STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 18, 2015)

SETH KURN; BARBARA HARRIS; DANIEL C. YEE; and STEFANO BORTOLI	:	
V.	:	**C.A. No. PC 13-5432**
MYRTH YORK, ARTHUR STROTHER, DANIEL VARIN, SCOTT WOLF, MARC GREENFIELD and ENRIQUE MARTINEZ, in their capacities as members of the City of Providence's Zoning Board of Review; MICHAEL PEARIS, in his capacity as the City of Providence's Finance Director; DAVID T. SHWAERY; and GERALD P. HAMMEL	:	

DECISION

CARNES, J. Before the Court is an appeal from a decision of the City of Providence Zoning Board of Review (the Board) granting a use variance to Applicants David T. Shwaery (Mr. Shwaery) and Gerald P. Hammel (Mr. Hammel) (collectively, Applicants) to convert the basement area of their R-3-zoned property from a professional office to a hair salon. The Appellants—Seth Kurn (Mr. Kurn), Barbara Harris, Daniel C. Yee, and Stefano Bortoli—are asking the Court to reverse that decision. Jurisdiction is pursuant to G.L. 1956 §§ 45-24-69 and 45-24-69.1.

I

Facts and Travel

The Applicants are record owners of the subject property located in an R-3 residential zoning district[1] at 170-172 Cushing Street and 459 Brook Street, Providence, RI and otherwise known as Lots 17, 18, and 19 on Assessor's Plat 13. The sole structure on the property is a three-story house containing five professional offices and two apartments.[2] On May 6, 2013, the Applicants applied for a use variance to convert one of the professional offices into a hair salon. Said professional office is located in the basement of the property. A duly noticed hearing on the matter took place on July 9, 2013.

At the hearing, Mr. Shwaery and various expert witnesses testified on behalf of the Application, including licensed professional engineer Ramzi J. Loqs (Mr. Loqs); real estate appraiser Peter M. Scotti, MAI (Mr. Scotti); and certified planner Edward Pimentel, AICP (Mr. Pimentel). Also testifying in favor of the Application were Edward Bishop (Mr. Bishop), who is a board member of the College Hill Neighborhood Association and Chairman of the Thayer Street District Management Association; an employee of the Squires Hair Salon, Anna Mezhberg; and neighbors Hillary Guerin, Linda Miller and Alice Miles. Furthermore, in addition to their testimony, experts Mr. Scotti and Mr. Pimentel submitted written reports for the

---

[1] Article 4, Sec. 400 D. of the City of Providence Zoning Ordinance provides in pertinent part:

> "The R-3 Residential District is intended for higher density residential areas of detached single-family, two-family, and three-family residential development, as well as rowhouse development. Limited non-residential uses, which are compatible with surrounding residential neighborhoods, may be allowed."

[2] In 1980, the previous owners of the property obtained a use variance to allow the current uses in the building. Although not part of the record below, on February 17, 2015, this Court entered an Order granting the Board's Motion to Supplement the Record with the Board's 1980 decision. See Order dated February 17, 2015 and Resolution No. 4476 dated February 8, 1980 (Resolution No. 4476).

Board's consideration. Testifying against the Application were the following objectors: City of Providence Councilman Samuel D. Zurier (Councilman Zurier), Seth Kurn (Mr. Kurn) and Chris Tompkins (Mr. Tompkins).

Mr. Shwaery testified that he and Mr. Hammel were seeking the use variance so that they could move their hair salon business, Squires Hair Salon, from its current location to the basement office unit of the subject property.[3] Mr. Shwaery testified that the unit "basically opens out, it's a walk-out basement right out to the parking lot." Id. at 166. According to Mr. Shwaery, the office unit had been vacant since its previous tenant, Brown University Oncology and HIV, had relocated to the jewelry district in 2010. Id. at 165. He further testified that the unit had been marketed as professional office space to no avail: "I have very diligently tried to rent it. I used two different real estate agents to do that. Neither of them were successful. And I tried on my own, too, to rent it." Id. at 165-66.

