STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: December 10, 2013)

ALEXANDRA BONOME	:	
	:	**C.A. No. NC-2007-0230**
VS.	:	***(Consolidated with)***
	:	**C.A. No. NC-2007-0488**
	:	
JAMES NOTT, et al.	:	

DECISION

CLIFTON, J. Before this Court is a consolidated appeal from the Portsmouth Zoning Board of Review (Zoning Board), which granted Carol Zinno (Ms. Zinno) dimensional variances, as well as the appeal from the Portsmouth Planning Board of Appeals (Appeals Board), which affirmed the Planning Board's granting Ms. Zinno permission to subdivide her lot. Appellant Alexandra Bonome (Ms. Bonome) seeks reversal of both decisions. Jurisdiction is pursuant to G.L. 1956 §§ 45-24-69 and 45-23-71.

Facts and Travel

The lot in question is located at 178, 182 Glen Road, Portsmouth, Rhode Island (the Property). The Property is located in a Residential District (R-30 Zone). In an R-30 zone, the Portsmouth Zoning Ordinance (the Ordinance) requires a minimum area of 30,000 square feet, minimum frontage of 125 feet, and minimum side yard setbacks of twenty feet. See Portsmouth Zoning Ordinance Article IV-3(b). The Property is approximately 21,706 square feet with frontage of 122 feet and a west side setback of approximately nine feet. See Defendant's Application to Zoning Board.

Currently, there are two full-sized, single family homes situated side by side on the Property. One of the homes is occupied by Ms. Zinno, and the other is vacant. (Tr. 13, 22, June

28, 2007.) Ms. Zinno's mother previously resided in the now vacant home, but she passed away and left the house to Ms. Zinno. Id. Each home has its own separate driveway, septic system, connection to the town's public water supply, and electric meter. Id. at 14-15. The homes were constructed over one hundred years before the adoption of the Ordinance; thus, the Property is legally nonconforming. Id. at 13.

Ms. Zinno wishes to subdivide the Property into two separate lots. She wishes to sell the vacant home; she is now seventy-five years old and does not want to maintain two homes, nor does she wish to be a landlord. Id. at 15, 16, 22. In May 2007, Ms. Zinno petitioned the Planning Board for permission to subdivide her lot, and she petitioned the Zoning Board for the dimensional relief from lot size, frontage, and setback requirements that both of the two proposed lots would require.[1]

On June 20, 2007, the Planning Board conducted a hearing at which it heard testimony from Ms. Zinno and objectors. The minutes of that hearing reveal that Ms. Bonome and her husband appeared and testified in opposition to Ms. Zinno's petition. (Appellant's Ex. E.) Ms. Bonome alleged that the subdivision, if allowed, would create lots that would be out of character with the surrounding area and would establish a precedent that could lead other similar properties to seek subdivision. Id. at 3. The result, they argued, would be a change in character of the neighborhood from one characterized by large lots and open space to smaller lots more appropriate to an R-10 or R-15 zone. See id. Mr. Bonome also raised questions about the impact that the subdivision would have on the capacity of the lots to adequately provide backup areas for septic systems on the Property. Ms. Bonome expressed concern about the impact of the

[1] The requested dimensional relief would create one lot approximately 10,647 square feet, with a 6.7 foot side yard setback and a second lot that is approximately 11,059 square feet with a side yard setback of 6.9 feet.

subdivision on an access easement that the Bonomes possess over the Property. Id. Barry O'Neil, a neighbor, testified that he shared Ms. Bonome's concerns that the proposed subdivision would set an unwanted precedent. Mr. O'Neil stated that he was concerned about the character of the neighborhood and "this type of subdivision bec[oming] a trend." Id. The Planning Board granted Ms. Zinno conditional approval to subdivide, subject to Ms. Zinno's obtaining all required variances from the Zoning Board.

Ms. Bonome appealed the Planning Board's decision to the Appeals Board. In August 2007, the Appeals Board considered the record and argument of counsel, and voted unanimously to deny the appeal. Ms. Bonome then filed a timely appeal to this Court.

