STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: March 21, 2014]

CHARLES ORMS ASSOCIATES	:	
	:	
VS.	:	**C.A. No. PC 2011-5879**
	:	
ZONING BOARD OF REVIEW OF THE CITY OF PROVIDENCE, MYRTH YORK, SCOTT WOLF, ARTHUR V. STROTHER, MICHAEL R. EGAN, and DANIEL W. VARIN, in their capacities as Members of said Zoning Board, CAPITOL ADVERTISING, LLC and PETTIS PROPERTIES, LLC	:	

DECISION

LANPHEAR, J. Before the Court is the appeal of Charles Orms Associates (Appellant) from a decision by the Zoning Board of Review of the City of Providence (Zoning Board), granting use and dimensional variances to Capital Advertising, LLC (Capital or Applicant),[1] and Pettis Properties, LLC (Pettis) (collectively, Appellees). Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Pettis is the owner of an 11,598 square foot vacant lot located at 58 Printery Street in Providence, and otherwise known as Lot 447, Assessor's Plat 2 (Property). See Application for

[1] The caption in the Complaint lists "Capitol Advertising, LLC" as a named appellee. However, the Court observes that the Application for Variance or Special Use Permit refers to the Applicant as "Capital Advertising, LLC," and that the decision of the Zoning Board also lists the Applicant as "Capital Advertising, LLC." Consequently, the Court also will refer to that party as Capital Advertising, LLC.

Variance or Special Use Permit at 1. The Property is located in a C-4 Heavy Commercial District (C-4 District). It also is located in the JD Jobs Overlay Zoning District (Jobs District). See Report of Edward Pimentel, AICP (Pimentel Report) at 1.

On May 12, 2011, Capital filed an Application for Variance or Special Use Permit (Application) with the Zoning Board seeking use and dimensional variances. Id.[2] Capital sought a use variance to allow for the erection of a two face, freestanding billboard sign. Id. at 1-2. Capital also sought dimensional relief from the Zoning Ordinance (Ordinance) of the City of Providence (City) in order to allow the billboard to exceed the height requirement and to further allow for messages to be displayed on the billboard via LED display.

The Zoning Board conducted a duly noticed hearing on July 27, 2011. At the hearing, the Zoning Board heard testimony in favor of the Application from Thomas Badway, on behalf of Pettis; real estate and appraisal expert Thomas O. Sweeney; and Mary Burns, on behalf of Capital. The Zoning Board also received documentary evidence in favor of the Application, including reports from expert certified planner Edward Pimentel, AICP, an urban planning and land use consultant; from expert Paul Bannon, President of RAB Professional Engineers (RAB Report); and a report from a billboard company called Daktronics (Daktronics Report).

Testifying in opposition to the Application was Choyon Manjrekar, on behalf of the City's Department of Planning and Development (Planning Department or DPD) and lay witness Grant Dulgarian. The Planning Department also submitted a report recommending that the Zoning Board deny the requested relief. The Appellant did not participate at the hearing.

At the conclusion of the hearing, the Zoning Board considered all of the testimony and documentary evidence before voting to approve the Application by a four to one vote. On

[2] The Court observes that although the application is dated May 13, 2011, it is date stamped as having been received on May 12, 2011. See Application at 1.

September 20, 2011, the Zoning Board issued Resolution No. 9635, in which it memorialized its approval of the Application. See Resolution No. 9635, Sept. 20, 2011 (Decision). In its decision, the Zoning Board made the following findings of fact and conclusions of law:

> "2. The Applicant has clearly shown that the hardships from which the variances are sought are due to the unique characteristics of the Property because, as credibly discussed by Mr. Pimental [sic] in his written report and testified to by Mr. Sweeney, the Property is located in an isolated location in a heavy commercial area next to Interstate Route 95, in a flood plain, with the Moshassuck River running through approximately the middle of the Property, thus severely restricting the development and use of the Property. In addition, the Board, on its inspection of the Property, noted this uniqueness of the Property;
> 3. With respect to the requested dimensional variances relating to height, freestanding signs and maximum sign area, these variances are also sought due to the unique characteristics of the subject land. Specifically, the relief is necessary because of the topography of the Property and, as noted by Mr. Sweeney, the site is 30-40 feet below the grade of Interstate 95 and the proposed height and size of the sign are necessary in order for the sign to be seen;
> . . . .
> 6. The Board finds that the granting of the requested variances will not alter the general character of the surrounding area nor impair the intent and purpose of the Ordinance or the Comprehensive Plan as the Property is located in a heavy commercial area containing auto body shops;
> 7. The Board further finds, based upon the above findings, that the relief requested is the least relief necessary to allow a viable use of the Property as the billboard will not exceed beyond the height necessary to be visible from the highway;
> 8. The Board also finds that denial of the requested use and dimensional variances would lead to a loss of all beneficial use of the Property and would be more than a mere inconvenience since the Property has a river running through it and due to its severe topography it would be very difficult to find any other viable use." (Decision at 3.)

The Zoning Board then approved:

> "granting relief from Section 303-use code 68, 305, 603.2, 603.3 and 607.4 of the Zoning Ordinance permitting the construction of a new "V" shaped billboard 112 feet in height, consisting of two sign panels each panel face measuring 48' x 14' attached to a monopole, one sign panel would face in a generally northerly direction and one sign panel facing in a generally southerly direction as per the specifications and plans presented by the Applicant." Id.

The Appellant timely appealed the Zoning Board's decision. Additional facts will be provided in the Analysis portion of this Decision.