Mr. Loqs testified that the basement area needed only general renovations to make the basement compliant with the building code and meet handicap requirements. Id. at 173. Thereafter, real estate appraiser Mr. Scotti testified that:

> "[t]he subject property is one of the largest contiguous pieces in the neighborhood; it's 24,597 square feet, the building 1890's colonial revival, about 5500 square feet – 5800 square feet above grade, a 2300 square-foot basement." Id. at 177.

According to Mr. Scotti, with some landscaping, the proposed appointment-only salon would be "virtually invisible" from the street and that he "[doesn't] think this will have even a vague effect

[3] The Applicants established Squires Hair Salon in 1958. (Tr. at 162.) At the time of the hearing, the salon was located at 10 Euclid Street in Providence, employed approximately sixteen people, and had an appointment-only client list of about 3500 people. Id. at 163. However, as a result of selling the Euclid Street property, see id. at 170, they needed a new location for their hair salon business. Id. at 164. According to Mr. Shwaery, the Applicants were having difficulty finding a local property with handicap access and parking to suit their needs. Id. at 164-65.

on surrounding uses or the neighborhood." Id. at 178. Mr. Scotti also opined that "the office market on the East Side is very soft. It really is." Id. at 180

Planning expert Mr. Pimentel observed that, "All the improvements will be to the interior[,] [and that] . . . from the exterior, no one would be the wiser that this is even happening." Id. at 185. He then testified that the Application is simply "asking permission to take the lower level which just doesn't seem viable for office use, and use it for a use that is classified as a personal convenience service, serving neighborhood needs." Id. at 186. Mr. Pimental was asked if "the action of [the Applicants] selling the other property is the cause of them moving to here . . . ?" Id. at 187. He replied: "That has nothing to do with the case of the hardship[,]" and that "any hair salon would be appropriate given that it's a professional office use, it is already commercial in nature . . . ." Id. at 187 and 188.

In his written report, Mr. Pimentel addressed the issue of "all beneficial usage of the floor space in question" by stating that:

> "[i]n order to satisfy this criteria, the property owner has gone to great lengths to utilize the referenced floor space. He has both marketed it for residential and/or professional office (because of its appropriate recognition by a previous Board). However, there has not been any expressed interest, as evidenced by the fact that the subject floor space has remained underutilized for a period of time. This planning consultant believes that the applicant/property owner has done his diligence and attempted to utilize the property in a manner that is consistent with the Ordinance, to no avail. The petitioner has exhausted all permissible avenues. The property owner is entitled to utilize the stated floor space in some beneficial manner, and if impossible to do so by introducing a permitted or by special use permitted land use, he is legally entitled to pursue a prohibited land use." (Report of Edward Pimentel at 7.)

Mr. Pimentel concluded in his written report that "to deny the requested relief will cause the applicant to suffer hardship such that the subject commercial floor space will continue to remain vacant and non-tax generating." Id. at 9. He further concluded that "to deny the applicant's

proposal will not only result in extinguishing all beneficial use of the lower (basement) commercial level, but also be contrary to the goals and objectives of the Comprehensive Plan." Id.

Various lay witnesses also testified at the hearing in objection to the Application. (Tr. at 191-213.) Councilman Zurier testified that in early 2012, Mr. Shwaery sought changes to the Comprehensive Plan so that he could sell nine multi-family properties—including the Squires Hair Salon property—for demolition and development into one hundred student apartments. Id. at 191 and 194. According to Councilman Zurier, at the time of the requested change, Mr. Shwaery represented that the salon was "a failing business," that it had "lost half [its] customers," and that it "[couldn't] get financing . . . ." Id. at 193.

Councilman Zurier then testified: "I think if it is a failing business, I don't understand why that would be what you'd want to move into another building." Id. at 194. Councilman Zurier also questioned whether the Applicants' inability to rent out the basement constituted a hardship where "[i]t is clear the rest of the building is being put to very good use." Id. at 196. He then stated: "I would question whether all beneficial use is lost, even of a basement, either for storage or for student apartments, never mind the fact that there [sic] certainly beneficial use of the building." Id. at 197. In addition, Councilman Zurier observed that the Planning Board previously had recommended that the Board not grant any variances in the area until completion of a Brown University-funded study of the Thayer Street neighborhood. Id. at 195.

