STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: November 15, 2016]

GEORGE G. JACKSON	:	
	:	
v.	:	
	:	**C.A. No. PC-14-6102**
CITY OF WOONSOCKET ZONING BOARD OF REVIEW	:	
	:	

DECISION

VOGEL, J. The Appellant, George G. Jackson (Appellant or Jackson), appearing pro se, appeals for the second time from a decision of the Woonsocket Zoning Board of Review (Board), denying his application for a dimensional variance. This Court remanded the earlier case after reviewing the initial decision and determining that the Board failed to provide adequate findings of fact and to apply the correct legal standard. On remand, the Board issued a new decision again denying the dimensional relief sought. (Decision of Woonsocket Zoning Board of Review upon Remand from Providence [County] Superior Court – Jackson v. City of Woonsocket Zoning Bd. of Review – C.A. No. PC 12-6196 (Decision)). Appellant takes the instant appeal from that Decision. This Court exercises jurisdiction over this matter pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, this Court affirms the Board's denial of Appellant's application for a dimensional variance.

I

Facts and Travel

The Appellant resides in a single-family home on a 37,313 sq. ft. lot located at 170 Spring Street in Woonsocket, Rhode Island. (Zoning Bd. Hr'g Tr. (Tr.) 4, Oct. 9, 2012.) The

subject lot is identified as Tax Assessor's Plat 13, Lot 4 and is situated in an R-3 Medium Density Single- and Two-Family Residential District. Id.

The Appellant applied for a dimensional variance to construct a six-foot fence around his property. (Appellant's Appl., Ex. A.) Specifically, Appellant sought relief from municipal Ordinance 6.2-1,[1] limiting the height of fencing along two sections of his property, the front yard and also along the sides of his house. Id. He sought a three-foot variance to erect the fence in the front of his property and a two-foot variance to erect the fence along the sides of his residence. Id. The Zoning Board conducted a hearing on his application on October 9, 2012. At the hearing, Jackson testified that a six-foot fence with vegetation growing on it would give him privacy from intruders who would not be deterred from entering upon his property by a three-foot fence. (Tr. at 13); see also Appellant's Appl., Ex. A. Additionally, he claims he requires a six-foot fence to protect his yard from noise and pollution emitted by street traffic such as fire engines, police cars, and trash trucks. (Tr. at 11-12); see also Appellant's Appl., Ex. A.

Although she did not appear at the hearing, one of Jackson's neighbors submitted a letter to the Board objecting to the proposed relief. (Tr. at 19-20). In her letter, which was entered into the record, the objecting neighbor complained that Appellant had initiated construction of the fence prior to requesting the dimensional relief, specifically by putting six-foot fence posts in the ground. (Zoning Bd. R. Ex. A: Letter from Abutter.) The neighbor also noted that those fence posts sit on top of a two-foot retaining wall, elevating the posts and proposed structure to eight feet above street level. Id. She expressed concern about the height and the possible impact the fence would have on traffic safety since the property sits on a corner lot. Id. The neighbor

[1] 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 Zoning Ordinance 6.2-1.

further questioned Jackson's claim that such a fence would serve to solve neighboring noise problems. Id.

At the hearing, Board member Kathryn Dumais noted that she lives in the same neighborhood as Appellant and questioned Jackson's assertion that he suffered hardships regarding fire engines, police cars, and garbage trucks. (Tr. at 10-11).[2] Specifically, Dumais suggested that emergency vehicles rarely go into Appellant's neighborhood and proceed mostly along the main road. Id. at 11. Additionally, Dumais noted that new equipment on trucks has reduced the harshness of fumes. Id. She further questioned how a fence could stop fumes in any event. Id. Dumais dismissed Jackson's concerns over odors emanating from garbage trucks by saying she lives nearby and does not smell the trucks. Id. at 12.

The Appellant insisted that fire trucks, ambulances and police vehicles drove upon the left-hand lane of his road although he acknowledged that they did not drive on his street as often as they traveled on other roads. Id. at 11-12. He responded to Dumais' contention that she lives nearby and does not notice any odor from garbage trucks, noting that he is sensitive to such smells and is troubled by them. (Tr. at 12).

