STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC **SUPERIOR COURT**

(FILED: March 8, 2013)

HENRY TARBOX and MARY TARBOX	:	
	:	
v.	:	**C.A. No. NC-10-667**
	:	
ZONING BOARD OF REVIEW FOR THE TOWN OF JAMESTOWN	:	

DECISION

VAN COUYGHEN, J. This matter is before the Court as a result of an appeal taken by Henry and Mary Tarbox ("Appellants") of the denial of their application for a dimensional variance by the Zoning Board of Review for the Town of Jamestown ("Appellee" or "Zoning Board"). Jurisdiction is pursuant to R.I Gen. Laws § 45-24-69.

I

Facts and Travel

Mr. and Ms. Tarbox own a single-family home located at 28 Clarke Street in Jamestown, Rhode Island, which is identified as Tax Assessor's Plat 9, Lot 798. (Zoning Board Decision ("Decision") 1.) The Tarboxes' lot ("the Property") contains 11,427 square feet and is located in an R-8 zone according to the Jamestown Zoning Ordinance ("Zoning Ordinance"). Id. at 1-2. The Property, in its current form, conforms to the dimensional requirements of the Zoning Ordinance; that is, an R-8 zone permits single-family homes on lots of at least 8000 square feet. Zoning Ordinance § 82-302 Table 3-2.

Mr. and Ms. Tarbox requested dimensional relief to build an apartment attached to their home. (Appl. for Exception or Variance 1.) Appellants' proposed addition consisted of a one-

bedroom, one-and-one-half-bathroom apartment. See Decision 1; Appl. for Exception or Variance 2. The addition of the 624 square-foot apartment would create a duplex.[1] (Appl. for Exception or Variance 1.) An R-8 zone permits duplexes but requires a minimum lot size of 15,000 square feet. See Zoning Ordinance § 82-302 Table 3-2; Decision 1.

The Zoning Board held a hearing on October 26, 2010. (Decision 1.) Mr. Tarbox, who was the only witness who testified, explained that his purpose for building the apartment was to provide his mother with a place to live. (Tr. 10/26/10, 6:15-7:1.) Eventually, he and his wife would move into the apartment and his children would occupy the existing house. Id. Mr. Tarbox also testified that he wanted to construct a duplex rather than add additional bedrooms to his residence because it provided more privacy for his mother and subsequently for him and his wife. Id. at 7:2-18. Additionally, Mr. Tarbox testified that there are other duplexes in his neighborhood, including the property next to his house. Id. at 7:19-8:4. There was a brief conversation about how long the Zoning Ordinance had required 15,000 square-feet for a duplex,[2] and no other witnesses spoke in support of or opposition to the Tarboxes' request. Id. at 8:22-11:10, 12:7-10.

After some discussion, a member of the Zoning Board made a motion to grant the Tarboxes' application for a variance based on seven findings of fact. Id. at 12:24-14:9. Following additional discussion, three members of the five-member Zoning Board voted in favor of granting the motion to approve the application. However, because four votes were required to

[1] The Zoning Ordinance's definition of "Duplex" refers to "Dwelling – Two Household," which is defined as "[a] structure containing two households where each dwelling unit provides complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking, and sanitation, and containing a separate means of ingress and egress." Zoning Ordinance § 82-103(52), (53).

[2] The Zoning Ordinance available to the public apparently mistakenly showed no dimensional requirements for a duplex in an R-8 zone. Id. at 9:25-11:5. This was amended in March of 2010, when the 15,000-square-feet requirement was properly included. Id.

approve the Tarboxes' request, the two dissenting votes prevailed, and the application was denied. See Tr. 14:16-17:23. The Zoning Board formally denied the Tarboxes' application for a variance in a written Decision issued on October 27, 2010, and filed on November 17, 2010. The Decision reflected that the motion for approval, with findings of fact, was made but did not pass because of the two negative votes. The Zoning Board's Decision did not contain findings of fact to support the Zoning Board's denial of the application. Mr. and Ms. Tarbox filed this appeal on December 3, 2010.

II

Standard of Review

Pursuant to § 45-24-69(d), the Superior 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." A reviewing court may

> "affirm the decision . . . remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced 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.