Thereafter, Mr. Kurn testified the proposed variance would adversely affect the quality of the neighborhood for the single-family homes in the area. Id. at 199-200. In addition, Mr. Kurn likewise requested that the Board not approve any changes to the area until the Thayer Street study had been completed. Id. at 200. Another lay witness, Mr. Tompkins, "strongly object[ed]

to the characterization of this neighborhood as in transition[,]" stating that residents of the nearby single-family homes "aren't going anywhere[,]" and that the "area is surrounded by local historic districts and this property is in the national historic district." Id. at 202.

In addition to the lay witness objectors, several lay witnesses gave general testimony in favor of the Application, including patrons and an employee of the hair salon. The Planning Department's recommendation then was read into the record. Id. at 218.

Said recommendation observed that the area in question was the subject of an ongoing study to "develop a plan for the future development of Thayer Street and the surrounding areas, and it may result in a change in the Comprehensive Plan and zoning ordinance." Id. As a result, the Planning Department recommended denial of the use variance until the study had been completed. Id. The Board subsequently closed the meeting to conduct its deliberations. Id.

During deliberations, the following colloquy took place:

> "MS. DINERMAN: So when it refers to the hardship from which they're seeking relief, that means from only being able to use it as it is currently in use, authorized for use. That's the hardship they're seeking relief from.
>
> "MR. WOLF: Well, they've testified, I think pretty specifically, that for the last couple of years they've tried to market this and rent this for its currently allowed use and without any success. I think that's a pretty straightforward indication of their being able to meet that standard.
>
> "MR. CARNEVALE: I guess you're saying you're accepting the testimony of the real estate expert and the planning commission.
>
> "MR. WOLF: Generally, yeah. Is that all right?
>
> ". . . .
>
> "MR. GREENFIELD: . . .this is commercial space, it's vacant, they didn't cause it to be vacant. They're trying to rent it, so it's not their actions that caused it to be empty." (Tr. at 221-22.)

Thereafter, the Board unanimously voted to approve the Application "for an 18-month probationary period . . . ." Id. at 227.[4] On October 7, 2013, the Board issued a written decision on the matter. See Resolution No. 9757 (the Decision). The Appellants timely appealed the Decision.

II

Standard of Review

This 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:
>
> "(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).

In reviewing a zoning board decision, 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)). The term

[4] The Court observes that the Certified Record did not include the last four pages of the transcript; however, by agreement of the parties, these pages later were filed to supplement the record.

"[s]ubstantial evidence" is defined 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)).

This Court "gives deference to the findings of a local zoning board of review. This is due, in part, to the principle that 'a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.'" Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (quoting Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)). However, a justice of the Superior Court 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.'" Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1083 (R.I. 2013) (quoting Apostolou v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)).

III

Analysis

The Appellants contend that the Applicants failed to sustain their burden of proving that without the use variance, the property cannot yield any beneficial use. They further maintain that the Board failed to properly address how the addition of a prohibited commercial use to a building that already contains office and residential uses would not alter the general character of the R-3 zoned area. The Appellants also aver that the Board erred in granting an eighteen-month, probationary variance. Finally, Appellants assert that the Applicants created their own

hardship when they sold the building in which they were operating the hair salon and then needed to relocate their business to the subject property.

In order to obtain a variance, an applicant must submit evidence into the record that satisfies the following standards:

> "(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." Sec. 45-24-41(c).[5]

With respect to use variances in particular, the applicant also is required to provide evidence that "the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance." Sec 45-24-41(d). Additionally, "[t]he fact that a use may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief." Id.

In Rhode Island, variances are granted "only upon a showing that literal adherence to the zoning ordinance will result in unnecessary hardship to petitioner and that the granting of the variance would not be contrary to the public interest." Almeida v. Zoning Bd. of Review of Tiverton, 606 A.2d 1318, 1320 (R.I. 1992) (citing Gaglione v. DiMuro, 478 A.2d 573, 576 (R.I. 1984) and R.I. Hosp. Trust Nat.'l Bank v. East Providence Zoning Bd. of Review, 444 A.2d 862,

[5] The requirements set forth in § 45-24-41 are mirrored in the Providence Zoning Ordinance. See Art. 19, Sec. 1902 B.3. of the Providence Zoning Ordinance.

