STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC **SUPERIOR COURT**

(FILED – DECEMBER 6, 2012)

BRADLEY J. PERRY	:	
	:	
v.	:	**PC-2007-3323**
	:	
TOWN OF BURRILLVILLE ZONING BOARD OF REVIEW, by and through its members, RAYMOND CLOUTIER MICHELE CARBONI, EDWARD HOCHWARTER, JR., KEN JOHNSON, GEORGE KEELING, JR., SANDRA COONEY, AND JOHN PATRIARCA	:	

DECISION

MCGUIRL, J. Before this Court is a timely appeal by Bradley J. Perry ("Appellant") from a decision by the Town of Burrillville Zoning Board of Review (the "Zoning Board"). The Appellant seeks reversal the Zoning Board's decision denying his Application for Variance to construct a single-family dwelling. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The Appellant is the owner of an undeveloped property located on Laurel Ridge Avenue, in Burrillville, Rhode Island, and delineated as Tax Assessor's Map 157, Lot 201 (hereinafter the "Property"). The Property is comprised of approximately 17,820 sq. ft. and is located both in a Residential 12 (R-12) Zone and an A-100 Aquifer Overlay Zone. (Tr. at 3.)

The Appellant wishes to build a single-family house and requests dimensional variance relief due to the presence of wetlands on the property. (Tr. at 5.) In his Application for Variance, Appellant requests relief from the Town of Burrillville Zoning Ordinance (Ordinance)

§§ 30-111 (Table of Dimensional Regulations), 30-153(3) (Lots Containing Wetlands), and 30-205(10) (Regulation of Flood Hazard Area, Floodway Setback Line).

Prior to requesting the dimensional variances, Appellant filed an Application to Alter a Freshwater Wetland with the Department of Environmental Management ("DEM"). (Insignificant Alteration Permit at 1.) The DEM conducted a site inspection of the Property and an evaluation of the single-family dwelling proposed by Appellant, along with the proposals of an associated driveway, sewer line, and well. Id. After conducting this investigation, the DEM found that the proposed project "does not involve significant alterations to the subject wetlands and therefore [is] permitted as an **insignificant alteration** to freshwater wetlands . . . ." Id. (Emphasis in original.) This permit included requirements for erosion and sediment controls, as well as the planting of a buffer zone of trees and shrubs between the house and the wetlands. (Insignificant Alteration Permit at 2.) The Appellant proposed the construction of a 24 foot x 32 foot house in the center of the property, 15 feet from the street line. (Tr. at 5.)

To build this house, Appellant required three dimensional variances. Ordinance § 30-111 states that an "R-12 Zone requires a Thirty (30) Feet Front Setback." The Appellant proposed a front setback of fifteen feet and thus requested relief of 15 feet from this Ordinance. Ordinance § 30-205(10) states, "[a]ll buildings shall be set back from a floodway at least the average of setbacks existing on similar plots within 200 feet, then at least 30 feet."[1] The Appellant proposed a six-foot setback from a 100-year floodplain and thus requested twenty-four feet of relief. These two setbacks were requested so that Appellant could build on a raised portion of land approved by the DEM. (Tr. at 9.) In addition, Ordinance § 30-153(3) states that, "[e]ach lot

[1] On February 11, 2009, Ordinance § 30-205 Regulation of Flood Hazard Areas was repealed and replaced with § 30-205 Special Flood Hazard Areas and Flood Fringe Land. This updated ordinance does not contain such a setback requirement.

shall have a minimum buildable area of 12,000 square feet excluding wetland and wetland buffer zone as defined by the Wetland Act of the State of Rhode Island." As all Appellant's land falls in this wetland buffer zone, he requested relief of 12,000 square feet of upland area. (Tr. at 18.)

At a properly advertised hearing, Appellant presented three expert witnesses before the Zoning Board. The first, Mr. Norbert Therien (Mr. Therien), a professional land surveyor and site developer, presented to the Zoning Board a map outlining construction plans (Large Site Plan), and he discussed the proposed plans for the house. (Tr. at 4-19.) In describing the planning process, he stated "there were different comments given to us by the Zoning Officer of the Town, Mr. Joe Raymond, as well as the Department of Environmental Management; and the house was shrunk. The house was pushed forward. It was pushed one way to the other . . . ." (Tr. at 8.) Mr. Therien continued to describe the placement of the house on a flat area above an embankment that slopes towards the wetlands and the 100-year floodplain. (Tr. at 9-10.) When discussing the construction of the house, Mr. Therien remarked that in building the foundation, the excavated excess material would be "brought off site." (Tr. at 13.) He also described the creation of a buffer zone consisting of rhododendrons and white pines to screen noise and light from the wetlands. (Tr. at 16-17.) When confronted with flooding concerns resulting from construction, Mr. Therien responded that the "lawn area [which would] allow water to be absorbed," as well as additional drainage systems associated with construction, would create better drainage than the "hard, compacted gravel" currently covering the proposed construction site on the Property. (Tr. at 47.)

