STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC **SUPERIOR COURT**

(FILED: March 13, 2013)

SANDRA LANG, F. DENNIS MCCOOL, RICHARD P. FAIRGRIEVE, AND BANCROFT ON THE BLUFFS CONDOMINIUM ASSOCIATION	:	
V.	:	**C.A. No. NC-2011-0302**
ZONING BOARD OF REVIEW FOR THE TOWN OF MIDDLETOWN ACTING BY AND THROUGH ITS MEMBERS PETER VANSTEEDEN, LUCY LEVADA, THOMAS NEWMAN, FRANK FLANAGAN, GREG SCHULTZ; BANCROFT PARTNERS, LLC, JOHN W. BAGWILL, JR., AND EMILY S. BAGWILL, INDIVIDUALLY AND AS TRUSTEES OF THE EMILY S. AND JOHN BAGWILL, JR. TRUST	:	

DECISION

VAN COUYGHEN, J. The matter before this Court is an appeal from a decision ("Decision") of the Zoning Board of the Town of Middletown ("Board"). The Board granted the petition of Bancroft Partners, LLC ("Bancroft" or "Appellees"), John W. Bagwill Jr. and Emily S. Bagwill[1] ("Bagwills" or "Appellees") for a dimensional variance from Section 603 of the Middletown Zoning Ordinance. Sandra Lang, F. Dennis McCool, Richard P. Fairgrieve, and Bancroft on the Bluffs Condominium Association ("Appellants"), abutters, seek to reverse the Board's Decision. Appellants' appeal was timely filed, and jurisdiction is pursuant to R.I. Gen. Laws § 42-24-69 (1956).

[1] The petition involved a transfer of land from the Bagwills to Bancroft some time after the initial petition for relief, thus requiring Bancroft to amend its original application, adding the Bagwills as parties.

I
Facts and Travel

The property involved in the current dispute is located at 575 Tuckerman Avenue, Middletown, Rhode Island. It was purchased by Appellees, Bancroft Partners, LLC, in December of 2004. The property consisted of two lots: Lot 123 and Lot 12700 (formerly Lot 127). When Bancroft purchased the property, Lot 123 was a vacant, legal nonconforming lot of record. It had 13.06 feet of road frontage, approximately 78,100 square feet of land area, and was capable of accommodating the construction of a single-family dwelling by right. The only nonconformity at the time was that it lacked sufficient road frontage. Lot 12700 had an eleven-unit residential structure, with 173± feet of road frontage, and contained 98,783 square feet of land area. The multi-unit building was a legal nonconforming use. Bancroft purchased the property with the intent to reconfigure the lots. The lots are located in an R30 residential zoning district which permits single-family homes. Additionally, R30 zoning requires 130 feet of road frontage and 30,000 square feet of land area.[2]

Upon consideration of multiple development options, Bancroft decided that the preferred option was to add a 5641 square foot addition to the multi-unit building and erect a single-family dwelling on the water. This option required an administrative subdivision of the property, as well as a special use permit in order to add on to the multi-unit building.[3] The administrative subdivision proposed to reconfigure the property lines and essentially flip the lots from north to south. In other words, Lot 123 would be moved to the south on the water, and Lot 12700 would be moved to the north away from the water. The effect of the subdivision was that the road

[2] At all times during the ownership of the property, Bancroft complied with the requisite land area of each lot.

[3] In order to accommodate the construction of the 5641 square foot addition, Lot 12700 was improved with grading, drainage, parking, driveways, landscaping, and buffer zones.

frontage of 13.06 feet would be moved with Lot 123 to the south, which would allow for a single-family house to be built on the water. The resulting subdivision relocated the road frontage of 13.06 feet from the North Lot to the South Lot and 173± feet of road frontage from the South Lot to the North Lot. The record reflects that the property lines were configured in a way that kept the multi-unit building on lot 12700 in conformance with the Zoning Ordinance.[4]

This subdivision was approved by the Middletown Planning Board on February 14, 2005. Subsequent to approval from the Planning Board, Bancroft next sought approval from the Coastal Resource Management Council ("CRMC") in order to build a single-family dwelling on Lot 123. Bancroft knew—at all times throughout the process—that it would be required to seek approval from the CRMC prior to building the house on Lot 123. Bancroft did, in fact, seek approval and submitted plans to the CRMC. However, due to a long, difficult, and expensive approval process, Bancroft eventually decided to withdraw its application from the CRMC for the construction of the single-family dwelling.[5]

In May of 2008, Bancroft filed a petition with the Planning Board seeking to reverse the lots back to their original design, that is, relocate Lot 123 to the north, along with the 13.06 feet of road frontage, and relocate Lot 12700 back to the south on the water.[6] The result would allow for the construction of a single-family dwelling on Lot 123 in the location it could have been built in 2004.

