STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: March 30, 2012)

GARFIELD AVENUE DEVELOPMENT LLC and THE STOP & SHOP SUPERMARKET COMPANY LLC	:	
vs.	:	**C.A. No. PC 09-3675**
CURTIS PONDER, DAVID IMONDI, JOY MONTANARO, EDWARD DIMUCCIO, and FRANK CORRAO, in their capacities as Members of the City of Cranston Zoning Board of Review	:	

DECISION

RUBINE, J., Before the Court is an appeal filed by Plaintiffs Garfield Avenue Development LLC ("Garfield, LLC") and the Stop & Shop Supermarket Company LLC ("Stop & Shop") (collectively, "Plaintiffs"). They appeal from a decision that the Cranston Zoning Board of Review ("Zoning Board") issued after remand from this Court. Said decision denied Plaintiffs' application for a special use permit and dimensional relief with respect to property located at 110 Garfield Avenue, Cranston, and otherwise known as Assessor's Plat 7, Lots 2561, 2562, 2593-2597 and 3768. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Garfield, LLC, a Rhode Island limited liability company, owns the property that is the subject of this appeal. It plans to consolidate vacant, undeveloped lots to form a single 33,083 square foot lot. The property is located within an M-2 zoning district with frontage on Garfield

Avenue and West Harry Street. (Hearing Transcript, dated May 13, 2009, at 45 and 63 (Tr. I)). Garfield Avenue is a four-lane road that is located between two ramps leading to and from Route 10. (Id. at 63). According to the Zoning Ordinance for the City of Cranston (the Ordinance), M-2 districts are designated for industrial uses and require a minimum lot size of 60,000 square feet.

Stop & Shop seeks to construct a gasoline fueling station on the Garfield Avenue property. Gasoline service stations are permitted as an approved use in an M-2 district only by way of a special use permit, and they are subject to the provisions contained in Section 17.48.010 of the Ordinance. In April 2009, Stop & Shop filed an application with the Zoning Board seeking a special use permit pursuant to Section 17.92.020 of the Ordinance, as well as dimensional relief from the requirements of Sections 17.48.010 (gasoline service station)[1] and 17.72.010 (signs). Section 17.92.010 of the Ordinance governs the granting of variances.

[1] Section 17.48.010 of the Zoning Ordinance for the City of Cranston, entitled "Gasoline service stations," provides:

> A. Generally. Any gasoline service station, filling station, in any district shall conform at least to the following regulations. Where the intensity regulations for any district in which a gasoline service station is located are more restricting than the regulations contained hereinafter, all gasoline service stations or filling stations shall conform to the more restrictive dimensional requirements.
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> B. Frontage and Area. Every gasoline service station shall have a minimum frontage of one hundred twenty (120) feet and a minimum area of twelve thousand (12,000) square feet.
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> C. Setbacks. Every structure erected for use as a gasoline service station shall have a minimum setback from the street right of way of forty (40) feet and a minimum setback from all property lines of ten (10) feet. Pump islands shall be permitted in front yard and set back a minimum of fifteen (15) feet from all property lines.
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> D. Construction Standards. All vehicle service areas shall be constructed to conform to the following standards:
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> 1. Suitable separation shall be made between the pedestrian sidewalk and the vehicular parking or moving area with the use of appropriate bumper, wheel guards or traffic islands. Where the portion of the property used for vehicular traffic abuts a street,

In its application, Stop & Shop recognized that the lot "is undersized for an M-2 industrial zone parcel and is directly adjacent to Route 10." (Application, dated April 1, 2009, at 2). The application further stated:

> "The fueling facility will include five (5) double-sided fueling dispensers, a kiosk with employee restroom and overhead canopy. The site plan has provided for space for an ATM bank machine as well as for an area for vending machines. In addition to the dimensional variance for the pre-existing undersized lot, applicant seeks relief from the requirement that a driveway be a minimum of 20' from a property line. . . . Applicant also seeks a dimensional variance for signage for this location. An existing billboard that has stood as a legal nonconforming use for decades will remain. It contains 1,472 sq. ft. Billboards in an M-2 zone are allowed 500 sq. ft. The remaining proposed signage for the fueling facility totals 122.8 sq. ft. The gasoline pricing sign will utilize LED type lettering. The proposed signage for the fueling facility is necessary to assist customers and to identify gas prices." Id.