The second expert witness called by Appellant was Scott Rabideau, president of Natural Resource Services, Inc., a private wetland consulting firm. (Tr. at 19.) Mr Rabideau inspected the Property, performed a "detailed habitat assessment," and outlined an environmental impact

"mitigation scheme" in his report. (Narrative of Biological Impact at 3-5.) Mr. Rabideau explained how the proposed construction plans were designed to "minimiz[e] the disturbance to th[e] 200-foot riverbank wetland to the greatest degree practicable." (Tr. at 20.) Mr. Rabideau testified:

> "[I]t's my opinion and it's the State's opinion that by siting the house in this location, keeping the house as small as we've kept it, and providing the screening vegetation at the limit of the disturbance, there really is an insignificant impact to the wetlands system, to the functions and values of that wetlands system, which include wildlife habitat, which include the flood storage capacity of that wetlands." (Tr. at 22.)

Mr. Rabideau further testified that there "should not [be] an erosion problem from a flood event" and that he "wouldn't anticipate in the next 100-year storm event that there would be any erosion . . . ." (Tr at. 24-25.) He further stated that the building of the proposed single-family house on the Property would not "result in any increase in the flood levels." (Tr. at 27.) Mr. Rabideau's report also notes that this "unauthorized disposal of . . . fill material has been established." (Narrative of Biological Impact at 2.) However, he notes that such fill would be removed from the site in accordance with DEM regulations. (Tr. at 35.) Indeed, Mr. Rabideau's prepared report presented before the Zoning Board states that "no disturbance to the identified swamp or perennial river will occur." (Narrative of Biological Impact at 2.)

The third expert witness called by Appellant was Jeffrey R. Fontaine, a certified residential appraiser. Mr. Fontaine performed an inspection of the property and the surrounding neighborhood and prepared a report as to his findings for the Zoning Board. (Letter from Preferred Appraisal Services.) Before the Zoning Board, Mr. Fontaine testified that if the dimensional variances were granted, there would be no negative impact to surrounding property. (Tr. at 37.) He noted that in the neighborhood surrounding the Property, "the majority of homes

. . . are within 30 feet of the road . . . [with] one as close that could have been seven or eight feet . . . ." (Tr. at 40-41.) Mr. Fontaine concluded that the proposed construction "[was]n't altering the characteristic of the neighborhood and [was]n't making any changes that w[ere] out of the ordinary." (Tr. at 37.)

Various neighbors appeared before the Zoning Board in opposition to the approval of the dimensional variances. Abutters also submitted several letters expressing concerns over traffic, an increase in flooding, and environmental impacts on the wetlands. (Zoning Board Record Ex. A: Letters from Abutters.) At the hearing, Ellen Levesque, an abutter, expressed concern over flooding, remarking on an event in 2005 where the river was "a rushing rapid." (Tr. at 56.) She also noted that the proposed construction site was filled in by the prior owner. (Tr. at 56.) Ms. Levesque stated that she owns the abutting lot, which has been deemed as "unbuildable." (Tr. at 72.) In response, Board Member Cloutier noted that "many lots in this Town are considered unbuildable. That's why people come here for a variance." Id. Next, Margaret Desjarlais, another abutter, spoke regarding traffic concerns and expressing concern that the vehicles that typically park on the flat lot on the Property may have to park on the narrow street. (Tr. at 59-60.) Further witnesses discussed similar concerns. (Tr. at 62-65.)

In addition to statements by abutters, members of the Board spoke as to their experiences regarding the Property. Board Member Keeling recounted walking through the Property, noting "it's mostly very hard and very rocky [with] not much vegetation at all, except dead timber." (Tr. at 26.) Mr. Keeling further noted having performed a surveillance of the area years ago, expressing concern over the looseness of the soil. (Tr. at 34.)

In making their decision, Board Member Cloutier remarked that Appellant "was asking for an awful lot of relief." (Tr. at 75.) Board Member Johnson responded by stating, "I

understand that DEM is an organization that does – that does their job, dot's their I's, crosses their T's; but they don't live in Burrillville . . . ." Id. He continued, "[The DEM] can tell me all they want that there's not going to be any disturbance . . . . I've put in foundations for a living." (Tr. at 75-76.) Board Member Johnson went on to opine as to the amount of disturbance that construction would cause to the Property. (Tr. at 76.)

In the Resolution Denying the Variance at Lot: 201 Assessor's Map: 157, the Board Members listed as reasons for denying the dimensional variances: "the amount of relief required," "the testimony of abutters," and "the unstable nature of the lot." (Resolution Denying the Variance at Lot: 201 Assessor's Map: 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 21.) The Appellant filed a timely Complaint and appeal on June 29, 2007.