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[4] For a visual aid of the property configuration, see parties' exhibits B I, II, and III.

[5] The record reflects that CRMC approval was not required in order to build a house at the original location, away from the water.

[6] Bancroft sought a dimensional variance to allow for both 13.06 feet of road frontage as well as side yard setback relief to accommodate the addition of the multi-unit building. However, Bancroft revised its petition and withdrew its request for side yard setback relief and moved forward only with the dimensional variance for road frontage.

Bancroft obtained conditional approval from the Middletown Planning Board and filed the instant application for variance relief with the Zoning Board of Review. The matter came before the Board on March 24, 2009; July 28, 2009; October 13, 2009; and November 24, 2009.

During the hearings, Bancroft presented three witnesses. These witnesses included Mr. Richard Lipsitz, PLS, a registered land surveyor; Mr. William Hubbard, managing member and owner of the membership interest in Bancroft Partners, LLC; and Mr. George Durgin, a real estate expert. The Appellants presented one witness, Mr. Edward Pimental, a zoning official employed by the City of East Providence, who also engages in planning and zoning consulting services.

Mr. Lipsitz, who had been involved in the planning process for the property since 2004 and has prepared all of the plans and surveys for the property on behalf of Bancroft, was the first to testify. (Tr. 3/24/09 at 27-29.) He stated that Bancroft could have constructed a single-family dwelling on Lot 123 to the north—away from the water—as a matter of right in 2004. Id. at 33. He then testified that he prepared the previous subdivision plan, allowing for the construction of the addition to the multi-unit building and the ability to construct a home to the south on the water. Id. at 34.

Mr. Lipsitz then testified that he was asked to prepare plans to subdivide the property in 2008, back to its original configuration. Id. at 37. He further stated that the application before the Board would essentially revert the lots back to the configuration that they were prior to the 2005 administrative subdivision. Id. at 41. He testified that the frontage would remain the same, the area of each lot would remain substantially the same,[7] and that both lots would well exceed the

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[7] In 2004, Lot 123 had approximately 78,100 square feet and Lot 127 had approximately 98,783 square feet. The proposed subdivision provides that Lot 123 will have approximately 76,313

30,000 square foot minimum requirement in R30 zoning. Mr. Lipsitz testified that the lots could not return to the exact same measurements because he had to make adjustments to the lot lines around the addition to the multi-unit building in order to meet side yard setbacks.

Next, Mr. Lipsitz testified that he was involved in the preliminary CRMC application process for the construction of the home on the water. Id. at 46. He testified that Bancroft received negative feedback from the CRMC regarding the size and location of the home and was asked to make changes in order to minimize the impact to the coastal feature and buffer. Id. at 49. He then stated that sometime thereafter, Bancroft voluntarily withdrew its application because it felt that CRMC approval was a "hurdle" it didn't see itself getting past.[8] Id. at 49-50. He further testified that pursuant to Bancroft's dealings with the CRMC, Bancroft decided to return the lots to their original configuration prior to the 2005 administrative subdivision. Id. at 50-52.

Mr. Lipsitz testified that present Lot 123—the current vacant lot on the water—had constraints to the development based on the natural features and would not be buildable in his opinion. Id. He also stated that Bancroft knew—at the time of the 2005 administrative subdivision—that building a home on the water would be subject to CRMC rules, regulations, and permitting. Id. Ultimately, Mr. Lipsitz testified that the purpose of the current application to subdivide the property was to build a single-family dwelling in the most logical and economic location. Id. at 52.

