STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: October 26, 2012)

JAMES WEISS	:	
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	:	
V.	:	**C.A. No. PC 09-2814**
	:	
THE ZONING BOARD OF REVIEW for the CITY OF PROVIDENCE, ET AL	:	

DECISION

SAVAGE, J. In this administrative appeal, Appellant James Weiss challenges an April 27, 2009 decision of the Zoning Board of Review of the City of Providence. The decision denied his application for a dimensional variance from Providence Zoning Ordinance § 704.2 to add four parking spaces to the front yard of his twelve-unit apartment building. He also asks this Court grant him reimbursement for expenses associated with this appeal, pursuant to the Equal Access to Justice Act, R.I. Gen. Laws 1956 § 42-92-3. For the reasons set forth in this Decision, this Court affirms the decision of the Zoning Board and denies Appellant's claim for expense reimbursement.

I
FACTS AND TRAVEL

The subject property is located at 153 to 159 Medway Street in Providence, Rhode Island and identified on Tax Assessor's Plat 15 as lots 150 and 167 (the "Property"). (Hr'g Tr. at 38.) The two lots contain a total of 7405 square feet. Id. A twelve unit residential apartment building (the "structure") with a footprint of 2720 square feet sits on the Property. (Tr. at 23, 38.) A small

one car garage occupies the southwest corner of the rear lot. (Tr. at 38.) The structure and garage sit at a slight elevation, and a driveway slopes downward from the garage to Medway Street. (Tr. at 38-39.) The dwelling structure and the garage close off a small rear yard. (Tr. at 42.) Prior to 2006, the driveway provided the only available parking space for occupants of the apartment building, with room for three to four small cars parked in tandem.[1] (Tr. at 23, 39.) Because of the configuration of the lot, the size of the structure, and the location of the garage, tenants cannot access the rear yard for parking. (Tr. at 42, 61.) James Weiss acquired the property with several partners in the 1960's and became sole owner in 1988. (Tr. at 28). For twenty-eight years—from the time James Weiss became sole owner in 1988 until 2006—he managed his apartment building with only three to four parking spaces in the driveway. (Tr. at 49, 55-56.)

The property is located in an R-3 Residential District. (Tr. at 42.) Under Providence Zoning Ordinance § 101.1, R-3 zones are intended for low and medium density residential areas containing one, two, and three family dwelling units. Because it was erected in 1919, prior to the enactment of Providence's first comprehensive zoning ordinance in 1923,[2] the twelve-unit property does not have to meet this requirement, however, and hence is grandfathered as a pre-existing non-conforming use. Id.; see also, Scotti Report, Appellant's Br., Ex. B. 2. Under § 703.2 of the current Zoning Ordinance, which dictates that a property in a residential zone used as a multiple-family dwelling must have 1.5 off-street parking spaces per dwelling unit, James Weiss' property should have eighteen parking spaces. (Tr. at 42.) The property, however, is also grandfathered for the parking requirement, as it had pre-existing legal, non-conforming

[1] Providence Zoning Ordinance § 704.4 authorizes tandem parking.
[2] See Chapter 370 of the General Ordinances of the City of Providence, entitled "An Ordinance Zoning the City of Providence and Establishing Height, Area and Use Districts," adopted June 6, 1923.

status with three to four parking spaces as of 2006. (Tr. at 25; Zoning Board Resolution at 3 ¶ 1; Scotti Report 2.)

In 2006, Gregory Weiss, Appellant James Weiss' grandson, took over management of the property. (Tr. at 24.) Without prior approval from the City of Providence, Gregory Weiss had an oil tank removed from the property's grassy front yard because it had filled up with sediment. Id. After removal of the tank, he had the area leveled and replaced the grass with gravel to create four additional parking spaces. (Tr. at 24, 28-29.) In March 2008, a City building inspector noticed a car parked on the graveled space and cited James Weiss for a violation of Providence Zoning Ordinance § 704.2. (Tr. at 28; Notice of Violation, City's Br., Ex. 1.) Section 704.2 prohibits property owners in residential zones from paving more than 33% of a property's front yard area for the purposes of parking.[3] The front yard of James Weiss' property has a total area of 1000.58 square feet; the already existing driveway covered 183.43 square feet of the front

[3] Section 704.2 of the Providence Zoning Ordinance reads, in its entirety, as follows:

> Paving Limitations: Paving on lots in R Zones shall be limited to the following:
> A) The front yard may be paved only for a driveway to access a garage or parking area located in the side or rear yard. Such driveway shall not occupy more than 33% of the front yard. A driveway used to access a single car garage, side yard parking area, or rear yard parking area of four cars or less, may be no more than 15 feet wide. A driveway used to access a two-car garage or larger, or a parking area for more than four cars, located in a side or rear yard may be no more than 25 feet wide. Nothing herein shall prohibit a circular driveway or parking area in the front yard provided there is no other driveway located in the front yard, there is no other parking area located on the lot, and the paved area occupies no more than 33% of the area of the front yard.

Providence Zon. Ord. § 704.2, amended by Zon. Ord. 2009-39.

yard. The graveled space covered an additional 690 square feet, resulting in a total paved area that covers 87.29% of the Property's front yard. (City's Br. 2, n.1.)

In response to the violation citation, James Weiss filed an application for a dimensional variance with the Zoning Board on July 17, 2008, requesting relief from the requirements of § 704.2.[4] (Application, Appellant's Br., Ex. A.) In effect, he sought retroactive permission for the four additional parking spaces.

The Zoning Board conducted a site inspection of the Property on November 10, 2008 and held a public hearing to consider James Weiss' request for dimensional relief on November 24, 2008. (Resolution at 1.) At the hearing, the following individuals testified in support of James Weiss' request: his attorney, Albert Romano; his grandson, Gregory Weiss; and Peter M. Scotti, a licensed real estate broker and certified appraiser. Three neighbors—Miriam McRobb, Nina Tannenwald, and Mark Suchman—testified in opposition to his application.

James Weiss' attorney, Albert Romano, gave a brief introduction describing the Property and the relief requested. (Tr. at 23.) Specifically, Mr. Romano claimed that James Weiss sought to bring the Property closer to providing the minimum number of spaces required for compliance with § 703.2 of the Zoning Ordinance, notwithstanding the property's grandfathered status. (Tr. at 24-25.) Mr. Romano described some of the common parking problems in the neighborhood, including a three-hour limit on street parking and a lack of off-street parking. (Tr. at 25-26.) He later explained that the lack of off-street parking at the Property is due, in part, to the fact that the structure was erected in 1919, before the automobile attained widespread popularity. (Tr. at 62.) Mr. Romano admitted that additional parking is available in a commercial lot directly abutting

[4] After James Weiss failed to rectify the violation, the City of Providence filed a complaint in Providence Housing Court on September 17, 2008. (Housing Court Complaint, City's Br., Ex. 2.) Neither the Appellant nor the City makes further mention of the complaint or the status or outcome of the proceedings in the Providence Housing Court in their memoranda.

the Property to the west, but expressed his belief that property owners should be able to do what they please with their land without being dependent on their neighbors. (Tr. at 61.) Mr. Romano told the Zoning Board that he thought Gregory Weiss' landscaping plans for the parking spaces at issue would allow for greenery, maintain consistency with the surrounding area and would upgrade the neighborhood. (Tr. at 62.) In closing, Mr. Romano indicated—in response to a question from Zoning Board member Egan—that James Weiss would not object to the Zoning Board including a sunset provision that would terminate the dimensional variance should the City ever allow on-street parking for residents.[5] (Tr. at 63.)

The current property manager, Gregory Weiss, next testified in support of his grandfather's application. He began by describing the removal of the tank, the gravelling over of the front yard, and other circumstances leading to the violation and the current application for relief. (Tr. at 28-29.) He then explained the current parking dilemma: at any given time, James

[5] Beginning in April 2012, the City of Providence started phasing in its Overnight Parking Pilot Program on a district-by-district basis. See Bryan Rourke, "Providence to Institute Overnight Parking Program," The Providence Journal, April 14, 2012. As of July 1, 2012, the Overnight Parking Pilot Program went into effect citywide. Under the Program, residents who file an application and pay a fee to obtain the proper permit may park overnight on streets designated as allowing overnight parking. See Overnight Resident Pilot Parking Program: Frequently Asked Questions, available at http://www.providenceri.com/efile/2814. The portion of Medway Street where James Weiss' apartment building is located is designated as allowing overnight parking "unless prohibited by signage." See Resident Parking Permit District 9 Map, available at http://www.providenceri.com/efile/2658. Effective March 26, 2012, the Department of Public Works promulgated regulations governing the Pilot Program that provide that "[n]o person residing in a dwelling or structure with six (6) or more units is eligible to obtain a permit under this program, unless the applicant can demonstrate hardship. Documentation of the lack of on-site parking will be the sole factor in making a determination of eligibility." See Rules and Regulations for the Pilot Overnight Parking Program, Part III, C(e).

Since James Weiss specifically agreed to a sunset provision that would terminate his proposed dimensional variance should the City allow on-street parking, the new Pilot Program might well render this case moot if James Weiss' tenants can obtain on-street parking under the Program. Neither party has addressed the new Program or raised the issue of mootness in connection with this appeal.

Weiss has twelve or more tenants with twelve or more vehicles. (Tr. at 29.) Since the driveway only provides space for three or four small cars if they are parked in tandem, a tenant who needs to get out of the driveway may have to call another tenant to come down and move his or her car, sometimes at odd hours of the day or night. Id. The tandem parking arrangement also makes it infeasible for any of the tenants to park in the garage, since all of the other cars would have to move each time someone needed to get a car in or out of the garage. (Tr. at 37.)

Although he acknowledged that five of James Weiss' tenants rent parking spots in the commercial parking lot directly abutting the Property to the west, Gregory Weiss explained that the commercial lot is not a satisfactory solution to his parking problem because his tenants cannot enter the lot until after 5 p.m. and must exit by 8 a.m. (Tr. at 29-31, 45-46.) He testified that this arrangement interferes with his efficient management of the property because he has to deal with calls from the manager of the lot "every other day" about tenants who have not removed their cars from the lot by 8:15 a.m. (Tr. at 31.) He alleged that during snowstorms, his tenants have no place to park; they cannot park on the street, and their cars will be plowed in if left in the lot. (Tr. at 30-31.) According to Gregory Weiss, his tenants are working professionals who pay good rent and therefore do not want the nuisance of having to repeatedly move their vehicles. (Tr. at 29.) He also expressed his concern that he is at the mercy of the lot owner should the owner decide to increase rates or terminate the relationship. (Tr. at 45.) Despite the lack of parking, however, he acknowledged that all of the units are currently rented. (Tr. at 46.)

