

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: March 24, 2016)

CITY OF EAST PROVIDENCE, :  
Plaintiff/Appellee :

v. :  
:

C.A. No. PC 2015-5308

CITY OF EAST PROVIDENCE ZONING :  
BOARD OF REVIEW, V.S.H. REALTY, INC. :  
AND CUMBERLAND FARMS, INC. :  
Defendants/Appellants :

**DECISION**

**LANPHEAR, J.** Cumberland Farms, Inc. and the City of East Providence (Appellants) appeal the November 13, 2015 decision of the City of East Providence Zoning Board of Review (Zoning Board) denying Cumberland Farms, Inc.’s request for several dimensional use variances in order to expand the size of its current gas station and convenience store. The Defendant, the Zoning Board, opposes the appeal. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, this Court reverses the Zoning Board’s decision, thereby granting Cumberland Farms, Inc.’s requests for dimensional relief.

**I**

**Facts and Travel**

V.S.H. Realty, Inc. and Cumberland Farms, Inc. (Cumberland Farms) proposed an expansion of its pre-existing convenience store and gas station, which is located on Assessor’s Map 309, Block 6, Parcels 5, 6, and 7, on Wampanoag Trail and Pawtucket Avenue in East

Providence (Parcels). Before the requests for dimensional relief were ripe for review by the Zoning Board, however, the East Providence Zoning Code (Zoning Code) required<sup>1</sup> that Cumberland Farms obtain approval for a Zoning Map Amendment and a Comprehensive Plan Amendment (Amendments)<sup>2</sup> from the East Providence City Council (City Council), as well as an overall design approval from the City Development Plan Review Committee<sup>3</sup> (Committee), pertaining to the Parcels. See G.L. 1956 §§ 42-45-1 et seq.

On April 21, 2015, in compliance with the Zoning Code, Cumberland Farms obtained approval from the City Council of the Amendments regarding the Parcels from an existing designation of “low-density residential” to a “commercial 2 retail” zone.<sup>4</sup> This zoning change is subject to the limitation that a convenience store and gas station is the only permitted use. See City of East Providence Zoning Board of Review, Case Number 6579, Nov. 13, 2015 Decision (Zoning Board’s Decision).

Thereafter, on August 3, 2015, the Committee issued a conditional approval of the overall proposed design and found that the proposal is compatible and consistent with the goals of the

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<sup>1</sup> This requirement is a result of the condition that certain proposals, including Cumberland Farms’ application, must be reviewed by the City Development Plan Review Committee prior to consideration before the Zoning Board.

<sup>2</sup> Both Amendments fall under the jurisdiction of the City Council.

<sup>3</sup> As defined in Article VIII of the Zoning Code, the Committee has jurisdiction over design issues, including, but not limited to, compatibility and consistency with the goals of the City Comprehensive Plan, landscaping, buffering, parking area landscaping requirements, parking area design standards, walls and fences, drainage, storm water management, impermeable surface coverage, and lighting. See §§ 42-45-1 et seq.

<sup>4</sup> The approval was subject to the following conditions: (1) that the use of the property be restricted to a convenience store and gas pumps; (2) that in the event the properties are not developed into, or used as, a convenience store and gas pumps, the properties would revert to their original status as “low-density residential” designated on the generalized land use map of the City’s Comprehensive Plan; and (3) that all of the landscaping, storm water management, lighting, buffer requirements and parking area design standards are met, which are defined in Article VIII of Chapter 19 of the Zoning Code or a reasonable attempt as shall be determined by the Committee is made by the applicant to meet the minimum standards.