Next, Mr. Hubbard testified on behalf of Bancroft. His testimony provided that Bancroft knew—at the time it purchased the property in 2004—that a single-family dwelling could have

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square feet and Lot 12700 will have approximately 100,570 square feet. Thus, the measurements provide that the lots would return to substantially the same area as in 2004.

[8] The CRMC application was not officially withdrawn until November 25, 2008, when its attorney sent the request on behalf of Bancroft.

been built on the North Lot, away from the water, without any need for zoning relief. Mr. Hubbard then testified that after consulting with abutters O'Regan, Lang, and the Bagwills, it was preferred that a house be built to the south, on the water. Consequently, Bancroft proposed a plan for the subdivision of the property to accommodate that preference. (Tr. 7/28/09 at 47-48, 77.)

Mr. Hubbard also confirmed that Bancroft knew that compliance with CRMC regulations was required in order to build a house on the water on present Lot 123. He explained that because the CRMC approval process was costly and time consuming, Bancroft voluntarily withdrew its application. Lastly, Mr. Hubbard testified that the CRMC permitting process has been an extreme hardship due to the tremendous expenses since 2008. Id. at 66-67.

Lastly, Mr. Durgin testified on behalf of Bancroft as a real estate expert. Essentially, he confirmed what the previous witnesses testified to: that in 2004, a single-family dwelling could have been built on Lot 123 prior to the subdivision. Mr. Durgin testified that the resulting hardship suffered by Bancroft is due to the fact that there is only 13.06 feet of road frontage where 130 feet is required in an R30 zoning district. (Tr. 11/24/09 at 35-40.) Such hardship, he explained, is based on the fact that the lot would support the construction of a single-family home, if not for the road frontage issue. Id. at 39. Thus, it was Mr. Durgin's opinion that the hardship was based on the unique characteristics of the land and a single-family dwelling would be the least intense use for the lot. Id. at 39-40. If the variance were denied, according to Mr. Durgin, then Bancroft could not build what it could do by right prior to the 2005 subdivision. Id. Thus, any such denial would result in more than a mere inconvenience. Id. However, he later admitted that the 2005 subdivision did not create an unbuildable lot and that present Lot 123 is buildable subject to CRMC approval. He further testified that the hardship is not the result of

Bancroft's prior action or to realize greater financial gain, would not alter the general character of the surrounding area, and would not impair the intent or purpose of the Zoning Ordinance or Comprehensive Plan. Id. at 39-43.

Next, Mr. Pimental testified on behalf of the Appellants as an expert in zoning and planning matters. (Tr. 10/13/09 at 7-11.) He testified that the proposed subdivision involves not two, but three lots. This proposal, he asserted, includes a portion of Lot 124 which is owned by the Bagwills and was needed in order to accommodate the multi-unit building on Lot 12700 and meet setbacks. Id. He further stated that pursuant to the Town's classification of the lots, the proposed subdivision would not affect the use of Lot 12700 or the multi-unit building as a legal nonconforming use and the only relief needed was for road frontage requirements. Although he had a difference of opinion on that status of the subdivision, he did state that approval for the multi-unit building is not impacted or affected in any way. Id. at 18.

Mr. Pimental also testified that present Lot 123 is buildable and can be developed. He stated that it was Bancroft's actions that created the lots in their present condition in order to develop the property in accordance with its plans at that time. Thus, it was his professional opinion that Bancroft's own actions created the conditions from which it is now seeking relief. In his opinion, the purpose of the proposed subdivision is to realize a greater financial gain. Id. at 26.

Mr. Pimental provided that, in his opinion, there is a strict compliance requirement when relief is granted and that the property should remain in compliance with plans which were originally submitted for obtaining such relief. He further stated that the proposed subdivision is a major alteration to the previously approved special use permit and requires, at a minimum, a special use permit in addition to the dimensional variance. Id. at 19-20. Ultimately, Mr.

Pimental's opinion was that Bancroft failed to meet its burden of showing that the relief requested is the least relief necessary, or that any hardship is a result of the unique characteristics of the property. Id. at 33.

