STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

(FILED: August 22, 2013)

LYNN THURSTON and PAMELA ROHDENBURG	:	
v.	:	**C.A. No. NC-12-172**
ZONING BOARD OF REVIEW FOR THE TOWN OF PORTSMOUTH, by and through its members, KEVIN M. AGUIAR, JAMES E. EDWARDS, JOHN G. BORDEN, TIA G. SCIGULINSKY, and BYRON J. HALL, and JAMES SEVENEY and VALERIE SEVENEY	:	

DECISION

VAN COUYGHEN, J. This matter is before the Court on the appeal of abutters Lynn Thurston and Pamela Rohdenburg (Appellants) as a result of the Portsmouth Zoning Board of Review's (Board) approval of the petition by James and Valerie Seveney for a special-use permit and dimensional variances. For the reasons stated herein, this Court affirms the Decision of the Board. Jurisdiction is pursuant to Rhode Island General Laws section 45-24-69.

I

Facts and Travel

Mr. and Mrs. Seveney own the property at 72 Macomber Lane in Portsmouth, Rhode Island (the Property), which is identified as Lot 77 on Tax Assessor's Map 34. (Zoning Board Decision (Decision) at 1, Apr. 16, 2012.) Mr. Seveney inherited a partial interest in the Property from his mother in 2006, and he and Mrs. Seveney bought the remaining interest in 2007. Id. at 1. The fifty-foot wide Property contains a single-family residence and an outbuilding on its 8394 square feet. See id.; Pet. at 1. The single-family residence now includes the original single-story

structure on the Property and a two-story addition constructed in 1974 on the south side of the original structure. See Decision at 1-2. According to Mr. Seveney, other than a septic system and a new deck, little renovation has been done to the Property since that 1974 addition. Id. at 2. The outbuilding on the Property contains two rooms, one of which is a bathroom, but has no stove, oven, or kitchen sink. Id.

The Seveneys would like to renovate and expand the house. Because the Property is located in an R-20 zone, its approximately 8400 square feet are fewer than the 20,000 square feet that the Portsmouth Zoning Ordinance (Ordinance) requires for a single-family dwelling. See Ordinance Art. IV, Sec. B. Additionally, the fifty-foot frontage is less than the 110 feet of frontage required by the Ordinance. See id. Moreover, the orientation of the existing structure places it within the setbacks required under the Ordinance. See id.; Decision at 1. The fact that the house is not parallel to the lot lines means that the house's northern exterior wall is closer to the northern lot line at its northwesternmost point than it is at its northeasternmost point. The opposite is true for the southern exterior wall, which approaches the southern lot line at the southeasternmost point. See Decision at 1; Ex. 17, John Barker Class I Land Survey. Specifically, the northwest corner of the house is two and one-quarter feet from the northerly lot line separating the Seveneys' Property from the lot owned by Appellants. See Decision at 1; Ex. 17. The part of the house that sits closest to Appellants' lot is the original, single-story portion of the dwelling. (Decision at 1.) The two-story portion of the house is fourteen and one-quarter feet from the northern property line. Id. Also, the southernmost part of the Seveneys' house is fourteen and one-tenth feet from the southern lot line. See Decision at 2; Ex. 17. The Ordinance requires thirty-foot setbacks in the front and rear yards and fifteen-foot setbacks in side yards. The Seveneys' petition requests dimensional-relief requests from the side-yard setbacks to the

north and south of their house. See Ordinance Art. IV, Sec. B; Pet. at 2.

Based on their desire to renovate the Property, the size of the Property, and the orientation of the house on the Property, the Seveneys applied to the Portsmouth Zoning Board for dimensional relief. The original petition, filed in 2007, was granted, but that decision was appealed to this Court. See Thurston v. Zoning Bd. of Review, No. NC-2008-157, 2010 WL 4688073 (R.I. Super. Ct. Nov. 15, 2010) (Clifton, J.). The matter was remanded because the Board's written decision contained insufficient findings of fact. Id. Although the Court retained jurisdiction, a change in the composition of the Board required that the matter be heard de novo.

The Seveneys applied for a special-use permit and dimensional variances pursuant to the Ordinance. See Pet. at 1. The Board held hearings on May 19, June 16, June 23, July 21, August 17, September 29, October 13, October 20, and November 16, 2011, and on January 19, 2012, although it appears that evidence was heard beginning at the July 21, 2011 hearing. See Special Meeting Minutes, June 23, 2011, at 1. During the hearings, the Board heard testimony from Mr. Seveney, Richard Carrubba, Ms. Thurston, and Michael Corey, considered exhibits submitted with the petition, and received letters from neighbors in support of the petition. (Decision at 1.)

Mr. Seveney testified about the nature of the Property and his and his wife's plans for renovating it.[1] The plans called for renovating the house and increasing its square footage within its existing footprint. (Decision at 2.) The Seveneys intend to increase by twenty inches the height of the house's northernmost wall, which is part of the original, single-story portion of the

[1] Appellants filed a motion to stay and for injunctive relief to prevent the Seveneys from proceeding with construction. This Court denied the motion, but the Court's Order made clear that if the Seveneys chose to commence construction, they did so at their own risk. Although the Seveneys may have elected to begin the renovation, this Court will nevertheless discuss the Seveneys' plans prospectively.

house and faces Appellants' lot. See id. In that part of the house, the ceiling height is below six feet in some areas and below six feet and nine inches at its highest point, "which does not comply with the R[hode] I[sland] State Building Code." Id. The plans reflect that the height of the sidewall would be increased by twenty inches, and the roof's pitch and construction would change so that the roof would intersect the two-story portion of the house at the same point. Id. The overall height of the single-story portion of the house would not change. Id. Essentially, by changing the pitch and construction of the roof, the Seveneys plan to increase the interior volume of that portion of the house without adding an additional story. The addition would not encroach further on the side yard setback except to make the existing sidewall taller. These changes necessitated dimensional relief because that portion of the house is already within the side-yard setbacks. See Decision at 2, 4-5.

