STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

(FILED: MARCH 9, 2012)

MENA LUPO	:	
	:	
v.	:	**C.A. No. PC 11-4454**
	:	
COMMUNITY WORKS RHODE ISLAND, INC. CITY OF PROVIDENCE ZONING BOARD OF REVIEW BY AND THROUGH ITS CHAIR, MYRTH YORK OF PROVIDENCE, AND ITS MEMBERS MICHAEL EGAN, DANIEL VARIN, MS. UNKNOWN MARTINEZ, AND SCOTT WOLF, AND ITS EXECUTIVE SECRETARY, PETER CARLEVALE	:	

DECISION

CARNES, J. This matter is before the Court on the appeal of Mena Lupo ("Lupo" or "Appellant") from a decision by the Providence Zoning Board of Review ("Board"), dated July 18, 2011. The decision granted a use variance and dimensional variance to Community Works Rhode Island, Inc. ("Community Works") to convert a three-unit condominium to a five-unit condominium and, to allow paving of a proposed parking lot and two curb cuts to allow access to the parking lot. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I
Facts and Travel

Community Works is a non-profit community developer dedicated to providing affordable housing in Providence, Rhode Island. (Transcript of Providence Zoning Board of Review, July 14, 2011 (hereinafter "Tr.") at 4-5.) Community Works owns real property located at 514 Broadway in Providence, Rhode Island, otherwise identified as Lot 584 on the Tax

Assessor's Plat 35 ("Property"). The Property is positioned in an R-3 zone, which allows the use of a building for up to three residential units as a matter of right. The Property contains an historic 6530 square foot single-family dwelling on a 17,534 square foot lot. Community Works purchased the property in January of 2011. (Tr. at 65.)

On or about March 25, 2011, Community Works applied to the Board for a use variance and a dimensional variance. Community Works sought a use variance to allow five condominium units—which would include two one-bedroom units, two two-bedroom units, and one three-bedroom unit—in an R-3 zone, pursuant to § 303 of the City of Providence Zoning Ordinance ("Ordinance"). Dimensional relief was sought to allow two curb cuts on opposite sides of the lot—specifically on Bainbridge Avenue and Tobey Street—to provide access to the two proposed parking lots, pursuant to §§ 704.2(B) and 704.2(D) of the Ordinance.

In compliance with § 45-24-41(b), the Board conducted a public hearing for Community Works's request for a use variance and a dimensional variance on July 14, 2011. During the hearing, the Board heard testimony from Carrie Marsh ("Marsh"), Executive Director of Community Works; Don Powers ("Powers"), principal of Don Powers Architects; Barbara Sokoloff ("Sokoloff"), President of Barbra Sokoloff Associates, which is a planning and development consulting firm; Thomas Sweeney ("Sweeney"), Sweeney Real Estate & Appraisal; neighbors; and local businesses.

Marsh provided an overview of the project and the financial challenges. She explained that Community Works is a non-profit community developer that partnered with Providence for this project. (Tr. at 5-6.) Providence requested Community Works's assistance with the project because Community Works had extensive experience renovating large scaled Victorian mansions, particularly in the Elmwood neighborhood. (Tr. at 6.) For the project, Providence

envisioned four units of housing at 80% of median income, although Providence provided Community Works with application for a fifth unit if necessary. (Tr. at 6.) Providence offered $520,000 of the neighborhood stabilization program funding to assist Community Works with the project. (Tr. at 6.) Providence also offered $350,000 in HOME funding and $10,000 in lead funding and eligible funding to remove lead paint. (Tr. at 6-7.) In total, Providence committed $920,000 to the project. (Tr. at 7.) Further, Community Works received $127,000 in private grants. (Tr. at 7.)

Marsh explained that Community Works required a total of $1.7 million to complete the project. Even with the grant money, Community Works was short $670,000 to balance the budget. Community Works determined that to bridge the gap of $670,000 while also meeting the requirement to sell four units as affordable housing, it was necessary to build five units. (Tr. at 7-8.) The fifth unit would be sold above the 80% of median income at around $240,000 so the other four units could be sold around $110,000 to $120,000. (Tr. at 10.) Since Community Works is a non-profit organization, Marsh explained that it was critical for the five units to be approved if Community Works was to go forward with the project. (Tr. at 8.)