At the conclusion of the hearings, the Board voted 4-1 to grant the petition for a dimensional variance. The Board first concluded that the requested variance relief is the result of unique characteristics of the subject premises; namely, that Lot 123 currently has 13.06 feet of road frontage. The Board found that Bancroft cannot reconfigure the lot lines between the two parcels and provide the vacant parcel with 130 feet of road frontage. Thus, the Board found that Bancroft is not further reducing the road frontage for Lot 123 but only seeking to relocate the same. (Decision at 4.)

The Board further found that the hardship from which Bancroft seeks relief is due to the unique characteristics of the property and not due to the general characteristics of the surrounding area or to the physical or economic disability of Bancroft; namely, that Lot 123 has 13.06 feet of road frontage, which frontage is simply being relocated from the southerly end of the two properties to the northerly end of the two properties. Id. Furthermore, the Board found that the hardship experienced by Bancroft is not the result of any prior action taken by Bancroft and does not result primarily from the desire to realize greater financial gain. The Board concluded that Bancroft did not create Lot 123 with 13.06 feet of road frontage because that is the amount of road frontage it had at the time it purchased the property. Rather, it is simply seeking to relocate that road frontage. Additionally, the Board found that the proposed petition does not yield any additional units for development. Id.

The Board ultimately found that the granting of relief would not alter the general character of the surrounding area or impair the intent or purpose of the Zoning Ordinance or the

Comprehensive Community Plan. The Board determined the relief sought was the least restrictive relief necessary, as Bancroft is simply relocating the road frontage, and not reducing it. Lastly, the Board found that the hardship which would be suffered by Bancroft, if the dimensional variance is not granted, will amount to more than a mere inconvenience. Id.

II
Standard of Review

Rhode Island General Laws 1956 § 45-24-69(a) establishes this Court's jurisdiction to review decisions of municipal zoning boards. This Court's review is governed by § 45-24-69(d), which 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 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:
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> (1) In violation of constitutional, statutory, or ordinance provisions;
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> (2) In excess of the authority granted to the zoning board of review by statute or ordinance;
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> (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."

"[A]n appeal from a decision of the zoning board is not a civil action but is essentially an appellate proceeding." Mauricio v. Zoning Bd. of Review of City of Pawtucket, 590 A.2d 879, 880 (R.I. 1991); see also Notre Dame Cemetery v. Rhode Island State Labor Relations Bd., 118

R.I. 336, 338, 373 A.2d 1194, 1196 (1977). The Superior Court gives deference to the findings of a local zoning board of review, in part, because they are "presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance." Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009) (quoting Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008)). Therefore, "[t]he trial justice may not 'substitute [his or her] judgment for that of the zoning board if [he or she] can conscientiously find that the board's decision was supported by substantial evidence in the whole record.'" Mill Realty Associates v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting Apostolou v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). "Substantial evidence * * * means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." Lischio v. Zoning Bd. of Review of Town of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (citing Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). Thus, "a reviewing court merely examines the record below to determine whether competent evidence exists to support the tribunal's findings." New England Naturist Ass'n, Inc. v. George, 648 A.2d 370, 371 (R.I. 1994) (citing Town of Narragansett v. International Association of Fire Fighters, AFL-CIO, Local 1589, 119 R.I. 506, 380 A.2d 521 (1977)).

III
Analysis

Appellants challenge the Board's decision pursuant to §§ 45-24-69(d)(1), (2), (4), and (5). Specifically, Appellants argue that the hardship from which Appellees seek relief was completely self-created and the undisputed evidence submitted at the hearings below support no other conclusion. Additionally, Appellants aver that the evidence produced by the Appellees fails to satisfy the requisite standards set forth in §§ 45-24-41(c) and (d), as well as section 903 of the

Middletown Zoning Ordinances. Finally, Appellants contend that the proposed subdivision and application for a variance requires a new special use permit because it will substantially alter the nonconforming development that was expanded in 2005 pursuant to the original special use permit. The new special use permit, appellants argue, would not be available to Appellees pursuant to § 45-24-40(c)[9] and section 803(J) of the Middletown Zoning Code.

