STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: June 17, 2024)

LINDA ZUNDA	:	
Appellant,	:	
	:	
v.	:	**C.A. No. WC-2023-0081**
	:	
TOWN OF WESTERLY BY AND THROUGH ITS ZONING BOARD OF REVIEW, JOSEPH MONTESANO and JEAN MARIE MONTESANO, TRUSTEE OF THE JEAN MARIE MONTESANO TRUST U/A/D SEPTEMBER 28, 2016	:	
Appellees.	:	

DECISION

LANPHEAR, J. Before this Court is Linda Zunda's appeal from a Town of Westerly Zoning Board of Review Decision,[1] which approved the application of Joseph Montesano and Jean Marie Montesano, Trustee of the Jean Marie Montesano Trust (the Montesanos) for dimensional variances on their property. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The Montesanos own property at 5 Terrace Avenue, Westerly, Rhode Island. They applied for dimensional variances for new construction on the existing home. Their 1,380 square foot ranch, built in the 1960s, is legally nonconforming as the real estate is only 7,160 square feet, although 10,000 square feet is required in the HDR-10 zone. Ms. Zunda is an adjacent abutter who lives at 9 Terrace Avenue. She testified before the Zoning Board.

[1] The Zoning Board Decision is Document 26 of the Certified Record.

A

First Dimensional Variance Application

On December 17, 2020, the Montesanos filed an application (First Application) seeking setback variances on all four sides of the home, a proposed second floor, and a two-story garage. They sought a substantial reduction in the existing impervious surface area to accommodate the additions and a Special Use Permit for Mr. Montesano's commercial real estate business.

The Zoning Board held hearings on February 25, 2021; April 7, 2021; May 5, 2021; and June 2, 2021. On February 25, 2021, neighbors and experts in home design, land surveying, and city planning testified on the Montesanos' behalf. Ms. Zunda, an adjacent abutting neighbor, presented expert and lay witnesses in opposition. The Montesanos then revised their application twice because of continued opposition from neighbors. Ultimately, they withdrew their requests for a 7.1' left side yard variance for the two-story garage and the Special Use Permit. Instead, they sought a 3.1' right side yard variance, a 15.4' rear yard variance, and a 12.1' front yard variance. These adjustments were made to accommodate the addition of a second story, porch, mud room, and bathroom to the existing structure. The amended proposal sought permission to build just 3.1 feet from Ms. Zunda's border.

On July 6, 2021, the Zoning Board approved the Montesanos' final amended application. Of note, the Zoning Board found that the Montesanos' "claimed hardship is directly in reference to how the [Montesanos] seek to live given current health conditions and anticipated health concerns," as well as the shape of the Property—namely, the way the house is positioned on the lot. July 6, 2021 Decision at 5. The Zoning Board found that each approved variance was the least relief necessary

> "because of the minimalization of the actual improvements to the house being a straight up expansion and a small addition of the mud

> room, bathroom and laundry area on the left of the existing house, without requiring a left side yard variance. In addition, the right side variance is only for the vertical expansion of the home, the home is not expanding further into the right side yard. The rear side yard variance similarly does not expand further into the rear yard than what is already present from the existing home. The front yard variance is minimal and assists to maintain proportions." *Id*.

Further, the Zoning Board expressed the approved plans

> "may not be altered, amended, or changed in any 'material' way unless approved by the Westerly Zoning Board of Review. The determination of whether any alteration, amendment or change in the approved plans is 'material' shall be made by the Town Zoning Official and the Zoning Board Chairman. The Zoning Board hereby grants to the Zoning Official administrative authority to approve further 'non-material' modifications to its approved plans[.]" *Id*. at 4.

Ms. Zunda did not appeal.

B

Second Dimensional Variance Application

On September 20, 2022, the Zoning Board received a separate application (Second Application) from the Montesanos, in which they "now seek[] to amend the prior approval and propose[] to construct a 16' (front wall) x 38' (left side wall) two-story addition for a garage at grade, and two bedrooms and a bathroom on the second floor." (Application for Dimensional Variance, 4.) The Montesanos maintained "this application keeps the existing home a single story." *Id*. The Montesanos acknowledged the Property "is subject to an approval granted by the Zoning Board of Review and codified in a Zoning Decision dated July 6, 2021 . . . . " *Id*.

