STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: November 10, 2016)

JAMES J. CARRIA and DENISE M. CARRIA, *Plaintiffs/Appellants,*	:	
v.	:	**C.A. No. NC 2015-0145**
CECILIA M. SCHILLING and REBECCA McSWEENEY, HEIDI BLANK, ROBERT BUZARD, DONALD BOUCHER, and MICHAEL J. MARTIN II, in their capacities as Members of the Zoning Board of Review of the City of Newport *Defendants/Appellees.*	:	

DECISION

STONE, J. Before this Court is an appeal from a decision of the Zoning Board of Review of the City of Newport (the Board) which granted Cecilia M. Schilling (Schilling or Appellee) a dimensional variance and a special-use permit for the construction of an addition to her home. Abutters James J. Carria and Denise M. Carria (collectively, the Carrias or Appellants) seek reversal of the Board's decision. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasoning set forth herein, this Court remands this matter to the Board for further proceedings consistent with this opinion.

I

Facts and Travel

Schilling owns the property at 4 Ellery Road, Newport, Rhode Island, which is identified as Lot 118 on Tax Assessor's Plat 20 (the Property). Currently, there is a two-story, single-family home on the Property. It contains three bedrooms and one and one-half bathrooms. The

Property is nonconforming by dimension—as provided for in § 17.08.010 of the City of Newport's Code of Ordinances (the Zoning Ordinance) and § 45-24-31—in four regards: (1) the lot size is only 4160 square feet where 10,000 square feet is required; (2) frontage is 45', where 80' is required; (3) the east side yard setback is 6', where 10' is required; and (4) the existing lot coverage is 36% where 20% is the maximum allowed. Pursuant to the Zoning Ordinance, Schilling's lot is zoned as R-10, residential.

On February 25, 2015, seeking to renovate the property, Schilling filed an application with the Board for a special-use permit and a dimensional variance.[1] Schilling sought to increase the current size of her home by building a two-story addition. Specifically, the addition would provide space for the inclusion of another bathroom and a bedroom on the second floor. Schilling's stated motivation was to allow for her fiancé and his son to move into the home with her and her two children once they were married. While she was able to live in the home with her two children rather comfortably, she maintained that the anticipated increase in the size of the family—by sixty-seven percent, to a family of five—rendered the available living space inadequate. Once the addition was complete, she explained, the home would contain four bedrooms, and two and one-half bathrooms.

On March 23, 2015, the Board held a hearing on Schilling's application. Present for the Board were Chairperson Rebecca McSweeney, Heidi Blank, Robert Buzard, Donald Boucher

[1] Schilling used a generic application titled "Combined Application for a Special Use Permit & a Regulatory (Dimensional) Variance." Schilling's application did not specify which form of relief she sought, though presumably Schilling sought both a Special Use Permit and a Regulatory (Dimensional) Variance. Furthermore, the application does not specify which portion of the Zoning Ordinance provides her with the right to seek such relief; however, based on the application's title and the language contained therein, the application was made pursuant to §§ 17.108.010, 17.72.030(C), and 17.108.020 of the Zoning Ordinance.

and Michael J. Martin II.[2] During the hearing, the Board heard testimony from Ms. Schilling, James Corcoran—Schilling's fiancé—Mr. Carria—the abutter contesting Schilling's application—and Attorney Mark B. Bardorf—counsel for the Carrias. The Board also considered the submitted application, plans, and exhibits presented by both Schilling and the Carrias.

At the hearing, Schilling testified[3] that she wanted to bring the house up to modern living standards and to provide adequate living space in the home for herself, her two children, her fiancé, and his son—the latter two of whom would be moving in once Schilling and Corcoran were married. (Tr. 22:13-23:23, Mar. 23, 2015) In support, Schilling noted that, as presently constituted, she shared one full bathroom with her two sons, and, if she was not granted relief, all five members of the family would have to share that same bathroom. Id. at 5:9-16. She believed that allotment did not afford a practical living arrangement for her family.

Additionally, Schilling noted that her two sons each had their own bedroom and, without more space, one of them would have to share a room with Corcoran's young son. Id. at 5:17-19. Complicating matters, she continued, was the fact that the two bedrooms used by the boys were already "very small" and therefore ill-suited to accommodate another individual. Id. at 5:19-23. Another issue with the bedrooms, she noted, was that they offered minimal storage space. Id. at

[2] These individuals are Defendants in the current action in their capacities as Members of the Zoning Board of Review of the City of Newport, and they have adopted Schilling's arguments for the purposes of this appeal.