Id. A reviewing court's role is not "'to weigh the evidence, to pass upon the credibility of witnesses, or to substitute his or her findings of fact for those made at the administrative level.'" Restivo v. Lynch, 707 A.2d 663, 665-66 (R.I. 1998) (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). Instead, the court must "'examine the entire record to determine whether

substantial evidence exists to support the board's findings.'" Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting DeStefano v. Zoning Bd. of Review, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)) (internal quotation marks omitted). "'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, 818 A.2d 685, 690 n.5 (R.I. 2003) (alteration in original) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). If the court cannot find sufficient evidence to support a zoning board's decision, then the decision cannot stand. See Mill Realty Assocs., 841 A.2d at 672.

III

Analysis

Mr. and Ms. Tarbox argue that the Zoning Board failed to sufficiently explain its reasons for denying their application for dimensional relief, as the Zoning Board's Decision did not explain which, if any, of the requirements for a dimensional variance the Appellants failed to satisfy. In other words, the Tarboxes argue that the minority voting bloc of the Zoning Board did not provide findings of fact, which is required pursuant to § 45-24-61(a).

A

The Board's Decision

Section 45-24-61(a) requires that a zoning board's written decision must "include . . . all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote." Findings of fact are necessary to determine "'whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles.'" Bernuth v. Zoning Bd. of Review, 770

A.2d 396, 401 (R.I. 2001) (quoting Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986)). The Court in Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001), noted that a zoning board's failure to include findings of fact and conclusions of law "completely disregarded [the zoning board's] obligation to spell out its conclusions and reasoning," an obligation that was "clearly set forth . . . [in the zoning ordinance]." That Court "caution[ed] zoning boards . . . to make certain that zoning board decisions . . . address the evidence in the record before the board that either meets or fails to satisfy each of the legal preconditions for granting [or denying] such relief." Id. 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.'" Bernuth, 770 A.2d at 401 (quoting Irish P'ship, 518 A.2d at 358-59). Unless "'[t]hese minimal requirements . . . are satisfied, a judicial review of a board's work is impossible.'" Id. (quoting Irish P'ship, 518 A.2d at 358-59).

In Bernuth, 770 A.2d at 402, a zoning board granted a dimensional variance upon findings of fact regarding some but not all of the statutory prerequisites. The Supreme Court reversed, holding that the Superior Court erred by affirming the decision that contained "no discussion" of the additional requirement, which the zoning board had not even acknowledged in its decision. See id. Because the zoning board's decision failed to comply with the statutory provision requiring findings of fact and conclusions of law, the Bernuth Court remanded the case to the Superior Court for an order denying the variance. Id. The Court "caution[ed] zoning boards and their attorneys to make certain that zoning-board decisions on variance applications . . . address the evidence in the record before the board that either meets or fails to satisfy each of the legal preconditions for granting such relief." Id.

Here, the Decision of the Zoning Board reflects a motion to grant the application, which

included findings of fact in support of granting the application. That motion failed to pass because only three of the five members voted in favor of it. See Zoning Ordinance § 82-501(B)(3) (requiring a four-fifths majority to grant variances); see also § 45-24-57 (explaining that four votes "are required to decide in favor of an applicant on any matter within the discretion of the board upon which it is required to pass under the ordinance, including variances and special-use permits"). The motion provided that the Zoning Board had "determined that th[e] application d[id] satisfy the requirements of Article 6, Section 600, Section 606, and Section 607," which substantially mirror the Rhode Island General Laws' requirements for dimensional relief. See Decision at 1. The Zoning Board's motion, labeled as its Decision, set forth only seven findings of fact, all of which supported the majority position to grant the relief sought:

> "1. Said property is located in a[n] R8 zone and contains 11,427 sq[uare] f[ee]t.
> 2. A duplex is a permitted use in the zone. There are other duplexes in the area.
> 3. No dimensional variance is required.[3]
> 4. The total building area, as expanded, will be less than 17% of the land area.
> 5. Granting of the variance will enable the applicant's family to remain on the island, which is consistent with the tenor of affordable housing principles recently incorporated into the Comprehensive Plan.
> 6. A duplex is consistent with the Comprehensive Plan.
> 7. There were no objections to the application."

(Decision 2.) The minority voting bloc added no findings of fact indicating why it voted against the application.