A
Sufficiency of the Evidence

Sections 45-24-41(c) and (d) set forth the standards for obtaining a dimensional variance which an applicant must satisfy to obtain relief:

> "(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;
> >
> > (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;

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[9] Section 45-24-40 provides:

> (a) A zoning ordinance may permit a nonconforming development to be altered under either of the following conditions:
>
> > (1) The ordinance may establish a special-use permit, authorizing the alteration, which must be approved by the zoning board of review following the procedure established in this chapter and in the zoning ordinance; or
> > (2) The ordinance may allow the addition and enlargement, expansion, intensification, or change in use, of nonconforming development either by permit or by right and may distinguish between the foregoing actions by zoning districts.
>
> (b) The ordinance may require that the alteration more closely adheres to the intent and purposes of the zoning ordinance.
> (c) A use established by variance or special use permit shall not acquire the rights of this section.

> (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.[10]
>
> (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:
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> ….
>
> (2) 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."

Overall, in order to satisfy the dimensional variance standard, Bancroft must demonstrate "that the hardship the applicant would suffer if the dimensional variance is not granted amounts to more than a mere inconvenience." Lischio at 691.

The Appellants first argue that the reliable, probative, and substantial evidence of the entire record shows that any hardship Bancroft is now suffering is due to its prior actions and therefore cannot satisfy the standard set forth in § 45-24-41. In support of their argument, Appellants point to the uncontradicted testimony of Bancroft's witnesses which provides that when Bancroft purchased the property in 2004, Lot 123 was buildable as a matter of right. According to the Appellants, due to Bancroft's actions of reconfiguring the property lines, it now needs zoning relief to build in the exact location it could have built a home in 2004.

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[10] See also § 903(A) of the Middletown Zoning Ordinance, which is substantially similar to § 45-24-41(c).

Bancroft asserts that the proposed subdivision complies with all zoning regulations with exception to the road frontage. Bancroft contends that Lot 123 well exceeds the 30,000 square foot minimum requirement, and the proposed road frontage of 13.06 feet is identical to the road frontage that existed in 2004, prior to the 2005 subdivision. Furthermore, Bancroft argues that a literal application of the 130 foot minimum road frontage requirement creates a hardship in that it would deny them the right to construct a single-family dwelling in the North Lot, as it originally could as a matter of right. Bancroft asserts that the facts establish that the property has always lacked sufficient road frontage and the two lots combined could never satisfy the road frontage requirement of the ordinance.

Appellants rely on Sciacca v. Caruso, 769 A.2d 578 (R.I. 2001), with respect to self-created hardships. In Sciacca, a landowner was denied a dimensional variance for the smallest of her two lots so that she could construct a single-family house thereon. The basis for the denial was because she had earlier obtained approval from the town planning board to subdivide her property to create the undersized lots. Sciacca held that a self-created hardship is "most properly employed where one acts in violation of an ordinance and then applies for a variance to relieve the illegality." Id. at 584.

Here, it is impossible for both lots to comply with the 130 foot road frontage requirement because the combined road frontage for Lots 123 and 12700 totals approximately 186± feet, where 260 feet is required. Both lots were legal nonconforming lots of record when Bancroft purchased them. The record demonstrates that Bancroft never reduced the original road frontage of 13.06 feet. The 13.06 feet of road frontage existed at the time it purchased the lots. See id. (holding that [petitioner's] prior action . . . creating the undersized lot in question . . . was considered "prior action" that resulted in the self-created hardship that she later used as the basis

for her variance request). Here, the road frontage was not reduced, and the nonconformity of 13.06 feet that currently exists has always existed, through no fault of Bancroft Partners. Thus, Bancroft did not create or enhance the hardship.

Furthermore, Bancroft has not violated the Middletown Zoning Ordinance and is not now trying to relieve the illegality. See id. Instead, the evidence establishes, and the Board found, that 13.06 feet of road frontage constituted a hardship which existed at all times during Bancroft's ownership of the property. At no time did Bancroft reduce the road frontage of Lot 123; it merely relocated it. Thus, there is reliable, probative, and substantial evidence of record that the hardship Bancroft is suffering is not due to its prior actions.

Next, Appellants argue that Bancroft's proposal is based on its desire to achieve a greater financial gain. Alternatively, Bancroft asserts that there would be a greater financial gain if a home could be built on the South Lot on the water, and building a home where it now proposes will diminish its potential gain.