On June 28, 2007, the Zoning Board heard Ms. Zinno's petition for dimensional relief. (Tr., June 28, 2007.) At the hearing, Ms. Zinno testified that she inherited both houses and that her main reason for requesting permission to subdivide the land (and hence the need for the variances before the Zoning Board) was that she did not wish to be a landlord. Id. at 16. She explained the dimensional relief she was requesting and opined that there would be absolutely no change to the surrounding area. See id. at 12-26. Ms. Zinno explained that the basis of that opinion was that the proposed subdivision and necessary variances would not cause any visible changes to the Property. Id. at 21. Ms. Zinno further testified that she sought to subdivide and requested the necessary dimensional relief because she desired to sell the property and did not wish to be a landlord. Id. at 16, 23. She stated that she believed that it was "not nearly as easy" to sell the property as one lot with two structures as it would be to sell it as two lots with one structure upon each. Id. at 16-17, 22. Furthermore, in responding to a series of questions from her attorney, Ms. Zinno made it clear that the primary goal of the subdivision was not increased profits and testified that a denial of her request would be "more than a mere inconvenience":

> "Q: This request is not being made primarily to realize financial gain?
> "A: No, not at all.
> "Q: It's (178) a full sized house?
> "A: They're (both) full sized.
> "Q: They both require all the maintenance that a full sized house – a normal full sized house does, and what you have is this property that has (inaudible) (requires) maintenance on 20 thousand square feet right now?
> "A: Absolutely.
> "Q: It's a hardship for you as a property owner?
> "A: Absolutely." Id. at 32-33.

Ms. Bonome could not attend the June 28, 2007 hearing and, instead, submitted a statement outlining her concerns about Ms. Zinno's proposed project. The Zoning Board accepted this statement and read it into the record. Id. at 34-38. The statement expressed Ms. Bonome's concern that allowing the subdivision and granting the dimensional relief would create lots that did not comport with the character of the surrounding area and set a bad precedent because many of the lots in the area have one or more large structures upon them. Ms. Bonome's letter expressed her concern that if the subdivision was allowed, one of the lots may need to upgrade its septic system. Ms. Bonome was worried that there may not be sufficient room and the upgraded system might encroach onto her easement. Id. at 26-30. While no expert testimony was offered regarding the septic system issue, the Zoning Board's "resident engineer," Mr. Aguar, did briefly add his opinion on the matter. Id. His conclusion was that if an upgraded system was needed, "there's probably still sufficient room" to install it without encroaching on Ms. Bonome's land or easement. Id. at 29.

Ms. Bonome, through counsel, did attempt to present a real estate expert to testify on "matters relevant to the issue of dimensional variances," but the Zoning Board, noting that a motion to close the hearing had already been made and seconded at the time the expert was

introduced, did not permit the testimony.[2] The Zoning Board unanimously approved Ms. Zinno's request and issued a written decision. Ms. Bonome timely appealed the decision to this Court. The appeals were consolidated by motion.

In September 2009, this Court remanded both opinions to their respective Boards for further findings of fact. Specifically, this Court instructed the Zoning Board to "fully apply § 45-24-41(c)," and to address "the legal standard for § 45-24-41(c)(1) and (2) with particular care." This Court then instructed the Appeals Board to "make clear which pieces of evidence fulfill each of the statutory standards of § 45-23-60." Thereafter, the Appeals Board sought permission from this Court to remand the case to the Planning Board because the Appeals Board was unable to conduct a meaningful review of the Planning Board's one sentence decision. The Court issued an Order authorizing the remand on February 19, 2010.

On July 20, 2010, the Planning Board issued its Further Findings of Fact. On September 16, 2010, the Zoning Board issued its Further Findings of Fact. That same day, the Zoning Board, sitting as the Appeals Board, upheld the Planning Board's Further Findings. Ms. Bonome once again timely appealed to this Court.