Relying on photographs[3] that were included in the record, two other Board members, Allen Rivers and Richard Masse, raised concerns over the height of the proposed fence, which

[2] Our Supreme Court has held that "[a] board may take into consideration probative factors within their knowledge in denying the relief sought***." Goldstein v. Zoning Bd. of Review of City of Warwick, 101 R.I. 728, 733, 227 A.2d 195, 199 (1967). Thus, such information by Board member Dumais could be considered probative on issues she addresses within her personal knowledge.

[3] The Appellant submitted six photos to the Board, together with his application. Four of the photos included views of the proposed fence from his property. One photograph was an aerial view of Appellant's property and the surrounding area. The last image was a diagram of the proposed fence around Appellant's property. See Appellant's Appl.

would sit on the two-foot retaining wall. Id. at 13-16. Masse further questioned how the proposed open fence would remedy Appellant's privacy concerns. Id. at 15.

In its initial decision, the Board unanimously voted to deny Appellant's request for a variance. Id. at 50. At that time, the Board gave the reasoning for its denial in two sentences: "The Board did not believe testimony by the applicant rises to the level of reasonable or relevant enough hardship to constitute a hardship"; "Applicant receives full and beneficial use of his property." Id. at 51. The Appellant took an appeal from the denial of his application. Without addressing the merits of his arguments, the Court remanded the case to the Zoning Board after determining the Board's findings of fact were inadequate and conclusory. Jackson v. City of Woonsocket Zoning Bd. of Review, No. PC 12-6196, 2014 WL 4101445 (R.I. Super. Aug. 14, 2014), 6. Additionally, this Court found that the Board's Decision was affected by error because the Board applied the incorrect legal standard when rendering its decision. Id. The Court concluded that these errors substantially prejudiced the rights of Appellant, and this Court remanded the matter to the Board to make sufficient findings of fact and to apply the correct legal standard. Id.

On remand, the Board issued a written Decision on November 13, 2014, again denying the relief sought by Appellant. (Decision). In its written Decision, the Board applied the correct legal standard governing consideration of applications for dimensional variances. (Decision 2-3.); see §§ 45-24-41(d) and (e)(2). Further, the Board specifically addressed the statutory requirements and then applied the evidence on the record to the applicable law to support its findings. (Decision 2-3.) The Board determined that based on photographs and the testimony on the record, Appellant's asserted hardships were not unique and therefore Appellant did not meet the standard set out in § 45-24-41(d)(1). Id. at 2. Additionally, the Board found that Appellant

created his own hardship by erecting the fence posts first and then seeking dimensional relief that would entitle him to do so. Id. Section 45-24-41(d)(2) precludes relief to an applicant if the hardship claimed is the result of his or her own prior action, and thus the Board concluded that Appellant did not meet this standard. Id. Further, the Board found that granting the variance would alter the general character of the surrounding area due to the height of the proposed fence. (Decision 3.) As such, the Board determined his proposal failed to comply with § 45-24-41(d)(3). Id. The Board concluded that Appellant failed to provide sufficient evidence showing that the relief sought would remedy his asserted hardships. Id. As such, the Board determined that Jackson failed to demonstrate that his requested variance constituted the least relief necessary. (Decision 3); see § 45-24-41(d)(4). Finally, the Board found that Appellant failed to demonstrate that he would suffer more than a mere inconvenience if his application for a variance was denied. (Decision 3); see § 45-24-41(e)(2).

The Appellant again took a timely appeal from the denial of his application. In the instant appeal, Jackson challenges the findings of fact set forth in the Board's Decision on remand. (Appellant's Mem. 6-9). Additionally, Appellant argues that the Board's Decision fails to comply with the statutory purposes of zoning ordinances. Id. at 3. Finally, Appellant argues that the Board discriminated against him in denying his application while granting other applications. Id. at 3-4.

II

Standard of Review

Under § 45-24-69, the Rhode Island Superior Court possesses appellate jurisdiction of appeals from zoning board decisions. The Superior Court, sitting in review of a zoning board decision, can affirm the decision, remand the case for further proceedings, or 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).