Gregory Weiss then described for the Zoning Board the changes he intended to make to the Property. Specifically, he planned to add more greenery to the front yard by replacing the gravel with "California" or "Hollywood" style paving bricks. (Tr. at 31-32.) Such pavers, he testified, contain holes that allow grass to grow up from underneath and show at the surface. (Tr.

at 32-33.) He also envisaged additional landscaping that would help create a more verdant appearance in the front yard, including spreading grass seed and planting shrubbery. (Tr. at 33.) He confirmed that he was not seeking a variance to enlarge the property, add additional units, or increase the number of tenants. (Tr. at 31.)

In addition to his testimony, Gregory Weiss presented the Zoning Board with a petition signed by six neighboring property owners in support of James Weiss' request for a variance and a letter of support from Kenneth Dulgarian, the owner of nearby Wayland Court Apartments at 100 Wayland Avenue. (Tr. at 34.) He acknowledged that neither the six signatories nor Mr. Dulgarian actually resides on Medway Street. (Tr. at 35-36.)

Peter M. Scotti, a certified appraiser and a licensed real estate broker, testified next in support of James Weiss' application. The Zoning Board recognized Mr. Scotti as an expert in real estate. (Tr. at 38.) Having reviewed James Weiss' application for a dimensional variance and the Property, Mr. Scotti presented his findings and conclusions to the Zoning Board both in his testimony and in a written report. See Scotti Report, Appellant's Br., Ex. B. Mr. Scotti began by describing the character of the surrounding area: up and down Medway Street to the east of the Property are two-unit and three-unit dwelling structures. (Tr. at 39.) Directly across the street and abutting to the east are also residential structures. (Tr. at 40.) The 25,000 square foot commercial parking lot directly abuts to the west. (Tr. at 39.) Mr. Scotti also indicated that the relevant part of Medway Street is close to the Wayland Square commercial area; there is a four-unit commercial building on nearby Wayland Avenue and a laundromat and a couple of other commercial structures across the street. Id. Mr. Scotti went on to describe the parking arrangements of a few neighboring residences. Condominiums with underground parking occupy the far corner of Medway Street. (Tr. at 39-40.) Directing the Zoning Board's attention

to photographs from his report, Mr. Scotti informed the Zoning Board that the dwelling next door to the Property has a garage in front of it, and the dwelling across the street has parking in front of it for a couple of cars. (Tr. at 40.) Mr. Scotti reiterated Mr. Romano's description of some of the parking problems in the area, namely the three-hour limit on street parking during the day and the prohibition on overnight street parking. (Tr. at 41.) He explained that without the relief requested, James Weiss can provide at most three to four off-street parking spaces for his tenants, due to the lot size and configuration. (Tr. at 40-42.)

After presenting the above findings, Mr. Scotti stated that, in his opinion, the Zoning Board should grant James Weiss' request. (Tr. at 41.) Specifically, Mr. Scotti told the Zoning Board that he believed that the requested variance was the least relief necessary, would bring the Property into greater conformity with the Zoning Ordinance, and would be consistent with the Comprehensive Plan. Id. Mr. Scotti explained that James Weiss was not seeking the variance primarily for financial gain or trying to increase the number of units or the size of the building, but rather was trying to accommodate his existing tenants. Id. In his opinion, allowing parking in the front yard of the Property would be consistent with the general appearance of the neighborhood because other properties in the area have front yard parking. (Tr. at 60.) According to Mr. Scotti, Gregory Weiss' landscaping plans for the proposed parking spots would be compatible with the neighborhood such that the additional parking would have no effect on surrounding property values. (Tr. at 41.) Finally, Mr. Scotti echoed Mr. Romano's assertion that a property owner should be able to rely on his or her own parcel to accommodate tenants' parking needs without having to be dependent on parking supplied by his or her neighbors. (Tr. at 63.)

Miriam McRobb testified first in opposition to James Weiss' request for dimensional relief. Ms. McRobb is a neighbor who resides in a condominium at 164 Butler Avenue, located at the corner of Medway Street and Butler Avenue. (Tr. at 46-47.) She testified that the parking spaces in the Property's front yard interfere with the ability of other people in the area to park on that section of Medway Street since James Weiss' tenants have to drive over the curb to get to their parking spaces. (Tr. at 47-48.) In addition to being a neighbor, Ms. McRobb had an additional connection to the Property: her daughter rented a unit in James Weiss' building from 2005 to 2007, knowing at the time that she moved into the Property that she did not have parking. (Tr. at 46; Resolution at 2.) Ms. McRobb stated that the Property was poorly managed during the time her daughter was a tenant. (Tr. at 46.) She also believed that "improvements" that Gregory Weiss had made to the Property to date had detracted from, rather than enhanced, the appearance of the Property. (Tr. at 48.) Ms. McRobb sought to clarify for the Zoning Board some of the information Gregory Weiss had provided about parking availability in the commercial lot, stating that the 5 p.m. to 8 a.m. time restrictions on parking do not apply on weekends. Id. She also informed the Zoning Board that twenty-four hour parking spaces are available for rent in the lot, with five or six such spaces currently rented, and more available. (Tr. at 59.) Ms. McRobb expressed general skepticism as to why James Weiss now considered his lack of parking a hardship, after many years with only three or four spaces. (Tr. at 49.)

In addition to her testimony, Ms. McRobb presented the Zoning Board with a letter and a newspaper article. The letter was from Don and Susan Welsh, residents of 179 Medway Street, who could not attend the hearing but wished to express their opposition to the proposed variance. (Tr. at 46; Resolution at 1.) The Welshes believed that granting James Weiss' application would undermine the City's long-term plans to decrease paving and increase green space. See Letter of

Don and Susan Welsh, Nov. 24, 2008. Similarly, the newspaper article focused on the City's efforts to promote foliage and greenery. See Richard Dujardin, "The Greening of Providence," Providence Journal, April 29, 2008.

Nina Tannenwald, a neighboring homeowner at 167 Medway Street, next expressed her objections to the requested variance. Like Ms. McRobb, Ms. Tannenwald also stressed the availability of parking in the commercial lot. In particular, Ms. Tannenwald informed the Zoning Board that she had leased a twenty-four hour parking space in the lot for approximately $80 per month. (Tr. at 49-50.) She indicated that at least one of James Weiss' current tenants has a twenty-four hour space. (Tr. at 50.) According to Ms. Tannenwald, there are ninety spaces available in the lot, and the lot's owner is willing to make a variety of arrangements. (Resolution at 3; Tr. at 50.) Ms. Tannenwald pointed out that even if the Zoning Board were to grant James Weiss' request, he still would be ten to eleven spaces short of the eighteen spaces required to comply with § 703.2 of the Zoning Ordinance. (Tr. at 51-52.)

Ms. Tannenwald specifically disagreed with Mr. Scotti's characterization of the neighborhood as commercial. Id. She testified that a number of the buildings on Medway Street are single family homes and that most of the commercial buildings are limited to the western edge of Medway Street—where Medway Street intersects Wayland Avenue. Id. Ms. Tannenwald further informed the Zoning Board that her home had recently won a Preservation Award from the Providence Preservation Society; in her opinion, such an award is indicative of the Preservation Society's interest in the restoration of Medway Street. (Tr. at 53.) She believed that James Weiss' proposed additional parking spaces would undercut any restoration efforts. Id. Ms. Tannenwald wanted the Zoning Board to note that all of the individuals supporting his

application are property owners with parallel development interests who do not actually reside on Medway Street. (Tr. at 52.)

Mark Suchman, also a resident at 167 Medway Street, testified last in opposition to the proposed variance. Like his neighbors who testified before him, Mr. Suchman emphasized the availability of twenty-four hour parking in the commercial lot. (Tr. at 56.) Mr. Suchman told the Zoning Board that he has rented a twenty-four hour space in the lot for two years without suffering interruptions or having to move his car due to snow. (Tr. at 57.) Mr. Suchman further addressed the effect Gregory Weiss' proposed landscaping would have on the neighborhood: in his opinion, the use of "California" style pavers would make the Property appear more dilapidated because it is difficult to maintain the grassy spaces in between the pavers. (Tr. at 55.) He also believed that the pavers did not adequately compensate for the grass and trees that Gregory Weiss removed when he graveled over the front yard. Id. Mr. Suchman questioned James Weiss' motives for adding additional parking spaces, given that the Property has grandfathered status for parking. (Tr. at 56.)

The Zoning Board also considered—as it is required to do under § 902.3 of the Zoning Ordinance—the findings and recommendation of the City's Department of Planning and Development. (Resolution at 1, 4 ¶ 6.) The Department recommended that the Zoning Board deny James Weiss' request for a variance. Id. It found that but for the Property's grandfathered status, the twelve-unit dwelling in an R-3 zone would be a non-conforming use and that additional parking would increase this overdevelopment. (D.P.D. Report.) The Department further found that the proposed variance would be inconsistent with the Comprehensive Plan, which calls for reducing surface parking and promoting green space. Id.

After the Zoning Board considered all of the testimony and other evidence, Zoning Board member Egan made a motion to approve James Weiss' application, subject to the following conditions: (1) that the variance would cease should the City ever allow overnight on-street parking; and (2) that he comply with the landscaping requirements of § 425 of the Zoning Ordinance.[6] (Resolution at 3.) Zoning Board members Wolf and Varin seconded Mr. Egan's motion. Id. Chairwoman York and Zoning Board member Strother, however, voted against the motion. Id. Since § 903.6 of the Zoning Ordinance requires a concurring vote of four out of five Zoning Board members to approve a request for a variance,[7] however, the Zoning Board denied James Weiss' application. Id.