City's Comprehensive Plan. Specifically, the Committee found that Cumberland Farms' proposal to develop a convenience store and gas station is a lawfully permitted use, as it amounts to an expansion of a pre-existing convenience store and gas station.<sup>5</sup>

After receiving each of these approvals, Cumberland Farms then petitioned the Zoning Board seeking approximately ten requests for dimensional relief to expand its pre-existing convenience store and gas station. See Zoning Board's Decision. In order to do so, Cumberland Farms submitted the following requests for dimensional variances to the Zoning Board: to permit (1) that the side-yard setback requirement of the new retail facility be only approximately two and one-tenths<sup>6</sup> (2.10) feet from the southerly property boundary (Roof Overhang Variance); (2) the redevelopment without requiring that it meet the two hundred (200) foot setback<sup>7</sup> from a church requirement, resulting in the redevelopment being situated approximately one hundred and forty-six (146) feet from the church situated to the northeast across Wampanoag Trail (Church Variance); (3) the redevelopment to place an off-street loading space directly north of the trash storage area<sup>8</sup> (Trash Variance); (4) the introduction of an off-street parking area that

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<sup>5</sup> Presently, two residential structures jut into the commercial zone where Cumberland Farms seeks to develop. See Zoning Board's Decision. These residences are owned by the Cumberland Farms' developer and are surrounded on three sides by a strip mall, the existing Cumberland Farms, and Rhode Island Route 114A, also known as the Wampanoag Trail. See id. Cumberland Farms' proposal to the Board seeks to demolish those residential structures and expand its convenience store and gas station, effectively squaring off the strip mall. See id.

<sup>6</sup> Section 19-136(b) of the Zoning Code requires that the minimum side setback measurement shall be parallel to the lot line at the minimum distance of the required setback, but where no minimum side setback is required, such side setback shall not be less than five feet. See § 19-136(b).

<sup>7</sup> Section 19-188(b) of the Zoning Code requires that all buildings shall be located at least 200 feet from any church or other place of worship. See § 19-188(b).

<sup>8</sup> Section 19-261(b)(4) of the Zoning Code prohibits trash storage areas, including dumpsters, from interfering with off-street parking and loading areas. See § 19-261(b)(4).

will be improved with deficient landscape buffering with an eight-tenths<sup>9</sup> (0.8) foot variance, resulting in a portion of said landscape buffer to be as narrow as four and two-tenths (4.2) feet in overall width; (5) the redevelopment without provisions for sufficient off-street parking<sup>10</sup> (Parking Variance); (6) the introduction of an off-street loading space that may potentially conflict with the proposed trash storage area<sup>11</sup> resulting from the placement of an off-street loading space directly north of the proposed trash storage area and to the immediate east of the proposed retail facility (Loading Variance); (7) a prohibited free-standing sign<sup>12</sup> to benefit the adjacent Coastway Bank Property (Bank Sign Variance); (8) the use of a digital pylon sign<sup>13</sup> to show the gas prices of Cumberland Farms (Digital Sign Variance); and (9) the installation of pylon signage, resulting in approximately forty (40) square feet<sup>14</sup> in total face area per respective side (Pylon Sign Variance).<sup>15</sup> See Zoning Board’s Decision.

The Zoning Board conducted three hearings on Cumberland Farms’ proposal, which were held on August 12, 2015; September 2, 2015; and November 4, 2015. At the hearings,

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<sup>9</sup> Section 19-283(f) of the Zoning Code requires a minimum five feet wide planting strip between the parking area and the street. See § 19-283(f).

<sup>10</sup> Section 19-284(a)(33) of the Zoning Code requires one parking space “for each 200 square feet of GFA, plus one space for each two employees.” Sec. 19-284(a)(33).

<sup>11</sup> Section 19-288 of the Zoning Code requires that off-street loading spaces be on the same premises as the building they are intended to serve and shall have vehicular access to a street. See § 19-288.

<sup>12</sup> Section 19-439(b)(1) of the Zoning Code requires that “[a]ny sign advertising, an activity, business, product or service no longer produced or conducted on the premises upon which the sign is located and identifying a business or organization which is either defunct or no longer located on the premises must be physically removed, not just covered over, with[in] 30 days of the business or organization closing or moving.” Sec. 19-439(b)(1).

<sup>13</sup> Section 19-440(b) of the Zoning Code states that digital and electronic signs, including digital screens, are prohibited. Sec. 19-440(b).