On September 21, 2022, the Montesanos received a "variance required" letter from the Zoning Board indicating it still needed copies of all application material. (R. 3 (Variance Required Letter) 1.) On November 10, 2022, the Montesanos received a letter of completeness from the Zoning Board indicating that it "has received and reviewed [the Second Application] which

proposes to modify a Variance Decision granted by the Westerly Zoning Board on July 6th, 2021." (R. 5 (Completeness Review of Zoning Application) 1.)

1. January 11, 2023 Hearing

At a hearing on January 11, 2023, Zoning Official Martin E. Loiselle said "the applicant wishes to modify a variance decision granted on July 6, 2021 . . . the new proposal reduces the overall height of the project [by ten] feet below the max height allowance." (R. 22 (Meeting Minutes) 3.) Further, the Zoning Official indicated he had received seven letters in support and seven letters in opposition to the Second Application.

An attorney appeared on behalf of the Montesanos and represented that their initial request for a size variance of 3,124 square feet would be reduced to 2,461 square feet "to satisfy neighborhood and Board concerns." *Id*. Applicant Jean Marie Montesano testified under oath that she and Joseph Montesano desired to update the 1960 ranch-style home and "bequeath [it] to their children" and to accommodate visitors. *Id*. The revised plan, which would reduce the size and eliminate the original home office, provides a single-floor living space to accommodate Ms. Montesano's fibromyalgia, with the addition above the garage serving as guest quarters for their son and visitors. *Id*.

A separate attorney appeared on behalf of Ms. Zunda and asked to cross-examine Applicant, to which the Montesanos' counsel objected, arguing "no new information would be added from a cross examination." However, the Assistant Solicitor said, "the rules of procedure require the applicant to speak and any public questions should be directed through the Chair of the Board." *Id*. This exchange followed:

> "[BOARD COUNSEL]: Traditionally, questions are directed through the Chair, which I think is appropriate. To the extent [Counsel for Ms. Zunda] has any questions, he can certainly do so, when he is invited to, through the Chair.

> "[CHAIRMAN]: [Y]ou don't get to cross-examine. You get to ask questions after the presentation." (Tr. 57:8-23, Jan. 11, 2023.)

The Zoning Board unanimously voted to approve a

> "3.1-foot right side variance, a 12.1-foot front yard variance, a 15.4-foot rear yard variance, and a 1.6 percent impervious surface variance to modify a previous variance decision granted by the Westerly Zoning Board on July 6, 2021 in order to add a garage with a second story containing two bedrooms and a full bath on the northside of the house and to eliminate the previously approved second floor over the existing house." (Meeting Minutes 5.)

2. Zoning Board Decision

The Zoning Board issued its written Decision on January 31, 2023. (Jan. 31, 2023 Decision.) Specifically, the Zoning Board decided the Montesanos satisfied the standards of § 260-33 Variances. First, the Zoning Board noted that the inability to construct a garage on the Property is attributed to its unique characteristics rather than any physical or economic disability of the Montesanos, as the lot is nonconforming and does not allow for garage construction within the designated building envelope. Second, it found that the alleged hardship is not the primary result from the desire of greater financial gain because the claimed hardship stems from the need to "grow old" in the home given the Montesanos' health conditions and the property's unique trapezoid shape. *Id*. at 6-7. Third, the Zoning Board found the new proposal would not alter the general character of the surrounding area or impair the intent or purpose of the Ordinance or Comprehensive Plan because it encourages "homeowners to renovate their properties," there is "absolutely a need for a garage," and replacement of an "outdated cesspool with a state-of-the art denitrification system" would improve public health. *Id*. at 7. Fourth, the Zoning Board found it is the least relief necessary because it reduced both the "height by 4'-3"", the second floor from 1,476

square feet to 833 square feet, and the overall impervious surface from the previous design. *Id*.[2] Lastly, the Zoning Board found that the Montesanos would suffer more than a mere inconvenience because the requested variance is "reasonably necessary for the full enjoyment of the [Montesanos'] permitted use[,]" and the garage will create a more beneficial property by aiding the Montesanos with medical challenges, even absent the medical condition. *Id*. at 7-8.

On February 17, 2023, Ms. Zunda filed her Complaint in the Superior Court seeking to appeal the Zoning Board's Decision.

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

[2] Also, the Zoning Board found persuasive that the Montesanos considered alternatives, in that they changed "from a two-car garage to a one car garage." (Jan. 31, 2023 Decision, 7.)

> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Our Supreme Court has opined that "[i]t is the function of the Superior Court 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) (internal quotation omitted). 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."' *New Castle Realty Co. v. Dreczko*, 248 A.3d 638, 643 (R.I. 2021) (quoting *Iadevaia v. Town of Scituate Zoning Board of Review*, 80 A.3d 864, 870 (R.I. 2013)).

