STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 14, 2014]

GEORGE G. JACKSON	:	
	:	
VS.	:	**C.A. No. PC 12-6196**
	:	
CITY OF WOONSOCKET ZONING BOARD OF REVIEW	:	

DECISION

VOGEL, J. George G. Jackson (Appellant), pro se, brings this appeal from a decision by the City of Woonsocket Zoning Board of Review (the Zoning Board or Board), denying his application for dimensional relief. The Court exercises jurisdiction over this matter pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, this Court remands the case to the Zoning Board to make additional factual findings and to apply the correct dimensional variance standard.

I

Facts and Travel

The Appellant is the owner of a single-family home located at 170 Spring Street in Woonsocket, Rhode Island, and delineated as Tax Assessor's Plat 13, Lot 4 (the Property). (Zoning Board Hr'g Tr. (Tr.) 4, Oct. 9, 2012.) The Property is comprised of approximately 37,313 sq. ft. and is located in an R-3 Medium Density Single and Two-Family Residential District. (Tr. at 4.)

The Appellant wishes to build a six-foot fence around the Property. (Tr. at 5.) Appellant's proposed plan includes white fence posts, and either a black or green colored see through wire vinyl fence. (Tr. at 6.) In order to construct the fence, Appellant

requests relief from Woonsocket Zoning Ordinance (Ordinance) 6.2-1. Appellant requests the dimensional variance for security, privacy, odor and noise reasons. (Tr. at 6.)

Ordinance 6.2-1 states that in R-3 Districts, "[f]ences located in front yards shall not exceed three (3) feet in height. Fences located in side yards shall not exceed four (4) feet in height. Fences located in rear yards shall not exceed six (6) feet in height." Woonsocket, Rhode Island, City Code app. C, 6.2-1. The Appellant's proposed plan requires three feet of relief from the Ordinance in the front yard, and two feet of relief in the side yard.

Prior to requesting the dimensional variance, Appellant began constructing the fence at the Property. (Zoning Bd. R. Ex. A: Letter from Abutter.) However, during the installation of the fence, the inspector informed Appellant that a permit was necessary before a fence could be constructed. (Tr. at 9.) The Appellant had not obtained the requisite permit. (Tr. at 8-9.)

At a properly advertised hearing, Appellant presented several arguments to the Zoning Board. The Appellant stated that the fence would be used to support bushes and to increase privacy as well as provide security. (Tr. at 6.) Further, Appellant testified the fence also would be used to combat the noise and exhaust fumes from passing police cars, fire trucks, and garbage trucks. (Tr. at 6-7.) Additionally, Appellant asserted that the fence would increase traffic safety because a motorist would be more focused on the road instead of his yard. (Tr. at 6.) The Appellant reasoned that the fence was necessary to protect his garden from people and pollution. (Tr. at 7.) Lastly, Appellant expressed doubt that a three-foot fence would be sufficient to stop people from trespassing on his property and would not provide adequate privacy. (Tr. at 13.)

Although no abutters appeared before the Zoning Board in opposition to the dimensional variance, one objector submitted a letter to the Zoning Board (Tr. at 19, 20.) In the letter, the abutter expressed concerns about the proposed fence. (Zoning Bd. R. Ex. A: Letter from Abutter.) She questioned the appearance of the fence, explaining that Appellant had failed to give her an adequate description of the proposal. Id. The abutter also complained that Appellant had already installed the proposed six-foot white fence posts on the Property and complained that some of the posts were installed on top of an existing two-foot retaining wall, increasing the height of those posts to eight feet. Id. The abutter worried that the fence may cause traffic problems since the Property is a corner lot, and "[o]rdinance 6.5 provides that every improvement installed or planted on a corner within any district . . . shall be constructed, installed, or planted so as not to cause any obstruction of vision between the height of three (3) feet and eight (8) feet." Id. Lastly, the abutter questioned Applicant's suggestion that any fence would diminish noise problems emanating from the neighboring church. Id.

In addition to statements by the abutter, a member of the Board spoke of her personal experiences regarding the area in which the Property is situated. Board Member Dumais explained that she lives in the area, and she has not observed fire trucks and police cars frequenting the area. (Tr. at 11.) She further stated that she has not experienced any odor issues from passing garbage trucks. (Tr. at 12.)

Board Members Frechette and Masse voiced concerns about the height of the fence, particularly if mounted atop an existing two foot wall. (Tr. at 10; Tr. at 15.) Additionally, Board Member Dumais questioned whether a wire fence would stop exhaust fumes from entering the property. (Tr. at 11.) Further, while Appellant argued

the fence was needed for privacy, Board Member Masse expressed doubt that a wire fence would serve that purpose. (Tr. at 15.)

