STATE OF RHODE ISLAND

NEWPORT, SC. **SUPERIOR COURT**

(FILED: March 12, 2024)

LYNN THURSTON	:	
Appellant,	:	
	:	
v.	:	**C.A. No. NC–2014–0211**
	:	
ZONING BOARD OF REVIEW FOR THE TOWN OF PORTSMOUTH, by and through its members KEVIN M. AGUIAR, JAMES E. EDWARDS, JOHN G. BORDEN, TIA G. SCIGULINSKY and BYRON J. HALL and JAMES SEVENEY and VALERIE SEVENEY	:	
Appellees.	:	

DECISION

LANPHEAR, J. Before this Court is Appellant Lynn Thurston's appeal of the Zoning Board of Review for the Town of Portsmouth's (Zoning Board) decision to grant two dimensional zoning variances and a special-use permit, applied for by James Seveney and Valerie Seveney. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, Appellant's appeal is denied, and the Zoning Board's decision is affirmed.

I

Facts and Travel

The Seveneys applied for two dimensional variances and a special-use permit to construct a wooden deck on their property at 72 Macomber Lane in Portsmouth, Lot 77 on Assessor's Plat 34. Hr'g Tr. 7:14-19, Apr. 17, 2014 (Hr'g Tr.); *see generally* R. at 15-23. The deck would cover an above-ground septic tank enclosure, which Mr. Seveney described as an "eye sore." (Hr'g Tr. 8:9-10:7, 12:12.) The Seveneys requested relief from the Town's minimum setback and maximum allowed lot coverage requirements. *See* R. at 15-16; Portsmouth Municipal Code Art. IV § B; *see*

also Hr'g Tr. 9:14, 10:2-6. They also applied for a special-use permit, because the deck would be constructed on a substandard lot. *See* R. at 16; Portsmouth Municipal Code Art. VII § A (citing Art. VI § A); *see also* Hr'g Tr. 13:18-20.

The Seveneys testified before the Zoning Board on April 17, 2014. (Hr'g Tr. 7:14-8:4.) Counsel appeared on behalf of Ms. Thurston. *Id.* at 18:7-9. Ms. Thurston owns Lot 76 on Assessor's Plat 34 (the Thurston Property), 66 Macomber Lane, which abuts the Seveney Property to the north. R. at 15; *see also* Hr'g Tr. 18:7-9. The attorney expressed concerns that runoff in the area has caused erosion of the Thurston Property. (Hr'g Tr. at 18:9:19:2, 20:11-20.) To mitigate the runoff flowing onto the Thurston Property, he requested that the Zoning Board require that the Seveneys redirect a downspout away from the Thurston Property and construct a berm.[1] *Id.* at 20:20-21:2, 21:19-22. Counsel stated that the parties already agreed to those terms before the hearing and suggested that the Zoning Board did not need additional evidence to impose the condition. *Id.* at 18:18-20, 26:3-10. However, the Seveneys objected to the berm condition during the hearing. *See id.* at 20:20-21:6.

Mr. Seveney, Ms. Thurston's attorney, and Zoning Board members engaged in lengthy discussion regarding the proposed berm, runoff, and erosion. *See generally id.* at 20:7-43:15. Notably, the parties distinguished between runoff that existed at the time of the hearing from any additional runoff that may be caused by constructing the proposed deck:

> "MR. AGUIAR [Zoning Board Member]: You're concerned with the runoff, the additional runoff from the deck?
> " . . .
> "MR. FOX [Counsel for Ms. Thurston]: Yeah. That's part of it. . . . [A]ny runoff [that] comes onto the property . . . continues to erode the front area on the water . . . between storms and runoff, it gets eroded considerably.

[1] The Seveneys agreed to redirect the downspout as requested by Ms. Thurston. (Hr'g Tr. 29:21-30:1.) The terms of the condition relating to the downspout are not at issue on appeal.

> " . . .
> "MR. HALL [Zoning Board Member]: So, it has nothing to do . . .
> "MR. SEVENEY: Has nothing to do with [the runoff].
> "MR. HALL: With the cover [i.e., the wooden deck at issue here, which will also serve to cover the septic tank enclosure].
> "MR. FOX: Actually, it does, because . . . when you put the cover on, then that . . . surface, it creates total runoff . . . I don't know what the calculations are. I just know . . . part will end up on the Thurston [P]roperty." Hr'g Tr. 20:8-18, 34:20-35:6.