864 (R.I. 1982)). With respect to use variances, an "[u]nnecessary hardship exists when literal application of the zoning ordinance completely deprives an owner of all beneficial use of his property and when granting a variance becomes necessary to prevent an indirect confiscation of the property without compensation." Almeida, 606 A.2d at 1320; see also Gaglione, 478 A.2d at 576 (requiring proof that "rigid insistence upon the property being devoted to a use permitted by the zoning regulations will deprive [landowner] of all beneficial use of his [or her] property and will therefore be confiscatory"); Berard v. Zoning Bd. of Review of Barrington, 87 R.I. 244, 246, 139 A.2d 867, 869 (1958) (declaring the "deprivation of beneficial use of land must as a practical matter amount to confiscation of the owner's land without compensation").

In the instant matter, the Board found in its written Decision that "[t]he hardship from which the Applicants seek relief is the inability to make beneficial use of the property for the permitted uses in an R-3 Zone (as a 1, 2 or 3-family dwelling), and Applicants' inability to lease the basement[,]" and that "[t]he uncontradicted evidence on the record indicates that the Applicants have made significant efforts to lease the space." (Decision at 4.) In support of its finding that "the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the Ordinance[,]" the Board stated that "[t]he basement of the building has been vacant for three (3) years and has not yielded any beneficial use as either a residence or professional offices." Id. at 6. In addition, "[t]he Board restate[d] and adopt[ed] its 1980 Resolution that the Property and the structure are not suitable for use as a three-family dwelling or as a fully residential building and that denial of a variance would amount to loss of all beneficial use." Id.[6]

[6] The Court observes that the Board's 1980, one-page decision did not make specific findings regarding the property's alleged unsuitability as a three-family dwelling or as a residential building, nor did it specifically find "that denial of a variance would amount to loss of all

Section 45-24-41(d) clearly requires a showing that "the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance." (Emphases added.) In accordance with the City of Providence Zoning Ordinance (the Ordinance), a lot is defined as: "the basic development unit for determination of lot area, depth, and other dimensional regulations; or a parcel of land whose boundaries have been established by some legal instrument such as a recorded deed or recorded map and which is recognized as a separate legal entity for purposes of transfer of title." (Art. 2, Sec. 202 H. of the Ordinance). A lot line (or property line) is defined as "[a] line of record, bounding a lot, which divides one lot from another lot or from a public or private street or any other public or private space . . . ." (Art. 2, Sec. 202 L. of the Ordinance.) The area of a lot is defined as [t]he total area within the boundaries of a lot, excluding any street right-of-way, usually reported in acres or square feet." (Art. 2, Sec. 202 I. of the Ordinance.)

The variance Application in this case describes the "subject property" as "172 Cushing St." with a total dimension of "24,597 sq. ft." and an existing building measuring "34'-6"± x 59'-0"." (Application at 1.) Although the requested variance was for a change in the use for only one unit on the property, the result of that change would result in a modification of the subject property in its entirety by adding an additional use.

In order to demonstrate that "the subject land or structure cannot yield any beneficial use[,]" (§ 45-24-41(d)), the Applicants were required to prove that they were "completely deprive[d] . . . of all beneficial use of [their] property" such that the requested variance "[became] necessary to prevent an indirect confiscation of the property without compensation." Almeida, 606 A.2d at 1320. As a result, the Applicants were required to demonstrate that denial

---

beneficial use." See Resolution No. 4476. Nevertheless, assuming that these findings can be implied from the 1980 decision, such findings would have no impact on the instant Decision.

of the Application would result in a loss of all beneficial use for the "subject land or structure" in its entirety, not just for the basement area. Sec. 45-24-41(d). The Court notes that the record is silent with respect to the profitability of the other units in the building and whether the basement area could be utilized for a permitted use—such as a community center, a type-I community residence, a cultural facility, or a permitted day care facility.[7] See Weaver v. United Congregational Church, 120 R.I. 419, 423, 388 A.2d 11, 13 (R.I. 1978) ("In order to obtain a variance, then, respondents were required to prove that the property in question could not be beneficially utilized or profitably operated if used for . . . any other purpose allowed in an R-[3] district.").