II

Standard of Review

Section 45-24-69(a) provides this Court with the specific authority to review the decision of a zoning board. 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." Sec. 45-24-69(d).

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). The deference given to a zoning decision is due, in part, to the fact '"that a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance."' Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009) (quoting Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)). Accordingly, 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).

Our Supreme Court has declared that "[s]ubstantial 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." Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981) (citing Apostolou, 120 R.I. at 507, 388 A.2d at 825). 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. International 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 v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003); Caswell, 424 A.2d at 647.

III

Analysis

The Appellant asserts that the Zoning Board's decision was clearly erroneous, affected by errors of law and arbitrary and capricious. Specifically, Appellant maintains that with respect to the granting of the use variance, the Zoning Board (a) failed to find a loss of all beneficial use; (b) ignored clear and convincing evidence that the proposed project would alter the general character of the surrounding area and would impair the purpose of the Ordinance as well as the City's Comprehensive Plan; and (c) failed to find that construction of the billboard was the least relief necessary. With regard to the dimensional relief, Appellant contends that the Zoning Board (a) failed to consider art. VI, § 609.3 of the Ordinance, which explicitly limits the maximum deviation allowed from the Ordinance's sign-height restrictions; (b) failed to address the Ordinance's limits on the area of a sign; and (c) failed to make sufficient findings of fact to support its conclusion that the requested relief would be more than a mere inconvenience.

In response, Appellees contend that Appellant is not an aggrieved party for purposes of § 45-24-31(4) and that as a result, the Court lacks jurisdiction over the matter. They further maintain that the Zoning Board had the authority to grant the requested relief and that its decision is supported by the competent evidence in the record.

A

Standing

The Appellees assert that Appellant does not have standing to appeal the decision because it does not hold an interest in any property which would be affected by the Zoning Board's decision, and does not own property within the 200 yard radius of the Property such that

it was entitled to notice.[3] Thus, before addressing the merits of Appellant's appeal, a threshold issue is whether it has standing to appeal the Zoning Board's decision.

Section 45-24-69 permits an "aggrieved party" to "appeal a decision of the zoning board of review to the superior court . . . ." Sec. 45-24-69(a). An aggrieved party is defined as:

> "(i) Any person or persons or entity or entities who can demonstrate that their property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town; or
> (ii) Anyone requiring notice pursuant to this chapter." Sec. 45-24-31(4).

When discussing the term "aggrievement," our Supreme Court has declared that "Aggrievement in the personal sense requires * * * an actual and practical, as distinguished from a mere theoretical, interest in the controversy, and it results when the judgment whose review is sought adversely affects in a substantial manner a personal or property right of the applicant or imposes upon him some burden or obligation." Hassell v. Zoning Bd. of Review of City of East Providence, 108 R.I. 349, 351, 275 A.2d 646, 648 (1971) (internal citation and quotations omitted). To establish aggrievement, a party, by "necessity[,] would be obligated to show that the [board's decision] might adversely affect the value or use of [his or her] land and that such impairment of use or diminution of value would have to be more than merely nominal but, in fact, be substantial." Patterson v. Corcoran, 100 R.I. 475, 481, 217 A.2d 88, 91 (1966). Conversely, '"[o]ne who is merely in the class of a resident-owner of zoned property in and a taxpayer of the municipality and whose only interest is to have a strict enforcement of zoning

[3] Rhode Island Zoning law requires that notice "shall be sent to all owners of real property whose property is located in or within not less than two hundred feet (200') of the perimeter of the area proposed for change . . . ." Sec. § 45-24-53(d)(2). As a result, such owners constitute aggrieved parties by operation of law regardless of whether their properties are injured by a proposed change. It is undisputed that Appellant's property is not located within 200 feet of the perimeter of the Property at issue in this case.

regulations for the benefit of the general welfare of the community or general enhancement of property values, is not an aggrieved person who may review a decision of the Board of Appeals . . . .'" D'Almeida v. Sheldon Realty Co., 105 R.I. 317, 320, 252 A.2d 23, 24 (1969) (quoting Blumberg v. Hill, Sup., 119 N.Y.S.2d 855, 857 (1953)).

With respect to establishing the existence of an aggrievement, "absent a showing of aggrievement in the record, the petitioner must allege such facts in the petition . . . ." D'Almeida, 105 R.I. at 320, 252 A.2d at 24 (observing that "when the record does not set forth facts establishing aggrievement and such facts are not alleged in the petition, other than to allege ownership of land within the municipality, the petition contains insufficient allegations to establish aggrievement"). With these principles in mind, the Court will determine whether the Appellant in this case is an aggrieved party for purposes of filing this appeal.

There is no evidence in the record that Appellant participated in the hearing before the Zoning Board. Accordingly, the record fails to set forth any facts which may tend to establish aggrievement on the part of Appellant. However, in its Amended Complaint, Appellant asserts the following:

> "9. Charles Orms Associates, as owner of property which is in close proximity with said premises, to wit, 10 Orms Street, Providence, Rhode Island 02904, whose property has been adversely affected by the granting of said Application, is an aggrieved party under R.I. Gen Laws 45-24-69.
> "10. Specifically, Charles Orms Associates is aggrieved because:
>
> A. Charles Orms Associates owns a property, the Charles-Orms Building, which is located within approximately 1500 feet of the property addressed by Resolution No. 9635.
>
> B. The inclusion of 112 foot tall LED lighted billboard within close proximity to the property owned by Charles Orms Associates will adversely impact the general character of the area, thus diminishing both the overall

> value of the property and the rental value of the space available for lease in the Charles Orms Building.
> C. Additionally, Charles Orms Associates' use and enjoyment of its property will be adversely impacted because the 112 foot tall LED lighted billboard will be visible from the building and the vicinity of the building, and the prominent billboard will conflict with outdoor advertising efforts of more modest proportions by Charles Orms Associates and/or its tenants that would conform to the Providence Zoning Ordinance." See Am. Compl. 2-3.

