STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

[Filed: March 13, 2017]

JAMES McGOWAN	:	
	:	
v.	:	**C.A. No. KC-2016-0074**
	:	
ZONING BOARD OF REVIEW OF THE CITY OF WARWICK, AND DONALD MORASH, RICHARD CORLEY, BEVERLY STURDAHL, MARK McKENNEY, PAUL WYROSTEK, and JULIE FINN in their capacities as members of the Zoning Board of Review of the City of Warwick	:	

DECISION

RUBINE, J. This matter is before the Court on appeal from a final decision of the Warwick Zoning Board of Review (Board or Zoning Board), which on December 8, 2015 denied an application for dimensional variances to allow James McGowan (Applicant or Mr. McGowan) to build a single-family home on a lot in the Conimicut section of the City. Mr. McGowan intended to build a 3 bedroom single-family dwelling on a vacant undersized non-conforming lot. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Applicant filed an application with the Warwick Zoning Board on November 2, 2015. Applicant has owned the subject property located on Spadina Avenue and designated by the City of Warwick as Assessor's Plat 334, Lot 229 since 2003. See Zoning Bd. Decision. The property is in a Zoning District designated as Residential A-40, which requires that a residence may be built only on properties with at least 40,000 sq. ft. of land. The property owned by Applicant

measures only 4050 sq. ft. The property is also non-conforming in regard to width, square footage, front yard setback, side yard setback, and rear yard setback. The subject property, located on Spadina Avenue in Warwick, Rhode Island, is located in a VE-14 flood zone. In order to build the home, it would be necessary for him to obtain dimensional relief from the front and rear yard setbacks, the side yard setbacks, and the width and square footage requirements contained in the Warwick Zoning Ordinances. The Applicant has received Individual Sewage Disposal System (ISDS) approval for an above-ground septic system, and he has received preliminary approval of the Coastal Resources Management Council (CRMC or Coastal). Id.

On December 8, 2015, the Zoning Board held a duly noticed public hearing. Mr. Richard Crenca, Planner for the City of Warwick, testified against the proposed construction. Specifically, Mr. Crenca testified that "the Warwick Comprehensive Plan strongly opposes the construction on undersized, nonconforming lots" and "calls for the City to discourage the creation and/or development of undersized and nonconforming lots." Hr'g Tr. 6-7. Mr. Crenca further testified that "the City is in the process of foreclosing on the right of redemption of a number of lots directly across from Spadina [Avenue] . . . in order to preserve the property as open space and prevent the development of this sensitive environmental property." Id. at 7-8. According to Mr. Crenca, the view of the Planning Board was that "approval of this petition would result in adverse impacts on the environment and is in direct conflict with the goals and objectives of the City Comprehensive Plan," and therefore, his Department "would recommend denial of this petition." Id. at 8-9.

Attorney Richard Johnston represented the Applicant at the hearing of the Zoning Board. He described the subject property as "a single-family, nonconforming lot of record." Id. at 12. He further elaborated that the Applicant "did receive an ISDS approval" and "a preliminary

determination from Coastal for this plan, [in] which they acknowledged that it will be approved subject to a full Coastal application." Id. Attorney Johnston confirmed that the Applicant sought relief from Warwick Zoning Ordinance 405.4 (A), which governs properties with a square footage of less than 7000 and frontage less than 50 ft. Id. at 14.

