

Plaintiff Eleni Fidas (Plaintiff or Fidas) operates a pizza restaurant (d/b/a Silver Lake Pizza) at 1146 Main Street in Coventry (Fidas property), which is adjacent to a pub operated by a tenant of BC Property. The tenant, Bella's Sports Pub (Bella's or Pub), operates an eating and drinking establishment at the property owned by BC Property, which filed an application with

the Zoning Board seeking permission to maintain a dumpster in the front of the Pub for use by its tenant. This would require a variance from Coventry Zoning Ordinance § 1207, which requires that “[a]ll commercial, industrial and multi-family residential uses shall provide trash and/or garbage collection [at] areas located in the **rear** of the building[.]” (Emphasis added.)

On May 7, 2014, the Coventry Zoning Board held a duly noticed public hearing. Mr. Richard Crowe (Crowe), the sole member of BC Property, testified in favor of the variance, as did John Brunero, counsel for the Applicant. Specifically, Crowe testified that the proposed location is “the only location” for a dumpster. Ex. A, Zoning Board Meeting Minutes 4, May 7, 2014. Crowe further testified that the building has been used as a restaurant or a bar “since the 1700’s.” Id. at 5. In response to questioning from Attorney John Brunero (Brunero), Crowe responded in the affirmative when asked if there was “no way to get the trash from the back to the front other than leave it out there in bags[.]” and employees of Bella’s “would physically have to walk the trash through the building, through the patron’s area and kitchen area . . . to bring it to the front, that’s the only way?” Id. Crowe testified that the dumpster had, at the time of the hearing, been at its present location in front of the building for two years. Id. at 6. He acknowledged that for a short time, the dumpster was behind the building, and regarding that time, he testified that “[w]e tried but it was very difficult.” Id.

Attorney Brian LaPlante (LaPlante), who represents Plaintiff, offered testimony and argument against the proposed variance. Id. at 8. He argued that the “dumpster in its current location can’t be emptied unless it’s rolled into my client’s property[.]” and his “client is similarly concerned about a neighbor using . . . [her] property.” Id. He further argued that “[a]ny business asking you for relief is to realize greater financial gain.” Id. at 9. Addressing whether granting the variance would “alter the general character of the surrounding area[.]” LaPlante told

the Board “[o]f course it will, this dumpster was never there before.” Id. He further stated that denial of the variance would result in “just a mere inconvenience.” Id.

The Board asked Brunero if the trash had ever been stored behind the establishment, and he responded that it had been tried, but “[t]he problem with the dumpster going to the back of the building is in the winter trying to plow anything back there is impossible.” Id. at 10. Brunero further stated that “[e]ven if we sat here tonight and the fence [between Bella’s and the Fidas property] was no longer there[,] it’s almost impossible to get that dumpster in and out in the winter.” Id. However, with respect to plow access, Crowe used the phrase “very difficult,” whereas Brunero described the difficulty with plow access as “almost impossible.” Id. at 6, 10.

The Zoning Board met again on July 2, 2014. Board member John D’Onofrio acknowledged that “[p]utting it right in front of the building on Main Street doesn’t look good.” Ex. B, Zoning Board Meeting Minutes 2, July 2, 2014. Finally, by a vote of 5-0, the Board ultimately approved the requested variance in a written decision dated July 2, 2014. Id. at 4. the Board added a stipulation that Applicant must “[e]nclose dumpster [where it is] <sup>1</sup> to make [it] aesthetically pleasing.” Id.

On July 29, 2014, the Board issued a written decision approving the Application for a variance. The decision held that the dumpster could remain in front of the building, with the stipulation that it “shall be enclosed with access doors, so that the actual dumpster is out of view.” Ex. C, Coventry Zoning Board of Review Dimensional Variance Decision 2, July 29, 2014.

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<sup>1</sup> Applicant did not request a location at a specific area of the front yard, leaving it open to the Board to allow a dumpster where presently located.

Plaintiff filed her complaint and appeal on August 12, 2014. She alleged that there was no legal or factual basis for the decision of the Zoning Board, and the Zoning Board, in fact, had not been presented with any evidence to support its findings.

