STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 5, 2013)

DAVID ROTONDO	:	
	:	
V.	:	**C.A. No. PC-2011-3415**
	:	
TOWN OF WARREN ZONING BOARD OF REVIEW, by and through its members, BENEDICT L. FERRAZZANO, III, MICHAEL GERHARDT, PAUL ATTEMANN, STEVEN P. CALENDA and ALDEN HARRINGTON	:	

DECISION

TAFT-CARTER, J. Before the Court is an appeal from a decision of the Zoning Board of Review of the Town of Warren (the Zoning Board), granting Kenneth and Ann Morrill's (the Morrills) petition for a dimensional variance. The Appellant, David Rotondo (Appellant), an abutting landowner, asks this Court to reverse the Zoning Board's decision. Jurisdiction of this appeal is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The Morrills are the owners of real estate located at 48 Laurel Lane, Plat 13D, Lot 341, in Warren, Rhode Island. (R., Ex. 1.) On or about March 18, 2011, the Morrills filed a petition for a dimensional variance pursuant to § 32-25 seeking relief from §§ 32-88(c) and 32-77 of the Town of Warren Zoning Ordinance (the Ordinance) to construct a 16' x 20' detached garage. (R., Exs. 1, 2.) The construction of the proposed garage would violate the ten-foot setback

requirement set forth in the Ordinance, as well as exceed the lot coverage. (Tr. at 7:10-19, April 20, 2011.)

On April 20, 2011, the Zoning Board held a hearing on the petition. The Zoning Board heard testimony from Mr. Morrill and two objectors, including the Appellant. Initially, Mr. Morrill clarified that his petition involved construction of a garage with dimensions of 16' x 20', not 16' x 30' as was advertised on the internet and in the newspaper. (Tr. at 2:16-4:14.) Mr. Morrill testified that the dimensional variance requested was the least needed to accommodate his vehicle. (Tr. at 5:14-17.)

Thereafter, Appellant testified and expressed concern that the granting of the petition would reduce the value of his property. Specifically, he argued that the aesthetics of the neighborhood would be negatively impacted. (Tr. at 13:16-14:20, 16:14-20.) Appellant suggested that the Morrills construct the garage on an adjacent lot owned by the Morrills. (Tr. at 19:14-16.) Appellant acknowledged that the construction of the garage would not create water run-off issues. (Tr. at 15:9-17.) In addition, the height of the garage would not be an issue for the Appellant. Id.

Next, Mr. Paul Bullock, an abutting property owner, expressed his concerns about water runoff and drainage during heavy rain. (Tr. at 21:4-9.) Mr. Bullock explained that construction of a detached garage would exacerbate his current drainage problems. Id. The Zoning Board advised Mr. Bullock to speak directly with the Town of Warren about the drainage problems, noting that this issue was distinct from the Morrills' petition for a dimensional variance. (Tr. at 24:1-5.)

At the conclusion of the hearing, the Zoning Board unanimously voted to approve the Morrills' petition for a dimensional variance subject to Coastal Resource Management Council's

assent and "no additional runoff into neighboring properties." (R., Ex. 10.) The Zoning Board recorded a written decision granting the Morrills' requested relief on May 31, 2011. Id. The Appellant filed a timely appeal with this Court on June 16, 2011.

On June 17, 2013, this Court remanded the case to the Zoning Board for additional findings of fact. Rotondo v. Town of Warren Zoning Board of Review, 2013 WL 3169015 (R.I. Super. June 17, 2013). On August 26, 2013, the Zoning Board issued a Resolution and Supplemental Decision with specific findings of fact and conclusions of law. The Zoning Board found that (1) the Morrills are forced to park on their lawn during a parking ban; (2) parking on the front lawn is causing significant damage to their lawn; (3) the Morrills need a place to park their car during inclement weather; (4) approval of the petition would prevent further damage to their lawn; (5) the proposed 16' x 20' garage would not be attached to the house and would therefore be an accessory structure which allows for 6 feet from front to setback instead of 10 feet; (6) the Morrills' lot is extremely small; and (7) most properties in the area exceed lot coverage. Based upon these findings of fact, the Zoning Board concluded that the Morrills met each of the statutory criteria for the grant of a dimensional variance as set forth in § 45-24-41(c) and (d)(2). The Zoning Board also clarified the condition regarding additional rain water runoff by stating that the Town Building Official would need to approve "that the plans would not cause rain water to runoff into a neighbor's yard." (Resolution.)

II

Standard of Review

Section § 45-24-69(a) provides this Court with the specific authority to review decisions of town zoning boards. This Court's review is governed by § 45-24-69(d), which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of

> fact. The court may affirm the decision of the zoning board of review or 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."

