STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: April 8, 2015)

THOMAS V. GRZEBIAN and MARNEE GRZEBIAN	:	
V.	:	**C.A. No. WC-2012-0581**
MATTHEW E. MELCHIORI, ROXANNE MELCHIORI, and THE ZONING BOARD OF REVIEW OF THE TOWN OF NARRAGANSETT	:	

DECISION

K. RODGERS, J. Thomas V. and Marnee Grzebian (the Grzebians or Appellants) appeal from a decision of the Zoning Board of Review of the Town of Narragansett (Zoning Board) granting Matthew and Roxanne Melchiori (the Melchioris or Appellees) certain relief from the Coastal and Freshwater Wetlands Overlay District and the Coastal Resources Overlay District, as well as variances from certain dimensional regulations set forth in the Code of Ordinances of the Town of Narragansett (the Zoning Ordinance).

Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, the Zoning Board's decision is affirmed.

I

Facts and Travel

The Melchioris and Grzebians are abutting property owners in the Town of Narragansett (Town). The Melchioris' property is designated as Lot 68 on Assessor's Plat W and is known as 14 Gull Road (the Property); the Grzebians' property is designated as Lot 70 on Assessor's Plat W, known as 16 Gull Road, and is situated to the

north of the Melchioris' Property. Point Judith Pond abuts both properties to the west. Both properties are located in an R-40 zoning district, which requires a minimum lot size of 40,000 square feet. The Melchioris' Property measures 30,310 square feet and contains a single-family residence.

Because of its proximity to Point Judith Pond, the Property is subject to the Coastal and Freshwater Wetlands Overlay District and the Coastal Resources Overlay District, as codified in §§ 4.3 and 4.4 of the Zoning Ordinance, respectively. The Zoning Ordinance limits the uses permitted in those overlay districts and requires property owners to maintain setbacks between the edge of the water and any construction on the property. Specifically, § 4.3(1) defines the Coastal and Freshwater Wetlands Overlay District as all land within 150 feet of the biological edge of the wetlands; § 4.4(a) defines the Coastal Resources Overlay District as areas contiguous to shoreline features extending inland for 200 feet. Construction that cannot satisfy these requirements is only permitted with both a special use permit and a variance.

In 2000, the Melchioris sought to construct a 24 x 28 foot detached two-story garage with an 8 x 18 foot second-floor deck. The Melchioris were required to obtain special use permits and variances for the proposed garage and deck in accordance with the restrictions imposed by being within the Coastal and Freshwater Wetlands Overlay District and the Coastal Resources Overlay District. On August 17, 2000, the Zoning Board approved the Melchioris' requests for special use permits and variances for the construction of the garage measuring 24 x 28 feet and lying twenty feet from the side Property line to the south, but limited the use of the second floor of the garage to storage.

In October 2011, the Melchioris sought to convert the second floor of the garage from storage to a pool changing area[1] and recreation room with a computer/office area. They also wished to construct exterior stairs leading from the ground-level deck to the deck of the second floor of the garage. Accordingly, they applied to the Zoning Board to lift the use condition that had been imposed in 2000 and also requested two variances and special use permits. Specifically, the Melchioris sought an eighty-five foot variance and special use permit from the Coastal and Freshwater Wetlands Overlay District, Zoning Ordinance § 4.3, and a 135-foot variance and special use permit from the Coastal Resources Overlay District, Zoning Ordinance § 4.4. After their application was filed, however, the Melchioris learned that the garage that had been approved by the Zoning Board in 2000 had been constructed nineteen feet from the southern side yard Property line rather than the required twenty foot minimum side setback, see Zoning Ordinance § 6.4, and that the existing garage measured 24.3 feet x 30.3 feet rather than 24 x 28 feet.[2]

The Melchioris' application, including information and supplemental documentation pertaining to the larger-than-approved garage and its encroachment on the side yard setback, was sent to the Narragansett Planning Board (Planning Board) for preliminary review on December 6, 2011. In a written memorandum dated March 27, 2012, the Planning Board raised for the first time that the Property's lot coverage appeared to exceed the 15% lot coverage maximum for lots in an R-40 zone by 3%.[3] See

[1] In or about 2007, the Melchioris were duly granted permission to construct an above-ground pool on the Property, which pool is situated between the two-story detached garage and the Point Judith Pond shoreline.