<sup>14</sup> Section 19-443 of the Zoning Code allows for thirty square feet in total face area per respective side. Sec. 19-443.

<sup>15</sup> The City of East Providence Planning Department, in its July 28, 2015 Memorandum to the Zoning Board, determined that four of the requests for relief were minor deviations that may support a hardship because the requested relief was a result of the parcel being a corner lot in an established commercial zone.

Cumberland Farms introduced evidence—in the form of both lay and expert testimony—to support its requests for dimensional relief. The sole objector to Cumberland Farms’ proposal was the resident of 31 Wampanoag Trail (Objector), who was represented by her children.

On November 4, 2015, the Zoning Board voted three to two<sup>16</sup> (3-2) in favor of approving each of Cumberland Farms’ requests for dimensional relief. The majority of the Zoning Board found that all the necessary prerequisites for granting relief were supported by evidence on the record and reasoned that (1) the hardship from which Cumberland Farms sought relief is due to the unique character of the subject land and not the general character of the surrounding area; (2) the hardship is not a result of any prior action of Cumberland Farms; (3) granting the variances will not alter the general character of the surrounding area or impair the intent of the City of East Providence; (4) the comprehensive plan for relief is the least relief necessary; and (5) Cumberland Farms will suffer hardship constituting more than a mere inconvenience unless the dimensional variances are granted. See Zoning Board’s Decision at 5. As a result, the majority of the Zoning Board moved to grant the dimensional variances—subject to Cumberland Farms obtaining all necessary permits. See id. The minority of the Zoning Board, however, claimed that (1) a hardship has not been shown; (2) granting the variance will alter the general character of the area and clearly alter the general character of the neighborhood, specifically with the direct abutter; and (3) the relief is not the least relief necessary. See id. at 6. Since § 45-24-57(2)(iii) requires the concurring vote of four of the five members of the Zoning Board, the result constituted a denial of Cumberland Farms’ requests.<sup>17</sup>

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<sup>16</sup> The two nay votes were by Mr. Braga and Mr. Croke; the remaining members voted in the affirmative.

<sup>17</sup> This Court has previously shown how a reviewing court must treat its review of a zoning board’s decision that requires a supermajority—that being the same as it would any other zoning

On December 4, 2015, the Appellants timely appealed the Zoning Board's Decision to the Superior Court.

## II

### Standard of Review

Pursuant to § 45-24-69, the Superior Court has 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).

The scope of this Court's “review is circumscribed and limited to an examination of the certified record.” Nickerson v. Reitsma, 853 A.2d 1202, 1205 (R.I. 2004). Furthermore, a reviewing court is limited to consideration of questions of law, and it is not to weigh the evidence. Rocha v. State Public Utilities Commission, 694 A.2d 722, 727 (R.I. 1997); St. Pius X Parish Corp. v. Murray, 557 A.2d 1214, 1218 (R.I. 1989). Regarding questions of law, this Court conducts a de novo review. See Nickerson, 853 A.2d 1202. Consequently, the court

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board decision. See Morrone v. Zoning Bd. of Review of Hopkinton, 2004 WL 2821642 (R.I. Super. Nov. 28, 2004) (Lanphear, J.).

may remand the case for further proceedings or vacate the decision of the zoning board if it is “[i]n violation of constitutional, statutory, or ordinance provisions.” Bernuth v. Zoning Board of Review of New Shoreham, 770 A.2d 396, 399 (R.I. 2001); see § 45-24-69(d)(1). Moreover, the court will not “substitute its judgment for that of the zoning board as to the weight of the evidence on questions of fact.” Apostolou v. Genovesi, 120 R.I. 501, 506, 388 A.2d 821, 823 (1978). Instead, the court will examine the full record “to determine whether ‘substantial’ evidence exists to support the board’s findings.” Toohey v. Kilday, 415 A.2d 732, 735 (R.I. 1980). The Supreme Court has defined substantial evidence as “such . . . 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.” Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981).