In January 2011, the cases were transmitted back to this Court. Ms. Bonome argues that the Zoning Board's Further Findings of Fact fail to cite competent evidence in the record to satisfy the statutory requirements for granting dimensional variances and that no such evidence

[2] With respect to the Board's declination to hear this witness, this Court recognizes that "zoning boards of review are not required to observe strictly either the rules of evidence or the formality that apply ordinarily in judicial proceedings." Hopf v. Board of Review of City of Newport, 230 A.2d 420, 102 R.I. 275, 285 (1967) (internal citations omitted). However, there still exists a "fundamental requirement that such hearings be basically fair and impartial, and in the course thereof such boards may not refuse arbitrarily to receive and consider material evidence on the issues being tried." Id. at 286. Here, the Court is more than satisfied that, in the narrow circumstances of this particular case, the Zoning Board's decision rested on such substantial evidence that presenting expert testimony to the contrary would have been futile. Accordingly, the Appellant's due process rights were not substantially prejudiced.

exists. Additionally, Ms. Bonome argues that the Planning Board and Appeals Board did not cite evidence to meet the statutory requirements for a subdivision and misapplied the Development Review Act and Regulations (the Regulations). Ms. Bonome requests that this Court reverse the decisions of the Zoning Board and Appeals Board and deny Ms. Zinno's requests for a variance and to subdivide her lot. Ms. Zinno did not file a brief on this appeal, but rather joined in the arguments of Defendant Town of Portsmouth (Town or Portsmouth). Portsmouth essentially argues that both Boards properly cited competent evidence to support their decisions.

The Decision of the Appeals Board

Ms. Bonome's current appeal of the decision of the Appeals Board alleges that the Planning Board failed to make a positive finding regarding § 45-23-60(a)(2): that the proposed development is in compliance with the applicable Zoning Ordinance.[3] Ms. Bonome argues that no such positive findings were, or could have been, made because the subdivision required "Waivers and Modifications" pursuant to § 45-23-62. Ms. Bonome further argues that Ms. Zinno's subdivision should have been classified as a "major subdivision"—rather than a "minor" or "administrative" subdivision—because it required waivers and modifications. See Appellant's Ex. F ("At the regular meeting of the Planning Board on 20 June 2007, it was voted to approve the minor subdivision of the subject lot . . . .").

This Court now reviews the decision of the Zoning Board sitting as the Appeals Board. Section 45-23-70 governs the standard of administrative appellate review and provides that a zoning board sitting as a planning board of review may only reverse the lower board's decision if it finds that there was "prejudicial procedural error, clear error, or a lack of support by the weight

[3] Section 45-23-60(a)(2) sets forth the exact same standard as Regulations, Article XIII(A)(2); the two will be used interchangeably.

of the evidence in the record." Sec. 45-23-70(a). Section 45-23-71 governs appeals to the Superior Court of the appeals board's decision. Subsection (c) of § 45-23-71 provides:

> "The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of appeal 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, ordinance or planning board regulations provisions;
> "(2) In excess of the authority granted to the planning board 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."

The Superior Court must review such decisions utilizing the "traditional judicial review standard that is applied in administrative-agency actions." Munroe v. Town of E. Greenwich, 733 A.2d 703, 705 (R.I. 1999) (internal citations omitted). Thus, this Court may not consider the credibility of witnesses, weigh the evidence, or make findings of fact. Id. Rather, the Superior Court must give "deference to the findings of fact of the local planning board." West v. McDonald, 18 A.3d 526, 531 (R.I. 2011). This Court's review is confined to a search of the record to determine whether the Board's decision rests on "competent evidence or is affected by an error of law." Kirby v. Planning Bd. of Review of Town of Middletown, 634 A.2d 285, 290 (R.I. 1993).

The decision of the Appeals Board provides that it "reviewed the Planning Board's Further Findings of Fact in light of the record of the Planning Board [and] found by unanimous vote that the Further Findings of Fact are supported by sufficient evidence contained in the Planning Board record." (Appeals Board's Dec., Sept. 16, 2010). For the purposes of the instant

appeal, this Court reviewed the minutes from the June 20, 2007 Planning Board hearing and the Planning Board's July 20, 2010 Further Findings of Fact.