With respect to the dimensional variance standard, the hardship must not stem "*primarily* from the desire of the applicant to realize greater financial gain." Section 45-24-41(c)(2) (emphasis added). A plain reading of subsection two (2) does not prevent the possibility of a financial gain if the variance were granted. Otherwise, the word "primarily" would be unnecessary. Indeed, most variances are likely to confer some financial benefit upon the property owner when granted. The prohibition set forth in § 45-24-41(c)(2) concerns whether the alleged hardship itself is a desire for financial gain or a self-created need, not whether some financial benefit might possibly accrue to the applicant.

The Board found that Bancroft would not achieve greater financial gain due to the fact that the proposed configuration will not yield additional units. But see Rozes v. Smith, 120 R.I.

515, 520, 388 A.2d 816, 820 (1978) (holding that the variance relief was denied, in part, because the applicant conceded that it would be to his "financial advantage" if the board granted him relief). Regardless of the location, Bancroft seeks to build a single-family dwelling, not a multi-unit building or multiple buildings. Additionally, it appears from the record that the Board accepted Mr. Durgin's expert representation, concluding the purpose of the requested variance is not to achieve greater financial gain. Mr. Durgin testified, "I think that the lot, if you were able to build close to the water, would be worth a lot more than the lot, [with] the potential home site associated with the proposal." (Tr. 11/24/09 at 40.) Mr. Durgin further testified that "[the proposal] doesn't increase the number of buildable lots" and there will be no change as far as density in numbers of units. Id. at 40-42. Accordingly, the Court finds substantial evidence of record to support the Board's conclusion that the relief sought is not based on the desire to achieve greater financial gain.

Appellants further contend that the relief sought is not the least relief necessary because Bancroft still has the option and availability to build a home on existing Lot 123 with CRMC approval. Alternatively, Bancroft argues that the request for a variance of 13.06 feet for the proposed North Lot is the least relief necessary to satisfy all of the dimensional requirements of the Ordinance. In support of this contention, it argues that the lot more than satisfies the minimal land area requirements, and that there is enough room to satisfy all of the setback requirements as well.

The burden rests with the applicant to demonstrate that the dimensional variance requested is, in fact, the least relief necessary. According to one source:

> The inquiry is not whether there are other available uses for the property, but whether the applicant can achieve the benefit of a permitted use through some means other than the variance. Accordingly, if the use is permitted, and the benefit sought cannot

> be achieved absent the grant of a variance, the factor weighs in favor of granting the variance. As such, applicants for an area variance should demonstrate that they have considered whether the desired result can be achieved without obtaining a variance. Failure to do so, weighs against the applicant and favors denial of the variance. Patricia E. Salkin, American Law of Zoning §13:25 (5th ed. 2009).

The uncontradicted evidence and expert testimony does provide that present Lot 123 is buildable subject to CRMC approval. The record also provides that Bancroft received negative feedback from the CRMC and, based on the testimony of Mr. Lipsitz, CRMC approval was unlikely. Additionally, the Board found that the relief being sought is, in fact, the least relief necessary because Bancroft is not reducing the road frontage but merely relocating it back to its original location. Therefore, this Court finds that substantial evidence exists to support Bancroft's assertion that the requested relief is the least relief necessary.

Lastly, Appellants argue that granting the dimensional variance will impair the intent and purpose of the Zoning Ordinance and Comprehensive Plan. Appellants maintain that approval of the variance would allow for the re-subdivision of Lot 12700 which contains the legal nonconforming multi-unit building and its addition, which was approved by the 2005 special use permit. Bancroft asserts that the proposal does not alter the general character of the surrounding neighborhood area. It submits that the number of buildable lots will not increase, the density of the units will not increase, and the proposal will not extend or create any additional streets. Further, Bancroft maintains, the use of the lots will remain as residential, which is permitted in R30 zoning.

Section 45-24-41(c)(3) provides "[t]hat 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." Although the Rhode Island Supreme Court previously determined that

> "the provisions of § 45-24-41(c)(3) are applicable and relevant for a dimensional variance when seeking dimensional relief for *lawfully permitted uses* the review should not focus on the use of the parcel because a legislative determination has been made previously that the use is appropriate and does not adversely affect the general character of the area." Lischio at 693.