### **III**

#### **Analysis**

##### **A**

#### **Jurisdiction of the Zoning Board**

The Appellants submitted a joint memorandum of law asserting that their rights pursuant to § 45-24-69(d) have been substantially prejudiced by the Zoning Board’s Decision. As a threshold matter, the Appellants argue that the source of the nay votes were not within the jurisdiction of the Zoning Board, but instead, were an attempt to effectively reopen and reverse the previously approved drive aisle, buffer zone, and zone change—all matters that were in the exclusive jurisdiction of either the City Council or the Committee. The Appellants allege that during the August 2015 hearing, despite it being clearly stated on the record that the buffer zone and drive aisle were already approved by both the City Council and Committee, the Zoning

Board<sup>18</sup> continued to question these approved design components—questions that the Appellants assert were well outside the Zoning Board’s jurisdiction. The Appellants additionally contend that the September 2015 hearing was almost entirely based on the two-lane drive aisle and buffer zone, instead of dealing with Cumberland Farms’ actual requests for dimensional relief. Specifically, the Appellants argue that Mr. Braga focused much of the conversation on his disapproval of the way in which Cumberland Farms dealt with the Objector and explicitly asked that Cumberland Farms further appease the Objector even though no further action was necessary as the proposal had already been approved by the Committee. The Appellants assert that even the Zoning Officer had to remind the Zoning Board that it only had jurisdiction to hear Cumberland Farms’ requests for dimensional relief and discuss whether Cumberland Farms carried its burden to obtain such relief. As a result, the Applicants contend that the focus of the Zoning Board was on the accommodation of the Objector and the previously approved zone change, drive aisle, and buffer zone—not on the dimensional relief requested. Therefore, the Appellants argue that the Zoning Board arbitrarily and capriciously expanded its authority over previously approved components of the proposal. The Appellants insist that this Court reverse the Zoning Board’s Decision as it is affected by error of law.

According to §§ 19-2 and 19-38 of the Zoning Code, as well as § 45-24-57 of Rhode Island General Laws, zoning boards have the power to hear variations from the zoning regulations and, upon application and in cases of hardship, to authorize variances in the application of a specific zoning ordinance. See §§ 19-2; 19-38(a)(3); § 45-24-57. The jurisdiction of a zoning board is therefore that which is “prescribed in the enabling act and that the jurisdiction . . . can neither be enlarged nor restricted.” Reynolds v. Zoning Bd. of Review of

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<sup>18</sup> Specifically, the two nay voters led this questioning.

Lincoln, 96 R.I. 340, 343, 191 A.2d 350, 353 (1963) (citing Mello v. Board of Review of Newport, 94 R.I. 43, 177 A.2d 533 (1962)); see Bernstein v. Zoning Bd. of Review of E. Providence, 99 R.I. 494, 500, 209 A.2d 52, 55 (1965) (stating that zoning boards were “created by the legislature and vested with a jurisdiction of limited scope and purpose”). In considering whether or not a hardship exists that warrants granting a variance, a zoning board may hear evidence that pertains to the requested relief. See § 45-24-57; §§ 19-2; 19-38(a)(3). When a zoning board acts in excess of its jurisdiction, however, its decision must be reversed. See Monopoli v. Zoning Bd. of Review of Cranston, 102 R.I. 576, 578, 232 A.2d 355, 356 (1967).

