STATE OF RHODE ISLAND

NEWPORT, SC. **SUPERIOR COURT**

(FILED: March 27, 2024)

FRED A. KELLY, JR. and ALICIA KELLY,	:	
	:	
Appellants,	:	
v.	:	**C.A. No. NC-2022-0203**
	:	
THE TOWN OF JAMESTOWN ZONING BOARD OF REVIEW; JOHN WELCH; DEAN WAGNER, in his capacity as a Member of the Jamestown Zoning Board of Review; JAMES KING, in his capacity as a Member of the Jamestown Zoning Board of Review; RICHARD BOREN, in his capacity as a Member of the Jamestown Zoning Board of Review; TERRANCE LIVINGSTON, in his capacity as a Member of the Jamestown Zoning Board of Review; JANE BENTLEY, in her capacity as a Member of the Jamestown Zoning Board of Review; JUDITH BELL, in her capacity as an Alternate Member of the Jamestown Zoning Board of Review; JOHN SHEKARCHI, in his capacity as an Alternate Member of the Jamestown Zoning Board of Review; and ALEX FINKELMAN, in his capacity as an Alternate Member of the Jamestown Zoning Board of Review,	:	
Appellees.	:	

DECISION

LANPHEAR, J. Before this Court for decision is Appellants Fred A. Kelly, Jr. and Alicia Kelly's (collectively, the Kellys or the Appellants) appeal from a May 24, 2022 decision of Appellee Town of Jamestown Zoning Board of Review. *See* Certified Record (Record), Ex. 12. The Board granted Applicant John Welch's (Mr. Welch or Applicant) petition requesting a variance and special use permit on his property located at 11 Bay View Drive North, Jamestown,

Rhode Island, further identified as Town of Jamestown Tax Assessor's Plat 1, Lot 221 (Property). *See id*. at Ex. 4. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Mr. Welch seeks to raze an existing house and construct a new house on his Property so that his partner and elderly parents may move in with him. At present, the Property is improved with a single-family home, which is an allowed use pursuant to the Jamestown Zoning Code. *See* Appellees' Mem. in Opp'n of Appellants' Appeal (Appellees' Mem.) 1. In March 2022, Mr. Welch submitted site plans to the Town of Jamestown Building/Zoning Official requesting a variance and special use permit.[1] *See* Record at Exs. 5, 7, 8. He requested a variance from the front and side setback requirements to replace the existing dwelling "with a new house in substantially the same location" with the same footprint as the existing dwelling, except for an additional ninety-nine square feet for a cantilevered stair tower to the west side. *Id*. at 4, 5; *see* Appellees' Mem. 2. He requested a special use permit due to the high groundwater and impervious soil on the Property. *See* Appellees' Mem. 8. Mr. Welch planned to install a "rain garden to capture stormwater runoff" and "an advanced on-site wastewater treatment septic system" to reduce impervious coverage and "improve the surface and groundwater quality." *Id*.

The Planning Commission unanimously voted to recommend approval of Mr. Welch's requests to the Board on April 6, 2022. (Record at Exs. 6, 7.) Meanwhile, the Kellys, owners of

[1] Specifically, Mr. Welch petitioned for a variance from the following: (1) Article 3, Section 82-302 entitled *District Dimensional Regulations*; (2) Table 3-2 for RR 80 District; and, (3) Article 6, Section 82-605 *et seq.* entitled *Variances Authorized by this Ordinance*. *See* Record, Ex. 5. He requested a special use permit for relief from the following: (1) Article 3, Section 82-314 entitled *High Groundwater and Impervious Layer Overlay District*; (2) Article 6, Section 82-601 *et seq*. entitled *Special Use Permits Authorized by this Ordinance*; and (3) Article 6, Section 82-605 *et seq*. entitled *Variances Authorized by this Ordinance*. *See id*.

real property[2] abutting the Property, were in discussions with Mr. Welch regarding his plans because they feared the proposed construction would obstruct their view. *See* Hr'g Tr. (Tr.) 28:17-29:1, May 24, 2022. Subsequently, on April 15, 2022, Mr. Welch filed an application (Application) with the Board seeking the same requests as in the site plans. *See* Record, Ex. 5.

A

Board Hearing and Decision

The Board conducted a hearing on May 24, 2022. Mr. Welch described the existing dwelling stating how it is an old house, built in 1934, "rather primitive[,]" and that his realtor told him "it's in rough shape"—"living there is like camping." *Id*. at 6:11-17.