To the west of the two-story portion of the home that was added in 1974, Mr. Seveney and his wife intend to construct a two and one-half story addition. Id.; Ex. 4, Plans for Site. This addition would be built in place of an existing porch, with the addition extending two feet beyond the footprint of the porch. See Decision at 2; Ex. 4. Because the entire house, including the 1974 portion, is not square with the property lines, the house's corners extend into the setbacks. See Decision at 2, 4-5. As the proposed addition would essentially extend the dimensions of the 1974 portion of the house, the addition extends nine inches into the fifteen-foot side-yard setback from the northern property line, although the single-story portion of the home already sits within that setback. See id. at 2. The proposed addition would also decrease the distance between the house and the outbuilding to nine and one-half feet. Id. The Ordinance provides that there must be twenty feet between any two buildings on a single lot, unless one is a one, two, or three car garage; a tool shed; a greenhouse; or a cabana. Ordinance Art. IV, Sec.

C(7). The Seveneys contend that because the outbuilding is a cabana, it would not produce any need for relief, but they requested a variance from the building-separation requirement in case the Board concluded that such relief was required.

Finally, the Seveneys proposed to change the pitch of the roof in the two-story portion of the house, parts of which sit within the setbacks because of the house's orientation on the lot. (Decision at 2.) The part of the house on which the roof pitch will be changed sits ten inches into the fifteen-foot side-yard setback at the southeast and nine inches into the fifteen-foot side-yard setback at the northwest of the Property. Id. As with other changes to the house where it currently sits in relation to the lot lines, these roof-pitch changes necessitated dimensional relief.

Mr. Carrubba testified on behalf of the Seveneys as an expert in the field of real estate consulting and appraising. Id. at 3. According to Mr. Carrubba, the Seveneys' current house is one of the smaller houses in the neighborhood and the proposed structure would not exceed the median home size in the neighborhood. Id. The house's proposed footprint would grow two feet to the west, but Mr. Carrubba said that it would still sit more than thirty feet from Macomber Lane so as to avoid encroaching on the front-yard setback. See id.; Ex. 4. Further, Mr. Carrubba stated that the neighborhood is composed of single-family properties and that the Seveneys' proposal has no objectionable features and would not affect any abutter's solar rights or interfere with the use of their property. (Decision at 3.) Finally, the testimony revealed Mr. Carrubba's opinion that the design, details, and materials were all consistent with the Town of Portsmouth's guidelines, were consistent with the surrounding area, and would preserve the character of the surrounding area and enhance property values. Id.

Testifying in opposition to the petition were Ms. Thurston and her so-called common-law husband Mr. Corey. Ms. Thurston, who co-owns her lot with her sister, Ms. Rohdenburg, said

that the Seveneys should not be permitted to rebuild the original, single-story portion of the house because it sits too close to the property line that separates the Property from her lot. Id. Also, both Ms. Thurston and Mr. Corey said that they would not be able to enjoy the use of their property because the animosity created by this zoning dispute would make them uncomfortable using their side yard, which is adjacent to the property line. Id. at 2-3. Ms. Thurston actually submitted alternative plans that demolished the original, single-story portion of the house but that she believed provided sufficient living space. Id. at 2. Mr. Corey believed that the interior space of the house is the most important factor and that the Seveneys' home was disproportionately large compared to its lot and the neighborhood. Id. at 3. Finally, Ms. Thurston and Mr. Corey objected to the Seveneys' petition because they believed that excavation would damage the roots of a tree on their lot. Id.

On January 19, 2012, the Board met to discuss the evidence regarding the Seveneys' petition. (Tr. 2-43, Jan. 19, 2012.) In succession, the five members of the Board expressed their verbal approval for the Seveneys' petition. Id. On April 16, 2012, the Board issued a written Decision containing findings of fact and its unanimous decision to grant the petition, and that Decision was recorded on the same day. (Decision at 10.) Appellants timely filed this appeal on April 26, 2012. (Compl. at 1.)

II

Standard of Review

The Superior Court's review is guided by section 45-24-69(d), which prohibits the reviewing court from "substitute[ing] its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact." § 45-24-69(d). The court may "affirm the decision," "remand the case for further proceedings," or

> may reverse or modify the decision if substantial rights of the appellant have been prejudiced [by] findings, inferences, conclusions, or decisions which are:
> (1) In violation of constitutional, statutory, or ordinance provisions;
> (2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. The Superior Court's task is "to 'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" Lloyd v. Zoning Bd. of Review, 62 A.3d 1078, 1083 (R.I. 2013) (quoting Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). "'Substantial evidence . . . means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" Murphy v. Zoning Bd. of Review, 959 A.2d 535, 541 n.3 (R.I. 2008) (alteration in original) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). If the reviewing court "'can conscientiously find that the board's decision was supported by substantial evidence in the whole record,'" then the decision should be affirmed. Lloyd, 62 A.3d at 1083 (quoting Apostolou, 120 R.I. at 509, 388 A.2d at 825).

Issues of law, however, are reviewed de novo by the Superior Court. See West v. McDonald, 18 A.3d 526, 532 (R.I. 2011). A zoning board's "determinations of law, like those of a[n] . . . administrative agency, are not binding on the reviewing court; they may be reviewed to determine what the law is and its applicability to the facts." Id. (citing Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008)). The usual rules of

statutory construction apply to the construction of ordinances, so clear and unambiguous language receives its plain and ordinary meaning, while ambiguous ordinances are interpreted to "'establish[] and effectuate[] the legislative intent behind the enactment.'" Pawtucket Transfer Operations, 944 A.2d at 859 (quoting State v. Fritz, 801 A.2d 679, 682 (R.I. 2002)).

III

Analysis

In appealing the Board's Decision, Appellants claim error relating to the procedure followed by the Board, the relief sought by the Seveneys, and the sufficiency of the evidence supporting the Board's Decision. First, they assert that procedural errors committed by the Board require reversal. Next, they argue that the Seveneys sought to enlarge a nonconforming use without conforming to the dimensional requirements, which is prohibited by the Ordinance. Additionally, according to Appellants, the Seveneys' petition failed to request a lot-coverage variance, which Appellants contend was required. Lastly, Appellants also contend that the Seveneys presented insufficient evidence to satisfy the standards for dimensional variances.

A

Procedural Arguments

According to Appellants, the fact that the July 21, 2011 hearing was only partially recorded critically undermines the Decision. In addition, they maintain that the Board failed to record its Decision within the thirty-day time frame required by law.