The minutes of the June 20, 2007 hearing, as described above, reveal that Mr. and Ms. Bonome testified regarding their concerns with the subdivision. Specifically, they believed it would negatively impact their use of the easement they possess over the subject land; change the character of the neighborhood; and, result in future upgrades to one of the lot's septic systems that would encroach on the Bonomes' easement.

The Planning Board's Further Findings of Fact is a three page memorandum, divided into five subsections, each addressing one of the five standards that must be addressed to support a subdivision of land. Section 45-23-60(a) and Article XIII(A) of the Regulations delineate the five standards[4]:

> "All local regulations shall require that for all administrative, minor, and major development applications the approving authorities responsible for land development and subdivision review and approval shall address each of the general purposes stated in § 45-23-30 and make positive findings on the following standard provisions, as part of the proposed project's record prior to approval:
> "(1) The proposed development is consistent with the comprehensive community plan and/or has satisfactorily addressed the issues where there may be inconsistencies;
> "(2) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance;
> "(3) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval;
> "(4) The subdivision, as proposed, will not result in the creation of individual lots with any physical constraints to development that building on those lots according to pertinent regulations and building standards would be impracticable. (See definition of Buildable lot). Lots with physical constraints to development may be created only if identified as permanent open space or

[4] Quoted language is taken from § 45-23-60. The language in the Development Review Act and in the Regulations is virtually identical.

> permanently reserved for a public purpose on the approved, recorded plans; and
> "(5) All proposed land developments and all subdivision lots have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered in compliance with this requirement."

The Development Review Act sets forth the procedure to be followed in applying for approval for each of the three types of subdivisions. An "administrative subdivision" occurs where [r]e-subdivision of an existing lot yields no additional lots for development, and involves no creation or extension of streets." Sec. 45-23-32(2). A "minor subdivision" consists of two stages, preliminary and final, and does not require a public hearing unless a public street is created or extended. However, a development plan that requires waivers and modifications as specified in the Development Review Act cannot be classified as a minor subdivision. Sec. 45-23-32(24). Property owners seeking to subdivide their property in a manner that does not qualify as either an administrative or minor subdivision are seeking a major subdivision under the terms of the Act. Sec. 45-23-32(22). Approval requires satisfying three steps including obtaining master plan approval from the planning board, submitting a preliminary plan for which a public informational meeting must be held, and then obtaining final approval by a vote of the board. Sec. 45-23-39(b).

When an applicant in Portsmouth requires both a variance from the local zoning ordinance and planning board approval, Article XIII(B)(1)(a) of the Regulations applies. It reads, in pertinent part:

> "The applicant shall first obtain an advisory recommendation from the planning board, as well as conditional planning board approval for the first approval stage for the proposed project, which may be simultaneous, then obtain conditional zoning board relief, and then return to the planning board for subsequent required approval(s)." Article XIII(B)(1)(a).

The language of Article XIII(B)(1)(a) is identical to that of § 45-23-61(a), which provides for a subdivision requiring both planning board and zoning board approval on the state level. See § 45-23-61(a)(1); see also Regulations, Art. XIII(B)(1)(a).

Thus, once the applicant has successfully obtained conditional approval from the planning board, and the zoning board has granted the necessary variances, the planning board can grant final approval for the project. See Sawyer v. Cozzolino, 595 A.2d 242, 247 (R.I. 1991) (holding that parties seeking a subdivision requiring a dimensional variance must first apply for conditional subdivision approval from the planning board then seek variance from the zoning board.) Because Ms. Zinno followed the appropriate procedures, the Planning Board was not in excess of its authority to find § 45-23-60(a)(2) and its Regulations counterpart properly satisfied, subject to the Zoning Board's approval of the requested variances. Therefore, Ms. Bonome's argument that the Planning Board was required to consider whether the standards were met for granting a waiver or modification is without merit.

