

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC.

SUPERIOR COURT

[Filed: August 21, 2015]

EDITH L. BLANE AND CHRISTOPHER J. :
BLANE :

v. :

C.A. No. WC-2013-0314

TOWN OF NEW SHOREHAM ZONING :
BOARD OF REVIEW AND BATTYVILLE, :
LLC :

DECISION

THUNBERG, J. Before the Court is the appeal of Appellants Edith L. Blane and Christopher J. Blane (Appellants) from the Town of New Shoreham Zoning Board of Review’s (the Board) May 31, 2013 decision. The Board granted a dimensional variance to Appellee Battyville, LLC (Battyville), to increase the height of a prior existing, nonconforming accessory structure. Appellants contend that: (1) Battyville failed to satisfy the requirement that the relief granted be the least relief necessary; and, (2) the Board exceeded its authority because its decision was premised upon the finding of a pre-existing nonconforming use. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth below, this Court affirms the Board’s decision.

I

Facts & Travel

The subject property is one of three condominium units on one lot (the Lot), described as Lot 32-3 on Tax Assessor’s Plat 4 in the Town of New Shoreham (the Town). Although the Lot was divided into three condominium units in the early 1990s, the Town treated the condominiums as one lot for zoning purposes. (Board Hr’g Tr. (Tr.) 5, Apr. 24, 2013.)

Battyville is the owner of the condominium unit known as Unit C, which includes one principal dwelling and four accessory buildings. (Appellants' Ex. 2.) One of these accessory buildings was a small 11' 6" by 21' 3" (the original shed). (Tr. 11). Due to the original shed's deteriorating condition, Battyville demolished it with the intent to replace the structure on the same footprint with a small increase in height (the proposed shed).¹ (Decision, ¶ 8.)

The Lot is located in the Residential A Zone (RA Zone). (Tr. 6.) In this zone, the zoning ordinance requires a minimum lot size of 120,000 square feet and a minimum frontage of 200 feet. (Art. III, § 306(C) of the Town of New Shoreham Zoning Ordinance.²) This Lot is 84,085 square feet with 156 feet of frontage. (Tr. 6-7.) A Zoning Certificate for the Lot, dated July 15, 1994, describes the Lot's nonconformity as follows:

- "1. All prior existing structures on this property were constructed prior to March 4, 1989.
- "2. A prior existing, non conforming use of three (3) single family dwelling units continues on the property.
- "3. No more than three (3) 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 shall exist on the property.

¹ After the original shed was demolished, Appellants appealed the decision of the Building Official allowing Battyville to rebuild the shed at an increased height. (Decision, ¶ 8; Tr. 6.) The Zoning Board found that the Building Official erred in issuing the original permits since the Lot was nonconforming in frontage and lot size. Id. These building permits were not in the record before this Court. Appellants' appeal is from the Board's grant of Battyville's application for a dimensional variance.

² Although the Appellants attach an older version of the zoning ordinance to their memorandum as Exhibit 1, the current zoning ordinance is not in the record before this Court. Since the Board can take notice of the zoning ordinance, it is proper for this Court to review it. See Toohy v. Kilday, 415 A.2d 732, 734 n.1 (R.I. 1980) ("[The Court] may take notice of the ordinance without its having been admitted into evidence, since the board itself, as a municipal tribunal, could have 'judicially noticed' the regulation enacted by the municipality that created it."); Weaver v. United Congregational Church, 120 R.I. 419, 423 n.2, 388 A.2d 11, 13 n.2 (1978) ("The . . . Ordinance itself is not in the record of this case, but the parties have provided us with copies of those portions which are relevant to the present petition. Since the board itself could have taken notice of the ordinance without its being placed in evidence, we can do so ourselves. . . .").

“4. The remaining structures on the property may be used for any lawful accessory use.

“5. There shall be no further increase in the non-conforming use without Zoning Board of Review approval. (Battyville Ex. 4.)

The footprint of both the original and proposed shed are within the applicable side yard setback requirement of forty feet.³ The proposed shed was within the side yard setback, and Battyville planned to increase the height of the structure. On February 13, 2013, Battyville applied for a dimensional variance from the requirements of Article I, § 113(c)(1)⁴ and Article III, § 306(C)⁵ of the Town’s Zoning Ordinance. Battyville’s application for the variance described the proposed project as follows: “Replace non-residential accessory building demolished in accordance with Sec. 711 to slightly less than original footprint of 11’ 6” x 21’ 3” but with increased max. roof height from 11’ 10” (within pre-existing setback encroachment) to 14.” (Battyville’s Appl. for Variance.) Without this variance, Battyville maintains it would be unable to increase the height of the structure within the side yard setback requirement because § 113(c)(1) of the Zoning Ordinance states that: “[a] structure which is non-conforming with respect to the dimensional requirements of the Zoning Ordinance may not be expanded, enlarged or increased unless such expanded or enlarged portion complies with the dimensional requirements of the Zoning Ordinance.”

