

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: November 2, 2015]

DOROTHY ANN GIRARD, MIGUEL :  
MILICH, and JOAN MILICH, :  
Plaintiffs/Appellants :

vs. :  
:

C.A. No. PC 2015-1264

THE ZONING BOARD OF THE TOWN OF :  
BARRINGTON, and LINDA BURTON, :  
Defendants/Appellees :

**DECISION**

**TAFT-CARTER, J.** The Plaintiffs—Dorothy Ann Girard, Miguel Milich, and Joan Milich—appeal the March 10, 2015 decision of the Zoning Board of the Town of Barrington, granting Linda Burton’s request for dimensional variances for her property at 296 Narragansett Avenue in Barrington, Rhode Island. The Defendants, the Zoning Board of the Town of Barrington and Applicant Linda Burton, oppose the zoning appeal. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, this Court remands this matter to the Zoning Board of the Town of Barrington for further proceedings consistent with this Decision.

**I**

**Facts and Travel**

Linda Burton of 296 Narragansett Avenue in Barrington, Rhode Island submitted an application to the Town of Barrington for dimensional variances on January 14, 2015. The property at 296 Narragansett Avenue, Plat 1, Lot 281 is a 736 square foot single family residence with a 644 square foot detached garage. The residence currently has two bedrooms, one bathroom, a living area, and a kitchen. Ms. Burton proposed to raise the garage roof to make a

second floor living space and connect the garage to the residence. The application requested dimensional variances for exceeding 1) front yard setback; 2) side yard setback; 3) rear yard setback; 4) lot coverage; and 5) construction within 100 feet of any water body. The home and garage, built in 1915, were already nonconforming structures. The only increase in nonconformity requested was for the lot coverage—from 35.8% to 37.7%.

With the application, Ms. Burton attached a 200 foot radius map, a list of abutters, and a proposed plan for the additions to the existing structures. Additionally, Ms. Burton provided a narrative with the application, explaining that she suffers from psoriatic arthritis, which renders her unable to climb stairs or walk sometimes. Because she is not responding to treatments, her doctor suggested she live in a one-story home. The proposed construction seeks to accommodate her family and her physical needs. Ms. Burton then sets forth the standards for a dimensional variance and explains how she meets each factor. Moreover, Ms. Burton attached a note from her doctor, Dr. Mark C. Fisher, MD MPH, from Massachusetts General Hospital, confirming her diagnosis of psoriatic arthritis.

The Town of Barrington Zoning Board of Review (Zoning Board) held a public hearing on February 19, 2015 and approved the application with a vote of five to zero (5-0). At the hearing, many people testified in favor of the application. First, Ms. Burton's attorney, Ms. Federico, explained Ms. Burton's medical issues caused by her degenerative, progressive psoriatic arthritis and explained the building plans. Tr. 4:16-7:1. Also, David Boyce from the Conservation Commission testified on behalf of the Commission, stating that it supported the application, but required the building materials to be placed on the Narragansett Street side of the property. Tr. 12:22-13:3. Moreover, a neighbor, Janice Lee Kelly, averred that the change would not alter the general character of the neighborhood. Tr. 36:4-38:15.

Additionally, people testified in opposition to Ms. Burton's application. Mr. Healey spoke on behalf of Mr. and Ms. Milage [sic] and Ms. Girard, averring the expansion would inhibit the views and privacy of the neighbors. Tr. 24:7-35:25. Ms. Girard also testified to her concerns about her view being obstructed. Tr. 45:10-48:21. Finally, a neighbor, Sandra Wyatt, testified about her concerns about construction being so close to the wetlands and how the addition would diminish the Girards' light and privacy. Tr. 38:19-45:6.

The Board issued its written decision on March 10, 2015, and incorporated the minutes as findings of fact. Plaintiffs Dorothy Ann Girard, Miguel Milich, and Joan Milich filed the present timely appeal on March 30, 2015. Both the Zoning Board of Barrington and Ms. Burton filed separate objections to the appeal.

## II

### Standard of Review

Pursuant to § 45-24-69, the Superior Court has jurisdiction to review zoning board decisions. The statute provides as follows:

“[t]he 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; see Irish P'ship v. Rommel, 518 A.2d 356, 359 (R.I. 1986) (matter was returned to the Zoning Board of Review).

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 City of 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 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.” Iadevaia v. Town of Scituate Zoning Bd. of Review, 80 A.3d 864, 870 (R.I. 2013) (citing Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (internal quotes omitted)). If the Court finds that the zoning “board’s decision was supported by substantial evidence in the whole record” then the Zoning Board’s decision must stand. Lloyd, 62 A.3d at 1083.