II

Standard of Review

Pursuant to § 45-24-69, the Superior Court possesses jurisdiction of appeals from a zoning board. Section 42-24-69 provides as follows:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency 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 or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

The court, "when reviewing the action of a zoning board of review 'must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" Salve Regina v. Zoning Bd. of Review of the City of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). "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." Lischio v. Zoning Bd. of Review of the Town of N. Kingston, 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)). Indeed, "this test is not satisfied by any evidence but only by that which [the court] determine[s], from [its] review of the record, has probative force due to its competency and legality." Salve Regina, 594 A.2d at 880 (citing Thomson Methodist Church v. Zoning Bd. of Review of Pawtucket, 99 R.I. 675, 681, 210 A.2d 138, 142 (1965)). If evidence on the record is insufficient to sustain a determination, the court may remand for further factfinding. Roger Williams College v. Gallison, 572 A.2d 61, 63 (R.I. 1990).

III

Analysis

A
Issues on Appeal

On appeal, Appellant contends that the Zoning Board's denial of the dimensional variances was arbitrary and erroneous in view of the reliable, probative, and substantial evidence on the record. Specifically, Appellant contends that the Zoning Board's conclusions were not supported by evidence on the record.

The Appellant first argues that the Zoning Board improperly considered the testimony of abutters and personal observations and did not take the character of the area properly into

account. The Appellant next asserts that he did not create his own hardship, and that it is irrelevant that he purchased two lots in a single transaction because the Property is residentially zoned and he is entitled to use the Property for that purpose. The Appellant finally maintains that no evidence during the hearing suggested that the relief requested was not the least relief necessary.

In response, the Zoning Board alleges that substantial evidence on the record demonstrated that Appellant's hardship resulted primarily from his desire to achieve greater financial gain. As the Property is currently used as a parking lot, the Zoning Board maintains, Appellant has not been deprived of all beneficial use of his property. In addition, the Zoning Board argues that it properly considered abutter testimony and past personal observations. The Zoning Board further contends that as Appellant could have proposed the construction of a smaller house, the relief requested was not the least relief necessary.

B
Law on Variances

Before delving into Appellant's issues on appeal, the Court first will set forth the law as it pertains to variances. Section 45-24-41(d)(2) of the Rhode Island General Laws states that the zoning board of review shall require evidence showing:

> "in granting a dimensional variance, 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. The fact that a use may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief."

The language of this statute reaffirms the Viti Doctrine, which "held that for an applicant to obtain a dimensional variance (also known as a deviation), the landowner needed to show only an adverse impact that amounted to more than a mere inconvenience." Lischio, 818 A.2d at 691 (citing Viti v. Zoning Bd. of Review of Providence, 92 R.I. 59, 64-65, 166 A.2d 211, 213

(1960)); see also Westminster Corp. v. Zoning Bd. of Review of Providence, 103 R.I. 318, 239 A.2d 353 (1968) (similarly holding there must be "an adverse impact that amount[s] to more than a mere inconvenience"). Ultimately, "[a]lthough [dimensional] regulations are contained in the zoning ordinance . . . such regulations as are here considered do not constitute 'zoning' as that term is generally construed." Westminster Corp, 103 R.I. at 320, 239 A.2d at 356-57 (citing Viti, 92 R.I. at 65, 166 A.2d at 213).

Essentially, "when the literal enforcement of the pertinent ordinance provisions would preclude a reasonably full enjoyment of the permitted use of the land, and relief, if granted, would not be contrary to those public interests which justify an exercise of police power," a dimensional variance should be granted. Westminster Corp, 103 R.I. at 323, 239 A.2d at 360; see also Northeastern Corp. v. Zoning Bd. of Review of the Town of New Shoreham, 534 A.2d 603, 605 (R.I. 1987) (holding that the standard of deprivation of all beneficial use is not applicable to requests for dimensional variances). A dimensional variance may be granted in conjunction with a permitted use. See Westminster Corp, 103 R.I. at 323, 239 A.2d at 367. "A permitted use, under § 45-24-31(52), is '[a] use by right which is specifically authorized in a particular zoning district.'" Lischio, 818 A.2d at 693.

To demonstrate a hardship constituting more than a mere inconvenience, the applicants must satisfy the requirements of § 45-24-41(c). Lischio, 818 A.2d at 692. Section 45-24-41(c) provides:

> "(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 on which the ordinance is based; and
> (4) That the relief to be granted is the least relief necessary."

In denying the request for a dimensional variance in the instant matter, the Board set forth the following findings:

> "1. That the granting of the requested variance will alter the general character of the surrounding area and impair the intent or purpose of the Zoning Ordinance and the Comprehensive Plan upon which the Ordinance is based as the subject property is located along a riverbank, subject to flooding where there is no other development in the surrounding area on the other lots in the vicinity.
> 2. The hardship results primarily from the desire of the Applicant to realize greater financial gain as the applicant purchased the subject lot along with a residential property as part of a single transaction.
> 3. That the relief requested to be granted is not the least relief necessary." (Resolution Denying the Variance at Lot: 201 Assessor's Map: 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 21.)