³ Although, pursuant to Art. III, § 306(C) of the Zoning Ordinance, the side yard setback for accessory buildings located in the RA Zone is 50 feet, Art. I, § 113(E)(2)(d) states that “the minimum front and rear yard setbacks may be reduced for substandard lots of record in the RA and RB Zones which have a lot depth of less than 200 feet.” It is undisputed that the required side yard setback for the Lot is 40 feet. (Tr. 7, 10-11.)

⁴ Section 113(c)(1) states that “[a] structure which is non-conforming with respect to the dimensional requirements of the Zoning Ordinance may not be expanded, enlarged or increased unless such expanded or enlarged portion complies with the dimensional requirements of the Zoning Ordinance.”

⁵ Section 306(C) details the dimensional requirements for buildings located with the RA Zone.

A properly advertised hearing was held on April 24, 2013. At the hearing on Battyville's application, Geoffrey Hall, Battyville's contractor, testified that the proposed shed would be in the exact location of the original shed and would have a slightly smaller footprint. (Tr. 12). Mr. Hall testified that the primary change to the shed would be to increase the height of the structure by twenty-six inches. Id. Mr. Hall explained that the additional height was necessary to conform to modern building codes and to have proper egress windows "for firefighters to get in or out." Id. Mr. Hall also stated that the increased height would allow for a roof design that would "keep[] with the aesthetic values of Block Island." Id. at 16. Further, he noted that the modest height increase was well within the maximum allowable height of twenty-five feet in the RA Zone. Id. at 17. In response, Appellants,⁶ who are abutting landowners, stated that they were opposed to the proposed shed mainly due to their concern that it would be used as an additional residence.⁷ Id. at 37, 42. It is undisputed that residential use of the proposed shed is illegal under the applicable Zoning Ordinance. Id. at 43-44.

In a decision dated May 31, 2013, the Board granted Battyville's application for a variance. In its decision, the Board made the following findings of fact:

- "1. The subject lot is a prior-existing, spatially non-confirming [sic] lot of 84,085 square feet in the RA Zone.
- "2. Accessory use buildings are a permitted use in the RA Zone.
- "3. Mr. Hall testified that the proposed project will result in no additional bedrooms and that there is no anticipated increase to the general use of the property.
- "4. The proposed project does not increase the non-conformity of the lot.

⁶ William Murphy, a representative of abutter, Thelma Murphy, also spoke in opposition to Battyville's application at the hearing (Tr. 36). In addition, a letter from Richard Hayes in opposition to the variance was read into the record. (Tr. 46). It is unclear from the record whether Mr. Hayes is an abutting landowner.

⁷ Although Mr. Blane testified at the hearing under oath, Mrs. Blane was not sworn in. (Tr. 37, 41).

“5. The requested expansion will not be raised above the existing roof line. The expansion will result in 113 square feet of additional head room, but the footprint will not increase.

“6. The proposed shed is compatible with the surrounding area and the other buildings on the site.

“7. Mr. Hall testified that the additional head room will allow for standard egress windows to be installed into the structure. I find that it is more than a mere inconvenience to want to install egress windows that are considered a standard safety need in today’s building codes.

“8. The proposed shed is in the exact location of the previous shed. The applicants properly applied to demolish and renovate the original shed. After the shed was demolished a neighbor appealed the decision of the Building official. This Zoning Board found that the Building Official did err in issuing the original permits.” (Decision 1.)

The Board also made clear that its decision was subject to the following conditions: (1) that Battyville construct the proposed shed in conformance with the submitted site plan, and (2) that the proposed shed not contain any additional bedrooms. (Decision 2.) On June 17, 2013, the Appellants timely filed an appeal to this Court for review.

II

Standard of Review

This Court’s review of a zoning board’s decision is governed by § 45-24-69(d), which provides, in pertinent part, as follows:

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

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

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

“(3) Made upon unlawful procedure;

“(4) Affected by other error of law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Sec. 45-24-69(d).

The Court gives deference to the findings of the zoning board since “a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.” Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). In reviewing a zoning board’s decision, this Court “must examine the entire record to determine whether ‘substantial’ evidence exists to support the board’s findings.” DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979). “‘Substantial evidence . . . means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.’” Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)).