Powers, an architect who was qualified as an expert by the Board, testified as to the condition of the building. (Tr. at 13.) He explained that the building had many holes in the roof, leaving the interior exposed to the elements. (Tr. at 14.) He speculated that after another year, large parts of the building would be deteriorated to a point beyond repair. (Tr. at 14, 17-18.) Powers also testified about the preservation efforts for the landscape. In particular, Powers explained that the location of the seven parking spaces was determined in cooperation with the Providence Historic District Commission so as to preserve the historic landscape. (Tr. at 14-15, 18-19.) Finally, Powers discussed the interior site plan, which was also developed in

conjunction with the Providence Historic District Commission so as to meet the Providence Historic District Commission's criteria in determining the scope of renovations. (Tr. at 16-17.)

Another expert, Sokoloff, testified about the project's financial feasibility of the project and its consistency with the Providence Comprehensive Plan. (Tr. at 20.) Sokoloff explained that the project was consistent with the Comprehensive Plan's effort to maintain the rich architectural history and residential character of the Federal Hill District. (Tr. at 20-21.) Sokoloff also discussed the development cost of the project. In particular, she explained that the estimated cost of $1,747,000 to $1,747,500 for the project included the acquisition price, environmental mediation, construction, contingency, and Community Works's developer's fee. (Tr. at 21-22.) She explained that if they lost any of the units, Community Works would be about $200,000 short on the entire project. (Tr. at 23.)

Sweeney, who was qualified as an expert real estate broker and appraiser, testified as to viability of the unit sales and the impact of the use variance and dimensional variance on the surrounding properties. (Tr. at 24.) He explained that the project was unique because it was a large historic residential building in very poor condition; the cost to renovate the projected was estimated to be $1.7 million dollars; and if the project was limited to three units, then the average unit cost would be $567,000. (Tr. at 27.) In considering the sales in the area, Sweeney testified that the highest sale price of a new unit over the past eighteen months in the Federal Hill and Broadway area was $328,000. (Tr. at 27.) Sweeney also testified that the surrounding area was mixed for both residential and commercial uses and that there were buildings throughout with more than five units. (Tr. at 28.) Sweeney opined that five units was the least relief necessary due to the poor condition of the building and the fact that no other developer came forward to

take on the project. (Tr. at 29.) Ultimately, Sweeney concluded that the renovations would preserve the historic character and fix the current safety issues of the building. (Tr. at 29-30.)

Lupo, a neighboring property owner, testified against the project. (Tr. at 33.) Lupo was the coordinator of Friends of Broadway and member of Broadway Neighborhood Association. (Tr. at 33-34.) She explained that the last family to occupy the house was the Raposa's in 2006. Lupo explained that she went on a tour of the house in May of 2011, which was sponsored by Community Works, and, in her opinion, the Property was in good condition. (Tr. at 33, 41-43.) Lupo also testified about her concerns with traffic safety as a result of the new curb cut on Bainbridge Avenue. (Tr. at 35, 44-45.) Lupo speculated that there was a high risk that the Property dwellers would drive down Bainbridge, a one-way street, in the wrong direction to get to Broadway instead of driving the entire length of the street in the correct direction to get to Westminster. (Tr. at 35, 44.) Lupo explained that she was not experienced as a traffic engineer but that her speculations for traffic safety issues were based on her personal experience. (Tr. at 35, 44-45.) Finally, Lupo opined that allowing five units would set bad precedent as it would increase the density in the area and would be against the Comprehensive Plan. (Tr. at 37-38.)

After Lupo testified, neighboring property owners expressed their opinion on the project. Janice Hannert, a neighbor, testified that she was against the project and expressed her opinion that Community Works should be able to complete the project within the zoning requirements. (Tr. at 46.) James Hall of the Providence Preservation Society summarized that the Providence Preservation Society fully supported the proposal. (Tr. at 47-48.) Sara Emmenecker, a member of the Board of Directors of the West Broadway Neighborhood Association, testified that the committee viewed the project as a landmark. (Tr. at 48-49.) Malik Aziz, a member of the Community Works Board and a member of the Providence Economic Development Partnership,

testified in his own personal capacity in support of the project. (Tr. at 50.) Shannon McHale, a neighbor, supported the project as it would improve the neighborhood. (Tr. at 54.) Robert Berrillo, also a neighbor, opined that the house should be a national landmark for the city and the state. (Tr. at 55.) Richard Sciolto, a neighbor, explained that Ron Raposa could not afford to maintain the house, and he hoped that the house will be preserved. (Tr. at 56-57.) Joseph McCarthy of Coldwell Banker of Residential Brokerage testified that he would be handling the marketing of the Property and explained that taking a unit away would diminish necessary funding. (Tr. at 57.) Appellant also provided five letters for the record. (Tr. at 48.)