The Court will address each of these findings in the order presented by the Board's decision

C
General Character of the Area

The Appellant contends that the Zoning Board's finding—"[t]hat the granting of the requested variance will alter the general character of the surrounding area and impair the intent or purpose of the Zoning Ordinance and the Comprehensive Plan upon which the Ordinance is based"—was characterized by an abuse of discretion and erroneous in view of the reliable, probative, and substantial evidence on the record. (Resolution Denying the Variance at Lot: 201 Assessor's Map: 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 21.) Specifically, Appellant contends that in finding that the requested relief would alter the general character of the area, the Zoning Board members improperly considered testimonial

evidence from abutters, as well as their own personal observations and notions about the Property. The Appellant further argues that the Zoning Board did not properly weigh the testimony of the expert witnesses.

Contrarily, the Zoning Board contends that it was within its right to consider the testimony by abutters, as well as the personal experiences of its members, in reaching its decision. In addition, the Zoning Board argues that many of the statements made by Appellant's experts were conclusory in nature, and as such, were disregarded.

A zoning designation is a "'right which is specifically authorized.'" Lischio, 818 A.2d at 693 (citing § 45-24-31(52)). In this case, the property is located in a R-2 Zone; thus, Appellant has the right to construct a house on the Property. Consequently, the Board must examine "the nature and extent of the relief sought" in deciding on the dimensional variances, and can deny the dimensional variances if the specific relief requested would alter the character of the neighborhood in some way. See Lischio, 818 A.2d at 692.

In determining whether the dimensional variance will "alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan on which the ordinance is based," § 45-24-41(c)(3), the Board must look to "the nature and extent of the relief sought." Lischio, 818 A.2d at 692. The Board cannot consider "the intended use of the parcel" in making such a determination. Id. Lischio, in dicta, generally notes two examples of where dimensional variances would alter the general character of the neighborhood—"a structure so massive or out of place as to alter the general character of the surrounding area" and "a side-yard variance that would eliminate the front yard or sidewalk in a residential neighborhood, a result completely incompatible with the surrounding parcels." 818 A.2d at 693; cf 8 Patrick J. Rohan, Zoning and Land Use Controls § 43.02[4](c) at 43-59 and 43-

60 (2012) ("So long as use variances are allowed . . . the mere fact that the requested variance is inconsistent with the zoning scheme is not a basis for denying the variance); Rogers v. Zoning Hearing Bd. of East Pikeland Tp., 520 A.2d 922, 924 (Pa. 1987) (stating "purely esthetic considerations, standing alone, do not constitute a valid basis for rejecting a request to erect a single-family home on an undersized lot in a district where such dwellings are permitted").

In its decision, the Zoning Board concluded:

> "That the granting of the requested variance will alter the general character of the surrounding area and impair the intent or purpose of the Zoning Ordinance and the Comprehensive Plan upon which the Ordinance is based as the subject property is located along a riverbank, subject to flooding where there is no other development in the surrounding area on the other lots in the vicinity." (Resolution Denying the Variance at Lot: 201 Assessor's Map: 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 21.)

With respect to the general character of the surrounding area, the Zoning Board made several statements regarding their familiarity with the property. Personal observations by zoning board members constitute "legally competent evidence upon which a finding may rest . . . if the record discloses the nature and character of the observations upon which the board acted." Restivo v. Lynch, 707 A.2d 663, 666-67 (R.I. 1998) (quoting Perron v. Zoning Bd. of Review of Burrillville, 117 R.I. 571, 576, 369 A.2d 638, 641 (1977)); see also Dawson v. Zoning Bd. of Review of Cumberland, 97 R.I. 299, 402-03, 197 A.2d 284, 286 (1964) (holding evidence on the record of "condition and circumstances" regarding an inspection of the premises by board members to constitute "legal evidence capable of sustaining a board's decision in an appropriate case[]"). Thus, actual evidence on the record of a board member's inspection can be considered in the decision-making; however, the court "will not presume that a board reached its decision on the basis of knowledge acquired in the course of an inspection . . . ." Dawson, 97 R.I. 302, 197

A.2d at 286. Accordingly, this Court's review is limited to the Zoning Board members' statements made on the record. See Dawson, 197 A.2d at 286 (holding that only evidence on the record of board member's observations can be considered in the decision).

The factual assertions on the record of the Zoning Board members' observations of the property are Board Member Keeling's remarks on surveying the Property "years ago." (Tr. at 34.) When describing the work he performed, he remarked that he didn't "want to get into it" but it focused on "street sweeping . . . ." (Tr. at 73.) Mr. Keeling noted that based on his memory, the grounds of the Property were "very hard and very rocky," (Tr. at 26), but later stated that there was "a lot of loose impediment soil." (Tr. at 34.) In fact, the area of the Property on which construction was proposed consisted of "hard, compacted gravel." (Tr. at 47.) Mr. Keeling also stated that on the Property, there was "not much vegetation at all except dead timber." (Tr. at 26.)

