STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[Filed: November 9, 2018]

KIMBERLEY WALTZ, ELAINE BARBOZA GEORGE FOUNTAS and TRACIE E. FOUNTAS,	:	
Appellants,	:	
v.	:	**C.A. No. NC-2017-0380**
THE ZONING BOARD OF REVIEW OF THE TOWN OF TIVERTON; LISE J. GESCHEIDT in her capacity as Tiverton Zoning Board Chairperson; DAVID COLLINS in his capacity as Tiverton Zoning Board Vice Chairperson; GEORGE S. ALZAIBAK as Tiverton Zoning Board member; JOHN R. JACKSON in his capacity as Tiverton Zoning Board member; WENDY TAYLOR HUMPHREY in her capacity as Tiverton Zoning Board member; PETER MELLO in his capacity as Tiverton Zoning Board member; DENISE G. SAURETTE, in her capacity as the Town of Tiverton Treasurer; JOHN A. SCADUTO; MARCY SCADUTO; AND JOHN & MARCY SCADUTO, TRUSTEES,	:	
Appellees.	:	

DECISION

NUGENT, J. Appellants Kimberley Waltz, Elaine Barboza, George Fountas and Tracie E. Fountas (Appellants) challenge the decision of the Zoning Board of Review of the Town of Tiverton (Board) issued on August 20, 2017. That decision granted dimensional relief to Applicants John and Mary Scaduto (Applicants) to reduce the lot coverage of their nonconforming lot, as well as to build stairs beyond the preexisting setback. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Applicants' Trust, "John & Marcy Scaduto, Trustees," is the owner of the subject property, Plat 806, Lots 154 & 158 on Tiverton Tax Assessor's map located at 24 Shore Road in the Town of Tiverton (Property). Am. Compl. ¶¶ 13-15. The Property is a substandard lot, containing only 3750 feet in a R-80 zone, which is subject to different dimensional standards than other lots in a R-80 zone under Article VII § 4 of the Tiverton Zoning Ordinance. On June 2, 2017, Applicants applied for a dimensional variance from the Board requesting relief from Tiverton Zoning Ordinance, Article V, Sections 1 and 2(c). The Appellants are among the abutters to the Property. *See* Appellants' Br., Ex. B, *Town of Tiverton Zoning Board Notice*. At the hearing, Applicants specified that they sought relief from the front setback along Barbara Street (Front Yard Setback) which is currently 9.5 feet, requesting that it be reduced to 4.9 feet, and approval for a reduction of lot coverage from 37% to 34.3%. Hr'g Tr. 4-10, July 5, 2017 (Tr.)).

The public and the abutters within 200 feet of the Property received notice of the July 5, 2017 hearing. The notice stated in part:

> "A petition has been filed by John A Scaduto of Tiverton, RI requesting a variance to Article V Sections 1 and 2.c. of the Tiverton Zoning Ordinance in order to raze the existing home and construct a new single family home to conform to V.E. flood zone coastal requirements located at 24 Shore Road, Tiverton, RI being Plat 806 Lots 154 & 158 on Tiverton Tax Assessor's maps closer to the front, rear and side yard property lines than allowed and exceeding maximum lot coverage in a R80 zoning district." Appellants' Br., Ex. B.

This application was filed as part of Applicants' effort to convert this property from their summer home into their year round home adding a second story to the Property.