Here, the record demonstrates that for a majority of the time at each hearing, the Zoning Board mainly focused on the buffer zone and drive aisle—both of which were already approved by the Committee and in no way related to any of Cumberland Farms’ requested dimensional relief. See e.g., Tr. at 30:16-24, 83:3-10, 84-86, Aug. 12, 2015; Tr. at 5, 19, 36, 39, 71, Sept. 2, 2015; Tr. at 25:2-8, 38, 91, Nov. 4, 2015. During the August 2015 hearing, the Zoning Board even requested that Cumberland Farms meet with the Objector in order to resolve the previously approved buffer zone. See Tr., Aug. 12, 2015. Furthermore, at multiple times throughout the hearings, Cumberland Farms had to reiterate that the Zoning Board only had jurisdiction to review its requests for dimensional relief, and not the previously approved drive aisle and buffer zone. See e.g., Tr. at 75:6-18, Aug. 12, 2015; Tr. at 39:15-20, Sept. 2, 2015; Tr. 19:4-7, Nov. 4, 2015. In addition, the Zoning Board was so far outside its jurisdiction that the Zoning Officer had to remind it that it only had authority to hear and discuss whether or not Cumberland Farms met its burden of proving a hardship. See Tr. at 74:14-17, Sept. 2, 2015. It was not until the November 2015 hearing that the Zoning Board began to even slightly discuss Cumberland Farms’ requested relief. See Tr., Nov. 4, 2015. As a result, the focus of the Zoning Board was

on the accommodation of the Objector, the drive aisle, and buffer zone, not on the dimensional relief requested. Rhode Island law specifically allows the Zoning Board to consider requests for dimensional relief and any evidence pertaining thereto. See § 45-24-57; §§ 19-2; 19-38(a)(3). This vested authority, however, is limited in nature and cannot be enlarged. See Reynolds, 96 R.I. at 343, 191 A.2d at 353; Bernstein, 99 R.I. at 500, 209 A.2d at 55. Therefore, the Zoning Board's attempt to expand its jurisdiction over the previously approved components of Cumberland Farms' proposal is in violation of ordinance provisions, in excess of its limited vested authority, and, thus, in error of law. See Reynolds, 96 R.I. at 343, 191 A.2d at 353; Bernstein, 99 R.I. at 500, 209 A.2d at 55. Accordingly, this Court must reverse the Zoning Board's Decision. See Monopoli, 102 R.I. at 578, 232 A.2d at 356 (stating that a zoning board's decision must be reversed when the zoning board acts in excess of its jurisdiction); see also Braun v. Zoning Bd. of Review of S. Kingstown, 99 R.I. 105, 109, 206 A.2d 96, 98 (1965); WHI, Inc. v. Toscano, 1989 WL 1110293, at \*2 (R.I. Super. June 9, 1989) (the Superior Court reversed the board's decision in denying the requested variances when the zoning board focused on matters outside of its jurisdiction).

## **B**

### **Clearly Erroneous**

The Appellants next contend that the Zoning Board's Decision is facially inadequate, even when considering the evidence in the record. The Appellants argue that, although the majority of the Zoning Board made specific findings of fact pertaining to each of the prerequisites necessary to grant relief, the minority failed to specifically identify findings of fact

and conclusions of law that required the denial of Cumberland Farms' requests.<sup>19</sup> Instead, the Appellants assert that the nay voters merely stated that Cumberland Farms failed to carry its burden of proving that a hardship existed and that such hardship required granting the requested relief, without citing to any evidence in the record to support such a contention. Rather, the Appellants contend that the substantial evidence in the record—specifically, the City of East Providence's statement that the Roof Overhang, Church, Parking, and Landscape Variances were all minor deviations from the current requirements; the findings by the City Council, Committee, Planning Department, witnesses, and majority of the Zoning Board that the proposal was consistent with the intent of the Zoning Ordinance and the City's Comprehensive Plans; and the backing of the surrounding neighborhood—supports granting the dimensional variances. The Appellants further argue that the two nay votes are not substantiated by even a scintilla of evidence on the record. The Appellants therefore conclude that this Court must reverse the Zoning Board's Decision because it is clearly erroneous in light of the reliable, probative, and substantial evidence on the record.

