

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: November 6, 2015)

JAN CO. CENTRAL, INC., :  
Plaintiff/Appellant :

V. :

C.A. No. PC 2014-4772

RPS ASSOCIATES, LLC, ZONING :  
BOARD OF REVIEW OF THE CITY OF: :  
PROVIDENCE, and MYRTH YORK, :  
SCOTT WOLF, ARTHUR V. :  
STROTHER, MARK GREENFIELD, :  
and NURIA CHANTRE in their :  
capacities as members of the Zoning :  
Board of Review of the City of :  
Providence, :  
Defendants/Appellees :

**DECISION**

**PROCACCINI, J.** This matter is before the Court on Plaintiff Jan Co. Central, Inc.’s (Plaintiff or Jan Co.) appeal of a decision from the Zoning Board of Review of the City of Providence (Zoning Board), issued September 12, 2014, which granted RPS Associates, LLC (RPS or Defendant) two special use permits and four dimensional variances. Defendant opposes the zoning appeal. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

# I

## Facts and Travel

RPS owns 48, 50, and 54 Plainfield Street and 4, 6, 10, and 14 Atwood Street.<sup>1</sup> The property is composed of seven lots or approximately 64,300 square feet of vacant land. RPS seeks to put a retail building of approximately 8400 square feet and a quick-service restaurant of approximately 4500 square feet with a double drive through and signs on the property, which require relief from the Providence Zoning Ordinance (Zoning Ordinance). On May 22, 2014, RPS submitted an application for dimensional variances from sections 305 (dimensional restrictions in M-1 Zone), 425.2 (location of trees and landscaping for parking areas), 604.3 (freestanding signs), and 607.3 (maximum area of signs) of the Zoning Ordinance.<sup>2</sup> Additionally, RPS requested special use permits under sections 303(5.0)(57.1) (eating and drinking establishment more than 2500 square feet) and 303(5.0)(57.2) (drive-in establishment in a C-2 Zone).

The Zoning Board held a properly-noticed public hearing on June 25, 2014. The Zoning Board issued its decision on September 12, 2014, granting RPS's request for all dimensional variances and both special use permits.<sup>3</sup>

At the hearing, RPS presented testimony in support of its application for dimensional variances and special use permits through Attorney Zachary Darrow of DarrowEverett, LLP. John Kucich<sup>4</sup>, a civil engineer with Bohler Engineering, testified about the uniquely-shaped lot

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<sup>1</sup> The land is also identified as Tax Assessor Plat 105, Lots 46, 47, 66, 98, 99, 100, and 101.

<sup>2</sup> The Providence Zoning Ordinance was revised effective December 24, 2014. This application submission and hearing were heard prior to the revisions; therefore, this Decision cites to the old Zoning Ordinance.

<sup>3</sup> The Zoning Board may grant a dimensional variance in conjunction with a special use permit. See § 902.4 of the Zoning Ordinance.

<sup>4</sup> Mr. Kucich's name is misspelled in the record as Cusack.

and how it created a hardship for any builder. Next, Paul Bannon, Senior Project Manager with BETA Group, spoke about how the design and traffic flow promotes pedestrian safety. Finally, Thomas Sweeney, a real estate broker and appraiser from Sweeney Real Estate & Appraisal, discussed how RPS meets the requirements for a special use permit. Jan Co. presented testimony in opposition to RPS's application through its attorney, K. Joseph Shekarchi. David Westcott, certified planner from Mason & Associates, testified that the land is not unique enough to satisfy the hardship requirement and that the design does not fit in with Providence's Comprehensive Plan. Further, Robert Vanasse, a professional engineer with RD Vanasse & Associates, Inc., spoke about how the design would cause traffic congestion and put pedestrians at risk. Additionally, the following—Councilmember Sabina Matos, as the ward representative of where the property is located; Abelardo Hernandez, an abutter; and Greg Stevens, owner of the Olneyville New York System Restaurant in Providence—testified in support of the development.