A waiver or modification is appropriate:

> "where the literal enforcement of one or more provisions of the regulations is impracticable and will exact undue hardship because of peculiar conditions pertaining to the land in question or where waiver and/or modification is in the best interest of good planning practice and/or design as evidenced by consistency with the municipality's comprehensive plan and zoning ordinance." Sec. 45-23-62(b).

Here, there is no provision of the Regulations of which enforcement is impracticable; by following the procedures outlined in Article XIII(B)(a) and § 45-23-61(a)(1), an applicant has fully complied with both the Regulations and the Ordinance. If literal enforcement is not a problem, § 45-23-62 is simply not applicable. The Court is satisfied that Ms. Zinno did follow these procedures; thus, no waiver or modification was necessary. As Ms. Bonome's argument—

that the subdivision was misclassified as "minor," rather than "major"—was based completely on her claim that a waiver or modification was needed, the argument fails. Ms. Bonome argued that Ms. Zinno's proposed subdivision should have been classified as a "major subdivision" because the subdivision needed a waiver or modification for approval. However, the record demonstrates a waiver or modification was not needed. Hence, the Planning Board's classifying the proposed subdivision as "minor" was not clearly erroneous.

This Court finds that the Planning Board satisfactorily addressed each of the requisite statutory standards to conditionally grant Ms. Zinno permission to subdivide her land. The Planning Board's decision was based on competent evidence and was not affected by error of law. Accordingly, the Appeals Board's decision affirming the Planning Board's decision was not in excess of its statutory authority or in violation of ordinance provisions.

The Decision of the Zoning Board

On September 16, 2010, the Zoning Board issued its court ordered Further Findings of Fact.[5] Before this Court, Ms. Bonome continues to argue that the Zoning Board's Findings of Fact fail to include sufficient evidence from the record to support its legal conclusions. Specifically, Ms. Bonome contends that evidence is lacking to support the requirements of § 45-24-41(c)(1)-(3) and (d).

The Superior Court's review of a Zoning Board's decision is governed by § 45-24-69. Subsection (d), in relevant part, provides:

> "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

[5] On that same day, the Zoning Board, acting as the Planning Board of Appeals, also upheld the Planning Board's July 20, 2010 Further Findings of Fact.

> 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."

It is the function of the Superior Court to "'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" Lloyd v. Zoning Bd. of Review for City of Newport, 62 A.3d 1078, 1083 (R.I. 2013) (quoting Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 82 (1978)). Substantial evidence has been defined as "'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, . . . [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 (R.I. 2003) (quoting Caswell v. George Sherman Sand and Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). This Court must give deference to the "findings of the local zoning board of review" 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." Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (citing § 45-24-69(d); Monforte v. Zoning Bd. of Review of City of East Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)).

The Portsmouth Zoning Board's Further Findings of Fact give this Court little more than the requisite "scintilla" of relevant evidence upon which the Court must now make its judicial review. The two-page memorandum offered by the Zoning Board forces this Court to come dangerously close to "search[ing] the record for supporting evidence"—a quest our Supreme

Court disfavors. JCM, LLC v. Town of Cumberland Zoning Bd. of Review et al., 889 A.2d 169, 178 (R.I. 2005); Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 8 (R.I. 2005); Bernuth v. Zoning Bd. of Review of Town of New Shoreham et al., 770 A.2d 396, 401 (R.I. 2001); Irish P'ship v. Rommel, 518 A.2d 356, 359 (R.I. 1986). Thus, this Court will reiterate our Supreme Court's "caution [to] zoning boards and their attorneys to make certain that zoning-board 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 relief, as set forth in § 45-24-41(c) and (d)." Sciacca et al. v. Caruso et al., 796 A.2d 578, 585 (R.I. 2001).

Here, the Portsmouth Zoning Board's findings of fact were sufficient to make review possible. The Zoning Board's decision, though scant, is nevertheless adequately "susceptible to judicial review," so that the parties may still receive a meaningful review. Bernuth, 770 A.2d at 401.