When the Superior Court reviews a zoning board decision, it "lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level." Restivo v. Lynch, 707 A.2d 663, 666 (R.I. 1998) (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). Therefore, "when reviewing the action of a zoning board of review, [the court] '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 the City 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 No. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981)).

Furthermore, with respect to zoning board decisions, our Supreme Court has emphasized that "a zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review."

Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 401 (R.I. 2001) (quoting Thorpe v. Zoning Bd. of Review of Town of No. Kingstown, 492 A.2d 1236, 1237 (R.I. 1985)); see also Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (cautioning zoning boards to make certain their decisions on use or dimensional variances address evidence in the record before the board that either meets or fails to satisfy the requirements of § 45-24-41 (d) and (e)). Therefore, the Board has the burden of ensuring its decision is sufficient.

III

Dimensional Variance

Rhode Island statutory law clearly sets out the standard for granting dimensional variances. Sec. 45-24-41(d) and (e)(2); see also Lischio, 818 A.2d at 692 (holding that the standards in § 45-24-41(d) apply both to use and dimensional variances). According to the statute, the applicant must first demonstrate that he or she meets the requirements of § 45-24-41(d). Section 45-24-41(d) requires:

> "(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(d).

Additionally, the applicant must demonstrate that he or she meets the requirement of § 45-24-41(e)(2), which requires a showing that not granting the variance would amount to more than a mere inconvenience. Lischio, 818 A.2d at 694.

IV

Analysis

A

Appellant Waived Issues Not Raised Before the Board

In his appellate brief, Jackson disputes the Board's findings and conclusions by raising factual issues on appeal that he did not present before the Board. (Appellant's Mem. 6-9). He argues for the first time that the six-foot fence would provide protection for the safety of those on his property who might topple over a three-foot fence and injure themselves. Id. at 8. He also suggests on appeal that his property is unique because it previously housed a church rectory giving people the mistaken impression that public access is permitted. Id. at 6. On appeal, Jackson identifies ten other applicants who sought and obtained similar relief suggesting that the Board discriminated against him by denying his application for a variance. Id. at 3-4. He did not reference these other applications at the administrative level.

This Court notes that the raise or waive rule that prohibits the introduction of evidence for the first time on appeal applies to zoning appeals as well as to court proceedings. Ridgewood Homeowners Ass'n v. Mignacca, 813 A.2d 965, 977 (R.I. 2003). In Ridgewood Homeowners Ass'n, our Supreme Court noted that "the zoning board of review was the appropriate venue in which [these] issue[s] should have been presented *** and [the applicant] [could not], for the first time on an appeal before the Superior Court" raise new arguments. Id. Therefore, the raise or waive rule precludes this Court from relying on arguments challenging the Board's findings with new evidence unless, in this Court's view, such evidence is necessary to the proper disposition of the matter. See § 45-24-69(c) (providing that the Superior Court "shall consider the record of the hearing before the zoning board of review and, if it appears to the court that

additional evidence is necessary for the proper disposition of the matter, it may allow any party to the appeal to present that evidence in open court, which evidence, along with the report, constitutes the record upon which the determination of the court is made."). Though mindful of the raise or waive rule with respect to new arguments after remand, this Court will comment briefly on each of these arguments when addressing the Board's specific findings as set forth in its Decision.

B

More Than a Mere Inconvenience Requirement

In his application for a dimensional variance, Jackson claimed that he needed to install a fence that exceeded the permitted heights to provide for personal privacy and security and to limit emissions and noise problems. (Appellant's Appl. Ex. A.) Specifically, Appellant noted that "[a]mbulances and fire trucks and police cars run up and down this street as one of their main paths at all hours of the day and night and it gets noisy and the exhaust fumes get smelly and drift towards the property." Id. He further asserted that "[t]rash trucks with all their noise and pollution do the same." Id. Finally, Appellant explained that "[t]here are always people acting up and coming onto the property at all hours of the day and night doing something good and bad and some people just like to think it is a public place instead of a residence." Id.