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[6] Section 425 of the Providence Zoning Ordinance sets out minimum landscaping requirements:

> Trees and Landscaping: Open space within lots and outdoor parking areas shall be landscaped with trees, groundcover and shrubs to enhance the environmental and aesthetic quality of the City and to reduce the visual impact of parking areas from the public right-of-way and from adjoining properties. This Section regulates the quantity and location of landscaping on all lots in all Zoning Districts except for the D-1 Zoning District, which has separate landscaping provisions in Section 502.2. All development activity shall require either retention or installation of landscaping and trees, in accordance with the provisions of this Section.

Providence Zon. Ord. § 425. In its report, the Department stated that James Weiss' paving of his front yard may violate section 425.1(A)(1), which requires that properties in residential zones have sufficient trees such that those trees, when mature, will cover 30% of the square footage of the lot. See § 425.1(A)(1). Where it is impracticable for a property owner to meet the minimum canopy requirements, he or she may make up the shortfall by planting trees in public rights-of-way at the direction of the City Forrester for the City of Providence. See id. James Weiss believed that his non-compliance with § 425 was a factor in the Zoning Board's decision to deny his application. Thus, in a letter dated January 15, 2009, James Weiss' attorney, Albert Romano, asked the Zoning Board to reopen the hearing to allow him to present additional evidence on this issue. See Letter of Albert Romano, Jan. 15, 2009. James Weiss' memorandum, however, makes no mention of his request.

[7] Section 906.3 of the Providence Zoning Ordinance provides, in relevant part: "The concurring vote of four (4) members of the Zoning Board shall be required to decide in favor of the

The Zoning Board issued a comprehensive written decision on April 27, 2009, signed by the Chairperson on behalf of the Board, which denied James Weiss' request for dimensional relief. The Zoning Board's decision sets forth—in a level of detail that is to be applauded—its findings of fact and conclusions of law. In its decision, the Zoning Board acknowledged that the limits on street parking, coupled with a lack of off-street parking, create a common hardship for many property owners in the area. (Resolution at 3 ¶ 1.) The Zoning Board found, nonetheless, that James Weiss' hardship is due to the unique characteristics of his Property, namely the size of the lot and the size and configuration of the structure. Id. at ¶ 2. The Zoning Board further found that the hardship was not due to any economic or physical disability of the applicant and that James Weiss was not primarily seeking relief for financial gain. Id. The Zoning Board denied his request for a dimensional variance, however, because it found that his hardship was not sufficient to warrant relief. Id. at ¶ 1. Specifically, the Zoning Board concluded that: (1) the proposed variance would alter the general character of the area and is not in accordance with the intent of the Zoning Ordinance and the Comprehensive Plan; (2) the requested relief was not the least relief necessary; and (3) denial of relief would not cause James Weiss to suffer more than a mere inconvenience. Id. at ¶¶ 3-5.

On May 15, 2009, James Weiss timely filed an appeal of the Zoning Board's decision. He filed a memorandum in support of his appeal on August 19, 2010. On appeal, he argues that this Court must vacate the Zoning Board's April 27, 2009 decision, denying his request for a dimensional variance, on the grounds that the decision was clearly erroneous in light of the substantial evidence of record and was arbitrary and capricious. He also asserts that the Zoning

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applicant on the matter of a special use permit or a variance or any other matter upon which the Zoning Board is authorized to pass." Providence Ordinance § 906.3, amended by Zon. Ord. 2009-39.

Board committed an error of law. James Weiss asks this Court to grant him reimbursement of expenses associated with this appeal, pursuant to the Equal Access to Justice Act, § 42-92-3.

The City filed a memorandum in opposition to James Weiss' appeal on October 14, 2010. In response, the City argues that this Court should uphold the Zoning Board's decision because the Appellant failed to make the requisite showing for dimensional relief, the Board did not commit any error of law, and the Board did not abuse its discretion or otherwise act arbitrarily or capriciously.

This Court has jurisdiction of the appeal pursuant to R.I. Gen. Laws § 45-24-69. After review of the administrative record and the parties' legal memoranda, this Decision follows.

II
STANDARD OF REVIEW

Section 45-24-69(a) of the Rhode Island General Laws grants this Court jurisdiction to review decisions of municipal zoning boards. This Court's review is governed by § 45-24-69(d), which provides, in pertinent part, as follows:

> The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reserve or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
>
> . . . .
>
> (4) Affected by other error of law;
>
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record;

> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

R.I. Gen. Laws § 45-24-69(d).

Judicial review of a zoning board decision is "essentially an appellate proceeding." Mauricio v. Zoning Bd. of Rev. of City of Pawtucket, 590 A.2d 879, 880 (R.I. 1991) (citation omitted). This Court will give deference to the findings of a local zoning board because of the Zoning Board's "presumed . . . knowledge concerning those matters which are related to an effective administration of the zoning ordinance." Pawtucket Transfer Operations, L.L.C. v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (quoting Monforte v. Zoning Bd. of Rev. of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)). In reviewing a zoning board's decision, this Court will not "substitute its judgment for that of the zoning board as to the weight of the evidence on questions of fact." Apostolou v. Genovesi, 120 R.I. 501, 506, 841 A.2d 821, 823 (1978). Instead, this Court's task is to "examine the entire record to determine whether 'substantial' evidence exists to support the zoning board's findings." Hugas Corp. v. Veader, 456 A.2d 765, 769 (R.I. 1983) (quoting Toohey v. Kilday, 415 A.2d 732, 735 (R.I. 1980)). This Court will uphold the decision "if it can conscientiously find that the zoning board's decision was supported by substantial evidence in the whole record." Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting Apostolou, 120 R.I. at 509, 841 A.2d at 825). Our Supreme Court has defined "substantial evidence" 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 Rev. of N. Kingstown, 818 A.2d 685, 690 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)).

III
ANALYSIS

Appellant James Weiss challenges the Zoning Board's decision on essentially three main grounds: (1) the Zoning Board's decision was clearly erroneous in light of the substantial evidence of record; (2) the Zoning Board committed an error of law in its application of the "mere inconvenience" standard; and (3) the Zoning Board's decision to deny Appellant's application when it had granted a neighbor's similar application was arbitrary and capricious. This Court will address each argument in seriatim.

A
Substantial Evidence of Record

A dimensional variance, as codified in Rhode Island law, is:

> Permission to depart from the dimensional requirements of a zoning ordinance, where the applicant for the requested relief has shown, by evidence upon the record, that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations. However, the fact that a use may be more profitable or that a structure may be more valuable after the relief is granted are not grounds for relief.

R.I. Gen. Laws § 45-24-31(62)(ii). To grant a request for a dimensional variance, a zoning board must find that an applicant has satisfied the following four-prong standard:

> (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.

Id. § 45-24-41(c).[8] When either granting or denying a request for relief, a zoning board must issue a written decision that sets forth "'findings of fact and conclusions of law in support of its decision[] in order that such decision[] may be susceptible of judicial review.'" Bernuth v. Zoning Bd. of Rev. of Town of New Shoreham, 770 A.2d 396, 401 (R.I. 2001) (quoting Cranston Printworks Co., v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996) (internal citations omitted)).

[8] A mirror provision to this statutory standard is set forth in § 902.3(A) of the Providence Zoning Ordinance, which provides:

> In granting a variance, the Zoning Board shall require that evidence to the satisfaction of the following standards be 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;
>
> 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 this Ordinance or the Comprehensive Plan; and
>
> 4) That the relief to be granted is the least relief necessary.

Providence Zon. Ord. § 902.3(A).

In this case, the Zoning Board set forth its findings of fact and conclusions of law in its written decision, issued on April 27, 2009. (Resolution No. 9378, Appellant's Br., Ex. C.) It specifically found that:

> 1. . . . The hardship from which the Applicant is seeking relief is based on the limited parking available on his Property because of the size of the lot and the location and large footprint of the dwelling, thus the hardship from which the dimensional variance is sought is due to the unique characteristics of the Property. . . .
> 2. [T]he hardship from which the Applicant seeks a dimensional variance is not due to a physical or economic disability of the Applicant . . . . Further, the Board finds that the hardship does not result primarily from the Applicant's desire to realize greater financial gain;
> 3. . . . [T]he granting of the requested dimensional variance would alter the general character of the surrounding area and is not in accordance with the intent of the Ordinance and the Comprehensive Plan . . . .
> 4. The Applicant failed to demonstrate that if denied a dimensional variance the hardship that will be suffered will amount to more than a mere inconvenience . . . .
> 5. Since the Board finds that denial of the requested relief will not entail more than a mere inconvenience to the Applicant, the Board also finds that the relief requested is not the least relief necessary. . . .

(Resolution at 3-4, ¶¶ 1-5.)

Appellant James Weiss does not quarrel with the Zoning Board's decision that his hardship is due to the unique characteristics of the Property and does not result primarily from his desire for greater financial gain. He nonetheless asserts that the Zoning Board's decision that he failed to satisfy the third prong of the standard for dimensional relief—that the granting of the dimensional variance will not alter the general character of the neighborhood or contravene the Ordinance or the Comprehensive Plan—and the fourth prong—that the dimensional relief to be granted is the least relief necessary—is clearly erroneous in light of the reliable, probative and substantial evidence of record.

1
The Third Prong

In its decision, the Zoning Board explained its finding with regard to the third prong of the standard for granting dimensional relief:

> The Zoning Board finds that the granting of the requested dimensional variance would alter the general character of the surrounding area and is not in accordance with the intent of the Ordinance and the Comprehensive Plan. Many neighboring properties do not have front yard parking areas, therefore a denial of the requested relief results in the maintenance of and consistency with the land uses in the area.

(Resolution at 3 ¶ 3.) Appellant James Weiss argues that these findings are clearly erroneous.

a
Alteration of the General Character of the Area

In support of his argument that the Zoning Board clearly erred in determining that his request for dimensional relief would alter the character of the neighborhood, Appellant points to the testimony of Mr. Scotti, who the Zoning Board recognized as an expert in real estate, who offered testimony about the character of the surrounding area. Specifically, Mr. Scotti testified that even though the Property is in an R-3 residential zone, there are some commercial uses on and around Medway Street. (Tr. at 39.) Mr. Scotti stated:

> [T]his portion of Medway Street is in very close proximity to the Wayland Square commercial area. Directly abutting the subject to the west is a 25,000-square-foot blacktop parking lot which services the whole neighborhood, and then fronting on Wayland Avenue is a four-unit commercial building. Across the street are a Laundromat and a couple of more commercial buildings. Next door is the old People's Bank building which is now occupied by [a lawyer's office]. Going up and down Medway Street to the east, there's a two-unit—there are several twos and threes.