Shahin Barzin, a licensed architect, opined how the existing dwelling's "conditions are not right . . . for [Mr. Welch's] needs and his elderly parents[.]" *Id*. at 11:16-18. Additionally, Mr. Barzin testified that (1) "the hardship from which Mr. Welch seeks relief is due to the unique characteristics of the land or structure" because "the lot is . . . much smaller than standard size within that zone"; (2) "the main objective is to build the house that meets today's standard . . . efficiencies [and] . . . safety standards and provide a home for him, for his partner and the parents, and . . . there is no interest in investment"; (3) the proposed dwelling would not "alter the general character of the surrounding area" because "the proposed use as a single-family home is perfectly consistent with the existing use"; (4) "given the conditions of the existing house, the constraints that exist with the lot itself, the environmental safety and . . . the rule of creating a decent living space . . . I believe that this is the least he could ask for. The least relief"; and (5) Mr. Welch would suffer "significant" hardship if not granted his requested relief because the existing dwelling does "not meet any standards of modern living[.]" *See id*. at 12:1-7; 13:15-20;

[2] The Kellys own real property located at 1116 East Shore Road, Jamestown, Rhode Island, further identified as Tax Assessor's Plat 1, Lot 352.

14:4-5, 11-12; 14:21-15:1;15:9-11.

Thereafter, professional engineer Matthew Viana opined as to how the plan will reduce impervious coverage, explaining that the "[e]xisting impervious is 1620 square feet" including the building and four sheds, and since the plan calls for a removal of three sheds, "it [will] reduce[] the impervious coverage from 1620 to 1479, or from 14.85 percent to 13.61." *Id*. at 18:11-19. Mr. Viana further opined that the proposed dwelling's design is appropriate because storm water runoff will be reduced, the foundation's design "will not affect the septic system," and the septic system is "the best technology available" so it will not "pose a threat to the public health or safety." *Id*. at 18:20-23; 19:11; 20:6-9.

Witnesses in opposition to the Application expressed concerns with the proposed height of the dwelling, erosion of the road, and design aesthetics. *See id*. at 23:9-18, 24-25; 24:1-9. Appellant Alicia Kelly insisted that the proposed dwelling is not "in keeping with the character of the area" and "is essentially exceeding or extending the footprint" which is "effecting [her] view." *See id*. at 27:1-21.

On June 29, 2022, the Board recorded its written decision unanimously granting the Application. *See* Record, Ex. 3. On May 1, 2023, the Kellys timely appealed the Decision to this Court on the following grounds: (1) the Application does not satisfy the standards for granting a variance or special use permit and (2) they did not receive sufficient notice of the Hearing. *See* Appellants' Mem. in Supp. of Appeal (Appellants' Mem.) 7, 15.

II

Standard of Review

The Superior Court's review of a zoning board decision 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 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." Section 45-24-69(d).

This Court is required to "'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). Substantial evidence is "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." *Iadevaia v. Town of Scituate Zoning Board of Review*, 80 A.3d 864, 870 (R.I. 2013)). In reviewing an appeal from a zoning board's decision,

"the Superior Court may not substitute its judgment for that of the zoning board concerning the weigh of the evidence on questions of fact." *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004). If the Court concludes that the zoning "board's decision was supported by substantial evidence in the whole record[,]" then the zoning board's decision must be affirmed. *Lloyd*, 62 A.3d at 1083. If the Court determines that the zoning board's decision was not supported by sufficient findings of fact and conclusions of law, the Court may remand the matter to the zoning board. *See Irish Partnership v. Rommel*, 518 A.2d 356, 359 (R.I. 1986).

III

Analysis

A

Dimensional Variance

The Kellys assert that the Board erred in granting Mr. Welch's requested zoning relief because the Application failed to satisfy the requirements for a dimensional variance as stated in G.L. 1956 §§ 45-24-41(d) and (e). *See* Appellants' Mem. 7-11. Section 45-24-41(d) states,

> "(1) That 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 is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(a)(16);
>
> "(2) That the 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) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and

> "(4) That the relief to be granted is the least relief necessary." Section 45-24-41(d).[3]

The applicant also must show "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." *Id*. at (e)(2).