The parties went on to discuss whether the Zoning Board should impose a condition to mitigate runoff from the Seveneys' property and, if so, how that mitigation should be effectuated. *See generally id.* at 35:7-43:15. Ms. Thurston's attorney relayed that she was "fine with" the following:

> "MR. BORDEN [Zoning Board Member]: . . . [T]his is subject to be tweaked, but [a] . . . berm [would] be constructed to eliminate . . . a drainage problem on the property to the north. [S]hould the berm not . . . alleviate the problem, other forms will be explored to eliminate the runoff . . . under the supervision of the building inspector.
> " . . .
> "MR. EDWARDS [Zoning Board Member]: You're, you're saying along the property line and . . . the runoff as Mr. Seveney said, um, is actually not even from his property . . . it certainly has to be runoff from the Seveney Property.
> "MR. FOX: (Inaudible) that's right.
> " . . .
> "MR. EDWARDS: It's just not water runoff, there's concern that there [is] going to be water . . . [c]oming from the [deck.]
> "MR. FOX: Yeah.
> "MR. AGUIAR: And running back towards their property.
> " . . .
> "MR. BORDEN: Okay. So, a berm would be constructed between the two walls . . . [to] alleviate runoff from the [Seveney P]roperty . . . going on the property to the north. Should that solution not be adequate, then other forms shall be investigated under . . . the building inspector.
> " . . .
> "MR. BORDEN: Is that the language . . . you were looking for?
> "MR. FOX: Yes." Hr'g Tr. 44:3-47:14.

The Zoning Board then voted to approve the Seveneys' request for a dimensional variance and special-use permit, subject to the conditions to mitigate runoff from the Seveney Property.[2] *Id.* at 47:19-53:14. The Zoning Board issued its written decision on May 1, 2014. *See* R. at 27-29 (the Decision). The Decision states in pertinent part that the Seveneys will

> "install such [a] berm between the two existing cement walls on the north side of their property as the Building Official, in his sole discretion, shall deem necessary to control any additional water runoff from petitioners' property onto the Thurston property resulting from the proposed wooden decking, or utilize such other measures as the Building Official, in his sole discretion, may determine to be necessary and appropriate to prevent such additional water runoff[.]" (Decision 2.)

Ms. Thurston appealed the Zoning Board's Decision to the Superior Court on May 23, 2014. *See* Compl. She asserts that the terms of the condition, voted on by members of the Zoning Board in the hearing, requires the Seveneys to prevent *all* runoff from their property onto the Thurston Property, not only the additional runoff caused by the proposed deck. *See* Mem. in Supp. of Pl.'s Zoning Appeal (Appellant's Mem.) 4-5.

This Court acknowledges the delay in rendering a decision in this matter and is mindful that the parties may have been adversely impacted as a result.

II

Standard of Review

Section 45-24-69(a) grants the Superior Court jurisdiction to review decisions from local zoning boards. Such review is governed by § 45-24-69(d), which 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 zoning board of review or

[2] The Zoning Board first voted to add the terms of the conditions to construct a berm and redirect the downspout away from Ms. Thurston's property. (Hr'g Tr. 47:19-48:21.) The Zoning Board voted separately to approve the Seveneys' amended application. *Id.* at 48:22-53:14.

> 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."

In other words, this 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). The Court is "limited to a search of the record to determine if there is *any competent evidence* upon which the agency's decision rests. If there is such evidence, the decision will stand." *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977) (emphasis added). The Court may not substitute its judgment for that of the zoning board's with respect to the weight of evidence, questions of fact, or credibility of the witnesses. *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986). However, this Court conducts a *de novo* review of questions of law. *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 791 (R.I. 2005). The burden is on the applicant "seeking relief . . . to prove the existence of the conditions precedent to a grant of relief." *DiIorio v. Zoning Board of Review of City of East Providence*, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969).

The Court must consider '"the entire record to determine whether 'substantial' evidence exists to support the board's findings."' *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). "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." *Caswell v. George Sherman Sand & Gravel Company, Inc.*, 424 A.2d 646, 647 (R.I. 1981).

III

Analysis

Ms. Thurston contends the Decision does not accurately reflect the terms approved at the hearing on April 17, 2014. (Appellant's Mem. 4-5.) The Zoning Board granted the Seveneys' variance subject to the condition that they "control any additional water runoff from [the Seveney P]roperty onto the Thurston [P]roperty resulting from the proposed wooden decking[.]" (Decision 2.) Ms. Thurston argues that the Zoning Board voted "to control *all* runoff from the Seveney [P]roperty" (emphasis added). (Appellant's Mem. 4.) She cites to the hearing transcript to support this contention. (Hr'g Tr. 46:3-8.)

Appellees assert that the Decision is supported by competent evidence. *See* Mem. of Zoning Board of Review in Opp'n (Appellee's Mem.) 4-6.[3] Moreover, Appellee contends that, even if the members voted to approve the application subject to the Seveneys eliminating all runoff from their property onto Ms. Thurston's, such a condition would fall outside the scope of the Zoning Board's authority, because it would be unrelated to the application. *Id.* at 5-6.