However, Mr. Rabideau promptly corrected Mr. Keeling, discussing the abundance of shrubs on the property with "nice deep root zones" to control erosion. (Tr. at 26.) Furthermore, photographs of the property entered into evidence at the Zoning Board's hearing demonstrate an abundance of trees and shrubbery. (Zoning Board Record Ex. C: Photographs of Property.) It is clear from the record that Board Member Keeling possessed an imperfect memory of the property. Regardless, evidence on the record describing the Zoning Board members' recollection of the Property is insufficient to support the Zoning Board's decision as it bears no relation to the proposal at hand or any purported change in the general characteristics in the area. See Dawson, 197 A.2d at 286 (holding that board members' observations of the property can only sustain a board's findings when adequate evidence of their observations is placed on the record).

With respect to the Zoning Board's conclusion that "there is no other development in the surrounding area on the other lots in the vicinity[,]" (Resolution Denying the Variance at Lot: 201 Assessor's Map: 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 21), according to the Town of Burrillville's own map, only two lots remain undeveloped: Appellant's lot and the significantly smaller lot belonging to Ms. Levesque. (Amended Variance Application at 7.) Ms. Levesque's lot is at a lower elevation, closer to the wetland, (Tr. at 72), and only about two-third the size of Appellant's lot. (Letter from Preferred Appraisal Services at 4.) All other lots in the vicinity are developed and the area, including Appellant's Property, is zoned for single-family residences. (Amended Variance Application at 7.)

In its findings of fact, the Zoning Board noted the testimony of Ms. Levesque, Ms. Dejarlais and abutter Ms. Linda Cosetta, who each testified that the Clear Water River flowing through Applicant's property greatly increases in velocity during severe storms. (Resolution Denying the Variance at Lot: 201 Assessor's Map: 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 19-20.) However, as to the Zoning Board's concerns over flooding in denying Appellant's dimensional variance (Resolution Denying the Variance at Lot: 201 Assessor's Map 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 21), no evidence was presented to demonstrate that the grant of a dimensional variance would exacerbate flooding beyond bare allegations from abutters and Zoning Board members.

With regard to lay witness testimony, only bare observations can be considered by this Court to bear any probative value. Restivo, 707 A.2d at 670. Thus, the opinions by witnesses that the house would create traffic hazards and worsen flooding bear no probative value. See

Salve Regina, 594 A.2d at 882 (holding lay opinions hold no probative weight). Indeed, the Zoning Board decision should only rest on lay observations if the Zoning Board can "fairly draw inferences" from this evidence. See Restivo, 707 A.2d at 670 (holding in the context of a planning board).

In Salve Regina, with respect to a petition for a special exception, the Court held that "'the lay judgments of neighboring property owners on the issue of the effect of the proposed use on neighborhood property values and traffic conditions have no probative force in respect of an application to the zoning board of review for a special exception.'" 594 A.2d at 882 (quoting Toohey v. Kilday, 415 A.2d 732, 735 (R.I. 1980)). Nevertheless, lay testimony may be persuasive where it encompasses "physical facts and conditions . . . from which the planning board could fairly draw inferences." Restivo, 707 A.2d at 670. Despite the Zoning Board's referring to abutter's testimony as support for their decision, Tr. at 80-81, the Zoning Board could not reasonably make an inference from witness reports of flooding that construction would exacerbate flooding in the wetlands. Cf. Restivo, 707 A.2d at 670 (finding lay testimony persuasive where witnesses specifically observed exacerbated drainage problems in the wake of residential construction).

In contrast to the unsupported lay testimony, the Zoning Board had before it uncontraverted testimony from Appellant's experts. It is well-settled law that "there is no talismanic significance to expert testimony." Id. Indeed, "[i]f the expert fails specifically to set forth the factual basis for his conclusion, the court must disregard his testimony." Ferland Corp. v. Bouchard, 626 A.2d 210, 214 (R.I. 1993). Expert testimony may also be outweighed by the board's own evidence. Smith v. Zoning Bd. of Review of Warwick, 103 R.I. 328, 237 A.2d 551 (1968). However, "if expert testimony before a zoning board is competent, uncontradicted, and

unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony." Murphy v. Zoning Bd. of Review of the Town of North Kingstown, 959 A.2d 535, 542 (R.I. 2008); see also Dawson, 197 A.2d at 287 (holding the zoning board's decision must rest on legally competent evidence).