[2] There was no evidence presented that the increased footprint caused or contributed to the encroachment into the twenty foot side yard setback.

[3] The Planning Board calculated as follows:

Planning Board Recommendation at 2, Mar. 27, 2012. As a result of this discovery, and in addition to the relief specifically requested by the Melchioris in their original application, the Planning Board recommended that the Zoning Board approve an 895 square-foot lot coverage variance. Id. at 3.

On March 14, 2012, the Melchioris submitted an amended application to the Zoning Board dated March 12, 2012, requesting a one foot left side yard dimensional variance to account for the one foot encroachment as built, in addition to the previously requested relief. On May 17, 2012, the Zoning Board held a public hearing on the Melchioris' application. Matthew Melchiori (Melchiori) and Amy Sonder (Sonder), a professional land surveyor who prepared the Melchioris' site plan, testified in support of the application. Two neighbors testified in support of the application. Appellants' attorney argued in opposition to the application.

At the hearing, Melchiori discussed the reasons why he and his wife sought to remove the use condition on the garage's second-floor space. He testified that he and his wife wanted to have more space and a pool changing area so that their daughters, ages thirteen and twelve, would not track mud and grass throughout the house. Tr. 9:5-9, May 17, 2012. He also testified that he and his wife would like to utilize a portion of the second-floor garage space as a game and computer room "with some work space"

"- Lot 68 is approximately 30,310 square feet and is occupied by a 41' x 41' irregularly-shaped 3-bedroom dwelling with a 438 square foot deck and 6' x 27' front porch and a 24.3' x 30.3' detached garage with second floor storage."

"- Existing lot coverage of structures approximately 3,451 square feet (11.5%) and existing impervious surfaces approximately 1,963 square feet (6.5%). Total lot coverage on this parcel is approximately 5,414 square feet (18%)." Planning Board Recommendation at 2, Mar. 27, 2012.

The Planning Board concluded that the Melchioris' "project does not appear to conform to the dimensional regulations of Section 6.4 as the proposed lot coverage is approximately 5,414 square feet or 18% (15% maximum)." Id.

because his wife, a certified public accountant, would occasionally bring work home and work at the kitchen table. Tr. 9:15-17; 11:7-16, May 17, 2012. Melchiori also stated that both he and his wife have separate offices away from home, that neither brings clients to their home, and that they deduct no home office expenses on their tax returns. Tr. 11:1-12:3, May 17, 2012.

Melchiori also explained the reason for seeking a one foot side yard variance. He stated that when the garage was constructed, the hole for the foundation was wet due to the distance below grade. A contractor himself, Melchiori testified that he believed that the concrete subcontractor had trouble "getting things exactly where it needed to be." Tr. 13:20-25, May 17, 2012. In response to a question from a Zoning Board member as to why the size of the garage was built as twenty-four feet by thirty feet, as opposed to the approved twenty-four feet by twenty-eight feet, Melchiori conceded that his contractor, and ultimately he, chose to increase the size of the interior staircase by two feet "in order to get stuff up, in order to use [the second floor] as storage." Tr. 35:9-36:1, May 17, 2012.

Sonder was recognized by the Chairman of the Zoning Board as an expert based upon her experience and qualifications; her field of expertise, however, was never specified. Sonder discussed the site plan she prepared for the Melchioris, pointing out that everything on the plan was an existing condition with the exception of the proposed stairs, which would be placed over an existing structure, namely, the first-floor deck. Tr. 15:15-20, May 17, 2012. Sonder concluded that there would be no alteration to the ground or the site. Tr. 15:22-23, May 17, 2012. Sonder also testified that, notwithstanding the fact that it was not included on the site plan, there was currently an

existing and operable septic tank with a leach field on the Property and that, in her professional opinion, a site suitability determination (SSD) would not be required because SSD's are usually required only when an applicant increases the number of bedrooms on a site or does fifty percent more construction to the existing structure. Tr. 17:13-19:1-16; 22:8-18, May 17, 2012. Since the Melchioris were doing neither, Sonder stated that an SSD was unnecessary.[4]

Sonder next testified that she was familiar with the Coastal and Freshwater Wetlands Overlay District and the Coastal Resources Overlay District in the Town. With regard to the Zoning Ordinance's requirements for building within these districts, Sonder testified that in the course of preparing the site map and viewing the Property, she did not observe any conditions that affected the coastal feature of the wetlands. Tr. 21:4-15, May 17, 2012. She noted that unlike other site plans she has worked on where she was asked to opine if a proposed structure would affect coastal features and wetlands, here she was able to observe that the garage that has been in existence for a number of years has had no impact on coastal features of the wetlands. Tr. 21:22-22:1-5, May 17, 2012.