## II

### Standard of Review

Pursuant to § 45-24-69, the Superior Court has jurisdiction to review zoning board decisions. The statute provides as follows:

“The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:

“(1) In violation of constitutional, statutory, or ordinance provisions;

“(2) In excess of the authority granted to the zoning board of review by statute or ordinance;

“(3) Made upon unlawful procedure;

“(4) Affected by other error of law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or

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

The Superior Court must “examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.” Lloyd v. Zoning Bd. of Review for City of Newport, 62 A.3d 1078, 1083 (R.I. 2013) (citing Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). Substantial evidence is defined as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.” Iadevaia v. Town of Scituate Zoning Bd. of Review, 80 A.3d 864, 870 (R.I. 2013) (citing Pawtucket Transfer Operations, LLC v. City of

Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (internal quotation omitted)). If the Court finds that the zoning “board’s decision was supported by substantial evidence in the whole record,” then the Zoning Board’s decision must stand. Lloyd, 62 A.3d at 1083. If the findings of fact are not supported by substantial evidence in the record, the court must reverse or remand the board’s decision. Salve Regina Coll. v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 882 (R.I. 1991) (court held that it was reversible error for trial court to uphold board’s denial of variance where record was “devoid of any legally competent evidence upon which the board could reasonably have based its finding”). A zoning board “when acting in a quasi-judicial capacity, must set forth in its decision findings of fact and reasons for the action taken.” Irish P’ship v. Rommel, 518 A.2d 356 (R.I. 1986) (citing Zammarcelli v. Beattie, 459 A.2d 951, 953 (R.I. 1983) (further citation omitted)).

### III

#### Analysis

Plaintiff contends that the Zoning Board improperly granted a dimensional variance, because the Applicant did not satisfy the requirements of §§ 45-24-41(d)(1-4) and (e)(2). Therefore, she argues that this Court should reverse the decision of the Zoning Board and order that the Board deny the variance requested. Conversely, the Board argues in its memo that the Board considered the testimony of the opposing parties and “applied their own knowledge of the site and discussed all available options for the Pub to handle its trash disposal.” (Town of Coventry Mem. 8.) Therefore, they argue that this Court should uphold the decision of the Zoning Board.<sup>2</sup>

For a zoning board to approve a dimensional variance, it must find that an applicant satisfied all of the requirements of §§ 45-24-41(d)(1-4) and (e)(2). Section 45-24-41(d)(1-4) provides:

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<sup>2</sup> Although the Applicant would naturally agree with the decision of the Board, it chose not to file a separate memorandum in support of the decision but rather, relied on the memorandum of the Board in seeking to uphold the decision.

“(1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(a)(16);  
“(2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;  
“(3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and  
“(4) That the relief to be granted is the least relief necessary.”

Finally, § 45-24-41(e)(2) requires: “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.”

Our Supreme Court has held that a property owner seeking a dimensional variance is entitled to relief where “the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience, which means that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one’s property.”

Lischio v. Zoning Bd. of Review of Town of N. Kingstown, 818 A.2d 685, 691 (R.I. 2003).

As to each of the standards, the Zoning Board, in its decision, noted the evidence supporting its findings with regard only to § 45-24-41(d)(1). The Board found that “the hardship that the applicant seeks relief from is due to the unique characteristics of the subject land inasmuch as the newly erected fence from an abutter has led to the necessity of placing the dumpster in its present location.”<sup>3</sup> Ex. C, Coventry Zoning Board of Review Dimensional Variance Decision 2.

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<sup>3</sup> This Court is not convinced that the Applicant satisfied the requirement that the hardship from which the Applicant seeks relief is “due to the unique characteristics of the subject land.” See Zahn v. Bd. of Adjustment of City of Newark, 45 N.J. Super. 516, 133 A.2d 358 (1957) (The Court upheld the Board’s denial of a variance to allow a laundry service in basement of apartment building where “the only special reason shown is the congestion which attends pick-up and delivery from the individual tenants. This difficulty, however, may be eliminated by dealing with the cleaner at his main place of business, and thus the congestion is self-

The statute requires that an applicant seeking a variance must satisfy all of the requirements of §§ 45-24-41(d)(1-4) and e(2). Regarding these requirements, the findings of fact are inadequate. The Board merely listed the remaining requirements of the statute, but failed to provide any explanation as to how the Board concluded that the Applicant had satisfied these requirements, or on what evidence in the record the Board relied. The Board wrote:

- “2. That the hardship is not a result of any prior action of the applicant and is not a result primarily of the desire of the applicant to realize a greater financial gain;
- “3. That the granting of the proposed project will not alter the general character of the surrounding area;
- “4. That the relief being granted is the least relief necessary;
- “5. That if this application is rejected it will result in more than a mere inconvenience.” Id.