Regarding Appellants' first argument, section 45-24-61(a) of the General Laws provides in part that

> [t]he zoning board of review shall keep written minutes of its proceedings, showing the vote of each member upon each question, or, if absent or failing to vote, indicating that fact, and shall keep records of its examinations, findings of fact, and other

> official actions, all of which shall be recorded and filed in the office of the zoning board of review in an expeditious manner upon completion of the proceeding. For any proceeding in which the right of appeal lies to the [S]uperior or [S]upreme [C]ourt, the zoning board of review shall have the minutes taken either by a competent stenographer or recorded by a sound-recording device.

§ 45-24-61(a). The Court is not convinced that the language of section 45-24-61 requires a verbatim transcript of the proceedings. The statute requires that the *minutes* are taken "by a competent stenographer or recorded by a sound-recording device." "Minutes" is defined by Black's Law Dictionary as "[m]emoranda or notes of a transaction, proceeding, or meeting." Black's Law Dictionary 1087 (9th ed. 2009). Similarly, "memorandum" is defined as "[a]n informal written communication used esp. in offices," and as "[a] short note written as a reminder" or "[a] written record or communication, as in a business office." See American Heritage Dictionary of the English Language 1096 (4th ed. 2000); Black's Law Dictionary at 1074. "Note" is defined as "[a] minute or memorandum intended for later reference," and "[a] brief record, especially one written down to aid the memory." See American Heritage Dictionary at 1203; Black's Law Dictionary at 1163. Because the statute requires only that "minutes" be taken by a stenographer or sound-recording device and because "minutes" may be memoranda or notes of the meeting, the statute may be satisfied by something less than a verbatim transcript or recording, such as a thorough summary of what transpired. See § 45-24-61(a); Black's Law Dictionary at 1087.

In this case, hearings at which the Board heard testimony took place on July 21, August 17, September 29, October 13, October 20, and November 16, 2011. The July 21, 2011 hearing was only partially recorded: the latter part of the meeting was not recorded. The fifty-seven page transcript made from the recording ends when the Board took a break at 8:25 p.m. (Tr. 57:18-20, July 21, 2011.) Appellants fault the Board for failing to provide a recording of the

second portion of the July 21, 2011 meeting. However, the Board's recording secretary prepared detailed minutes consisting of six typewritten pages that include an in-depth summary of the unrecorded portion of the meeting. See Board Meeting Minutes at 1-6, July 21, 2011.

It is important to note that Appellants were represented by current counsel who fully participated in the hearing. Appellants do not dispute the content of the minutes, contend that the minutes fail to accurately disclose what took place during the second part of the meeting, or reference any testimony that they insist was omitted from the minutes. Nor do Appellants dispute the qualifications of the recording secretary to create the minutes. Instead, Appellants base their argument on the failure to create a word-for-word recording of the proceedings in their entirety.

This Court is not persuaded that section 45-24-61(a) requires a verbatim recording of the proceedings. In previous cases, the Superior Court has reached the same conclusion. See Genereux v. Bruce, C.A. Nos. PC-09-7295, PC-09-7296, PC-09-7297, PC-10-0926, PC-10-3045, 2011 WL 1337983 (R.I. Super. Apr. 4, 2011) (Silverstein, J.); Palazzo v. Montanaro, C.A. No. PC-05-0569, 2006 WL 1756909, at *6-7 (R.I. Super. June 27, 2006) (Gibney, J.).

Even if the Court were to determine that the Board failed to comply with section 45-24-61, despite providing minutes from the July 21, 2011 meeting, "[t]he mistake w[ould go] to form rather than substance and did not prejudice petitioners." Staller v. Cranston Zoning Bd. of Review, 100 R.I. 340, 341, 215 A.2d 418, 419 (1965) (citing Taft v. Zoning Bd. of Review, 76 R.I. 443, 71 A.2d 886 (1950)). The meeting minutes reveal the questions and responses of members of the Board and Mr. Seveney, respectively. See Board Meeting Minutes at 4-6, July 21, 2011. Additionally, the minutes recount the questions of Appellants' counsel and Mr. Seveney's answers, including questions about the possibility of making repairs without enlarging

the house and what was counted in lot-coverage calculations. Finally, the subsequent meeting of the Board began with a discussion to clarify some issues addressed during the latter portion of the July 21, 2011 meeting. See Board Meeting Minutes at 1, Aug. 17, 2011.

It is clear that the legislative intent of the statute is to provide a sufficient record to enable judicial review. See § 45-24-61(a) (limiting the requirement to "proceeding[s] in which the right of appeal lies to the [S]uperior or [S]upreme [C]ourt"). In cases interpreting earlier versions of this statute, the Supreme Court reinforced that purpose. See Holmes v. Dowling, 413 A.2d 95, 98 (R.I. 1980) (citations omitted); DiDonato v. Zoning Bd. of Review, 104 R.I. 158, 161, 242 A.2d 416, 418 (1968); Iannuccillo v. Zoning Bd. of Review, 103 R.I. 242, 244-45, 236 A.2d 253, 255 (1967).[2]

In this case, the Court is satisfied that the minutes and recordings provided by the Board complies with both the language and the purpose of section 45-24-61(a).

Appellants' second procedural argument is based upon their assertion that the Board failed to comply with section 45-24-61 by failing to file its Decision within the time period prescribed therein. Section 45-24-61 provides that "[f]ollowing a public hearing, the zoning board of review shall render a decision within a reasonable period of time." Once the decision is rendered, it "shall be recorded and filed in the office of the city or town clerk within thirty . . . working days . . . ." Id.

The timing of the Board "render[ing]" its Decision in this case is not fatal. Appellants argue that the decision was rendered when the Board unanimously expressed verbal approval of the Seveneys' proposal on January 19, 2012. Appellants thus argue that the Board violated the thirty-day mandate stated in section 45-24-61 by filing its written Decision on April 16, 2012.

[2] The earlier versions of the statute did not include the last sentence of section 45-24-61(a).

Section 45-24-61 requires the Board to "render" its decision within a reasonable time and to record that decision within thirty days. The separate requirements for rendering a decision and recording that rendered decision plainly reveal that the "reasonable time" limitation refers to the Board's issuing of its written Decision, for only a written decision could be recorded and filed. See § 45-24-61.

