STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 3, 2014)

BROADWAY EXPRESS, LLC	:	
	:	
v.	:	**C.A. No. PC 13-0180**
	:	
CITY OF PROVIDENCE ZONING BOARD OF REVIEW; MYRTH YORK, ARTHUR STROTHER, SCOTT WOLF, DANIEL VARIN and MARC GREENFIELD, in their capacities as Members of the City of Providence Zoning Board of Review; JOHN P. DePASQUALE and JOAN ANN DePASQUALE, and DMR ENTERPRISES, INC., d/b/a Nikki's Liquors	:	

DECISION

McGUIRL, J. Before this Court is an appeal from a decision of the City of Providence Zoning Board of Review (the Board). Broadway Express, LLC (Appellant), a neighboring business owner of the subject properties, appealed from the decision of the Board granting the DePasquales' (Appellees or Owners) application for a use variance and a special use permit, which would allow a vacant pharmacy building and adjacent parking lot to be used as a liquor store and parking lot. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth in this Decision, this Court remands the decision to the Board so that it may obtain the opinion of the Director of the Department of Inspection and Standards of the City of Providence regarding the proposed parking lot.

I

Facts and Travel

Appellees are John and Joan DePasquale, owners of the two subject lots of the application. Co-appellees are the Board, and DMR Enterprises, Inc., the corporation which seeks to lease the subject lots. The properties are listed as Lots 615 and 505 on the Tax Assessor's Plat 28, also known as 319-323 Broadway and 127 Vinton Street in Providence, respectively. Lot 615, located on Broadway, houses a brick building that had been used as a pharmacy for over thirty years. The property was used for a commercial purpose even though the Use Table in the Providence Zoning Ordinance (Ordinance or Zoning Ordinance) indicates that it is located in a Residential Professional R-P Zone (RP zone) and also within the Broadway Historic District. Lot 505, located on Vinton Street, was used as parking for the pharmacy and currently serves as a parking lot; it is located in a Residential R-3 Zone (R-3 zone).

The Appellees filed an application with the Board seeking relief necessary to lease the properties to DMR Enterprises, Inc. for use as a liquor store. The application sought three different types of relief from the Board to ensure the liquor store would be in compliance with the zoning regulations. First, the application requested a use variance in order to operate a retail business on the property instead of using it for Residential/Professional purposes. The District Use table in Section 303-Use Code 57 of the Ordinance states that a retail property is prohibited in an RP zone, and thus the Owners applied for a use variance for Lot 615. Second, the application requested a dimensional variance for signage on the front of the building to put up a sign for the liquor store. Additional relief was sought from Section 607.2 of the Ordinance for a dimensional variance for signage to expand from eight to sixty feet. Third, the owners sought a special use permit for Lot 505, which they intend to use as an off-site parking lot on Vinton

Street to support the commercial liquor store. This request was pursuant to Section 303-Use Code 64.1 of the Ordinance which allows a special use permit to allow a property to be used primarily as a parking lot. The parking lot is necessary to satisfy the parking requirements of Section 703.2 of the Ordinance. Specifically, Section 703.2 of the Ordinance requires off-street parking spaces for commercial use properties. Thus, because Lot 615 does not contain off-street spaces, the Appellees sought a special use permit to use Lot 505 to meet the necessary required parking as provided in Sections 707 and 707.1 of the Ordinance.

On September 19, 2012, the Board held a properly advertised public hearing on the Owners' petition for three types of relief. At the hearing, DMR Enterprises, Inc. was represented by counsel who began his presentation of the case with an explanation of the relief requested. (Tr. at 152-153.) In support of the application, Mr. DePasquale offered testimony. He testified that he has owned the subject properties since 1976 and has used them to run a pharmacy and parking lot. (Tr. at 155.) Further, he explained that, since the pharmacy closed, he has tried to lease or sell the property for the past six years but has had no offers. Id.