Edward Pimentel, who has offered testimony to several zoning boards and Rhode Island courts regarding land use and planning, offered testimony on behalf of the Applicant. Based upon his qualifications and experience, Mr. Pimentel was unanimously accepted by the Board to provide expert testimony, including opinions as to the application. Id. at 16.[1] He also submitted a written report, which was submitted as Applicant's Exhibit 4. Id. He testified that the subject property was "similar in size" to other nearby properties on which a dwelling was constructed, and "it's true that the lots . . . to the east, which borders the wetlands, are larger, for [the] most part, the interior blocks [where the subject property is located] probably are more reflective of a A-7000 [square footage requirement]." Id. at 17. Mr. Pimentel elaborated that this is relevant because the designation of A-40,000 "results in a lot of setback area [being required] that probably would not be required if it was, once again, zoned 7,000 instead of the 40[000 square feet]." Id. at 17-18. According to Mr. Pimentel, the "side yard setbacks extinguish the building envelope because we don't have the requisite 60 feet [30 feet on each side]. And then if you apply the front and rear, we end up with only ten feet." Id. at 18. He told the Board that compliance with the Warwick Zoning Ordinances would be "impossible. You can't build a house that's ten feet in depth and a house that's zero feet in width." Id.

[1] Mr. Pimentel, based upon his qualifications and experience, was unanimously accepted as an expert on behalf of the Applicant. The Court, based on its review of the record, finds that Mr. Pimentel was quite knowledgeable about the standards, contained in both the statute and the applicable provisions of the zoning ordinance, and his testimony focused precisely on the issues relevant to the Board's consideration.

Mr. Pimentel further testified that the subject property is "in a flood zone. So, we can't go with something smaller in stature . . . If you look at the immediate homes in the area, especially the newer ones, they have all been reconstructed and the properties have been developed to reflect the new building and flood zone codes." Id. at 18-19. He testified that nearby "homes were constructed in 1994 and 2006 . . . [that] had to address the new codes and be out of the flood zone; and both of those are [on lots that measure] 4,050 square feet[.]" Id. at 19. He explained that he "took pictures of the homes in the proximate neighborhood . . . fairly new construction. All meeting the larger size stature to reflect flood zones . . . this is why we went with the two-story." Id. Mr. Pimentel further testified that two nearby "Lots 236 and 237, which are right on the water . . . only 8300 [square feet] . . . [were able to have homes] built in 1999 right on the water." Id. at 21-22.

Mr. McGowan next testified. He explained, "to tell you the honest truth, I don't know if I'm going to live in this house or not. My original plans were to build this house and to live in there with my wife . . . I bought this land a long time ago . . . I got a lot older. This thing is 21 feet up in the air. So, one of the things that I would have to consider . . . is some way to access this house without having to go up and down stairs all the time." Id. at 32-33. Richard Corley, Vice-Chairman of the Board, opined that was "not possible." Id. at 33. Mr. McGowan responded, "Am I willing to go up and down the stairs all the time . . . My wife is on the fence . . . I'm trying to encourage her to move there." Id. The Applicant concluded by stating that "I may move there and I may not move there." Id. at 34.

Mr. Pimentel then addressed §§ 45-24-41(d)(1-4) and (e)(2), the statutory provisions that govern the requirements for the issuing of a dimensional variance. He told the Board that "the hardship resulted from the land itself. It is . . . a substandard lot of record. Approximately less

than one-tenth of the lot requirement." Id. at 35. He then testified that the hardship "is not the result of this owner and the prior owners. This lot has been a lot of record for approximately 95 years, going on 96." Id.

Mr. Pimentel elaborated that:

> "this clearly is not to realize, primarily realize financial gain. It's to realize reasonable use of one's property. We believe we are seeking the least relief necessary. The footprint area is not that large. I presented the character of the neighborhood, what's in character with the footprint, et cetera." Id. at 35-36.

He concluded that if the variance "were to be denied . . . not only does the hardship amount to more than a mere inconvenience, in fact, we would be precluded from using the property in any way . . . you would have denied our right to some beneficial use to this property." Id. at 36.

The first witness to speak in opposition to the variance was Ms. Leslie Derrig. Ms. Derrig testified that she had spoken to Ms. Janet Friedman of the CRMC, and Ms. Friedman informed her that she "would never have approved anything like that, and nothing came to me." Id. at 40. She also questioned whether the proposed construction had sufficient elevation to meet the requirements of a flood zone. Id. at 40-42. She testified that the area was prone to flooding, and the proposed construction would worsen the propensity for flooding. Id. at 43-47. She testified that she and Ms. Friedman have been monitoring the erosion of the area known as Spot Park since 2002, an area on which the area residents would have gatherings during the summer months, which is now impossible due to the erosion. Id. at 53-54. Her narrative concerning the erosion, as well as her photographs thereof, was admitted as Objector's Ex. 1. Id. at 56. The testimony she offered concerning her discussion with representatives of CRMC was hearsay.