With regard to the Planning Board's recommendation that an 895 square-foot lot coverage variance was required, Sonder testified that such a variance was unnecessary. Tr. 26:20-22, May 17, 2012. In reaching that conclusion, Sonder relied on the substandard size of the Melchioris' lot, believing the lot coverage measurement should be governed by the substandard table which permits landowners to have a maximum of 20%

[4] Appellants raise no argument in their Memorandum to address this line of testimony or the Zoning Board's decision in connection therewith.

lot coverage.[5] Tr. 27:1-3, May 17, 2012. In the course of a discussion amongst the Zoning Board members over whether the 15% or 20% maximum lot coverage applied to the Property, Chairman Donald L. Goodrich asked the Melchioris' attorney, "Would you be unhappy if we gave it [the lot coverage variance] to you?" Tr. 31:15-16, May 17, 2012. The Melchioris' attorney responded, "No." Tr. 31:17, May 17, 2012.

Appellants submitted a written objection to the Zoning Board. See Grzebian letter, March 12, 2012. Appellants' counsel also argued against the Melchioris' application. First, he argued that an SSD was needed as no septic system was shown on the submitted site plan. Tr. 41:1-4, May 17, 2012. Next, he maintained that the Melchioris could not meet the burden of proof for a dimensional variance or special use permit because of the closer proximity of the garage to the side lot line. Tr. 41:5-15, May 17, 2012. He also relied upon a different section of the Zoning Ordinance, § 4.5,[6] in arguing that the 15% maximum lot coverage applies to the Property. Tr. 41:20-42:8, May 17, 2012. Finally, he asserted that the change of use of the second floor of the garage to a computer/office area would constitute a "home occupation" in violation of the Zoning Ordinance which limits home occupation to the main dwelling. Tr. 42:9-18, May 17, 2012.

On May 31, 2012, the Zoning Board unanimously approved a special use permit and variance under § 4.3, a special use permit and variance under § 4.4, a one foot left side yard setback variance, and a 3% lot coverage variance. That decision was put into

[5] Section 6.5 of the Zoning Ordinance sets forth modified dimensional regulations for legally-created substandard lots of record in all zoning districts. Specifically, for a lot measuring over 100' in width, § 6.5 allows for a maximum lot coverage of 20%. Zoning Ordinance § 6.5. The Property measures 150' wide and over 200' deep.

[6] Section 4.5 governs the High Water Table Limitations Overlay District. Zoning Ordinance § 4.5.

writing and filed on August 31, 2012 (Decision). In its Decision, the Zoning Board accepted Sonder's testimony that there was no evidence of detrimental environmental effects on the coastal or wetland features from the existing garage and concluded that granting the requested relief (1) would not be contrary to the public interest; (2) would further substantial justice; (3) would be consistent with the purposes and objectives of the Zoning Ordinance; (4) was necessary for the full enjoyment of the property; (5) resulted from physical conditions peculiar to the subject land; and (6) that any hardship on the part of the Melchioris did not result from any of their acts. Decision at 5.

The Grzebians timely appealed to this Court on September 18, 2012.

II

Standard of Review

The Superior Court's review of a zoning board decision 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." Id.

When reviewing a decision of a zoning board, this Court '"must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" Salve Regina Coll. v. Zoning Bd. of Review 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)). Rhode Island law defines "substantial evidence" as "'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)).

III

Analysis

Appellants argue that the Zoning Board's Decision should be reversed. First, they contend that the Zoning Board's Decision to grant special use permits and variances under §§ 4.4 and 4.3 was erroneous because the Melchioris did not provide competent evidence that the proposed construction met the development standards of those sections and because the Melchioris presented no evidence of hardship. Next, Appellants maintain that the Zoning Board erred in granting the dimensional variances because § 11.6 of the Zoning Ordinance requires specific findings that there be enhanced protection of a wetlands feature, and that the Zoning Board exceeded its authority because § 12.4 of the Zoning Ordinance does not permit the granting of a special use

permit and dimensional variance in an overlay district if it allows the structure to be placed closer to a wetland or coastal feature, nor does that section permit the granting of a lot coverage variance. They also state that the Zoning Board's Decision to grant the lot coverage variance was made upon unlawful procedure because the Melchioris did not even request such relief. Finally, Appellants assert that the Zoning Board's Decision to allow the second floor of the garage to be used as an office area/workspace was erroneous because § 7.3(4) only permits home occupations within the dwelling unit, not within accessory structures such as a garage.