Cases considering the suitability of zoning board's decisions further support this conclusion. In May-Day Realty Corp. v. Board of Appeals of City of Pawtucket, 107 R.I. 235, 238-40, 267 A.2d 400, 402-03 (1970), the Court faulted a zoning board for issuing a decision that "[wa]s not in writing, but instead, consist[ed] of a stenographic transcription of the comments of each board member with respect to the variance issue together with a recordation of their vote." The Court said that it "neither recommend[ed] nor encourage[d] the practice."[3] Id., 267 A.2d at 402-03. If this Court were to accept Appellants' argument that the Board rendered its decision when it verbally discussed their approval on the record, the decision would have resulted in precisely the type of flawed decision of which the May-Day Realty Court disapproved. See id., 267 A.2d at 402-03. Further countenancing the procedure followed by the Board here is the May-Day Realty Court's acknowledgment that deficient decisions result in a "disservice to the parties and to the public" and acknowledgment "that it is common practice for administrative bodies to request counsel to submit proposed findings of fact and conclusions of law and to seek the assistance of their legal advisers in the decision-writing process." See id., 267 A.2d at 402-03. Such advice is especially appropriate in cases such as this one, where the evidence was presented during multiple hearings held over the course of several months.

Given the history of this case, in which a remand by the Superior Court for additional

[3] After cautioning zoning boards about issuing adequate written decisions, the Supreme Court revealed that the true problems with the decision in May-Day Realty related to its content.

findings of fact resulted instead in a de novo hearing because the Board's composition had changed, the Board, to its credit, engaged in a thorough process to produce its written Decision. This Court finds that the procedure followed by the Board did not violate section 45-24-61.

B

Nonconforming Use

Appellants argue that the Seveneys' combination of a single-family house and an outbuilding makes the Property's use nonconforming, and consequently the house cannot be enlarged because the proposed enlargement does not comply with the setback requirements of the Ordinance.

Article VI, Section C(1) of the Ordinance provides that

> [w]ith Board of Review approval as a special use permit, a building or structure which is devoted to a non-conforming use lawfully existing at the time of the passage of this Ordinance may be added to or enlarged provided that the front, side and rear yards, lot coverage**,** height of such enlarged building or structure and parking requirements meet the zoning requirements of the district in which [it] is located.

Ordinance, Art. VI, Sec. C(1). A "nonconforming use" as defined in the Ordinance is "a lawfully established use of land, building, or structure which is not a permitted use in that zoning district" and includes "[a] building or structure containing more dwelling units than are permitted by the use regulations of a zoning ordinance." Id. at Art. II, Sec. B. To qualify under the Ordinance's definition of a "dwelling unit," "[a] structure or portion thereof" must "provid[e] complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation, and containing a separate means of ingress

and egress." Ordinance, Art. II, Sec. B.[4]

According to Appellants, the Seveneys' house is one dwelling and the outbuilding, referred to as a "small cottage or cabin," a "cabana," or even a "shed," is another dwelling. See, e.g., Decision at 1; Tr. 16:21, Jan. 19, 2012; Ex. 17. Thus, Appellants contend, the Property is a nonconforming use, the enlargement of which is proscribed by strict adherence to the setback requirements. See Ordinance, Art. II, Sec. B, Art. VI, Sec. C(1). This argument, however, strains the definition of "dwelling unit" and fails under the language of the Ordinance and the facts presented to the Board.

According to the Board's Decision, the outbuilding "consists of one room and a small bathroom, and has no stove, oven, kitchen, or kitchen sink." (Decision at 2.) The Board's characterization of the outbuilding as containing "no stove, oven, kitchen, or kitchen sink" is well supported by the record. See id.; Tr. 47:14-48:15, July 21, 2011; Tr. 7:20-8:23, Aug. 17, 2011.

For the outbuilding to be considered a dwelling unit, raising the number of dwelling units to two and making the Property's use nonconforming, the outbuilding must provide "permanent provisions for . . . cooking," which the evidence establishes that it does not. See Ordinance, Art. II, Sec. B; Decision at 2; Tr. 47:14-48:15, July 21, 2011; Tr. 7:20-8:23, 18:21-24, Aug. 17, 2011. The plain and ordinary meaning of "permanent provisions for . . . cooking" makes clear that the outbuilding, which lacks provisions for cooking of any kind, does not qualify as a dwelling unit. See Pawtucket Transfer Operations, 944 A.2d at 859; Decision at 2.

[4] The Ordinance's definition is substantially similar to the definition found in Rhode Island General Laws section 45-24-31(24), which defines "dwelling unit" as "[a] structure or portion of a structure providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation, and containing a separate means of ingress and egress."

Appellants' argument that the proposed renovation is an addition to or enlargement of a nonconforming use that must therefore stay within the setbacks depends on their assertion that the Seveneys plan to install temporary provisions for cooking in the outbuilding during the renovation of the house. During the Board's discussion, one member explained that "Mr. Seveney gave testimony that the cabana will have cooking facilities during construction of the main house, that those cooking facilities will be removed after construction is completed." Tr. 21:8-12, Jan. 19, 2012. However, the same member indicated that "[t]he cabana will be used for guest sleeping but not as a dwelling." Tr. 21:12-13, Jan. 19, 2012. Neither the Ordinance nor the evidence supports the proposition that the temporary or potential future installation of cooking equipment makes the current use of the Property nonconforming. See Ordinance, Art. II, Sec. B; Decision at 2. Because there is one dwelling on the Property, the proposed renovations cannot be an expansion of a two-dwelling, nonconforming use. See Ordinance, Art. II, Sec. B.

The evidence shows, and the Board concluded, that there is one single-family dwelling unit on the Property; thus, Article VI, Section C(1) does not apply to the Seveneys' proposed changes.[5]

C

Lot Coverage Variance

Appellants maintain that the Seveneys' proposal requires a lot-coverage variance, and that the Board's failure to include such relief is fatal to the Decision. According to the

[5] The Board also granted a variance for the minimum distance between buildings pursuant to Article VI, Section C(7) of the Ordinance, which requires at least twenty feet between buildings on a lot unless one of the buildings is a garage holding three cars or fewer, a toolshed, a greenhouse, or a cabana. This variance was requested despite the Seveneys' position that the outbuilding is a cabana. The granting of this variance has not been challenged before this Court.

provisions of the Ordinance applicable at the time the Seveneys filed their petition, the maximum percentage of lot coverage in an R-20 zone is twenty percent. Art. IV, Sec. B. Since February of 2008, and prior to its February 2012 amendment, Article IV, Section C, entitled "Special Yard and Coverage Requirements," contained provisions that included off-street parking space when calculating lot coverage. See Ordinance Art. IV, Sec. C(10) & n.4, C(11) & n.5.