Edward Abraham and Rona Murray spoke on behalf of McDonald's, explaining the benefit McDonald's would have on the community and elaborated on a letter submitted before the board entitled "Communities Grow with McDonald's." The Zoning Board also had the planning and drawing of the proposed site, reports, and curriculum vitae from experts Mr. Sweeney, Mr. Westcott, and Mr. Vanasse. Although a representative from Family Dollar was not present, Cliff Cermak, Community Affairs Specialist from Family Dollar, submitted a letter for evidence. Further, there was a letter from Olneyville Housing Corporation opposing the application and an email from Peter Marinucci in support of the application. Lastly, City Plan Commission (CPC) submitted a recommendation, which approved the master plan for the proposed project.

The Zoning Board approved both the special use permits by a five-to-zero (5-0) vote and the dimensional variances by a four-to-one (4-1) vote in its decision, Resolution No. 9818. On September 12, 2014, the Zoning Board issued Resolution No. 9818 with detailed findings of fact and conclusions of law to support their decision. On September 29, 2014, Jan Co. appealed the Zoning Board's decision to this Court.

On appeal, Jan Co. sets forth four main arguments in their appeal to the Rhode Island Superior Court. Jan Co. argues that the Zoning Board should not have granted the special use permit because Jan Co. presented testimony that the development would be detrimental to the health and welfare of the community. Additionally, Jan Co. asserts that RPS, in their request for dimensional relief, did not present sufficient evidence for the Zoning Board to conclude that RPS suffered a hardship. Moreover, Jan Co. avers that the hearing itself was procedurally flawed because RPS's expert, Mr. Bannon, was not properly accepted as an expert and that RPS's expert, Mr. Sweeney, testified beyond his area of expertise. Jan Co. asserts that these procedural problems require the experts' testimony to be excluded from the Zoning Board's consideration. Further, Jan Co. contends that its due process rights were violated because the Zoning Board did not allow its attorney to cross-examine RPS's experts at the hearing.

## II

### **Standard of Review**

The Superior Court possesses jurisdiction to review a zoning board decision pursuant to § 45-24-69. The statute 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).

The Superior Court must “examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.” Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1083 (R.I. 2013) (citing Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). “Substantial evidence has been defined as more than a scintilla but less than a preponderance.” Id. (internal quotation marks omitted). 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.” Id. (internal quotation marks omitted). In reviewing the record, the Court must “scrutinize the record as a whole to determine ‘whether legally competent evidence exists to support the findings. . . .’” Id. (citing Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004)). The Court may not weigh the evidence on appeal, but must rather review the record to look for substantial evidence. Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 399 (R.I. 2001).

### **III**

#### **A**

#### **The Special Use Permit**

Jan Co. avers that the Zoning Board “erroneously concluded that the special use permits would not be detrimental or injurious to the health and welfare of the community, as the potential

congestion of traffic alone affects the health, safety and welfare of those individuals living near or patronizing McDonald's and the Family Dollar." (Pl.'s Mem. at 25.) Jan Co.<sup>5</sup> further argues that the Zoning Board's decision was clearly erroneous, made under unlawful procedure, in violation of statutory and ordinance provisions, arbitrary and capricious, and constituted an abuse of discretion because there was not sufficient evidence before the Zoning Board for it to grant a special use permit.

RPS argues that the Zoning Board's decision was supported by the evidence. RPS asserts that all this evidence at least amounts to "more than a scintilla but less than a preponderance," fulfilling the requirements for a special permit to be granted. (Opp'n at 28-29.)

Special use is defined as "[a] regulated use which is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42."<sup>6</sup> Sec. 45-24-31(61). Local zoning boards set their own requirements for special use permit. In Providence, in order for the Zoning Board to issue a special use permit, the Zoning Board must:

"(A) Consider the written opinion from the department of planning and development. (B) Make and set down in writing specific findings of fact with evidence supporting them, that demonstrate that: 1. The proposed special use permit is set forth specifically in this ordinance, and complies with any conditions set forth therein for the authorization of such special use permit; 2. Granting a proposed special use permit will not substantially injure the use and enjoyment of nor specifically devalue neighboring property; and 3. Granting the proposed special use permit will not be

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<sup>5</sup> Jan Co. misstates the standard for granting a special use permit as requiring "a deprivation of all beneficial use of the property," which is the standard for a use variance. (Pl.'s Mem. at 23.) However, Jan Co.'s subsequent review of the Zoning Board decision and testimony presented at the hearing uses the correct standard for a special use permit. (Pl.'s Mem. at 23-26.)