> such portion shall be separated from the street line by a curb at least six inches high.
> 2. The entire area used for vehicle service shall be paved, except for such unpaved area as is landscaped and protected from vehicle use by a low barrier.
> 3. Hydraulic hoist, pits, lubricating, greasing, washing and repair equipment shall be entirely enclosed within a building. Tire and battery service and minor automobile repair, excluding automobile body repair and painting may be carried out within the premises.
> 4. The maximum widths of all driveways at the sidewalk shall be thirty (30) feet.
> 5. Minimum angle of driveway intersection with the street from the curb line to lot line shall be sixty (60) degrees.
> 6. The distance of any driveway from any property line shall be at least twenty (20) feet.
> 7. The distance between curb cuts shall be no less than forty (40) feet.
> E. Wall Next to Residential Use. A wall or evergreen screening of fence five feet high shall be erected along all property lines abutting residential use.

Stop & Shop also submitted its proposition to the Planning Commission for the City of Cranston ("Planning Commission").[2]

The Site Plan Review Committee of the Cranston Planning Commission conducted a preliminary site plan review of the proposal on March 5, 2009. At that hearing, the Acting Deputy Fire Chief and the City's Traffic Engineer raised several traffic concerns that needed to be addressed. Those concerns involved traffic speed, viability of spot traffic speed count, traffic capacity from Route 10 to Garfield Avenue, and the frequency of vehicle accidents in the immediate vicinity. On March 19, 2009, the Site Plan Review Committee recommended approval of the preliminary proposal, provided, among other things, that the applicant address the issue of accident prevention; work with the police department to determine if spot traffic speed counts are viable; work with the Rhode Island Department of Transportation regarding proposed detours or traffic rerouting that may affect the proposal; and document all coordination efforts with certain water supply boards concerning project approvals.

On May 5, 2009, the Planning Commission issued its written report. After making its findings of fact, the Planning Commission unanimously "recommend[ed] *approval* with the condition that the applicant enters into the Zoning Board of Review's record of proceedings, sufficient evidence satisfying the remaining standards for the granting of variances relating to

[2] Section 17.92.020 of the Ordinance provides in pertinent part:

> "No special permit shall be granted by the zoning board of review until the application or request has been referred to the city planning commission. The planning commission shall have thirty (30) days following such referral in which to express its opinion thereon. If within such period, the commission fails to express its opinion or make a recommendation, the application or request should be deemed to be recommended by the planning commission. The opinion and recommendation should be considered by, but shall not be binding upon, the zoning board of review.

hardship, least relief necessary, mere inconvenience and reasonable use, as set forth in R.I.G.L. § 45-24-41." (Emphasis in the original.)

After a duly noticed public hearing, the Board denied the application. The Plaintiffs timely appealed the decision to this Court. By written Decision, the Court vacated the Board's decision in light of its failure to make adequate findings and its failure to state the evidence upon which it relied in reaching its conclusions. The matter was remanded to the Board for further proceedings. The Court ordered the Board to confine its review to the facts in the record and to the law that was applicable at the time of the Board's initial decision.

After remand, the Board conducted a hearing on September 8, 2010. No new evidence was introduced at that hearing; instead, the Board confined its review to the established record. For reasons set forth in a written decision, recorded September 30, 2010, the Board once again denied the application. The Plaintiffs then timely appealed to this Court. In addition to their appeal, Plaintiffs seek reimbursement of the reasonable litigation expenses incurred after the Board's denial of the application after remand, pursuant to chapter 92 of title 42, entitled the Equal Access to Justice for Small Businesses and Individuals Act ("Equal Access to Justice Act").

II

Standard of Review

This Superior Court's review of a zoning board decision is governed by § 45-24-69(d), which provides in relevant part:

> "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[s] 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."