Paragraph 10 of the Ordinance provides that "[i]n all districts, off-street parking provided and maintained as paved/impervious surface shall be counted as part of the allowable lot coverage as defined and specified herein and in Articles VII, VIII and IX of these regulations." Art. IV, Sec. C(10).[6] Additionally, paragraph 11 provides that

> [p]arking areas composed of pervious surfaces are encouraged for all land uses and lots, unless there are overriding environmental limitations, and may be provided to meet part of any required parking spaces on a lot. [Twenty percent] of such pervious surfaces which provide for grass surface shall be counted as part of the overall allowable lot coverage; otherwise 60% of such pervious surfaces shall be counted.

Art. IV, Sec. C(11).

After reviewing the record, the Board determined that the Seveneys' petition would result in a reduction of lot coverage, thus reducing the nonconformity. This is supported by the record as the Seveneys' proposed changes slightly increase the amount of building but significantly decrease the amount of off-street parking. Thus, the Board concluded that the reduction in the nonconformity negated the need for a lot-coverage variance. Id. Appellants maintain that the Board's conclusion constitutes error.

Section 45-24-39(a) provides that "[a]ny city or town adopting or amending a zoning

[6] Articles VII, VIII, and IX, referenced in paragraph 10 of Section C of Article IV, are titled "Special Use Permits," "Land Development Projects," and "Specific Development Regulations," respectively.

ordinance under this chapter shall make provision for any use, activity, structure, [or] building . . . , lawfully existing at the time of the adoption or amendment of the zoning ordinance, but which is nonconforming by use or nonconforming by dimension." That section allows local zoning ordinances to regulate nonconformance by dimension differently from nonconformance by use but requires ordinances to "permit the continuation of nonconforming development." § 45-24-39(a) & (b).

The protection afforded to nonconforming uses is based on the premise that property owners have the right to continue to use the property as it was used at the time an ordinance was enacted. "The doctrine of vested nonconforming uses is based upon the reluctance of courts to give zoning ordinances a retroactive effect which would destroy substantial, existing property rights." Edward H. Ziegler, Jr., 4 Rathkopf's The Law of Zoning and Planning § 72:3 at 72-7 (2005). Generally, "[a] lawfully existing nonconforming use or structure may continue to be operated by virtue of the protection afforded by statutory or ordinance provisions . . . ." Id. § 73:2 at 73-3. In Town of West Greenwich v. A. Cardi Realty Associates, 786 A.2d 354, 362 (R.I. 2001), the Rhode Island Supreme Court relied on the distinction between the continuation and expansion of nonconforming development, in that case a nonconforming use. After explaining that once "the nonconforming use ha[d] been established," it was "permitted to continue," the Court said that "the right to continue a nonconforming use does not generally include the right to expand or intensify the use." Id.; see also M.B.T. Const. Corp. v. Edwards, 528 A.2d 336, 339 (R.I. 1987) (holding, under previous enabling legislation, that ordinance was "invalid and void" because it failed to adequately protect the statutorily conveyed right to continue a nonconforming use).

The subsequent section in chapter 24 of title 45 of the General Laws dictates that

> [a] zoning ordinance may permit a nonconforming development to be altered under either of the following conditions:
> (1) The ordinance may establish a special-use permit, authorizing the alteration, which must be approved by the zoning board of review following the procedure established in this chapter and in the zoning ordinance; or
> (2) The ordinance may allow the addition and enlargement, expansion, intensification, or change in use, of nonconforming development either by permit or by right and may distinguish between the foregoing actions by zoning districts.

§ 45-24-40(a). Additionally, the ordinance "may require that the alteration more closely adheres to the intent and purposes of the zoning ordinance." Id. at (b). The Zoning Enabling Act thus mandates that towns make provisions for structures that are nonconforming by dimension and likewise prescribes two methods by which a nonconforming development may be altered.

The Ordinance addresses alteration of nonconforming development in several ways. In Section B of Article VI, entitled "Nonconforming Development," the Ordinance permits a nonconforming use to continue, "provided that [it] shall not in any way be expanded or enlarged," except as provided in the Ordinance. It also provides that a nonconforming use "may continue to function as a non-conforming use of the same type or any other use that is permitted by this Ordinance, or other such use may be added to the existing use within the confines of the existing building, with the approval of the Zoning Board of Review." See Ordinance, Art. VI, Sec. B(1)-(4). Section C of Article VI, entitled "Alteration of Nonconforming Development," provides that enlargements of structures devoted to a nonconforming use must receive special-use permits and must comply with dimensional requirements, see supra. Additionally, the Ordinance includes certain requirements for substandard lots of record, which are defined only by their inadequate size or frontage. See Ordinance Art. VI, Sec. A.[7] A nonconforming use may

[7] Lot coverage is not referenced in Article VI, Section A's description of substandard lots of record.

not be changed to another nonconforming use. See Ordinance, Art. VI, Sec. C(3). Finally, any alteration to a nonconforming development "shall adhere more closely to the intents and purposes of this Ordinance." See Ordinance, Art. VI, Sec. C(4). The Ordinance does not prohibit or require relief when a nonconformity is being reduced unless the proposed reduction is otherwise inconsistent with the zoning ordinance.

In Cohen v. Duncan, 970 A.2d 550, 556 (R.I. 2009), the Supreme Court considered a similar case in which the owner of a nonconforming development obtained a building permit to perform renovations. A neighbor appealed the issuance of the building permits to the zoning board. The zoning board concluded that the proposed renovations neither expanded nor changed the nonconforming use and instead made the use "less intense." Id. at 559. On appeal to the Superior Court, the trial justice determined that section 45-24-40 allows municipalities to allow alterations by permit or by right, but because the local ordinance failed to affirmatively permit alterations, the alterations were thus prohibited. Id. at 562.

The Supreme Court, "mindful that the authority of a zoning board and the validity of zoning ordinances are circumscribed by the Zoning Enabling Act," held that "although th[at] ordinance d[id] not affirmatively grant permission to 'alter' nonconforming uses by right, it clearly d[id] not affirmatively deny the right to make any alteration to a nonconforming use." Id. at 563. Because the Court had interpreted similar prohibitory language to restrain only what could be done by right, the Court said that that ordinance "by its plain meaning allow[ed] some alterations," as long as the alterations did not violate the specific prohibitions in that ordinance. Id. (citing Costantino v. Zoning Bd. of Review, 74 R.I. 316, 324-25, 60 A.2d 478, 482 (1948)). To conclude that all alterations were prohibited because they were not affirmatively permitted "would [have] serve[d] to transform the entire ordinance into meaningless surplusage." Id.