In her appeal, Ms. Bonome further argues that there was insufficient evidence supporting the grant of the variance. With respect to the granting of variances, § 45-24-41(c) requires that evidence sustaining the following four standards appear in the record:

> "(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;
> "(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 comprehensive plan upon which the ordinance is based;
> "(4) That the relief to be granted is the least relief necessary."

Subsection (d) of the statute requires the Zoning Board to cite evidence from the record indicating 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."[6]

The Zoning Board did, with particularity, address each of the requirements outlined in § 45-24-41(c) and (d). The first requirement—that the hardship from which applicant seeks relief is due to the unique characteristics of the land or structure and not to the general characteristics of the surrounding area and is not due to a physical or economic hardship of the applicant—was supported by Ms. Zinno's own testimony. (Zoning Bd. Dec.) The Board found it "unique" that Ms. Zinno not only had two structures on her lot, but also that one was built in the 1700s, one was built in the 1800s, and that the two structures have separate utilities which predate zoning laws. The only other evidence the Board had before it regarding the existence of multiple structures on single lots in the area came from Ms. Bonome's letter that was read into evidence. (Tr. 35-36, June 28, 2007.) Ms. Bonome's letter informed the Zoning Board that "[m]any lots on [her] street have two large structures or more. It's usually a house with a barn or a large (inaudible) studio apartment." Id. The Board could deduce from Ms. Bonome's letter that Ms. Zinno's situation was unique: the existence of two full-sized, single family houses on one lot is very different from the existence of one house and a barn, or studio apartment. Therefore, the Board had evidence before it to indicate that the hardship suffered by Ms. Zinno, and any future owner of the land, was due to the uniqueness of the structures on the land and not to the general characteristics of the surrounding area or the physical or economic hardship of Ms. Zinno.

[6] The Portsmouth Zoning Ordinance, Article VI, D(5) and (6), set forth essentially the same requirements as the cited statutory provisions.

To satisfy the second statutory requirement, Ms. Zinno needed to show 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." Sec. 45-24-41(c)(2). There is competent evidence in the record to support the Board's finding that the hardship was not the result of any prior action of Ms. Zinno. The record demonstrates that Ms. Zinno inherited both homes on the lot. Id. at 13. Furthermore, she did not build either of the houses, and they were built before the Zoning Ordinance was adopted. Id.

It is well settled in Rhode Island that an application for dimensional relief may not be granted if the relief is necessary because of prior action on the part of the applicant. Sciacca v. Caruso, 769 A.2d 578, 583 (R.I. 2001); § 45-24-41(c)(2). In Sciacca, the landowner originally owned two separate parcels; the parcels were subsequently merged together by legislative action. Sciacca, 769 A.2d at 579-80. The landowner then owned one single lot. Thereafter, wanting to build a second home on that lot, the landowner received conditional approval from the planning board to divide her land, and then she requested dimensional relief so that she could build the second home on the newly created, substandard second lot. Id. at 579-81. The Supreme Court held the landowner could not obtain a variance because "the undeniable fact is that [landowner's] prior action caused the planning board to subdivide her single-conforming lot into two substandard-sized parcels, thereby creating the undersized lot in question. This 'prior action' resulted in the self-created hardship that she later used as the basis for her variance request." Id. at 584.

Here, Ms. Zinno is not attempting to build anything or to subdivide her land so that she may circumvent a zoning ordinance's prohibition on building. The Sciacca landowner's alleged hardship was the existence of the substandard lot that she herself had created. Ms. Zinno's

hardship is the existence of two homes on a single lot which she is now forced to maintain. Ms. Zinno did not cause both of these houses to exist on her single lot. Therefore, the Court finds that Ms. Zinno did not create the hardship—the existence of two full-sized, single family homes constructed side by side on a single lot—which is the basis for her variance request.