Judicial review of an administrative action is "essentially an appellate proceeding." Notre Dame Cemetery v. R.I. State Labor Relations Bd., 118 R.I. 336, 339, 373 A.2d 1194, 1196 (1977); see also Mauricio v. Zoning Bd. of Review of Pawtucket, 590 A.2d 879, 880 (R.I. 1991). A justice of the Superior Court may not substitute his or her judgment for that of the zoning board if he or she conscientiously finds that the board's decision was supported by substantial evidence. Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 825 (1978). "'Substantial evidence as used in this context means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion and means an amount more than a scintilla but less than a preponderance.'" Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981)). The reviewing court "examines the record below to determine whether competent evidence exists to support the tribunal's findings." New England Naturist Ass'n, Inc. v. George, 648 A.2d 370, 371 (R.I. 1994) (citing Town of Narragansett v. Int'l Ass'n of Fire Fighters, AFL-CIO, Local 1589, 119 R.I. 506, 380 A.2d 521 (1977)). Thus, this Court's review of a zoning board's factual findings is undertaken to ensure "'that a reasonable mind might accept [them] as

adequate to support a conclusion.'" See Lischio, 818 A.2d at 690 n.5 (quoting Caswell, 424 A.2d at 647).

III

Analysis

Appellant's arguments focus on the purported lack of evidence to support any of the criteria specified in § 45-24-41(c) and (d)(2). Appellant asserts that the Zoning Board's decision to grant the Morrills' application for a dimensional variance was arbitrary, capricious, an abuse of discretion, and affected by errors of law because the Zoning Board did not have sufficient evidence on which to base its legal conclusions.

A

Findings of Fact

Upon remand to the Zoning Board, this Court directed the Zoning Board to "determine whether the Morrills satisfied § 45-24-41(d)(2) and further indicate the findings of fact and conclusions of law in support of its decision." 2013 WL 3169015 at *2. The Zoning Board subsequently filed a Supplemental Decision and Resolution that contained the determination that the Morrills did satisfy § 45-24-41(d)(2). The requirements for a Zoning Board of Review are simply to make "findings of fact and [apply] legal principles in such a manner that a judicial body might review a decision with a reasonable understanding of the manner in which evidentiary conflicts have been resolved and the provisions of the zoning ordinance applied." Thorpe v. Zoning Bd. of Review of Town of North Kingstown, 492 A.2d 1236, 1237 (R.I. 1985). Determining that the Zoning Board's Resolution and Supplemental Decision met these requirements, this Court now turns to the merits of Appellant's appeal.

B

Devaluation of Appellant's Property

First, Appellant argues that the Zoning Board erred by not considering whether a devaluation of the surrounding properties would occur as a result of granting the relief requested. In response, the Zoning Board contends that Appellant's lay opinion concerning the value of his property was not probative of whether the Morrills' application met the criteria for a dimensional variance. At the hearing on the Morrills' application, Appellant testified that the erection of a one-car garage on a property across the street from his would decrease and "deface" the value of his property. (Tr. at 14:12.) Appellant did not provide any evidence of devaluation when requested by the Zoning Board. Id. at 14.

Our Supreme Court has consistently held that lay opinions concerning property valuation have no probative value with respect to zoning applications. Mendonsa v. Corey, 495 A.2d 257, 263 (R.I. 1985); Toohey v. Kilday, 415 A.2d 732, 737 (R.I. 1980) (citing Smith v. Zoning Bd. of Review of Warwick, 103 R.I. 328, 334, 237 A.2d 551, 554 (1968)). Appellant was not qualified as an expert on property values. Accordingly, the Zoning Board did not err in its decision with respect to the weight it afforded Appellant's lay opinion regarding the alleged effect of granting the Morrills' petition on the value of Appellant's property. See id.

C

The Dimensional Variance Standard

Appellant further argues that the Zoning Board did not have sufficient evidence from which to conclude that any of the criteria set forth in § 45-24-41(c) and (d)(2) were met. The Zoning Board replies that it made sufficient findings of fact to support its conclusions that the Morrills' petition did meet each of the required criteria.

A dimensional variance will be granted only after an applicant satisfies the requirements of both § 45-24-41(c) and (d)(2). See Lischio, 818 A.2d at 692. Applicants, therefore, must present evidence to a zoning board of review demonstrating:

> "(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 or the comprehensive plan upon which the ordinance is based; and
> (4) That the relief to be granted is the least relief necessary."

Sec. 45-24-41(c). In addition, an applicant must submit evidence establishing 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." Sec. 45-24-41(d)(2). The burden of proof requires "that the effect of denying dimensional relief amounts to more than a mere inconvenience." Lischio, 818 A.2d at 691.