(citing Ruggiero v. City of Providence, 893 A.2d 235, 238 (R.I. 2006)).

Here, the Seveneys' single-family residence is a permitted use that is nonconforming by dimension as a result of the 2008 amendment requiring paved parking to be included in lot-coverage calculations. As described above, Article VI of the Ordinance dictates the requirements regarding nonconforming development. Neither the Ordinance nor the Zoning Enabling Act prohibited the Board in this case from allowing the specific alterations at issue. Under the facts of this case, the dimensional nonconformity is not being expanded or enlarged but is instead being reduced to more closely adhere to the Ordinance's intent. See §§ 45-24-39, -40; Ordinance, Art. VI, Secs. A, B, C. To read the lack of affirmative permission to make such an alteration as a prohibition would make the provisions actually in the Ordinance "'meaningless surplusage.'" See Cohen, 970 A.2d at 563 (citation omitted).

To hold otherwise, that is, to hold that the Ordinance prohibits reducing the extent of nonconformity of a legal, dimensionally nonconforming lot in a way that is more consistent with the Ordinance, would fail to protect the preexisting property rights associated with that nonconformity. Such a holding would fly in the face of both the Zoning Enabling Act's directive that nonconforming development must be allowed to continue, see § 45-24-39(b), and the basis for protecting that nonconforming development, which is the protection of established property rights. See 4 Ziegler, supra § 72:3 at 72-7.

The conclusion that the renovations in question did not increase the nonconformity because they did not violate the specific prohibitions in the Ordinance depends on the Board's factual determination that the lot coverage was being reduced. See Cohen, 970 A.2d at 562-63. The Board based its conclusion on Mr. Seveney's testimony and Exhibits 23 and 24, which show the calculations of lot coverage, including parking, for the existing and proposed development,

respectively. See Decision at 4; Ex. 23 Lot Coverage Calculation for Existing Structure with Parking and Travel Areas; Ex. 24 Lot Coverage for Proposed Structure, with Parking and Travel Areas. The Board's factual conclusion that the lot-coverage percentage is being reduced is supported by substantial evidence and did not constitute an error of law. See Exs. 23 & 24.

In its Decision, the Board parenthetically acknowledged that it must decide the Seveneys' petition as if paragraphs 10 and 11, relating to lot coverage, were applicable to the Property even though it believed that the provisions "were intended to apply only to large scale retail developments." The Board specifically noted in its Decision that an amendment that "would make it clear those sections do not apply to single family developments" had been approved by the Town's Planning Board and submitted to the Town Council. (Decision at 4.)[8]

Although the Board did not base its decision on the proposed amendment, the Board's Decision alternatively explained that if paved, off-street parking were not included and lot coverage was "restricted to buildings and other similar structures," no variance was required because the lot coverage does not exceed the mandated twenty percent. Id. The Board based its conclusion on Mr. Seveney's testimony and Exhibit 14, which shows the lot-coverage calculations without impervious off-street parking. See Decision at 4; Ex. 14 Lot Coverage Calculations.

Although this Court agrees that the Board was required to apply the Ordinance as it then existed, it is worth noting that if the Seveneys filed their petition today, the parking areas would not be included in the lot-coverage calculation, supporting the Board's alternative conclusion that no relief was required because the Seveneys' proposed lot coverage would not exceed the permitted percentage. See Najarian Realty Corp. v. Zoning Bd. of Review, 99 R.I. 465, 467-68,

[8] That amendment has since been passed by the Portsmouth Town Council. See Portsmouth Town Council Meeting Minutes at 6-7, Feb. 13, 2012.

208 A.2d 528, 529-30 (1965) (holding that the Supreme Court could consider an amendment to an ordinance that eliminated the landowner's desired use as permitted because the amendment was enacted prior to a board's action and therefore deprived the board of jurisdiction). The Najarian Realty Corp. Court specifically said that its decision was "[w]ithout in any way impairing the continued validity of [its] holding in" an earlier case in which it refused to consider an amendment that was enacted after a board's denial of a special-use permit. Id. (citing Ralston Purina Co. v. Zoning Bd., 64 R.I. 197, 12 A.2d 219 (1940)).

D

Dimensional Variances

Appellants maintain that the Seveneys failed to satisfy the criteria to obtain a dimensional variance or a special-use permit in the context of dimensional variances on a substandard lot of record. Specifically, Appellants argue that the Seveneys did not show a hardship amounting to more than a mere inconvenience, did not show that there were no reasonable alternatives to the proposed development, and did not request the least relief necessary. Further, Appellants fault the Board for relying on certain evidence in determining that the Seveneys satisfied the special-use permit criteria.

The Ordinance sets forth criteria that must be satisfied to obtain a dimensional variance. Article VI, Section D provides that the Board must receive evidence into the record:

> a) 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 . . . ;
> b) 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;
> c) 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
d) That the relief to be granted is the least relief necessary.

Ordinance, Art. VI, Sec. D(5). Additionally, if it grants a dimensional variance, a zoning board of review must find "that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience." Ordinance, Art. VI, Sec. D(6).

The Board determined that the Seveneys satisfied the above criteria. In its Decision, the Board found the need for relief was due to the unique characteristics of the lot, in particular the lot's size: it is only fifty feet wide and the applicable setbacks are intended for lots at least one hundred and ten feet wide. (Decision at 7.) The original structure was built before zoning ordinances, and, relying on Exhibit 17, the Board concluded that relief from the side-yard setbacks would be unnecessary had previous improvements been constructed parallel to the lot lines. Id. A variance to raise the sidewall of the original portion of the house was necessitated, the Board determined, by the location of the original portion of the house, which is a unique characteristic of the lot and structure rather than a personal disability of the Seveneys. Id. The record contains substantial evidence to support the Board's conclusions. See, e.g., Tr. 26:9-21, Aug. 17, 2011 (explaining that a fifty-foot wide lot with fifteen-foot setbacks on each side "leav[es] little margin for error to construct even a 20-foot wide house," before explaining the house's orientation on the lot necessitating relief).