The minority of the Zoning Board responds by asserting in its memorandum that its decision to deny Cumberland Farms' requested relief is supported by the evidence on the record. The Zoning Board contends that Cumberland Farms did not bear its burden in proving a hardship exists. The Zoning Board further argues that the hearings proved that Cumberland Farms was only requesting relief because it was trying to expand its current facility to approximately twice the size. Additionally, the Zoning Board contends that on numerous occasions, the Objector pointed out that if Cumberland Farms' relief was granted, the surrounding area would be

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<sup>19</sup> Instead, the Appellants assert that the minority nay votes primarily focused on the size of the entire proposal—an issue which they did not focus on during the hearing—rather than voting in regard to each of the requests for dimensional relief.

negatively affected and the Objector's property would be devalued. Moreover, the Zoning Board asserts the record demonstrates that no hardship was shown; any necessary relief is a direct result of Cumberland Farms' own actions, not because of the unique character of the land; if the building was smaller, many of the requests would disappear; granting the relief would alter the general character of the area; and the requested relief is not the least relief necessary. The Zoning Board minority supports its assertion by pointing to the testimony of the Objector; its own personal knowledge of the land, City of East Providence, and particular site; and its disagreement with Cumberland Farms' expert testimony and traffic study. The minority of the Zoning Board therefore concludes that since Rhode Island law requires that four members vote in favor of a petition in order to grant relief, the two nay votes compel the Zoning Board to deny Cumberland Farms' requests.

It is well settled under Rhode Island law that this Court must examine the full record "to determine whether 'substantial' evidence exists to support the board's findings." Toohey, 415 A.2d at 735. Substantial evidence is evidence that reasonable minds would accept as adequate to support a particular conclusion. Caswell, 424 A.2d at 647. The Rhode Island Supreme Court has additionally stated that, in order for a reviewing court to do its job, the zoning board must "resolve[] . . . evidentiary conflicts, [make] the prerequisite factual determinations, and appl[y] the proper legal principles. Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany." Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986). Section 19-45 of the East Providence Zoning Code sets forth the following legal standards that the Zoning Board must apply when deciding whether to grant a dimensional variance:

“(a) In granting a variance, the zoning board of review shall require that evidence to the satisfaction of the following standards be entered into the record of the proceedings that:

“(1) 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 not due to a physical or economic disability of the applicant excepting those physical disabilities addressed in Rhode Island General Laws 45-24-30(16) (personal hardship shall not be considered grounds for a variance, since the variance will continue to affect the character of the neighborhood after title to the property has passed);

“(2) Such 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) 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 city comprehensive plan upon which this chapter is based; and

“(4) The relief to be granted is the least relief necessary.

“(b) The zoning board of review shall, in addition to the above standards, require that evidence be entered into the record of the proceedings showing that:

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“(2) In granting a dimensional variance, 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. The fact that a use may be more profitable or that a structure may be more valuable after the relief is granted shall not be grounds for relief.” Sec. 19-45.

In addition, § 45-24-41(d) of the Rhode Island Zoning Enabling Act states that when considering requests for dimensional variances,

“[t]he zoning board of review shall, in addition to the above standards, require that evidence is entered into the record of the proceedings showing that . . . (2) 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.” Section 45-24-41(d).<sup>20</sup>

A review of the record below discloses that Cumberland Farms presented sufficient evidence at the hearings before the Zoning Board to meet this standard. In its Decision, the minority of the Zoning Board purportedly made several findings of fact—that would seemingly be a result of the evidence in the record—but never addressed which findings show that the standards set out in § 45-24-41 or in the Zoning Code had not been met. See Zoning Board’s Decision at 6. Instead, the Zoning Board’s minority decision merely provides conclusory, boilerplate language that mirrors the language of § 45-24-41 and of the Zoning Code, and furthermore, is unsupported by the record. See *Sciacca v. Caruso*, 769 A.2d 578, 585 (R.I. 2001) (stating that the Rhode Island Supreme Court “caution[s] zoning boards and their attorneys to make certain that zoning-board decisions on variance applications (whether use or dimensional) address the evidence in the record before the board that either meets or fails to satisfy each of the legal preconditions for granting such relief, as set forth in § 45-24-41”). Furthermore, when reviewing the record, it becomes apparent that Cumberland Farms satisfied its burden under § 19-45 and § 45-24-41.

