “a medium density residential area” that comprised a “mixture” of residential types. Id. at 9:4-6. He opined that roughly twenty-five percent of the neighborhood consisted of multi-family homes. Id. at 9:11-12. Further, he asserted that the proposal would not create a nuisance because the property was well maintained, fenced in, and had two separate driveways for off-street parking. Id. at 9:18-23. Mr. Lombardo also testified that the proposal would not hinder any future development of the town; rather, it would “likely enhance the values in that neighborhood.” Id. at 10:10-11. He further stated that the proposal conformed to all applicable sections of the R-8 zoning provision that pertained to multi-family homes.⁵ Id. at 10:20-25.

After concluding his testimony regarding the criteria of the Special Use Provision, Mr. Lombardo testified that the proposal would advance several land use goals and policies. He explained that one such goal is to provide a land use pattern that is capable of meeting present and future needs of the community. Mr. Lombardo noted that “two-family and three-family

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- “10.2.2.2 Not create a nuisance in the neighborhood;
 - “10.2.2.3 Not hinder the future development of the town;
 - “10.2.2.4 Conform to all applicable sections of this ordinance; and
 - “10.2.2.5 Be in conformance with the purposes and intent of the West Warwick comprehensive plan and applicable standards of this ordinance.”

⁵ The property is zoned R-8, which requires a minimum of 12,000 square feet for a two-family home. Id. at 11:1-2. In fact, Mr. Lombardo explained that the property has in excess of 14,000 square feet. Id. at 11:2-3. He noted that this is “probably the number one consideration,” and it is “very important” that the proposal “meet the density requirement of the zoning district.” Id. at 11:6-12.

homes meet a housing need for people who are not in the housing market to purchase a home, who want to rent a home. But it's in a nice, stable neighborhood where there is a mix of single and multi-family homes.” Id. at 11:18-12:3.

Mr. Lombardo concluded his testimony by asserting that the proposal would advance several “purposes and intents” of the Town of West Warwick’s comprehensive plan. He explained that “[t]here’s nothing out of character here. The intensity is within—well within the R-8 zoning district.” Id. at 12:17-19. In addition, “[w]hen you look at [the home], it has all the attributes of a two-family home, with two driveways[,] and with some small improvements . . . it can become a very functioning two family home.” Id. at 12:21-13:1.

After Mr. Lombardo concluded his testimony, Ms. Morgan—a member of the Zoning Board—stated that she was very familiar with the area where the house is located. Id. at 13:21-22. She noted that there is only one multi-family home on that street, which was built in the early 1800s, and except for this house, the area consists of primarily single-family residences. Id. at 13:22-14:1. From her personal knowledge of the neighborhood, Ms. Morgan questioned Mr. Lombardo regarding how he concluded that multi-family homes constituted twenty-five percent of the neighborhood. Mr. Lombardo explained that his analysis and observations included the area “two or three streets over” and was not limited to the immediate area surrounding the home. Id. at 14:7-17.

Following Mr. Lombardo, Mr. Boyer testified as an expert witness in the field of surveying. Id. at 17:4-20. After stating that the proposal meets all the R-8 zoning regulations and setback requirements, and noting that the property has two driveways with an area sufficient for additional parking, Mr. Boyer concluded that “it’s a pretty sound piece of property.” Id. at 19:24-25. Mr. Boyer also explained that the interiors of both apartments were completely

finished and both were occupied. Id. at 20:2-8. Attorney Shekarchi informed the Zoning Board that the Appellants’ son, along with his girlfriend and a co-worker, reside in the in-law apartment. Id. at 20:24-21:1.

Fred Presley, town manager and planner for West Warwick, also testified. He explained that the previous owner had originally been approved by the Zoning Board to build an “addition” to the home. Id. at 25:3-8. The previous owner then, in violation of the granted variance, installed a full kitchen in the addition and converted it into an illegal in-law apartment. Id. at 21:15-17. Mr. Presley clarified that “[w]hat [the proposal] was approved for was an addition with a bar and a sink.” Id. at 25:3-4. He noted that during the building inspector’s final review, the addition conformed to the R-8 zoning restrictions and the granted variance.⁶ Id. at 25:6-8. It was after the final inspection that the previous owner reconstructed the addition into an in-law apartment. Id. at 25:9-10. Mr. Presley concluded that “[i]t was clear that the buyer was not informed correctly.” Id. at 25:19-20.