III

Analysis

A

Procedural Issues before the Board

1. Second Application – New vs. Modified

As a threshold inquiry, the Court addresses Ms. Zunda's contention that the Second Application is a modification of the Zoning Board's July 6, 2021 Decision, rather than a new application. After protracted hearings in a contested case, the July 6, 2021 Decision explicitly conditioned the approved plans "may not be altered, amended, or changed in any 'material' way unless approved by the Westerly Zoning Board of Review." Just fourteen months later, the Montesanos filed a significantly different application. The Court is faced with the issue of whether the rules of the Zoning Board unfairly changed.

The hearing minutes describe the Second Application as an "amendment" modifying the July 6, 2021 Decision. *See generally* R. 22 (Meeting Minutes). The video shows a board member

stating, "I always observed [the Second Application] as a new application." *Id*. at 93:8-9. Even Ms. Montesano indicated that "[w]e have a previously approved plan from this board. It was not the plan we initially requested." *Id*. at 48:13-15. Further, the January 31, 2023 Decision states, "[t]he applicant proposes to modify the previous Decision in order to add a garage with a second story on the north side of the house, and to eliminate the previously approved second floor over the existing house." (R. 23 (Jan. 31, 2023 Decision) 3.)

The Zoning Board found the Second Application was indeed a new application. The January 31, 2023 Decision provides:

> "Since the Zoning Board approved the revised plans at the January 11th, 2023 public hearing, the [First Application] is now null and void, and a new 9 month variance expiration period will begin 20 days after this Decision is recorded. It should be noted that both the applicant's attorney, . . . and several Zoning Board members stated that this was a new application, and that the prior approval dates were irrelevant. The applicant simply wanted to refer to it as a modification to more effectively make a comparison with the original 2021 plans." *Id*. at 4.

Nevertheless, affording the local board some discretion in controlling its own procedures, this Court will not disturb the Zoning Board's finding that the Second Application is not a modification.

While doing so, the Court states its concern for this odd procedure. The Montesanos filed an application, after several hearings the application was changed, and after several more hearings the first application was granted. After the thorough analysis and favorable result, another application was filed just fourteen months later, each of the changes being significantly different from the last, purportedly because the result Ms. Montesano received before was not what was asked for. No wonder some of the members of the Zoning Board, and Ms. Montesano herself, were confused with what was before the Board. The Court notes its concern that members of the

public, such as Ms. Zunda, appear to be left to chase a moving target. Other abutters receiving a notice may believe that it had already been heard. Those without counsel may wonder what is next, and should they bother to go to yet another hearing?[3]

2. *Res Judicata*, Collateral Estoppel, and Administrative Finality

Ms. Zunda contends the doctrines of *res judicata* and collateral estoppel bar the Montesanos' Second Application. These doctrines do not apply to zoning decisions; rather, courts apply the doctrine of administrative finality. *RICO Corp. v. Town of Exeter*, 787 A.2d 1136, 1143 n.7 (R.I. 2001). "Under this doctrine, when an administrative agency receives an application for relief and denies it, a subsequent application for the same relief may not be granted absent a showing of a change in material circumstances during the time between the two applications." *Apex Oil Company, Inc. v. State by and through Division of Taxation*, 297 A.3d 96, 114 (R.I. 2023) (internal quotation omitted). "While the rule is sound, it is operative only if the relief sought in each case is substantially similar." *Id.* at 114 (internal quotation omitted); *see also Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, 755 A.2d 799, 808 (R.I. 2000) ("This rule applies as long as the outcome sought in each application is substantially similar . . . even if the two applications each rely on different legal theories.").

While it is a close call, this Court concludes that the doctrine of administrative finality does not apply here. The key consideration lies in whether the Second Application pursues an outcome substantially similar to the First Application. *See Apex Oil Company, Inc.*, 297 A.3d at 114 (holding '"[w]hile the rule [of administrative finality] is sound, it is operative only if the relief

[3] There is merit to limiting successive applications for the same owners and the same property. Not only does the multi-application process confuse the public, it escalates litigation costs unnecessarily, encouraging the more affluent to try again and again, while neighbors question whether to oppose another battle and employ experts again. Moreover, it exposes zoning boards to longer dockets and hearing matters that the boards have just resolved.

sought in each case is substantially similar"') (quoting *May-Day Realty Corp. v. Board of Appeals of City of Pawtucket*, 107 R.I. 235, 237, 267 A.2d 400, 402 (1970). In *May-Day Realty Corp*, our Supreme Court determined that applicant's permit request to erect two ten-family apartment houses was "[o]bviously . . . so dissimilar" to his current request to construct a single apartment building containing a hundred units with underground parking that the doctrine of administrative finality did not apply. *May-Day Realty Corp.*, 107 R.I. at 237, 267 A.2d at 402.