The next witness to testify against the Application was Mr. Thomas Sepe. He is a resident of the area who lives just outside the 200-foot radius that would provide him with

mandatory notification of any proposed construction before the Zoning Board. Id. at 57-58. He testified that he has "observed in the last ten years . . . there's more frequent storms, and greater flooding in the whole area." Id. at 60.

Mr. William Derrig, another area resident, testified next against the proposed construction. He testified that there has been an increase in the flooding and associated erosion in the area, and he was concerned that the proposed construction would worsen the aforementioned problems. Id. at 64-68. He concluded his testimony by stating to the Board that "If he builds a house that has run-off that runs into my lot . . . you have a tough job to balance it [the competing interests of the parties], and I appreciate your time." Id. at 69.

Mr. Fred Clarke also testified against the Application. He has been a resident of the area since 1980, and similar to the preceding objectors, he testified to increasing flooding and erosion in the time he has lived in Conimicut. Id. at 70-72.

Next to testify in opposition was Ms. Alice McCoy, a resident of Hopkinton, Rhode Island. She testified that prior to moving to Hopkinton, she lived on Spadina Avenue in Warwick in close proximity to the site of the proposed construction. Id. at 72-73. She testified that her property would often be completely submerged under water following storms. Id. at 73-77.

Also offering testimony was Lori Perrotti-Jones. Vice-Chairman Corley asked if she was "in favor of the petition? I assume you are opposed[,]" and she responded, "I'm neither." Id. at 77-78. She explained to the Board that she was offering testimony because her father owned "a vacant piece of land in front of the gentleman's [Mr. McGowan's property]." Id. at 78. She inquired as to whether approval of the Applicant's proposed construction would affect the possible future development of the vacant lot properly owned by her father. Board Vice-

Chairman Corley informed her that the Board was only able to address applications presently before the Board. Id. at 79-80.

Attorney Johnston then addressed the Board on behalf of the Applicant. He stated that the testimony of those objecting to the application for variances focused "around flooding and erosion." Id. at 80. Attorney Johnston argued that the proposed construction would have "no effect on flooding and will have minimal effect on erosion, and it's the bailiwick of Coastal to determine if, in fact, it will have any effect at all." Id. at 81.[2] Attorney Johnston described the subject property as a "nonconforming lot of record[,]" and he further argued that if the application "is denied by this Board, all beneficial use of this property is gone." Id. at 81-82. According to Attorney Johnston, "Coastal will look at the flooding. Coastal will look at the erosion. If this particular application is making an impact on the flooding and the erosion in that area, it will not be approved by Coastal." Id. at 82. He elaborated that "the abutters are going to have a chance to have their say at Coastal: and when they do, that will be the [time when] flooding and erosion will be talked about." Id.

Vice-Chairman Corley then inquired as to the possibility of the sewage system on the property being submerged in water. The Applicant responded that he was familiar with such systems because he "was licensed to install those systems for years[.]" Id. at 84. He explained that such systems can be constructed so that they will not discharge toxic waste even when flooding causes the ISDS to be underwater. Id. at 84-86. Vice-Chairman Corley then inquired as to whether he could address the concerns of residents who complained that during times of flooding, they "have seen soap bubbles in the backyard of 69 Spadina [Avenue, a neighboring property]?" Mr. McGowan responded that he "went down to DEM to get additional information

[2] Due to the proximity of the property to the coast, construction cannot be commenced without approval of the CRMC.

on the system next door . . . [and] they went out and took a look at it, and they found no such information, no such situation ever existed." Id. at 85-86. The Applicant elaborated that the party that "has control over that system is DEM in Providence." Id. at 86. Mr. McGowan offered testimony that "DEM went out and examined the situation and found . . . there was no situation like that that existed . . . When they went there, they didn't see any such thing." Id.