The Decision of the Zoning Board failed to adequately set forth the required findings of fact. The Decision contains no findings of fact whatsoever regarding the minority voters'

[3] The record reveals that this finding refers to a variance, such as from setback requirements, other than the relief from the lot-size requirement that the Tarboxes requested in their application. See Tr. 8:19-22.

reasoning for denying the application. Consequently, the Court is unable to review the propriety of the Decision. This Court requires findings of fact to determine "'whether the board members . . . made the prerequisite factual determinations[] and applied the proper legal principles.'" See Bernuth, 770 A.2d at 401 (quoting Irish P'ship, 518 A.2d at 358-59). Such findings are required to enable appellate review. See id. (citing Irish P'ship, 518 A.2d at 358-59).

The minority members should have included the findings of fact and conclusions of law on which they based their votes. See Schofield v. Zoning Bd. of Review, 99 R.I. 204, 205-06, 206 A.2d 524, 525 (1965); Noyes v. Zoning Bd. of Review, 95 R.I. 201, 203-06, 186 A.2d 70, 71-73 (1962). In Schofield, the Supreme Court reviewed an application for an exception that was denied because it garnered only three affirmative votes and explained that "[n]either is it disputed that a minority may make findings other than those of the majority and that such findings will not be disturbed by [the Supreme Court] on review when supported by legally competent evidence disclosed in the record." 99 R.I. at 205-06, 206 A.2d at 525. The Schofield Court held that the minority's position was supported by legally competent evidence and therefore affirmed the zoning board's action. Id. at 208, 206 A.2d at 527.

B

Dimensional Relief

In most situations, insufficient findings of fact would cause this case to be remanded to the Zoning Board for factual findings. The Supreme Court in Hopf v. Board of Review of the City of Newport, 102 R.I. 275, 289, 230 A.2d 420, 428 (1967), adopted this approach for that case "and, in the future, to all cases where the evidence is in conflict." The Hopf Court distinguished earlier cases in which it "searched the record itself to determine whether there was evidence therein to support the board's decision" by noting that in those cases "the evidence was

undisputed and the facts uncontradicted." Id. at 289, 230 A.2d at 428 (1967) (citations omitted); see also Travers v. Zoning Bd. of Review of Town of Bristol, 101 R.I. 510, 514, 225 A.2d 222, 224 (1967) (examining the record in a case in which the board failed to state its reasons and determining that a variance was warranted); Roland F. Chase, Rhode Island Zoning Handbook § 210 at 299 (2d ed. 2006) ("Unless the evidence is not in conflict, a decision granting or denying relief" that fails to give the reasons and evidence on which it is based "will be returned to the zoning board for completion and clarification.").

Justices of this Court have acknowledged this approach when distinguishing cases that contain uncontradicted evidence. See, e.g., Bailey v. Warwick Zoning Bd. of Review, C.A. No. KC 96-229, 1997 WL 839934 *3-4 (R.I. Super. June 16, 1997) (Silverstein, J.); Castelli v. Zoning Bd. of Review, C.A. PC 91-6209, 1993 WL 853829 *4 (R.I. Super. June 30, 1993) (Goldberg, J.). In Bailey, 1997 WL 839934 *3, a zoning board's decision denying an application for a dimensional variance "lack[ed] specific findings of fact." The Superior Court examined the record, explaining that "[t]he Hopf case expressly limits the above-mentioned rule [requiring remand because of insufficient findings of fact] to cases where evidence is in conflict." Id. Upon its examination of the record, that Court reversed the zoning board's decision because it found that the applicants there had satisfied their burden. Id. Similarly, in Castelli, 1993 WL 853829 *3-4, the evidence was also uncontradicted. The Court reviewed the record, reversing the zoning board's decision because the applicants had met their burden. Id. Because the evidence was not in conflict, the Castelli Court rejected an argument that the lack of findings of fact precluded a review of the decision, explaining that although it was "a well-settled rule that zoning boards should set forth the reasons and grounds for their decisions," the "Supreme Court has stated that courts should not subject the parties to such delay and inconvenience where they

were able to satisfy themselves from the record that the [b]oard's decision was either correct or erroneous regardless of the failure to give reasons for their decision." See id. at *3 (citing Richards v. Zoning Bd. of Review, 100 R.I. 212, 219-20, 213 A.2d 814, 818 (1965); Winters v. Zoning Bd. of Review, 80 R.I. 275, 277, 96 A.2d 337, 339 (1953)).