[3] Corcoran testified in support of Schilling in the application process. Corcoran testified: "I am representing her as an attorney would." (Tr. 4:17–18, Mar. 23, 2015) While the Board correctly noted that Corcoran could not "represent" Schilling in a legal capacity, it did allow him to offer testimony from Schilling's point of view, as her contractor and the one most familiar with the plans. As their interests were identical, the Court will consider the whole of Corcoran and Schilling's testimony as "Schilling's" testimony.

5:23-24. Accordingly, the two by five foot closet available in the "so-called master bedroom," in her opinion, would be insufficient for Schilling and Corcoran's storage needs. Id. at 5:24-6:4.

Mr. Carria—Mr. and Mrs. Carria own the property located at 2 Ellery Road, Newport, Rhode Island, which directly abuts Schilling's property to the west—testified in opposition to Schilling's application. At the hearing, Mr. Carria testified that he had viewed Schilling's plans and feared the addition would affect the cross-breeze and sunlight his home received. Id. at 30:22-24. Mr. Carria opined that Schilling's home would become a "hulking massive structure" and would "affect our ability to enjoy our house." Id. at 30:24-31:2. Additionally, he testified that his view of the street would be limited[4] from certain angles if the plans were approved. Id. at 32:14-17.

Finally, Attorney Bardorf provided closing remarks on behalf of his clients, the Carrias. Attorney Bardorf identified what he perceived to be inaccuracies in the site plans, as well as the absence of evidence that supports granting Schilling's application. Id. at 35:1-36:5.

At the conclusion of the hearing, the Board voted unanimously to approve Schilling's application by a vote of five to zero. Id. at 44:14-15. The Board issued a written decision (the Decision) that was recorded in the Land Evidence Records on May 19, 2015 at Book 2515, Page 75. The Decision states that after reviewing the application and plans, and hearing the testimony of Ms. Schilling and Mr. Carria, the Board adopted the following findings of fact:

> "1. The property is located in a residential (R-10) zoning district.
> "2. The lot is a non-conforming lot of record containing 4,160 sq. ft. of land.
> "3. The property contains a single-family dwelling. The existing structure is non-conforming to the front and side yard setback requirements as well as lot coverage.

[4] The Board pressed this issue as Mr. Carria based the statement on his assumption that Schilling's porch would extend out to the sidewalk; however, Schilling testified that the porch, as planned, would stop eleven feet short of the sidewalk. Id. at 34:6-18.

> "4. Petitioner seeks permission to add a 1st floor entry hall, a 2nd floor children's bedroom, a master bathroom, and a farmer's porch to the front of the existing dimensionally non-conforming structure. Ms. Schilling testified the additions were the minimum required to accommodate a growing family.
> "5. Mr. Carria opposed the petition on the basis that the proposal would limit the views from his property. However the Board found through photographs presented by the petitioner, that the view from the neighboring property would not be significantly altered by the addition." (R. at 1.)

Additionally, the Board stated:

> "[T]he request is in harmony with the surrounding area; the proposal will not have an adverse impact on abutting properties; the variances sought were the minimum variances that will make possible the reasonable use of the land, building or structure; and the proposal was in conformance with the city's Comprehensive Master Plan." Id.

On June 4, 2015, the Carrias timely filed the present appeal.

II

Standard of Review

This Court's review of a zoning board decision is governed by § 45-24-69(d), which states:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
> "(1) In violation of constitutional, statutory, or ordinance provisions;
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or

> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 45-24-69(d).

When evaluating a zoning board of review's factual findings, the court must "'examine the entire record to determine whether substantial evidence exists to support the board's findings.'" Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)) (internal quotation marks omitted). The term "[s]ubstantial 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) (citation omitted). The court gives deference to a zoning board because "a zoning board of review is presumed to have knowledge 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).

This Court's deference, however, is "contingent upon sufficient findings of fact by the zoning board." Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005). The legislature has mandated that zoning boards include in their decisions "all findings of fact." Sec. 45-24-61(a). "'Those 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. These are minimal requirements. Unless they are satisfied, a judicial review of a board's work is impossible.'" Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986) (quoting May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970)) (emphasis added). When the board fails to sufficiently state its finding of facts, this Court "will

not search the record for supporting evidence or decide for itself what is proper in the circumstances." Id. (citing Hooper v. Goldstein, 104 R.I. 32, 44, 241 A.2d 809, 815 (1968)).