Specifically, Cumberland Farms satisfied the first prong of § 19-45(a) by providing expert testimony suggesting that the requested relief is due to a hardship created by the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area. See Tr. at 6, 9, Nov. 4, 2015. Mr. Conley testified that the size and layout of

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<sup>20</sup> East Providence Zoning Code § 19-45 is virtually identical in substance to that of § 45-24-41(c) and (d) of the Rhode Island Zoning Enabling Act.

the land, as well as the easements on the lot, are unique to the parcel and result in Cumberland Farms' requested relief. See id. at 9. Cumberland Farms additionally provided testimony that the hardship is due to "merging three [] corner lots in an established commercial zone," while trying to design a building with proper landscaping and a "residential appearance" that provides "vehicular and pedestrian movement." See id. at 10, 11, 12, 13. Cumberland Farms additionally testified that such hardship is not related to any of its prior action "as no prior action has occurred" by it, thus satisfying the second prong of § 19-45(a). See id. at 6-7. Furthermore, regarding the third prong of § 19-45(a) that deals with the general character of the surrounding area, Cumberland Farms testified that the proposal is for the expansion of a convenience store and gas station, a use which is pre-existing and permitted under the current zone. See Tr. at 10, Sept. 2, 2015. Maureen Chlebek of McMahon Associates also testified to a traffic study that was done for the proposal and indicated that the traffic would not negatively impact the surrounding area. Cumberland Farms additionally emphasized that the redevelopment is going to be "built solely [] for aesthetic and architectural purposes [] to create something that's going to fit within the community and hopefully set a standard for future development and re-development within the community." Tr. at 6:15-19, Aug. 12, 2015. Moreover, Coastway Community Bank, the Condominium Association, and the Kent Heights Neighborhood Association<sup>21</sup> all testified in support of the proposed redevelopment. In addition, Patrick O'Leary of VHP Engineering testified to the necessity and positive impact that granting such requests would have. Barely any evidence was presented in opposition of Cumberland Farms' proposal. In fact, the only

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<sup>21</sup> Joe Botello, in his capacity as the President of the Kent Heights Neighborhood Association—a neighborhood organization that represents the area surrounding the proposal—provided testimony before the Zoning Board stating that the Kent Height Neighborhood Association Board unanimously endorsed Cumberland Farms' proposal, as it would greatly improve the neighborhood and further encourage high quality developments in the immediate area.

objection to Cumberland Farms' application was based on the potential negative impact that the development would have on the Objector's property, without providing any concrete evidence of such impact.

As a result, upon review of the record, the Court finds that the Zoning Board's Decision is clearly erroneous as the record demonstrates that Cumberland Farms sustained its burden of proving that a hardship exists which justifies granting its requested relief. As the nay votes were neither legal nor factually supported, a remand would only result in further delay and unnecessarily extend the harm. Accordingly, this Court must reverse the Zoning Board's Decision. See Citizens Trust Co. v. Silveira, 1994 WL 930999, at \*2 (R.I. Super. Nov. 22, 1994) (the Superior Court reversed the Zoning Board's decision in denying the requested variances when "[a]ll of the evidence presented at the hearing was in favor of granting the petitions").

This Court admires and applauds the countless volunteer hours and dedication which this Zoning Board, and Zoning Board members across our state, contribute to protect their community. Nevertheless, they are duty-bound to adhere to the statutory and case law requirements.

#### **IV**

#### **Conclusion**

Upon review of the record before it, this Court finds that the Zoning Board's decision must be reversed, as it is in error of law and clearly erroneous. The Zoning Board's Decision was in violation of its statutory and ordinance provisions, pursuant to § 45-24-69(d)(1). Therefore, consistent with this opinion, this matter is reversed and Cumberland Farms' requests for dimensional relief are granted.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** City of East Providence v. City of East Providence  
Zoning Board of Review, et al.

**CASE NO:** PC 2015-5308

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** March 24, 2016

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

**ATTORNEYS:**

**For Plaintiff:** Timothy J. Chapman, Esq.

**For Defendant:** Dylan B. Conley, Esq.; Gregory S. Dias, Esq.;  
William J. Conley, Esq.