Next, Mr. Ianozzi, a Principal of DMR Enterprises, Inc., doing business as Nikki's Liquors, described the nature of his business, explained why he wants to move it to the property on Broadway, and detailed the changes that would be made to the property. (Tr. at 157-165.) He testified that the exterior of the building would stay the same and minor improvements would be made on the interior, including bringing the building into compliance with the fire code. (Tr. at 159-160.) Additionally, he specified that Appellees are asking for thirty square feet of signage; currently the signage is about sixty square feet, but the ordinance allows for only eight square feet. (Tr. at 161-162.) Mr. Ianozzi explained that he has submitted the proposed sign to the HDC to ensure that it approves of the design and size of the sign and that he has been working

with the Historic District Commission (HDC) to design a sign which it would approve.[1] (Tr. at 160, 165.) While on the subject of the proposed signs, the Board Chairwoman read a letter into the record from the executive director of the Broadway Heritage Commission, another local organization, which opposed the sign but were in favor of the prior design proposal made by Mr. Ianozzi. (Tr. at 164-165.) Lastly, Mr. Ianozzi testified that the proposal which the Broadway Heritage Commission had looked at was created prior to the meeting with the HDC and that the current proposal was actually the first design that the HDC approved. (Tr. at 165.)

Thereafter, the Appellees presented Thomas Sweeney of Sweeney Real Estate as an expert witness. Mr. Sweeney testified that the building has been used for retail use for at least the past thirty-seven years, and the parking lot has supported that use. (Tr. at 166.) Mr. Sweeney stated that it was his opinion that the use would not change the general character of the area. (Tr. at 167.) Additionally, Mr. Sweeney opined that the use would have no negative impact on the surrounding property values or their use and enjoyment. (Tr. at 168.) Lastly, he concluded by stating that the use requested would be the least relief necessary and that a denial would result in the Appellees being denied all beneficial use of the property. Id.

Kari Lang, Executive Director of the West Broadway Neighborhood Association (WBNA), testified on behalf of the organization, stating that the association supports the application, despite its initial concerns with adding another liquor store in the area. (Tr. at 169-171.) She also testified that the WBNA believes that Nikki's Liquors will offer a product for a different customer base than the other liquor stores in the area. (Tr. at 169.) Additionally, Ms.

[1] The proposed signs also need to be approved separately by the HDC. Section 608.1 of the Ordinance states that: "[a]ll signs, including window signs, in an Historic District shall be subject to approval by the Historic District Commission."

Lang commended Mr. Ianozzi for engaging in dialogue with the neighbors to address concerns prior to applying for the variance. (Tr. at 170.)

Additional area business owners and employees offered testimony in support of the application. John Richard, owner of Avery, testified in favor of the application. (Tr. at 175.) Sam Walker, manager of Julian's Restaurant, testified in favor of the application. (Tr. at 171.) Brian Oakley, an area business owner, testified in favor of the application because he believes another business will benefit the other businesses in the area. (Tr. at 173-174.)

In rebuttal, several neighbors and business owners testified at the hearing against the application. Joe Fergus, an organizer and activist in the Federal Hill area, testified against the application. (Tr. at 176-177.) Mr. Fergus stated that the liquor store would hurt the business of the other liquor stores in the area. Additionally, he submitted to the Board 1200 signatures of people who oppose the opening of Nikki's Liquors on Broadway. Id. at 177.

Next, Mr. Saliba and Robin Saliba, owners of another liquor store, testified that every liquor store sells craft beers now. (Tr. at 185-187.) Ms. Saliba also testified that she made an offer to buy the building five years ago, but the Appellees decided they didn't want to sell it to her to be used as a liquor store. Id. at 187.

Mr. Santurri, owner of several properties in the area, testified in opposition of the application. (Tr. at 178.) He testified that the store would create traffic problems in the area. (Tr. at 180-181.) Further, he stated that the building could be subdivided and leased for office use and that a lot of the other buildings on the street have had trouble renting out the space. (Tr. at 184-185.) Mehmet Akba and Savannah Brown, the owners of the liquor store less than a mile from the property, testified against the application. (Tr. at 191-193.) Mr. Akba stated that the

traffic in the area is already bad and that more traffic would cause gridlock during rush hour. (Tr. at 193.)