It is well-settled in Rhode Island that:

“the minimal requirements for a decision of a zoning board of review would be the making of findings of fact and the application of legal principles in such a manner that a judicial body might review a decision with a reasonable understanding of the manner in which evidentiary conflicts have been resolved and the provisions of the zoning ordinance applied.” Thorpe v. Zoning Bd. of Review of Town of N. Kingstown, 492 A.2d 1236, 1237 (R.I. 1985) (citing May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970)).

The Court in Thorpe elaborated that “unless these minimal requirements are satisfied, judicial review of a board’s work is impossible.” Id. (In reviewing the Superior Court’s decision, the Supreme Court remanded the matter to the Superior Court with instructions to remand to the zoning board “for a new hearing and a decision in conformity with the requirements set forth in

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imposed[.]”); see also McGlasson Realty, Inc. v. Town of Patterson Bd. of Appeals, 234 A.D.2d 462, 651 N.Y.S.2d 131 (2d Dep’t 1996) (“A prospective purchaser of property is chargeable with knowledge of the applicable restrictions of the zoning law and is bound by them and by the facts and circumstances which can be learned by the exercise of reasonable diligence, even where there are harsh results.”). The Board needs to clarify how the newly erected fence constitutes a unique characteristic of the land. This Court, therefore, will remand the matter to the Board for further findings of fact and conclusions of law.

this opinion.”) Id. at 1237. The Court reaffirmed this principle in Irish P’ship, 518 A.2d at 358-59. The Court in Irish P’ship held that the issue before the Court is “whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles.” Id., at 358 (quoting Zammarelli, 459 A.2d at 953 (further citation omitted)). The Court further explained that a zoning board’s “findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany. These are minimal requirements. Unless they are satisfied, a judicial review of a board’s work is impossible.” Id. at 358-59 (citing Carter Corp. v. Zoning Bd. of Review of Town of Cumberland, 103 R.I. 515, 238 A.2d 745 (1968) (further citation omitted)).

In the within matter, the Zoning Board merely listed the requirements of the statute in a conclusory fashion, and as to four of the five requirements for the granting of a variance, offered no explanation as to how the Board concluded that the Applicant satisfied these requirements. The decision of the Zoning Board does not meet the long-standing requirements of our highest Court. These requirements, explained above, were reaffirmed by the Court in Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 402 (2001) (The Court ordered remand where “the zoning board’s decision was conclusional and failed to apply the proper legal principles, thereby making judicial review of the board’s work impossible.”) (citing Irish P’ship, 518 A.2d at 358). This Court similarly “will not search the record for supporting evidence or decide for itself what is proper in the circumstances.” Irish P’ship, 518 A.2d at 359 (citing Hooper v. Goldstein, 104 R.I. 32, 44, 241 A.2d 809, 815 (1968)). Therefore, this Court remands the within matter to the Zoning Board for a decision that contains sufficient findings of fact and conclusions of law, and identifies the record evidence that supports each of the factual findings.



## **IV**

### **Conclusion**

For the reasons explained above, this Court remands this matter to the Coventry Zoning Board of Review for a decision that contains sufficient findings of fact and conclusions of law to allow for meaningful judicial review. Substantial rights of the Appellant have been prejudiced. Counsel shall submit the appropriate judgment for entry. This Court retains jurisdiction.



## **RHODE ISLAND SUPERIOR COURT**

### ***Decision Addendum Sheet***

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**TITLE OF CASE:** Eleni Fidas v. Town of Coventry Zoning Board of Review, et al.

**CASE NO:** KC-2014-0825

**COURT:** Kent County Superior Court

**DATE DECISION FILED:** August 23, 2017

**JUSTICE/MAGISTRATE:** Rubine, J.

**ATTORNEYS:**

For Plaintiff: Brian LaPlante, Esq.

For Defendant: Nicholas Gorham, Esq.; John S. Brunero Jr., Esq.