**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**(FILED: December 8, 2014)**

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| **IRW REAL ESTATE; WEISS REALTY, LLC., ELAINE S. WEISS TRUST, and SABAR REALTY, INC.** | : | |
| **v.** | : | **C.A. No. PC-2014-0294** |
| **CITY OF PROVIDENCE ZONING BOARD OF REVIEW, by and through its members MYRTH YORK, ARTHUR STROTHER, SCOTT WOLF, ENRIQUE MARTINEZ, DAN VARIN and PROVIDENCE FIREFIGHTER'S REALTY CORP.** | : | |

**DECISION**

**CLIFTON, J.** Appellants IRW Real Estate, Weiss Realty, LLC., Elaine S. Weiss Trust, and Sabar Realty, Inc. (Appellants) appeal the January 6, 2014 decision of Appellee, City of Providence Zoning Board of Review (the Board), granting a use variance and various dimensional variances to Applicant Providence Firefighter's Realty Corporation (Applicant or Firefighter's Realty) for their property on Lots 239 and 586[1] of Tax Assessor's Plat 2 in Providence, Rhode Island (the Property). Such variances provide relief for Applicant to construct a billboard on its Property abutting Interstate 95. Lamar Central Outdoor, LLC (Intervenor or Lamar) has intervened in support of the Board's decision as an interested party planning to rent this billboard. Jurisdiction of this Court is pursuant to G.L. 1956 § 45-24-69.

[1] The March 12, 2013 and September 30, 2010 applications' request of variances for Lot 586 appears to result simply from the fact that both lots have the same owner and same street address. The map attached to Applicant's March 12, 2013 application clarifies that the proposed billboard is to be placed solely on Lot 239, and, as such, the requested variances are pertinent only to this lot. (Appl. for Variance, Mar. 12, 2013 at 4.) Thus, for the purposes of discussion herein, the Property encompasses only Lot 239.

## I

## Facts and Travel

On March 28, 2011, the Board denied Lamar's[2] application for variance on the Property. (Resolution No. 9554.) Lamar had requested both a use variance and dimensional variances to construct a V-shaped billboard opening at a 50 degree angle and measuring 137 feet high with two sign panels, each spanning 48 feet by 14 feet. Id. Specifically, Lamar requested relief from Providence Ordinance ch. 27 § 603, which states that billboards "shall be prohibited in all zones in the city." The Board found, inter alia, that the Applicant had not shown that the hardships sought resulted from the unique nature of the Property and that denial of the requested relief would not lead to the loss of all beneficial use of the Property. Id. at 3.

On March 12, 2013, Firefighter's Realty, owner of the Property, submitted the instant application to the Board, similarly proposing construction of a billboard that Lamar would rent. (Appl. for Variance, Mar. 12, 2013.) Mr. Paul Doughty, counsel for Firefighter's Realty, testified as to the modifications between this application and the one denied by the Board in 2010:

> "We have narrowed [the V-shape] from 50 degrees to 30 degrees, and the effect of that is for people that may be viewing it from the east or from the North Main Street side is to narrow the width of the billboard, the wide part of the V, the mouth of the V, from 30 feet to 27.5 feet which is a reduction of approximately 25 percent, in that width.
>
> "Secondly we moved the pole, and therefore the entire billboard, three feet south thereby increasing, along with the narrowing of the V, the distance from the abutting landowner . . . [by ten feet] or approximately 33 percent.
>
> "In addition, we've made an offer on behalf of [Lamar] to remove the equivalent square footage of billboard from the city

[2] The application refers to Lamar as "Lamar Advertising Co." However, there appears no dispute that this company is, at least for the purposes herein, the same as "Lamar Central Outdoor, LLC." In its own brief, Lamar utilizes this same nomenclature.

> from a list of identified billboards locations that was submitted to the Department of Planning. That's 1344 square feet and it represents approximately nine or ten billboards depending on which billboards are selected. And they are in different neighborhoods, and different streets, including, for instance, Potters Ave., Public Street, Broad Street[,] Elmwood, Charles Street, et cetera." (Tr. 127:6-128:9, July 9, 2013.)

Consequently, the Board found, upon motion and a vote of 4-1, that there existed a "substantial change" from the previous application. Id. at 131:1.