III

Analysis

The Carrias advance two arguments in opposition to the Board's Decision. The first argument is that insufficient evidence was submitted to the Board to justify granting a special-use permit and a dimensional variance under either the Zoning Enabling Act or the Zoning Ordinance. The Carrias argue that as a condition precedent to granting Schilling's application, Schilling was required to produce evidence that satisfied the specific elements delineated in the Zoning Enabling Act and the Zoning Ordinance for variances and special-use permits, respectively.

The Carrias' second argument is that the Board's Decision is conclusional, ultimately failing to make express findings of fact. The Carrias posit that such a failure on the part of the Board is fatal and request the Court to reverse the Board's Decision.

As the Court believes the adequacy of a zoning board's decision is a threshold matter, it must first examine the Board's Decision.

A

Adequacy of the Board's Written Decision

The Carrias argue that the Board's Decision is conclusional and fails to make express findings of fact. Section 45-24-41(d) of the Rhode Island Zoning Enabling Act sets the legal standard that the Board must apply when deciding whether to grant a dimensional variance:

> "In granting a variance, the zoning board of review . . . shall require 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(a)(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).

In addition, § 45-24-41(e) of the Rhode Island Zoning Enabling Act states that when considering requests for dimensional variances:

> "[t]he zoning board of review . . . shall, in addition to the above standards, require that evidence is entered into the record of the proceedings showing that . . . (2) [i]n granting a dimensional variance, 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." Sec. 45-24-41(e).

With respect to special-use permits, the Zoning Enabling Act requires municipalities to provide for the issuance of special-use permits and to specify uses that will require special-use permits, the conditions and procedures under which special-use permits will be issued, and the criteria by which an applicant's request will be reviewed. See § 45-24-42. Special-use permits under the Zoning Ordinance are not, however, limited to proposed uses and are required when residents seek to expand dimensionally nonconforming structures. On its face, this arrangement may give rise to confusion; nevertheless, the Zoning Ordinance specifically provides that the alteration of a dimensionally nonconforming structure requires a special-use permit as set forth in § 17.72.030(C). That section provides:

> "Dimensionally Nonconforming—Excepting Proposed Decks (as defined in the Rhode Island State Building Code and regulations

> adopted thereby). Alteration to dimensionally nonconforming structures that otherwise conform to the use regulations of the zoning district shall be allowed as a matter of right if the alteration in and of itself: (1) conforms to the current dimensional requirements of the zoning district in which the property is located; and (2) does not increase or intensify the element(s) of the dimensional nonconformity.
>
> "A structure or land which is nonconforming by dimension, but the use of which is a use permitted by right in the district in which the land or structure is located, shall only be altered, changed, enlarged or subject to addition or intensification with respect to its nonconforming element(s) by obtaining a special use permit from the zoning board of review." Sec. 17.72.030(C).

Section 17.108.020(G) sets forth the legal standard that the Board must apply when deciding whether to issue a special-use permit:

> "Special use permits shall be granted only where the zoning board of review finds that the proposed use or the proposed extension or alteration of an existing use is in accord with the public convenience and welfare, after taking into account, where appropriate:
> "1. The nature of the proposed site, including its size and shape and the proposed size, shape and arrangement of the structure;
> "2. The resulting traffic patterns and adequacy of proposed off-street parking and loading;
> "3. The nature of the surrounding area and the extent to which the proposed use or feature will be in harmony with the surrounding area;
> "4. The proximity of dwellings, churches, schools, public buildings and other places of public gathering;
> "5. The fire hazard resulting from the nature of the proposed buildings and uses and the proximity of existing buildings and uses;
> "6. All standards contained in this zoning code;
> "7. The comprehensive plan for the city." Sec. 17.108.020(G).

Thus, to meet the standards set forth in both the Zoning Enabling Act and the Zoning Ordinance, the Board must make specific findings of fact that demonstrate an applicant qualifies for the relief sought. See § 45-24-61 (stating "[t]he zoning board of review shall include in its decision

all findings of fact . . ."). Absent such express findings of fact, this Court cannot make a determination as to whether the Appellants have been prejudiced. See § 45-24-69(d).

The Rhode Island legislature has instructed the Court to refrain from "substitut[ing] its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact." Id. Instead, the Court's role is to "decide [ ] whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles." Irish P'ship, 518 A.2d at 358 (citation omitted).