At the hearing, the Board questioned Appellant on whether the relief requested—or any fence for that matter—would address his asserted hardships. (Tr. at 11.) Board member Dumais indicated that she lives in Jackson's neighborhood and never smells odors from trash trucks. Id. at 12. She disputed Appellant's claim that emergency vehicles often drive by his home creating noise problems. Id. at 10-11. She asked Jackson: "[d]o you really think a fence is going to stop anything[?]" Id. The Appellant failed to provide any adequate response to that question. See id.

The Board found that "based on the evidence," Appellant failed to prove that he would suffer more than a mere inconvenience if the relief sought was not granted—as is required by § 45-24-41(e)(2). (Decision 3). Specifically, the Board concluded that Jackson failed to provide sufficient evidence that the requested height variance would better address his concerns of privacy, noise, and pollution than would the permitted height restrictions. Id. After reviewing the entire record, the Court finds that Appellant failed to demonstrate to the Board that denial of his application would amount to more than a mere inconvenience.

On appeal, Appellant raises an argument that was not presented before the Board. He contends that the six-foot fence is necessary to prevent people potentially toppling over a permitted three-foot fence and injuring themselves on the sidewalk below. (Appellant's Mem. 8). There is no evidence on the record from which the Board could have determined the merits of such argument. Accordingly, the Court finds Jackson has waived this argument by failing to raise it at the board level. See Ridgewood Homeowners Ass'n, 813 A.2d at 977.

The Court notes that Appellant also argues on appeal that he has suffered a hardship merely because so much time passed since he first filed his application for a variance. (Appellant's Mem. 8). He argues that the delay has deprived him of the enjoyment of his yard which rises to the level of more than a mere inconvenience. Id. However, Appellant fails to provide any legal authority to support such a contention. See Appellant's Mem. The Court finds that this contention is without basis in law. See Wilkinson v. State Crime Lab. Comm'n, 788 A.2d 1129, 1131 n.1 (R.I. 2002) ("Simply stating an issue for appellate review, without meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue"). The Board's finding that Appellant failed to demonstrate that the denial of his application would result in

more than a mere inconvenience is supported by the reliable, probative, and substantial evidence of the record. Id. In H. J. Bernard Realty Co., Inc. v. Zoning Bd. of Review of the Town of Coventry, our Supreme Court addressed the "more than a mere inconvenience" standard and held that an applicant must show "more than that the varying of the proscribed regulation is for him a preferable alternative to compliance therewith, where compliance might be had, albeit with some inconvenience." 96 R.I. 390, 394, 192 A.2d 8, 11 (1963).

C

Hardship Due to the Unique Characteristics of the Subject Land

Section 45-24-41(d)(1) requires that in order for a dimensional variance to be granted, the applicant must show "[t]hat 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***." Here, the Board found Appellant's asserted hardships of noise, fumes, privacy, and security concerns were not unique to Appellant's property. (Decision 3.) The Board relied on an aerial photograph depicting Appellant's property and the surrounding area that was submitted as part of the application to conclude that the asserted issues were common to residential neighborhoods. Id.; see Appellant's Appl. Furthermore, the Board relied on its recital of Appellant's alleged hardships, most of which Appellant failed to adequately support when challenged to do so by Board members. (Tr. at 9-13). In addition to the photographs and testimony in the record, a member of the Board who lived near Appellant stated that the issues of the trash trucks were not unique to the subject property and not as exaggerated as Appellant made them out to be. (Tr. at 10-12.) Specifically, Board member Dumais stated "*** I live on Summer, and my house is close, and [trash trucks] come by, and I do not smell any sort of [trash]." Id. at 12. Additionally, Dumais stated in regards to the fire trucks, "I know for a fact,

normally, the fire trucks, when they leave the station***try to stay on the main roads. Unless there is a problem up there, they will go directly up there***." Id. at 10. Although the Board does not specifically rely on Dumais' statements in articulating its Decision, our Supreme Court has held that factors within the knowledge of the board are probative in considering the denial of relief from a zoning ordinance. Goldstein, 101 R.I. at 733, 227 A.2d at 199. Here, Board member Dumais provided information based on her knowledge of the area. (Tr. at 12.) Such evidence can be probative of whether Appellant's claimed hardships were due to the unique characteristics of the land. See Goldstein, 101 R.I. at 733, 227 A.2d at 199. ("The board may take into consideration probative factors within their knowledge in denying the relief sought and their decision will not be disturbed if disclosed therein are the conditions by which they were motivated.").