Finally, the Zoning Board Madam Chair, Myrth York ("York"), read into the record the resolution from the Providence Historic District Commission, which found that "Broadway is a stretch of historical and architectural significance and contributes [to] the significance of the Broadway historic district"; "[t]he application for Minor Alterations (Site Improvements) is complete"; "the work as proposed consists of Minor Alterations (Site Improvements) to include the installation of two parking areas: A three-space area accessed from Tobey Street and a four-space area accessed from Bainbridge Avenue, for a total of seven spaces"; "[t]he alterations are congruous with the structure, its appurtenances and the surrounding historic district"; and "[t]he work is consistent with the [Providence Historic District Commission] Standard 8 as follows: The work will be done so that it does not destroy the historic character of the property and/or the district." (Tr. at 58-59.) Madam Chair York also read the recommendation from the Department of the Planning and Development, which provided that the five units would not have a significant impact on the density of the area or negatively affect the neighborhood character. (Tr. at 60-61.) The hearing was then closed, and the Board deliberated. (Tr. at 61.)

On July 18, 2011, the Board issued Resolution 9627, which memorialized its approval of the application. The Board explained that it considered the testimony given at the hearing, the letters submitted during the hearing by various neighbors, and Resolution 11-20 from the Providence Historic District Commission to make findings of fact and conclusions of law. (Zoning Board of Review Resolution No. 9627 (the "Board's Decision"), July 18, 2011, at 1-2.) The Board approved Community Works's use variance "granting relief from Section 303 use code 14 to use the Property for five (5) dwelling units and dimensional relief from Sections 704.2(B) and 704.2(D) (paving limitations and curb cuts) per the specifications and plans presented by the Applicant." (Board Decision at 4.)

Specifically, the Board found that the hardships from which the use and dimensional variances were sought resulted from the unique characteristics of the Property "because the existing historic structure is in such an extreme condition of disrepair that it cannot be brought back to habitable conditions unless the proposed development into five (5) dwelling units is approved," and that the hardships were not as a result of a physical or economic disability "as the Appellant asserted none." (Board Decision at 3.) The Board also concluded that the hardship did not result primarily from a desire to realize greater financial gain "because the Applicant, a not for profit corporation, merely seeks to provide viable affordable housing and the project could not come into fruition without the two (2) additional dwelling units." Id.

Under the next prong to approve a use variance, the Board found that the variances would not alter the character of the surrounding area. These conclusions were based on the Board's own observations: "the dwelling was built in 1867"; it was a "very large Italianate design single-family dwelling that is not conducive as a one-family dwelling today because of its size and massing"; "[i]t is one of the largest residential structures in the neighborhood"; "in order to make

the project viable, the rehabilitation of the structure requires the relief requested"; "the historic restoration of this important structure will enhance the neighborhood"; "Applicant's proposal will not increase the size or massing"; and "the proposal will result in an improvement to the surrounding area." (Board Decision at 3-4.)

In determining whether the relief was the least relief necessary, pursuant to the fourth prong, the Board found that "the proposed variances are minimal in nature, the footprint of the structure will remain the same, the intent of the Ordinance and the Comprehensive Plan will be satisfied[,] and the Board accepts the credible testimony proffered by the Applicant." (Board Decision at 4.) Finally, the Board found that denying the use variance would result in a loss of all beneficial use "because the Property would have no viable use," which the Board based on,

> "the credible and uncontroverted testimony of Mr. Powers, Ms. Sokoloff, and Mr. Sweeney that continued deterioration, which will occur unless immediate restoration occurs, will render the Property uninhabitable and unsalvageable; that this will result in the loss of the residential and architectural viability of the Property that its use as a five unit dwelling is the minimum use necessary to permit a viable use of the Property; and that, although the Property has been vacant and without any responsible owner for a number of years, there have been no other offers to renovate the Property." (Board Decision at 4.)