### III

#### **Adequacy of the Zoning Board’s Written Decision**

Pursuant to Rhode Island law, “[t]he zoning board of review shall include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote.” Sec. 45-24-61. The purpose of this statute is to allow the decision to be reviewable by the Superior Court. Thorpe v. Zoning Bd. of Review of Town of N. Kingstown, 492 A.2d 1236, 1236-37 (R.I. 1985) (“This court has stated on numerous occasions that a zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review.”). The Board must write a comprehensive decision, but

“[T]he minimal requirements for a decision of a zoning board of review would be the making of findings of fact and the application of legal principles in such a manner that a judicial body might review a decision with a reasonable understanding of the manner in which evidentiary conflicts have been resolved and the provisions of the zoning ordinance applied.” Id. at 1237.

The Court must review the decision, not for form, but content, and ensure that the “board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles. Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany.” Irish P’ship, 518 A.2d at 358-59. Moreover, if the zoning board does not provide a decision with proper findings of fact and conclusions of law, “the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances.” Id. at 359 (citing Hooper v. Goldstein, 104 R.I. 32, 44, 241 A.2d 809, 815 (1968)). Instead, the Court “will either order a hearing de novo or remand in order to afford the board an opportunity to clarify and complete its decision.” Hooper, 104 R.I. at 44, 241 A.2d at 815-16.

Here, the Zoning Board’s decision is a mere two pages reciting the Zoning Board’s decision and incorporating the minutes<sup>1</sup> as the findings of fact. The Zoning Board’s incorporated

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<sup>1</sup> Compare MINUTES, Black’s Law Dictionary (10th ed. 2014) (“minutes” are “[m]emoranda or notes of a transaction, proceeding, or meeting.”) with TRANSCRIPT, Black’s Law Dictionary (10th ed. 2014) (a “transcript” is “[a] handwritten, printed, or typed copy of testimony given orally; esp., the official record of proceedings in a trial or hearing, as taken down by a court reporter.”). The state legislature requires that each public board keep minutes, includes:

“(1) The date, time, and place of the meeting; (2) The members of the public body recorded as either present or absent; (3) A record by individual members of any vote taken; and (4) Any other information relevant to the business of the public body that any member of the public body requests be included or reflected in the minutes.” Sec. 42-46-7.

minutes are also a short narrative reciting all the hearing testimony and other evidence before the Board. The facts did set forth the proper requirements that must be established for a dimensional variance to be met. However, neither the decision nor minutes set forth the Zoning Board's reasoning as to how the facts meet the requirements of the statute. The findings of fact here were merely conclusional, a recital of a litany, which is not sufficient for a board decision. See Irish P'ship, 518 A.2d at 358-59; Bernuth v. Zoning Bd. of Review of Town of New Shoreham, 770 A.2d 396, 402 (R.I. 2001) ("the zoning board's decision was conclusional and failed to apply the proper legal principles, thereby making judicial review of the board's work impossible"). Further, this Court will "not search the record for supporting evidence or decide for itself what is proper in the circumstances." Id. at 359. Therefore, this Court remands the present case to the Zoning Board of the Town of Barrington for a decision containing findings of fact and conclusions of law because the decision of the Zoning Board lacks "sufficient facts that would facilitate our judicial review." Id.; Hooper, 104 R.I. at 44, 241 A.2d at 815-16.

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The transcript, a written recitation of the oral hearing, was not included in the certified record here, but was provided in Appellant's Reply Memorandum. See Coupe v. Zoning Bd. of Review of City of Pawtucket, 104 R.I. 58, 59, 241 A.2d 821, 822 (1968) (although the certified transcript is not required to be in the certified record, the Court opined that "[a] better practice, however, would have been to include the stenographic transcription of the testimony, if available, with the record which was certified."); DiDonato v. Zoning Bd. of Review of Town of Johnston, 104 R.I. 158, 161, 242 A.2d 416, 418 (1968) ("it would be more helpful if, in performing our duty under the statute, we have the advantage of a written transcript").

## **IV**

### **Conclusion**

For these reasons, the matter is remanded to the Zoning Board of the Town of Barrington for further findings of fact and conclusions of law. This Court retains jurisdiction.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**CASE NO:** PC 2015-1264

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** November 2, 2015

**JUSTICE/MAGISTRATE:** Taft-Carter, J.

**ATTORNEYS:**

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For Defendant: Michael A. Ursillo, Esq.; Amy H. Goins, Esq.; Stephanie L. Federico, Esq.