1

Source of Hardship

On appeal, the Kellys claim that Mr. Welch "created his own hardship" because he purchased a property which he knew was substandard and intended to move his partner and parents into it. Appellants' Mem. 8; *see also* Appellants' Reply Mem. to Appellees' Opp'n (Appellants' Reply) 5-6. The Kellys further insist that the request for dimensional relief is "directly related to a physical disability of the applicant" because Mr. Welch plans to move his elderly parents into the home, and the question of "whether the home would be suitable for Welch's parents" should not bear on the Board's decision. (Appellants' Mem. 8-9.)[4]

Section 45-24-41(d)(1) requires that the hardship "relate to some characteristic of the land for which the variance is requested, and must not be *solely* based on the needs of the owner." *See* 3 Rathkopf, *The Law of Zoning and Planning* § 58:20 (4th ed. Dec. 2023 Update) (emphasis added); *see also* § 45-24-41(d)(1). For example, in *O'Donnell v. Town of East*

[3] The Legislature amended the Rhode Island Zoning Enabling Act, Title 45, Chapter 24, effective January 1, 2024. However, the appropriate standard for an appeal is "the law in effect at the time when the applicant . . . submitted its application for a permit to the zoning board[,]" absent a "clear expression of retroactive application." *East Bay Community Development Corporation v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1144 (R.I. 2006). Thus, although the current ordinance is effective January 1, 2024, the ordinance as it was before January 1, 2024 is applicable. *See id*.

[4] Because the Board did not make any findings regarding disability, nor was disability discussed at the Hearing, the Court need not address the parties' arguments on this matter.

Greenwich Zoning Board of Review, No. KC-2022-0065, 2023 WL 6968057, at *1-2 (R.I. Super. Oct. 17, 2023), the applicant requested two dimensional variances so she could construct an addition to accommodate a first-floor bedroom with a handicap-accessible bathroom. In granting the variances, the zoning board cited a variety of factors as the source of the hardship, such as the property's historic nature, the comments from the Historic District Commission, the property's proximity to the northern property line, and the applicant's wish for a handicap-accessible bathroom on the first floor. *Id*. at *9. On review, the Court concluded that the zoning board had based its finding of hardship only in part on the applicant's need for a handicap-accessible room. *Id*. The Court determined that the burden under § 45-24-41(d)(1) was met because her disability was not the sole reason for granting the variance. *Id*.

Here, the Board heard various testimony confirming that living in the existing dwelling is "like camping" and fails to meet safety and efficiency standards. *See* Tr. 6:11-17; 13:12-23. Substantial evidence supports the Board's finding that Mr. Welch's sole reason for the improvements was not to have his elderly parents live with him, but rather was because the poor conditions of the existing dwelling necessitate improvements.

2

Financial Gain

The Kellys challenge the Board's finding that Mr. Welch met his burden under § 45-24-41(d)(2). *See* Appellants' Mem. 11. They claim that the relief requested "is primarily motivated by a desire of the [A]pplicant to realize greater financial gain" because the "new house will have a value two to three times the value of the existing dwelling[.]" *Id*.

A determination that an improvement will add value is not enough to satisfy this prong. Critically, the § 45-24-41(d)(2) standard requires that an applicant's primary desire be financial

gain. *See New Castle Realty Co. v. Dreczko*, 248 A.3d 638, 648 (R.I. 2021) (denying applicant's request for a dimensional variance because the request was primarily for financial gain or investment purposes, which was confirmed by applicant's testimony that the size of the house would "affect the value of the real estate").

Here, the record is devoid of evidence regarding Mr. Welch's desire for financial gain. Mr. Barzin opined that it would be "a very long time before [Mr. Welch] can see a return on the investment." (Tr. 13:21-23.) He also opined that the requested changes are to improve the "efficiencies" and "safety standards" of the dwelling." *Id*. at 13:17-20. Indeed, these improvements may increase the value of the property; however, this Court is satisfied that substantial evidence supports the Board's finding that Mr. Welch's primary motivation for the improvements is his desire to make the dwelling livable for him, his partner, and his parents.

3

General Character of the Surrounding Area

The Board correctly determined that the evidence before it sufficiently confirmed that the general character of the area would not be altered. *See* Tr. 14:3-17 ("granting of the variance will not alter the general character of the surrounding area" because "[t]he surrounding area is . . . exclusively single-family homes, and the proposed use as a single-family home is perfectly consistent with the existing use . . ."). Furthermore, the concerns about the height of the new dwelling are misguided; Mr. Welch did not seek a variance for height; the proposed height of his new dwelling was lawful, as he only sought relief from the side and front setback requirements. *See* Record, Exs. 4, 5.