The evidence in the record does not demonstrate that the proposed project would impact the wetlands or contribute to flooding. Indeed, the Zoning Board had before it evidence that the proposed construction would cut down on erosion and serve to preserve the wetlands. Mr. Rabideau, in preparing his report, performed an inspection of the site, followed by a habitat assessment. (Narrative of Biological Impact at 5.) He examined the soil and topography of the Property. Id. In collecting his data, Mr. Rabideau was accompanied by two wildlife biologists who noted the vegetation and potential fauna on the Property. Id. at 6-8.

In addition, Mr. Rabideau proposed erosion controls, such as grass and vegetation buffers to reduce scouring velocities, id. at 10, as well a wetland buffer to screen noise and light from the street away from the wetlands. (Tr. at 16-17.) Mr. Rabideau's report concluded that the proposed construction has "no potential to adversely affect any freshwater wetland's flood capacity." (Narrative of Biological Impact at 10.) The DEM affirmed this conclusion, after its own inspection, stating that the proposed "project does not involve significant alterations to the subject wetlands . . . ." (Insignificant Alteration Permit at 1.) In addition, Mr. Therien commented that the change in soil compaction would actually improve drainage on the property. (Tr. at 47.) Furthermore, Mr. Fontaine, an expert Real Estate Appraiser, testified that the proposed home would be characteristic of the surrounding area. (Tr. at 38.)

The record reveals that the Board's only response to the expert testimony is that the "DEM . . . dots their I's [and] crosses their T's; but they don't live in Burrillville . . . ." (Tr. at

75.) Board Member Johnson stated, "[The DEM] can tell me all they want that there's not going to be any disturbance. You put a foundation in on that property, there's going to be a certain amount of disturbance." Id. As such, the Zoning Board listed only unsubstantiated concerns that construction would exacerbate flooding of the wetlands, despite expert testimony to the contrary, as a reason for denying the variance. Similarly, the Zoning Board's concerns over excavation of the site upon which the house would be built are not supported by the probative evidence; the fill removed for the construction of a foundation would be brought off site, eliminating any impact on the topography of the area. (Tr. at 13.)

Ultimately, the conclusion by the Zoning Board that the approval of dimensional variance would alter the general character of the area by exacerbating flooding is erroneous in view of substantial evidence on the record. The expert evidence demonstrated the contrary; namely, that the proposed plans would reduce erosion and preserve the wetland area. Consequently, the Court reverses the Zoning Board on this issue.

D
Hardship and Financial Gain

The Appellant further contends that the Zoning Board erred in finding that "[t]he hardship results primarily from the desire of the Applicant to realize greater financial gain as the applicant purchased the subject lot along with a residential property as part of a single transaction." (Resolution Denying the Variance at Lot: 201 Assessor's Map 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 21.) Specifically, Appellant maintains that the hardship results from the wetland feature across his property, and that not being able to build a house on the Property constitutes more than a mere inconvenience. With respect to financial gain, Appellant contends that the Zoning Board improperly considered the evidence that Appellant bought two adjoining lots in a single transaction. Indeed, Appellant

appears to suggest that without the dimensional variances, he would not be able to use the land and be deprived of all beneficial use. Thus, rather than seeking financial gain, the Appellant indicates that he simply is seeking the ability to use his land in the first instance.

Contrarily, the Zoning Board contends on appeal that in denying the variance, it did not deprive Appellant of all beneficial use of the land. The Zoning Board asserts that as Appellant uses the land for a parking lot to serve his other abutting property, he is already benefitting from the land. The Zoning Board further contends that Appellant's request to build a house on the premises is based solely on a desire for greater financial gain and suggests that as a result, he has created his own hardship.

For a zoning restriction to constitute an undue hardship, strict adherence to the dimensional requirement must interfere with the reasonably full enjoyment of the permitted use of the land. Westminster Corp., 103 R.I. at 323, 239 A.2d at 360; see also Lischio, 818 A.2d at 694-95. An applicant cannot request a variance to simply achieve greater financial gain. See § 45-24-41(c) (stating hardship may "not result primarily from the desire of the applicant to realize greater financial gain"). In addition, the hardship endured must not be self-created, i.e., it cannot be created by the applicant. See id. (stating that the hardship may not be "the result of any prior action of the applicant"). However, the term "self-created hardship" is a label that "seems to be most properly employed where one acts in violation of an ordinance and then applies for a variance to relieve the illegality." Sciacca v. Caruso, 769 A.2d 578, 584 (R.I. 2001) (Quoting 7 Patrick J. Rohan, Zoning and Land Use Controls § 43.02[6] at 43-66 (1998)).

In the instant matter, there is not one scintilla of evidence that Appellant acted in violation of the ordinance and then applied for variances to relieve the resulting illegality. Indeed, the record clearly demonstrates that Appellant did not create his own hardship. Instead,

he merely purchased two legally separate, adjacent lots, one of which is unbuildable without the issuance of dimensional variance relief. See DeStefano, 122 R.I. at 247, 405 A.2d at 1171 (holding that the knowing purchase of a lot improperly zoned for construction did not constitute creation of hardship); see also Gardiner v. Zoning Bd. of Warwick, 101 R.I. 681, 691, 226 A.2d 698, 704 (1967) (same); cf. Caccia v. Zoning Bd. of Review of Providence, 83 R.I. 146, 113 A.2d 870 (1955) (overturning a grant of dimensional variance where applicant requested a variance to build a garage to service a house he built in excess of permitted lot coverage).