Bijaal Patel, owner of the Appellant company which owns a store across the street from the subject property, testified that putting a liquor store across the street from the property would make the parking problems in the area worse than the current levels. (Tr. at 199.) The Appellant's testimony was followed by that of Mr. Force, a resident on Vinton Street, who explained that the traffic on Broadway and Vinton is terrible and another business would make it worse. (Tr. at 201.) The substance of most of the testimony against the application related to the impact the liquor store would have on the business of other area liquor stores and concerns with traffic.

Lastly, the Board Chairwoman read into the record the recommendation of the Department of Planning and Development (DPD) relating to the relief requested under the application. (Tr. at 205-207.) The recommendation stated that the use would be in conformance with the objectives of the Comprehensive Plan, provided that the building retains its character. (Tr. at 206.) Further, because Lot 505 is currently empty and serves as a parking lot, the DPD does not object to the parking lot. Id. The DPD also recommended that the signage be allowed as long as it is subsequently approved by the HDC. (Tr. at 207.)

At the conclusion of the hearing, the Board heard other scheduled matters and then resumed deliberation on the Appellees' application at the end of the meeting. The Board discussed the requests for relief and approved each one of them. The use variance was approved 4-1, and the special use permit and dimensional variance were each granted with a vote of 5-0. (Tr. at 279-280). The Board issued its decision on December 21, 2012, and it was recorded on

December 26, 2012. Aggrieved by the Board's decision to grant the requested relief, Appellant filed a timely appeal.

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by § 45-24-69(d). Section 45-24-69(d) provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions or decisions which are:
>
> "(1) In violation of constitutional, statutory, or ordinance provisions;
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

When reviewing a decision of a zoning board, the trial justice "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979). The term "substantial evidence" has been defined as '"such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" Lischio v. Zoning Bd. of Review of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). In conducting its review, the trial justice "may 'not substitute its

judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.'" Curran v. Church Cmty. Housing Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)).

The Supreme Court has acknowledged that "the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the [Board]." Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S. Ct. 2856, 2866 (1983) (internal citations omitted). "Nevertheless, the [Board] must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Id.

III

Open Meetings Law

As a threshold issue, the Appellant contends that the hearing conducted by the Board on September 19, 2012 did not satisfy the terms of an open meeting under G.L. 1956 § 42-46-3 which requires "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5." Specifically, Appellant argues that because the Board took a break from the hearing on the Appellees' application to hear other matters, it did not afford other individuals who had not testified yet the opportunity to be heard. However, before filing this appeal, the Appellant failed to file an open meetings complaint against the Board with the Attorney General in compliance with the statutory requirement pursuant to § 42-46-8. Section 42-46-8, in relevant part, reads as follows:

> "a) Any citizen or entity of the state who is aggrieved as a result of violations of the provisions of this chapter may file a complaint with the attorney general. The attorney general shall investigate the complaint and if the attorney general determines that the allegations of the complaint are meritorious he or she may file a

> complaint on behalf of the complainant in the superior court against the public body.
>
> . . . .
>
> "(c) Nothing within this section shall prohibit any individual from retaining private counsel for the purpose of filing a complaint in the superior court within the time specified by this section against the public body which has allegedly violated the provisions of this chapter; provided, however, that if the individual has first filed a complaint with the attorney general pursuant to this section, and the attorney general declines to take legal action, the individual may file suit in superior court within ninety (90) days of the attorney general's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later."

Accordingly, because no complaint was filed with the Attorney General, this Court does not have jurisdiction to address the merits of the issue of the alleged violation of the open meetings law.

IV

Analysis

In the present case, Appellant avers that the decision of the Board was arbitrary and capricious and therefore should be reversed. Specifically, Appellant contends that the inferences drawn from the facts of record do not support the finding that the Appellees would suffer hardship without the use variance and other requested relief. In response, Appellees contend the decision by the Board to grant the application for relief was supported by the evidence of record.

A

Use Variance

Appellant argues that the Board's decision to grant the use variance for Lot 615 to be used as a liquor store was arbitrary and capricious. Conversely, Appellees contend that the decision to grant the use variance was based on reliable, probative and substantial evidence.