Our Supreme Court requires this Court to "review[] the decisions of a . . . 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). Furthermore, the 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 665-66 (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). Accordingly, in performing its review, the Court "may 'not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.'" Curran v. Church Community Housing Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)).

Furthermore, as part of its review, the Court "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." Salve Regina College v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review 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." Lischio v. Zoning Bd. of Review of North Kingston, 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)).

Although this Court reviews a zoning board's decision with deference, such "deferential standard of review, however, is contingent upon sufficient findings of fact by the zoning board." Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005). This is because "[s]uch findings are necessary so that zoning board decisions 'may be susceptible of judicial review.'" Id. (quoting von Bernuth v. Zoning Board of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001)). In situations where "a zoning board 'fails to state findings of fact, the [C]ourt will not search the record for supporting evidence or decide for itself what is proper in the circumstances.'" Id. (quoting Irish Partnership v. Rommel, 518 A.2d 356, 359 (R.I. 1986)).

III

Analysis

The Plaintiffs once again assert that they met all of the requirements necessary for the granting of a special use permit and for dimensional relief under both Rhode Island Law and under the Ordinance. They contend that they presented reliable and uncontested expert evidence demonstrating that they met all of the necessary requirements, but that the Board ignored said evidence and failed to adequately address the specific criteria for the grant of the special use permit and dimensional variances. They further maintain that the Board addressed only one of the requested variances; namely, deviation from the minimum lot area requirement, and failed to address the other two dimensional variance requests. Finally, Plaintiffs aver that the Board's actions were without substantial justification and, as a result, they are entitled to reasonable litigation expenses pursuant to the Equal Access to Justice Act.

The Board counters that its decision was supported by substantial evidence in the record. It further contends that Plaintiffs did not satisfy the requisite criteria for the issuance of a special use permit, and that the proposal did not conform with the purpose and intent of the Comprehensive Plan's Future Land Use Map. Specifically, the Board maintains that there was competent evidence in the record concerning adverse traffic conditions at, or near, the property to support its conclusion that the proposed facility would be injurious and obnoxious to the neighborhood. The Board also contends that should Plaintiffs prevail in their appeal, they would not qualify for relief under the Equal Access to Justice Act. Consequently, it reserves the right to respond to this claim in the event that Plaintiffs prevail.

The Rhode Island Supreme Court distinguishes the three recognized categories of relief that a zoning board may award; namely, a "true" variance (also known as a use variance),[3] a deviation (also known as a dimensional variance),[4] and an exception.[5] With respect to said categories,

> "A 'true' variance is relief to use land for a use not permitted under the applicable zoning ordinance. A deviation is relief from restrictions governing a permitted use such as lot-line setbacks, limitations on height, on-site parking, and minimum frontage requirements. An exception is relief expressly allowed by the applicable zoning ordinance that is similar in nature to a deviation in that it generally pertains to area and setback requirements of a permitted use." Bamber v. Zoning Bd. of Review of Foster, 591 A.2d 1220, 1223 (R.I. 1991) (internal citations omitted).

The instant matter involves requests for a special use permit and dimensional variances. These are readily distinguishable from one another.

[3] See 3 Edward H. Ziegler, Rathkopf's The Law of Zoning and Planning, § 58.4 (2009).
[4] See Lischio v. Zoning Bd. of Review of North Kingstown, 818 A.2d 685, 691 (R.I. 2003).
[5] Also known as a special use permit.

A "special use" is defined as "[a] regulated use which is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42 . . . ." Sec. 45-24-31(57). A specially permitted use "contemplates a permitted use when under the terms of the ordinance the prescribed conditions . . . are met." Kraemer v. Zoning Bd. of Review of the City of Warwick, 98 R.I. 328, 331, 201 A.2d 643, 644 (1964). Accordingly, although the use is permitted under the ordinance, the use is conditional and the criteria set forth in the zoning ordinance must be established before a special use permit may be issued. See Roland F. Chase, Rhode Island Zoning Handbook §§ 121, 122 (1993).