However, in *Costa v. Gagnon*, 455 A.2d 310 (R.I. 1983), the applicant who operated a chicken farm and store sought a variance to operate an autobody shop on his property instead. The applicant stated the property was not appropriate for residential use, citing terrain issues and doubts about passing a perc test. After the zoning board's denial, the applicant filed a second petition asserting a different theory that state law required an autobody shop to have certain dimensional requirements and proposed relocating the autobody shop to a different building on the premises, to which the zoning board approved after hearing various testimony. The abutters appealed, and the Superior Court reversed. On review, our Supreme Court distinguished *May-Day Realty Corp.*, because the defendants in *Costa*

> "petitioned the board on two separate occasions and on each occasion they pursued different legal theories. In both petitions the Costas were seeking the board's approval of their auto-body-shop use and expansion of that use. Unlike the clearly dissimilar requests for relief in the *May-Day Realty* case, the Costas[']requests for relief, we find, were substantially similar in each petition. Furthermore, there was no evidence of a material change in the circumstances. In such a case the doctrine of administrative finality bars the repetitive petition." *Costa*, 455 A.2d at 313.

The circumstances in this case are more akin to those in *May-Day Realty*. The relief requested in the First and Second Applications are not substantially similar because, as with the relief sought in *May-Day Realty*, they propose an entirely different structure and a 1.6 percent

impervious surface variance. Notwithstanding that the right side yard, front yard, and rear yard variances remained the same, the Second Application "eliminate[s] the previously approved second floor over the existing house" and now allows for a "garage with a second story containing two bedrooms, a full bath, and a sitting area . . . " (Jan. 31, 2023 Decision 8.) Additionally, the Zoning Board concluded that, due to the distinct characteristics of the property being legally nonconforming, constructing a garage within the building envelope would not be feasible. Therefore, administrative finality does not bar the Second Application.

3. Alleged Abuse of Authority and Impropriety

i

Cross-examination

Ms. Zunda challenges the Zoning Board's denial of her attorney's request to cross-examine Applicant's witnesses and her speculation regarding the manner in which the Decision was reached. "Although interested persons have a right to be heard in zoning hearings in accordance with rules and regulations lawfully adopted and impartially applied by such boards for the conduct of their hearings, there is nothing in the law entitling such persons to cross-examine opposing witnesses as a matter of right." *Colagiovanni v. Zoning Board of Review of City of Providence*, 90 R.I. 329, 335, 158 A.2d 158, 162 (1960). An exception exists when the refusal to allow cross-examination "deprive[s] a party of a complete and impartial hearing in that it prevent[s] him from introducing competent, relevant evidence on the issues raised." *Westminster Corp. v. Zoning Board of Review of City of Providence*, 103 R.I. 381, 393-94, 238 A.2d 353, 360 (1968).

At the January 11, 2023 hearing, after Ms. Montesano testified, Ms. Zunda's attorney sought to cross-examine. Because the Chairperson determined that counsel could not cross-examine witnesses, Ms. Zunda avers this "constitutes an abuse of authority and prevents the

opportunity to properly cross-examine any witness tendered by an applicant as is permitted in such proceedings . . .” (Ms. Zunda’s Mem. 15.)

Though the Zoning Board’s response to an adjoining abutter’s attorney posing reasonable concerns[4] was more than curt, its actions were not a clear abuse of authority. Ms. Zunda’s counsel was allowed to submit questions through the Chairperson of the Zoning Board after a witness testified. Moreover, counsel was not precluded from presenting his own witnesses to refute the Montesanos and their witnesses’ testimony. The Chairperson stated, “If Mr. Lynch has experts to present, to rebut these -- our experts or to rebut Ms. Montesano’s testimony, that is his right, but he doesn’t have a legal right to cross-examination.” (Tr. 56:16-19, Jan. 11, 2023.)

The Court cannot conclude that the Zoning Board acted improperly or abused its authority in refusing cross-examination.