From the foregoing, the Court discerns that Appellant is asserting the proposed billboard will conflict with the outdoor advertising efforts of Appellant and its tenants due to the fact that said billboard is close enough to be visible from Appellant's property. Appellant maintains that said conflict, in turn, will cause it to suffer a decrease in value of its rental property. The Appellant further contends that the billboard will adversely impact the general character of the neighborhood and also cause a diminishment of Appellant's property value.[4]

Viewing the totality of these allegations—namely, that Appellant owns property in close proximity to the proposed billboard and the billboard will diminish Appellant's property value because it will be visible from Appellant's property and will conflict with the outdoor advertising efforts of Appellant and/or its tenants—the Court concludes that the facts as set forth in the Amended Complaint are sufficient to allege aggrievement on the part of Appellant. Consequently, the Court is satisfied that Appellant has standing to pursue its appeal.

[4] The Appellees maintain that Appellant is not aggrieved because it failed to provide evidence of an injury-in-fact at the hearing. They also assert that a claim that the billboard will adversely impact the general character of the neighborhood "directly contradict[s] the Resolution," because the Zoning Board specifically stated ". . . the requested variances will not alter the general character of the surrounding area . . . a heavy commercial area containing auto body shops." (Mem. of Law in Opp'n to Pl.'s Appeal of Decision at 9.) However, whether the relief would alter the general character of the surrounding area was an ultimate issue for the Zoning Board to decide and thereafter, for this Court to review in the event that the Court finds aggrievement on the part of Appellant.

B

The Law of Variances

A variance serves as "a constitutional safety valve to prevent confiscation of one's property." Northeastern Corp. v. Zoning Bd. of Review of Town of New Shoreham, 534 A.2d 603, 605 (R.I. 1987). It is defined as "[p]ermission to depart from the literal requirements of a zoning ordinance. An authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance." Sec. 45-24-31(65).

Two categories of variances exist; namely, use variances and dimensional variances. See id. A "use" is defined as "[t]he purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." Sec. 45-24-31(64). A use variance constitutes "Permission to depart from the use requirements of a zoning ordinance where the applicant for the requested variance has shown by evidence upon the record that the subject land or structure cannot yield any beneficial use if it is to conform to the provisions of the zoning ordinance." Sec. 45-24-31(65)(i). Dimensional variance relief is defined as:

> "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 alternative 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(65)(i).

To obtain either type of variance, an applicant must satisfy the four-prong standard set forth under art. IX, § 902.3 of the Ordinance, which essentially tracks the language of § 45-24-41(c). It provides in relevant part:

> "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(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; and
> "4) That the relief to be granted is the least relief necessary." Art. IX, § 902.3(A) of the Ordinance.

In addition to satisfying this four-prong standard, an applicant for a use variance must show that "the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of this Ordinance[,]" and for a dimensional variance, the applicant must show "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." Art. IX, § 902.3(B) of the Ordinance. Furthermore, regardless of the type of variance being sought, the Zoning Board is required to "consider the written opinion of the Department of Planning and Development prior to making a decision on a variance petition." Art. IX, § 902.3(C) of the Ordinance.

Our Supreme Court has recognized the distinction between a use variance, otherwise known as a "true" variance, and a dimensional variance, otherwise known as a "deviation." See Sako v. DelSesto, 688 A.2d 1296, 1298 (R.I. 1997). A use variance provides '"relief to use land for a use not permitted under the applicable zoning ordinance."' Id. (quoting Bamber v. Zoning Bd. of Review of Foster, 591 A.2d 1220 (R.I. 1991)). To obtain a use variance, the applicant must demonstrate that the hardship suffered from the denial of an application would amount to a deprivation of all beneficial use of the property. See art. IX, § 902.3(B)(1) of the Ordinance;

Almeida v. Zoning Bd. of Review of Town of Tiverton, 606 A.2d 1318, 1320 (R.I. 1992) ("Unnecessary hardship exists when literal application of the zoning ordinance completely deprives an owner of all beneficial use of his property and when granting a variance becomes necessary to prevent an indirect confiscation of the property without compensation.").

A dimensional variance, or '"deviation[,]' is relief from restrictions governing a permitted use such as lot-line setbacks, limitations on height, on-site parking, and minimum frontage requirement." Sako, 688 A.2d at 1298 (quoting Bamber, 591 A.2d at 1223). Thus, unlike a use variance, which "var[ies] the use to which the property can be put," a dimensional variance simply "allow[s] a relaxation of one or more of the dimensional requirements under which a permitted use may be exercised." Roland F. Chase, Rhode Island Zoning Handbook § 153 at 222 (2d ed. 2006) (emphasis in original).