Before a decision was rendered, Board Member Frechette stated, "I'm going to move to make a motion to deny the application, and after the vote's been taken, I'll give my reason why." (Tr. at 22.) The Board's counsel, Mr. Carroll, advised the Board that any decision must be based upon findings of fact. (Tr. at 22.) In response to Mr. Carroll's advice, Board Member Michaud indicated that they would "continue to operate in a manner that the Zoning Board has been run for the last decade." (Tr. at 24.) The Board did ask Mr. Carroll "to make sure that [the decision] would be adequate in [his] opinion, legally." (Tr. at 34.) Mr. Carroll again advised the Zoning Board that statute requires the Board to make its decision based upon findings of fact. (Tr. at 36.)

Board Member Michaud then moved to deny the variance; the motion was seconded by Board Member Rivers. (Tr. at 47.) Following a roll call vote, the Zoning Board unanimously voted to deny the application for a variance. (Tr. at 50.) After denying the application, the Zoning Board articulated the following basis for its decision:

> "1. The Board did not believe testimony by the applicant rises to the level of reasonable or relevant enough hardship to constitute a hardship;
> "2. Applicant currently receives full and beneficial use of his property."
> (Tr. at 51.)

The Board also informed Appellant that he was required to remove any existing portions of the fence that were not in compliance with the Ordinance. (Tr. at 52.)

The Zoning Board's decision was mailed to Appellant on November 14, 2012. (Letter from Zoning Bd.) The Appellant filed a Complaint and Appeal of the Board's decision on December 3, 2012. (Complaint.) Thus, Appellant filed a timely notice of appeal of that decision. (Affidavit of Notice.)

On Appeal, Appellant argues that the Zoning Board did not promote public health, safety, and general welfare but instead "gave into peer pressure, political and religious gossip and personal small town favoritism." (Pl.'s Appeal Mem. at 4). Further, Appellant contends that the Board's decision was "discriminatory and contradictory" because the Zoning Board approved ten other dimensional variance applications. Id. at 5. Additionally, Appellant maintains a three-foot fence is too low and people could flip the fence over "causing potential fatal or life threatening injuries" and exposing Appellant to liability. Id. at 6. Lastly, Appellant argues that "[t]he public entering my personal property by trespassing illegally is more than a mere inconvenience." Id. at 6-7.

II

Standard of Review

Pursuant to § 45-24-69, the Superior Court possesses jurisdiction of appeals from a zoning board. Section 42-24-69(d) provides as follows:

> "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. 42-24-69.

The court, "when reviewing the action of a zoning board of review 'must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" Salve Regina College v. Zoning Bd. of Review of the City of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). '"Substantial evidence . . . means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance."' Lischio v. Zoning Bd. of Review of the Town of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). Indeed, "this test is not satisfied by any evidence but only by that which [the court] determine[s], from [its] review of the record, has probative force due to its competency and legality." Salve Regina, 594 A.2d at 880 (citing Thomson Methodist Church v. Zoning Bd. of Review of Pawtucket, 99 R.I. 675, 681, 210 A.2d 138, 142 (1965)). If the findings the decision is rendered upon are insufficient, the court may remand for further factfinding. Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001).

Additionally, the court may remand when the board has failed to resolve "the evidentiary conflicts, [make] the prerequisite factual determinations, [or] appl[y] the proper legal principles" [or] when "[t]he infirmities and deficiencies of the decision make judicial review impossible. . . ." May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239-40, 267 A.2d 400, 403 (1970). Further, if the board has applied the incorrect legal standard or a too strict legal standard, the court can remand the matter to the board for the application of the appropriate one. Hugas Corp. v. Veader, 456 A.2d 765, 770-71 (R.I. 1983).

III

The Zoning Board Decision

Section 45-24-41(d)(2) of the State Zoning Enabling Act sets forth the standard that zoning boards must apply when considering an application for dimensional variance:

> "in granting a dimensional variance, [the applicant must show] 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. The fact that a use may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief."

To demonstrate a hardship constituting more than a mere inconvenience, the applicants must satisfy the requirements of § 45-24-41(c). Lischio, 818 A.2d at 692. Section 45-24-41(c) provides:

> "(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).

A dimensional variance "provides relief from one or more of the dimensional restrictions that govern a permitted use of a lot of land, such as area, height, or setback restrictions." Sciacca, 769 A.2d at 582, n.5.

With respect to an application for a variance, a zoning board, '"when acting in a quasi-judicial capacity, must set forth in its decision findings of fact and reasons for the action taken."' Id. at 578 (quoting Irish P'ship v. Rommel, 518 A.2d 356, 358 (R.I. 1986)). The '"findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany."' Id. (quoting Irish P'ship, 518 A.2d at 358).

In the present case, the Zoning Board denied the application for the variance without offering adequate findings of fact. The Board never addressed the evidence upon which it relied in rendering its decision. The Board merely stated:

> "1. The Board did not believe testimony by the applicant rises to the level of reasonable or relevant enough hardship to constitute a hardship;
> "2. Applicant currently receives full and beneficial use of his property." (Tr. at 51.)

The Zoning Board's bare conclusory statements do not constitute sufficient findings of fact. Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 401 (R.I. 2001). In denying the Appellant's request for dimensional relief, the Board failed to support its decision with any specific findings of fact. Id. at 402. Moreover, the Zoning Board's decision provides no guidance as to how the Board arrived at its decision. The Board did not articulate specific evidence that led to the denial of the application. Id.