B

Open Meeting Laws

Lastly, Ms. Zunda suggests that the Zoning Board violated “Open Meeting laws” because “[i]t is inconceivable [Mr.] Russo could have penned the decision rendered following the presentation by the Montesanos given the limited time provided for ‘cross-examination’ and other opposition to the application.” (Ms. Zunda’s Mem. 16.) Further, Ms. Zunda argues that, “[t]he only explanation is that he or someone else for him crafted the decision in advance.” *Id*.

[4] For the First Application, the Montesanos proposed at least three different versions of the building to the Zoning Board. This is reflected in the Zoning Board Decision of July 6, 2021, (Appellant’s Exhibit A), which shows the request for a side setback on the Zunda side to be “withdrawn.” *Id*. at 1. The Second Application could be requesting a deviation from the 15-foot setback for the Montesano property on Ms. Zunda’s border. Frankly, it is difficult to ascertain the distance from the Second Application itself, with its handwritten revision. Appellant’s Exhibit B at 6. This cryptic sketch seems to show a space of 3.1 feet on Ms. Zunda’s side or 8 feet from Ms. Zunda’s home to what now may be a two-story garage. *See* R. 13, site plan. In this situation, it was more than reasonable for Ms. Zunda’s representatives to inquire.

General Laws 1956 § 42-46-1 provides, "[i]t is essential to the maintenance of a democratic society that public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." Of course, public bodies may have their own counsel and should be able to employ staff to spot issues and suggest alternatives.

Ms. Zunda's contention that the Zoning Board violated §§ 42-46-1 to 42-46-14, because of alleged discussion in advance of the January 11, 2023 hearing was not established. The following exchange occurred between the Chairman, Speaker, and Ms. Zunda's counsel:

> "[MS. ZUNDA'S COUNSEL]: Can I ask through the Board whether or not there has already been a preliminary decision that has been written for tonight's hearing?
>
> "CHAIRMAN: No [there is not]." (Tr. 75:17-21, Jan. 11, 2023.)

Not only has Ms. Zunda failed to furnish sufficient case law to support her contention; she has not provided this Court with competent evidence evincing that an impropriety occurred beyond mere conjecture and speculation. It is likely that several board members have significant experience in such applications and familiarity with the legal standards. Counsel may have provided advice and staff may have prepared alternative talking points. The Court affords the local board some discretion and will not assume the worst.

C

Application of the Dimensional Variance Standard

In order for a zoning board to have approved an applicant's variance request at the time of the Second Application, the request must have satisfied § 45-24-41(d):[5]

[5] In *Kaveny v. Cumberland Zoning Board of Review*, 875 A.2d 1, 4–5 (R.I. 2005) our Supreme Court declined to retroactively apply various amendments to the Rhode Island Zoning Enabling Act because the amendments lacked the requisite clear expression of retroactive application. *East*

> "(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."

When reviewing a request for a dimensional variance, a zoning board also must "require that evidence is entered into the record of the proceedings showing 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." *See* § 45-24-41(e)(2).

1. The Zoning Board found that the hardship was caused as the lot is nonconforming by being "only 100' wide and 72' deep." With setbacks, the garage could not be constructed, limiting the ability of the applicants to live in their "grow old home." (Jan. 31, 2023 Decision 6-7.) Not all properties have a garage or suites for occasional guests. It was never established, nor was there a finding, that Ms. Montesano had a disability as defined in § 45-24-30(a)(16). While the Zoning Board found a hardship, the Court is hard-pressed to

Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington, 901 A.2d 1136, 1144 (R.I. 2006). Because the Montesanos submitted their application before the General Assembly amended § 45-24-41(d), this Court will use the previous version as the amended version does not express any legislative intent for it to apply retroactively.

understand its reasoning, particularly when the lot seems to be consistent, if not larger, than the other lots in the area, and a substantially sized lot in itself.

2. The Zoning Board found that the hardship was not the result of the applicants' prior actions, nor is it for financial gain. *Id.* at 6. There is no evidence to the contrary, and the Court does not question this finding.

3. The Zoning Board is required to consider the general character of the area. The Board did so here, noting that the septic system would be updated, and the house would be renovated consistent with goals of the Comprehensive Plan. *Id.* at 7. The Board did not reference the neighborhood, the size of houses nearby, or how the proposal compares. As stated above, the Court is hard-pressed to find that this proposal is consistent with the character of the area.