<sup>6</sup> Section 45-24-42 sets forth what the local zoning boards must include in their ordinances for special use permit requests.

detrimental or injurious to the general health, or welfare of the community.” Providence Zoning Ordinance § 902.4.<sup>7</sup>

See Piccerelli v. Zoning Bd. of Review of Barrington, 107 R.I. 221, 230, 266 A.2d 249, 254 (1970) (discussing health, safety and welfare). When the special use permit requirements are met, it is an abuse of discretion for the Zoning Board to deny the application. Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 882 (R.I. 1991).

## **B**

### **The Zoning Board Decision**

In its written Resolution, the Zoning Board found that the permits would not injure the use and enjoyment of, nor significantly devalue the neighboring property, or be injurious to the general health or welfare of the community. Sec. 902.4 of the Zoning Ordinance. This Court finds, after reviewing the record, that the Zoning Board’s decision was “supported by substantial evidence,” because “legally competent evidence exists to support the findings.” See Lloyd, 62 A.3d at 1083.

The Zoning Board had before it evidence from RPS in the form of testimony from Mr. Sweeney, who opined that the development was consistent with the neighborhood and would have no negative impact on the surrounding property values. (Tr. at 197:1-24.) Mr. Sweeney instead thought that the development would be a benefit, not injurious to the general health, safety, and welfare of the community. Id. at 198:11-199:1. Additionally, Councilwoman Matos spoke in support of the project because of the business and positive effect it would have on the neighborhood. Id. at 206:17-23. She explained she supported the project because the development will motivate other businesses in the area to improve their own businesses, the

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<sup>7</sup> This statute has been revised, effective December 24, 2014, and can be found at Zoning Ordinance § 1901(B)(3), which contains the same standard with minimal edits to the text of the statute. (Available at <https://www.providenceri.com/efile/5782>.)

potential employment for youth of the neighborhood, and the café will provide a meeting spot and free WiFi. Id. at 206:19-207:1; 208:20-25.

Jan Co. argues that the Zoning Board overlooked opinion testimony from Mr. Westcott, who stated that the special permit should be denied because the design would be detrimental to the health, safety, and welfare of the community. Id. at 225:16-226:14. Jan Co. further noted Mr. Vanasse gave his expert opinion that the lack of accessible parking will cause traffic congestion and put pedestrians at risk. Id. at 232:14-23; 236:12-18. See V. S. H. Realty, Inc. v. Zoning Bd. of Review of E. Greenwich, 120 R.I. 785, 791, 390 A.2d 378, 381 (1978) (held the proposed application would not be beneficial to the public welfare and traffic congestion was inimical to the general health, safety, and welfare of the community).

The Zoning Board deliberated on all the evidence before it. Mr. Wolf in deliberations explained that as it stands, the property currently is not safe and to leave it as a vacant lot would be detrimental to the community. (Tr. at 282:1-10.) Both Mr. Wolf and Mr. Greenfield agreed that most of the community feedback, except for Burger King, indicated that the development would not devalue the community or interfere with its use and enjoyment, but would rather make the community better. Id. at 283:4-284:1. Mr. Wolf explained how he weighed the evidence on both sides, in particular the evidence presented concerning pedestrian safety, and found that by a preponderance of the evidence, it would not be detrimental to the health, safety or welfare of the community to grant the special use permits. Id. at 284:10-285:1. See Murphy v. Zoning Bd. of Review of S. Kingstown, 959 A.2d 535, 542 (R.I. 2008) (citing Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998) (“there is no talismanic significance to expert testimony [and it] may be accepted or rejected by the trier of fact”)).



In conclusion, the Zoning Board had before it testimony and evidence to support their finding that two special use permits would not injure the use and enjoyment of, nor significantly devalue the neighboring property, or be injurious to the general health or welfare of the community. After reviewing the Zoning Board's decision, this Court finds that the "findings of the zoning board were supported by substantial evidence." See Lloyd, 62 A.3d at 1083. As such, the decision was not clearly erroneous or an abuse of discretion. Sec. 45-24-69(d).