Furthermore, a permitted use, under § 45-24-31(52), "is [a] use by right which is specifically authorized in a particular zoning district." Id. Here, the construction of a single-family house is a permitted use because Lots 123 and 12700 are located in an R30 zoning district; consequently, a single-family house will not adversely affect the character of the surrounding area. See Lischio at 693 (holding that a dimensional variance for road frontage for an otherwise landlocked lot is not of such size or degree that it would adversely impact the surrounding neighborhood or impair the intent of the zoning ordinance; it merely reduces the frontage necessary to obtain access to a public street).

Again, the record reflects the Board accepted the testimony of real estate expert George Durgin in concluding that the granting of the variance would not alter the general character of the surrounding area and would not impair the intent or purpose of the Zoning Ordinance or Comprehensive Plan. Mr. Durgin testified that "[o]ther than the frontage, you have got more than enough land area to support a single-family dwelling. With regard to the Comprehensive Plan, I believe that it satisfies the goals of the land use element of the Plan." (Tr. 11/24/09 at 42.) Thus, the Board had before it probative evidence that the variance would not violate the purpose of the Comprehensive Plan.

Appellants also contend that Bancroft has not shown that denial of the variance would constitute more than a mere inconvenience. Their main contention is that Bancroft's need to

obtain a variance—its alleged hardship due to time and cost—is not a "hardship" pursuant to Rhode Island law. Appellants rely on Gartsu v. Zoning Bd. of Review of City of Woonsocket, 104 R.I. 719, 720, 248 A.2d 597, 598 (1968), which provides that "the award of a variance was never intended to afford relief from a mere personal inconvenience experienced by a property owner or as a guise to guarantee such an individual a more profitable use of his property." Alternatively, Bancroft contends that the denial of its right to construct a single-family dwelling on the North Lot amounts to more than a mere inconvenience based on the unique characteristics of the property. It argues that denial of the variance would result in the denial of the use of a buildable lot. Furthermore, Bancroft avers that it has satisfied the standard because the current lot is located within CRMC jurisdiction and CRMC approval is unlikely.

In the instant case, the proposition that CRMC approval is unlikely is supported by the testimony of Mr. Lipsitz. His testimony provided that based on Bancroft's dealings with the CRMC staff, approval was unlikely. Furthermore, the testimony of Mr. Durgin provided that the resulting hardship is due to the unique characteristics of the property, which prevents Bancroft from developing Lot 123. He also testified that this amounts to more than a mere inconvenience because it would deny it the use of an otherwise buildable lot. The record reflects that the Board accepted Mr. Lipsitz's and Mr. Durgin's testimony and found that the hardship suffered by Bancroft was more than a mere inconvenience. Thus, this Court finds that the Board's findings were supported by competent evidence of the record that the hardship suffered by Bancroft, if the dimensional variance is not granted, shall amount to more than a mere inconvenience.

B
Requirement of a Special Use Permit

The Appellants argue that a special use permit is required for any alteration of the nonconforming development which now exists on lot 12700. They submit that the current lots—created in 2005—are substantially different than the lots that existed in 2004 and from the proposed lots in the current petition. Their argument is based on the fact that the 2005 subdivision was granted in order to accommodate the addition to the multi-unit building and to allow for the necessary setback requirements, parking, ingress, and egress. In support of their argument, Appellants rely on the testimony of Mr. Pimental. He testified that, "it's my opinion that I deem it to be a major modification." His testimony referred to the parking configuration, stating that it is a major modification because "[y]ou are going to be traversing on someone else's property." (Tr. 10/13/2009 at 44). The Appellants further assert that pursuant to § 803 of the Middletown Zoning Code,[11] Bancroft is required to obtain a special use permit before

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[11] Section 803 of the Middletown Zoning Ordinance provides:

EXTENSION OR ALTERATION.

> (A) A legal nonconforming use may not be added to, extended or enlarged without first receiving a special use permit from the Zoning Board of Review in accordance with Article 9.
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> (B) A legal nonconforming use may be altered in whole or in part in a way which diminishes the extent of its nonconformity without first receiving a special use permit as required in division (A) above; provided, however, that once a nonconforming use is made less nonconforming for a period of one year, or for 18 months during any three year period, it shall not be permitted to resume the previous extent of its nonconformity.
>
> (C) Any addition, extension or enlargement of a nonconforming use shall conform to all other applicable district regulations and district dimensional regulations required by this chapter for "other permitted uses" and for the zoning district in which such use or structure is located.

altering or enlarging its legal nonconforming development. Thus, Appellants argue, because the proposed subdivision substantially alters the lot that contains the existing multi-unit building, a special use permit is required.