Ms. Julie Finn, a member of the Zoning Board, made further inquiry as to how the ISDS would be affected by flooding. Specifically, she inquired "when it gets flooded under water, when the ocean comes in, does it ruin the system"? Id. at 91. Mr. McGowan responded that "even if . . . you put the whole thing under water, the pumps would still force the water through the pipe and out of the pipe." Id.

In response to further questioning from the Board, Mr. McGowan testified that "when people say I see all kinds of bubbles coming up . . . that's just fallacy. There's no . . . way to create bubbles coming out of there, other air bubbles if it was under water . . . as far as that [neighboring] lot, it's always going to have water because [of] the proximity to . . . the beach." Id. at 93-94. Vice-Chairman Corley reminded the Applicant that the Board was considering his particular lot, and Mr. McGowan responded that his observations about flooding were applicable to all of the properties similarly proximate to the water. Id. at 94. He then addressed area residents who assert "it's always flooding and water" "when they want to stop people from building[.]" Id. The Applicant argued that "these people have been down there for a thousand years, and they elect to stay there . . . they built to compensate for the water . . . they elect to stay there because they like the area." Id.

Attorney Johnston spoke again on behalf of the Applicant. He stated that if the proposed construction were approved, the property would have an "above ground system [which] is

designed for high water table areas and environmentally sensitive areas." Id. He elaborated that "when ISDS approves them [above-ground systems], they know the area it's going into, and Coastal, when they approve their plan, they look at as one of the requirements is that an approved ISDS system is in place." Id. at 94-95.[3] Vice-Chairman Corley expressed "hope that they are doing their jobs on the cases that leave the Zoning Board to make sure that the public safety is protected." Id. at 95. He expressed concern that such had not occurred with the development at 69 Spadina Avenue, and he closed the hearing to further testimony. Id.

The Board, by a 4-1 vote, denied the application, and it thus denied dimensional variances for the Applicant to build a single-family home on the lot that he owns. On January 20, 2016, the Board mailed the Applicant written notice of its decision. On January 27, 2016, Applicant filed the appeal presently before this Court as authorized by § 45-24-69.

II

Standard of Review

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

[3] Approval of any ISDS must be approved by the DEM, whether the property is in the coastal zone or not.

> "(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 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. If the findings of fact are not supported by substantial evidence in the record, the court must reverse the board's decision. Salve Regina Coll. v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 882 (R.I. 1991) (court held that it was reversible error for trial court to uphold board's denial of variance where record was "devoid of any legally competent evidence upon which the board could reasonably have based its finding").

III

Decision of the Zoning Board

Appellant contends that the Zoning Board improperly denied dimensional variances following the determination of the Zoning Board that the Applicant failed to satisfy the requirements of §§ 45-24-41(d)(1-4) and (e)(2), as well as the applicable standards for relief set forth in the zoning ordinance. See Warwick Code of Ordinances Section 906.3. Therefore, he

argues that this Court should reverse the decision of the Zoning Board and order that the Board grant the variances requested.

For a zoning board to approve a dimensional variance, it must find that an applicant satisfied all of the requirements of §§ 45-24-41(d)(1-4) and (e)(2). Sec. 45-24-41(d)(1-4) provides:

> "(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(a)(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."

Finally, § 45-24-41(e)(2) requires "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." Our Supreme Court has held that a property owner seeking a dimensional variance is entitled to relief where, if the variance is not granted, "the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience, which means that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property." Lischio v. Zoning Bd. of Review of Town of N. Kingstown, 818 A.2d 685, 691 (R.I. 2003).