As the Zoning Board discussed whether to grant or deny the application, Ms. Morgan adamantly did not want to condone the illegality of the in-law apartment. She continuously asserted that “the whole neighborhood is single-family homes,” and “that neighborhood is really single family-homes; it is. It’s not duplexes.” Id. at 28:5-15, 42, 43. She stated her desire to follow precedent, which traditionally does not permit in-law conversions into duplexes. Id. at 53:13-25. She explained:

“[W]e have consistently said that we do not want in-law apartments to be turned into two retail apartments. We’ve been really consistent on that, and there’s a reason behind that. And just because this was done illegally and because they were duped into

⁶ Mr. McPhillips, a member of the Zoning Board, pointed out that the addition was close to three times the size of the original structure. Id. at 35:20-21.

buying this, doesn't mean that—that we should change our posture on this” Id. at 42:13-20.

Alternatively, the Chairman explained that this situation was distinguishable from other petitions for “in-law” conversions because the addition (or in-law apartment) was already added to the house and would remain there regardless of the Zoning Board’s ruling. He expounded:

“But it’s still already there. You can’t—you can’t change the appearance of the property without knocking the building down. You can’t change—even if it remains as an in-law illegally and somebody lives on the other side, you’re not going to change the traffic flow, you’re not going to change the density. You’re not going to change any of that.” Id. at 43:15-22, 52-53.

Ms. Morgan rebutted that an approval of the proposal would potentially invite more people to live on the property. Id. at 44:8-10. Zoning Board member Coutu agreed, pointing out that the number of bedrooms could hypothetically increase because the unfinished basement could be renovated to provide for additional bedrooms. Id. at 45-47.

With respect to whether the conversion was compatible with neighboring uses, Ms. Morgan explained:

“I know the area very well, and it is single-family homes, except for one structure, and that is the street behind the street that it’s on and the street in front. They’re single-family homes in there, so I don’t think it is compatible. Like I said, there’s one large building that’s been there since the 1800’s that’s multifamily. Other than that, it’s single family homes.” Id. at 58:4-11.

Ms. Morgan also questioned whether the proposal would create a nuisance in the neighborhood due to the increased volume in cars. She further explained that “yes, we could put parking on the side, but you’d be tempted—I’m afraid that people would be tempted to put them in the—in the street, and that would create a nuisance.” Id. at 58:21-24.

Zoning Board members Coutu and Morgan voted against the Appellants’ petition; members McPhillips, Messier, and the Chairman voted for the petition. Id. at 60:3-13.

Appellants' petition was denied because a special use permit requires a majority vote of four to one. Id. at 60:14-20.

On November 19, 2013, the Zoning Board issued a written Decision. See Petition 2013-4. In denying the Appellants' application, the Zoning Board based its Decision on two principal factual findings: that the proposed conversion (1) would not be compatible with neighboring land uses, and (2) would create a nuisance in the neighborhood. See id. In determining that the proposal was not compatible with neighboring land uses, the Zoning Board made the following findings of fact:

“Based on the personal knowledge of member Patricia Morgan the area in which the property is located is single family except for one multi-family dwelling unit constructed in the 1800's. The area is single family on the street behind, the street on which the property is located and the street in front.” Id.

In addition, the Zoning Board found that the proposal would constitute a nuisance because:

“At present the residence has 8 bedrooms used by one family. Based on personal knowledge of member Patricia Morgan there are usually 2 automobiles parked at the property. Conversion to a 2 unit family dwelling could lead to more automobiles with tenants being tempted to park on the street causing a nuisance.” Id.

Subsequently, on December 4, 2013, Appellants timely filed a “Zoning Appeal Complaint” with this Court.

II

Standard of Review

This Court's appellate review of a zoning board's decision is statutorily limited by § 45-24-69(d), which provides the following:

“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.”

This Court is tasked to “examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.” Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981). “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.” Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell, 424 A.2d at 647). Importantly, the trial judge may not “substitute [his or her] judgment for that of the zoning board if [he or she] can conscientiously find that the board’s decision was supported by substantial evidence in the whole record.” Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1083 (R.I. 2013) (quoting Apostolou v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). In fact, in evaluating a zoning board’s decision, “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). Rather, the Court must give deference to the zoning board on findings of fact. Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008). “This is due, in part, to the principle that ‘a zoning board of review is presumed to have knowledge concerning

those matters which are related to an effective administration of the zoning ordinance.” Id. (quoting Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)).