In his application, Jackson stated that "[t]here are always people acting up and coming onto the property at all hours of the day and night[,] doing something good and bad[,] and some people just like to think it is a public place[,] instead of a residence." (Appellant's Appl. Ex. A.); Tr. at 6. At the administrative level, he never elaborated on his contention that people think it is a "public place[,] instead of a residence." Id. On appeal, however, Jackson asserts that his property is unique due to its prior use as a church rectory—causing people to think that public access is permissible. (Appellant's Mem. 6.) The mere statement on his application that people think his home is a public place rather than a residence does not provide the Board with a sufficient basis upon which to conclude that his property is unique. Jackson never developed this contention on the record to give the Board ample evidence upon which to consider it. The raise or waive rule thus precludes this Court from considering Appellant's new evidence. See Ridgewood Homeowners Ass'n, 813 A.2d at 977.

The photographs and testimony before the Board constitute more than a scintilla and less than a preponderance of evidence that Appellant's asserted hardships were not due to the unique characteristics of his land. See Lischio. 818 A.2d at 690 n.5. Accordingly, the Board's finding that Appellant's asserted hardships were not due to the unique characteristics of the subject land is supported by the reliable, probative, and substantial evidence of the record.

D

Hardship Results from Prior Action by Appellant

The Court finds that the Board erred in determining that the Appellant created the hardships he seeks to remedy by obtaining a variance. In this case, before seeking a dimensional variance, Jackson began construction on a six-foot fence by installing fence poles on his property. See Tr. at 9. At the hearing on October 9, 2012, Board member Norman Frechette asked Appellant, "[y]ou didn't know you had to get a permit to install that fence?" (Tr. at 9). The Appellant responded by saying, "I didn't think I did. I was really just planning on installing the fence***." Id. The Appellant never argued that he suffered a hardship by erecting those poles. See Appellant's Appl. Ex. A. He relied on other arguments as to why he required the variance. (Appellant's Appl. Ex. A.) Nonetheless, the Board addressed the issue as a factor it considered in denying him the relief he sought. (Decision 2.)

It is clear that Appellant would not qualify for a dimensional variance if the claimed hardship was "the result of any prior action of the applicant***." Sec. 45-24-41(d)(2). The Board found that the hardship that would be visited upon Appellant if his application were denied was of his own making because he erected fence posts before receiving a dimensional variance permitting him to do so. (Decision 2.) According to the Board, "[h]ad the applicant gone through the proper administrative process, including obtaining the necessary permits, the

issue might have been avoided in its entirety." Id. The Board noted that the "alleged hardship was the***result of the applicant's unilateral decision to construct a fence, inconsistent with the zoning code of the City, prior to the relief he now seeks." Id.

It is well settled that a landowner cannot obtain a variance if he or she has created his or her own hardship. Sec. 45-24-41(d)(2). In Sciacca, an applicant who subdivided her lot to create an undersized parcel was found to have created her own hardship, thus precluding variance relief to allow her to build on the resulting undersized lot. 769 A.2d at 583-84. The landowner in Sciacca based her application for dimensional relief on a hardship she created. Id. at 584.

The Court compares the Sciacca case to an earlier decision in DeStefano, 122 R.I. at 247, 405 A.2d at 1171. In DeStefano, the Court found that the applicant should not have been denied a dimensional variance when he purchased an undersized lot knowing that the property was unbuildable when he purchased it. Id. Unlike the applicant in Sciacca, the appellant in DeStefano did not subdivide it himself creating the hardship. See DeStefano, 122 R.I. at 247, 405 A.2d at 1171; see also Denton v. Zoning Bd. of Review of City of Warwick, 86 R.I. 219, 223, 133 A.2d 718, 720 (1957) ("The question of whether an applicant is entitled to a variance because of hardship flowing from a literal application of the terms of the ordinance is in no way dependent upon his knowledge or lack of knowledge of the existence of zoning restrictions affecting the land.").