Later in the proceedings, the Board heard from Applicant's expert, Mr. Thomas O. Sweeney (Mr. Sweeney), who testified that "about 50 percent of [the Property] is unusable due to the [Narragansett Bay Company] pipeline [easement], and the Moshassuck River[.]" (Tr. 166:4-6, Oct. 22, 2013.) Mr. Paul Doughty readily admitted that Applicant did not ask Narragansett Bay Company whether it could use the land upon which the easement lies for parking. Id. at 168:8-12. Nevertheless, part of the Property is already being utilized as a parking lot. Id. at 149:2-4. In response to this evidence, the Chairperson of the Board stated that the Board was "not persuaded that a denial of the requested use and dimensional variances would lead to a loss of all beneficial use of the property. The Board considers the use of the property as a union hall[3] and parking lot to be a beneficial use to the property." Id. at 170:22-171:2. Mr. Sweeney did not dispute this impression but rather stated that zoning strictures had "an impact on the full beneficial use of the [P]roperty." Id. at 171:3-5. Despite the Chairperson's position regarding the parking lot as a beneficial use of the Property, in its final decision, Resolution No. 9778, the Board granted the requested variances, finding that the Property "cannot yield any beneficial use if it is required to conform to the use provisions of this Ordinance [as] [t]he

[3] Confusion abounds in the record conflating Lot 586 and Lot 239. Lot 586 is the parcel of land upon which Firefighter Realty's union hall is located. Lot 239, at issue here with respect to the requested variances, contains only a parking lot for this hall.

specific area on the Property where Applicant seeks to place the monopole is of very limited use." (Resolution No. 9778 at 7.)

Appellants filed a Complaint with this Court on January 17, 2014 appealing the Board's grant of relief. Appellants contend that the Board acted in excess of its statutory authority by rehearing a substantially similar application to the one decided on March 28, 2011. Additionally, Appellants assert that the decision of the Board was affected by error of law as the Board granted relief where Applicant was deprived of the beneficial use of some of its property rather than all. Furthermore, Appellants allege that the Board failed to make adequate findings of fact as per § 45-24-61(a)[4]. Lamar contends that the Board's decision was proper, resting on record evidence that Applicant would lose beneficial use of the Property without the proper variances. Furthermore, Intervenor asserts the instant application is materially different from the previous application, a question of fact adjudicated by the Board in its decision here.

**II**

**Standard of Review**

The Superior Court "reviews the decisions of a plan commission or board of review under the 'traditional judicial review' standard applicable to administrative agency actions." Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998) (internal citations omitted). This Court may reverse, modify, or remand a zoning board's decision if the:

> "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] Sec. 45-24-61(a) states in relevant part, "The zoning board of review shall include in its decision all findings of fact and conditions[.]"

> "(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).

This 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." Id. Rather, the Superior Court "'must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" Toohey v. Kilday, 415 A.2d 732, 735 (R.I. 1980) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 405 A.2d 1167, 1170 (1979)). Substantial evidence is defined as "'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" Lischio v. Zoning Bd. of Review of 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)) (brackets in original). This Court is proscribed from "substitut[ing] [its] judgment for that of the zoning board if [it] can conscientiously find that the board's decision was supported by substantial evidence in the whole record." Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (internal citations omitted). Such deference is due, in part, to the presumption that zoning boards possess an expertise "concerning those matters which are related to an effective administration of the zoning ordinance." Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962).

Nevertheless, "questions implicating statutory interpretation are questions of law and are therefore, reviewed de novo by this Court." Town of N. Kingstown v. Albert, 767 A.2d 659, 662 (R.I. 2001). It is well settled that "'when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and

ordinary meanings.'" Anolik v. Zoning Bd. of Review of Newport, 64 A.3d 1171, 1174 (R.I. 2013) (quoting Olamuyiwa v. Zebra Atlantek, Inc., 45 A.3d 527, 534 (R.I. 2012)). Where "there is no room for statutory construction[, this Court] must apply the statute as written." Interstate Navigation Co. v. Div. of Pub. Utils., 824 A.2d 1282, 1287 (R.I. 2003) (internal citations omitted).

## III

## Discussion

### A

### Sufficiency of Findings of Fact

Appellants contend that the Board's decision set forth insufficient findings of fact as required by § 45-24-61(a). Specifically, they assert that the Board's finding that the requested relief was the least necessary was framed in a conclusory fashion, lacking any supporting findings of fact.

A zoning board, '"when acting in a quasi-judicial capacity, must set forth in its decision findings of fact and reasons for the actions taken.'" Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005) (quoting Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001)). Such findings of fact must be included so that a board's '"decisions may be susceptible of judicial review.'" Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001) (quoting Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996)). As such, the decision need follow only "minimal requirements[,]" setting out findings that are "factual rather than conclusional[.]" May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970).