## C

### **The Dimensional Variances**

Jan Co. further contends that the property can be developed without dimensional relief. Jan Co. concludes that the Zoning Board ignored Mr. Westcott's testimony and the Zoning Board's decision was clearly erroneous, made under unlawful procedure, in violation of statutory and ordinance provisions, arbitrary and capricious, and constituted an abuse of discretion. RPS asserts that the decision is supported by substantial evidence and therefore is not an abuse of discretion, because RPS's three experts testified that the dimensional variances were required for safe access to the establishments.

A variance is "[p]ermission to depart from the literal requirements of a zoning ordinance. An authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning ordinance." Sec. 45-24-31(65). A dimensional variance is

“[p]ermission to depart from the dimensional requirements of a zoning ordinance, where the applicant for the requested relief has shown, by evidence upon the record, that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations.” Id. at (ii).

For the Zoning Board to have the power to authorize a dimensional variance, the Zoning Board must find the following:

“(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)(1); Providence Zoning Ordinance § 902.3.”<sup>8</sup>

Additionally, the Zoning Board must find “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.” Id. at (d)(2). “Therefore, an applicant seeking a dimensional variance has the burden before the zoning board of showing that a factual basis appears in the record to support the proposition that there is ‘no other reasonable alternative’ that would allow the applicant to enjoy a legally permitted beneficial use of the property.” Bernuth, 770 A.2d at 401.

The Zoning Board in its written Resolution explained how RPS met the above six elements. This Court finds, after reviewing the record, that the Zoning Board’s decision was “supported by substantial evidence,” because “legally competent evidence exists to support the findings.” See Lloyd, 62 A.3d at 1083.

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<sup>8</sup> This statute has been revised without changes, effective December 24, 2014, and can be found at Zoning Ordinance § 1902(B)(3)-(4). (Available at <https://www.providenceri.com/efile/5782>.)

For Jan Co., Mr. Westcott testified that this design was not in line with the Comprehensive Plan. (Tr. at 222:1-223:23.) Further, Mr. Westcott testified that there are no unique characteristics to this land that create a hardship preventing the buildings from being built right up on the sidewalk as required by the Comprehensive Plan. Id. at 223:24-225:15. Mr. Moore, an attorney representing the owner of Fete, also testified that he believed the buildings should be built on the street line because aesthetics is not a good enough reason for a variance. Id. at 241:22-242:22.

Experts testified on both sides as to whether the six elements as required to grant dimensional relief were met by RPS. For RPS, Mr. Kucich testified about the uniquely-shaped lot and how the variances were needed to make the drive through safer. (Tr. at 174:22-175:5; 178:7-15.) Additionally, Mr. Kucich testified that relief from the buffer requirement resulted from the land being a corner lot sided by three streets, but that they supplemented the plan with more tree covering to make up for it. Id. at 180:21-181:21. After, Mr. Bannon spoke about the traffic studies conducted on the site and how the design safely and effectively moves traffic around the buildings. Id. at 191:3-16. Next, Mr. Sweeney spoke extensively as to why he thought the dimensional variances should be granted in his expert opinion, discussing each statutory requirement in turn.<sup>9</sup> Id. at 196:11-25. Overall, Mr. Sweeney stated that he believed this development would be a benefit to the community. Id. at 204:9-13.

The Zoning Board found the testimony that it would be cheaper to set the buildings forward, which would fully comply with the Comprehensive Plan, an important factor in

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<sup>9</sup> Mr. Sweeney opined that the variances are all required because of the unique characteristics of the land, the hardship is not due to the prior actions of the applicant, he was familiar with the city's Comprehensive Plan and avers this design is consistent with that plan, the relief requested is the least relief necessary, and that to deny the application would be more than an inconvenience. Id. at 199:2-200:24; 201:15-202:6; 202:7-203:1; 203:2-12; 203:13-204:1.