4

Least Relief Necessary / More than a Mere Inconvenience

Finally, the Kellys assert that Mr. Welch's requested relief was not the least relief necessary and that Mr. Welch would not suffer hardship greater than a mere inconvenience if his Application were denied. (Appellants' Reply 8-10.) In requesting a dimensional variance, an applicant must "establish that the relief sought is minimal to a reasonable enjoyment of the permitted use to which the property is proposed to be devoted." *Standish-Johnson Co. v. Zoning Board of Review of City of Pawtucket*, 103 R.I. 487, 492, 238 A.2d 754, 757 (1968). The standard also requires an applicant to demonstrate that denial of the request would result in more than a mere inconvenience. *See* § 45-24-41(e). A "mere inconvenience" means that "there is no other reasonable alternative to enjoy a legally permitted beneficial use of [one's property.]" *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 692 (R.I. 2003). This Court finds the rationale from *Cosel v. Silveira*, No. NC-09-0264, 2011 WL 1748542, at *6 (R.I. Super. May 3, 2011) and *Hayde v. New Shoreham Zoning Board of Review*, No. WC-2022-0221, 2023 WL 8531120, at *8 (R.I. Super. Dec. 04, 2023) to be persuasive.

In *Cosel*, the applicants petitioned for a dimensional variance to "demolish an existing detached, single-story garage and to construct an attached two-story garage." 2011 WL 1748542, at *1. An expert testified at the zoning board hearing that the existing property is "outdated" and that the "proposed changes would be to add a master bedroom/bathroom suite that would be in keeping with today's standards[.]" *Id*. The zoning board granted the variance in reliance on various factors, including the expert's testimony that "the property was outdated and inadequate[.]" *Id*. at *5. On appeal, the Court upheld the zoning board's decision, reasoning that the zoning board relied on "the unique characteristics of the [p]roperty (i.e., an antiquated home

on an undersized lot which predates the [town's zoning ordinance])." *Id*. at *6.

Likewise, in *Hayde*, the applicant requested dimensional variances to build a single-family home because she wanted to build a "forever home on Block Island for people in her family so they can age and be taken care of." 2023 WL 8531120, at *6. At the zoning board hearing, the applicant testified that she planned for a "small house placed in the center of the lot, with a footprint of 1,145.7 square feet out of 7,177 square feet, seeking only relief from the front and rear setback requirements[.]" *Id*. at *8. Additionally, the land surveyor opined that "it would not be possible to build a single-family dwelling on the lot without the rear and front setback relief requested in the variance[.]" *Id*. The zoning board approved the application, reasoning that denying the application "would have been more than a mere inconvenience to [the applicant] because she would have been denied of her right to build a single-family home on the property." *Id*. at *8. The trial court concluded that the zoning board's determination was "well-supported by substantial evidence in the record." *Id*.

Similarly, here, the Board relied on substantial evidence in determining that Mr. Welch's plan requests the least relief necessary and he would suffer hardship greater than a mere inconvenience if his requested relief were denied. The evidence before the Board sufficiently summarized the "rough shape" of the existing dwelling, such that a raze and rebuild of the existing dwelling would be necessary regardless of whether Mr. Welch was to live there on his own or with his elderly parents. Mr. Barzin opined that "given the conditions of the existing house, the constraints that exist with the lot itself, the environmental safety and . . . the rule of creating a decent living space . . . I do believe that this is the least he could ask for." (Tr. 14:21-15:1.) He further opined that, without approval by the Board, the existing dwelling "will not meet any standards of modern living." *Id*. at 15:10-11. Mr. Viana explained how the requested

relief would result in a reduction of the impervious coverage, reduction of stormwater runoff, and an improved septic system that uses the "best technology available." *See id*. at 18:17-20:9. As in *Cosel* and *Hayde*, the testimony before the Board sufficiently provided that without a variance, Mr. Welch would not have a livable home nor would the existing dwelling properly capture runoff or accommodate today's septic system's health and safety needs. Accordingly, this Court is satisfied that the Board's approval of Mr. Welch's dimensional variance was well supported by substantial evidence in the record.