Id.

Mr. Scotti also provided the Zoning Board with photographs of several neighboring properties. (Scotti Report 3-7.) The photographs show a mix of commercial and residential uses. Mr. Scotti called the Zoning Board's attention to the parking arrangements of some of the nearby residences depicted in the photographs. In particular, he pointed out two residential structures—one next door to the Property and one across the street—that have front yard parking.[9] (Tr. at 40.) Mr. Scotti described the parking arrangements of these properties and of a neighboring condominium in the following exchange with Zoning Board member Varin:

> MR. SCOTTI: . . . The far corner of Medway, the northeast corner of Medway I guess, is occupied by a series of condominiums with garages under, with underground parking.
>
> MR. VARIN: I think that's the northwest.
>
> MR. SCOTTI: Correct, it is. In any event, directly across the street from the subject is a residential structure. If you turn to the pictures on page 5 of my report. The white building directly across the street has a couple of cars parking abutting directly to the east of the subject. . . .
>
> Next door to that is another residential structure which has a garage right in the front and you can see the vehicle parked in front of the garage doors.
>
> MR. VARIN: That vehicle was parked right there this morning.
>
> MR. SCOTTI: Yes, it was. I took the picture this morning.

(Tr. at 39-40.) Mr. Scotti also recommended that the Zoning Board grant the requested variance, in part, because he believed that Gregory Weiss' proposed landscaping would be "nicely done"

[9] In a later portion of the hearing, Mr. Scotti also asserted that the requested relief would be consistent because "some of the objectors, their parking is right in front." (Tr. at 60.) He did not, however, identify the objectors to whom he was referring.

such that it would be compatible with the neighborhood and would have no effect on neighboring property values. (Tr. at 41.)

The Supreme Court has counseled that when deciding whether a request for a dimensional variance—as opposed to a use variance—will alter the general character of the area, the inquiry should focus on the extent and nature of the relief requested. See Lischio, 818 A.2d at 693. To illustrate the type of dimensional variance that would be incompatible with surrounding properties, the Supreme Court, in Lischio, gave the example of a variance that completely eliminates the front yard and sidewalk in a residential neighborhood. See id. Moreover, the Supreme Court has indicated, in the slightly different context of use variances, that in areas that are a mix of commercial and residential uses, the proximity of the commercial uses to the residential structures, as well as the size and frequency of the commercial activities, are all relevant factors for determining the impact on the character of the area.[10] See D'Acchioli v. Zoning Bd. of Rev. of City of Cranston, 74 R.I. 327, 331-32, 60 A.2d 707, 710 (1948) (denying application to establish produce vendor in residential zone where commercial factory, cemetery and train tracks were of limited size and several hundred feet removed from residential area).

In the instant case, this Court is satisfied that there was sufficient competent evidence to show that Appellant's request for dimensional relief—to allow him to pave eighty-seven percent of the total area of his front yard in order to add four parking spaces to his already existing three to four spaces, in an area where most of the immediately adjacent structures were residential dwellings—was of such an extent as to impair the character of the neighborhood. First, although

[10] Granting of a use variance also requires a showing that the requested variance will not alter the general character of the area or impair the intent of the zoning ordinance or comprehensive plan. R.I. Gen. Laws § 45-24-41(c)(3).

Mr. Scotti recommended that the Zoning Board grant James Weiss' request, his testimony about the character of the area provided mixed support, at best, for his recommendation. Mr. Scotti specifically testified that there are residential two- and three-unit dwellings up and down the eastern portion of Medway Street. (Tr. at 39.) In addition, the photographs that Mr. Scotti presented to the Zoning Board also show a mix of commercial and residential properties. (Scotti Report 3-7.) More significantly, the photographs show that the structures directly across the street from the Property and abutting to the east are residential units. Id. at 5; see D'Acchioli, 74 R.I. at 331-32, 60 A.2d at 710. Finally, the portions of Mr. Scotti's testimony and the photographs on which Appellant relies show that only a few residences in the area have front yard parking, and those that do only have space for a "couple of cars" at most. (Tr. at 40.)

Furthermore, the Zoning Board had before it competent evidence of record that contradicts Mr. Scotti's testimony about the effect of Appellant's proposed parking expansion on the character of the area. Appellant emphasizes that Mr. Scotti was the only witness who the Zoning Board recognized as an expert. It is well established, however, that "'there is no talismanic significance to expert testimony [and it] may be accepted or rejected by the trier of fact.'" Murphy v. Zoning Bd. of Rev. of Town of S. Kingstown, 959 A.2d 535, 542 (R.I. 2008) (quoting Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998)). A zoning board may reject expert testimony where there is clear and competent evidence in the record contradicting such testimony. Restivo, 707 A.2d at 671. While a lay person's opinion on the effect of a proposed variance on property values is not competent evidence, lay person testimony "describing physical facts and conditions" is competent evidence on the basis of which a zoning board may reject expert testimony to the contrary. Id. (discussing Salve Regina College v. Zoning Bd. of Rev. of City of Newport, 594 A.2d 878, 882 (R.I. 1991)). Personal knowledge and observations

of the members of the zoning board are also competent evidence to contradict expert testimony, so long as the evidence is adequately disclosed on the record. Murphy, 959 A.2d at 542 n.6 (citing East Bay Cmty. Dev. Corp. v. Zoning Bd. of Rev. of Barrington, 901 A.2d 1136, 1157 (R.I. 2006)). On review, the Court does not weigh the evidence. See Budlong v. Zoning Bd. of Rev. of City of Cranston, 93 R.I. 199, 207, 172 A.2d 590, 593-594 (1961) (citing Haden v. Zoning Bd. of Rev. of City of E. Providence, 90 R.I. 108, 155 A.2d 333 (1959)).

Here, there was sufficient competent evidence to support the Zoning Board's rejection of Mr. Scotti's assertions. Neighbor Nina Tannenwald testified that most of the commercial uses in the area are limited to the western edge of Medway Street. (Tr. at 51.) Her testimony is consistent with Mr. Scotti's photographs. See Scotti Report 3-7. Additionally, the Zoning Board's decision and its record show that the Zoning Board was familiar with the area both from its site inspection of the Property and from previous applications from other neighbors in the area. (Resolution at 1; Tr. at 37, 101-103.); see Murphy, 959 A.2d at 542 n.6. On the record, several Zoning Board members discussed at length their observations of limited residential parking in the area. (Tr. at 100-103.) In its decision, the Zoning Board specifically noted that "the neighborhood in which the Property is located contains many dwelling areas in which there is insufficient parking available on site." (Resolution at 3 ¶ 1.)

The record also reveals evidence contradicting Mr. Scotti's assertion that Gregory Weiss' landscaping would be compatible with the area because it would be "nicely done." Zoning Board member Strother indicated that, at the time she viewed the Property, it looked "quite shabbily." (Tr. at 37.) Miriam McRobb, an abutter, further observed that "improvements" to the Property in the past had added to its shabby appearance. (Tr. at 48.) Mark Suchman, another abutter, noted that Gregory Weiss' removal of the grass and trees also had detracted from the

Property. (Tr. at 55.) While it is true that the neighbors' lay testimony was not competent evidence to contradict Mr. Scotti's expert testimony that the proposed dimensional variance would not affect property values, "the fact that there will be no negative impact on surrounding property, or even that abutting property will benefit from the granting of a variance, is not, by itself, sufficient to warrant zoning relief." Roland Chase, R.I. Zoning Handbook § 155 (2d ed. 2006) (citing Raposo v. Zoning Bd. of Rev. of Town of Middletown, 104 R.I. 216, 243 A.2d 99 (1968)).

Mr. Scotti did an excellent job in attempting to put the best face on Appellant's proposed parking expansion. Yet, from the equivocal nature of his testimony, the Zoning Board's personal knowledge of the problems with residential parking in the area, and neighbors' testimony about the predominately residential character of the neighborhood and out-of-character nature of Appellant's parking proposal and landscaping of his lot, the Zoning Board had sufficient grounds to reject his expert testimony. It had before it competent evidence to find that—despite the few neighboring properties with limited front yard parking and the smattering of nearby commercial buildings—Appellant's request to pave eighty-seven percent of his front yard to park four vehicles, in addition to the three to four vehicles in the driveway, was of such an extent as to be incompatible with the surrounding area. See Lischio, 818 A.2d at 693.

b

Contravention of the Zoning Ordinance and the Comprehensive Plan

Appellant further contends that the Zoning Board erred in finding that his proposed variance was contrary to the purposes of the Zoning Ordinance and the Comprehensive Plan. Citing various provisions of Article VII of the Providence Zoning Ordinance pertaining to

parking,[11] he contends that the ordinances evince a general intent that property owners should provide adequate, permanent, off-street parking on the same lot as the dwelling structure. He again relies on Mr. Scotti's testimony that the proposed variance would bring the Property closer to providing the eighteen parking spaces required by § 703.2 of the Ordinance. (Tr. at 40-42.) Appellant also notes Mr. Scotti's assertion that Gregory Weiss' proposed landscaping would be in accordance with the emphasis on green space in the Comprehensive Plan. (Tr. at 41.)

It is fundamental that, while a variance waives the strict letter of a zoning ordinance, it "should preserve the spirit and purpose of the ordinance." E.C. Yokley, Zoning Law and Practice § 20-1 (4th ed. 2002) (citing Bamber v. Zoning Bd. of Rev. of Foster, 591 A.2d 1220 (R.I. 1991)). With respect to dimensional variances in particular, our Supreme Court has instructed that, in determining whether a dimensional variance is contrary to the intent of an Ordinance or Comprehensive Plan, the inquiry must focus on the nature and extent of the relief requested. Lischio, 818 A.2d at 693 (emphasis added). For parking, a "variance to enable a property owner to provide off-street parking may not be so extensive as to change the zoning scheme established by the Ordinance." Edward H. Ziegler, Rathkopf's The Law of Zoning and Planning § 83:24 (4th ed. 2012) (emphasis added.)