Each of Appellants' contentions will be addressed *seriatim*.

A

Special Use Permits and Variances In the Overlay Districts

In arguing that the Zoning Board erred in finding that the Melchioris are entitled to a special use permit and an eighty-five foot variance under § 4.3 and a special use permit and a 135 foot variance under § 4.4, Appellants largely rely upon what they view as scant evidence offered by an individual with no experience in civil engineering or wetlands biology. See Appellants' Mem. at 12-14. For the reasons discussed below, Appellants' contention is without merit.

The purpose of the overlay districts is to preserve and protect coastal and freshwater wetlands and to preserve, protect, develop and restore coastal resources and their ecological systems. Zoning Ordinance, §§ 4.3(1), 4.4(a). To that end, the Coastal and Freshwater Wetlands Overlay District and the Coastal Resources Overlay District each set forth development standards in order to protect the coastal and wetland features

and their natural habitats. The Coastal and Freshwater Wetlands Overlay District requires compliance with the following:

> "a. For lots platted prior to August 7, 1989, in areas serviced by both sewers and water, structures, roads and land disturbance shall be set back 100 feet from the wetland edge;
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> "b. In all other areas, sewage disposal systems and land disturbance shall be set back 150 feet from any wetland edge except for areas subject to storm flowage and areas subject to flooding, which shall have a 50-foot setback;
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> "c. The proposed project will not obstruct floodways in any detrimental way, or reduce the net capacity of the site to retain floodwaters;
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> "d. The proposed project will not cause any sedimentation of wetlands, and will include all necessary and appropriate erosion and sediment control measures;
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> "e. The proposed project will not reduce the capacity of any wetlands to absorb pollutants;
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> "f. The proposed project will not degrade the biological, ecological, recreational, educational, and research values of any wetlands;
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> "g. The proposed project will not directly or indirectly degrade water quality in any wetlands or waterbody;
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> "h. The proposed project will not reduce the capacity of any wetlands to recharge groundwater;
>
> "i. The proposed project will not degrade the value of any wetlands as spawning grounds and nurseries for fish and shellfish or habitat for wildlife and wildfowl." Zoning Ordinance § 4.3(4).

The Coastal Resources Overlay District has somewhat similar, yet distinct requirements:

"(1) The proposed project will not interfere with public access to or use and enjoyment of tidal waters and shorelines features;

"(2) The proposed project will not degrade the aesthetic and recreational values of tidal waters or diminish the natural diversity of shoreline features;

"(3) The proposed project will not degrade existing water quality or adversely affect the circulation and flushing patterns of tidal waters, or diminish the value of tidal waters and shoreline features as habitats for fish, shellfish, wildlife, and wildfowl;

"(4) The proposed project will not increase the volume or velocity of stormwater runoff or sedimentation of tidal waters or exacerbate the potential for shoreline erosion or flooding;

"(5) The proposed project will not diminish the value of any shoreline feature as a storm and hurricane buffer;

"(6) Any filling, grading, excavating, and other land alteration will be the minimum necessary to construct the proposed project;

"(7) The proposed project will not pose any threat to public health, public safety, or property;

"(8) Except for foot paths and selective thinning of vegetation for view corridors as approved by CRMC, a 150-foot wide natural undisturbed buffer drawn from the inland edge of the coastal feature shall be required for "areas of critical concern" and "self sustaining lands" as these areas are defined by CRMC, and lands adjacent to Wesquage Pond and other poorly flushed estuarine areas. A 100-foot wide buffer is required for other areas fronting on other natural shoreline features in the coastal resource overlay district. Within these buffer areas all structures, roads, individual sewage disposal systems are prohibited, except as allowed by section 16 of this ordinance." Zoning Ordinance, § 4.4(c).