The Board also concluded that the need for relief was not based on the Seveneys' prior action. The Board explained that the record demonstrated that the lot and structures existed before the current zoning ordinances were adopted or the Seveneys acquired the Property. (Decision at 8.) The record, specifically Exhibits 6, 7, and 8, which were cited by the Board, support this conclusion. See Ex. 6, 1964 Photo of Property; Ex. 7, 1974 Application for Building

Permit for Renovations; Ex. 8, Vision Appraisal Tax Assessor's Report.

Appellants argue that the Seveneys caused the need for the relief sought through their prior action of purchasing the property; failing to make any repairs for the two years prior to this petition; and installing a septic system on the south side of the house. They cite Sciacca v. Caruso, 769 A.2d 578, 584-85 (R.I. 2001), in support of their position. In Sciacca, the Supreme Court explained that a landowner "sought relief from dimensional zoning requirements that became applicable to [the landowner's] substandard lot only because of her earlier subdivision of the property before the planning board," and held that such prior action precluded a dimensional variance. Among the legal principles cited by the Sciacca Court was the "ancient legal maxim" "nullus commodum capere potest de injuria sua propia" meaning "[n]o person should profit by his or her own wrongdoing." Id. at 585 n.8.

The Board specifically addressed this issue regarding the septic system, explaining that "[a]ll requested relief would still be necessary" because any addition that could be located to the south of the house absent the septic system would necessitate dimensional relief because the house is so close to the southern property line. (Decision at 8.) Additionally, the record discloses that the repairs needed on the house likely did not develop in the two years between Mr. Seveney's inheriting of an interest in 2006 and the original petition two years later. See, e.g., Tr. 36:25-36:13, July 21, 2011 (explaining that the original portion of the house "needs to be extensively rebuilt," "needs a new foundation" and "a new roof," and "the siding is falling apart"). Similar to the Board's conclusion that the need for relief was not caused by the installation of a septic system, the Property's width and the orientation of the house necessitated the relief sought, not the fact that Mr. Seveney did not pursue these repairs in 2006 when he first inherited an interest in the Property or in 2007 when he and his wife bought the remaining

interest. See Decision at 8. The facts presented to the Board in this case are clearly distinguishable from the facts in Sciacca, 769 A.2d at 584-85. The Board's finding that the Seveneys did not create their hardship is supported by the record, and the Board's decision to not apply the principles set forth in Sciacca did not constitute an error of law. See id.

Finally, the mere purchase of a property that may require zoning relief at some later date does not qualify as the type of prior action contemplated by the self-created hardship rule. See Sciacca, 769 A.2d at 584-85 & n.8; see also DeStefano v. Zoning Bd. of Review, 122 R.I. 241, 247, 405 A.2d 1167, 1171 (1979) (criticizing reliance "upon the fact that petitioners allegedly knew that the lot in question was undersized at the time they made the purchase," a factor that "cannot be employed as support for the denial of an application" for dimensional relief).

The Board relied on the testimony of Mr. Carruba in finding that the proposed changes will not be detrimental to the area and will, in fact, enhance the area because of the improved "appearance, design and quality of construction." (Decision at 8.) Included in the record were photos of other recently renovated homes, and the Board found that the Seveneys' home will be "similar in style" to those neighborhood homes. Id. at 9. There is substantial evidence on the record to support the Board's conclusion. See Ex. 18, Photos of Neighborhood; Ex. 19, Proposed Site Plan and Elevations; Ex. 21, Real Estate Report; Tr. 24:4-26:8, Aug. 17, 2011.

According to the Board, the relief sought by the Seveneys is the least relief necessary, as they are renovating the property within its existing footprint on three sides: the east, south, and north. (Decision at 8.) The dimensional relief being sought is from the side-yard setbacks, into which the renovated house will extend no farther than the existing house. Id. The Board's conclusion is supported by substantial evidence in the form of Mr. Seveney's and Mr. Carruba's testimony, as well as Exhibit 4 depicting the plans for the site. See Ex. 4; Tr. 32:17-40:24, Tr.

July 21, 2011; Tr. 26:9-21, Aug. 17, 2011. Despite Appellants' argument that the Seveneys did not request the least relief necessary, the Board determined that the "encroach[ment] into the setback or alter[ation of] the structure literally by inches" was the least relief necessary. Although Appellants may disagree, the Board's Decision is supported by substantial evidence. See § 45-24-69(d).

Appellants also contend that the Seveneys failed to establish any hardship amounting to more than a mere inconvenience. The Ordinance defines "hardship" in the context of a dimensional variance as "more than a mere inconvenience, which shall mean that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property." Ordinance, Art. II, Sec. B. The Rhode Island Zoning Enabling Act of 1991 includes a similar definition, but it omits the reference to language requiring "no reasonable alternative to enjoy a legally permitted beneficial use." See § 45-24-41(d)(2); see also § 45-24-28(a) (requiring zoning ordinances to comply with the Zoning Enabling Act); Lischio v. Zoning Bd. of Review, 818 A.2d 685, 691-92 (R.I. 2003) (explaining that a 2002 amendment to the state statute "lessen[ed] the burden of proof to obtain dimensional relief" to the more-than-a-mere-inconvenience standard).

In its Decision, the Board found that the hardship that the Seveneys would suffer if the dimensional variance were not granted amounted to more than a mere inconvenience. Specifically, the Board found that the original, single-story portion of the house "is in need of significant repair," which it based on the depiction in Exhibits 11 and 15 of the "rotted and crumbling" foundation. See Decision at 5; Ex. 11, Photos of Interior; Ex. 15, Photos of Foundation. Additionally, according to the testimony of Mr. Seveney and Exhibit 9, the ceiling inside that portion of the house is as low as six feet and is only six feet and nine inches at its

highest, so the ceiling needed to be raised. Id.; Ex. 9, Photos Depicting Ceiling and Floor Height. Because this portion of the house sits within the setback, without a dimensional variance the Seveneys would not be able to rebuild the house to comply with the Rhode Island Building Code. Similarly, renovations to alter the roof pitch require that work be done within the setbacks, so the Board found that the height was permitted by right and that requiring the entire house to be shifted to defeat the need for dimensional relief would amount to more than a mere inconvenience.