[11] Specifically, James Weiss cites the following sections of the Providence Zoning Ordinance: § 700 Intent of Parking Ordinances (noting that it is the intent of § 700 to require minimum off-street parking space but discourage excessive paving); § 701 Accessory Parking ("Accessory parking required by this ordinance shall be located on the same lot as the principal structure or use the parking is intended to serve."); § 703 Parking Space Requirements (requiring 1.5 parking spaces per dwelling unit); § 704.2 Paving Limitations (limiting paving for parking purposes to no more than 33% of front yard area); § 706.1 Continuation of Facilities (stating that property owners have a continuing obligation to provide the requisite number of off-street parking spaces); and § 706.4 Off-Site Parking ("Off-street parking requirements may be provided on a separate lot from the lot containing the use for which parking is required, if the Director finds that the proposed location is within a reasonable distance of the use, the off-site parking conforms to this Ordinance, and the off-site parking is not required for another use.").

Again, this Court is satisfied that the substantial, reliable and probative evidence of record supports the Zoning Board's conclusion that the dimensional relief requested by Appellant is of such a nature and extent as to undermine the purposes of the Ordinance and the Comprehensive Plan. As noted, Appellant argues that the proposed variance would bring him closer to providing the eighteen parking spaces required by § 703.2 of the Ordinance. As the record reflects, however, James Weiss does not have to comply with § 703.2 because the Property has grandfathered status. (Tr. at 25, 56; Scotti Report 2.). The Zoning Board specifically cited this fact in its decision. (Resolution at 3 ¶ 1.) It is thus improper for Appellant to argue, in effect, that he is seeking to comply with a Zoning Ordinance from which he is exempt—§ 703.2—by violating a Zoning Ordinance with which he is required to comply—the paving restrictions of § 704.2.

Moreover, as one witness pointed out, even if James Weiss' variance is granted, he still would be ten to eleven spaces short of compliance with § 703.2. (Tr. at 51.) Additionally, in its report, the D.P.D. found that, but for the Property's grandfathered status, the twelve-unit dwelling in an R-3 zone would be a non-conforming use and that additional parking would increase the extent of this overdevelopment. (D.P.D. Report.); see Ahmad v. Zoning Bd. of Binghampton, 99 N.Y.S.2d 634 (App. Div. 1984) (denying variance for parking in residential zone where parking was to be used to support non-conforming use because parking did not "support and harmonize with a generally low density residential area" and thus, was contrary to the intent of the relevant ordinances). In its decision, the Zoning Board relied on the Department's report. (Resolution at 4 ¶ 6.)

With respect to the Comprehensive Plan, the Zoning Board further observed that it agreed with the Department's finding that the proposed variance would be inconsistent with the

Comprehensive Plan. (Resolution, p. 4 ¶ 6.) The Department specifically found that the variance would be inconsistent with Objective M6, Strategy H of the Plan. (D.P.D. Report.) Objective M6 pertains to parking and calls for the City to "[d]evelop a comprehensive citywide approach to parking that addresses parking needs both downtown and in the neighborhoods as adequate parking is crucial to the future economic development of the city." Providence Tomorrow: The Interim Comprehensive Plan, 62 (December 17, 2007).[12] Strategy H aims to "[r]educe the amount of surface parking in the city to increase green space and developable land through regulations . . . ." Id. at 63. In addition, neighbor Mark Suchman, in his testimony, and the Welshes, in their letter, all referenced Gregory Weiss' removal of grass and trees from the front yard. (Tr. at 55.) As such, there was substantial and reliable evidence of record to support the Zoning Board's determination that Appellant's request to use eighty-seven percent of his front yard in violation of § 704.2 of the Zoning Ordinance would be contrary to the intent of the Ordinance and the purpose of Objective M6, Strategy H of the Comprehensive Plan.

Accordingly, the Zoning Board's findings as to the third prong of the standard for granting a dimensional variance—that the variance proposed by Appellant would alter the character of the neighborhood and would contravene the Ordinance and the Comprehensive Plan—are not clearly erroneous in light of the substantial, reliable and probative evidence of record. Appellant's claim to the contrary, therefore, must be rejected.

[12] Mayor David N. Cicilline signed the Interim Comprehensive Plan into law on December 17, 2007. Mayor Angel Taveras and the Providence City Council adopted the final Comprehensive Plan on May 5, 2012. Objective M6, Strategy H in the Interim Comprehensive Plan from 2007 is nearly identical to Objective M6, Strategy H in the final Comprehensive Plan adopted in 2012.

2
Least Relief Necessary

Appellant James Weiss also contends that the Zoning Board's decision as to the fourth prong of the standard for dimensional relief—that the relief sought by him was not the least relief necessary—was clearly erroneous in light of the substantial, reliable and probative evidence of record. This Court disagrees.

An applicant seeking a dimensional variance must prove that "the relief sought is minimal to a reasonable enjoyment of the permitted use to which the property is proposed to be devoted." Standish-Johnson Co. v. Zoning Bd. of Rev. of Pawtucket, 103 R.I. 487, 492, 238 A.2d 754, 757 (1968); see also Lincoln Plastic Products Co. v. Zoning Bd. of Rev. of Town of Lincoln, 104 R.I. 111, 115, 242 A.2d 301, 303 (1968) (Zoning boards' authority to grant dimensional variances "is limited to the extent of relief demonstrated to be reasonably necessary to the enjoyment of the permitted use sought to be served."). A zoning board may not grant more relief than is necessary simply to suit the preferences of a particular applicant. See Roland Chase, R.I. Zoning Handbook § 157 (2d ed. 2006) (citing DiDonato v. Zoning Bd. of Review of Johnston, 104 R.I. 158, 242 A.2d 416 (1968) (applicant allowed a variance to construct a one-family house but not allowed to deviate from front and side yard restrictions to build larger than one-family house where applicant claimed a larger house was necessary because his family had grown)).

Here, with respect to the fourth prong of the requirements for a dimensional variance under § 45-24-41(c), the Zoning Board found that:

> [T]he relief requested is not the least relief necessary. The Applicant currently has 3-4 parking spaces available on his Property. He seeks parking for an additional four vehicles in his front yard, which the Zoning Board finds to be a significant request, particularly in light of the Applicant's

> ability to procure parking from its next door neighbor—a commercial parking lot . . . .

(Resolution at 4 ¶ 5.) In arguing that the Zoning Board clearly erred in its decision, James Weiss relies on Mr. Scotti's opinion that the relief he sought would be the least relief necessary. (Tr. at 41.) He also relies on the testimony of the Property manager, Gregory Weiss, who described the inconvenience for his tenants in parking in the driveway and in the lot. (Tr. at 29-31.) Gregory Weiss testified that the Property's driveway could fit only three to four small cars if tenants parked the cars in tandem. (Tr. at 29.) Consequently, if one tenant needed to move his or her car, he or she would have to call the other tenants to come down and move their cars, sometimes at odd hours of the day or night. Id. He also indicated that the commercial lot was a poor solution to his parking problem because his tenants could not enter it until after 5 p.m. and had to exit it by 8 a.m. (Tr. at 30.) He testified that he has no access to twenty-four hour parking. Id. According to Gregory Weiss, this arrangement interferes with his efficient management of the Property because he receives calls "every other day" from the lot's manager about tenants who have not exited the lot by 8:15 a.m. (Tr. at 31.) In the event of a snowstorm, tenants have to move their cars out of the lot or risk their cars being plowed in. (Tr. at 30-31.) He explained that the current parking arrangement leaves him entirely at the mercy of the lot owner should the owner decide to raise rates or terminate their arrangement. (Tr. at 45.) Both Mr. Romano and Mr. Scotti expressed the opinion that property owners should be able to do what they please with their land without having to rely on the assistance of their neighbors. (Tr. at 61, 63.)

Yet, the Zoning Board had before it reliable, probative and substantial evidence to show that Appellant's request to allow an additional four parking spaces in his front yard was not the minimum relief needed for the use of his dwelling structure. All three neighbors who testified contradicted Gregory Weiss' assertion that Appellant's tenants do not have access to twenty-four

hour parking in the commercial lot. See Budlong, 93 R.I. at 207, 172 A.2d at 593-4 (reviewing court does not weigh evidence on appeal from decision of zoning board). Miriam McRobb, whose daughter previously rented an apartment at the Property, testified that the time restrictions for the lot do not apply on weekends. (Tr. at 47.) She also informed the Zoning Board that there are currently five or six people who rent twenty-four hour spaces in the lot and that more twenty-four hour spaces are available. (Tr. at 59.) Nina Tannenwald testified that she rented a twenty-four hour space in the lot for a cost of $80 per month. (Tr. at 50.) She confirmed Ms. McRobb's assertion that more such spaces are available. (Tr. at 59.) According to Ms. Tannenwald, one of James Weiss' tenants currently rents a twenty-four hour space, and a variety of arrangements can be made with the lot owner. (Tr. at 50.) Finally, Mark Suchman informed the Zoning Board that he had rented a twenty-four hour space in the lot for two years without interruption or the need to move his car during a snow storm. (Tr. at 56.)

In addition, there was also testimony pointing out that James Weiss had managed his apartment building for many years prior to 2006 with only three to four parking spaces in the driveway. (Tr. at 49.) Moreover, the Zoning Board members observed, during their site inspection of the Property and during their previous site inspections in the area, that many neighboring properties managed with no parking or insufficient parking. (Tr. at 101.) The Zoning Board thus had before it competent evidence that Appellant's request to pave eighty-seven percent of his front yard area to add four parking spaces in his front yard, in addition to the already existing three to four spaces in the driveway, was not the least relief necessary. Cf. Travers v. Zoning Bd. of Rev. of Town of Bristol, 101 R.I. 510, 225 A.2d 222 (1967) (upholding grant of variance to applicant who wished to replace an old one-car garage, measuring seventeen

feet by eighteen feet, with a two-car garage, measuring twenty feet eight inches by twenty-two feet, where applicant claimed old garage was too narrow for modern vehicles).

This Court also disagrees with Appellant's argument that landowners cannot be required to depend on leased parking space in a neighboring lot. While this Court is not insensible to James Weiss' understandable desire not to be subject to the whims of an independent landlord in trying to meet the needs of his tenants, it is nonetheless satisfied that the Zoning Board did not err in considering his tenants' ability to lease space in the commercial lot abutting the Property.