The Board heard Applicants' request for a variance on July 5, 2017. Although "relief from the front side, rear setbacks and lot coverage" was requested in the application, Applicants' attorney, Joelle Rocha, began by stating that the rear and side setbacks were not going to be affected. Tr. at 4-10; *see* Appellants' Br., Ex. F, *Plans and Submissions to Zoning Board of Review*. Instead, Ms. Rocha clarified that only two issues were before the Board: relief from the Front Yard Setback and for the reduction in lot coverage from 37% to 34.3%. *Id.* At the beginning of the hearing, Ms. Rocha offered new plans that included outside stairs to access the elevated structure. Tr. at 5. These plans were not included in the Board's package as they were not submitted with the original application. *Id.* Relief from the Front Yard Setback was required for the stairs to be constructed outside the dwelling. Initially, members of the Board were reluctant to consider these new plans as they received them for the first time at the hearing. Id. In response, Ms. Rocha opined that she was not sure "whether the stairs should be included in the setback," or whether "the stairs are a requirement for the setback." Tr. at 5-6. A Board member clarified for her that "[a]ny part of the structure would be the closest part of the structure [sic] would be within the setback distance. So if the stairs would be part of the structure, then that would be part of the setback." Tr. at 6. Nevertheless, the Board proceeded to discuss the stairs as part of the application. Tr. at 7.

Applicant John Scaduto testified as to how his construction plans came to fruition. Upon deciding to move into the Property year round, Applicant wanted to expand the house by adding a second story. Tr. at 13. Applicant discovered that the costs associated with improving the Property exceeded 50% of the Property's value, triggering the Property's compliance with the coastal construction regulations of the Federal Emergency Management Agency (FEMA). Tr. at 12. These regulations seek to better protect properties and people alike in the event of coastal

storms. Applicant sought assistance from Mr. Warren Ducharme, the State of Rhode Island Building Code Staff Architect, who strongly advised building the home to FEMA's regulations because the Property was in a VE-18 flood zone. *Id.* While building to comply with these regulations, Applicant also sought to remain on the same footprint of the original home but conceded the stairs go beyond that footprint. Tr. at 14-15. When the Board members inquired into whether Applicant considered interior stairways—as part of the garage under the raised house and within the existing footprint—Applicant said that they had considered it but it would have resulted in a loss of square footage for living space. Tr. at 22-23. Applicants explained they were "trying to get as much living space as you can out of the house." Tr. at 23. The existing house's living space is 692 square feet but there would be 1500 square feet of living space between the proposed structure's two floors because the second floor included an indoor addition which would cover the first-floor patio area underneath it. Tr. at 25.

The Board heard from Applicant's engineer, Thomas J. Principe III (Mr. Principe), who testified to the proposed structure's design and otherwise corroborated Applicant John Scaduto's testimony. He explained the structure was compliant with the applicable FEMA regulations for a property located in a VE-18 flood zone, having worked on multiple properties subject to FEMA's regulations. Tr. at 17. He explained that the reason for raising the structure was for the structure to be above the flood zone. Tr. at 18. Mr. Principe reasoned that the need for this elevation is what pushed the proposed stairs as far out as they are. Tr. at 22.

Mr. Neil Hall, the Town Building Official, commented on his experience evaluating the damage to waterfront property after Hurricane Sandy. Zoning Decision at 3; Tr. at 24. Mr. Hall recalled that houses such as the Applicants' proposed structure were among the few still standing

after the storm. *Id.* Mr. Hall supported raising structures pursuant to the FEMA regulations and stated he knew many residents of the town were considering doing so themselves. *Id.*

Attorney for Appellants Kimberley Waltz and Elaine Barboza, Mr. Frank Lombardi, questioned Applicant John Scaduto, Mr. Principe, and Ms. Rocha. Mr. Lombardi questioned Mr. Scaduto on his previous variance application to the Board in February 2016 when he requested relief to build a patio expanding his lot coverage from 25% to 37%. Tr. at 32. Mr. Lombardi questioned both Mr. Scaduto and Mr. Principe about the lot coverage, asking for an explanation as to how this proposed structure would reduce lot coverage from 37% to 34.3%. Zoning Decision at 2; Tr. at 32-33. Mr. Principe explained that the additions to the proposed structure would be above the existing patio—and therefore within that footprint for lot coverage purposes—but part of the existing patio would be removed for the stairway and thereby reduce the lot coverage to 34.3%. *Id.*; Tr. at 46-47.