Unlike the applicant in Sciacca, Appellant here does not claim hardship based upon his actions, to wit, installing fence posts. See Appellant's Appl. The record is devoid of any claim that he would incur a hardship if he had to remove the fence posts he installed. Instead, Appellant identifies his hardships as those resulting from excessive noise created by emergency vehicles, odors emanating from trash trucks, and invasions of privacy caused by trespassers

entering upon his property. (Appellant's Appl. Ex. A.); Tr. at 6-8. In fact, after the clerk read the Appellant's application into the record detailing the aforementioned concerns, Chairman Alan Leclaire initiated the following dialogue:

> "Chairman Leclaire: Everything she read in, is there anything you want to add to that?
>
> "George Jackson: No, basically, it's just going to be, you know, (inaudible) by the property (inaudible) wire fence (inaudible).
>
> "Chairman Leclaire: Okay. Anything else?
>
> "George Jackson: No, that's it." Id. at 8.

Accordingly, the Board's determination that Jackson created the hardship he seeks to remedy is not supported by the evidence and clearly is erroneous and in excess of its statutory authority. See § 45-24-69(d). However, this finding does not substantially prejudice Appellant because the plain language of §§ 45-24-41(d) and (e)(2) and our case law requires that an applicant must fully satisfy the requirements of both sections in order for dimensional relief to be granted. See Lischio, 818 A.2d at 692. The Court finds that regardless of the erroneous finding that Appellant created his own hardship, his application would fail on other grounds as set forth herein.

The Court notes that in presenting his appeal before this Court, Appellant identifies an added hardship, also unrelated to the installation of the fence posts. (Appellant's Mem. 8). He claims that the Decision fails to comply with the Court's remand instructions, and as such, he has been deprived of full and beneficial use of his property. Id. Specifically, Appellant argues that contrary to the Court's remand instructions, the Board still has not provided specific evidence to support its decision denying his application. Id. The Court disagrees. The Court finds that the Decision on remand includes sufficient findings of fact to provide the Court with guidance as to

why the Board denied Appellant's request for dimensional relief. See Lischio, 818 A.2d at 691-92.

E

Granting Relief Would Alter the General Character of the Surrounding Area

The applicable statute cautions that the Board should not grant an application for a dimensional variance unless "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." Sec. 45-24-41(d)(3). In this case, the Board found that the proposal would alter the general character of the surrounding area because "[t]he lot borders a sidewalk area whose [sic] curbing is approximately two feet higher than the sidewalk grade." (Decision 2.) As such, the proposed fence would sit on top of a two-foot wall which would result in elevating the fence to a height of eight feet above street level. (Decision 3.)

In making this finding, the Board reviewed an aerial photograph of the property submitted by Appellant along with his application. Id. at 2. Additionally, the Board received a letter from an objecting neighbor who complained that the proposed fence would alter the characteristic of the neighborhood and noted the impact of the two-foot wall on the overall height of the proposed fence. Id. at 3; Zoning Bd. R. Ex. A: Letter from Abutter. At the hearing, Board member Masse stated, "*** [Y]ou've got a two foot wall, and your poles are on the top of the two foot wall. Those two foot walls are holding your embankment up, so therefore, you've got seven [sic] feet of fence." (Tr. at 15.); see Appellant's Appl. The Board found that approving Jackson's proposal would result in "transforming a fence into a fortress-like structure" that would in part make it more difficult for drivers in the area. (Decision 3.) In so finding, the

Board concluded that such a fence would change the character of the surrounding area, and therefore, Appellant did not meet the standard set forth in § 45-24-41(d)(3). Id.

In Lischio, our Supreme Court found that the proposed variance in that case would not alter the general character of the neighborhood. 818 A.2d at 693. In so ruling, the Court suggested that such determination is fact based and acknowledged that a request for a variance could "result in a structure so massive or out of place [that it would] alter the general character of the surrounding area." Id. In this case, the Board concluded from the evidence before it that the proposed variance would create a "fortress-like structure" that would alter the character of the neighborhood. (Decision 3.)