With regard to the dimensional variance, the Board found that denial would "result in more than a mere inconvenience as the Property is located between two (2) one-way streets running in opposite directions making ingress and egress difficult and will not allow the Applicant to provide a reasonable on-site parking scheme for prospective dwellers." (Tr. at 4.) The Board provided that it agreed with the Providence Historic District Commission and Department of the Planning and Development in that the renovations would result in retaining of a historical structure that would "continue to maintain the historic fabric of the Broadway Historic District." (Tr. at 4.) Finally, the Board concluded that granting dimensional relief for

the two on-site parking areas and second curb cut was "in character with the neighboring land uses" and therefore would "not alter the existing character of the Broadway area." (Tr. at 4.) Based on these findings, the Board granted the use and dimensional variances.

Following this decision, on July 18, 2011, Appellant brought the within case. Appellant seeks a declaratory judgment and an appeal of the Board's decision.

II
Standard of Review

The Superior Court's review of a Zoning Board's decision is governed by § 45-24-69(d) which states:

> "[t]he 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 reserve 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 statue 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;
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 45-24-69.

The court "must examine the entire record to determine whether 'substantial' evidence exists to support the Board's findings." Hugas Corp. v. Veader, 456 A.2d 765, 769 (R.I. 1983) (quoting Toohey v. Kilday, 415 A.2d 732, 735 (R.I. 1980)); DeStefano v. Zoning Board of Review, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (R.I. 1970). The Supreme Court

defines substantial evidence 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 Board of Review of North Kingstown, 818 A.2d 685, 690 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981).

III
Analysis

Appellant advances three arguments challenging the Board's decision to grant the use variance requested by Community Works. First, Appellant argues that the Board violated the Open Meetings Act ("OMA") when the Board members met at the site with no notice to Appellant or other interested parties. Second, Appellant argues that the Board violated Appellant's due process rights when cross-examination of Community Works's witnesses was not allowed. Finally, Appellant argues the Board's findings were based on mere conclusory statements. Specifically, Appellant argues that the testimony presented demonstrates that it was economically feasible to proceed with the project within the zoning requirements; that the Property's historical and aesthetic uniqueness could be preserved within the confines of the existing zoning plan; and that the Board ignored and disregarded the traffic and safety concerns raised during the hearing in considering the curb cut and parking lot.

Contrarily, the Board and Community Works argue that the Board members did not violate the OMA as the members went on a view of the Property pursuant to their customary practice. With regard to due process, the Board maintains that it is not required to strictly adhere to the rules of evidence pursuant to Rhode Island law. Finally, the Board and Community Works respond that the Board carefully weighed and considered the evidence presented at the public

hearing. As such, the Board and Community Works suggest that the Court should defer to the Board's particular knowledge of the area and local zoning conditions.

A
Open Meetings Act

Appellant argues that the Board's decision violated the OMA because the members met on site without notice to the Appellant or other interested parties. The Board and Community Works argues that the Board did not violate the OMA because it was the customary practice of the Board members to view property in question and the Board did not hold a meeting prior to the public hearing.

In Rhode Island, the OMA applies to a "public body" that convenes with a "quorum" of members present. Sec. 42-46-2. Section 42-46-2(3) defines "public body" as "any department, agency, commission, committee, board, council, bureau, or authority or any subdivision thereof of state or municipal government. . . ." Sec. 42-46-2(3). Section 42-46-2(1) defines "meeting" as "the convening of a public body to discuss and/or act upon a matter over which the public body has supervision, control, jurisdiction, or advisory power. . . ." Sec. 42-46-2(1).

The Legislature enacted the OMA to ensure that "public business be performed in an open and public manner and that the citizens be advised of and aware of the performance of public officials and the deliberations and decisions that go into the making of public policy." Sec. 42-46-1. To achieve this purpose, it requires that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5." Sec. 42-46-3. Section 42-46-4 establishes the procedure for closing a meeting, while § 42-46-5 enumerates the limited occasions when a meeting may be closed.

In this case, the Court finds that a visit by the Board members to the Property, for a view, does not violate any closed meeting prohibition. The visiting Board members were neither a public body holding a meeting nor a subdivision thereof within the statute. See § 42-46-2. Further, the Board's decision contains findings, which, as the Court reviews the record, are fully supported by evidence from the experts who testified and the Board member's personal observations, as discussed below. See discussion infra Part III.C; Hopf v. Board of Review of Newport, 102 R.I. 275, 288-89, 230 A.2d 420, 428 (1967) (explaining that a zoning board must pinpoint the specific evidence upon which it based its findings).