An applicant must prove deprivation of all beneficial use of property by submitting "probative evidence" to that effect. Gaglione, 478 A.2d at 576. A mere showing of "a more profitable use that would result in a financial hardship [to the owner] if denied does not satisfy the requirements of our law." Id. (quoting R.I. Hosp. Trust Nat'l Bank, 444 A.2d at 864); see also Almeida, 606 A.2d 1320 ("That petitioner would be precluded from using the property in a more profitable manner if the variance is denied is not of itself proof of unnecessary hardship amounting to confiscation."); Goodman v. Zoning Bd. of Review of Cranston, 105 R.I. 680, 683-84, 254 A.2d 743, 746 (1969) ("To show that some other use not allowed in a [given] district might be more profitable or that the return would be more favorable if the relief sought were granted is not enough."); Hall v. Zoning Bd. of Review of Pawtucket, 93 R.I. 65, 67, 170 A.2d 912, 913 (1961) (holding "petitioner's testimony that the addition was necessary to enable her to derive some beneficial use of her premises was not substantial" and "did not tend to show that

[7] Although Councilman Zurier testified that "[i]t is clear the rest of the building is being put to very good use[,]" (Tr. at 196), there is no specific evidence in the record regarding the occupancy of the remaining units or the income generated therefrom.

she was deprived of all beneficial use of her premises but only that the nursing home with its present facilities was an unprofitable business").

In proving unnecessary hardship,

> "statements of economic unfeasibility that are mere conclusions and are unsupported by financial statements or cost data do not constitute probative evidence. To be entitled to a zoning variance, a landowner must show that the present return on the property [is] so low that to require its continued devotion either to its present use or to others permitted under the ordinance would be confiscatory. Without such a showing, [a] naked assertion of economic unfeasibility is meaningless." Gaglione, 478 A.2d at 576 (internal citations and quotations omitted).

In Goodman, the applicants presented a "bald statement" from a corporate officer about the alleged economic unfeasibility of a tract of land. Goodman, 105 R.I. at 684, 254 A.2d at 746. The Court observed that such a statement

> "tells us nothing about the cost of the property or whether the conclusion of economic unfeasibility is premised upon that cost, or upon the more than a half million dollars which the other applicant might pay for it if, after rezoning, it exercises its option to purchase. It lacks any support whatsoever from a balance sheet, or from a profit and loss statement, or indeed from any financial information or data. It is completely devoid of anything which in any way assists in reaching an informed or an intelligent opinion that the property is incapable of yielding a return sufficient to justify its continued use either as a nursery or for any other permissive possibility. In short, it is conclusional rather than factual, and therefore lacks probative force." Id. at 684-85, 254 A.2d at 746.

The record reveals that the Applicants failed to produce even a scintilla of financial evidence to support their Application with respect to the loss of all beneficial use of "the subject land or structure . . . ." Sec. 45-24-41(d)(emphasis added). As such, they failed to carry their burden of demonstrating a loss of all beneficial use of the property. See OK Props. v. Zoning Bd. of Review of Warwick, 601 A.2d 953, 955 (R.I. 1992) (upholding denial of variance where

the applicant produced evidence that the property was undevelopable but failed to produce any evidence that an easement covering 74% of the property did not grant a continuing benefit); Crossroads Recreation, Inc. v. Broz, 149 N.E.2d 65, 68 (N.Y. App. 1958) ("Plainly, before a claim that a property is yielding less than a reasonable return may properly be interposed, the reasonable return for that property must first be known or at least be ascertainable.").

Considering that the Applicants failed to produce any financial evidence whatsoever, it was impossible for the Board to determine whether there was a net loss on the property amounting to a loss of all beneficial use as a result of the Applicants' inability to rent the basement area. See Matter of DePaola v Zoning Bd. of Appeals of Vill. of Dobbs Ferry, 640 N.Y.S.2d 230, 232 (N.Y.A.D. 1996) (rejecting argument that loss of rent from basement apartment would cause a net loss on the property where "financial statement reflecting a net gain on the rental of the apartments" covered only one year and there was "no evidence that several of the claimed expenses would be recurring). In light of the lack of reliable, probative and substantial evidence in the record on the issue of unnecessary hardship, the Court concludes that the Board's finding of a loss of all beneficial use clearly was erroneous. Consequently, this Court must reverse the Board's Decision to grant the Application.