Rhode Island General Laws § 45-24-31(61) defines a "dimensional variance" as follows:

> "Dimensional Variance. Permission to depart from the dimensional requirements of a zoning ordinance, where the applicant for the requested relief has shown, by evidence upon the record, that there is no other reasonable way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations. However, the fact that a use may be more profitable or that a structure may be more valuable after the relief is granted are not grounds for relief." Sec. 45-24-31(61)(ii).

A dimensional variance, or "deviation, [is] a form of relief from an ordinance which regulates the manner in which a permitted use may be implemented." V.H.S. Realty, Inc. v. Zoning Bd. of Review of the Town of East Greenwich, 120 R.I. 785, 792, 390 A.2d 378, 382 (1978). A special use permit carries a different burden of proof from a dimensional variance. Such respective burdens will be discussed infra. See id.

In its decision after remand, the Board specifically incorporated the findings from its previous decision, as well as its discussion from its September 8, 2010 deliberations.[6] In addition to those findings, the Board found:

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[6] In its May 13, 2009 decision, the Board made the following findings of fact:

"1. The property is located in an M-2 industrial zone;
2. The application seeks to establish a commercial use within the M-2 zone;
3. Gasoline fueling stations are an allowed use within an M-2 zone by grant of a special use permit;
4. A lot size of 60,000 square feet is required in an M-2 industrial zone;
5. The lot upon which the use is to be situated is approximately 33,083 square feet;
6. The lot in question is triangular in its configuration;
7. The Property upon which the use is to be situated is an undersized lot for an M-2 industrial zone;
8. The Property is directly adjacent to Route 10 south;
9. One block north of the Property is an exit ramp from Route 10 south;
10. Immediately south of the Property is an on-ramp to Route 10 South;
11. The Property is directly adjacent to Garfield Avenue;
12. The Property is located near commercial uses;
13. The Property is directly adjacent to a residential neighborhood;
14. The Board received as evidence a petition signed by neighbors who objected to the proposed use. Said petition having been signed by 50% of all residents in the area;
15. The Board received into evidence the Applicant's traffic study which found Garfield Avenue to be a high traffic area

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"1. The property's proposed commercial use is inconsistent with the Comprehensive Plan's Future Land Use Map, which calls for Industrial uses in this area of the City.

2. Though zoned for industrial use, the existing lot size is ½ the required area needed to construct an industrial building in an M-2 zone (60,000 sq. ft.).

3. The triangular shape of the lot makes it difficult to accommodate the placement of an industrial building on the lot with sufficient parking and site circulation.

4. The structures on the site (pump islands, canopy, kiosk) meet the required yard setbacks.

5. The proposed freestanding sign . . . conforms to the area and height for freestanding signs in an M-2 zone.

. . .

7. Total signage for the site . . . is less than the total signage permitted . . . in an M-2 zone.

8. There is a pre-existing non-conforming . . . billboard located on the southerly end of the site that will remain. . . ."

in which the majority of cars regularly exceed the posted speed limit;

16. The Applicant's traffic study further found that if the use applied for were to be allowed it would increase the traffic volume on Garfield Avenue;
17. The Board received lay testimony from objectors who testified as to having regularly observed cars traveling at excessive speed in the area as well as automobile congestion;
18. Some of the Board members stated on the record that they had personally observed the Property to have been situated in a high traffic area;
19. The traffic engineer noted some safety issues;
20. Board members [sic] stated within the record that based upon his personal knowledge, ingress and egress to the parcel could present a danger to the neighborhood[.]" Decision, recorded September 30, 2010, at 3-4.

Having set forth the Board's findings, the Court now will address the Board's conclusions of law in denying the special use permit and dimensional variances. Additional facts will be provided as needed in the Analysis portion of this Decision.

A

The Special Use Permit

The Plaintiffs assert that the Board improperly relied upon lay testimony when it found that the proposal does not conform to the comprehensive plan and would be injurious, obnoxious, and otherwise offensive to the surrounding area. They contend that this reliance was error, especially in light of the favorable and unchallenged expert testimony that they presented at the hearing.