Here, the only evidence presented at the hearing was the testimony of Mr. Tarbox. There was no conflicting evidence, no objectors, nor did the Zoning Board indicate on the record that it relied on its own special knowledge of the area. See Sciacca, 769 A.2d at 585 (addressing the inadequacy of a decision and explaining that reliance on a zoning board's "special knowledge" is permitted only if "the record reveals the underlying facts and circumstances"). Because the evidence was not in conflict, this Court will examine the record to determine whether there was evidence to support the Tarboxes' application. See Hopf, 102 R.I. at 289, 230 A.2d at 428.

To obtain a dimensional variance, the Zoning Ordinance provides, as § 45-24-41(c) similarly provides, that the Zoning Board

> "shall require that evidence to the satisfaction of the following standards be entered into the record of the proceedings:
> 1. That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant;
> 2. That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;
> 3. That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the ordinance [this chapter] or the comprehensive plan upon which the ordinance [this chapter] is based; and
> 4. That the relief to be granted is the least relief necessary."

Zoning Ordinance § 82-606. Additionally, "[i]n granting a dimensional variance," there must be evidence on the record that "the hardship that will be suffered by the owner of the subject property if the dimensional variance is not granted shall amount to more than a mere

inconvenience." Id. § 82-607(2).

Here, a review of the record demonstrates that Mr. and Ms. Tarbox have satisfied their burden to obtain a dimensional variance. They wish to create a duplex, which is a permitted use in an R-8 zone, by adding a 624 square-foot apartment to their home. See § 82-302 Table 3-1; Appl. for Exception or Variance 1-2. The record shows that the relief sought by Mr. and Ms. Tarbox in pursuing a permitted use with a substandard lot was due to the unique characteristics of their lot—its square footage is below the required square footage for a duplex—and not due to their personal physical or economic disability. See Zoning Ordinance § 82-606; Tr. 6:1-11.

There was no evidence that the relief sought was due to any prior action of the Tarboxes or primarily from their desire for financial gain. The only evidence presented was that Mr. and Ms. Tarbox intend that his mother live in the apartment, followed by their own use of the apartment. See Zoning Ordinance § 82-606; Sciacca, 769 A.2d at 584; Tr. 6:15-7:18. There was no indication that any Zoning Board members questioned Mr. Tarbox's credibility. The only motivation supported by the record for a duplex as opposed to a larger single-family home is the desire for privacy for the occupants of the respective apartments. Tr. 7:2-7:18.

The record shows that there are other duplexes in the area, so permitting the relief sought would "not alter the general character of the surrounding area." See Zoning Ordinance § 82-606; Tr. 7:19-8:1, 15:22-16:3. In fact, Mr. Tarbox testified that his next-door neighbor's home is a duplex. Tr. 7:19-8:4. Additionally, the record shows and the Zoning Board found that the presence of duplexes in that area indicates that granting the requested relief would be consistent with the Comprehensive Plan.

Based on the size of the lot and the allowable usage of the land area of the lot, the relief sought was the least relief necessary. An R-8 zone requires 15,000 square feet for a duplex, and

while the Property is 11,427 square feet, the record shows and the Zoning Board found that the proposed total building area would be seventeen percent of the land area, which is well below the thirty percent maximum allowed in an R-8 zone. See § 82-302 Table 3-2.

Finally, the record discloses that the relief would allow Mr. and Ms. Tarbox and their family to "remain viable" in Jamestown. Tr. 6:23-7:1. Indeed, the Zoning Board found that the addition would permit the Tarboxes and their family to remain in Jamestown. The hardship suffered by the Tarboxes if the relief were denied would be more than a mere inconvenience.

IV

Conclusion

The Zoning Board's Decision did not include the necessary findings of fact. However, because the evidence was not in conflict, this Court has reviewed the record to determine whether it supported the Zoning Board's action. After reviewing the record, this Court finds that the Zoning Board's action was clearly erroneous in view of the reliable, probative, and substantial evidence. Substantial rights of the Tarboxes have been prejudiced. Accordingly, the Zoning Board's Decision is reversed, and the Tarboxes' application for a dimensional variance is granted. Counsel for the prevailing party shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Cover Sheet

TITLE OF CASE:	TARBOX v. ZONING BOARD OF REVIEW FOR THE TOWN OF JAMESTOWN
CASE NO:	NC 2010-667
COURT:	Newport County Superior Court
DATE DECISION FILED:	March 8, 2013
JUSTICE/MAGISTRATE:	Van Couyghen, J.
ATTORNEYS:	
For Plaintiff:	Peter Brockmann, Esq.
For Defendant:	Wyatt Brochu, Esq.