The Board next heard from the public. Four people came forward to support the Applicants' plans. Tr. at 39-41. Subsequently, Mr. Lombardi made some final remarks pertaining to other issues with the requested relief, such as the standard when granting a dimensional variance, as well as a pending lawsuit by the Town over titles to property along Shore Road—including the Applicants' property. Tr. at 42-43; *see Town of Tiverton v. Leeshore Realty LLC, et al.*, C.A. No. NC-2016-0462. The Board did not see how the outcome of that case would affect Shore Road as it existed at the time of the Board's hearing. Tr. at 43-44.

During their deliberation, two members of the Board expressed their hesitation with the application based on the exterior stairs. Tr. at 51. The members' primary concern centered around the Applicants' failure to construct an interior stairwell pointing to a similar application that had been able to save 5 feet of setback by using an interior stairwell. *Id.* A member stated

they "would have liked to have seen an effort made to put those stairs put inside." *Id.* No other Board members expressed concern about the application or the relief sought. Tr. at 51-55. Ultimately, the Board unanimously voted in favor of granting the application. Tr. at 56.

On August 20, 2017, the Board issued its written decision, recorded in the Tiverton Land Evidence Records at Book 1642, page 152. In this decision, the Board's findings of fact provided that this was the "least relief necessary." Appellants' Br., Ex. D, *Zoning Board of Review Decision*. The Board stated, "[t]he only setback for which additional relief is being requested is along Barbara Street which is due to the need for stairs to access the new structure since it will now be built above the flood plain and on piers with breakaway walls." *Id.* at 4-5. Aggrieved by the Board's decision, Appellants timely filed the instant appeal on September 7, 2017.

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by § 45–24–69. Section 45–24–69 provides:

> "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 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).

It is axiomatic that "the Superior Court reviews the decisions of a plan commission or board of review under the 'traditional judicial review' standard applicable to administrative agency actions." *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I. 1998). When reviewing a zoning board decision, the Superior Court '"lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level."' *Id.* at 666 (quoting *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986)). The trial justice "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." *DeStefano v. Zoning Bd. of Review of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979). The term "substantial evidence" has been 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 v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981)).

The deference this Court gives to the board's decision and findings is, however, conditional upon the Board providing adequate findings of fact that support its decision. *Kaveny v. Town of Cumberland Zoning Bd. of Review*, 875 A.2d 1, 8 (R.I. 2005). Factual findings, amounting to more than mere conclusory statements or a '"recital of a litany,"' are necessary to accomplish judicial review of a zoning board decision. *Bernuth v. Zoning Bd. of Review of New Shoreham*, 770 A.2d 396, 401 (R.I. 2001) (quoting *Irish P'ship v. Rommel*, 518 A.2d 356, 358 (R.I. 1986)). The deference given to a zoning decision is due, in part, to the fact "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." *Monforte v. Zoning Bd. of Review of E. Providence*, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). With respect to questions of law,

however, this Court conducts a *de novo* review; consequently, the Court may remand the case for further proceedings or potentially vacate the decision of the Board if it is "clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record." *Bernuth*, 770 A.2d at 399; *see also* § 45–24–69(d)(5).

III

Notice

Before a hearing may take place, a zoning board of review must provide public notice and due notice to all parties in interest. Sec. 45-24-41(b); *Ryan v. Zoning Bd. of Review of New Shoreham*, 656 A.2d 612, 615 (R.I. 1995). In order for a zoning board of review to exercise jurisdiction over such matters, compliance with these notice requirements is a prerequisite. *Id.* (citing *Zeilstra v. Barrington Zoning Bd. of Review*, 417 A.2d 303, 307 (R.I. 1980)). If done without providing adequate notice, any decision made by a zoning board is a nullity. *Corporation Serv., Inc. v. Zoning Bd. of Review of E. Greenwich*, 114 R.I. 178, 180, 330 A.2d 402, 404 (1975).