As to each of the standards contained in the statutes and ordinances of the City of Warwick, there is no evidence on the record to sustain the finding of the Zoning Board. Further, Mr. Edward Pimentel, the only expert who testified, whose expertise in land use planning and

zoning was unanimously accepted by the Board, opined that the application, in fact, was in compliance with each of the standards, and he offered extensive testimony in support of the Applicant. Hr'g Tr. 13-14. As will be explained below, his testimony supports the proposition that the Applicant satisfied all of the requirements of the applicable statute and ordinance for granting a dimensional variance. Hr'g Tr. 35-36.[4]

First, the Board found that the dimensional relief requested by the Applicant was not due to the unique characteristics of the surrounding area and was due to the physical or economic disability of the Applicant. The record reveals that Mr. Pimentel, in his testimony and in his report, reached conclusions entirely opposite to the Board's finding. Hr'g Tr. 35. Mr. Pimentel told the Board that "the hardship resulted from the land itself. It is quite considerably a substandard lot of record." Id. He elaborated that the Applicant is "trying to build in character something that we feel is reasonable . . . [and] clearly is not to realize . . . financial gain. It's to realize reasonable use of one's property." Id. at 35-36. Our Supreme Court has held that petitioners were entitled to relief permitting construction of a residence on an undersized (5000 sq. ft.) parcel. DeStefano v. Zoning Bd. of Review of City of Warwick, 122 R.I. 241, 247, 405 A.2d 1167, 1171 (1979). The Court held that "petitioners are being deprived of the beneficial use of their property . . . [the] board's denial of the requested variance cannot, therefore, be sustained." Id. The Court has long held that the standard for obtaining a variance is "the landowner need only demonstrate an adverse impact amounting to more than a mere inconvenience." Felicio v. Fleury, 557 A.2d 480, 482 (R.I. 1989) (citing Gara Realty, Inc. v.

[4] The standards set forth by the zoning ordinance are substantially similar to those provided in § 45-24-419(d). Compare Warwick Code of Ordinances Section 906.3(A)(B), with § 45-24-41(d).

Zoning Bd. of Review of S. Kingstown, 523 A.2d 855, 858 (R.I. 1987)); DeStefano, 122 R.I. at 246, 405 A.2d at 1170 (further citations omitted).

Here, there is no evidence in the record to support the Board's finding that the Applicant is seeking zoning relief in order to enjoy "a more profitable use" of his property. Rather, he is seeking relief from the application of the zoning ordinance because if he is denied such relief, he "would be precluded from using the property in any way[.]" Hr'g Tr. 36. Mr. Pimentel testified that the proposed building is a residence, which is the only permitted use of the property, and building in compliance with the Warwick Zoning Ordinance would be "impossible. You can't build a house that's ten feet in depth and a house that's zero feet in width." Id. at 18.

Next, the Board concluded the Applicant purchased the lot primarily for his desire to realize financial gain. The substantial evidence of record was that the Applicant purchased the property for the purpose of improving it with a single-family residence to be used by himself and his family. There is no competent evidence of record to support the Board's finding that Mr. McGowan purchased the lot for purposes of "development or financial gain." Mr. McGowan testified that at the time he purchased the property, it was more likely than not that the house to be constructed on that lot was to serve as the principal residence of him and his family, and it was not for development or financial gain. Hr'g Tr. 32-33. Our Supreme Court has held that '"[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."' Gaglione v. DiMuro, 478 A.2d 573, 576 (R.I. 1984) (quoting R.I. Hosp. Tr. Nat'l Bank v. E. Providence Zoning Bd. of Review, 444 A.2d 862, 864 (1982)). However, there is no probative evidence here that the Applicant purchased the property for the purpose of financial gain, and there is ample evidence to the contrary. See Hr'g Tr. 32-33 (The "original plans were to build this house and live in there with

my wife and so forth and so on."); see also id. at 35-36 (The proposed construction "clearly is not to realize primarily realize financial gain. It's to realize reasonable use of one's property.").