Indeed, section 706.4 of the Zoning Ordinance—one of the provisions James Weiss cites—expressly allows landowners to satisfy off-street parking requirements by providing the requisite number of spaces off premises. Section 706.4, in pertinent part, specifies:

> Off-street parking requirements may be provided on a separate lot from the lot containing the use for which parking is required, if the Director finds that the proposed location is within a reasonable distance of the use, the off-site parking conforms to this Ordinance, and the off-site parking is not required for another use . . . .

Providence Zon. Ord. § 706.4. As such, section 706.4 explicitly contemplates landowners using separate lots to provide off-street parking so long as the lot is "within a reasonable distance" from the principal use. See Edward H. Ziegler, Rathkopf's The Law of Zoning and Planning § 83:20 (4th ed. 2012) ("If a zoning ordinance requires off-street parking within a certain distance of a particular use, there is no necessity to provide that parking on the same zoning lot as the use . . . .").

Notably absent from § 706.4 is any requirement that the owner of the principal use also own or control the separate lot or guarantee continued access to the leased space. The absence of such a requirement distinguishes this case from a decision of the Massachusetts Appeals Court in Howland v. Bd. of Appeals of Plymouth, 434 N.E.2d 1286, 1288 (Mass. App. Ct. 1982). In

Howland , the Court reversed a zoning board of appeals' grant of a special permit to a restaurant where the restaurant provided parking on a municipal wharf, but where the relevant ordinance—in contrast to the municipal ordinance at issue here—specified that "off-premises parking shall be in possession, by deed or lease, of the owner of the use served."

Moreover, at least one court has interpreted a zoning ordinance similar to § 706.4 of the Providence Zoning Ordinance as impliedly allowing the use of leased space for meeting off-street parking requirements. See Tape Vee Corp. v. Town Bd. of Hempstead, 292 N.Y.S.2d 254, 255 (N.Y. App. Div. 1968). In Tape Vee, the town board issued resolutions approving the site plan and parking facilities of the applicant company. See id. The relevant ordinance required the applicant to "'provide off-street automobile parking spaces either on . . . premises or off premises within three hundred feet of such premises' for 361 automobiles." Id. The applicant planned to provide 261 of the required 361 spaces by leasing nearby land; the lease specified that it would only run for a five-year period and was terminable at the election of the landlord. Id. The New York Supreme Court, Special Term, vacated the town board's decision, reasoning that the intent of the ordinance was to have off-premises parking "continue to be available, without diminution, for a reasonable number of years . . . ." Tape Vee Corp. v. Town Bd. of Hempstead, 287 N.Y.S.2d 590, 592 (N.Y. Sup. Ct. 1967). The Supreme Court found that the lease in question did not offer sufficient long term protection and was, therefore, contrary to the ordinance. Id. The Appellate Division reversed, reasoning instead that "[a]s the Building Zone Ordinance condoned off-premises parking, it impliedly contemplated lease arrangements." Tape Vee, 292 N.Y.S.2d at 255.

Section 706.4 of the Providence Zoning Ordinance at issue in the instant case—like the New York zoning ordinance at issue in Tape Vee and unlike the Massachusetts ordinance at

issue in Howland—permits off-premises parking without any requirement that the owner of the principal use own or possess the off-premises facility. It thus implicitly condones off-premises parking such as that relied on by the Zoning Board here in its decision to deny dimensional relief.

In addition, a recent decision of another justice of this Court undercuts Appellant's assertion that he should not have to rely on leased parking space. See One Athenaeum Row Assocs., L.L.C. v. Kelly, No. 2007-1377, slip op. (R.I. Super. Ct. Feb. 22, 2010). In Athenaeum Row, three homeowners of three identical townhouses filed applications requesting relief from ordinances establishing minimum rear and side yard dimensions, paving coverage restrictions, and minimum parking requirements in order to construct parking decks in the rear of each of their yards to provide three parking spaces for each town home. Id. at 2. Historically, the residents of the town homes had leased parking spots from Brown University, but recent changes to those leases made them subject to cancellation on one year's notice. Id. at 3. One owner testified that shortly after closing on the purchase of his town home, he received a letter from Brown University informing him that it would not lease him parking space. Id. at 5. The owner, however, did not introduce the letter into evidence. Id. There was conflicting testimony from the President of the local Neighborhood Association who indicated that, although Brown University had rejected a homeowner's attempt to buy a parking space, it was renewing all leases. Id. at 10. The property owners suggested that they were not allowed to discuss the lease terms—other than the notice provision—because the leases contained confidentiality clauses. Id. The Chairman of the Zoning Board recommended continuing the hearing to allow a representative of Brown University to testify about the lease provisions. Applicant's counsel, however, declined the Chairman's offer. Id.

In denying the homeowners' applications, the Zoning Board noted that the applicants had continued "'to use the parking spaces without interruption under the terms of the new lease for over four years.'" Athenaeum Row, No. 2007-1377, slip op. at 16. The Zoning Board further indicated that it "'was uncomfortable with the various representations being made regarding Brown [University] without either a Brown [r]epresentative present or any documentation . . . ." Id. Upon review, the Superior Court affirmed the Zoning Board's denial of the homeowners' applications. Id. at 27. In affirming the Zoning Board's finding that denial of the request would not amount to more than a mere inconvenience, the Court specifically referenced the availability of leased parking spaces from Brown University. Id. at 23.

In the instant case, the evidence of the availability of leased off-street parking is even stronger than the evidence in Athenaeum Row. Here, neither James Weiss nor Gregory Weiss testified that the lot owner has refused to rent parking spaces to their tenants. To the contrary, no less than three of James Weiss' neighbors specifically testified as to the availability of twenty-four hour parking in the lot and the arrangements that can be made with the lot owner. (Tr. 47, 50, 56, 59.)

This Court's review of the relevant case law thus leads it to conclude that the Zoning Board properly considered James Weiss' tenants' ability to park in the commercial lot. His desire to not be at the mercy of a landlord did not obligate the Zoning Board to grant his request for dimensional relief. Accordingly, the Zoning Board's decision that the requested variance was not the least relief necessary was not clearly erroneous in light of the substantial evidence of record.

B
Mere Inconvenience Standard

In addition to satisfying the four-prong test for dimensional relief, codified in R.I. Gen. Laws § 45-24-41(c)(1)-(4) and § 902.3(A) of the Providence Zoning Ordinance, an applicant for a dimensional variance also must demonstrate that the hardship that he or she will suffer if the variance is not granted will "amount[] to more than a mere inconvenience." § 45-24-41(d)(2).[13] Appellant argues that in denying his request for a dimensional variance, the Zoning Board committed an error of law by misconstruing the standard for what constitutes "more than a mere inconvenience" under § 45-24-41(d)(2) and § 902.3(B)(2) of the Providence Zoning Ordinance.

In the recent past, the "mere inconvenience" standard has undergone several legislative amendments and judicial reinterpretations. Prior to 1991, Rhode Island courts and zoning boards applied the judicially created Viti doctrine, which held that an applicant for a dimensional variance need only show that the hardship that he or she would suffer if denied relief would amount to more than a mere inconvenience. See Viti v. Zoning Bd. of Rev. of City of Providence, 92 R.I. 59, 64-65, 166 A.2d 211, 213 (1960); see, e.g., Travers, 101 R.I. 510, 513,

[13] Section 902.3(B)(2) of the Providence Zoning Ordinance has an identical requirement:

> The Zoning Board shall, in addition to the above standards, require that evidence be entered into the record of the proceedings showing that:
> . . . .
> 2) in granting a dimensional variance, that the hardship that will be suffered by the owner of the subject property if the dimensional variance is not granted shall amount to more than a mere inconvenience . . . .

Providence Zon. Ord. § 902.3(B)(2). The state statute and municipal Zoning Ordinance further specify that "[t]he fact that a use may be more profitable or that a structure may be more valuable after the relief is granted" does not constitute grounds for relief. R.I. Gen. Laws § 45-24-41(d)(2); Providence Zon. Ord. § 902.3(B)(2).

225 A.2d 222, 223-24 (applying Viti doctrine to request for dimensional variance to deviate from lot-line and area restrictions); Gardiner v. Zoning Bd. of Rev. of City of Warwick, 101 R.I. 681, 689-90, 226 A.2d 698, 702-03 (1967) (applying Viti doctrine to request for dimensional variance to deviate from front and rear yard setback requirements). In 1991, the Legislature increased the burden on applicants for dimensional variances by amending § 45-24-41(d)(2) to require an applicant to show that "there is no other reasonable alternative to enjoy a legally permitted beneficial use of [his or her] property." See Sciacca v. Caruso, 769 A.2d 582, 583 n.6 (R.I. 2001) (acknowledging that the 1991 amendment supplanted the Viti doctrine and made it more difficult for property owners to obtain dimensional variances). In 2002, the General Assembly subsequently removed the "no reasonable alternative" language from § 42-24-41(d)(2). The Supreme Court in Lischio v. Zoning Bd. of Rev., 818 A.2d 685, 692 (R.I. 2003) then declared that the 2002 amendment constituted a revival of the Viti doctrine.

Appellant argues that the Zoning Board incorrectly applied the more rigorous—and now obsolete—standard from 1991 rather than the more lenient—and now reinstated—Viti standard. He cites the following exchange between Zoning Board members York and Strother:

> MADAM CHAIR: I guess what—the fact is there is a parking lot right next door that apparently is available. Whether that is the first choice or not, of course I assume that is not the first choice, but in a lot of these places, a lot of these cases, we've seen situations where there really hasn't been a viable alternative.
>
> MR. STROTHER: In fact, a lot of them there isn't.
>
> MS. UNDERWOOD:[14] And this is a viable one.
>
> MADAM CHAIR: And this one seems—you can't get too much more convenient than having a big parking lot right next door.

[14] Ms. Underwood is an alternate non-voting member of the Zoning Board. (Appellant's Br. 15.)

> And on the other hand, if the argument is that the property should be able to provide the needs is a legitimate argument, but I guess I don't –
>
> MR. STROTHER: This is murkier than other cases.
>
> MADAM CHAIR: It is a lot murkier, because there is something right next door and it apparently is available and we're not dealing with a situation where it is not available, where there's the hardship that says I don't have any other reasonable alternative.
>
> MR. STROTHER: If we had a piece of property that is landlocked and didn't have nothing in it and parking wasn't available, then we could do something.
>
> MS. UNDERWOOD: The other things [sic] is for all these other ones in the neighborhood, they have nothing and they're asking to pave across the front. They already can provide the three or four that the others in the neighborhood can and they can satisfy the other parking next door. He's asking for eight or seven or eight on this lot. It is the existing long driveway and across the front . . . .