A use variance, which has also been codified in § 45-24-31 and Section 902.4 of the Ordinance, "is a constitutional safety valve to prevent confiscation of one's property" from

burdensome zoning ordinance regulations. Ne. Corp. v. Zoning Bd. of Review of New Shoreham, 534 A.2d 603, 605 (R.I. 1987). Specifically, regarding the definition of a use variance, § 45-24-31(65) provides:

> **"Variance.** Permission to depart from the literal requirements of a zoning ordinance. An authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance. There are only two (2) categories of variance, a use variance or a dimensional variance.
>
> "(i) **Use Variance.** Permission to depart from the use requirements of a zoning ordinance where the applicant for the requested variance has shown by evidence upon the record that the subject land or structure cannot yield any beneficial use if it is to conform to the provisions of the zoning ordinance."

In applying this law to obtain a use variance, applicants are required to show that "they are deprived of all economically feasible use of their property." DiRaimo v. City of Providence, 714 A.2d 554, 564 (R.I. 1998). Specifically, our Supreme Court has held that an "ordinance completely deprived a landowner of all beneficial use of his land, [when] that condition presented such elements of special and great hardship, as would require that a zoning board should exercise its discretion to prevent complete confiscation of the applicant's land without compensation." Denton v. Zoning Bd. of Review of Warwick, 86 R.I. 219, 222, 133 A.2d 718, 719 (1957). Further, if there is some evidence that a board believes warrants a finding of unnecessary hardship, due to the board's peculiar knowledge of the case, the evidence shall not be weighed by a reviewing court. Taft v. Zoning Bd. of Review of City of Warwick, 76 R.I. 443, 449, 71 A.2d 886, 889 (1950).

Section 45-24-41 articulates the specific standard that a zoning board of review must look to when presented with an application for a use variance. It provides:

> "(c) In granting a variance, the zoning board of review requires that evidence to the satisfaction of the following standards is entered into the record of the proceedings:
>
> "(1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(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.
>
> "(d) The zoning board of review shall, in addition to the above standards, require that evidence is entered into the record of the proceedings showing that: (1) in granting a use variance the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance. Nonconforming use of neighboring land or structures in the same district and permitted use of lands or structures in an adjacent district shall not be considered in granting a use variance[.]" Sec. 45-24-41(c) - (d.)

The Board's decision went through each factor of the variance standard and recited the facts that satisfied each requirement. In relation to the first prong, undue hardship, the Board found that it existed as a result of the unique character of the structure, and that Appellees had not been able to sell or lease the property with the vacant pharmacy for the past six years. See Decision at ¶ 1. Specifically, the Board, noted, that "[the property] hasn't found a buyer" and "[n]obody's come in and said, I want this building." (Tr. at 274, 278.) This statement by the Board is supported on the record by the testimony of Mr. DePasquale and Mr. Sweeney.

A finding of undue hardship by a zoning board, as evidenced by the inability to sell property, is supported by Rhode Island case law. Our Supreme Court has held that "[i]nability to sell property as zoned, as shown by expert testimony or by sales efforts over a long period of time, may be sufficient to show deprivation of all beneficial use . . . ." Roland Chase, R.I. Zoning Handbook, 2d ed. § 162 (citing Carter Corp. v. Zoning Bd. of Review of Lincoln, 98 R.I. 270, 201 A.2d 153 (1964); Morin v. Zoning Bd. of Review of Warwick, 89 R.I. 406, 153 A.2d 149 (1959); Bergson Co. v. Zoning Bd. of Review of Woonsocket, 92 R.I. 226, 167 A.2d 844 (1961)). Specifically, in Bergson, our Supreme Court held that a board had abused its discretion when it had denied a use variance after having been presented with uncontradicted evidence of undue hardship. 92 R.I. at 230, 167 A.2d at 846. In its decision, the Court explained that the testimony of record "that for a long period of years every effort to dispose of the property for residential purposes was unsuccessful" was sufficient to prove an undue hardship. Id.