III

Special Use Permits

Chapter 24 of Title 45 of the Rhode Island General Laws—known as “The Zoning Enabling Act”—permits the issuance of special use permits by a zoning board. Sec. 45-24-42(a). “Generally, a special-use permit relates to a specific use the owner wishes to undertake on the parcel—a use that is not allowed under the ordinance absent zoning board approval.” Lloyd, 62 A.3d at 1085 (citing § 45-24-31(57)). An applicant for a special use permit must demonstrate that the “proposed use will not result in conditions that will be inimical to the public health, safety, morals and welfare.” Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991); Toohy v. Kilday, 415 A.2d 732, 736 (R.I. 1980); Hester v. Timothy, 108 R.I. 376, 385-86, 275 A.2d 637, 642 (1971). Section 45-25-42 requires that a zoning board’s special use permit ordinance must: (1) specify the particular uses authorized by the special use permit; (2) describe the conditions and procedures for special use permits; (3) establish the criteria for the issuance of special use permits in each category; and (4) comply with enumerated due process requirements. The Town of West Warwick delegates to its Zoning Board the authority to approve special use permits. See Zoning Ordinance § 10.1 (2011). Section 10.2.1 of the Zoning Ordinance provides:

“10.2.1 The special use permit shall:

- “10.2.1.1 Be compatible with neighboring land uses;
- “10.2.2.2 Not create a nuisance in the neighborhood;
- “10.2.2.3 Not hinder the future development of the town;

- “10.2.2.4 Conform to all applicable sections of this ordinance; and
- “10.2.2.5 Be in conformance with the purposes and intent of the West Warwick comprehensive plan and applicable standards of this ordinance.”

The purpose of such a statute is to “conditionally permit[]” nonconforming uses by special use permits. See Westminster Corp. v. Zoning Bd. of Review of Providence, 103 R.I. 381, 391, 238 A.2d 353, 359 (1968).

IV

Analysis

On appeal, Appellants contend the following: (1) the Zoning Board’s finding that the proposed use was not compatible with neighboring land uses was clearly erroneous because this finding was contrary to reliable, probative and substantial evidence in the record; (2) there is no evidence in the record to support the Zoning Board’s finding that the proposed use would cause a nuisance; and (3) the dissenting Zoning Board members abused their discretion when they failed to consider the evidence presented by the expert witnesses. The Appellees counter that the Zoning Board’s Decision is based on substantial evidence from (1) Ms. Morgan’s personal knowledge and (2) the record. Overall, Appellants contend that the Zoning Board’s Decision was clearly erroneous and an abuse of discretion because it relied upon the personal knowledge of Ms. Morgan rather than on the testimony of Mr. Lombardo and Mr. Boyer.

1

Neighboring Land Uses

Appellants aver that the Zoning Board’s finding that the proposal was not compatible with neighboring land uses was clearly erroneous because it was based on Ms. Morgan’s personal knowledge rather than the reliable, probative, and substantial evidence in the record.

The Zoning Board maintains that Ms. Morgan’s personal knowledge as to the composition of the neighborhood was sufficient evidence for it to find that the proposal was not compatible with neighboring land uses.

It is well settled that members of a zoning board may employ their personal (or “special”) knowledge in rendering a decision. See Kelly v. Zoning Bd. of Review of Providence, 94 R.I. 298, 303, 180 A.2d 319, 322 (1962). This notion is predicated on the “presumption that zoning boards of review have a special knowledge as to matters that are peculiarly related to the administration of a zoning ordinance.” Trovato v. Chiaradio, 95 R.I. 326, 329, 186 A.2d 736, 738 (1963). However, a zoning board’s use of personal knowledge is not a carte blanche grant of authority for it to issue arbitrary decisions. While a court must be mindful of the possession of special knowledge, “it will not presume that in making a challenged decision the board acted pursuant to such special knowledge in the absence of some disclosure to that effect in the record.” Kelly, 94 R.I. at 303, 180 A.2d at 322; see also 3 Rathkopf’s The Law of Zoning and Planning § 57:61 (4th ed.) (“As a general rule, before the special or personal knowledge of the members of [a] Board may be used as a basis for its decision, such facts must be set forth in the record . . .”).