Even assuming that the Applicants only had to demonstrate a loss of all beneficial use of one discrete unit of the property—the basement—as opposed to the property as a whole, the record reveals that the Applicants would not have sustained its burden of proving same. In its Decision, the Board "note[d] that the Application relates to use of the basement of the building, and not to the remaining portions of the Property." (Decision at 3.) The Board found credible Mr. Shwaery's testimony "that the basement space was last occupied in 2010 by a professional medical group[,]" and that the Applicants "'diligently attempted' to lease the space, . . . marketed

the rental property through two real estate agents and through Mr. Shwaery himself, but have not been able to find a tenant for the currently permitted use." Id. at 3-4. The Board also found credible Mr. Scotti's testimony "that the rental market for the Property as a professional office is 'very soft.'" Id. at 4. The Board then found that "[t]he hardship from which the Applicants seek relief is the inability to make beneficial use of the property for the permitted uses in an R-3 Zone (as a 1, 2 or 3-family dwelling), and Applicants' inability to lease the basement . . . [and that] [t]he uncontradicted evidence on the record indicates that the Applicants have made significant efforts to lease the space." Id. at 4.

However, despite the fact that the Board found the evidence regarding marketability of the basement unit to be credible and uncontradicted, such findings would have been insufficient to demonstrate a loss of all beneficial use of that unit. Similar to their failure to provide financial evidence concerning the subject property as a whole, the Applicants failed to provide any financial information concerning the basement unit. Consequently, assuming that it was proper to grant a use variance only for the basement, the Applicants would not have sustained their burden of proving an unnecessary hardship for that discrete area based upon the record.

Considering that the Applicants did not sustain their burden of proving an unnecessary hardship, the Court need not address Appellants' other issues on appeal. For purposes of discussion, however, the Court notes that there was sufficient expert opinion evidence of record to support a finding that the proposed use would not alter the general character of the neighborhood. See Tr. at 178 (opining that with landscaping, the proposed salon would be "virtually invisible" from the street and that it was unlikely to "have even a vague effect on surrounding uses or the neighborhood"); Tr. at 185 (opining that, "All the improvements will be

to the interior[,] . . . [and] it's got a vast parking area that you don't typically find in this area . . . .").

Furthermore, although Appellants contend that the Applicants created their own hardship by selling the Euclid Street property where the salon had been located, the Court observes that the Board properly rejected this contention in its Decision. See Decision at 4 (finding that the Applicants "did not take any prior action that resulted in the hardship posed by the Property[,]" that they "purchased the Property as it existed and did not cause the space to be vacant[;]" thus, the "'hardship from which [they] seek[] relief' is the hardship presented by the Property that is the subject of the application") (emphasis in original).

With respect to the claim of error regarding the issuance of an eighteen-month probationary variance, assuming such issuance was proper, the Court concludes that the Applicants' burden of proving an unnecessary hardship remained the same. See Light Co. v. Houghton, 226 N.E.2d 341, 344 (Ind. App. 1967) (rejecting a temporary, three-year limitation, holding "[t]emporary expediency in itself cannot be the reason for disregarding zoning statutes. The purpose of the restrictions applies to temporary as well as permanent uses"); Lynch v. Borough of Hillsdale, 54 A.2d 723, 725 (N.J. 1947) ("A use which is not the proper subject of a variance lasting and inviolable in character is not permissible for a limited period."). The record reveals, and this Court already has concluded, that Applicants did not meet their burden of proving an unnecessary hardship in the first instance; consequently, the Court need not address the propriety of issuing a probationary variance.

IV

Conclusion

After a review of the entire record, this Court finds that the Board's Decision was unsupported by the reliable, probative, and substantial evidence, was arbitrary and capricious, and was in violation of statutory, ordinance, and planning board provisions. The Board's Decision was also affected by error of law and was characterized by an abuse of discretion. Substantial rights of the Appellants have been prejudiced as a result. Accordingly, this Court reverses the Board's Decision to grant the use variance at issue in this case. The Appellants' request for attorney fees is denied.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Kurn v. York, et al.**
CASE NO:	**PC 13-5432**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 18, 2015**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**John O. Mancini, Esq.** **Joelle C. Rocha, Esq.**
For Defendant:	**Katherine A. Merolla, Esq.** **Lisa Dinerman, Esq.**