Additionally, in finding the undue hardship, the Board pointed to the peculiarities and uniqueness of the building/property based on its observations. See Taft, 76 R.I. at 449, 71 A.2d at 889. Specifically, during deliberations on the application, members of the Board noted that the building is styled for commercial use and is too big of a space for residential/professional use. (Tr. at 274-276.) The Board also acknowledged that the building has been on the property for a while and it would be expensive to convert the unique building for residential use. Id.

Much of the opposing testimony was offered by area business owners and raised concerns about business competition, which is not a consideration the Board can use to deny a variance. See Perron v. Zoning Bd. of Review of Burrillville, 117 R.I. 571, 369 A.2d 638 (1977). In fact, the only contrary evidence in the record was the testimony of a neighbor that, in his opinion, the building isn't unique enough to require a variance and that it could be utilized by the

Appellees for an allowed use.[2] (Tr. at 185.) Unsupported opinion testimony by a neighbor that a property has a viable use as zoned is not persuasive evidence to rebut a use variance application. See Bergson, 92 R.I. at 230, 167 A.2d at 846, ("The testimony of a remonstrant that he thought somebody might be interested in it, if it were offered for residential purposes, because there are residences not too far removed, is an opinion not based on any factual testimony to support it.") Therefore, "[i]n the circumstances there is no evidence in the record upon which it could base . . . finding that petitioners have 'failed to prove that the enforcement of the ordinance would result in an unnecessary hardship . . . .'" Carter Corp., 98 R.I. at 273, 201 A.2d at 155.

As to the second prong, the Board found that the hardship was not caused by prior action of the Appellees and was not the result of the applicant seeking to receive a greater financial gain. (Decision at ¶ 3.) Specifically, it acknowledged that Appellees claimed no economic or physical disability as reason for the hardship. Id. at ¶ 2.

With respect to self-created hardship, there is nothing in the record that indicates any exist. Through the testimony of Mr. Sweeney, the record indicates that the building on the property was built in 1947, prior to being owned by Appellees. It was not built by Appellees as a nonconforming use. (Tr. at 166.) Here, the facts differ from those in the case of Sciacca v. Caruso, in which our Supreme Court denied a dimensional variance because the Court held that the reason for the hardship, two undersized lots, was a direct result of the applicant's illegal subdivision of the properties. 769 A.2d 578, 584 (R.I. 2001). In fact, in making the determination as to whether or not there is hardship, the Board found that a denial would cause

[2] One remonstrant, the owner of a different liquor store, did testify that she had wanted to either move her store or put a Whole Foods Market on the property. (Tr. at 188.) Although this testimony was offered in opposition to the application, it, in fact, further supports the Appellees' case and the Board's finding of hardship, because it indicates another local business owner did not believe the subject property had a viable use without a variance.

the hardship and attributed it to the uniqueness of the building. Further, it relied upon the testimony of Mr. DePasquale, in which he explained that he has been unable to sell or lease the property, in order to find that Appellees made efforts to overcome the hardship. (Tr. at 155.) As a result, the Board found that the duration the building remained vacant, despite the efforts by the owner to sell or lease it for the past six years to no avail, proved the existence of an undue hardship. See Bergson, 92 R.I. at 230, 167 A.2d at 846.

In addressing the third prong, the Board found that the use will not alter the general character of the surrounding area or impair the intent or purpose of the Zoning Ordinance. (Decision at ¶ 4.) In particular, the Board noted that the exterior would remain unchanged and that the area surrounding the properties contains many commercial businesses. Id. The Board relied on the testimony of Mr. Sweeney, its personal knowledge of the area, and the recommendation of the DPD to find that the character of the area would not be altered and the use would fit within the objectives of the Ordinance. Id. The record reveals, through the testimony of the real estate expert, Mr. Sweeney, and the recommendation of the DPD, that the decision of the Board was supported by factual evidence.

Thereafter, the Board addressed the fourth prong, which requires that the relief be the least relief necessary. See § 45-24-41(c)(4). In finding that the proposal was the least relief necessary, the Board found it important that the request for the proposed commercial use was narrow as it would require no changes to the exterior of the building so as to maintain the same aesthetic character of the area. (Decision at ¶ 5.)