It is well established in Rhode Island that a view of property by board members is a customary practice used to aid in the decision-making process. The Zoning Board is "presumed to have special knowledge of matters that are peculiarly related to the administration of a zoning ordinance." Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009). Further, a board "may properly act on applications for an exception on the basis of knowledge that it has acquired through the making of an inspection of property to which the application refers." Kelly v. Zoning Bd. of Review of Providence, 94 R.I. 298, 303, 180 A.2d 319, 322 (1962). With regard to zoning boards taking views to aid in the decision-making process, the Supreme Court of Rhode Island stated in Perron v. Zoning Board of Review of the Town of Burrillville, 117 R.I. 571, 369 A.2d 638 (1977): "[i]nformation obtained in that manner certainly constitutes legally competent evidence upon which a finding may rest," although the record must disclose the nature and character of the observations upon which the board acted. Id. at 576, 369 A.2d at 641. A reviewing court "cannot presume that the board, notwithstanding its announcement to the contrary, acted on the basis of what was seen on its view of [plaintiff's] property." Id.

In this case, the record is clear that the Board viewed the Property before deciding to grant Community Works's request for a use and a dimensional variance. The Board's decision makes specific reference to the Board's "site inspection of the Property and of the area surrounding." (Board Decision at 3.) Accordingly, the personal observation by the Board members is probative evidence because the Board's decision evidences and contains a reasonable disclosure of the knowledge so acquired. See Board Decision at 3; see also Kelly, 94 R.I. at 303, 180 A.2d at 322. This Court is satisfied that the information obtained by the Board member's view of the property constitutes legally competent evidence to support the Board's findings and the Board did not violate statutory provisions.

Appellant, however, argues that the Board was prejudiced as a result of the visit to the Property. It is recognized that when an administrative agency acts in a quasi-judicial function, it is obligated to remain impartial, like a judge. Champlin's Realty Assocs. v. Tikoian, 989 A.2d 427, 443 (R.I. 2010). Thus, "administrative tribunals must not be 'biased or otherwise indisposed from rendering a fair and impartial decision.' " Id. Indeed, there is a presumption of regularity that attaches to the acts of public officials. See United States v. Chemical Foundation, Inc., 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed 131 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). "Any administrator is presumed to be neutral unless proven to be otherwise." In re Cross, 617 A.2d 97, 100 (R.I. 1992). "[T]he burden is upon the party challenging the action to produce evidence sufficient to rebut this presumption" of integrity and objectivity. Gorman v. University of Rhode Island, 837 F.2d 7 (1st Cir. 1988).

In this case, Appellant offers no evidence to rebut the presumption of regularity that the Board members properly discharged their official duties with integrity and objectivity. See Gorman, 837 F.2d at 15 (Any alleged bias must be based on "more than mere speculations and tenuous inferences."). Therefore, this Court cannot find evidence of bias within the Board's decision. Accordingly, the Board's decision was not made upon unlawful procedure.

B
Cross-Examination

Appellant argues that her due process rights were violated since she was not allowed to cross-examine Community Works's witnesses. The Board and Community Works, however, maintain that Board members are not required to strictly adhere to the rules of evidence when conducting public hearings.

In Rhode Island, although zoning boards perform quasi-judicial duties, it is well recognized that hearings before such boards are, to a certain extent, informal in nature and do not necessarily have to be conducted as hearings before a court. Woodbury v. Zoning Board of Review, 78 R.I. 319, 323, 82 A.2d 164 (1951); Jacques v. Zoning Board of Review, 64 R.I. 284, 288, 12 A.2d 222 (1940); Robinson v. Town Council, 60 R.I. 422, 435, 199 A. 308 (1938). Nevertheless, zoning boards are required to apply rules and regulations lawfully adopted by them equally and fairly to all persons properly before them. Colagiovanni v. Zoning Bd. of Review of City of Providence, 90 R.I. 329, 158 A.2d 158 (R.I. 1960). Although interested persons have a right to be heard in zoning hearings in accordance with rules and regulations lawfully adopted and impartially applied by such boards for the conduct of their hearings, there is nothing in the law entitling such persons to cross-examine opposing witnesses as a matter of right. Id.

In order to ascertain whether participants in a hearing before the Zoning Board were treated fairly, the court must consider:

> "[i]f the board . . . in its conduct of the hearing allowed all persons who desired to speak an opportunity to do so, and afforded to each side a fair chance to articulate his point of view, [then] reversal for failure to hold a hearing is unlikely." Anderson, American Law of Zoning, § 22.24 at 66-67 (4th ed.1997).