In several cases, zoning boards have failed to disclose such personal knowledge. In Toohey, our Supreme Court remanded a zoning board’s decision because the record was “barren of any disclosure” of the personal knowledge used in denying the application and the board failed to reveal the nature of its personal knowledge. 415 A.2d at 738.⁷ Additionally, in DeStefano v. Zoning Bd. of Review, City of Warwick, the Court held that a zoning board’s

⁷ The Court noted that blanket assertions that the board was “familiar with the area” were inadequate. Id. at 737. Rather, board members must disclose the nature of their personal knowledge on the record. Id. at 738.

decision was “arbitrary and an abuse of discretion” because “[d]espite the board’s reference to having knowledge of the conditions in the area, the record . . . contain[ed] no disclosure as to what conclusions it drew from this knowledge.” 122 R.I. 241, 247, 405 A.2d 1167, 1171 (1979) (superseded on other grounds). The Court further concluded that “the record [was] barren of any disclosure of the facts” upon which the board made its decision. Id.

If a zoning board discloses its personal knowledge on the record, that knowledge will constitute sufficient evidence to uphold a board’s findings. See Restivo v. Lynch, 707 A.2d 663, 666 (R.I. 1998); Perron v. Zoning Bd. of Review of Burrillville, 117 R.I. 571, 576, 369 A.2d 638, 641 (1977). In Restivo, the zoning board members based their decision solely upon personal knowledge of the poor water drainage of the proposed site. 707 A.2d at 666. Nevertheless, the Court explained that this type of personal observation “constituted ‘legally competent evidence upon which a finding may rest’” as it was properly disclosed on the record. Id. (quoting Perron, 117 R.I. at 576, 369 A.2d at 641); see Dawson v. Zoning Bd. of Review of Cumberland, 97 R.I. 299, 302, 197 A.2d 284, 286 (1964) (holding that board member’s observations and personal knowledge “so disclosed in the record [] constitut[ed] legal evidence capable of sustaining a board’s decision”).

Here, the Zoning Board’s finding that the proposal was not compatible with neighboring land uses—because the immediate surrounding area consisted mainly of single-family residences—was not clearly erroneous because it was supported by Ms. Morgan’s personal knowledge. See Toohey, 415 A.2d at 738. Ms. Morgan immediately, on the record, stated her familiarity with the area’s residential make-up and confronted Mr. Lombardo concerning his “medium density” classification of the neighborhood, stating:

“You know, I’m very familiar with that area, too. And except for the one large, I guess it’s a three-family, that’s across the street

that's probably been there since the 1800s, they really are single-family homes in that area. Out on Wakefield Street, there are some rental properties, but—but it's all single-family homes.” (Hr’g Tr. 13:21-14:4).

Further, Ms. Morgan stated that “[t]he whole street. Smith Street is really all single-family,” to which Mr. Lombardo conceded. Id. at 14:18-19. In fact, during his inspection, Mr. Lombardo had to travel two streets over before encountering multi-family homes. Id. at 14:20-15:3. Several times later in the hearing, Ms. Morgan reaffirmed that “[i]t’s a neighborhood of single-family homes”; “the whole neighborhood are [sic] single-family homes, except for one structure that’s been there forever”; “I just know the whole neighborhood is single-family homes”; and “[a]nd I know that that neighborhood is really single-family homes; it is. It’s not duplexes.” Id. at 40:7-8, 10-13; 42:24-25; 43:6-7. She further explained that the street was “a quiet, little neighborhood. Once you come in from Wakefield Street, it’s single-family homes.” Id. at 50:22-24. Lastly, she stated:

“I know the area very well, and it is single-family homes, except for one structure, and that is the street behind the street that it’s on and the street in front. They’re single-family homes in there, so I don’t think it is compatible. Like I said, there’s one large building that’s been there since the 1800’s that’s multifamily. Other than that, it’s single-family homes.” Id. at 58:4-11.