In response, Bancroft first argues that the dimensional variance sought is not a "development" requiring a special use permit, but merely a reconfiguration of the lot lines by moving the road frontage from the south to the north. Bancroft maintains that pursuant to § 45-24-31(20), development is defined as "the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any structure; any mining, excavation, landfill or land disturbance; or any change in use, or alteration or extension of the use, of land." Here, Bancroft

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> (D) Nothing herein shall prevent a legal nonconforming use from adding yard, off-street parking or off-street loading space to conform to the yard, parking or loading space requirements of this chapter.
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> (E) A nonconforming building or structure shall not be moved in whole or in part unless such building or structure is made to conform to all of the regulations of the zone in which it is to be located.
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> (F) A legal nonconforming single-family or two-family dwelling shall not be subject to the provisions of this subchapter and may be altered, added to, changed or moved; provided, that the dwelling be subject to the requirements of the nearest residential district as measured from the property line.
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> (G) If a nonconforming structure, other than a sign can be extended or enlarged in any lawful manner without increasing the extent of its nonconformity, then any extension or enlargement thereof shall only be permitted in accordance with the district dimensional regulations; otherwise variance relief from the Zoning Board shall be required.
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> (H) A nonconforming sign may be altered in whole or in part in a way which diminishes the extent of its nonconformity.
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> (I) Nonconforming signs shall also be governed by § 1207.
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> (J) A use established by variance or special-use permit shall not acquire the rights of this section.

contends, the multi-unit building on Lot 12700 will remain the same in all aspects and uses, and only the movement of road frontage is at issue and pertinent to their petition for relief. Therefore, Bancroft explains there will be no construction or reconstruction of the nonconforming building or a change in the use of the land. Consequently, Bancroft claims the proposal is not a development and is not an alteration of a development requiring a special use permit pursuant to § 45-24-40.

Bancroft relies on Cohen for the proposition that "minor repairs, changes or alterations that do not substantially change the nature of the use or expand the area of the use are unlikely to be held unlawful." Id. 556. The record demonstrates that the proposed change in configuration, although not identical to that which existed in 2004, is substantially similar and does not result in a substantial change in use. Bancroft is seeking a dimensional variance for the road frontage requirement, not for the square footage requirement of the lot, which is and always has complied with the Ordinance. Based on the figures, the proposed subdivision provides that the area of Lot 12700 will increase slightly, and the area of Lot 123 will decrease slightly, not constituting a substantial change. See Cohen at 564-67 (holding that a proposed renovation, including the improvement of decks, stairs, and courtyards, did not otherwise expand the nonconforming use or amount to a change of use).

It is apparent from the record that the Board did not accept Mr. Pimental's opinion that the proposal is a "major modification." Furthermore, the Board did not find the proposed change in lot size to be a substantial change, thus not requiring a special use permit. This Court finds that the Board's findings are not clearly erroneous and its decision is supported by competent evidence.

IV
Conclusion

After review of the entire record, this Court is satisfied that the Zoning Board had competent evidence before it to grant the Appellees' request for a dimensional variance. Its decision is supported by reliable, probative, and substantial evidence of record and is not in violation of ordinance provisions. The Court notes that substantial rights of the Appellants have not been prejudiced. Accordingly, this Court affirms the May 11, 2011 Decision by the Zoning Board of Review of the Town of Middletown. Counsel for the prevailing party shall submit an appropriate order.

RHODE ISLAND SUPERIOR COURT
Decision Cover Sheet

TITLE OF CASE:	SANDRA LANG, et als. v. ZONING BOARD OF REVIEW FOR THE TOWN OF MIDDLETOWN, et als.
CASE NO:	NC-2011-0302
COURT:	Newport County Superior Court
DATE DECISION FILED:	March 13, 2013
JUSTICE/MAGISTRATE:	Van Couyghen, J.
ATTORNEYS:	
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