Moreover, although "[t]he purpose of the public hearing is not to conduct a poll of the likes and dislikes of neighboring property owners," the board should afford those present at the hearing the full opportunity to be heard. Rathkopf, The Law of Zoning and Planning, § 37.07 at 37-109 (1999).

After a careful reading of the hearing transcript, it is apparent that the Board made every effort to conduct a full, fair, and impartial hearing. In doing so, the Board allowed everyone who sought to address the Board to do so and did not refuse arbitrarily to receive and consider material evidence. See Barber v. Town of North Kingstown, 118 R.I. 169, 372 A.2d 1269 (1977) (finding proper procedure when the Board allowed everyone who sought to address the Board to do so). Accordingly, the hearing was conducted in a matter that conforms to the standard allowing all persons an equal and fair opportunity to be heard. Appellant's due process rights were not violated and the Board's decision was not made upon unlawful procedure.

C
Basis of the Board's Decision and Sufficiency of the Evidence

Appellant argues the Board's findings in granting the use and dimensional variance were based on mere conclusory statements. The Board and Community Works, however, maintain that the decision of the Board was supported by the weight of the evidence.

In order to grant a variance, a zoning board is bound to follow the requirements of § 45-24-41(c), which "requires that evidence to the satisfaction of the following standards is entered into the record of the proceedings:

> "(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 upon which the ordinance is based; and
> (4) That the relief to be granted is the least relief necessary." Sec. 45-24-41(c); see Prov. Zon. Ord. Art. IX, § 902.3.

In addition to the four requirements under § 45-24-41(c), § 45-24-14(d)(1) requires the applicant for a use variance show a loss of all beneficial use of the property if the variance is denied and § 45-24-14(d)(2) requires the applicant for a dimensional variance show hardship amounting to more than a mere inconvenience. Sec. 45-24-14(d)(1) & (2).

In this case, Appellant argues that substantial evidence did not exist to support the Board's findings that denying the use variance would result in a loss of all beneficial use of the Property and that the structure's extreme condition of disrepair was a unique characteristic. Appellant also argues that the Board improperly disregarded the traffic and safety concerns in considering the impact on the character of the area in granting the dimensional variance.

It is well settled that in zoning cases, a zoning board must "pinpoint the specific evidence upon which [it] base[s] [its] findings." Hopf, 102 R.I. at 288-89, 230 A.2d at 428. The law requires this minimal showing so that a reviewing court can know whether the decision rendered "bears a substantial relation to the public interest, and whether it is consistent with an exercise of

reasonable discretion or instead is an arbitrary and unreasonable exercise of the Board's power." Coderre v. Zoning Board of Review, 102 R.I. 327, 230 A.2d 247, 249 (1967).

A careful review of the record reveals sufficient evidence to support the conclusions that a use variance is necessary for the structure to yield any beneficial use. The Board had before it expert testimony of Powers, Sokoloff, and Sweeney to determine that denying the use variance would result in a loss of all beneficial use. (Zoning Board Decision, at 4.) Our Supreme Court recognizes that an owner is deprived of all beneficial use of his or her property when it is economically prohibitive to continue a present operation or to convert to another permitted use. Bilodeau v. Zoning Bd. of Review, 103 R.I. 149 (1967). In this case, the Board relied on the expert testimony of Powers, Sokoloff, and Sweeney to conclude that:

> "continued deterioration, which will occur unless immediate restoration occurs, will render the Property uninhabitable and unsalvageable; that this will result in the loss of the residential and architectural viability of the Property; that its use as a five unit dwelling is the minimum use necessary to permit a viable use of the Property; and that, although the property has been vacant and without any responsible owner for a number of years, there have been no other offers to renovate the Property." (Board Decision at 4.)

This testimony by Powers, Sokoloff, and Sweeney was uncontroverted and specific evidence upon which the Board based its findings. See Hopf, 102 R.I. at 288-89, 230 A.2d at 428. Accordingly, Community Works satisfied the requirement to show a loss of all beneficial use if the use variance was denied.