determining that the variances were sought for safety reasons, not financial gain. Id. at 286:15-290:20. Further, the Zoning Board considered the alternative to not granting the variances, a vacant lot, which is also not in the Comprehensive Plan. Id.; see Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 693 (R.I. 2003) (examples of dimensional variances that would be contrary to the comprehensive plan). Mr. Wolf added that he thought the parking was sufficient, even in light of Mr. Westcott and Mr. Vanasse's testimony, and was actually happy there was not more parking because there is already too much pavement in that area. Id. at 290:1-4. Mr. Carnevale and Ms. Dinerman focused on the fact that the area has remained undeveloped for many years, and this project itself has gone through many revisions, in collaboration with the CPC, to make it work because of the unique characteristics of the property. Id. at 290:5-12. Lastly, when debating whether the hardship would be more than an inconvenience, Mr. Wolf commented, "Well, I think that's pretty clear," and the others agreed. Id. at 290:17-20. See Bernuth, 770 A.2d at 400-01 (discussion of hardship); Roland F. Chase, The Rhode Island Zoning Handbook § 167, 246-47 (2d ed. 2006) (summarizing the situations where the Rhode Island Supreme Court upheld and denied dimensional variances under the mere inconvenience standard).

In conclusion, the Zoning Board had before it testimony and evidence to support their finding that all four dimensional variance requests before it should be granted. It was clear that the Zoning Board considered Mr. Westcott and Mr. Vanasse's testimony, but ultimately concluded that RPS's evidence was stronger. See Murphy, 959 A.2d at 542 (the zoning board can accept or reject expert testimony before it in a hearing when contradictory experts are equally qualified).

After reviewing the Zoning Board's decision and mindful that it is not permitted to substitute its judgment for the Zoning Board's, this Court concludes that the "findings of the zoning board were supported by substantial evidence." See Lloyd, 62 A.3d at 1083. As the decision was based on substantial evidence, the Zoning Board's decision was not arbitrary or capricious or clearly erroneous. Sec. 45-24-69(d).

## **D**

### **Expert Testimony**

Jan Co. argues that RPS's expert, Mr. Bannon, was not properly accepted as an expert by the Zoning Board and that he testified beyond his area of expertise. Jan Co. asserts that, as such, Mr. Bannon's testimony has no probative value and should be disregarded. Jan Co. also argues that the Zoning Board only accepted Mr. Sweeney as a real estate broker and appraiser; therefore, he should not have been able to testify concerning the Comprehensive Plan or traffic and any testimony concerning either should be disregarded.

RPS asserts that zoning boards do not have to strictly follow the rules of evidence as a court does, even though they perform a quasi-judicial function. Further, Jan Co.'s experts were recognized in the same way as RPS's—no verbal acceptance was given to any expert, except for Mr. Sweeney. RPS concludes that if the Court does find that the expert testimony was not formally accepted as required, then all the experts except Mr. Sweeney must be disregarded. RPS also argues that Mr. Sweeney did not testify outside his area of expertise. RPS explains that Mr. Sweeney was accepted as an expert in the field of real estate because he is a real estate broker and appraiser. As such, he was more than qualified to opine on how the project fits in with the Comprehensive Plan.

A hearing in front of a zoning board is “informal in nature and do[es] not necessarily have to be conducted as are hearings before a court.” Woodbury v. Zoning Bd. of Review of Warwick, 78 R.I. 319, 323, 82 A.2d 164, 166 (1951). Because of this informal nature, there are no precise procedures for how a zoning board accepts a person as an expert. In one case, the Court overturned a zoning board’s decision that a witness was an expert because the record did not support it— the record showed his opinion was “formed not from an impartial and professional perspective but rather from the perspective of a neighboring property owner.” Salve Regina Coll., 594 A.2d at 881.

Here, it was clear that the Zoning Board considered Mr. Sweeney and Mr. Bannon experts because they testified impartially and with professional prospective. See id. The Zoning Board questioned the experts’ qualifications when necessary, and the Zoning Board allowed each expert to testify about complex and technical subjects. See e.g., Tr. 219:24-221:8 (questioning Mr. Westcott’s qualifications). Although the Zoning Board on the record did not state some specific phrase to indicate that they had accepted the experts, the conduct of the Zoning Board and language of the decision evidence that the Zoning Board considered both Mr. Sweeney and Mr. Bannon experts.<sup>10</sup> Therefore, it was not an abuse of discretion for the Zoning Board to consider Mr. Bannon and Mr. Sweeney experts.