Our Supreme Court has made it clear that zoning boards should ensure their "decisions on variance applications (whether use or dimensional) address the evidence in the record before the board that either meets or fails to satisfy each of the legal preconditions for granting such relief, as set forth in § 45-24-41(c) and (d)." Sciacca, 769

A.2d at 585. When the record contains inadequate findings of fact, the task of judicial review becomes exceedingly difficult. Bernuth, 770 A.2d at 402 (citing Irish P'ship, 518 A.2d at 358 (explaining "the zoning board's decision was conclusional and failed to apply the proper legal principles, thereby making judicial review of the board's work impossible"). Courts have declined to affirm variance decisions where the zoning board has "made no findings of fact specifically addressing the requirements of 42-24-41(d)(2)." Bernuth, 770 A.2d at 401; see also Irish P'ship, 518 A.2d at 359. Further, "when the board fails to state findings of fact, the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances." Bernuth, 770 A.2d at 401 (quoting Irish P'ship, 518 A.2d at 359).

Additionally, the Zoning Board articulated the wrong legal standard for considering an application for dimensional variance. The Board noted that ". . . Applicant currently receives full and beneficial use of his property." (Tr. at 51.) That finding is irrelevant to an application for a dimensional variance. The Board incorrectly applied the standard applicable to an application for a use variance instead of a dimensional variance. An applicant seeking a use variance must make a higher evidentiary showing than one seeking a dimensional variance. Section 45-24-41(d)(1) applies to a use variance and requires a showing of a loss of all beneficial use while § 45-24-41(d)(2) applies to a dimensional variance and requires a showing of hardship amounting to more than a mere inconvenience. Lischio, 818 A.2d at 692.

The Zoning Board's first finding of fact —"1. the Board did not believe testimony by the applicant rises to the level of reasonable or relevant enough hardship to constitute a hardship"— provides no evidence that the Board applied the correct legal standard. (Tr.

at 51). A zoning board must apply the correct standard when reviewing a variance application. Hugas Corp., 456 A.2d at 771 (citation omitted) (holding a zoning board "applied a stricter standard than the ordinance warranted and thus remanded case for reconsideration under appropriate standard"). Nowhere in the record does the Zoning Board mention § 45-24-41(d)(2) or use the term "mere inconvenience." Given that the Board failed to mention the statute or the appropriate standard, the Court has no basis for concluding that the Board applied the correct standard. Bernuth, 770 A.2d at 402 (explaining "there is no evidence that the zoning board considered or applied the statutory requirements, given that the statute is not acknowledged in the zoning board's decision[]").

This Court's conclusion—that the Board failed to consider or apply the correct standard—is buttressed by the second finding of fact wherein the Board articulated the incorrect variance standard. See Lischio, 818 A.2d at 691 (explaining in applying for a dimensional variance landowners are "not required to demonstrate a loss of all beneficial use of the parcel . . ."). The applicable standard states a landowner is entitled to dimensional relief when he or she is precluded from the "full enjoyment of the use of his [or her] property for permitted purposes by an insistence upon a literal enforcement of area restrictions," and such preclusion amounts to more than a mere inconvenience. Sun Oil Co. v. Zoning Bd. of Review of City of Warwick, 105 R.I. 231, 233, 251 A.2d 167, 169 (1969). When the incorrect legal standard is used by the zoning board, the court may remand the case to the zoning board for reconsideration under the correct standard. Hugas Corp., 456 A.2d at 771 (further citation omitted).

After reviewing the Zoning Board's decision, this Court finds that the Board failed to make sufficient findings of fact and failed to apply the correct legal standard for considering an application for a dimensional variance, as set forth in §45-24-41(c) and (d). Accordingly, this Court must remand the case to the Board for further proceedings consistent with this Court's Decision. This order neither requires nor invites a new or continued hearing on the application. On remand, the Board is directed to set forth its findings of fact adequately and to relate the findings to the applicable law. Id.; Irish P'ship, 518 A.2d at 359. The Board must address the specific evidence that supports the decision consistent with the statutory requirements. Id.

IV

Conclusion

Upon review of the entire record, this Court finds the Board's findings of fact to be inadequate and conclusory. As such, the decision of the Zoning Board violates statutory provisions. This Court also finds that the decision is affected by error of law because the Zoning Board applied the incorrect standard when rendering its decision. These errors resulted in substantial prejudice to the rights of the Appellant. Accordingly, the Court remands the matter to the Zoning Board to make sufficient findings of fact and to apply the correct legal standard consistent with this Decision.

Counsel for the Defendant shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	George G. Jackson v. City of Woonsocket Zoning Board of Review
CASE NO:	C.A. No. PC 12-6196
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 14, 2014
JUSTICE/MAGISTRATE:	Vogel, J.
ATTORNEYS:	
For Plaintiff:	George G. Jackson, *pro se*
For Defendant:	Michael J. Marcello, Esq.