Appellant maintains that no testimony was elicited that the first and second floors, if not subdivided, could or could not be sold for a figure of $240,000. However, in the findings of fact, the Board cited to the fact that the purpose of the project was to provide affordable housing, as testified to by Marsh and Sweeney, and therefore it would not be feasible to sell the units at a

price above $110,000 to $120,000. (Zoning Board Decision, at 1-3.) Marsh explained that Community Works had a mission to provide "high quality affordable housing." (Board Decision at 1.) Sweeney also testified that "the goal of the Applicant is to save a significant historic Property and to provide affordable housing." (Board Decision at 2.) It is well established that "if expert testimony before a zoning board 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 South Kingstown, 959 A.2d 535, 542 (R.I. 2008). In this case, the Board concluded that there was no competent evidence presented that the Property could be brought back to habitable condition unless the proposed development for five units was approved. (Board Decision at 3.) Accordingly, the Board relied on substantial evidence in the record in concluding that a denial of the use variance for five units would result in a loss of all beneficial use of the Property.

Appellant also argues that the Board itself acknowledged that the land could be subdivided for two three-family homes, and therefore a use variance is not the least relief necessary. (Tr. at 64, 69.) Appellant thus argues that the Board's finding that there would be no beneficial use of the property without permitting the variance is erroneous in view of the reliable, probative, and substantial evidence of the whole record. In this case, however, the record reveals that the Board acknowledged the issue was preserving the historic structure, not the land. Specifically, in the Board's decision, it recognized that "the hardship from which the variances were sought was due to the unique characteristics of the Property and not the general characteristics of the surrounding area because the existing historic structure is in such an extreme condition of disrepair that it cannot be brought back to habitable condition unless the proposed development into five (5) dwelling units is approved." See Board Decision at 3; Tr. at 64, 69; see also Messinger v. Zoning Bd. of Review of Town of E. Providence, 81 R.I. 159, 162,

99 A.2d 865, 866 (1953) (discussing that an ancient structure on the applicant's land may be regarded as a unique circumstance).

In determining the beneficial use of the land, the Board considered the expert testimony of Powers, Sweeney, and Sokoloff that development would be economically prohibitive without the five units. See Bilodeau, 103 R.I. 149, 152 (explaining that an owner is deprived of all beneficial use of his or her property when it is economically prohibitive to continue a present operation or to convert to another permitted use.) It is well establish that the board is free to weigh expert testimony as it wishes against opposing evidence, but it is not free to dismiss competent expert testimony when there is no competent evidence refuting it. See Salve Regina College v. Zoning Bd. of Review of Newport, 594 A.2d 878, 882 (R.I. 1991). Accordingly, this Court finds that the Board relied on substantial evidence in the record in concluding that the five units were required for the project to be economically feasible and denying the use variance would result in a loss of all beneficial use of the historic structure.

Next, Appellant contests the Board's reliance on the historical and aesthetic nature of the building as a unique characteristic resulting in a hardship. Appellant maintains that creating five separate condominium units would alter the unique, historical aspect of the Property. However, the Board found that sufficient evidence existed to support Community Works's claim that the property was outdated and inadequate. Indeed, it is recognized that "[w]hether a variance can or should be granted involves several problems, but the existence of the ancient structure on the applicant's land may be regarded as a unique circumstance." 83 Am. Jur. 2d Zoning & Planning § 795 (2003) (citing Messinger, 81 R.I. 159, 99 A.2d 865).

Here, the Court notes that the Board members considered their own knowledge of the unique characteristics of the Property as an historic structure in great disrepair and as a large

mansion that was no longer sustainable as a single-family home. See Messinger, 81 R.I. at 162, 99 A.2d at 866 (where a use variance was properly granted when the board "acted upon its own knowledge of the conditions existing in the neighborhood as evidenced by a recognition of the fact that applicant's house is outmoded as a single-family dwelling because of its size"); see also Dawson v. Zoning Bd. of Review of the Town of Cumberland, 97 R.I. 299, 303, 197 A.2d 284, 286 (1964) (explaining that where the board members made personal observations of the conditions at a site, these observations may constitute legal evidence capable of sustaining a board's decision as long as the conditions and circumstances are disclosed in the record). In addition, expert testimony was presented by Powers that Community Works worked with the Providence Historic District Commission to establish a scope of renovations that met the Providence Historic District Commission's criteria in both renovating the building as well as the historic landscape. See Tr. at 17-19; Salve Regina College, 594 A.2d at 882. Accordingly, this Court finds that the Board relied on sufficient evidence in the record to support that the variances were sought due to the unique characteristics of the Property.