The issuance of special use permits is governed by Section 17.92.020 of the Ordinance. It provides in pertinent part:

> "2. Special Permits Power. The zoning board of review shall have the power in appropriate cases and subject to appropriate conditions and safeguards to issue special permits as authorized by this chapter in harmony with its general purpose and intent. In

> issuing such permits, the board shall determine that the use meets the following requirements:
>
> a. It shall be compatible with its surroundings;
> b. It shall not be injurious, obnoxious or offensive to the neighborhood;
> c. It shall not hinder the future development of the city;
> d. It shall promote the general welfare of the city; and
> e. It shall be in conformance with the purposes and intent of the comprehensive plan." Section 17-92-020.

In seeking a special use permit, "an applicant must preliminarily show that the relief sought is reasonably necessary for the convenience and welfare of the public." Salve Regina College v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991). In addition, a zoning board "may not deny granting a special exception to a permitted use on the ground that the applicant has failed to prove that there is a community need for its establishment." Id. (citing Toohey v. Kilday, 415 A.2d 732, 735 (R.I. 1980)). Accordingly, "satisfaction of a 'public convenience and welfare' pre-condition will hinge on a showing that a proposed use will not result in conditions that will be inimical to the public health, safety, morals and welfare." Salve Regina College, 594 A.2d at 880 (quoting Nani v. Zoning Board of Review of Smithfield, 104 R.I. 150, 156, 242 A.2d 403, 406 (1968)); see also Toohey, 415 A.2d at 736 ("To satisfy the prescribed standard, the applicant need show only that neither the proposed use nor its location on the site would have a detrimental effect upon public health, safety, welfare and morals.") (Internal citations omitted.)

In the present case, the only expert evidence at the hearing was proffered by Plaintiffs. Essentially, they contend that the Board was required to accept this evidence because there was no contrary expert evidence in the record. The Court disagrees.

At the outset, "[a]n expert may not give an opinion without describing the foundation on which his opinion rests." Nasco, Inc. v. Director of Public Works, 116 R.I. 712, 712, 360 A.2d

871 (1976). Furthermore, "[i]f the expert fails specifically to set forth the factual basis for his [or her] conclusion, the [board] must disregard his [or her] testimony." Ferland Corp. v. Bouchard, 626 A.2d 210, 214 (R.I. 1993). In situations where there is "expert testimony before a zoning board [that] is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony." Murphy v. Zoning Bd. of Review of Town of South Kingstown, 959 A.2d 535, 542 (R.I. 2008). However, although "uncontradicted testimony may not be rejected arbitrarily . . . [it] may be rejected if it contains inherent improbabilities or contradictions that alone or in connection with other circumstances tend to contradict it." Lombardo v. Atkinson-Kiewit, 746 A.2d 679, 688 (2000) (internal citations and quotations omitted).

Furthermore, while a zoning board may accept or reject expert testimony, it must do so on the basis of clear and competent evidence in the record. See Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998) (observing that expert testimony "may be . . . rejected by the trier of fact . . . particularly when there is persuasive lay testimony" evidence in the record). Thus, even though "lay testimony regarding traffic data [is] not competent and ha[s] no probative force[,]" lay persons may give testimony "on actual observed effects" of events such as traffic congestion and speed that tend to contradict the factual foundation upon which an expert's opinion is based. Id. 707 A.2d at 671 (citing Salve Regina College, 594 A.2d at 881-82).

Likewise, where there is no opposing expert testimony or evidence in the record adverse to an applicant, the zoning board must accept that testimony as undisputed, unless the board can demonstrate that it relied upon its own special knowledge. See Salve Regina College, 594 A.2d at 882 and DeStefano, 122 R.I. at 247, 405 A.2d at 1171. However, if a board simply states that its decision is based upon its special knowledge, it "will not be upheld . . . unless the record

reveals the underlying facts or circumstances the board derived from its knowledge of the area." Id.