Here, the Board explained its conclusion that the relief "is the least . . . necessary" by stating that the billboard "must be high enough and large enough to be seen in order to fulfill its purpose." (Resolution No. 9778 at 7.) This conclusion is supported by the Board's synopsis of the record that Mr. Sweeney, in his undisputed expert testimony, stated that a billboard of this height is the least relief necessary. Id. at 5. Such statements are more than adequate to fulfill the "minimal requirements" of setting out findings that are "factual rather than conclusional[.]" May-Day, 107 R.I. at 239, 267 A.2d at 403. Thus, the Board's underlying factual basis—i.e. that the billboard needed to be 137 feet high in order to be seen from the highway—is sufficiently clear such that its conclusion is susceptible to meaningful judicial review. As such, this Court concludes that the Board's decision was not in violation of § 45-24-61(a).

**B**

**Administrative Finality**

Appellants contend that the Board lacked jurisdiction to hear the instant application as a substantially similar application had been previously considered and denied by a prior constituency of the Board. They assert that the doctrine of administrative finality bars reconsideration of such an analogous request.

It is well settled in Rhode Island that "a zoning board, on a subsequent application . . . for substantially similar relief, is without power to reverse its prior decision in the absence of a material change in circumstances intervening between the two decisions." Marks v. Zoning Bd. of Review of Providence, 98 R.I. 405, 405-06, 203 A.2d 761, 762 (1964). Such a rule is grounded in the long-standing "principle that persons affected by a decision in zoning matters ought not to be twice vexed for the same cause and are entitled to have their rights and liabilities settled by a single decision upon which reliance may be placed." Id. at 406, 203 A.2d at 763.

Nevertheless, the doctrine of administrative finality is applicable only where the proposals "in each case [are] substantially similar." May-Day, 107 R.I. at 237, 267 A.2d at 402. Such a determination is a question of fact to be determined by the Board. See Marks, 98 R.I. at 406-07, 203 A.2d at 763 (stating that "a factual situation differing materially from that existing at the time of the earlier decision and the occurrence of a substantial change in conditions is generally a condition precedent to the exercise of jurisdiction").

Here, the Board determined that the instant application was substantially different from the 2010 request for relief. (Tr. 131:5-8, July 9, 2013.) This decision was based on record evidence that the requested billboard was placed at a narrower angle to address aesthetic concerns and further away from abutting properties. Id. at 127:6-22. Additionally, the Chair opined that the most significant change to the application was Lamar's agreement to remove the equivalent square footage of pre-existing Providence billboards if the project was approved. Id. at 129:19-22. This Court may not substitute its judgment for that of the Board and will uphold its findings if substantial evidence in the record supports such a conclusion. Mill Realty, 841 A.2d at 672; see Lischio, 818 A.2d at 690 n.5 (defining substantial evidence as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion"). The record here supports the conclusion that substantial changes were made between subsequent applications. See May-Day, 107 R.I. at 237, 267 A.2d at 402 (finding two zoning applications, one for "two ten-family apartment houses" and the other proposing "a single apartment building containing 100 units with underground parking for 125 automobiles" to be so "[o]bviously . . . dissimilar that the doctrine of administrative finality is inapplicable"); see also Russell v. Tenafly Bd. of Adjustment, 31 N.J. 58, 155 A.2d 83, 88 (1959) (holding a five foot increase in setback and six percent decrease in lot coverage constituted sufficient change); Peterson v. City Council

for City of Lake Oswego, 32 Or. App. 181, 189, 574 P.2d 326, 331 (1978) (finding substantial changes in application where new proposal included smaller building and greater setbacks). As such, the Board did not act in excess of its statutory authority in hearing the instant application.

**C**

**All Beneficial Use**

Appellants contend that the Board misapplied the use variance standard in deciding to grant Applicant's relief. They assert that rather than looking to whether Applicant was completely deprived of all beneficial use of its Property, the Board granted the variance upon a showing of mere partial deprivation.

A use variance, as defined by statute, is to be granted only upon a showing "that the subject land . . . cannot yield any beneficial use if it is to conform to the provisions of the zoning ordinance." Sec. 45-24-31(65)(i). As such, an applicant must show that there is "no other reasonable alternative that would allow the applicant to enjoy a legally permitted beneficial use of the property." Bernuth, 770 A.2d at 401 (internal citations omitted). It is well established that "substantial deprivation of all beneficial use of one's property is not the standard to be used in determining whether one is entitled to a variance." Smith v. Zoning Bd. of Review of Warwick, 104 R.I. 1, 3-4, 241 A.2d 288, 290 (1968). Rather, "[t]he standard established in a long line of cases by this court is complete deprivation of all beneficial use." Id. at 4, 241 A.2d at 290 (emphasis in original). Whether a "petitioner might be able to use the property in a more profitable manner is not a basis for granting a variance." OK Props. v. Zoning Bd. of Review of Warwick, 601 A.2d 953, 955 (R.I. 1992).