III

Analysis

When reviewing a dimensional variance application, the Board must consider the requirements of § 45-24-41, which states as follows:

“(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, excepting those physical disabilities addressed in § 45-24-30(16);

“(2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;

“(3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and
“(4) That the relief to be granted is the least relief necessary.”⁸

In addition, there must be evidence entered into the record showing that “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.”⁹ Sec. 45-24-41(d). Accordingly, “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.” Rozes v. Smith, 120 R.I. 515, 521, 388 A.2d 816, 820 (1978) (quoting Gartsu v. Zoning Board of Review, 104 R.I. 719, 720-21, 248 A.2d 597, 598 (1968)).

Appellants contend that the Board erroneously found that the requested relief was the least relief necessary. According to Appellants, the proposed shed could have been built elsewhere on the property to conform to the required side yard setback. However, Appellants did not raise this issue before the Board. Therefore, there was no evidence before the Board that Appellants’ proposal of having the entire structure rebuilt on a different footprint outside the setback area would be the “least relief necessary” as compared to Battyville’s plan of raising the

⁸ The requirements set forth in § 45-24-41 are mirrored in the Town’s Zoning Ordinance. See Art. VII, Sec. 706(D) of the Town of New Shoreham Zoning Ordinance.

⁹ The Court notes that the “mere inconvenience” standard has undergone several changes in recent years. In 1991, the Legislature defined “more than a mere inconvenience” to mean that “there is no other reasonable alternative to enjoy a legally permitted beneficial use of one’s property.” See Sciaccia v. Caruso, 769 A.2d 578, 583 (R.I. 2001). However, in 2002, the General Assembly subsequently removed the “no reasonable alternative” language from § 42-24-41(d)(2). See Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 692 (R.I. 2003) (“We recognize that the revised language in the 2002 amendment lessens the burden of proof necessary to obtain dimensional relief and an applicant need show only that the effect of denying dimensional relief amounts to more than a mere inconvenience.”).

height of the structure by twenty-six inches on the same footprint as the original shed. Appellants cannot raise this issue for the first time on appeal to this Court. See Ridgewood Homeowners Ass'n v. Mignacca, 813 A.2d 965, 977 (R.I. 2003) (“After applying for a variance to the board and after arguing in favor of a variance at a hearing before the board following the planning commission’s determination that a variance was required to maintain a horse on their land, the [defendants] cannot, for the first time on an appeal before the Superior Court, disclaim the need for a dimensional variance.”).

At the April 24, 2013 hearing, Appellants’ arguments focused almost exclusively on their belief that Battyville intended to use the proposed shed as a residence. However, it is undisputed that residential use of the proposed shed is prohibited under the Town’s zoning ordinance, and there was no testimony that Battyville intended to use the shed for such a purpose. In fact, the Board’s decision granting the variance explicitly states that the proposed shed cannot have bedrooms. (Decision 2.) Thus, Appellants’ objections amounted to nothing more than mere speculation. See Caswell, 424 A.2d at 648 (noting that where there is substantial evidence in the record to support the board’s finding, “the Superior Court shall not substitute its judgment for that of the zoning board as to the weight of the evidence on questions of fact.”) (Internal quotation marks omitted).

The Board’s finding that the variance provided the least relief necessary was well-supported by the record. In determining whether the relief granted was the least relief necessary for enjoyment of the property, the Board looks to the proposed size and character of the building in relation to the surrounding area. See Gardiner v. Zoning Bd. of Review of Warwick, 101 R.I. 681, 688, 226 A.2d 698, 702 (1967) (upholding the grant of variance where the proposed dwelling was “not detrimental to the surrounding area”). Here, Mr. Hall testified that the

proposed shed would increase the height of the structure to fourteen feet, which was well below the twenty-five foot maximum height permitted for accessory structures in the RA Zone. (Tr. 17.) Additionally, the Board explicitly found that “[t]he proposed shed is compatible with the surrounding area and other buildings on the site.” (Decision, ¶ 6.) “Pursuant to § 45-24-41(c)(3), the board is vested with ‘discretion . . . to determine on a case by case basis’ whether the variance is proper ‘given the character of the surrounding area and the nature of the property. . . .’” Lischio, 818 A.2d at 692. The Board did not abuse its discretion in allowing Battyville to raise the height of a structure twenty-six inches for safety purposes.