1

Unique Characteristics of the Subject Land

Appellant argues that there is insufficient evidence to support the Zoning Board's finding that the Morrills' hardship is due to unique characteristics of their land because the Zoning Board found only that the Morrills own a small lot. Appellant also argues that the Zoning Board based its decision on personal opinions rather than on competent evidence in the record. In response, the Zoning Board argues that it did make sufficient findings to support its conclusion that the hardship from which the Morrills sought relief was due to the unique characteristics of the land, and that it properly relied on its special knowledge of the area in question.

A zoning board is presumed to possess "special knowledge of matters that are peculiarly related to the administration of a zoning ordinance and of local conditions as they are affected by the provisions of a zoning ordinance." Kelly v. Zoning Bd. of Review of City of Providence, 94 R.I. 298, 303, 180 A.2d 319, 322 (1962) (citing Harrison v. Zoning Bd. of Review of City of Pawtucket, et al., 74 R.I. 135, 141, 59 A.2d 361 (1948)). The criteria established to grant a dimensional variance allows the Zoning Board to rely on its special knowledge of the area. Here, the Zoning Board's discussion concerning lot size was appropriate. See id. In addition, the Zoning Board commented that ". . . the request that he's making is not an unusual request for this area . . . a small house of 3200 square feet on a lot this size, he's got a small house, he wants to put up a small garage . . . it's not overpowering the area . . . ." (Tr. at 18:10-18.) The small size of the land is a unique characteristic requiring that the Morrills request a dimensional variance in order to construct a one-car garage. The Zoning Board's reliance upon its specialized knowledge of the area when it considered the Morrills' application for the dimensional variance was neither arbitrary nor capricious. See Kelly, 94 R.I. at 303, 180 A.2d at 322. Therefore, the Zoning Board did not err in finding that the Morrills presented sufficient evidence to meet this criterion for a dimensional variance. See § 45-24-41(c)(1).

2

Prior Action

Appellant argues that the Zoning Board erred in finding that the hardship was not the result of any prior action of the Morrills because the Morrills knowingly purchased a small lot and are now trying to extract more use from the lot than allowed. The Zoning Board responds that purchasing a small lot of land is not what is meant by "prior action of the applicant." See § 45-24-41(c)(2).

Our Supreme Court has addressed the issue of "self-created hardship." In Sciacca v. Caruso, our Court held that the criterion specified in § 45-24-41(c)(2)—requiring that the hardship not be the result of any prior action of the applicant and not result primarily from the desire of the applicant to realize greater financial gain—applies when a property owner takes an action that violates a zoning ordinance and then petitions for a variance so that the property owner can relieve his or her action that had been contrary to the zoning ordinance. 769 A.2d 578, 584 (R.I. 2001) (citations omitted). In Sciacca, the property owners did not qualify for a dimensional variance because they subdivided their property into lots that were not large enough to accommodate a single-family home without dimensional relief from the zoning ordinances. Id.

The facts in Sciacca are distinguishable from those in the case at bar. Here, the Morrills did not create the small lot. In addition, there is no motivation of financial gain. Here, the Zoning Board noted in its Resolution that the Morrills have been required to park on their front lawn when the Warren Police Department issues an on-street parking ban during inclement weather. The finding of the Zoning Board—that the hardship was not the result of any prior action of the Morrills and did not primarily result from a desire to realize greater financial gain because the Morrills have not created their own hardship—was not clearly erroneous. The hardship created from parking on the front lawn resulted from the on-street parking bans issued during inclement weather, not from actions of the Morrills.

3

The General Character of the Area

Appellant argues that the Zoning Board's conclusion—that granting the dimensional variance would not alter the general character of the area pursuant to § 45-24-41(c)(3)—was

erroneous because the Morrills failed to offer any expert testimony to this effect. The Zoning Board replies that it properly relied on its specialized knowledge of the area in reaching its conclusion that granting the requested variance would neither alter the general character of the surrounding area nor impair the intent or purpose of either the zoning ordinance or the town's comprehensive plan.

With respect to expert testimony, a zoning board of review has the discretion to accept or reject expert testimony when it is offered. Lloyd v. Zoning Bd. of Review for City of Newport, 62 A.3d 1078, 1089 (R.I. 2013). Our Supreme Court has also held that a zoning board may not completely disregard competent, uncontradicted, and unimpeached expert testimony. Murphy v. Zoning Bd. of Review of the Town of North Kingstown, 959 A.2d 535, 542 (R.I. 2008). Here, Appellant does not provide support for his contention that the Zoning Board could not properly conclude that granting the dimensional variance would not alter the general character of the area without expert testimony to that effect. A zoning board's discretion with respect to expert testimony, when offered, is well settled. See Lloyd, 62 A.2d at 1089; Murphy, 959 A.2d at 542; Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998).