Further, it is within a zoning board’s authority to weigh the credibility of witnesses and the weight of the evidence because “a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.” Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009) (citing Pawtucket Transfer

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<sup>10</sup> See Resolution No. 9818 at 2 (“the following witnesses testified as experts on behalf of the Applicant: 1. John Kucich, P.E. of Bohler Engineering, civil engineer; 2. Paul Bannon of BETA, traffic engineering[;] 3. Thomas O. Sweeney, SIOR, Sweeney Real Estate & Appraisal, real estate appraisal”).

Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008)). Specifically for experts, the Court has commented, “there is no talismanic significance to expert testimony [and it] may be accepted or rejected by the trier of fact. . . . [I]t is also true that, if expert testimony before a zoning board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony.” Murphy, 959 A.2d at 542. When both sides present conflicting testimony from equally qualified experts, the Court should defer to the zoning board’s decision because it “had before it the individual witnesses and had the opportunity to judge their credibility,” which puts the zoning board “in a better position than the court to resolve the conflict.” Mendonsa v. Corey, 495 A.2d 257, 263 (R.I. 1985).

The Zoning Board’s decision recognized that evidence was presented on both sides of the issue and while it considered RPS’s experts’ testimony, and in particular their concern about pedestrian safety in the neighborhood, the Zoning Board ultimately concluded that a drive through would be safe and efficient. See Tr. 284:10-285:1. Mr. Wolf articulated how he weighed the evidence from experts on both sides of the issue, but ultimately concluded by a preponderance of the evidence that the special use permit would not be detrimental to the health and safety of the community, but instead would enhance safety. Id. Because both sides presented expert testimony regarding opposite sides of the issue, it was within the Zoning Board’s discretion to find RPS’s experts more credible. The Court cannot overturn the decision because the Zoning Board is in a better position to judge credibility when it sees live testimony. See Mendonsa, 495 A.2d at 263. Therefore, the Zoning Board’s decision to find RPS’s experts more credible than Jan Co.’s is not an abuse of discretion or clearly erroneous. See § 45-24-69(d).

## E

### **Due Process and Cross-Examination**

Jan Co. asserts that its due process rights were infringed when the Zoning Board denied its request to cross-examine RPS's witnesses. At the Zoning Board public hearing, Jan Co. was denied the right to cross-examine RPS's witnesses. Instead, Jan Co. could only make an offer of proof for the record. Jan Co. wanted to ask the experts about their qualifications to better ascertain the credibility of their testimony.

Our Supreme Court previously addressed the issue of cross-examination of witnesses at zoning board hearings. The Court has stated that “[a]lthough interested persons have a right to be heard in zoning hearings in accordance with rules and regulations lawfully adopted and impartially applied by such boards for the conduct of their hearings, there is nothing in the law entitling such persons to cross-examine opposing witnesses as a matter of right.” Colagiovanni v. Zoning Bd. of Review of Providence, 90 R.I. 329, 335, 158 A.2d 158, 162 (1960). It is well settled that as a quasi-judicial body, a zoning board must follow the rules and regulations for hearings; however, the hearings are informal in nature and do not require the same procedures as does a court of law. Id. A few years later, the Court revisited the issue again holding that cross-examination was not required in a zoning board hearing. Zimarino v. Zoning Bd. of Review of Providence, 95 R.I. 383, 387, 187 A.2d 259, 262 (1963). Because in Zimarino the petitioner was able to present competent and relevant evidence to the zoning board, just not through cross-examination, he was still provided with “a fair and impartial hearing.” Id. The Court recognized the benefits of cross-examination, but did not require it stating,

“[t]he interest of justice might well be better served if some reasonable cross-examination were permitted, particularly if it were to be conducted by legal counsel presumably skilled in that art. However, we cannot say that a refusal to permit formal cross-



examination, applied to all parties to a hearing, in and of itself we [sic] operate so as to preclude the production of competent, relevant evidence on the issues raised at such hearing.” Id.