To prove hardship on an application for a dimensional variance, an applicant must show that its deprivation simply would amount to "more than a mere inconvenience." See art. IX, § 902.3(B)(2) of the Ordinance. The "more than a mere inconvenience" standard requires an applicant to "show[] that a factual basis appears in the record to support the proposition that there is 'no other reasonable alternative' that would allow the applicant to enjoy a legally permitted beneficial use of the property." Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 401 (R.I. 2001). This is a lower standard than that of proving a deprivation of all beneficial use and "has never been applied as the controlling yardstick where the property owner is seeking both a relaxation of the area restrictions as well as a variance or an exception for a nonpermitted use." Sun Oil Co. v. Zoning Bd. of Review of the City of Warwick, 105 R.I. 231, 234, 251 A.2d 167, 169 (1969); see also Chase, Rhode Island Zoning Handbook § 172 at 255 (stating that "an applicant who seeks a true variance for a use not permitted in that district and

also seeks relief from area or setback requirements does not have the benefit of the 'more than a mere inconvenience' standard but must meet the 'loss of all beneficial use' hardship standard for all aspects of his or her petition").

Hence, where an applicant seeks both a use variance and a dimensional variance, the applicant must show a deprivation of all beneficial use with respect to both forms of relief being sought. Accordingly, both types of variances in this appeal will be considered according to the higher deprivation-of-all-beneficial-use standard.

C

The Zoning Board's Decision

The Appellant maintains that the Zoning Board erred in granting the use variance because it (a) ignored clear and convincing evidence that the proposed project would alter the general character of the surrounding area and impair the purpose of both the Ordinance and the City's Comprehensive Plan; (b) failed to find a loss of all beneficial use; and (c) failed to find that construction of the billboard was the least relief necessary. In granting dimensional relief, Appellant maintains that the Zoning Board failed to consider the Ordinance's height and area restrictions for signs in a C-4 District, and failed to make sufficient findings of fact to support its conclusion that denial of the requested relief would amount to more than a mere inconvenience. Before addressing these issues, the Court first will discuss the applicable zoning regulations for the Property at issue.

In its application, Capital sought permission to erect a "Two (2) face, freestanding sign (each face 48' x 14')." Application at 1. More specifically, it proposes "a new "V" shaped billboard, 112 feet in height, consisting of two sign panels each panel face measuring 48' x 14' attached to a monopole, one sign panel would face in a generally northerly direction and one sign

panel facing in a generally southerly direction." Id. The sign would be a digital display LED billboard, with changing messages. Id. Said sign would "change messages every ten seconds." (Hr'g Tr. 163, July 27, 2011).

The Property is located in a C-4 District overlaid by a Jobs District. A C-4 District "is intended for commercial areas for a wide diversity of commercial uses that serve regional needs for retail, service, professional office and automotive establishments." Art. I, § 101.2 of the Ordinance. Overlay Districts "are superimposed on existing zoning district(s) or part of a district which impose specified requirements in addition to, but not less, than those otherwise applicable for the underlying zone, and do not in any manner supersede or replace any requirements of the underlying zone." Art. I, § 101.7. A Jobs District is an "overlay zone [that] is intended for industrial, manufacturing, commercial and office uses to support job growth and expansion. No residential uses are permitted." Id. As a result, the Property cannot be developed for residential purposes.

Article VI of the Ordinance governs the erection of signs. It declares:

> "The purpose of this Article is to recognize the function of signs in the city, to provide for their inclusion under the zoning ordinance, and to regulate and control all matters relating to such signs, including location, size, materials and purpose. Signs are accessory uses and are permitted only in conjunction with permitted uses. Such signs are intended to advertise goods, identify services, facilities, events or attractions available on the premises where located, to identify the owner or occupant or to direct traffic on the premises. It is the further purpose of this article to preserve locally recognized values of community appearance; to safeguard and enhance property values in residential, commercial and industrial areas; to protect public investment in and the character of public thoroughfares; to aid in the attraction of tourists and other visitors who are important to the economy of the city; to reduce hazards to motorists and pedestrians traveling on the public way, and thereby to promote the public health, safety and welfare and ease of travel." Art. VI, § 600 of the Ordinance.

In accordance with this policy, "[n]o sign may be constructed, erected, moved, enlarged, or illuminated except in accordance with the provisions of this Article." Art. VI, § 601 of the Ordinance.

Section 607 delineates the type, height and size of signs that are permitted in each of the City's zoning districts; but, upon application, the Zoning Board may increase the area and height restrictions of any sign by up to 15% and 25%, respectively. See art. VI, § 609.[5] In C-4 Districts, the maximum area of a freestanding sign is sixty-square feet and its maximum height is thirty-five feet. See art. VI, § 607.4.[6]

Section 603 lists the types of signs that are prohibited in every zone of the City. Included in the list of prohibited signs are billboards (art. VI, § 603.3 of the Ordinance),[7] and signs that

[5] Section 609 provides:

> "Section 609 - Variances for Signs: The board, as provided in Section 902, may grant the following variance provided that all other requirements of this ordinance are met:
> "609.1 - Increase of sign area: Any particular sign may be increased in area by twenty-five (25) percent over the requirements in this article, provided that the total area of all permitted signs on the building does not exceed the maximum permitted sign area by fifteen (15) percent.
> "609.2 - Maximum sign area: The maximum permitted sign area for an allowed use or structure may be increased by fifteen (15) percent.
> "609.3 - Maximum sign height: The maximum permitted sign height may be increased by twenty-five (25) percent." Art. VI, § 609.

[6] A freestanding sign is defined as "A sign that is attached to, erected on, or supported by some structure (such as a pole, mast, frame, or other structure, but not any kind of antenna) that is not itself an integral part of or attached to a building." Art. VI, § 604.3.