(Tr. at 99-101.) (emphasis added.)

Appellant essentially contends that because Chairwoman York used the phrase "other reasonable alternative" during this exchange, the Zoning Board committed an error of law, requiring this Court to quash its decision. This Court is reminded, therefore, that in contrast to findings of fact, a zoning board's determinations of law "'are not binding on the reviewing court.'" Pawtucket Transfer, 944 A.2d at 859 (quoting Gott v. Norberg, 417 A.2d 1352, 1361 (R.I. 1980) (internal quotation omitted)). Instead, this Court must review the Zoning Board's decision de novo "'to determine what the law is and to determine its applicability to the facts.'" Id.

In applying the Viti standard for dimensional relief, our Supreme Court has clarified that while "an applicant is not required 'to prove a loss of all beneficial use in order to establish a

[right] to relief,'" he or she must show more "'than that the var[iance]…is for him [or her] a preferable alternative to compliance therewith, where compliance might be had, albeit with some inconvenience.'" Travers, 101 R.I. at 513, 225 A.2d at 224 (quoting H.J. Bernard Realty Co. v. Zoning Bd. of Rev. of Town of Coventry, 96 R.I. 390, 394, 192 A.2d 8, 11 (1963)). In other instances, the Supreme Court has alternatively expressed the "mere inconvenience" standard as requiring an applicant to prove that a dimensional variance "is minimal to a reasonable enjoyment of the permitted use to which the property is proposed to be devoted," Standish-Johnson, 103 R.I. at 491, 238 A.2d at 757, or is "reasonably necessary for the full enjoyment of a permitted use." Roland Chase, R.I. Zoning Handbook § 165 (2d ed. 2006) (citing Westminster Corp. v. Zoning Bd. of Rev. of City of Providence, 103 R.I. 381, 238 A.2d 353 (1968); DiDonato, 104 R.I. 158, 242 A.2d 416; Raposo, 104 R.I. 216, 243 A.2d 99; and others as "recognizing or implying that the two phrases are synonymous.").

In deciding whether a dimensional variance is "reasonably necessary" for an applicant to fully enjoy his or her chosen use, zoning boards are not prohibited from considering the property owner's available options—other than a variance—for enjoying that use. See Raposo, 104 R.I. at 219-22, 243 A.2d at 102-03 (considering an alternative construction plan that would comply with lot line restrictions and obviate applicant's need for a variance.) For parking in particular, the Supreme Court has declined to find hardship amounting to more than a mere inconvenience where an applicant could enjoy his or her use without a variance but seeks a variance, in part, to provide more parking space. See Apostolou, 120 R.I. at 509, 388 A.2d at 825-26 (denial of variance held not more than a mere inconvenience where applicant could complete construction without variance but claimed denial would aggravate parking situation.); H.J. Bernard Realty, 96 R.I. at 394, 192 A.2d at 11 (denial of variance held not more than a mere inconvenience where

applicant admitted he could construct desired addition within requirements of ordinance but said doing so would decrease space available for parking). In summation, a review of the case law exploring the contours of the Viti doctrine shows that a zoning board may not require an applicant for a dimensional variance to prove that he or she has no reasonable alternative to enjoy a permitted use of his or her property. See Travers, 101 R.I. at 513, 225 A.2d at 224. This case law also shows, however, that Viti does not prohibit—and in some cases may require—a zoning board's consideration of an applicant's options other than a dimensional variance in determining whether the variance is reasonably necessary for enjoying his or her chosen use, or is simply a more convenient preference of the applicant. See H.J. Bernard Realty, 96 R.I. at 394, 192 A.2d at 11; Raposo, 104 R.I. at 219-22, 243 A.2d at 102-03.

The Zoning Board's record and decision here show that it pursued a permissible line of inquiry under Viti. When Chairwoman York's use of the phrase "other reasonable alternative" is read in context, it is clear that the Zoning Board members were earnestly and appropriately trying to decide what amount of hardship a denial of the variance would impose on Appellant James Weiss. In making this decision, they discussed the inconvenience—or lack there of—of using the commercial lot. In her statement immediately preceding the statement to which Appellant objects, Chairwoman York reasons, "you can't get too much more convenient than having a big parking lot right next door." (Tr. at 100.) (emphasis added.) Additionally, at the outset of the cited exchange, Chairwoman York sparked this line of discussion by observing:

> [T]he fact is there is a parking lot right next door that apparently is available. Whether that is the first choice or not, of course I assume that is not the first choice, but in a lot of these places . . . we've seen situations where there really hasn't been a viable alternative.

(Tr. at 99-100.) In other words, Chairwoman York believed that the dimensional variance sought by Appellant was not necessary because neighbors in the surrounding area had managed with insufficient parking. The lot was a viable solution to Appellant's parking problem, in her view, even though it may not have been his preferred solution. This analysis was legal and proper under Viti. See Caccia v. Zoning Bd. of Rev. of City of Providence, 83 R.I. 146, 113 A.2d 870 (1955) (quashing grant of variance from lot coverage restrictions to allow construction of one car garage for lack of hardship where dwelling already exceeded coverage restrictions, others in area had managed to abide by coverage restrictions, and only reason applicant claimed variance was necessary was lack of land); accord Patullo v. Zoning Hearing Bd. of Twp. of Middletown, 701 A.2d 295, 300 (Pa. Commw. Ct. 1997) ("As this Court has consistently held, the need or desire to expand the existing garage for [] adding off-street parking to a residential dwelling does not establish unnecessary hardship required for granting a variance.") (citations omitted).

To the extent that Appellant suggests that the mere use of the phrase "reasonable alternative" in any context reflects legal error on the part of the Zoning Board, therefore, this Court disagrees. The statutory definition of a dimensional variance in § 45-24-31(62)(ii) retains the requirement that an applicant must demonstrate that "there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property" other than the requested variance.[15] See Roland Chase, R.I. Zoning Handbook § 165 n.10 (2d ed. 2006) (discussing Legislature's retention of "no other reasonable alternative language" in definition of dimensional variance).

[15] For the full statutory definition of a dimensional variance under R.I. Gen. Laws § 45-24-31(62)(ii), see Part III A of this Decision.

Moreover, a review of the Zoning Board's findings in its decision with respect to the "mere inconvenience" requirement further demonstrates that it applied the correct standard. The Zoning Board specifically found that:

> The applicant failed to demonstrate that if denied a dimensional variance the hardship that will be suffered will amount to more than a mere inconvenience. The testimony indicated, and the Zoning Board also observed, that to the immediate west and abutting the Property is the lot containing approximately 90 parking spaces where five tenants of the Property are currently parking. The Applicant did not testify that he is unable to rent apartments because of the lack of on-site parking; rather, he testified that the hours that his tenants are permitted to park in the neighboring lot are not 'accommodating with their work schedule and other things.' Accordingly, the Zoning Board does not find this hardship to be more than a mere inconvenience or sufficient enough to permit front yard parking . . . .

(Resolution at 3-4 ¶ 4.) Based on Gregory Weiss' testimony that all residential apartment units at the Property are currently rented and the neighbors' testimony about availability of parking in the commercial lot, the Zoning Board concluded that the only hardship that Appellant could demonstrate was that the lot's hours are not convenient for his tenants' schedules. (Tr. at 46, 56, 59, 29-31.) In fact, the Zoning Board specifically quoted Gregory Weiss' testimony that the hours of the lot are "not 'accommodating with [his tenants'] work schedules . . . .'" (Resolution at 3-4 ¶ 4; Tr. 30.) The cited exchange from the hearing and the Zoning Board's decision demonstrate to this Court that the Zoning Board inquired into the level of hardship that denial of the variance would impose on Appellant. It decided that, in light of James Weiss' ability to maintain full occupancy of his rental property and provide parking next door, albeit with some inconvenience, the dimensional variance was not necessary for him to continue to use the Property as a dwelling structure. See Standish-Johnson, 103 R.I. at 492, 238 A.2d at 757 ("[Viti]

does not stand for the proposition that a denial of more relief than is necessary constitutes an abuse of discretion.") Accordingly, this Court is satisfied that the Zoning Board correctly applied the "mere inconvenience" standard, as a matter of law, in denying Appellant's request for a dimensional variance.

C
Arbitrary and Capricious

Finally, Appellant James Weiss argues that the Zoning Board's denial of his application for a dimensional variance was arbitrary and capricious and an abuse of discretion. Specifically, he asserts that the Zoning Board's decision was arbitrary because four months before denying his request for dimensional relief, the Zoning Board granted a similar request made by his immediately adjacent neighbor.

A zoning board's decision is not arbitrary or an abuse of discretion where the record makes clear that there was "competent evidence" upon which the zoning board rested its decision. See Boisvert v. Zoning Bd. of Rev. of Town of S. Kingstown, 94 R.I. 107, 110, 178 A.2d 449, 451 (1962); compare V.S.H. Realty, Inc. v. Zoning Bd. of Rev. of City of Warwick, 103 R.I. 16, 19, 234 A.2d 355, 357 (1967) (holding that denial of variance from set-back requirement was arbitrary and capricious where zoning board based decision on its observation of lot and knowledge of traffic in area, but where record failed to disclose what zoning board observed or what conclusions it drew from knowledge of area) with Cole v. Zoning Bd. of Rev. of City of E. Providence, 102 R.I. 498, 506, 231 A.2d 775, 780 (1967) (ruling that grant of variance was not arbitrary or abuse of discretion where zoning board relied on "competent evidence" on issues of public interest and hardship). In zoning cases, the Supreme Court has defined "reasonably competent evidence" as "any evidence that is not incompetent by reason of being devoid of any probative force as to the pertinent issues." Zimarino v. Zoning Bd. of Rev.

of the City of Providence, 95 R.I. 383, 386, 187 A.2d 259, 261 (1963); see also Goldstein v. Zoning Bd. of Rev. of City of Warwick, 101 R.I. 728, 731-33, 227 A.2d 195, 198-99 (1967) (denial of special exception held arbitrary and capricious where the only evidence offered to contradict expert testimony on issue of property values was incompetent lay testimony).