Subsequently, the Court reiterated its sentiment that cross-examination would be beneficial to zoning board hearings but did not require zoning boards to adopt the procedure, even commenting that disallowing cross-examination was “a practice with which we have long been dissatisfied.” Westminster Corp. v. Zoning Bd. of Review of Providence, 103 R.I. 381, 393, 394, 238 A.2d 353, 360, 361 (1968) (citing Zimarino, 95 R.I. at 387, 187 A.2d at 262) (“We direct attention to the position we took in Zimarino and to our suggestion that cross-examination be permitted in appropriate cases.”).

The Supreme Court of Rhode Island has been clear on this issue: although it would be prudent and in the interest of justice to adopt hearing procedures allowing for cross-examination in zoning board hearings, due process does not require it.<sup>11</sup> See Westminster Corp., 103 R.I. at 394, 238 A.2d at 360-61.

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<sup>11</sup> This Court pauses to note that several jurisdictions recognize the right to cross-examine witnesses in front of zoning boards. See Patricia E. Salkin, American Law of Zoning § 40:33; 101A C.J.S. Zoning and Land Planning § 240. Zoning board hearings could benefit from cross-examination of witnesses because

“[t]he right to cross-examination is based on the principal [sic] that a full hearing at which every party has the right to present his or her case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts, is essential for wise and just application of the authority of administrative agencies.” 91 Am. Jur. Trials 233 (2004); see e.g., Wasicki v. Zoning Bd. of City of Stamford, 163 Conn. 166, 172-73, 302 A.2d 276, 279 (1972) (allowing cross-examination, inspection of documents and presentment of evidence because “[n]ot to do so would deny those opposing the application the right to be fully apprised of the facts on which the board is asked to act”); Town of Somerset v. Montgomery Cnty. Bd. of Appeals, 245 Md. 52, 65, 225 A.2d 294, 302 (1966) (“in an adversary proceeding before an

It has been almost fifty-five years since our Supreme Court first announced that due process does not require zoning boards to allow cross-examination of witnesses. However, despite the Supreme Court's repeated observation that the interests of justice would be better served if zoning boards adopted procedures providing for cross-examination, it has not spurred change in local town zoning board hearing procedures. See Westminster Corp., 103 R.I. at 393-94, 238 A.2d at 360-61. While this Court shares the sentiment expressed by our Supreme Court encouraging cross-examination, under present case law zoning boards are not required to allow adversaries a chance to cross-examine witnesses. Therefore, this Court is constrained to conclude that due process was not denied when Jan Co. was not allowed to cross-examine RPS's witnesses and such denial was not fatal to the Zoning Board's decision.

#### IV

#### Conclusion

After examining the entire record, this Court concludes that the Zoning Board's findings "were supported by substantial evidence." Lloyd, 62 A.3d at 1083. The Zoning Board's decision provided a detailed recitation of the factors for both the special use permits and dimensional variances and provided how RPS's evidence met each of those factors. After reviewing the record and evidence presented, this Court finds that there was legally competent evidence to support the Zoning Board's findings; and therefore, their decision was not clearly erroneous or an abuse of discretion. Further, although the Zoning Board may not have stated they "accepted"

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administrative board, the opportunity for reasonable cross-examination is a basic right").

Further, "the right to cross-examine witnesses in quasi-judicial or adjudicatory proceedings is a right of fundamental importance which, in regard to serious matters, exists even in the absence of express statutory provision, as a requirement of due process of law or the right to a hearing." P. G. Guthrie, Right to cross-examination of witnesses in hearings before administrative zoning authorities 27 A.L.R.3d 1304 (1969).

each witness, through the conduct and language of the Zoning Board's decision, it is clear that the Zoning Board accepted each witness, specifically Mr. Sweeney and Mr. Bannon, as experts in their field and found their testimony credible. Lastly, Rhode Island law is clear that in a zoning board public hearing, adversaries do not have a due process right to cross-examine witnesses. Here, Jan Co. was able to present its own evidence and participate in the hearing; therefore, due process was not violated. As such, this Court finds that substantial rights of the appellant were not prejudiced. Accordingly, the September 12, 2014 Zoning Board decision is affirmed.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Jan Co. Central, Inc. v. RPS Associates, LLC, et al.

**CASE NO:** PC 2014-4772

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** November 6, 2015

**JUSTICE/MAGISTRATE:** Procaccini, J.

**ATTORNEYS:**

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