When reviewing a zoning board's decision, the Court relies on the board's written decision and "'the entire record to determine whether substantial evidence exists to support the board's findings.'" Mill Realty Assocs., 841 A.2d at 672 (quoting DeStefano, 122 R.I. at 245, 405 A.2d at 1170) (internal quotation marks omitted). As such, it is essential that a board's findings be factual and amount to more than a mere "recital of a litany." Irish P'ship, 518 A.2d at 359. In an effort to facilitate the Superior Court's review of zoning board decisions, our Supreme Court has instructed zoning boards to ensure that written decisions "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 . . . ." Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001). Such specificity is "necessary so that zoning board decisions 'may be susceptible of judicial review.'" Kaveny, 875 A.2d at 8 (quoting von Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001)).

In this case, the Board's Decision does not reveal anything about how the Board determined that Schilling qualified for a dimensional variance and a special-use permit.[5] In its

[5] The Board's Decision does not specify which form of relief the Board approved. Such a failure may alone be grounds for remand, as "a zoning board cannot grant relief by implication; it must state expressly any relief that is being granted[.]" von Bernuth, 770 A.2d at 402.

written Decision, the Board made five findings of fact based on evidence submitted to it during the May 23, 2015, hearing. The Board also summarized several of the requirements listed in § 45-24-41(d) and § 17.108.020(G) and deemed them satisfied. The Board did not, however, explain how the facts it found relate to the legal standard set forth in § 45-24-41(d) and § 17.108.020(G). Mere boilerplate recitation of statutory language will not suffice, and this Court will not search the record for evidence that supports the Board's Decision. See Irish P'ship, 518 A.2d at 358-59.

Even if the Board had provided the facts that might otherwise support granting Schilling's application, the Board was required to discuss its analysis with greater specificity. See Sciacca, 769 A.2d at 585 (explaining that such specificity aids the Superior Court's review of zoning board decisions). This Court's role is to confirm that, among other things, the Board applied the proper legal standard. Irish P'ship, 518 A.2d at 358. Here, the Board not only failed to explain how Schilling satisfied the legal standards set forth in § 45-24-41(d) and § 17.108.020(G), it failed to even acknowledge the legal standards in its Decision. See von Bernuth, 770 A.2d at 402 (finding a Superior Court erred when it affirmed a zoning board decision in which "there [was] no evidence that the zoning board considered or applied the statutory requirement, given that the statute [was] not acknowledged in the zoning board's decision"). The purpose of a written decision is "to give the parties, the public and a reviewing court a clear understanding of the factual as well as the legal basis for the ultimate judgment." May-Day Realty Corp., 107 R.I. at 239, 267 A.2d at 402. Absent an adequate written decision, judicial review is impossible.

Accordingly, this Court finds that the Board failed to make sufficient findings of fact necessary to address the standards set forth in § 45-24-41(d) and § 17.108.020(G). Our

Supreme Court requires "specific findings of fact in zoning board decisions to avoid precisely this situation—where inadequate findings render [the] task of judicial review impossible." Kaveny, 875 A.2d at 8. As such, this Court remands the case to the Board for further proceedings consistent with this Decision. On remand, the Board is directed to adequately set forth each of its findings of fact, based on the record before it, and to relate those findings to the standards set forth in § 45-24-41(d) and § 17.108.020(G).

IV

Conclusion

Upon review of the record before it, this Court finds that the Board's written Decision was inadequate, as its findings of fact failed to articulate how the standards set forth in § 45-24-41(d) and § 17.108.020(G) were met. Furthermore, the Decision failed to address which form of relief the Schillings were to receive—dimensional, special-use, or both. As such, this matter is remanded to the Board so that it may clearly identify the relief it is granting; make sufficient findings of fact, based upon the record before it; and use such findings to identify how each element set forth in § 45-24-41(d) and § 17.108.020(G) has been satisfied. This Court will retain jurisdiction. Counsel shall submit an order for entry that is in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**James J. Carria, et al. v. Cecilia M. Schilling, et al.**
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COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**November 10, 2016**
JUSTICE/MAGISTRATE:	**Stone, J.**
ATTORNEYS:	
For Plaintiff:	**Mark B. Bardorf, Esq.** **Michael J. Richards, Esq.**
For Defendant:	**Christopher J. Behan, Esq.** **Turner C. Scott, Esq.**