To summarize:

> "It should go without saying that expert testimony proffered to a zoning board is not somehow exempt from being attacked in several ways. See, e.g., East Bay Community Development Corp. v. Zoning Board of Review of Barrington, 901 A.2d 1136, 1157 (R.I. 2006) (countenancing a challenge to expert testimony on the basis of the personal knowledge and observations of the members of the zoning board so long as there are adequate disclosures on the record); Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998) (noting that expert testimony can be discredited through examination of the expert by members of the zoning board or by counsel for an interested party)." Murphy, 959 A.2d at 542, n.6.

In the instant matter, Plaintiffs' expert witnesses consisted of Certified Land Planner Lisa Davis; Registered Professional Engineer Expert Robert Bragger; Registered Professional Engineer and Chemical Engineering and Environmental Sciences Expert William Taber; Transportation Engineer and Traffic Expert Robert Clinton; and Licensed Real Estate Broker and Real Estate Expert Peter Scotti. Each of these witnesses testified in favor of the Application.

After remand, the Board considered the record and found that the property is situated on Garfield Avenue and is directly adjacent to Route 10 between two ramps leading to and from that highway. Garfield Avenue itself is a four-lane road located near both commercial and residential uses. It also found that Plaintiffs' traffic study observed that the proposed use would increase traffic volume in an already high-traffic area where the majority of vehicles regularly exceeded the posted speed limit. This finding was buttressed by observations from lay persons who testified that cars regularly travel at excessive speeds, and that the road also is congested on a regular basis. Personal observations from board members also noted that the location is a high traffic area. Some safety issues were noted by the traffic engineer.

In denying the special use permit application, the Board concluded in pertinent part:

> "The nature of the proposed use, coupled with the existing high traffic volume, the increase in traffic volume that would accompany the proposed use, the Board's personal knowledge of existing congestion issues on the off-ramp and on-ramp from and to Route 10 south and on Garfield Avenue, the Board's personal knowledge of vehicle [sic] consistently exceeding the posted speed limits on Garfield Avenue (as corroborated by the Applicant's traffic report and lay observational testimony), the unusual physical lay-out of the Property and other safety related issues as set forth in the record, would be injurious, obnoxious or otherwise offensive to the surrounding neighborhood;
> . . .
> The proposed fueling station would not hinder the general welfare of the city, except to the extent set forth above as related to safety issues associated with existing traffic issues;
> . . .
> The proposal within the application does not conform with the purpose and intent of the city's comprehensive plan because of the nature of the proposed use, as coupled with the triangular configuration of the property, and the undersized nature of the lot." Decision, recorded September 30, 2010, at 4.

The Plaintiffs' expert witnesses testified that the proposal satisfied the requirements for a special use permit. In particular, Traffic Engineer Clinton testified that although the proposal would result in an increase in traffic, the study area had adequate capacity to accommodate that increase and that it would have no effect on traffic safety. However, he also testified that although the area is "posted at 25 miles per hour, we observed speeds, obviously, higher than 25 miles per hour, 36, 37 miles per hour." (Tr. I at 46). Lay witness observations supported a finding that vehicles excessively speed in the area. Lay witness observations also noted that there frequently is congestion in the area. These observations were supported by board member observations of the traffic conditions in the area. Furthermore, Mr. Clinton's own traffic study stated that over a three year period, there was an average of four vehicle accidents in the area per year.

After reviewing the record, the Court concludes that the record supports the Board's conclusions. Furthermore, given that it is undisputed that traffic volume would increase with the proposed use, coupled with the fact that there already exists traffic congestion, excessive speeds, and frequent accidents in the area, the Court cannot conclude that the Board erred in denying the special use permit.

B

The Dimensional Variances

The Plaintiffs maintain that the Board addressed only one of the requested variances; namely, deviation from the minimum lot area requirement, and that it erroneously failed to address the other two dimensional variance requests. It further asserts that the Board's denial of that variance was not supported by reliable and probative evidence.