A request for a dimensional variance "for relief from the literal requirements of a zoning ordinance because of hardship" is made "by filing with the zoning enforcement officer or agency an application describing the request and supported by any data and evidence as may be required by the zoning board of review or by the terms of the ordinance." Sec. 45-24-41(a). Furthermore, Tiverton's procedures require a variance application to include "a site plan for the proposed development. Such site plan shall be prepared by a registered land surveyor or registered professional engineer and drawn to scale. It shall show ***all existing and proposed structures***, parking spaces, driveway and driveway openings, outside storage areas and sign locations." Town of Tiverton Zoning Ordinance Article XV § 5(b) (emphasis added).

Notice is a jurisdictional prerequisite for a zoning board to decide upon the issues before it. *See Carroll v. Zoning Bd. of Review of City of Providence*, 104 R.I. 676, 678, 248 A.2d 321, 323 (1968). An adequate notice will serve two purposes. First, notice must properly advise "the public of the date, time and place at which the application for relief is to be acted upon." *Paquette v. Zoning Bd. of Review of West Warwick*, 118 R.I. 109, 111, 372 A.2d 973, 974 (1977) (citing *Mello v. Bd. of Review of City of Newport*, 94 R.I. 43, 49-50, 177 A.2d 533, 536 (1962)). Second, "[notice] is purposed upon affording those having an interest an opportunity to present facts which might shed light on the issue before the board." *Carroll*, 118 R.I. at 678, 248 A.2d at 323 (citing *Perrier v. Bd. of Appeals of City of Pawtucket*, 86 R.I. 138, 144, 134 A.2d 141, 144 (1957)). The Supreme Court's focus on "notice deficiency" centers around a concern for the due process rights of the abutters as well as of the public. *Cugini v. Chiaradio*, 96 R.I. 120, 123, 189 A.2d 798, 801 (1963) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Notice of a zoning board hearing is sufficient when it is "reasonably calculated, in light of all the circumstances, to apprise the interested parties of the pendency of the action, ***of the precise character of the relief sought*** and of the particular property to be affected." *Paquette*, 118 R.I. at 111, 372 A.2d at 974 (emphasis added). Moreover, this notice must '"afford them an opportunity to present their objections."' *Carroll*, 118 R.I. at 678, 248 A.2d at 323 (quoting *Mullane*, 339 U.S. at 314).

"Due process contemplates an opportunity to be heard. This right to be heard, however, is without meaning unless such notice of the pendency of a hearing or proceeding is adequate in the circumstances to safeguard the right." *Cugini*, 96 R.I. at 125, 189 A.2d at 801 (citing *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 246 (1944)). Both aspects of notice—knowing where and when the hearing will be held and what the hearing will cover—are essential for an

interested party to have the requisite opportunity to be heard. If the notice fails to reveal the "precise character of the relief sought ***by the application*** . . . ," then the notice will not serve "the purpose for which these hearings are held." *Mello*, 94 R.I. at 49, 177 A.2d at 536 (citing *Kent v. Zoning Bd. of Review of Town of Barrington*, 74 R.I. 89, 58 A.2d 623 (1948)) (emphasis added); *see also Carroll*, 118 R.I. at 679, 248 A.2d at 323 ("Merely to advise of the date, time, and place of a proposed meeting without more, however, is a mere gesture, and will be of little significance unless in addition some advice is given of the purpose for which the meeting has been called."). A notified party may still be prejudiced, however, if the underlying application did not provide the materially-relevant facts needed to prepare for that opportunity before the zoning board. *See Gardiner v. Zoning Bd. of Review of City of Warwick*, 101 R.I. 681, 688, 226 A.2d 698 (1967) (finding "the information in the application and on the plot plan was competent evidence" that provided the zoning board the "whole story."). "Whether a notice in a given case meets the tests will turn on its facts." *Paquette*, 118 R.I. at 111, 372 A.2d at 974.