[7] A billboard is defined as "A sign advertising products, goods, services, facilities, events or attractions not made, sold, used, served or available on the lot displaying such sign or a sign owned by a person, corporation, or other entity that engages in the business of selling the advertising space on that sign." Art. X, § 1000 of the Ordinance.

move. (Art. VI, § 603.2 of the Ordinance).[8] Section 303 specifically designates billboards as a prohibited use in every zoning district. See art. III, § 303(68) of the Ordinance.

1

The General Character of the Neighborhood and Intent and Purpose of the Ordinance

The Appellant first asserts that the Zoning Board erroneously ignored clear and convincing evidence that proposed project would alter general character of the surrounding area or impair the intent and purpose of the Ordinance or the Comprehensive Plan. In particular, it contends that the Zoning Board erroneously failed to consider compelling reasons for rejecting the application submitted by the Planning Department and City Planner Mr. Manjrekar, as well as the opposition testimony submitted by lay witness Mr. Dulgarian.

Where adverse witnesses offer conflicting testimony, it is the job of the hearing officer to "sift through the testimonial evidence and select which facts carried the greatest weight." Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 207 (R.I. 1993). Accordingly, "[c]redibility determinations [are] necessarily implicated in the hearing officer's decision." Id. Similarly, "[i]t is well settled that a trial justice is free 'to accept the opinion of one expert, while rejecting the opinion of another expert.'" Koutroumanos v. Tzeremes, 865 A.2d 1091, 1097-98 (R.I. 2005) (quoting Sun-Lite Partnership v. Town of West Warwick, 838 A.2d 45, 48 (R.I. 2003)); see also Lowry v. Faraone, 500 A.2d 950, 952 (R.I. 1985) (upholding fact finder's choice between conflicting expert testimony where that choice was not clearly erroneous).

Although Appellant in this case contends that the Zoning Board erroneously ignored clear and convincing evidence in reaching its decision, the record reveals that the Zoning Board

[8] Signs that move are defined as "Signs which move by mechanical means or by ambient wind currents, flashing signs, or animated signs in which an image changes at a frequency of faster than every thirty minutes (not including flags, banners and barber shop poles)." Art. VI, § 603.2.

specifically referred to the evidence submitted by the Planning Board, Mr. Manjrekar, and Mr. Dulgarian. During the hearing, the Chairperson of the Zoning Board read the Planning Department's recommendation into the record. (Tr. at 168-69.) In that recommendation, the Planning Department first discussed the general purpose and policies behind the City's signage regulations. (Recommendation to the Zoning Board, July 27, 2011.) It next stated: "Based on a site visit and examination of the plans, it appears that the proposed billboard would be distracting to motorists on the interstate and City streets and have a negative effect on the City's view corridor by detracting from views of the City." Id. (Emphasis added.) The Planning Department then concluded that "Based on the foregoing discussion, the DPD recommends that the requested relief be denied." Id.

Mr. Manjrekar, who testified on behalf of the Planning Department, pointed out that the Ordinance and the Comprehensive Plan are consistent in prohibiting billboards and that said prohibitions take precedence over Department of Transportation regulations which permit same. (Tr. at 177.) He further testified that in reaching its recommendation, the Planning Department particularly was concerned about glare because the proposed billboard would be located near an "assisted or elderly living community that's right next door, and the effect of glare and the excess lights can be extremely harmful." Id.

In its decision, the Zoning Board acknowledged Mr. Manjrekar's testimony, stating,

> "Mr. Manjrekar, of the DPD, reiterated the opinion of the DPD, in that the requested relief to construct a billboard on the Property should be denied and that the Ordinance prohibits all new billboards; and he further explained how the Comprehensive Plan talks about preserving view corridors and this proposal would interfere with that objective." (Decision at 2.)

The Zoning Board also recognized that "Mr. Dulgarian testified that he is opposed to any more billboards, that the East Side Renewal Project, in the 1960s did not include billboards and that the Zoning Ordinance passed in the 1990s prohibited billboards." Id.

In contrast with this evidence, the Zoning Board had before it the testimony of real estate and appraisal expert Thomas Sweeney, who testified: "The area is an industrial heavy commercial area, predominantly dominated by the auto body facility across the street and a heavy commercial uses." (Tr. at 150.) He opined that "the proposed use is consistent with the uses along the corridor of Interstate 95, specifically billboard uses as evidenced by the picture showing the billboard directly across the highway. My opinion, it will not have any negative impact on the surrounding property values." Id. at 150-51.

In addition, urban planning and land use consultant Edward Pimentel stated in his report:

> "Considering the proximity of the subject property to Interstate 95, the primary reasoning for locating the billboard signage in the manner so proposed, and the vast existing tree canopy, some of which will all but screen said signage, any resulting visual impact is nullified. Regardless, the only properties that would have any direct line-of-sight are similarly improved with highway commercial and/or industrial operations." (Pimentel Report at 4.)

Mr. Pimentel further stated that "[w]hen considering the surrounding land uses, billboard visibility will be severely, if not entirely, extinguished." Id. at 6. With respect to the proposed billboard itself, Mr. Pimentel observed that "there are several similar improvements located within the immediate vicinity, situated along both east and west sides of Interstate-95." Id. at 7.