Zoning boards may relieve property owners from municipal ordinances by granting dimensional variances, among other forms of relief. *See* § 45-24-57(1)(iv)-(v). "[Z]oning board[s] . . . may apply the special conditions that may, in the opinion of the board or agency, be required to promote the intent and purposes of the comprehensive plan and the zoning ordinance

[3] The Seveneys submitted a memorandum stating they "adopt and incorporate by reference the arguments and positions set forth in the [Appellee's Mem.]" (Mem. of James Seveney and Valerie Seveney).

of the city or town. . . . Those special conditions shall be based on competent credible evidence on the record, be incorporated into the decision, and may include, but are not limited to, provisions for . . . [m]inimizing the adverse impact of the development upon other land, including the type, intensity, design, and performance of activities[.]" Section 45-24-43.

Here, the Zoning Board approved a condition that required the Seveneys eliminate "runoff . . . [c]oming from the [proposed deck.]" (Hr'g Tr. 45:15-46:1.) The Decision memorialized those terms, stating they would "install . . . [a] berm . . . to control any additional water runoff . . . onto the Thurston [P]roperty resulting from the proposed wooden decking, or utilize such other measures as the Building Official . . . may determine to be necessary and appropriate to prevent such additional water runoff[.]" *See* Decision 2. The condition was approved to assuage Ms. Thurston's concerns that "the [deck] [would] create an [additional] impervious surface[,]" contributing to the "runoff [which] has become a much greater concern[.]" (Hr'g Tr. 18:7-13.) Before the vote, Mr. Seveney, Ms. Thurston's attorney, and Zoning Board members discussed the sources of runoff onto the Thurston Property at length. *See generally id.* at 20:7-43:15. The parties distinguished already-existing runoff from any additional runoff caused by the proposed deck. *See id.* at 20:8-18, 34:20-35:6. Ms. Thurston's attorney asserted that the deck would be an "impervious surface," adding to the "total runoff . . . [He] [did]n't know what the calculations [were]. [He] just kn[e]w . . . part w[ould] end up on the Thurston [P]roperty." *Id.* at 34:24-35:2, 35:4-6. The Seveneys were amenable to mitigating runoff from the proposed deck, but disagreed with the specific terms proposed by Ms. Thurston, such as the height of the berm. *Id.* at 28:16-30:10. As a compromise, the Seveneys agreed to construct a berm that would control additional runoff from the deck; if the berm was inadequate, they would implement another measure as determined by the Building Official. *Id.* at 39:6-21, 44:3-6, 44:17-45:2, 46:12-18.

Specifically, the Zoning Board debate was focused on how to "alleviate runoff," not eliminate all runoff. *Id.* at 46:14. Counsel agreed. *Id.* at 47:14. The Zoning Board voted 3-2 to impose these conditions, which it memorialized in writing in its Decision. *Id.* at 48:6-12; *see* Decision 2-3.

After a thorough review of the record, this Court finds there was competent evidence on the record to support the Decision, and that the Decision mirrors the terms the parties discussed—and the Zoning Board voted to approve—at the hearing. *See* Decision; Hr'g Tr. 44:2-48:21. The Zoning Board's reasoning aligns with one of the express reasons provided by § 45-24-43 to impose a condition: to "[m]inimiz[e] the adverse impact of the development upon other land . . . ." *See* § 45-24-43(1); *see* Decision 2-3. Ms. Thurston's contention that the Zoning Board voted to eliminate *all* runoff from the Seveney Property onto the Thurston Property is not supported by evidence. *See* Appellant's Mem. 4. In fact, Appellant also has not provided any evidence that the proposed deck would actually increase runoff or that the runoff would increase erosion. *See* Hr'g Tr. 23:19-24:8, 25:22-26:10; *see generally* R. 1-33. Furthermore, the Record does not contain any evidence to support the assertion that the proposed deck would adversely impact the Thurston Property. *See generally* R. 1-33.

Additionally, Ms. Thurston's allegation that she is a victim of Appellees' "bait and switch" tactic is unavailing—the parties' discussion at the hearing clearly distinguished already-existing runoff on the Thurston Property from additional runoff that would be caused by granting the application. *See* Hr'g Tr. 20:8-18, 34:20-35:6; Appellant's Mem. 5. The transcript reflects that Ms. Thurston, the Seveneys, and Zoning Board members understood that the condition on the variance required the Seveneys to prevent any additional runoff caused by the deck, not eliminate *all* runoff from their property onto Ms. Thurston's. *See* Hr'g Tr. 20:8-18, 34:20-35:6.

IV

Conclusion

For the foregoing reasons, Ms. Thurston's appeal is denied and the Zoning Board's Decision granting the Seveneys' application is affirmed.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Lynn Thurston v. Zoning Board of Review for the Town of Portsmouth, et al.**
CASE NO:	**NC-2014-0211**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**March 12, 2024**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**David J. Fox, Esq.**
For Defendant:	**Kevin P. Gavin, Esq.**