With respect to establishing the criterion that granting the dimensional variance would not alter the general character of the area, our Supreme Court has described instances when a dimensional variance would likely alter the general character of the surrounding area or the intent of the town's comprehensive plan or zoning ordinance. See Lischio, 818 A.2d at 693. For example, the general character of the surrounding area would be altered if relief were sought for a height variance that would "result in a structure so massive or out of place . . . [or] a side-yard variance that would eliminate the front yard or sidewalk in a residential neighborhood [with] a result completely incompatible with the surrounding parcels."

Here, the Zoning Board found that the four-foot rear yard setback relief requested to build a one-car garage would not alter the general character of the surrounding area. (Tr. at 12:20-21.) The Zoning Board commented that ". . . if everybody's house or property did not need to have relief, we'd have very few houses in the town. . . ." (Tr. at 14: 24-15:1.) The relief granted will not eliminate the Morrill's front yard or result in a structure so massive as to be out of place in the area in which the property is located. See Lischio, 818 A.2d at 693. At the hearing on this matter, the Zoning Board said that ". . . he's got a small house . . . it's not overpowering the area." (Tr. at 18:16-18.) With respect to the Morrills exceeding their lot coverage by building the one-car garage, the Zoning Board specifically found in its Supplemental Decision that "most properties in the area exceed lot coverage." The Zoning Board properly relied on its specialized knowledge of the area in which the Property is located and properly disclosed this reliance in its decision. See Kelly, 94 R.I. at 303, 180 A.2d at 322. Therefore, the Zoning Board's conclusion that the dimensional variance would not alter the general character of the area was supported by the reliable, probative, and substantive evidence on the record.

4

The Least Relief Necessary

Appellant further argues that there is insufficient evidence to support the Zoning Board's conclusion that the relief granted from the zoning ordinance was the least relief necessary. Appellant posits that the Morrills could situate the garage in closer proximity to their house or the Morrills could build and use a garage on the abutting property also owned by the Morrills. The Zoning Board argues that it would not be reasonable to require the Morrills to situate the garage in closer proximity to their home because to do so would leave a space between the house

and the garage that would be inaccessible for maintenance. The Zoning Board further argues that the Morrills would not be able to merge their two abutting lots because the presence of a single-family on each lot means that the properties cannot be legally merged.

Our Supreme Court has held that "the burden is on the property owner to 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 Bd. of Review of City of Pawtucket, 103 R.I. 487, 492, 238 A.2d 754, 757 (1968). During the hearing on this matter, the Zoning Board asked whether a 16' by 20' garage was the smallest size needed. (Tr. at 5-6.) The record clearly reflects that the proposed garage was shorter than the architectural graphic standards recommended and that the proposed dimensions were such that the garage would only be large enough to allow space for one car to fit inside with just enough room to open the car doors. Id. Zoning Board Chairman Ferrazzano then commented, "I see the advantage of what you're trying to do and it is only a one-car garage." (Tr. at 6:7-8.) The Morrills satisfied their burden to demonstrate that the relief requested from the Ordinance was the least relief necessary in order to reasonably enjoy the permitted use of the Property. See Standish-Johnson Co., 103 R.I. at 492, 238 A.2d at 757.

The Zoning Board specifically found that without a driveway and garage in which to park a car during inclement weather, the Morrills were ruining their front lawn by parking on it during town parking bans. (Resolution.) Therefore, the Zoning Board's finding that the relief granted is the least relief necessary was not clearly erroneous.

5

More than a Mere Inconvenience

After remand, the Zoning Board specifically concluded in its Resolution and Supplemental Decision that the hardship suffered by the Morrills amounts to more than a mere inconvenience. The Zoning Board found (1) the Morrills were forced to park on their front lawn when a town parking ban is in effect; (2) parking on the front lawn was ruining the lawn and impeding travel across the lawn; and (3) the Morrills were in need of a place to park their car during inclement weather. (Resolution.)

As addressed herein, the Zoning Board's Resolution and Supplemental Decision specifically addresses all of the criteria articulated in § 45-24-41(c) and (d)(2). This Court finds that the Zoning Board's findings in this matter are based on substantial and competent evidence. See Lischio, 818 A.2d at 690 n.5; New England Naturist Ass'n, Inc., 648 A.2d at 371. Therefore, this Court will affirm the Zoning Board's Decision filed on May 31, 2011 and the Supplemental Decision filed on August 26, 2013.

IV

Conclusion

After review of the entire record, this Court finds the Zoning Board's Supplemental Decision was supported by the substantial and probative evidence of the record and was not arbitrary or capricious, or affected by error of law. Substantial rights of the Appellant have not been prejudiced. Accordingly, the Zoning Board's decision filed on May 31, 2011 and Supplemental Decision filed on August 26, 2013 are affirmed.

Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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DATE DECISION FILED:	November 5, 2013
JUSTICE/MAGISTRATE:	Taft-Carter, J.
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