In Levreault v. Town of Lincoln Bd. of Review, a zoning board denied an application for a dimensional variance based solely on a finding that the height of a proposed tower was incompatible with surrounding property. 98 R.I. 466, 468, 204 A.2d 637, 638 (1964). The Court reversed the decision because the zoning board had failed to identify any evidence on the record to support that conclusion. Id. The instant case is distinguishable from Levreault because the Board supported its finding that the proposed structure would alter the general character of the neighborhood based upon on evidence drawn from the record. See id.; see Decision 3.

Jackson challenges the Board's statement that his planned fence would create "a fortress-like structure." (Appellant's Mem. 8). The Court can give that argument no weight because to do so would violate the Court's limited standard of review when determining appeals from a zoning board decision. On review, the Court "lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level." Restivo, 707 A.2d at 666.

The Court concludes that the Board's finding that Appellant's proposed fence would alter the character of the surrounding area is supported by the reliable, probative, and substantial evidence of the record.

F

The Least Relief Necessary

The Board determined that the relief sought by Appellant was not the least relief necessary, and therefore § 45-24-41(d)(4) had not been met. (Decision 3.) The stated purpose of Jackson's application was to respond to privacy, security, emissions, and noise concerns. Id. at 2. The Board noted in its Decision there was an absence of evidence to demonstrate why a six-foot fence as opposed to a permitted three-foot fence would meet these goals. Id. at 3. Furthermore, the Board opined that exhaust fumes and noise likely would penetrate the proposed fence no matter the size; therefore, the Board concluded that Appellant was not seeking the least relief necessary. Id.

Our Supreme Court has held that "applications for relief***are addressed to the sound discretion of boards of review whose authority to act favorably is limited to the extent of relief demonstrated to be reasonably necessary to the enjoyment of the permitted use sought to be served." Lincoln Plastic Prods. Co. v. Zoning Bd. of Review of the Town of Lincoln, 104 R.I. 111, 115, 242 A.2d 301, 303 (1968). In Lincoln Plastic Prods. Co., the Court reversed a zoning board decision which granted relief from lot line restrictions without a showing by the applicant that there was a need for such relief. Id. at 303-304. Likewise, here, Appellant has failed to present sufficient evidence to demonstrate why the relief sought is necessary. (Decision 3.) On the contrary, the evidence supported a finding that the six-foot fence proposed by Appellant would not better assist him in achieving his stated goals any more than would the permitted

three-foot fence. (Tr. at 15.) For example, Board member Masse stated: "[a]nd the fence, you are looking for privacy; it's not a stockade fence. It's an open fence." Id. The record is devoid of any reliable evidence to explain how the proposed fence would accomplish the desired noise and fume abatement. The Court points again to Board member Dumais asking Jackson: "[d]o you really think a fence is going to stop anything[?]" Id. at 11. The Appellant failed to provide an adequate response to that inquiry. See id. Accordingly, the Board's finding that Appellant did not seek the least relief necessary is supported by substantial evidence in the record and is not clearly erroneous.

G

Board's Compliance with the Statutory Purposes of Zoning Ordinances

The Appellant argues in his brief, without citing case law or any specific facts, that the Board failed to comply with the "primary" purpose of zoning ordinances as set out in § 45-24-30—promoting the public health, safety, and general welfare. (Appellant's Mem. 3.) Appellant fails to provide a factual or legal basis for this contention. See Appellant's Mem. Our Supreme Court has held that "[s]imply stating an issue for appellate review, without meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue." Wilkinson, 788 A.2d at 1131 n.1.

Additionally, statutory requirements that zoning ordinances be designed to fulfill certain public purposes are "directory only." Camara v. City of Warwick, 116 R.I. 395, 404, 358 A.2d 23, 29 (1976). In Camara, our Supreme Court held that, with the exception of the requirement that a zoning ordinance be made in accordance with a comprehensive plan, the remaining provisions with regard to purposes of zoning are directory only, and broad discretion is given to

the local legislatures on how to accomplish those goals. Id. The court further held that absent extraordinary circumstances, the trial justice should not consider whether the purposes of the enabling act are being violated. See id.