Our Supreme Court has held that "the burden is on the property owner to establish 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 Review of Pawtucket, 103

R.I. 487, 492, 238 A.2d 754, 757 (1968). Here, the relief requested, a use variance for commercial use, is the least relief available to overcome the undue hardship of the required Residential/Professional use. See § 45-24-41(c)(4).

This Court finds that the facts of record are rationally connected to the decision to grant the relief. See Pistachio v. Zoning Bd. of Review of North Providence, 88 R.I. 285, 287, 147 A.2d 461, 463 (1959) (upholding a zoning board's grant of a use variance for a two-story building used as a social club in a residential area to be used as a factory, based predominantly on testimony that the only way to make the building residential would be to tear it down and rebuild at a prohibitive cost). Accordingly, the decision was not arbitrary and capricious, and the decision to grant the use variance will not be disturbed.

B

Signage Relief

Appellees also applied for relief from the size restrictions for signs, located in Chapter 6 of the Zoning Ordinance, which provides the rules relating to signage. See Sec. 607.2. Specifically, Section 607.2 of the Ordinance allows a maximum of eight square feet for wall signage in an RP zone. Although the maximum is eight square feet, the current signage on the building is approximately sixty square feet. (Tr. at 161.) The larger-sized signage allowance was approved by the Board when the property was granted a sign variance in 1976 to erect the current commercial signs on the building. See Resolution No. 4092. As a result, the current signs on the building are permitted to have an area of sixty square feet.

It is well-settled in Rhode Island law that variances run with the real estate because they are related to the use of the lands. See Olevson v. Zoning Bd. of Review of Narragansett, 71 R.I. 303, 44 A.2d 720 (1945). Further, the application was made for the purpose of a proposed lease,

and the ownership of the properties remains the same. Despite the previous variance granted to the Appellees, they sought a dimensional variance to be relieved from the eight foot maximum. The proposed signs included in the application are allowed under the prior variance because the size is less than the space granted under the variance and will continue to be used to support the commercial use. See Stop & Shop Supermarket Co. v. Bd. of Adjustment of Twp. of Springfield, 162 N.J. 418, 438, 744 A.2d 1169, 1180 (2000) (holding a prior variance applied to new use when "the successor use is sufficiently similar to the variant use to afford it the benefit of the variance"); see also Tr. at 161. Accordingly, the Board's granting of the dimensional variance was not clearly erroneous.

C

Special Use Permit

Although the Board properly applied the standard to grant the use variance, certain commercial buildings have additional parking requirements in order to comply with the Ordinance. Article VII of the Zoning Ordinance prescribes regulations relating to parking. Here, the parking regulations require that a commercial building—the requested use variance would change the building to commercial use—has one parking spot per 500 square feet of building. See Sec. 703.2-5.0. Lot 615 does not have enough space to accommodate customer parking for a commercial use, and thus, Appellees requested to use Lot 505 for off-street parking. In order to use the lot for this purpose, the Appellees seek additional relief in the form of a special use permit which is necessary to utilize Lot 505, as per Use Code 64.1, "Parking Lot, Principal Use." This use is defined in the Ordinance as "Off-Street parking of automobiles on one or more lots where parking spaces for more than four (4) automobiles are available, whether free, for compensation, or as an accessory use to a principal use to satisfy parking requirements of the

principal use on a separate lot or lots." Without securing the requisite parking through the special use permit for parking, the variance application could not be approved under the Ordinance.