If a property owner is unable to meet the development standards required in the Coastal and Freshwater Wetlands Overlay District, a special use permit must be obtained for certain activities, including constructing structures and "[u]ndertaking any other new activity which directly or indirectly may substantially alter or impair the natural condition or function of any wetland." Zoning Ordinance §§ 4.3(3), 4.3(3)(b) and 4.3(3)(h). In the Coastal Resources Overlay District, a special use permit may be granted for certain specified activities, including constructing structures, provided the project does comply with the development standards set forth therein. Zoning Ordinance §§ 4.4(b), 4.4(b)(3).[7]

Importantly, the Melchioris' proposed project would not alter the ground or the site in any manner. Sonder testified that the proposal only sought to build an exterior staircase over an existing deck and change the interior use of the second story of the existing two-story garage. Tr. 15:18-16:4, May 17, 2012. The Zoning Board's Decision reflects this testimony. Decision at 3 ("[T]he Site topography and conditions will not be affected by the construction of the stairs."). Moreover, Sonder confirmed that she observed the existing garage in order to determine "whether or not there had been any impact to the coastal feature of the wetland," and she opined that there had been no detrimental impact to those features. Tr. 21:22-22:5, May 17, 2012. Appellants, through counsel, did not object to Sonder's testimony nor make any inquiry of the Melchioris'

[7] Appellees erroneously assert that a special use permit is required in the Coastal Resources Overlay District if the construction does not satisfy the development standards in § 4.4(c). Section 4.4(b) clearly states that the Zoning Board may grant a special use permit in this district "provided the proposed project or activity complies with all applicable development standards and other requirements" imposed by the Zoning Ordinance and the Rhode Island Coastal Resources Management Council. Zoning Ordinance § 4.4(b) (emphasis added). Put another way, a special use permit is required under § 4.4 regardless, even when the development standards set forth in § 4.4(c) are satisfied.

expert. Instead, Sonder's testimony was uncontradicted and unimpeached, and ultimately accepted by the Zoning Board.

Appellants argue that Sonder, a surveyor by trade, is not an expert in civil engineering or wetlands biology and therefore was not competent to offer testimony on the project's compliance with the development standards in §§ 4.3 and 4.4. Appellants' Mem. at 13-14. Appellants further state that the development standards under §§ 4.3 and 4.4 require evidence to be presented by a civil engineer, a biologist, or both. Id. at 13. Under the facts presented, such expert testimony from a civil engineer, a biologist, or both was unnecessary. There being absolutely no alteration of the ground or site due to the changes in the use of the second floor of the garage and the addition of an exterior stairway constructed over an existing deck, Tr. 15:18-16:4, May 17, 2012, Sonder's testimony that there was no detrimental impact to the coastal features from the existing structures is sufficient evidence from which the Zoning Board could conclude that the development standards under both §§ 4.3 and 4.4 had been satisfied. Thus, evidence exists in the record to support the Zoning Board's finding that "[t]he applicant demonstrated by way of expert testimony the projects [sic] ability to meet the standards set forth on Sections 4.3 and 4.4 of the Zoning Ordinance." Decision at 4.

Appellants also contend that in granting dimensional variances, the Zoning Board failed to comply with §§ 11.6 and 12.4 of the Zoning Ordinance, which apply when granting dimensional relief in conjunction with a special use permit.[8] See Appellants' Mem. at 19-21. Section 11.6 provides as follows:

[8] Appellants' Memorandum focuses on the one foot side yard variance and the lot coverage variance, both of which are addressed separately, infra. See Appellants' Mem. at 20-21. This Court will only briefly address this argument to the extent it was intended

> "[I]n granting a dimensional variance in conjunction with a special use permit in an overlay district, the zoning board shall make specific findings of fact defining any environmentally sensitive feature(s) to be protected and the manner in which the granting of the special use permit and dimensional variance will enhance the protection of the environmentally sensitive feature(s)." Zoning Ordinance § 11.6.

Section 12.4 provides that the Zoning Board:

> "may grant a dimensional variance from the front, side, and rear yard requirements of section 6.4 or 6.5 for a single-family dwelling and accessory structures in conjunction with a special use permit, provided the relief granted does not have the effect of allowing a structure to be placed closer to a wetland or coastal feature as described in section 4.3 or 4.4. If the special use could not exist without the dimensional variance the zoning board of review shall consider the special use permit and the dimensional variance together to determine if granting the special use is appropriate based on both the special use criteria and the dimensional variance evidentiary standards. But in no event shall this increase the footprint or size of a dwelling otherwise allowed in the particular Overlay District in which relief is requested." Zoning Ordinance § 12.4.