The record clearly supports that the Board was "not persuaded that a denial of the requested use and dimensional variances would lead to a loss of all beneficial use of the

property. The Board considers the use of the property as a . . . parking lot to be a beneficial use to the property." (Tr. 170:22-171:2, Oct. 22, 2013.) Applicant's expert provided nothing to dispute this contention. Id. at 171:3-5. However, apparent confusion led the Board to ultimately misconceive the proper standard to apply. See id. at 188:15-16 ("I don't fully understand th[e] standard"). The Board found that "[t]he specific area on the Property where Applicant seeks to place the monopole is of very limited use[,]" which, in turn, supported its conclusion that "[t]he subject land cannot yield any beneficial use." Resolution No. 9778 at 7. The benchmark is not whether the subject land holds only "very limited use," id.; rather, "[t]he standard established in a long line of cases by th[e] [Rhode Island Supreme C]ourt is complete deprivation of all beneficial use." Smith, 104 R.I. at 4, 241 A.2d at 290 (emphasis in original); see Bamber v. Zoning Bd. of Review of Foster, 591 A.2d 1220, 1223 (R.I. 1991) (holding that a petitioner seeking "relief to use land for a use not permitted under the applicable zoning ordinance" must make "a showing of deprivation of all beneficial use of property") (internal citations omitted). Additionally, the statute relevant here specifically states that a use variance can only be granted upon a showing of "evidence upon the record that the subject land . . . cannot yield any beneficial use[.]" Sec. 45-24-31(65)(i) (emphasis added). This Court must apply the statute's plain meaning, to wit, that the deprivation in question must be absolute. Anolik, 64 A.3d at 1174.

Evidence on the record supports the conclusion that the Property is used for a parking lot. (Tr. 149:2-4, Oct. 22, 2013.) This is not deprivation of all beneficial use. See Smith, 104 R.I. at 4, 241 A.2d at 291 (upholding a zoning board's decision to deny a use variance, finding testimony that the subject land was "in the vicinity of heavily traveled railroad tracks [and thus] not a desirable place for residential uses" insufficient to meet the standard). Additionally, there

is no evidence in the record as to whether Applicant benefited from Narragansett Bay Company's easement on the property or whether the company would allow Applicant to use the land for which it holds the easement. See OK Props., 601 A.2d at 955 (upholding zoning board's decision to deny use variance for billboard along Interstate 95, finding that applicant had "not demonstrated a complete loss of all beneficial use of the property" where, although "74 percent of the subject property [was] utilized as an easement by Narragansett Electric[,]" no evidence was presented as to "whether the owner of the property received any payment for [that] easement"). As such, this Court finds that the Board's decision was affected by error of law.

## IV

## Conclusion

This Court determines that the Board set forth sufficient findings of fact as per § 45-24-61(a). Further, this Court concludes that the Board properly determined the instant application is not barred by the doctrine of administrative finality and, as such, did not act in excess of its statutory authority in hearing the application. However, this Court finds that the Board misapplied the "all beneficial use" standard required in granting a use variance by looking to substantial, rather than complete, deprivation. As such, the Board's grant of relief was affected by error of law. Substantial rights of Appellants have been prejudiced. Resolution No. 9778 is hereby reversed and the application remanded for further proceedings. Counsel for the Appellants shall submit the appropriate judgment for entry.

**RHODE ISLAND SUPERIOR COURT**

***Decision Addendum Sheet***

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| **TITLE OF CASE** | **IRW Real Estate v. City of Providence Zoning Board of Review, et al.** |
| **CASE NO:** | **PC-2014-0294** |
| **COURT:** | **Providence County Superior Court** |
| **DATE DECISION FILED:** | **December 8, 2014** |
| **JUSTICE/MAGISTRATE:** | **Clifton, J.** |
| **ATTORNEYS:** | |
| **For Plaintiff:** | **Gina A. DiCenso, Esq.** |
| **For Defendant:** | **Lisa Dinerman, Esq.**<br>**Edward C. Roy, Esq.**<br>**Jeffrey S. Brenner, Esq.** |