Special use permits are authorized under Section 902.4 of the Ordinance, which allows for a property in an R-3 zone to be used primarily as a parking lot if the Board grants the permit. Specifically, Section 902.4 states:

> "To authorize, upon application, in specific cases, special-use permits, pursuant to Section 303, 419, 707, 905, and other applicable provisions of this Ordinance. The Board may impose such conditions regarding the proposed building, structure, use or otherwise, as it deems appropriate. The Board may issue a dimensional variance in conjunction with a special use permit. If the special use could not exist without the dimensional variance, the zoning board of review shall consider the special use permit and the dimensional variance together to determine if granting the special use is appropriate based on both the special use criteria and the dimensional variance evidentiary standards. To authorize a special use permit, the Board must first: [Ord. 2009-39]
> "A) Consider the written opinion from the Department of Planning and Development.
> "B) Make and set down in writing specific findings of fact with evidence supporting them, that demonstrate that:
> "1. The proposed special use permit is set forth specifically in this Ordinance, and complies with any conditions set forth therein for the authorization of such special use permit;
> "2. Granting the proposed special use permit will not substantially injure the use and enjoyment of nor significantly devalue neighboring property; and
> "3. Granting the proposed special use permit will not be detrimental or injurious to the general health, or welfare of the community"

Initially, the Board acknowledged that Section 303 of the Ordinance allows for a special use permit to be granted for properties in R-3 zones for use as primary parking lots. The district Use Table allows for R-3 properties to be used as a parking lot only if a special use permit is obtained in accordance with Section 707 of the Zoning Ordinance.

Subsequently, the Board addressed the second and third prongs and found that the parking lot would not adversely affect the area. Specifically, the Board based its determination to grant the special use permit for the parking lot upon the fact that Lot 505 currently serves as a parking lot and maintaining that use would not add any additional parking spots or change the current use. (Decision at ¶ 4.) Accordingly, the Board found that the property being primarily used as a parking lot would not injure the use and enjoyment of neighboring lots. (Decision at ¶ 9.)

For the proposed parking lot, the record reveals that Lot 505 currently contains a parking lot used by area residents and a continued use as a parking lot would have no disruptive impact because there would be no additional paving, and no additional parking spaces added. (Tr. at 155.) Because the evidence of record proves that the use of the lot for parking would not change if the special use permit were granted, and there was no evidence to suggest that traffic would intensify, the Board's determination on the impact to the area was proper. See Bonitati Bros., Inc. v. Zoning Bd. of Review of Woonsocket, 104 R.I. 170, 171, 242 A.2d 692, 693 (1968) (holding that in order to find that general welfare will be negatively impacted, it must be proven that "the traffic generated by its establishment at that site will intensity (sic) the congestion or create a hazard.").

However, in addition to satisfying the special use permit standard for lots used primarily as parking lots, the lot must also meet the requirement for off-street parking under Section 706.4 of the Ordinance.

> "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. In such a case, the property owner(s) shall permit

> the Director to file a lien with the Recorder of Deeds against both the lot containing the requiring parking and the lot for which the parking is being provided. Said lien shall designate the use of said lot for off-street parking, and provide notice that insufficient parking exists on the original lot. Said lien may be terminated by the Director if it is no longer necessary for conformance with this Section." Sec. 706.4.

Specifically, the "Director" referred to in this section is the Director of the Department of Inspection and Standards of the City of Providence, as defined in Article X of the Ordinance, "Definitions." See Sec. 1000 ("Director: The Director of the Department of Inspection and Standards of the City of Providence.").

Here, the Board's decision to grant the special use permit was made without the opinion of the Director of the Department of Inspection and Standards of the City of Providence.[3] Without such opinion, the parking would violate the Ordinance because it is unapproved off-street parking. Accordingly, this case must be remanded to the Board in order for it to obtain the Director's opinion. See § 45-24-69(d).

V

Conclusion

After a review of the entire record, the Court finds that it must remand the case to the Board. This Court hereby remands the Appellees' petition to the Board solely so that it may obtain the opinion of the Director as to whether the proximity of the off-street parking lot is within an acceptable distance from the building which it will support. Counsel shall submit an appropriate order for entry.

[3] The DPD did, however, give its opinion and recommended approval of the parking lot.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Broadway Express, LLC v. City of Providence Zoning Board of Review, et al.**
CASE NO:	**C.A. No. PC 13-0180**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 3, 2014**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
For Plaintiff:	**Clare T. Jabour, Esq.**
For Defendant:	**Lisa Dinerman, Esq.** **Kurt T. Kalberer, II, Esq.** **Alfred Ferruolo, Esq.** **John and Joan DePasquale, pro se**