Also in evidence was a report submitted by expert Paul J. Bannon. In it, Mr. Bannon observed that the Rhode Island Department of Transportation (RIDOT) "is the permitting agency for this type of land development project, though the law allows for local communities to adopt additional regulations." (RAB Report at 3.) Mr. Bannon opined that the proposed billboard

would not "obscure or otherwise physically interfere with an official traffic sign, signal, or . . . the driver's view of approaching, merging, or intersecting traffic." Id. He further reported that the "property is not in an area of natural or manmade scenic beauty or historical significance, including designated scenic roadways and bicycle paths, designated as such by the RIDOT." Id. at 3-4. Mr. Bannon concluded in his report that:

> "the analysis of traffic safety as it relates to the placement of the billboard sign structure determined that the proposal generally conforms to the regulations set forth by the RIDOT for permitting of a Legal Conforming Sign. Therefore it can be concluded that the construction of the billboard sign structure . . . will not adversely affect traffic safety and is in general compliance with the Declaration of Policy as stated in the regulatory documents." Id. at 4.

In granting the Application, the Zoning Board found that the requested variances would "not alter the general character of the surrounding area nor impair the intent and purpose of the Ordinance or the Comprehensive Plan as the Property is located in a heavy commercial area containing auto body shops[.]" (Decision at 3.) During deliberations, Board Member Scott Wolf observed that neither the Providence Preservation Society (PPS) nor the Providence Historic District Commission (PHDC) objected to the proposed billboard. (Tr. at 190.) Mr. Wolf then concluded that "[i]f they thought this was a significant obstruction to a major historic site, I would think they would come forward." Id.

The Court concludes that the foregoing evidence supports the Zoning Board's finding that the proposal would not alter the general character of the surrounding area or impair the intent and purpose of the Ordinance or the Comprehensive Plan. The expert evidence demonstrated that the proposed billboard would be located in a heavy commercial area that does not have any adjacent natural or manmade scenic beauty or historical significance; it will not

interfere with traffic safety; will generally conform to RIDOT regulations; will mostly be blocked by a vast tree canopy; and has not received any objections from PPS or PHDC.

In contrast, the Planning Department's recommendation merely speculated that the proposed billboard would distract motorists and would negatively interfere with the City's view corridor. See Recommendation to the Zoning Board, July 27, 2011 ("Based on a site visit and examination of the plans, it appears that the proposed billboard would be distracting to motorists on the interstate and City streets and have a negative effect on the City's view corridor by detracting from views of the City.") (Emphasis added.) Furthermore, although Mr. Manjrekar suggested that the billboard would throw off glare and excessive light, thereby negatively impacting a nearby assisted living community, (Tr. at 177) ("the effect of glare and the excess lights can be extremely harmful") (emphasis added), an industry report submitted on behalf of the Applicant appears to contradict this suggestion. See Daktronics Report at 10 ("Brightness on today's LED signs is automatically adjusted according to ambient light conditions[,]" [this] "means that the sign is only 4% as bright at night as during the daytime." Id.

In light of the foregoing, the Court concludes that the Zoning Board did not erroneously ignore "clear and convincing evidence" that the proposed project would alter the general character of the surrounding area or impair the intent and purpose of the Ordinance or the Comprehensive Plan. Rather, it simply found Applicant's expert opinions on this issue to be more credible than the Planning Board's recommendation. See Lowry, 500 A.2d at 952 (stating fact finder "was confronted with conflicting expert testimony and thus was free to choose one opinion over another"). Consequently, the Court cannot conclude that the Zoning Board erred in finding that the proposal would not alter the general character of the surrounding area or impair the intent and purpose of the Ordinance or the Comprehensive Plan.

2

Loss of all Beneficial Use

The Appellant next contends that the Zoning Board failed to find a loss of all beneficial use because it "ma[de] a conclusory assertion that all beneficial use is lost, but when it actually applies the facts—of a river running through the property and of severe topography—to the law, the Zoning Board applied an inapplicable standard of 'very difficult.'" (Pl.'s Mem. 9). Consequently, Appellant maintains that the decision must be set aside.

To obtain the requested variances in this case, the Applicant had to demonstrate the existence of an unnecessary hardship. See § 45-24-41. An "[u]nnecessary hardship exists when literal application of the zoning ordinance completely deprives an owner of all beneficial use of his [or her] property and when granting a variance becomes necessary to prevent an indirect confiscation of the property without compensation." Almeida, 606 A.2d at 1320.

After inspecting the Property and reviewing the evidence, the Zoning Board found the Property to be "located in an isolated location in a heavy commercial area next to Interstate Route 95, in a flood plain, with the Moshassuck River running through approximately the middle of the Property, thus severely restricting the development and use of the Property." (Decision at 3). It then concluded:

> "that denial of the requested use and dimensional variances would lead to a loss of all beneficial use of the Property and would be more than a mere inconvenience since the Property has a river running through it and due to its severe topography it would be very difficult to find any other viable use." Id.

At the hearing, Thomas Badway, speaking on behalf of Pettis, testified that "[t]he property has been in my family since about 1973. We own the auto shop across the street" (Tr. at 148). He further testified: "We can't get a building permit on it. You can't erect a building."

Id. at 149. Mr. Badway acknowledged that at one time, the Property was used for parking cars but that now, however, "[y]ou can't park cars on it because DEM came there and said to remove cars that were parked there." Id. at 149.

Mr. Sweeney testified that "the river runs through the property. It goes back a little ways off of Printery Street and then significantly drops down to the river. Then proceeds across to the other side and Interstate 95 is substantially above grade." Id. at 150. He then opined that "based on the configuration of the site, the river running through it, topography, and all the other issues, if this relief is not granted, the owner will be denied all beneficial use because there is no use for this property." Id. at 151.