Appellants contend that because the variances would permit the garage to be closer to Point Judith Pond, then the Zoning Board erred in granting relief and in failing to include any specific findings of fact that granting such relief will enhance the protection of Point Judith Pond. See Appellants' Mem. at 20. This Court disagrees. First, the Zoning Board summarized Sonder's testimony, noting *inter alia*, that the only physical change is the addition of the staircase, that the site topography and conditions will not be affected by the construction of the stairs, and that there has been no evidence of detrimental environmental effects on the coastal or wetlands features from the existing

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to be directed at the eighty-five foot variance under § 4.3 and the 135 foot variance under § 4.4. The same analysis herein applies, in any event, to the one foot side yard variance discussed infra.

garage. Decision at 3, ¶ 20. While not specifically referencing its analysis under §§ 11.6 and 12.4 of the Zoning Ordinance, the Zoning Board did conclude that the Melchioris demonstrated by way of expert testimony that the project meets the standards set forth in §§ 4.3 and 4.4 of the Zoning Ordinance, which require a stringent analysis of the impact of a project on coastal and wetlands features, and that the project would not affect the conditions on the Property. See Decision at 3-4, ¶¶ 20, 25. Thus, no enhanced protection of Point Judith Pond was necessary, and the Zoning Board did not err in failing to cite specific findings of fact addressing such enhanced protection.

Furthermore, the dimensional variances requested did not have the effect of placing the garage closer to Point Judith Pond as Appellants assert. See Appellants' Mem. at 20. The Melchioris were previously granted dimensional relief in 2000 to construct the garage, including the necessary 100-foot variance under § 4.3 and a 150-foot variance under § 4.4.[9] Planning Board Recommendation at 1, Mar. 27, 2012. There is no evidence that the present request for an eighty-five foot variance under § 4.3 and a 135-foot variance under § 4.4 places the garage any closer to Point Judith Pond. Rather, the garage, as built, and for which dimensional relief was sought, was placed one foot closer to the Property's boundary with Lot 4 directly to the south. Accordingly, the limitations in § 12.4 of the Zoning Ordinance upon which Appellants rely are inapplicable.

For these reasons, the Zoning Board's Decision concluding that the Melchioris satisfied the development review standards for both the Coastal and Freshwater Wetlands

[9] There is no explanation offered why the dimensional variances granted in 2000 under §§ 4.3 and 4.4 differ from the dimensional variances presently sought. Notably, though, the relief presently sought is less than what was previously granted which allowed for the construction of the garage.

Overlay District and the Coastal Resources Overlay District was not erroneous in view of the reliable, probative and substantial evidence in the record. The Zoning Board acted within its authority and did not err in issuing the special use permits and variances under § 4.3 for the Coastal and Freshwater Wetlands Overlay District and under § 4.4 for the Coastal Resources Overlay District, nor did it err in failing to comply with §§ 11.6 and 12.4 of the Zoning Ordinance.

B

One Foot Dimensional Variance for Side Yard

The Grzebians also take issue with the Zoning Board's approval of a one foot dimensional variance from the side yard setback requirements, which allowed the Melchioris' existing garage, as built, to conform to the Zoning Ordinance. Appellants maintain that the Zoning Board's Decision was clearly erroneous in view of the reliable, probative and substantial evidence of the whole record and that it was in excess of its authority. Appellants' Mem. at 14-20. More specifically, Appellants argue that the Melchioris failed to provide any evidence that there was no reasonable alternative to the granting of the one foot variance. Id. at 19.

Appellants' argument is premised upon an erroneous standard. The Melchioris correctly argued that the burden of proof for a dimensional variance is governed by § 45-24-41(d), as amended in 2002, which restored the "more than a mere inconvenience" standard in place of the more stringent "no reasonable alternative" standard. Appellees' Mem. at 9-10 (citing Lischio, 818 A.2d at 691-92). Although § 11.6 of the Zoning Ordinance applies the "no other reasonable alternative" standard for issuing a dimensional variance, it is well settled that a municipal ordinance cannot change or