In order to obtain a deviation or dimensional variance, an applicant must satisfy the requirements set forth in Section 17.92.010 of the Ordinance. It provides in pertinent part:

> "B. In granting a variance, the zoning board of review shall require that evidence to the satisfaction of the following standards be entered into the record of the proceedings:
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> 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;
> 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 codified in this title or the comprehensive plan upon which the ordinance is based; and
> 4. That the relief to be granted is the least relief necessary.
>
> C. The zoning board of review shall, in addition to the above standards, require that evidence be entered into the record of the proceedings showing that:

> . . .
> 2. In granting a dimensional variance, that the hardship that will be suffered by the owner of the subject property if the dimensional variance is not granted shall amount to more than a mere inconvenience, which shall mean that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property. The fact that a use may be more valuable after the relief is granted shall not be grounds for relief." Section 17.92.010.[7]

It is well settled that "[a] dimensional or area variance--also known as a 'deviation'--provides relief from one or more of the dimensional restrictions that govern a permitted use of a lot of land, such as area, height, or setback restrictions." Sciacca v. Caruso, 769 A.2d 578, 582 n.5 (R.I. 2001). The burden of proof remains at all times with an applicant. See Lischio, 818 A.2d at 693. Thus, in order "for an applicant to obtain a dimensional variance (also known as a deviation), the landowner needed to show only an adverse impact that amounted to more than a mere inconvenience." Id. at 691. Furthermore, an applicant must demonstrate that the hardship "does not result primarily from the desire of the applicant to realize greater financial gain." Section 17.92.010. Additionally, "[t]he fact that a use may be more valuable after the relief is granted shall not be grounds for relief." Id.

In denying the requested variances,

> "The Board found that there was evidence in the record that the applicant had applied for and was granted prior variances for this property. The Board found that the prior allowed variances were less intense than that of the requested variance. The Board found that there was testimony that applicant had used the property in furtherance of his business to store items and equipment. The Board also discussed the remaining criteria for the issuance of a variance . . . ." Decision, recorded September 30, 2010, at 5.

[7] The Court notes that the Ordinance requires that "the dimensional variance is not granted shall amount to more than a mere inconvenience, which shall mean that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property." Section 17.92.010. However, § 45-24-41(d)(2) controls the standard of review, which only requires an applicant to show that any hardship caused by the denial of a request for dimensional relief amount to more than a mere inconvenience. See § 45-24-41(d)(2). In the instant matter, the Board applied the correct standard, so the fact that the Ordinance sets a higher standard is of no relevance.

The Board then denied the application

> "based upon the conclusion that the hardship created by the applicant in requesting a variance to operate a gas service station in an M-2 zone on a 33,000 square foot lot resulting primarily from the desire of the applicant to realize greater financial gain and that the record contained evidence that there are reasonable alternatives for the applicant to enjoy a legally permitted use on the property." Id.

The record reveals that the Board previously approved a variance for the same property. Indeed, one of the board members recalled during the September 8, 2010 deliberations (which deliberations were incorporated into the Board's decision), that

> "This lot here, was given a permit, okay, in 1998, I was on the board then, to build an industrial—an office building. It was also given a permit to build a building, a commercial building in 1989 . . . they've come before this board twice and been approved for a commercial building on that lot . . . ." (Transcript, dated September 8, 2010, at 7).

Although Plaintiffs assert that the Board did not specifically address each variance application, the above reasoning would apply equally to all three requests. The fact that the Board previously had granted variances for the same property contradicts any claim of hardship amounting to more than a mere inconvenience. Consequently, in light of this finding, the Court cannot conclude that the Board erred in denying the dimensional variances.

IV

Conclusion

After a review of the entire record, this Court finds that the Zoning Board's decision after remand was not in violation of statutory and ordinance provisions, was not affected by error of law, and was not characterized by an abuse of discretion. Substantial rights of the Plaintiffs have not been prejudiced. Accordingly, this Court affirms the Zoning Board's decision. In light of this conclusion, the Court need not address the Plaintiffs' request for the reimbursement of reasonable litigation expenses pursuant to the Equal Access to Justice Act.

Counsel shall submit an appropriate Order for entry consistent with this Decision.