Mr. Pimentel stated in his report that the Property has development limitations due to "limited land resource, difficult vehicular accessibility and presence of severe wetlands (Moshassuck River)," and that these limitations are "further evidenced by the long-standing non-usage of said property. Id. at 13. On the issue of loss of beneficial use, Mr. Pimentel opined:

> "Considering the property is presently devoid of any usage, either principal and/or accessory – yielding from a litany of property constraints inclusive of lot area deficiencies and presence of wetlands as well as general location – a denial of the rather innocuous proposed development will most assuredly result in extinguishing all beneficial usage of the property." (Pimentel Report at 11.)

During deliberations, the Zoning Board Members conducted a discussion regarding the loss of all beneficial use issue. The Chairperson stated: "Personally, I'm hard pressed on this lot to find a beneficial use for it. There was no testimony that suggested that it had a beneficial use. There is no even idea that I could come up with or prior history . . . ." (Tr. at 186.) Board Member Carnevale observed: "There's substantial evidence that indicates that there is a lost [sic] of all beneficial use. That would be Ed Pimental's [sic] report, Mr. Sweeney's report . . . ." Id.

Thereafter, Board Member Egan remarked that "the owner here has indicated he's had no use of that property for 30, 40 years. It's a tiny little lot at the end of a dead end street in an industrial neighborhood." Id. at 187. The following colloquy then took place:

> "MR. MANJREKAR: If you look to the north of this street, I mean the end to the north has been used for parking. I guess the lot in question could probably be used for storage or maybe like some sort of storage space or shed. I mean, something that is over 10,000 square feet is a significant piece of land that could –
>
> "MADAM CHAIR: It maybe [sic] a significant piece of land, I don't want to argue with you about this, but it does have a river running through it. It does have the DEM setback requirements that far exceed from the river itself which is in the middle of the lot. So – and yes, I mean, I'm sure someone could put a tent on a corner of this piece of property and have that use. But I think that that – I think that stretching it to that extent is not – in terms of being a commercial piece of property in a commercial district with that river running through it, and the reality of the fact that it's not been used. They tried putting cars on it and DEM said no, you can't do that. I'm not sure what's better evidence of a lack of use when the one thing it was, surface parking, storing something on it such as cars." Id. at 187-88.

Although the Zoning Board stated in its decision that "it would be very difficult to find any other viable use[,]" considering the Property's size (11,598 square feet), location (a C-4 Jobs District), and topography (DEM-regulated wetlands sloping towards a river running through its middle), coupled with evidence that its sole previous use as a parking lot was prohibited by DEM and that residential uses are prohibited in a Jobs District, the Court cannot conclude that the Zoning Board erroneously found that denial of the Application would lead to a loss of all beneficial use. Consequently, Appellant's claim—that the Zoning Board erroneously failed to find a loss of all beneficial use—must fail.

3

Least Relief Necessary

With respect to the least relief necessary finding, the Appellant contends that the Zoning Board was required to address two distinct issues: namely, (a) whether the billboard itself was the least relief necessary; and if so, (b) whether the specifically requested dimensional relief was the least relief necessary. The Appellant maintains that although the Zoning Board addressed the second issue, it "completely failed to set forth any facts or legal conclusions regarding whether allowing the billboard, rather than not allowing the billboard, is the least relief necessary to alleviate the hardship from which the Applicants sought relief."

An applicant's burden under § 45-24-41(c)(4) is to demonstrate that the requested relief is the least relief necessary in order to remove the hardship. See Chase, Rhode Island Zoning Handbook § 157 at 227 ("Even when it decides that an applicant has satisfied the applicable standard for a variance, the zoning board of review must tailor the variance so that the relief granted is the least relief necessary under the circumstances."). In other words, "in granting variances, [a zoning board] should not authorize a greater degree of relief than is necessary to achieve a beneficial use." Standish-Johnson Co. v. Zoning Bd. of Review of City of Pawtucket, 103 R.I. 487, 493, 238 A.2d 754, 758 (1968). Rather, the relief should be the minimal amount necessary for a reasonable enjoyment of the use to which the property is proposed to be dedicated. See id. at 492, 238 A.2d at 757.

Appellant essentially is contending that the Zoning Board failed to address whether the proposed use—construction of a billboard—was the least relief necessary. However, the fact that the Zoning Board found that denial of the use variance would lead to a loss of all beneficial use necessarily meant that it found construction of a billboard to be the least relief necessary.

The appropriate question, therefore, is whether the proposed dimensions for that billboard constituted the minimal relief necessary for a reasonable enjoyment of the Property.

In its decision, the Zoning Board found:

> "3. With respect to the requested dimensional variances relating to height, freestanding signs and maximum sign area, these variances are also sought due to the unique characteristics of the subject land. Specifically, the relief is necessary because of the topography of the Property and, as noted by Mr. Sweeney, the site is 30-40 feet below the grade of Interstate 95 and the proposed height and size of the sign are necessary in order for the sign to be seen;
> . . . .
>
> 7. The Board further finds, based upon the above findings, that the relief requested is the least relief necessary to allow a viable use of the Property as the billboard will not exceed beyond the height necessary to be visible from the highway[.]" (Decision at 3.)

At the hearing, Mr. Sweeney testified that the Property "goes back a little ways off of Printery Street and then significantly drops down to the river. Then proceeds across to the other side and Interstate 95 is substantially above grade." (Tr. at 150.) Mr. Sweeney stated in his report that the Property is "isolated due to the difference in grade between it and North Main Street and I-95[,] [and that it] is in essence only visible from I-95." (Sweeney Report at 3.) He further stated that "the location of the site below the grade of I-95 and the traffic speed on I-95 make the need for the dimensional variances." Id. at 3. He concluded that "the relief is the least relief necessary due to the restrictions on the use of the site as well as the grade differences between the site and Interstate 95." Id. at 4.