In the instant appeal, this Court finds the notice was inadequate as a result of the application's omission of material information upon which the Board's decision would rely. The abutters within 200 feet of the Property received notice of the July 5, 2017 hearing, stating in part,

> "A petition has been filed by John A Scaduto of Tiverton, RI requesting a variance to Article V Sections 1 and 2.c. of the Tiverton Zoning Ordinance in order to raze the existing home and construct a new single family home to conform to V.E. flood zone coastal requirements located at 24 Shore Road, Tiverton, RI being Plat 806 Lots 154 & 158 on Tiverton Tax Assessor's maps closer to the front, rear and side yard property lines than allowed and exceeding maximum lot coverage in a R80 zoning district." Appellants' Br., Ex. B.

This letter provides abutters a general notice of the requested relief, but it further informed them of the petition on file with the Code Enforcement Office at the Tiverton Town Hall which was available for their review. *Id.* However, upon review of the petition on file, an abutter would have no better understanding of what Applicants intended to request relief from at the hearing. Contrary to the application's request for relief from the Property's rear, side, and front setbacks, the proposed structure did not encroach further into the setbacks other than the relief sought for the Front Yard Setback. While the submitted application did describe the proposed action as one to raze and construct a single-family house to conform to VE flood zone coastal requirements, it failed to indicate that the relief from the Front Yard Setback—let alone any setback—would be for building a stairwell. Appellants' Br., Ex. F. From the application and notice as a whole, a reasonable person would infer that the requested relief would be related to the efforts in razing and building the home, but the actual relief requested was premised upon an encroaching stairway that Applicants failed to mention in their application. Indeed, Applicant John Scaduto emphasized his desire to keep the home within the same footprint, but he suggested in his application that this construction requires setback relief on ***every side of the house***. Tr. at 14-15. Aside from the approval for a change in overall lot coverage, a Board member recognized that Applicants would not even need to come before the Board if the stairs were included in the house. Tr. at 52.

More importantly, the reason for the requested 4.9-foot setback, the exterior stairway, was not known until the introduction of the new plans at the hearing. Pursuant to § 45-24-41(a), the plan including the stairs should have been submitted as part of Applicants' original application because their request for relief must be "supported by any data and evidence as may be required by the zoning board of review." *See Gardiner*, 101 R.I. at 688, 226 A.2d at 702. At

the last possible moment, when the hearing started, Applicants sought to substitute new plans for the plans submitted with the application.

The omission of these plans from the submitted application was not a minor error for which the Board's decision may stand. In *Carroll*, the notice for the construction of a gasoline station sufficiently described the physical location of the property, but it did not include the proper party name. 104 R.I. at 679; 248 A.2d at 323. When determining "[t]he adequacy and sufficiency of the notice," the Court focused on whether the inaccurate statement in question "was of sufficient consequence to vitiate an otherwise clear and definite identification of both the specific relief sought and the particular land to be affected." *Id.* Ultimately, finding that the misstatement did not invalidate the notice, the Court stated

> "it related neither to the purpose for which the meeting was being held nor to what was intended to be accomplished, and it cannot reasonably be said to have misled into inaction at the hearing before the board or to have left the public or any interested person in doubt concerning what was being proposed and what property was to be affected." *Id.*

Without including the plans for the outside stairs in the application, the notice did not "reasonably convey[] the required information and adequately afford[] those interested a reasonable time to make their appearance." *Id.*, 104 R.I. at 679, 248 A.2d at 323-24. Applicants bore the burden of production and persuasion "before a zoning board of review to prove the existence of the conditions precedent to a grant of relief." *DiIorio v. Zoning Bd. of Review of City of E. Providence*, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969) (citing *Laudati v. Zoning Bd. of Review of Town of Barrington*, 91 R.I. 116, 161 A.2d 198 (1960)). Among other evidentiary requirements, Applicants were required to present evidence to show denying this relief would amount in a hardship that would be "more than mere inconvenience," *Travers v. Zoning Bd. of Review of Town of Bristol*, 101 R.I. 510, 514, 225 A.2d 222, 224 (1967), and that the relief

would be the least relief necessary. *Standish-Johnson Co. v. Zoning Bd. of Review of City of Pawtucket*, 103 R.I. 487, 238 A.2d 754 (1968); *see also* § 45-24-41(d) (evidence required for any kind of variance) and § 45-24-41(e)(2) (evidence required for a dimensional variance).