Section 45-24-41(c)(2) also requires that the desire for the relief not result primarily from financial gain. Ms. Bonome argues that this requirement has not been satisfied. The Zoning Board found otherwise. Ms. Zinno testified on this point directly. Specifically, Ms. Zinno's attorney asked her: "this request is not being made primarily to realize financial gain, is it?" She replied: "no, not at all." (Tr. 32, June 28, 2007.) Ms. Zinno also testified that she wished to sell the home in which she is not currently residing. Id. at 16. The record indicates that any financial gain Ms. Zinno may receive from selling the vacant house would be ancillary. Ms. Zinno testified that she wants to sell the home so that she does not have to own and maintain two full-sized homes. She further testified that she did not wish to rent out the second home because she did not want to be a landlord, but wanted to "wind down." Id. Ms. Zinno explained: "I don't want to be a landlord. I'm going to be 70 years old in January. I don't want to start interviewing a landlord [sic] and having to be running out to Portsmouth and getting everything done or running all around and chasing all around. I'd like quiet enjoyment." Id. at 23.

Ms. Bonome argues, however, that "[t]he fact that a . . . structure [may be] more valuable after the relief is granted shall not be grounds for relief." Portsmouth Zoning Ordinance § VI(D)(6)(b). Further Ms. Bonome directs the Court's attention to Apostolou v. Genovesi, which held that evidence that compliance with the zoning ordinance's dimensional requirements would be "economically impractical" does not constitute substantial evidence to support the granting of a variance. Apostolou, 120 R.I. 388 A.2d at 509.

This Court will adhere to the "oft-repeated rule that ordinarily the credibility of witnesses and weight of the evidence is the sole prerogative of the local board." Coderre v. Zoning Bd. of Review of City of Pawtucket, 105 R.I. 266, 270, 251 A.2d 397, 400 (1969). This Court's task is not to "consider the credibility of witnesses [or] weigh the evidence," but to defer to the decision of the Zoning Board if the record shows that the Board had before it substantial evidence that the applicant's request does not result primarily from the applicant's desire to realize financial gain. Munroe v. Town of E. Greenwich, 733 A.2d 703, 705 (R.I. 1999). The Zoning Board heard Ms. Zinno testify numerous times that her desire to sell her house was not a monetary issue; it was an issue of practicality and great inconvenience. Thus, the Zoning Board had before it substantial evidence that Ms. Zinno's request was "not for financial gain; it [was] to create a situation that a normal single family homeowner can maintain." (Board's Dec.)

The next requirement, § 45-24-41(c)(3), requires evidence "[t]hat 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 comprehensive plan upon which the ordinance is based." Ms. Zinno was asked twice what she believed would change in the surrounding area if her request were granted. (Tr. 21, 23, June 28, 2007.) She replied: "[n]othing. It will look exactly the same as it looks right now. There will be absolutely no change." Id. at 21. Our Supreme Court has offered examples of what type of dimensional variances may alter the general character of the surrounding area and/or the intent or purpose of the comprehensive plan or zoning ordinance. Lischio, 818 A.2d at 693. The Court "envision[ed]" § 45-24-41(c) becoming determinative when a "request for a height variance for a permitted use would result in a structure so massive or out of place as to alter the general character of the surrounding area.

Another example would be a side-yard variance that would eliminate the front yard or sidewalk in a residential neighborhood." Id.

In this case, Ms. Zinno is not attempting to build any structures nor is she asking to eliminate any physical attributes of the land in question. She is simply requesting to have an invisible line drawn approximately halfway through her property. Her request is easily distinguished from the physical alterations the Supreme Court envisioned would offend § 45-24-41(c).

Ms. Bonome also expressed concern that the subdivision would negatively impact her use of a current easement. Specifically, she feared the subdivision could potentially alter her existing usage if, in the future, the septic system of one of the houses needed to be upgraded. The Zoning Board looked to the subdivision plan to determine that the recorded easement will remain in effect. (Tr. 41, June 28, 2007.) Importantly, the Board noted at the hearing that "[t]he easement remains in effect, so abutters to the rear of the property are still going to have access to their property." Id. The Board then concluded that Ms. Bonome's concern over her easement "has no basis in fact." Board member and engineer Mr. Auger noted that, in his opinion, there would be sufficient room to install an upgraded system without interfering with Ms. Bonome's property rights. Id. at 29. Importantly, Ms. Bonome offered no expert testimony to support her septic system concerns. Without such expert testimony, the Board had no competent evidence on which to find her concerns warranted. See Salve Regina College v. Zoning Bd. of Review of City of Newport, 594 A.2d 878 (R.I. 1991) (finding that a zoning board abused its discretion when it had no competent expert testimony on which it could base its findings and conclusions.) Because "there will be no visible change to the property," and because Ms. Bonome's concerns about her easement are speculative at this point, the Zoning Board's concluding that the general