Mr. Pimentel stated in his report that the requested dimensional relief "is required to effectuate reasonable usage of a commercial property . . . ." (Pimentel Report at 11). On the issue of the least relief necessary, Mr. Pimentel opined:

> "permitting a somewhat greater height variance is a reasonable request . . . This conclusion is based upon a present inability to utilize the property in any beneficial manner, characteristics of the surrounding neighborhood, as well as goals and objectives of the plans reviewed. All relief sought is directly attributable to the unique characteristics of the subject property and surrounding neighborhood, thereby resulting in the least relief necessary.
> 8. The Board also finds that denial of the requested use and dimensional variances would lead to a loss of all beneficial use of the Property and would be more than a mere inconvenience . . . ." Id. at 13.

In light of the Zoning Board's conclusion that the denial of both the use variance and dimensional variances would lead to a loss of all beneficial use, and considering that the topography of the Property necessitates the requested dimensional relief for the billboard to be seen from I-95, the Court is satisfied that the Zoning Board did not err in finding that the requested dimensional relief was the least relief necessary to obviate the hardship in this case.[9] Consequently, Appellant's claim of error on this issue must fail.

However, although the Zoning Board granted the Application as requested, it failed to make any findings and conclusions with respect to the request for relief from art. VI, § 603.2 of the Ordinance. That provision prohibits "animated signs in which an image changes at a frequency of faster than every 30 minutes . . . ." Art. VI, § 603.2 of the Ordinance.

It is undisputed that the proposed billboard would contain a digitally displayed sign that would "change messages every ten seconds." (Tr. at 163.) The Zoning Board, however, failed to address whether this portion of the Application was the least relief necessary to avoid a hardship. See Chase, Rhode Island Zoning Handbook § 157 at 227 (observing that zoning boards of review are required to "tailor the variance so that the relief granted is the least relief

[9] Considering that the Zoning Board found that denial of the dimensional relief would lead to a loss of all beneficial use because, without such relief, the billboard could not be seen from I-95, the Zoning Board, by implication, found that it was necessary to exceed the Ordinance's height and area restrictions.

necessary under the circumstances"); see also Standish-Johnson Co., 103 R.I. at 493, 238 A.2d at 758 (declaring that a zoning board "should not authorize a greater degree of relief than is necessary to achieve a beneficial use").

The Zoning Board's failure to address whether the digital portion of the requested relief is the least relief necessary means that the Court is unable to comprehensively review the Zoning Board's determination with respect to the fourth prong of art. IX, § 902.3(A). See art. IX, § 902.3(A)(4) requiring a showing "[t]hat the relief to be granted is the least relief necessary"). As a result, the Court must remand the case to the Zoning Board to address whether the requested relief from art. VI, § 603.2 of the Ordinance is the least relief necessary to alleviate the Applicant's hardship.

4

More Than a Mere Inconvenience

The Appellant's final claim of error is that the Zoning Board failed to make sufficient findings of fact to support its conclusion that denial of the requested relief would be more than a mere inconvenience. However, as stated previously, the Zoning Board was not required to make any such findings because the Applicant's burden for dimensional relief in this case was to prove a loss of all beneficial use. See Sun Oil Co., 105 R.I. at 234, 251 A.2d at 169 (stating that the more-than-a-mere-inconvenience standard "has never been applied as the controlling yard stick where the property owner is seeking both relaxation of the area restrictions as well as a variance or exception for a non-permitted use").

In its decision, the Zoning Board found "that denial of the requested use and dimensional variances would lead to a loss of all beneficial use of the Property and would be more than a mere inconvenience . . . ." (Decision at 3) (emphasis added). The fact that the Zoning Board

found that denial of dimensional variance relief would lead to a loss of all beneficial use of the Property necessarily means that denial of the same relief would amount to more than a mere inconvenience because the latter standard presents a lower hurdle for a landowner to overcome. Compare § 45-24-41(d)(1) (requiring for a use variance a showing that "the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance"), with § 45-24-41(d)(2) (requiring a 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"). Consequently, the Court concludes that the Zoning Board's finding—that denial of the requested relief would amount to more than a mere inconvenience—was not clearly erroneous in light of the reliable, probative, and substantial evidence in the record.

IV

Conclusion

After a review of the entire record, this Court finds that, with respect to whether the requested relief from art. VI, § 603.2 of the Ordinance was the least relief necessary to alleviate the Applicant's hardship, the Zoning Board's decision was supported by the reliable, probative, and substantial evidence, was not arbitrary or capricious, and was not in violation of statutory, ordinance and zoning provisions. That portion of the Zoning Board's decision also was affected by error of law, was characterized by an abuse of discretion, and substantial rights of the Appellant have been prejudiced as a result. Accordingly, this Court remands the case to the Zoning Board so that it may make findings of fact and conclusions of law solely on the issue of whether the requested relief from art. VI, § 603.2 of the Ordinance was the least relief necessary to alleviate the Applicant's hardship.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Charles Orms Associates v. Zoning Board of Review of the City of Providence, et al.
CASE NO:	PC 2011-5879
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 21, 2014
JUSTICE/MAGISTRATE:	Lanphear, J.
ATTORNEYS:	
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