

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: August 22, 2016)

STEVEN CLARKE, TRUSTEE, :  
PATRICIA SMITH and BRUCE :  
SMITH :

v. :

C.A. No. KC-2015-0436

DONALD G. MORASH, JR., BEVERLY :  
J. STURDAHL, RICHARD K. CORLEY, :  
EVERETT J. O'DONNELL, and :  
JULIE A. FINN, in their capacity as :  
MEMBERS OF THE ZONING BOARD :  
OF REVIEW OF THE CITY :  
OF WARWICK :

**DECISION**

**RUBINE, J.** Before the Court is an appeal of a decision from the Zoning Board of Review of the City of Warwick, Rhode Island (the Zoning Board). Appellants Steven Clarke, Trustee, Patricia Smith, and Bruce Smith (collectively, Appellants) ask the Court to set aside the Zoning Board’s decision concerning property at 108 Airport Road in the City of Warwick. For the following reasons, the Court vacates the Zoning Board’s decision and remands the case for further proceedings.

**I**

**Facts and Travel**

Appellants own the 108 Airport Road property that is the subject of this controversy. The property contains two buildings: a residence and a garage. Appellants operated a home business out of the garage in conformity with applicable residential zoning ordinances. But, in 2014 they sought a use variance from the Zoning Board,

seeking to convert the garage into a full-time office. At the time of the 2014 variance petition, Appellants resided in the property. After a hearing on the matter in which testimony and evidence was presented, both from Appellants and from abutting landowners, the Zoning Board issued a decision approving the use variance. Zoning Board R. Ex. C2, Decision of the Zoning Board, Petition #10121 (May 20, 2014) (hereinafter 2014 Decision).

In 2015, Appellants petitioned the Zoning Board for an amendment to the 2014 approval, to approve an alternative parking plan. In all material respects the instant application is identical to the mixed-use request in 2014, save for the alternative parking schematic. Appellants also no longer reside on the premises and seek to rent the residential property, but this does not appear to alter the mixed use approved in 2014, as it remains split between residential and commercial uses. Apparently, the Zoning Board used this new application to revisit the conclusion reached in 2014, and the result was to deny the mixed use that had previously been approved. The Zoning Board treated this new application as a petition for a new use variance and voted to deny it, resulting in the denial of the previously-approved mixed use at the 108 Airport Road property.

As it was not their intention to seek reversal of the 2014 Decision, Appellants ask the Court to reverse or vacate this 2015 decision.

## **II**

### **Standard of Review**

The Court's review of decisions from a zoning board is limited as prescribed by statute:

“(d) 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.”  
G.L. 1956 § 45-24-69(d).

### **III**

#### **Analysis**

After a review of the record below, including the 2014 Decision, it is quite clear to the Court that the Zoning Board’s decision in this matter is made upon unlawful procedure, clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record, and an abuse of discretion. The 2014 Decision is quite clear in its terms:

“The following is the decision on your Petition #10121, heard by the Warwick Zoning Board of Review on April 8, 2014 for a use variance and dimensional variance to convert garage of existing residential home to an insurance office, house to remain residential . . . [t]he proposal is to convert the existing garage into the office with the existing residential single-family dwelling to remain.

....

“1. The hardship from which the petitioner 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 not due to a physical or economic disability of the applicant. The subject property is located on a very heavily traveled roadway comprising of mixed use. The structure has been existing on the property for many years.

“2. Said 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. The configuration of the lot and the location of the structure on the lot is not due to any prior action of the petitioner.

“3. The granting of the requested variance will not alter the general characteristic of the surrounding area or impair the intent or purpose of this zoning ordinance or the comprehensive plan of the City. The proposed use is in keeping with the character of the subject property and the surrounding land uses. There are many offices, formerly dwellings located along Airport Road.

“4. The relief requested is the least relief necessary. The proposed area for the off street parking is the largest part of the lot for the location of the off street parking.

“5. Literal enforcement of the dimensional regulations in this case would constitute more than a mere inconvenience for the applicant. There is no other reasonable alternative for the petitioner without seeking greater dimensional relief.

“Based on the foregoing, the Board voted to grant the petitioner’s application, by a four to one vote (4 to 1) for a use variance and a dimensional variance with the following stipulations and conditions.

....

“1. That the parking space located to the east of the handicap ramp be marked to indicate that the space would be for a turn around area only.

“2. That there shall be no more than one (1) full time and one (1) part time employee for the proposed insurance office.

“3. That this decision must be recorded in the Land Evidence Records in the City Clerk’s Office before a

building permit/certificate of occupancy is issued.” 2014 Decision, at 1-3 (emphasis added).

The 2014 Decision was quite clearly a decision based on an application for a use variance. At the time of the 2015 hearing, which is the subject of this appeal, the Zoning Board appears to have considered the property not to have received any such variance. This is obviously contrary to the record of the 2014 proceedings. It was error for the Zoning Board to convert Appellants’ petition to amend the 2014 Decision into a new application for a use variance, and it was further error to then deny such a variance despite the fact that one had already been granted in 2014.

The Zoning Board argues that it is without jurisdiction to hear a petition to amend a previous decision on a use variance. But, if that is the case, then the appropriate course of action for the Zoning Board would be to deny and dismiss Appellants’ petition on those grounds, not to convert it into a new petition for a use variance in order to revisit and reverse the 2014 Decision. The question of the Zoning Board’s jurisdiction to hear a petition to amend a prior decision not being properly before the Court on appeal at this time, the Court expresses no view as to the resolution of that question.

#### **IV**

#### **Conclusion**

For the foregoing reasons, the decision of the Zoning Board is vacated, and this matter is remanded for further proceedings not inconsistent with this Decision.



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

---

**TITLE OF CASE:** Steven Clarke, Trustee, et al. v. Donald G. Morash, Jr., et al.

**CASE NO:** KC-2015-0436

**COURT:** Kent County Superior Court

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

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

**ATTORNEYS:**

**For Plaintiff:** Michael J. McEntee, Esq.

**For Defendant:** Peter D. Ruggiero, Esq.