character of the surrounding area will not be sacrificed if Ms. Zinno's request is granted is supported by reliable, substantial, and probative evidence.

Lastly, Ms. Bonome argues that Ms. Zinno has not demonstrated that the hardship she will suffer "if the dimensional variance is not granted amounts to more than a mere inconvenience," as required by § 45-24-41(d). Ms. Zinno testified that at the time of the hearing five years ago, she was almost seventy years old. Id. at 23. She is the single owner of both homes. Id. at 13. Both homes are full-sized houses and require the maintenance that "a normal full sized house does." Id. at 33. In its decision, the Board noted that if the dimensional relief were not granted, this hardship will be passed on to any future owner of the property.

Rhode Island law is clear that satisfaction of § 45-24-41(d) requires that the hardship complained of must amount to more than a mere, personal inconvenience. See Apostolou, 120 R.I. 388 A.2d at 501; Rozes v. Smith, 388 A.2d 816, 120 R.I. 515 (1978); DiDonato v. Zoning Bd. of Review of Town of Johnston, 242 A.2d 416, 104 R.I. 158 (1968). The cited cases demonstrate situations that do not amount to more than a "mere inconvenience": a manufacturer's claim that compliance with the zoning ordinance would be economically impractical and would aggravate the parking situation at its facility; a homeowner's wish to sell a portion of his land because he found cutting the grass to be a chore; and, a homeowner's desire to build a larger home because his family size has increased. See Apostolou, 120 R.I. 388 A.2d at 509; Rozes, 120 R.I. 388 A.2d at 520-21; DiDonato, 104 R.I. 242 A.2d at 164.

Once again, Ms. Zinno's situation is unique and differs from the situations above. The Zoning board had before it evidence that if the dimensional relief were not granted, Ms. Zinno would have to maintain and care for two full-sized homes she had inherited. Performing such maintenance would clearly amount to more than a mere inconvenience. The Zoning Board

found that it would not only work as a hardship to Ms. Zinno, but that the burden "would be passed on to any future owner: in order to purchase a single family home, a purchaser would have to take on the maintenance and management of a separate building." The Zoning Board concluded that "[t]o force a property owner seeking to own a single family home to take on such a burden is a hardship amounting to more than a mere inconvenience."

The Zoning Board had before it such "relevant evidence that a reasonable mind might accept as adequate to support [the] conclusion" that "the hardship suffered by the owner if the dimensional variance is not granted amounts to more than a mere inconvenience." Therefore, Ms. Zinno sufficiently carried her burden and satisfied the requirements of § 45-24-41(d).

Conclusion

After an examination of the entire record, the Court is satisfied that the findings of the Zoning Board are supported by reliable, probative, and substantial evidence. The Court also finds that the Appeals Board's decision rested on competent evidence and was not affected by error of law. For the foregoing reasons, both appeals are denied. The Decision of the Appeals Board denying Ms. Bonome's appeal of the Planning Board's decision is affirmed. The Decision of the Zoning Board is affirmed. Counsel for the Appellee shall submit the appropriate order for judgment.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Alexandra Bonome v. James Nott, et al.
CASE NO:	C.A. No. NC 07-0230 and NC 07-0488 *(Consolidated)*
COURT:	Newport County Superior Court
DATE DECISION FILED:	December 10, 2013
JUSTICE/MAGISTRATE:	Clifton, J.
ATTORNEYS:	
For Plaintiff:	Matthew H. Leys, Esq.
For Defendant:	Kevin P. Gavin, Esq.