Regarding the ten-foot addition to the two-story portion of the house, the Board relied on Exhibits 17 and 19 and found that the addition would project only nine inches into the northern side-yard setback where the single-story portion of the house already sits. (Decision at 5-6.) Were the house parallel to the lot lines, the addition would not encroach into the setback at all. Id. Enforcement of the setback would require the exterior of the addition to end mere inches from the exterior of the single-story, creating a nine-inch gap between exterior walls that the Board found would be "impossible to maintain" and would "interfere with a reasonable layout of the interior." See id. at 6. The conclusion of the Board that denial of the dimensional relief sought would amount to more than a mere inconvenience is well supported by substantial evidence. See § 45-24-69(d).

E

Additional Criteria for Dimensional Variances on a Substandard Lot

Appellants also argue that the Seveneys failed to satisfy the additional criteria established by the Ordinance for requests for dimensional variances to expand a structure on a substandard lot of record. Pursuant to Article VI, Section A(4) of the Ordinance, the Board must consider

> whether such variance:
> a) Would allow adequate space for fire protection;

> b) Provide adequate light and air between buildings;
> c) Would alter the character of the neighborhood, or adversely affect neighboring property;
> d) Would create lot coverage and setbacks less than the average lot coverage and setbacks of adjacent properties;
> e) Would impose a substantial detriment to the public or to immediate neighbors.

Id.; see also § 45-24-38 (providing that a town "shall regulate the use or uses of any single substandard lot of record . . . at the effective date of adoption or amendment of the zoning ordinance notwithstanding the failure of that lot or those lots to meet the dimensional and/or quantitative requirements").

The Board found that the Seveneys satisfied the additional criteria required by the Ordinance to enlarge a structure on a substandard lot. See Ordinance, Art. VI, Sec. A(4). The Board relied on a letter from the Portsmouth Fire Department advising the Board that the Seveneys' project would "not inhibit" the fire department's "ability to respond to the surrounding properties in the event of an emergency" and would not violate the Rhode Island Fire or Life Safety Codes. See Ex. 5, Letter from Joseph Bento, Deputy Chief, Fire Prevention. Based on photos and site plans, specifically Exhibits 19, 22, E, J, and P, the Board concluded that there would be adequate light and air between buildings. (Decision at 6-7.) Additionally, the Board founded its conclusion that the changes would not alter the character of the neighborhood or impose a detriment on the neighborhood on photos of neighborhood houses and the testimony of Mr. Carruba, who said that the Seveneys' home is one of the smaller homes in the neighborhood and that the project would not interfere with neighbors' use of their properties in any way. Id. at 7.

Appellants take issue with the Board's conclusion regarding these additional criteria, arguing that the only evidence relevant to these criteria was the letter from the Portsmouth Fire

Department and the testimony of Mr. Carruba, who Appellants claim was not a certified or licensed appraiser but held only a trainee license. The letter, cited by the Board in its Decision, specifically addresses the project's impact on fire safety and says that there will be no impact. See Ex. 5. The Board's conclusion that there would remain "adequate space for fire protection" is thus supported by substantial evidence. The Board accepted Mr. Carruba as an expert witness, see Tr. 21:22-22:4, Aug. 17, 2011, and "[i]t is well settled that a fact-finder is free to accept or reject the testimony of an expert witness." Thus, it was within the Board's discretion to accept Mr. Carruba's testimony even if Appellants find his qualifications lacking or his testimony unpersuasive. See Lloyd v. Zoning Bd. of Review for City of Newport, 62 A.3d 1078, 1089 (R.I. 2013) (citing Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998)). Moreover, the Decision reveals that the letter and the testimony of Mr. Carruba were not the only evidence relied upon by the Board in determining that the Seveneys satisfied the criteria in Article VI, Section A(4).[9]

[9] Because this case had been remanded for additional findings of fact, which actually necessitated a de novo hearing because the Board's composition had changed, the Board decided out of an abundance of caution to address both Article VI, Section A(4) and Article VII, Section A(5). See Tr. 9:22-14:16, Jan. 19, 2012.

Article VII, Section A(1), contained in the Article addressing special-use permits, contains a list of uses for which a special-use permit is required. See Ordinance, Art. VI, Sec. A. Included on that list is the "[e]nlargement of a structure on a substandard lot of record according to the provisions of Article VI, Section A." Although Article VI, Section A(4) provides a list of similar criteria applicable specifically to enlarging a structure on a substandard lot, the Board here also analyzed the list of nine items that Article VII, Section A(5) dictates should be considered for a special-use permit. Those nine items

> include, but are not limited to, the following:
> a) The desired use will not be detrimental to the surrounding area;
> b) It will be compatible with neighboring land uses.
> c) It will not create a nuisance or a hazard in the neighborhood.
> d) Adequate protection is afforded to the surrounding property by the use of open space and planting;
> e) Safe vehicular access and adequate parking are provided;
> f) Control of noise, smoke, odors, lighting and any other objectionable feature is provided;
> g) Solar rights of the abutters are provided for;

Rather, the Board specifically cited Exhibits submitted by both parties to support its Decision. See Decision at 6-7. These exhibits and the testimony related thereto constitute substantial evidence to support the Board's Decision.

IV

Conclusion

Based on its review of the entire record, this Court is satisfied that the Board's Decision was supported by substantial evidence. The Decision was not in violation of ordinance provisions, in excess of the Board's authority, or made upon unlawful procedure. The Decision is hereby affirmed. Counsel for the prevailing party shall prepare the appropriate order for entry.

> h) The proposed special use will be in conformance with the purposes and intent of the comprehensive plan and the zoning ordinance of the Town of Portsmouth; and
> i) The health, safety and welfare of the community are protected.
> j) It is consistent with the Purpose of Design Standards set forth in Article IX. Section D. and, for developments within the Town Center District, the purpose of that district as expressed in Article III.

Ordinance, Art. VII, Sec. A(5). Appellants have not argued that any of the Article VII criteria were not supported by substantial evidence, nor would the Court accept such an argument because the criteria are adequately supported by substantial evidence.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Thurston v. Zoning Board of Review for the Town of Portsmouth, et al.**
CASE NO:	**NC-12-172**
COURT:	**Newport County Superior Court**
DATE DECISION FILED:	**August 22, 2013**
JUSTICE/MAGISTRATE:	**Van Couyghen, J.**
ATTORNEYS:	
For Plaintiff:	**David F. Fox, Esq.**
For Defendant:	**Vernon L. Gorton, Esq.**