This Court is satisfied that Ms. Morgan’s numerous references on the record to her personal knowledge of the neighborhood’s residential make-up is sufficient to sustain the low burden explained in Kelly and Toohey. See Toohey, 415 A.2d at 738; Kelly, 94 R.I. at 303, 180 A.2d at 322. Ms. Morgan was merely required to make “some reasonable disclosure” as to her personal knowledge on the record. See Kelly, 94 R.I. at 303, 180 A.2d at 322. The record before this Court is neither barren of a disclosure of personal knowledge nor contains bald assertions of personal knowledge; rather, it is rife with numerous references to Ms. Morgan’s

personal knowledge of the single-family character of the neighborhood. See Toohey, 415 A.2d at 737-38; see also DeStefano, 122 R.I. at 247, 405 A.2d at 1171. As a result, the record contains substantial evidence⁸ upon which the Zoning Board could rely in finding that the Appellants' proposal was not compatible with neighboring land uses. See Toohey, 415 A.2d at 737-38; Kelly, 94 R.I. at 303, 180 A.2d at 322. Therefore, it was not clearly erroneous for the Zoning Board to rely on this finding in denying Appellants' petition.

2

Parking Nuisance

Additionally, Appellants contend that the Zoning Board's finding that the proposal would constitute a nuisance was clearly erroneous because there is no evidence in the record to support this finding. The Zoning Board asserts that the testimony at the hearing and Ms. Morgan's personal knowledge constitute substantial evidence for the Zoning Board to find that the proposal would create a nuisance.

In the purview of zoning, the Supreme Court has applied traditional tort standards in determining what constitutes a nuisance. See DeNucci v. Pezza, 114 R.I. 123, 128, 329 A.2d 807, 809-10 (1974). "It is a well-recognized principle that compliance with a zoning ordinance does not immunize a person from the consequences of his making an unreasonable use of his land whereby he invades the private rights of his neighbor." Id. at 127, 329 A.2d at 809. The Court explained that "[t]o hold otherwise would be tantamount to allowing a regulatory agency to license a nuisance." Id. at 128, 329 A.2d at 810. Even under color of a zoning ordinance,

⁸ This Court notes that "substantial evidence" is a misnomer because it implies something greater than what is actually required. In fact, it is a relatively low burden, merely requiring evidence amounting to "more than a scintilla." Lischio, 818 A.2d at 690 n.5.

“[t]he rule of law is well settled that every person is bound to use his property so as not to injure that of another, or interfere with the reasonable and proper enjoyment thereof. . . .” Id.

In determining whether the proposal would constitute a nuisance, the Zoning Board had the benefit of Ms. Morgan’s disclosed personal knowledge. Specifically, the Zoning Board considered whether the increased volume of cars would affect the neighborhood. On the record, Ms. Morgan voiced her concerns about the increased volume of cars parking on the street based on her personal knowledge of the property. She stated: “[r]ight now [cars] [are] not an issue because it’s really pretty much used as a single-family home. I’ve never seen a lot of cars in and out of there. I’ve not seen them piled up on the street in front.” Id. at 54:16-20. She also stated that there has “only ever been like two cars in the—in the driveway.” She further explained that “number of cars is pretty consistent.” Id. at 58:17-18; 43:25. However, she noted that “if you break [the house] into two, now you’re providing more cars” and “if you start filling up two apartments with multiple adults, you could have a lot more cars.” Id. at 44:1-2; 58:18-20. More specifically, Ms. Morgan pointed out “[t]here’s six bedrooms in this structure, four on one side, two on the other. That’s a lot of cars if you start putting teenagers in some of those bedrooms.” Id. at 50:14-15.

Additionally, Mr. Boyer, the Appellants’ expert, explained “[i]f—the number of bedrooms will obviously control the cars, okay, or the cars will control the bedrooms. There’s plenty of room to add quite a few cars to this property.” Id. at 50:8-11. This evidence indicated that there is a correlation between the number of bedrooms and number of cars parking at the home. Ms. Morgan quickly stated that was “one of the issues,” and the Chairman and Mr. McPhillips agreed. Id. at 50:14-15.

Appellants did not dispute Ms. Morgan’s contention that an increased volume of cars would constitute a nuisance. Mr. Lombardo, like Mr. Boyer, did observe that there were two driveways and room for off-street parking; however, he offered no evidence to rebut or alleviate Ms. Morgan’s concerns. Appellants, now on appeal, object to the Zoning Board’s finding that the proposal would constitute a nuisance, arguing that it is based on conjecture and speculation.