The Board's suggestion on appeal that Appellant can use the land for a parking lot and thus is not deprived of all beneficial use is in violation of ordinance provisions. See Viti, 92 R.I. 59, 64-65, 166 A.2d 211, 213 (replacing the "all beneficial use standard with a "mere inconvenience" standard in regard to dimensional variances); see also Northeastern Corp., 534 A.2d at 605 (noting that the deprivation of all beneficial use standard applies only to "true variances" where the request is for a change in land use designation). The Appellant's Property is zoned for residential use; consequently, the proposed construction is a permitted use of the land. However, a stand-alone parking lot, the alternative use proposed by the Zoning Board on appeal, is not a permitted use of the Property. See Ordinance § 30-71.

The Appellant testified that he plans on building the requested house on the Property to use as his home rather than achieving some greater financial gain. (Tr. at 71.) Considering that the Property was zoned for residential use, the fact that the Property was purchased in conjunction with another lot has no bearing on the request for dimensional variances. See Westminster Corp., 103 R.I. at 323, 239 A.2d at 360 (upholding a grant of dimensional variance where the variance was necessary for applicant to utilize the property for its zoned usage designation). There is no evidence that Appellant is requesting this variance so that he may build

a large home from which he may profit. See id., 103 R.I. at 325, 239 A.2d at 358-59 (upholding a grant of a dimensional variance where a literal enforcement would prevent the project from being economically viable); cf. Apostolou v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 826 (1978) (overturning a grant of a dimensional variance where a literal enforcement would "be economically impractical and aggravate a parking situation at the facility" and as such, would not constitute more than a mere inconvenience).

The Zoning Board had before it evidence that Appellant would endure more than a mere inconvenience in his utilization of the Property if his request is denied. See Gardiner, 101 R.I. at 690-91, 226 A.2d at 703 (upholding the grant of a dimensional variance where "as a practical matter," applicant could not build his home without relief). The decision by the Zoning Board that Appellant's hardship results from a desire for greater financial gain is both arbitrary and clearly erroneous in light of reliable evidence on the record.

E
Least Relief Necessary

The Appellant also contends that the Zoning Board erred in finding "[t]hat the relief requested to be granted is not the least relief necessary." (Resolution Denying the Variance at Lot: 201 Assessor's Map: 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 21.) Instead, he maintains that his request for dimensional variances constituted the least relief necessary for the proper development of his land.

Specifically, Appellant asserts that as the entire Property is within the wetlands buffer zone, his requested relief of 12,000 square feet is the minimum needed to build on the land. As for the two requests for setback relief, Appellant avers that the record shows the proposed plans for the residence were reasonable. He further contends that as there is no evidence on the record

to suggest that the requested relief was not the least relief necessary, the Court must overturn the Zoning Board's decision.

In response, the Zoning Board contends that the proposed three-bedroom home was too large and should have been substituted with a two-bedroom residence. As such, the Zoning Board asserts it is obvious that Appellant could have proposed a smaller house and that consequently, the relief requested was not the least relief necessary.

The Appellant has the burden of demonstrating that the relief requested is the least relief necessary. Standish-Johnson Co. v. Zoning Bd. of Review of the City of Pawtucket, 103 R.I. 487, 492, 238 A.2d 754, 757 (1968) (holding 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"). Thus, the issue before the Zoning Board was whether the proposed construction plan submitted by Appellant was the least relief necessary for the development of his property.

The property in question is adjacent to a river and is part of a wetland buffer zone, as designated by the DEM. The Appellant seeks three dimensional variances: a front set-back variance, a floodplain set-back variance, and a variance for upland relief. Since all of Appellant's Property is part of a wetlands upland area, Appellant needs a dimensional variance to be able to build a home anywhere on the property.

In the course of planning for the construction of the home, Appellant contacted the DEM, which looked over his proposal and approved the project. In doing so, DEM delineated specific measures to protect the wetlands, thus, limiting potential placement of the house. (Insignificant Alteration Permit.) Accordingly, the Zoning Board heard from expert witness Mr. Therien, "There is no other place to build on this piece of property." (Tr. at 7.) Furthermore, in order to

maintain a proper buffer from the wetlands, the house must be situated closer to the road, in violation of the front-setback provision, as well as within the range of the 100-year floodplain. Id. As a result, the two additional requests are necessary before a house can be built on the Property.