It is axiomatic that every piece of property is unique: a grant of a variance for one property does not necessitate the granting of a similar variance for a neighboring property. See generally, E.C. Yokley, Zoning Law and Practice § 20-15 (4th ed. 2002) ("Since each case must be decided on its own facts, it follows that merely because the Zoning 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."); 83 Am. Jur. 2d Zoning § 781 ("The granting of a variance to one landowner does not require the granting of a similar variance to a second owner in the same neighborhood.") (citing Hendrix v. Bd. of Zoning Appeals of City of Va. Beach, 278 S.E.2d 814 (1981)). Instead, a zoning board must consider each application on its own merits. See Sewall v. Zoning Bd. of Rev. of Barrington, 93 R.I. 109, 114, 172 A.2d 81, 84 (1961) ("Prescinding from the wisdom of previous exceptions or variances, the question remains whether [applicant] met the burden of establishing a hardship in the circumstances of her particular claims."); accord Vito v. Zoning Hearing Bd. of Borough of Whitehall, 458 A.2d 620, 621 (Pa. Commw. Ct. 1983) (holding two previously granted variances did not oblige zoning board to grant third variance from rear yard requirements to construct garage because "[e]ach must be judged on its own merits.").

This Court will not find a zoning board's decision to deny relief to one applicant and grant relief to similar applicants to be arbitrary and capricious or an abuse of discretion so long as there is reliable and probative evidence supporting the zoning board's decision. See Mill

Realty, 841 A.2d at 675 (rejecting landowner's argument that zoning board's denial of requested relief was arbitrary and capricious in light of similar grants to neighbors where zoning enforcement officer provided reliable and probative evidence explaining differences among properties). Here, as this Court already has determined that there is substantial evidence of record to support the Zoning Board's decision to deny James Weiss' application for a dimensional variance, the fact that it granted a request for similar relief as to a neighboring property cannot render its decision arbitrary.

Moreover, even if this Court were to consider the merits of the denial of Appellant's application in light of the substance of the neighbor's application that the Zoning Board granted, it would not find the Zoning Board's decision in this case—and more particularly its finding that his proposed variance would alter the character of the area and not be in accordance with the Ordinance and the Comprehensive Plan—to be arbitrary or capricious or reflective of an abuse of discretion. Although the Zoning Board previously found expressly the opposite in its granting of a dimensional variance to Appellant's neighbor, Martingayle Properties, L.L.C, four months earlier,[16] there were significant differences in the two applications for dimensional relief. As a two-unit dwelling with four parking spaces, the neighboring property—in contrast to James Weiss' property—was already in compliance with the requirement of § 703.2 of the Ordinance of 1.5 spaces per dwelling unit in 2006 when Martingayle purchased the property. Id. at 1. Also in contrast to Appellant, Martingayle obtained the proper permits before making changes to its property. Specifically, Martingayle obtained building permits to convert the building from a two-family dwelling into two condominium units with four bedrooms on the second floor and three on the first floor. Id. The Zoning Board granted Martingayle relief from the paving

[16] See Resolution No. 9340, Appellant's Br., Ex. D.

restrictions of § 704.2 to allow it to add one additional parking spot to the front of its property, increasing the total number of spots from four spaces to five. Id. In granting Martingayle's request for relief, the Zoning Board noted that Martingayle had hired a landscape architect to landscape the front and rear yards, increasing the overall green space present on the property. Id.

Appellant essentially asserts that because the Zoning Board granted Martingayle permission to add one additional parking space to its already existing four spaces, to provide a total of five parking spaces for its two condominium units, the Board acted arbitrarily when it denied his request to add four additional parking spaces to his already existing three to four spaces, to provide a total of seven to eight spaces for his non-conforming twelve-unit apartment building. This Court disagrees.

While deliberating about Appellant's application, the Zoning Board referenced Martingayle's property during the following exchange:

> MR. VARIN: Well, the immediate surroundings, the house next door has four or five spaces in front that we authorized
> . . . .
> . . . .
> MS. UNDERWOOD: But this . . . one will have seven or eight.
>
> MR. EGAN: Four in front.
>
> MS. UNDERWOOD: Four in front and tandem parking. All you'll see is cars down the driveway. Seven or eight has a pretty different feel than three or four.

(Tr. at 103.) This exchange indicates that the Zoning Board believed that the extent of the relief sought by Appellant would be inconsistent with the neighborhood as a whole, whereas the extent of Martingayle's requested relief was consistent. See Lischio, 818 A.2d at 693. Moreover, in the decision granting Martingayle's request for dimensional relief, the Zoning Board noted that it based its finding about conformity with the area and the Comprehensive Plan "on its own

observation of the surrounding area . . . and further on the credible testimony of Mr. Scotti . . . ." (Resolution No. 9340 at 2 ¶ 4.)

As discussed previously, the Zoning Board is entitled to rely on its own observations and knowledge of the area, so long as it makes adequate disclosures on the record. See East Bay, 901 A.2d at 1157 (discussing Restivo, 707 A.2d 663). The Zoning Board is also entitled to rely on uncontradicted expert testimony. See Murphy, 959 A.2d at 542. Given that the Zoning Board here relied on competent evidence and drew a logical distinction between the two applications for dimensional relief filed by Martingayle and Appellant, this Court does not find that the Board's decision to deny James Weiss' application, after having granted Martingayle's application, was arbitrary and capricious or an abuse of discretion. See Mill Realty, 841 A.2d at 675 (holding that zoning board was entitled to rely on zoning officer's testimony that applicant—in contrast to neighbors—could connect to public water supply, in deciding to condition applicant's—but not neighbors'—building permit on requirement to connect to public water). In addition, this Court is not persuaded that the extent of Appellant's non-conformance with §§ 703.2 and 101.1 of the Providence Zoning Ordinance somehow entitles him to more parking spaces than his neighbor. Accordingly, this Court finds that the Zoning Board acted well within its discretion and in a principled, rather than arbitrary, fashion in denying Appellant's request for dimensional relief.

In affirming the Zoning Board's decision to deny Appellant James Weiss' request for a dimensional variance, this Court is not unaware that there is also strong evidence and persuasive arguments in favor of granting the application. As evidenced by the fact that three out of the five members of the Zoning Board voted in favor of granting the dimensional variance, the instant case can be characterized appropriately as a close decision. Nonetheless, the Zoning Board was

obligated to deny James Weiss' request because § 906.3 of the Zoning Ordinance requires a concurring vote of at least four members of the Zoning Board.[17] See Roland Chase, R.I. Zoning Handbook § 120 (2d ed. 2006) ("Since a bare majority vote is insufficient to grant relief from zoning restrictions, a negative decision may be made by a minority of the board."). This Court is equally obligated under § 45-24-69(d) to uphold the Zoning Board's decision, regardless of whether it agrees or disagrees with it, if it finds that the decision is supported by substantial evidence of record. See Mill Realty, 841 A.2d at 672. In light of the deference that the courts must afford local zoning boards because of their expertise, Pawtucket Transfer, 944 A.2d at 859, it is not the prerogative of this Court to second guess the Zoning Board's findings. See Apostolou, 120 R.I. at 506, 841 A.2d at 823. Moreover, a minority of a zoning board is entitled to make findings different from those of the majority. See Schofield v. Zoning Bd. of Rev. of City of Cranston, 99 R.I. 204, 205-06, 206 A.2d 524, 525 (1965) (citing Noyes v. Zoning Bd. of Rev. of City of Providence, 95 R.I. 201, 186 A.2d 70 (1962)). Indeed, this Court must apply the same deferential standard of review to minority findings.[18] See id. Specifically, this Court must

[17] Rhode Island General Laws § 45-24-57(2)(iii) requires local zoning boards to vote as follows:

> The concurring vote of four (4) of the five (5) members of the zoning board of review sitting at a hearing are required to decide in favor of an applicant on any matter within the discretion of the Zoning Board upon which it is required to pass under the ordinance, including variances and special use permits.

R.I. Gen. Laws § 45-24-57(2)(iii). Section 906.3 of the Providence Zoning Ordinance is substantially similar to § 45-24-57(2)(iii). See Decision, supra, at n.7.

[18] In Schofield, the zoning board members voted three to two in favor of granting the applicant's request for a variance but the zoning board ultimately denied the application because a provision of the R.I. Zoning Enabling Act—nearly identical to the provision applicable to the instant case—required a concurring vote of four members in order to grant a variance. 99 R.I. at 205, 206 A.2d at 525. The minority members of the zoning board made findings, dispositive of the application, that the denial of the variance would not result in unnecessary hardship and that the

uphold a minority's findings so long as those findings are supported by legally competent evidence of record. See Noyes, 95 R.I. at 203-294, 186 A.2d 71-72 (upholding denial of variance where three board members found applicant demonstrated sufficient hardship but two members found applicant did not demonstrate necessary hardship and where provision of Zoning Enabling Act—nearly identical to provision in instant case—required concurring vote of four members to grant variance.). In the instant case, the Zoning Board gave principled reasons for its decision and its findings were supported by legally competent evidence. This Court is thus obligated to uphold the Zoning Board's decision that denied the request of Appellant James Weiss for a dimensional variance.

IV
CONCLUSION

After reviewing the decision of the Zoning Board in light of the record below and the parties' memoranda on appeal, this Court is satisfied that the Board's decision is supported by substantial, reliable and probative evidence, is not affected by error of law, and is not arbitrary or capricious or reflective of an abuse of discretion. As such, the substantial rights of the Appellant have not been prejudiced by that decision. Accordingly, this Court affirms the April 27, 2009 decision of the Zoning Board of Review of the City of Providence that denied the application for a dimensional variance filed by Appellant James Weiss. In light of this Court's denial of the instant appeal, it likewise denies Appellant's request for reimbursement of reasonable litigation expenses under the Equal Access to Justice Act, § 42-92-3.

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requested variance would "substantially and permanently injure" neighboring properties. Id. at 206-07, 206 A.2d at 526. The Supreme Court stated that it is "[un]disputed that a minority may make findings other than those of the majority and that such findings will not be disturbed by this court on review when supported by legally competent evidence disclosed in the record." Id.

Counsel shall confer and submit to this Court forthwith for entry agreed upon forms of Order and Judgment that are consistent with this Decision.