enlarge the specific authority contained in the statewide zoning enabling legislation, but rather "each city and town [must] amend its zoning ordinance to comply with the terms of [Chapter 24 of Title 45]." Sec. 45-24-29(b)(5); see also Mongony v. Bevilacqua, 432 A.2d 661, 664 (R.I. 1981) (state law of general character and statewide application is paramount to local or municipal ordinances inconsistent therewith); Lincourt v. Zoning Bd. of Review of Warwick, 98 R.I. 305, 309, 201 A.2d 482, 485 (1964) (describing as a "nullity" an ordinance providing for variance that authorizes something different than terms of zoning enabling act); Reynolds v. Zoning Bd. of Review of Lincoln, 96 R.I. 340, 343, 191 A.2d 350, 353 (1963) ("[J]urisdiction of zoning boards of review is that prescribed in the enabling act and that the jurisdiction therein vested in such boards can neither be enlarged nor restricted by enactments contained in a zoning ordinance."). Thus, the lawful standard that the Zoning Board must apply in considering a request for a dimensional variance is whether (1) the hardship is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; (2) 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) granting the requested relief 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; (4) the relief requested is the least relief necessary; and (5) the hardship suffered by the owner of the subject property if the requested relief is not granted amounts to more than a mere inconvenience.[10] Sec. 45-24-41(c)(1)—(4) and (d)(2).

[10] In their Reply Memorandum, Appellants appear to concede their error and accept that

Substantial evidence exists on the record to support the Zoning Board's findings in granting the one foot side yard variance. First, the Zoning Board's findings of fact recited that the location of the garage foundation, which is what prompted the requested side yard relief, was a result of soil conditions at the time of construction. Decision at 3, ¶ 19. Melchiori testified that the area excavated for the garage foundation was wet and slippery and, consequently, the concrete subcontractor had difficulty placing the concrete forms "exactly where they needed to be." Tr. 13, May 17, 2012. The Zoning Board considered the testimony and did not find that the placement of the foundation was at the urging of Melchiori, as Appellants suggest. See Appellants' Reply Mem. at 6 ("[I]t sounds as if the Melchioris knew they were placing the garage in the setback.") (emphasis added). To the contrary, from its findings of fact, the Zoning Board concluded that the proposed relief, including the one foot side yard setback, results from the physical conditions peculiar to the Property and that the hardship did not result from any actions by the Melchioris. See Decision at 5.

The Zoning Board also concluded that the requested relief, including the side yard dimensional variance, "[i]s necessary for the full enjoyment of the property." Id. Importantly, our Supreme Court has expressly defined "the words '* * * more than mere inconvenience' to mean that an applicant must show that the relief he is seeking is reasonably necessary for the full enjoyment of his permitted use." DiDonato v. Zoning Bd. of Review of Johnston, 104 R.I. 158, 164, 242 A.2d 416, 420 (1968); Westminster Corp. v. Zoning Bd. of Review of Providence, 103 R.I. 381, 387-88, 238 A.2d 353, 357

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the standard to be applied is "more than a mere inconvenience," but now contend that the Melchioris failed to satisfy that standard as well as the more stringent "no reasonable alternative" standard. See Appellants' Reply Mem. at 5-6.

(1968). While not employing the express phrase "amounting to more than a mere inconvenience," the Zoning Board clearly found that the side yard variance, among the other relief requested, to allow for the continued use of the garage as built is "necessary for the full enjoyment of the [P]roperty." Decision at 5. There is ample evidence in the record to support this finding inasmuch as the application is wholly premised on the continued use of the Melchioris' two-story garage, in addition, of course, to the expanded use requested in the Melchioris' application vis-à-vis the use of the second floor and the addition of an exterior staircase leading thereto.

For these reasons, then, this Court concludes that the Zoning Board's Decision in granting the one foot side yard variance was not clearly erroneous, arbitrary or capricious or characterized by an abuse of discretion, or otherwise affected by an error of law. There is substantial evidence on the record from which the Zoning Board correctly concluded that, with regard to the one foot side yard variance, the hardship was due to the unique characteristics of the Property rather than the result of the Melchioris' actions, that granting the relief would not impair the intent or purpose of the Zoning Ordinance, and that the hardship suffered by the owners if the relief were not granted amounted to more than a mere inconvenience and is necessary for the full enjoyment of the permitted use of the Property. See Decision at 5; Sec. 45-24-41(c)(1)—(4) and (d)(2).

C

Lot Coverage Variance

Appellants next contend that the relief from the lot coverage requirements was made upon unlawful procedure as the Melchioris never even requested the relief granted. Appellants accurately point out that the Melchioris did not request such relief from § 6.4 of the Zoning Ordinance. Indeed, the Melchioris maintained that such relief was not necessary as they believed the maximum lot coverage was 20% rather than 15%, a position they continue to assert on appeal to this Court. This Court agrees that such relief was unnecessary.