At the hearing, Mr. Therien testified that he took into account suggestions made by the "Zoning Officer of the Town, Mr. Joe Raymond, as well as the Department of Environmental Management; and the house was shrunk." (Tr. at 8.) Mr. Therien also opined that nothing could be done "in developing the lot that would allow for a lesser amount of relief . . . ." (Tr. at 8.) Mr. Rabideau's report concluded that:

> "[t]here are no further possible reductions in the scale of the proposed project, nor are there any alternative locations, designs, or layouts for the project that would result in less disturbance to the on-site jurisdictional wetlands . . . . [T]his project will not result in any adverse consequences to public health and safety and/or the environment." (Narrative of Biological Impact at 5.)

Real estate appraiser, Mr. Fontaine, agreed with Mr. Therien's conclusion that the requested variances constituted the least relief necessary. (Tr. at 39.)

The Zoning Board's discretion in approving dimensional variances is "limited to the extent of relief demonstrated to be reasonably necessary to the enjoyment of the permitted use sought to be served." Lincoln Plastic Products Co. v. Zoning Bd. of Review of the Town of Lincoln, 104, R.I. 111, 115, 242 A.2d 301, 303 (1968). As such, in determining whether the relief requested was the least necessary to enjoyment of the property, the Court has looked to the reasonableness of the proposed size and character of the building in relation to the surrounding area. See Gardiner, 101 R.I. at 680-681, 226 A.2d at 703 (upholding a grant of variance where the proposed residence was of reasonable size in relation to the neighborhood). A request for a variance is not the least relief necessary if the zoning ordinance creates only a "personal

inconvenience" for the applicant. DiDonato v. Zoning Bd. of Review of Johnston, 104, R.I. 158, 164, 242 A.2d 416, 420 (1968) (upholding the denial of a dimensional variance where applicant requested a dimensional variance so that he could build an oversized home to accommodate his growing family).

The Zoning Board's decision lists the "excessive amount of relief required" as a reason for denying the dimensional variance. (Resolution Denying the Variance at Lot: 201 Assessor's Map: 157, Town of Burrillville Land Evidence Records on June 13, 2007 in Book 586 at 21.) In regards to the request for upland relief, Board Member Cloutier articulated that Appellant "was asking for an awful lot of relief." (Tr. at 75.) Indeed, without articulating specific facts as to why the relief would alter the general character of the area, the Zoning Board cannot look at the specific square footage for requested relief and arbitrarily decide it is too much. See Sciacca, 769 A.2d at 585 (chastising the zoning board for not offering evidence in support of its decision); see also Dawson, 197 A.2d at 287 (holding the zoning board's decision must rest on legally competent evidence); see also Lischio, 818 A.2d at 692 (holding a zoning designation to be a right vested in the property owner).

The Zoning Board contends that Appellant could have proposed a smaller house and thus, the relief requested was not the least relief necessary. In making this contention, and seemingly without any basis, the Zoning Board rejected expert testimony that the relief requested was the least relief necessary for construction. See Murphy v. Zoning Bd. of Review of the Town of North Kingstown, 959 A.2d at 542 (R.I. 2008) (holding that a zoning board may not simply ignore uncontradicted expert testimony when issuing its findings).

Case law suggests that the requirement of "least relief necessary" is, in essence, a "reasonableness" test, comparing the proposed project to what is characteristic of the

surrounding area. See Gardiner, 101 R.I. at 680-681, 226 A.2d at 703 (upholding a grant of variance where the requested variance was of practical necessity to allow the construction of proposed house that was of reasonable size and characteristic of the surrounding area); cf. DiDonato, 104, R.I. 158, 164, 242 A.2d 416, 420 (1968) (upholding denial of a grant of variance where variance was specifically requested to allow construction of oversized house in order to accommodate growing family when reasonably-sized home needed no variance). However, seemingly without any basis, the Zoning Board rejected expert testimony that the relief requested was the least relief necessary for construction. See Murphy v. Zoning Bd. of Review of the Town of North Kingstown, 959 A.2d at 542 (R.I. 2008) (holding that a zoning board may not simply ignore uncontradicted expert testimony when issuing its findings).

The record reveals that Appellant cooperated with DEM and the town's zoning officer in shrinking the size of his original plans. The record further reveals that Appellant produced uncontraverted expert evidence demonstrating that he was seeking the least relief necessary and that the proposed dwelling was in keeping with the character of the neighborhood. Nevertheless, the Zoning Board rejected this evidence and found that the requested relief was not the least relief necessary. This decision clearly was erroneous and arbitrary in light of the reliable evidence on the record, as the Court concludes that Appellant sustained his burden of proving that he was seeking the least relief necessary.

IV

Conclusion

After review of the entire record, the Court finds that the Zoning Board's decision is in excess of statutory authority, arbitrary, in violation of ordinance provisions, and not supported by the reliable, probative and substantial evidence of record. Substantial rights of Appellant have

been prejudiced. Accordingly, the decision of the Zoning Board is reversed. Counsel shall submit an appropriate Order for entry.