The Board's surprise at the hearing to the newly submitted plans evidences why such new evidence cannot be submitted at the eleventh hour and still comport with due process requirements. The Board's Chairwoman explained it best to the Applicants at the hearing: "[Submitting the new plan] was something that should have been done before you got here." Tr. at 6-7. Neither the Board nor the public had time to review the new plans or otherwise prepare for the hearing on the stairway issue. *See Bloch v. Zoning Bd. of Review of City of Cranston*, 94 R.I. 419, 422, 181 A.2d 228, 230 (1962) (holding that exhibits which were not formally introduced did not provide grounds for a reversal "[i]n the absence of evidence that petitioners were deprived of the opportunity of examining them"—nor were such exhibits "vital to the board's decision."). Since the application mentioned setback relief on all sides of the Property, it was not apparent to the Board what specific setback relief the Applicants would be requesting. Only when Ms. Rocha informed them that the only setback relief needed was for the exterior stairway did the Board learn of the substance of the dimensional variance—and what specifically Applicants had to show caused them the necessary hardship to grant that relief. Although members did inquire into whether Applicants considered alternative stairway designs to reduce the necessary relief, the Board should not have considered new plans for which they had no prior opportunity to prepare. *See* Roland F. Chase, *Rhode Island Zoning Handbook* § 151 (3d ed. 2016) ("In granting an application for a variance . . . a board of review necessarily incorporates the application for relief and any accompanying plot plan in its decision. This means that the relief granted is limited to the facts revealed by the application and plot plan.") (citing *Gardiner*,

101 R.I at 681, 226 A.2d at 698; *Phelan v. Zoning Bd. of Review of City of Warwick*, 90 R.I. 490, 159 A.2d 802 (1960)) ("Quote").

By considering the Applicants' newly-submitted stairway plan, the Board condoned the Applicants' amending their application during the hearing. The Board did not cite to any authority it had to do this,[1] but even if it did, it would not remedy the public's loss of opportunity to review the materially-relevant plan in relation to the rest of the application. Applicants submitted this plan while explaining to the Board that the actual relief requested was less than what was presented in the application. While a stairway obviously would be needed as a result of the proposed structure's new elevation, the orientation of that stairway was the primary issue that was "vital to the board's decision." *Bloch*, 94 R.I. at 422, 181 A.2d at 230. The specific setback relief for this stairway, however, was concealed in the application's broad description of razing and constructing the house in its entirety. Therefore, the abutters and public received a deficient notice because of the application's mischaracterization of what the dimensional relief would be for, and for having no opportunity to review the stairway plans submitted at the meeting.

[1] In addition to what an application must include, Tiverton Zoning Ordinance Article XV §5(b) provides "[t]he zoning officer may waive the requirements of this provision if he determines that strict compliance is unnecessary given the size or scope of the project involved." The zoning officer is separate from the Board, and it would not be consistent if the Board could admit plans which "show all existing and ***proposed structures*** . . . ." if such plans were required to be submitted with the application (emphasis added). *See Arc-Lan Co. v. Zoning Bd. of Review of Town of N. Providence*, 106 R.I. 474, 476, 261 A.2d 280, 282 (1970) ("[A] zoning board of review may not, either directly or indirectly, act so as to, in effect, amend the provisions of a zoning ordinance[,] and [] it is without authority to nullify the pertinent provisions of the [zoning] ordinance.").