4. The Zoning Board is required to ensure that the relief granted is the least relief necessary. It did so by comparing the new plan to the prior approved design or, if a more beneficial result would occur, noting the difference from the existing building. The Board specifically found "doing the project without a garage is not a reasonable alternative" without citing evidence to justify this odd conclusion. *Id.* Simply put, the Montesanos could have applied for, or continued with, a smaller home that did not violate so many setback requirements. *See New Castle Realty Company*, 248 A.3d at 648-49 (upholding the trial justice's ruling that the requested relief did not reflect the least relief necessary, as the applicant could have considered a smaller house).

5. Finally, the Zoning Board must consider whether the hardship incurred is more than a mere inconvenience. *See* § 45-24-4(e)(2). A "mere inconvenience" means "there is no other

reasonable alternative to enjoy a legally permitted beneficial use of [the] property." *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 692 (R.I. 2003).

The Zoning Board found that the Montesanos met the "more than a mere inconvenience" standard because

> "[t]he garage will assist in creating a much more beneficial property and provide assistance to the [Montesanos] who **might have** medical challenges as testified under oath, and the Board finds Mrs. Montesano to be a credible witness as it relates to her testimony regarding her medical condition. Even absent the medical condition discussed, the garage is reasonably necessary for the [Montesanos'] full enjoyment of their property. It is consistent with the Comprehensive Plan and encourages renovations to accommodate retirement needs as people need to grow old in their homes." (Jan. 31, 2023 Decision, 7-8 (emphasis added)).

Ms. Zunda argues that the Zoning Board should not have given Ms. Montesano's medical diagnosis consideration. She insists Ms. Montesano's reference to her medical diagnosis at the hearing was without evidentiary support and "was nothing more than a comment . . . seeking sympathy."[6] (Ms. Zunda's Mem. 11.) While this Court recognizes that the Zoning Board's function is to make findings of facts and determinations of the credibility of the witnesses and the weight of the evidence, the Board did not make a specific finding concerning Ms. Montesano's health here. The necessity for the garage for her medical condition cannot simply be inferred. The Court does not find that to be a reasonable inference. Certainly, there are reasonable alternatives to adding a garage with two bedrooms, a sitting area, and a full bath. No such alternatives were explored.

[6] Query whether the Zoning Board was determining that Ms. Montesano's condition had changed from her previous application and approval, and whether that proposal continued to leave her with a hardship.

In *DiDonato v. Zoning Board of Review of Town of Johnston*, 104 R.I. 158, 242 A.2d 416 (1968), the petitioner owned two lots of land, one vacant and the other where his original home was built, which were zoned as a single-family detached dwelling with minimum dimensional restrictions. The petitioner sought a dimensional variance to build a new home on the vacant lot. On appeal from the zoning board's denial of his application, our Supreme Court determined that the petitioner's request for a dimensional variance to build a house on his vacant lot because "he needs a larger home than that which the ordinance would permit because his family has increased in size" was not sufficient. *DiDonato*, 104 R.I. at 164, 242 A.2d at 420. The Court continued:

> "petitioner has shown merely that he would suffer a personal inconvenience in having to house his family in a dwelling which must conform to the lot-line restrictions imposed by the ordinance. He has failed to establish that the ordinance places more than a mere inconvenience upon him. In so holding, we define the words '. . . more than mere inconvenience' to mean that an applicant must show that the relief he is seeking is reasonably necessary for the full enjoyment of his permitted use." *Id*.

The *DiDonato* case is strikingly on point. There is insufficient evidence presented to establish such a showing here. Keeping the same dimensions for the same house would be, at best, a mere inconvenience for the Montesanos.

Considering the January 31, 2023 Decision as a whole, the Zoning Board's findings that the proposal was the least relief necessary and their hardship was more than a mere inconvenience were incorrect and not established by evidence presented. Those findings were clearly erroneous. The Board's findings that the hardship was from the unique characteristics of the area and consistent with the general character of the neighborhood were not clearly established or justified by the evidence presented. The Court cannot find that a hardship of more than a mere inconvenience was established.

IV

Conclusion

Therefore, this Court finds that the findings and conclusions of the Zoning Board were not supported by substantial evidence, were clearly erroneous in part, but were not based on unlawful procedure.

This Court therefore reverses the Decision of the Zoning Board of January 31, 2023 and thereby the Montesanos' Second Application for dimensional relief is denied.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Zunda v. Town of Westerly by and Through Its Zoning Board of Review, et al.**
CASE NO:	**WC-2023-0081**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**June 17, 2024**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**Michael P. Lynch, Esq.**
For Defendant:	**Michael A. Kelly, Esq.** **James P. Murphy, Esq.** **William J. Conley, Jr., Esq.** **Sarah F. O'Toole, Esq.**