Accordingly, the Court rejects Appellant's contention that the Decision should be reversed for failing to comply with the primary purpose of the zoning ordinances.

H

Discriminatory Treatment of Appellant by the Board

The Appellant also argues that the Board discriminated against him by denying his application while granting ten other applications for similar dimensional relief. (Appellant's Mem. 3-4.) Appellant points to the granting of the following applications: #5652, which requested a dimensional variance to erect a fence four feet high in the front yard, thus seeking one foot of relief from the ordinance; #5655, which requested a dimensional variance to erect a fence four feet and six feet high on the side and front yards of the subject property thereby requiring three feet of relief in the front yard; #5660 which allowed three feet of relief from the ordinance for the applicant to retain a six-foot fence in his front yard; #5663, which granted the applicant three feet of relief to erect a six-foot high fence in her front yard; #5665, which granted three feet of relief to the applicant to retain a six-foot fence in his front yard; #5668 where the Board granted the applicant two feet of relief to retain a six-foot fence along the side yard; #5675, wherein the Board allowed three feet of relief to the applicant by granting a dimensional variance to construct a six-foot fence in his front yard; #5679, which applicant requested and was granted three feet of relief to construct a six-foot fence in the front yard; #5690, in which the Board granted a dimensional variance allowing two feet of relief to erect a six-foot fence along the sides of the applicant's property; and #5692, seeking one foot of relief to enclose a corner lot

yard with a four-foot fence. The Appellant avers that the Board's granting of similar applications evidences the Board's discriminatory treatment of his application. (Appellant's Mem. 3-4.)

Even assuming arguendo that this Court was permitted to consider prior grants of relief, Appellant did not bring the prior decisions he now cites to the attention of the Board during the hearing. Consequently, they are not a part of the record. As noted earlier, the raise or waive rule applies to zoning board decisions as well. Ridgewood Homeowners Ass'n, 813 A.2d at 977. Therefore, under the raise or waive rule, this Court declines to consider Appellant's arguments based on the differing decisions mentioned above. See id.

Our Supreme Court has not determined the precise issue of whether prior decisions either granting or denying *dimensional* variances may be considered by the Superior Court on review. However, this Court finds guidance in a Rhode Island Supreme Court opinion on this issue relating to a *use* variance. In Sewall v. Zoning Bd. of Review of Barrington, 93 R.I. 109, 172 A.2d 81 (1961), the Court rejected the applicant's claim that she had been discriminated against and refused to consider the wisdom of previous exceptions or variances which had been granted. Id. 93 R.I. at 114, 172 A.2d at 84. The Court limited its consideration of her application to whether she had met the statutory standard for obtaining the relief sought. See id. It follows that in determining an appeal from the denial of a dimensional variance, this Court should focus on whether the Appellant has met the burden of proof under the applicable law and not on past grants or denials of other applications. Each application carries with it a unique piece of property with unique circumstances and thus prior similar grants cannot be used as a basis for granting new dimensional relief. See 3 E.C. Yokley, Zoning Law and Practice § 20-15 (4th ed. 2002) ("[s]ince each case must be decided on its own facts, it follows that merely because the

board takes certain action in one situation, it is not bound in another***Generally, therefore, it is not a relevant factor that a variance has been granted to neighbors or similarly situated properties."). Accordingly, this Court finds Appellant's contention here without merit.

V

Conclusion

After reviewing the entire record and Decision on remand, this Court affirms the Board's denial of Appellant's application for a dimensional variance. The Board's finding that Appellant failed to satisfy all of the requirements of §§ 45-24-41(d) and (e)(2), thus precluding him from dimensional relief, is not clearly erroneous in view of the reliable, probative, and substantial evidence of the record. See Decision. Substantial rights of Appellant have not been prejudiced. Accordingly, this Court affirms the November 13, 2014 decision of the Board.

Counsel shall present the appropriate judgment 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-14-6102
COURT:	Providence County Superior Court
DATE DECISION FILED:	November 15, 2016
JUSTICE/MAGISTRATE:	Vogel, J.
ATTORNEYS:	
For Plaintiff:	George G. Jackson, *Pro Se*
For Defendant:	Michael J. Marcello, Esq.