This Court, in its appellate capacity, cannot assess the weight of evidence. See Kirby, 634 A.2d at 290. It may only review the record to ensure that the Zoning Board’s decisions, conclusions, and inferences are based on substantial evidence in the record. See Lischio, 818 A.2d at 690 n.5 (substantial evidence is “relevant evidence that a reasonable mind might accept as adequate to support a conclusion”) (emphasis added). A conclusion, based on Ms. Morgan’s personal observations—that an additional apartment will yield an increased volume of cars—is not so unreasonable as to render it clearly erroneous under the low “substantial evidence” burden. This is the type of conclusion that a “reasonable mind might accept” from evidence in the record. Id. (emphasis added). Moreover, this Court is bound to give this finding deference. See Pawtucket Transfer, 944 A.2d at 859. As such, Ms. Morgan’s observations, which were disclosed on the record, constitute substantial evidence to sustain the Zoning Board’s findings.

3

Expert Testimony

Lastly, Appellants contend that the Zoning Board members abused their discretion when they gave more weight to Ms. Morgan’s personal knowledge than to the testimony of their expert witness, Mr. Lombardo, regarding compatible neighboring land uses. Conversely, the Zoning Board maintains that Mr. Lombardo’s testimony was directly contradicted by Ms. Morgan, and therefore it could use its discretion to disregard his testimony.

“[T]here is no talismanic significance to expert testimony. It may be accepted or rejected by the trier of fact.” Restivo, 707 A.2d at 671. However, it is also true that “if expert testimony before a zoning board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony.” Murphy v. Zoning Bd. of Review of S. Kingstown, 959 A.2d 535, 542 (R.I. 2008). The Murphy Court explained that expert testimony will only “carry the day” when it is devoid of any indication that the expert’s opinion was attacked or discredited. Id. at 542. Nevertheless, “[i]t should go without saying that expert testimony proffered to a zoning board is not somehow exempt from being attacked in several ways,” either by the personal knowledge of board members, or by discrediting the expert through examination by members of the zoning board. Id. at n.6; see also Salve Regina, 594 A.2d at 882 (a board must accept expert testimony that is undisputed, unless the board can demonstrate that it relied upon its own personal knowledge); DeStefano, 122 R.I. at 247, 405 A.2d at 1171.

Here, Mr. Lombardo testified that the Appellants’ proposal would be compatible with neighboring land uses because the surrounding homes constituted a “medium density residential area”; however, Ms. Morgan argued that it was comprised of mainly single-family homes. (Hr’g Tr. 9:4, 13-14.) The record reflects that Mr. Lombardo acknowledged that Ms. Morgan was correct in stating that the immediate area around the Appellants’ house was predominantly single-family homes. Id. at 14-15. Further, he and Ms. Morgan disagreed as to what area to consider when deciding whether the proposal was compatible with neighboring land uses—Ms. Morgan maintained that the immediate area should be the primary factor, while Mr. Lombardo argued that the area should consist of a much larger sample size. Moreover, Mr. Lombardo’s testimony that the proposal would not create a nuisance was challenged by the Zoning Board’s

collective, personal knowledge when members of the Zoning Board maintained that more cars would be a “problem.”⁹

Mr. Lombardo’s testimony was, in fact, contested by Ms. Morgan and other members of the Zoning Board; therefore, the Zoning Board did not have to treat Mr. Lombardo’s testimony as dispositive and was permitted, in its discretion, to accept or reject his testimony. See Murphy, 959 A.2d at 542 n.6. The Zoning Board’s credibility weighing of Mr. Lombardo’s disputed and contradicted testimony does not constitute an abuse of discretion. As such, the Zoning Board’s findings must be undisturbed as they are supported by substantial evidence.

V

Conclusion

Upon review of the entire record, this Court finds that the Zoning Board’s Decision was not an abuse of discretion and it was supported by reliable, probative, and substantial evidence in the record. Substantial rights of the Appellants have not been prejudiced. Accordingly, this Court AFFIRMS the Decision of the Zoning Board. Counsel shall submit to the Court an appropriate order for entry.

⁹ This Court observes that Mr. Boyer’s testimony was wholly undisputed; however, his testimony had no relevance as to whether the proposal would be consistent with neighboring uses. Rather, he testified as to current zoning restrictions, specifically setbacks and the possibility of additional parking.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Solas v. Zoning Board of Review of the Town of West Warwick, et al.

CASE NO: KC-2014-0243

COURT: Kent County Superior Court

DATE DECISION FILED: October 13, 2015

JUSTICE/MAGISTRATE: Stern, J.

ATTORNEYS:

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