Appellants also argue that that the Board’s decision is tantamount to a declaratory judgment action since the Board noted that the Lot was nonconforming. In so arguing, Appellants rely on the following language from the Rhode Island Supreme Court’s decision in RICO Corp. v. Town of Exeter:

“Notwithstanding that the enabling legislation does not permit nor the ordinance authorize any additional jurisdiction, the respondent board by purporting to confirm the legality of a pre-existing use in substance assumed to itself the power to issue declaratory judgments. This it had no right to do.” 787 A.2d 1136, 1144 (R.I. 2001) (quoting Olean v. Zoning Bd. of Review of Lincoln, 101 R.I. 50, 220 A.2d 177 (1966)).

Thus, Appellants rely on cases that stand for the proposition that a zoning board cannot issue declaratory judgments. See RICO Corp., 787 A.2d at 1143 (holding that the zoning board had no authority to issue a cease and desist order declaring that “a legal nonconforming gravel bank use existed on the property”); Olean, 101 R.I. at 52, 220 A.2d at 178 (holding that the zoning board was “clearly without jurisdiction” where it granted a petition to “confirm the legality of a pre-existing use”).

Because the Board did not impermissibly confirm the existence of nonconforming use—an act which would be outside its jurisdiction—the Board did not act in excess of its statutory authority in granting Battyville’s application for a dimensional variance. See Olean, 101 R.I. at 52, 220 A.2d at 178 (“[Zoning boards] are empowered to hear appeals from the determinations of administrative officers made in the enforcement of the zoning laws and in addition they may authorize deviations from the comprehensive plan by granting exceptions to or variations in the application of the terms of local zoning ordinances.”). The record demonstrates that Battyville entered into evidence the 1994 Zoning Certificate, which states that “[a]ll prior existing structures on this property were constructed prior to March 4, 1989” and that “[a] prior existing, non conforming use of three (3) single family dwelling units continues on the property.” (Battyville’s Ex. 4). Section § 45-24-31 defines a Zoning Certificate as “[a] document signed by the zoning enforcement officer, as required in the zoning ordinance, which acknowledges that a use, structure, building, or lot either complies with or is legally nonconforming to the provisions of the municipal zoning ordinance or is an authorized variance or modification therefrom.”

Although Appellants now argue that the Zoning Certificate did not address whether any of the structures were lawful when they were first built, Appellants presented no evidence before the Board that the original shed was an illegal structure. In fact, the March 4, 1989 date referenced in the Zoning Certificate before the Board is significant because the Zoning Ordinance was revised on this date. See Art. III, § 302(A). Article I, § 202(A)(65) defines “Existing Structure” as “[a] structure lawfully existing as of March 4, 1989.” The fact that the Board did not consider whether the structure was legal when first constructed was not in violation of statutory or ordinance provisions. The Board was without authority to determine that

issue in the context of considering an application for a dimensional variance. See RICO Corp., 787 A.2d at 1144.

Moreover, the Board's finding was not premised on the existence of a nonconforming use. The subject application concerned a nonconforming structure. Since the structure did not comply with the applicable dimensional requirements, Battyville was required to apply for a variance from Article I, § 113(c)(1) in order to increase the height of the shed. Article I, § 113(c)(1) of the Town Zoning Ordinance provides: "A structure which is non-conforming with respect to the dimensional requirements of the Zoning Ordinance may not be expanded, enlarged or increased unless such expanded or enlarged portion complies with the dimensional requirements of the Zoning Ordinance." See Cohen v. Duncan, 970 A.2d 550, 563 (R.I. 2009) (interpreting similar "prohibitory language" as limiting what alterations of nonconforming development a landowner may do as of right). Therefore, "when seeking dimensional relief for lawfully permitted uses" the Rhode Island Supreme Court has noted that "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, 818 A.2d at 693 (emphasis in original). Section 45-24-31(54) defines a permitted use as "[a] use by right which is specifically authorized in a particular zoning district." Here, as the Board noted, an accessory use building is a permitted use in the RA Zone. See Art. V, § 306(D). Accordingly, the Board did not err or abuse its discretion in granting the dimensional variance.

IV

Conclusion

After a review of the entire record, this Court finds that the Board had substantial evidence before it to grant the dimensional relief sought by Battyville. Its decision was not in

excess of its authority, in violation of ordinance provisions, or an abuse of discretion. Substantial rights of the Appellants have not been prejudiced. Accordingly, the May 31, 2013 decision of the Board is affirmed. Counsel shall submit the appropriate judgment for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Edith L. Blane and Christopher J. Blane v. Town of New Shoreham Zoning Board of Review and Battyville, LLC

CASE NO: WC 2013-0314

COURT: Washington County Superior Court

DATE DECISION FILED: August 21, 2015

JUSTICE/MAGISTRATE: Thunberg, J.

ATTORNEYS:

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