Finally, as to the dimensional variance, Appellant argues that the Board arbitrarily and capriciously ignored and disregarded evidence that adding the curb cuts with the parking spaces would further compound traffic and safety situations, ultimately altering the general character of the surrounding area. Sec. 45-24-41(c)(3). While Lupo testified to a risk of increased traffic, Lupo was not a qualified traffic expert. Salve Regina College, 594 A.2d at 882 ("The lay judgments of neighboring property owners on the issue of the effect of the proposed use on neighborhood property values and traffic conditions have no probative force."); cf. Toohey v. Kilday, 415 A.2d 732 (R.I. 1980) (stating that lay judgments "as to whether the [increased] traffic congestion [would constitute a] hazard [under] the zoning ordinance would follow a

granting of this application was a subject matter not within the testimonial competence of a witness lacking in expertise"). Our Supreme Court recognizes that the board is free to weigh expert testimony as it wishes when there is no competent evidence refuting it. Salve Regina College, 594 A.2d at 882.

Here, the record supports that the Board did consider Lupo's traffic concern, but ultimately concluded that the variance would not alter the general character of the surrounding area or impair the intent of the Comprehensive Plan. (Board Decision at 3-4.) The Board based this conclusion on the Board member's own observations; Sweeney's expert testimony regarding the mixed use of the neighborhood, Sokoloff and Sweeney's expert testimony regarding the project's consistency with the Comprehensive Plan; the Providence Historic District Commission and Department of the Planning and Development's approval of the project as maintaining the historic fabric of the Broadway Historic District; and Powers and Sweeney's expert testimony that the project would actually improve the surrounding area. (Tr. at 20-24, 28-30, 66-67; Board Decision at 3-4.) Accordingly, this Court finds that that the Board did not arbitrarily and capriciously disregard Lupo's evidence. See Salve Regina College, 594 A.2d at 882. There was substantial evidence based on the whole record to support the Board's finding that the variance would not alter the general character of the area or impair the Comprehensive Plan.

Thus, the Board did not abuse its discretion in findings that the use variance and dimensional variance should be approved, as it based its decision on the testimony it found credible and trustworthy. The Board found that Community Works would lose any beneficial use of the Property and suffer more than a mere inconvenience without the variance because Community Works would be unable to repair, improve, or upgrade the structure. This Court finds that the Board based its conclusions of law on probative and reliable evidence.

D
Declaratory Judgment

Appellant also seeks a declaratory judgment that substantial rights of Appellant have been prejudiced because the Board's decision violated the OMA and because Appellant was not entitled to cross-examine Community Works's witnesses.

Under G.L. 1956 § 9-30-1, the Superior Court "shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Sec. 9-30-1. "A decision to grant or deny declaratory or injunctive relief is addressed to the sound discretion of the trial justice." Hagenberg v. Avedisian, 879 A.2d 436, 441 (R.I.2005) (citing DiDonato v. Kennedy, 822 A.2d 179, 181 (R.I.2003) and Sullivan v. Chafee, 703 A.2d 748, 751 (R.I.1997)). Specifically, "[t]he court may refuse to render or enter a declaratory judgment or decree where the judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Sec. 9-30-6. "[W]here there is another action pending, it is within the sound judicial discretion of the court to grant or withhold declaratory relief." Theroux v. Bay Associates, Inc., 114 R.I. 746, 339 A.2d 266, 267-268 (1975). For a declaratory judgment action, "the court will avoid a needless judicial determination, where an application to the zoning board seeking a variance or special exception could meet with success." Annicelli v. Town of South Kingstown, 463 A.2d 133, 138 (R.I. 1983).

In the Zoning Board decision before it, this Court has found that the Board did not violate the OMA or Appellant's due process rights. As the Court is ruling on the issues presented in the declaratory judgment action pursuant to its statutory authority to review zoning appeals under § 45-24-69, rendering a declaratory judgment would constitute a needless judicial determination. Accordingly, in its discretion, this Court declines to issue a declaratory judgment, having rendered a decision in the zoning action.

CONCLUSION

For the reasons stated above, this Court is satisfied that the Zoning Board had competent evidence before it to grant Community Works's request for a use variance and a dimensional variance. This Court finds that the Board's grant of a use variance and a dimensional variance was supported by the reliable, probative, and substantial evidence of record, was not arbitrary and capricious, was not in violation Ordinance provisions, and did not constitute an abuse of the Board's discretion. Substantial rights of the Appellant have not been prejudiced. Accordingly, this Court affirms the July 18, 2011 decision of the Zoning Board of Providence.

Counsel shall submit the appropriate order for judgment.