The Zoning Ordinance defines "lot building coverage" as "[t]hat portion of the lot that is or may be covered by buildings and accessory buildings." Zoning Ordinance § 2.2. The maximum building lot coverage for a single-family dwelling on a conforming lot in the R-40 Zone is 15%. Zoning Ordinance § 6.4. The Property, however, is not a conforming lot; it is a legally-created undersized lot measuring 30,310 square feet, almost 10,000 square feet shy of the required 40,000 square feet in an R-40 Zone. Accordingly, the maximum building lot coverage is governed not by the table of dimensional regulations set forth in § 6.4, but by the table of dimensional regulations set forth in § 6.5 for legally created substandard lots of record. Because the Property measures over one hundred feet wide, the maximum building lot coverage is 20%. Zoning Ordinance § 6.5. Presently, the lot coverage is approximately 18% (5414 square feet) and will not change with the relief sought in the Melchioris' application. Accordingly, the Zoning Board erred in granting the lot coverage variance as it was not needed. The Property complies with the maximum lot coverage of 20% as a substandard lot of record over one hundred

feet in width, and the relief sought by the Melchioris does not affect the lot coverage calculation.

D

Use of Second Floor of Garage

Finally, Appellants argue that the Zoning Board erred in permitting a home office on the second floor of the Melchioris' accessory structure.[11] Appellants rely on the definition of "home occupation" and where such "home occupation" may take place on the premises, as set forth in the Zoning Ordinance. "Home occupation" is defined as "[a]ny activity customarily carried out for gain by a resident, conducted as an accessory use in the resident's dwelling unit." Zoning Ordinance § 2.2. Home occupations "are permitted as accessory uses in all zones when conducted and carried on entirely within the dwelling unit by the occupants thereof." Zoning Ordinance § 7.3(4). Appellants contend that any accounting work that Mrs. Melchiori performs at home, because it is an activity customarily carried out for gain by a resident, must be performed in the dwelling and not in the garage.

Appellants' argument—taken to its logical conclusion—would relegate any professional who takes professionally-related work home with him or her to review, edit, read, contemplate, or prepare for the next day as having a "home occupation," subject to all local zoning and licensing requirements. Such an interpretation is absurd and will not be countenanced. See Ryan v. City of Providence, 11 A.3d 68, 71 (R.I. 2011) (statute or ordinance should not be construed to achieve meaningless or absurd result); see also Berthiaume v. Sch. Comm. of Woonsocket, 121 R.I. 243, 247, 397 A.2d 889, 892 (1979).

[11] Appellants do not argue that the Zoning Board erred in permitting the second floor of the garage to be used as a pool changing area and/or recreation room.

Whether a person sits on his or her sofa, at a kitchen table, on a deck, or in a garage, individuals have the right to take professional work home from his or her office without being subject to regulation as operating a home office.

The evidence before the Zoning Board clearly established that the Melchioris do not intend to operate a home occupation for an accounting or any other business venture. Rather, the use of the second-floor space in the existing garage would be, in part, to permit Mrs. Melchiori some private space to do "homework" for her accounting practice in lieu of doing such work at the kitchen table. Tr. 11, May 17, 2012. The Zoning Board notes in its findings of fact that neither of the Melchioris would receive clients at or conduct business from the Property. Decision at 3, ¶ 19. The Zoning Board did not err in reaching its conclusion and rejecting Appellants' argument. The proposed use of the second-floor space in the garage as a computer/office area is not a "home occupation" that is prohibited in an accessory structure.

IV

Conclusion

Having reviewed the entire record before it, and for the foregoing reasons, this Court concludes that the Decision of the Zoning Board is supported by reliable, probative and substantive evidence, and is neither an abuse of discretion, clearly erroneous, nor affected by error of law. The substantial rights of Appellant have not been prejudiced. Accordingly, the Decision is affirmed.

Counsel for the Appellees shall prepare a judgment consistent with this Court's Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Thomas V. Grzebian, et al. v. Matthew E. Melchiori, et al.**
CASE NO:	**C.A. No. WC-2012-0581**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**April 8, 2015**
JUSTICE/MAGISTRATE:	**Kristin E. Rodgers**

ATTORNEYS:

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