B

Sufficiency of Evidence for Special Use Permit

The Kellys additionally assert that the Board "did not have competent evidence available in order to make the findings necessary to satisfy [the] special use permit standard." (Appellants' Mem. 12.) The Board and Mr. Welch (collectively, Appellees) insist that the Board was permitted to rely on Rhode Island Department of Environmental Management's (DEM) approval of the septic system. (Appellees' Mem. 15.)

"[A]n applicant for zoning relief ought to be able to rely on permits granted by DEM with respect to those matters uniquely within DEM's expertise." *New Castle Realty Co.*, 248 A.3d at 646. A DEM permit "is not conclusive evidence" that all DEM regulations have been satisfied; however, if "there is no contrary competent evidence in the record[,]" the DEM permit approval is entitled to deference. *Id. See id*. ("relief should not be denied based upon a board member's belief that a particular septic system would be more beneficial than one approved by DEM, unless that member's belief is firmly grounded upon competent scientific evidence").

Here, DEM granted Mr. Welch a permit for his plans "to move the well and to install an advanced [Onsite Wastewater Treatment System], AdvanTex treatment and bottomless sand

filter system." (Tr. 4:13-15.) His application "received the approval of the town engineer as being consistent with the ordinance and the unanimous approval of the planning commission." *Id*. at 5:1-4. In other words, DEM granted Mr. Welch a permit for the very activity in which he sought a special use variance for. At the Hearing, no evidence was presented in opposition to the permit. Accordingly, this Court is satisfied that substantial evidence supported the Board's grant of the special use permit.

C

Notice of Zoning Board Hearing

On appeal, the Kellys insist that they "did not receive sufficient or otherwise adequate notice" of the Hearing, claiming that Mr. Welch "purposefully deceived" them as to his proposed construction plans. (Appellants' Mem. 15.) Prior to the Hearing, the Kellys and Mr. Welch were "actively engaged in negotiations" regarding Mr. Welch's plans. *Id*. at 4. According to the Kellys, Mr. Welch's initial plans proposed a new dwelling that would not obstruct their view; therefore, the Kellys did not organize for an expert to attend the Hearing. *See id*; *see also* Appellants' Reply 12. They claim they learned of Mr. Welch's "true proposed location of the home, in contradiction of their previous negotiations" one week prior to the Hearing; therefore, they did not have enough time to get an expert. *See* Appellants' Mem. 4. According to Appellees, the Kellys waived their right to object to the sufficiency of the notice because they attended the Hearing. (Appellees' Mem. 17.) Further, Mr. Welch insists that he did not misrepresent his plan to the Kellys, directing this Court to review the email correspondence between him and the Kellys. *Id*. at 17-18. The Kellys request that this Court either (1) remand the matter to the Board and allow them to introduce additional evidence for the disposition of the appeal, or (2) allow them to present the additional evidence pursuant to G.L. 1956 § 45-24-69(c).

(Appellants' Mem. 16-17.) This Court finds one issue to be of crucial importance: the Kellys' failure to ask for a stay or continuance at the Hearing.

"It is well settled that this Court will not consider on appeal an issue that was not raised before the trial court." *Rhode Island Depositors Economic Protection Corporation v. Rignanese*, 714 A.2d 1190, 1196-97 (R.I. 1998). Here, Mrs. Kelly attended the Hearing. She did not ask for a stay, nor did she imply that Mr. Welch misrepresented the plans to them or that they would like to have an expert testify as to the negative impacts of the plans. *See generally* Tr. 26:18-31:6. In summary, the Kellys did not raise this issue and they should have. *See East Bay Community Development Corporation*, 901 A.2d at 1153. As such, this Court is satisfied that the raise-or-waive rule prohibits the Kellys from now raising the issue of misrepresentation and insufficient notice because they had the opportunity to raise such issues before the Board.

IV

Conclusion

For the reasons stated herein, the Court affirms the decision of the Zoning Board. Accordingly, the issuance of the variance and the special use permit is affirmed. Counsel shall submit an appropriate order for entry.

RHODE ISLAND
Decision Addendum Sheet

SUPERIOR COURT

TITLE OF CASE:	**Fred A. Kelly, Jr. and Alicia Kelly v. The Town of Jamestown Zoning Board of Review, et al.**
CASE NO:	**NC-2022-0203**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**March 27, 2024**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiffs:	**Michael A. Kelly, Esq.**
For Defendants:	**Wyatt A. Brochu, Esq.**