IV

Reasonable Litigation Expenses Under the Equal Access to Justice Act

In addition, Appellants argue they are entitled to reasonable litigation expenses under the Equal Access to Justice Act (EAJA), asserting the Board's decision was without substantial justification and a clear abuse of discretion. G.L. 1956 §§ 42-92-1, *et seq.* The EAJA "'was propounded to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings.'" *Tarbox v. Zoning Bd. of Review of Town of Jamestown*, 142 A.3d 191, 199 (R.I. 2016) (quoting *Krikorian v. R.I. Dep't of Human Servs.*, 606 A.2d 671, 674 (R.I. 1992)). "The [EAJA] provides that a prevailing '[p]arty' (§ 42-92-2(5)) may be awarded '[r]easonable litigation expenses' (§ 42-92-2(6)) where the '[a]gency' (§ 42-92-2(3)) was without '[s]ubstantial justification' (§ 42-92-2(7)) in actions that led to an '[a]djudicatory proceeding[]' (§ 42-92-2(2)) or taken in the proceeding itself." *Id.* at 200. In *Tarbox*, the Rhode Island Supreme Court determined that a "municipal zoning board is an agency," and that "the hearing before the board on plaintiffs' variance application qualified as an adjudicatory proceeding under the [EAJA.]" *Id.* at 201; see *also* § 42-92-2(2), (3).

Here, success on appeal is only a part of what a claimant seeking to recover reasonable litigation expenses must show. *See Tarbox*, 142 A.3d at 195 ("[I]t was only after plaintiffs prevailed in their zoning appeal in Superior Court that a motion for an award of reasonable litigation expenses under the [EAJA] could be brought and decided."). To be entitled to this relief, the claimant must be recognized as a "party" under the EAJA, meaning:

> "***any individual whose net worth is less than five hundred thousand dollars ($500,000) at the time the adversary adjudication was initiated***; and, any individual, partnership, corporation, association, or private organization doing business and located in the state, which is independently owned and

> operated, not dominant in its field, and which employs one hundred (100) or fewer persons at the time the adversary adjudication was initiated." Sec. 42-92-2(5) (emphasis added).

The Board disputes that the Appellants constitute a "party" under the EAJA. *See* Am. Compl. ¶ 27; Answer ¶ 27. Assuming *arguendo* that the Appellants would otherwise qualify as a "prevailing party" under the EAJA, the EAJA clearly restricts the recovery of reasonable litigation expenses to "any individual whose net worth is less than five hundred thousand dollars ($500,000) at the time the adversary adjudication was initiated." Sec. 42-92-2(5). Whether the Appellants are considered to be in this class and entitled to such relief under the EAJA is an issue that cannot be resolved here. Consequently, this Court does not yet reach the question of whether the Board's decision in granting the variance was substantially justified.

V

Conclusion

After review of the entire record, this Court finds that the Board's decision was in excess of the authority granted to the zoning board of review and in violation of statutory and ordinance provisions. Substantial rights of the Appellants were prejudiced. As a result of the inclusion of the relief not properly noticed, the Board's decision is a nullity. Accordingly, the August 20, 2017 decision of the Board is vacated. The matter is hereby remanded to the Board for a hearing on Applicants' amended application, for which proper notice must be served. Appellants' claim for reasonable litigation expenses is subject to further proceedings to determine if they are so entitled. Counsel for the parties shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Kimberley Waltz, et al. v. The Zoning Board of Review of the Town of Tiverton, et al.
CASE NO:	C.A. No. NC-2017-0380
COURT:	Newport County Superior Court
DATE DECISION FILED:	November 9, 2018
JUSTICE/MAGISTRATE:	Nugent, J.
ATTORNEYS:	
For Plaintiff:	Frank S. Lombardi, Esq.
For Defendant:	Peter F. Skwirz, Esq.; Anthony DeSisto, Esq.; Joelle C. Rocha, Esq.