As to the Board's finding that the requested variance will "alter the general characteristic of the surrounding area," there is no evidence in the record to support such a finding. In fact, Mr. Pimentel testified to having performed an extensive survey of the surrounding area and found that the footprint of the Applicant's proposed house, even with the dimensional variances requested, was similar in character to the surrounding homes, and had a footprint similar in character with existing lots. Hr'g Tr. 18-19. Further, the Board acknowledged in its opinion that the area surrounding the subject property consists of single-family dwelling[s] and vacant undersized unimproved lots. See Zoning Bd. Decision 2. Our Supreme Court has noted that in some instances, the granting of a variance "would result in a structure so massive or out of place as to alter the general character of the surrounding area" and thus, denial of the request for a variance would be warranted pursuant to § 45-24-41(d)(3). Lischio, 818 A.2d at 693. As Applicant's proposed construction was a single-family dwelling of modest size (24' x 36' with "an attached deck approximately 4' x 10'") on a vacant non-conforming lot, it is contrary to the evidence to find that the proposed construction on Applicant's lot is not in keeping with the surrounding area. See Zoning Bd. Decision 1. Mr. Pimentel introduced photographic evidence to show that the proposal was in keeping with the characteristics of the surrounding neighborhood. Therefore, there is unrebutted expert testimony in the record to establish that the requested variances will not alter the general characteristics of the surrounding area, but in fact are consistent therewith. See Hr'g Tr. 18-19.

With respect to the general characteristics of the area, there was considerable opposition to the application from several neighbors, who testified to, and introduced photographs of,

flooding and erosion that has occurred in this area. They argued that the proposed construction would exacerbate these difficulties (and thus presumably "alter the general character of the surrounding area[.])" The Applicant, however, introduced the DEM's approval of its ISDS, which was designed specifically for areas prone to flooding. The objectors introduced no expert testimony that the flooding would be worsened by Applicant's proposed construction, or that the proposed construction, with the dimensional relief requested, would contribute to greater erosion in the area. Mr. Pimentel, to the contrary, noted that the proposed construction met all of the requirements of the VE-14 flood zone. Our Supreme Court has held that when a party seeking variance from the literal application of a zoning ordinance presents competent expert testimony in support of its application, those parties in opposition must offer competent expert testimony in rebuttal. Salve Regina Coll., 594 A.2d at 881-82. The Court held that the lower court's decision in favor of objectors who offered no competent expert testimony to rebut the expert testimony presented by the College was reversible error. Id. at 882.

Zoning Ordinance 906.3(A)(4) also requires the Board find that the relief requested is the least relief necessary. The Board found that the relief requested is not the least relief necessary, because the Applicant sought "relief from six (6) of the eight (8) dimensional requirements of the Warwick Zoning Ordinance." See Zoning Bd. Decision 2. However, that finding is not supported by any evidence in the record, and runs contrary to the expert opinion of Mr. Pimentel, who testified that the relief requested was the least relief necessary for the Applicant to proceed with construction. Specifically, he testified that the Applicant is "seeking the least relief necessary. The footprint area is not that large. I presented the character of the neighborhood" and the proposed construction is in keeping with said character. Hr'g Tr. 36. The Court notes that the Applicant seeks "to construct a 24' x 36' single-family dwelling with a deck (approximately 4' x

10')." See Zoning Bd. Decision 1. The Court also notes that there is nothing in the record that suggests alternate relief recommended by the Board, and it is beyond dispute that it would not be possible to build a residence (the only permissible use of the property) without some relief from the literal application of the Zoning Ordinance. See Hr'g Tr. 18 (Construction in accord with the Zoning Ordinance is "impossible. You can't build a house that's ten feet in depth and . . . zero feet in width"). Mr. Pimentel's expert opinion on whether the relief requested is the least that is necessary is unrebutted, and he was the only witness to testify on that issue. See Salve Regina Coll., 594 A.2d at 882 (stating that "since the board had no other expert testimony or evidence in the record adverse to Salve Regina [which had presented expert testimony] upon which it could base its findings and conclusions . . . the trial justice erred in finding that the evidence was sufficient to support the board's determination"); see also Lischio, 818 A.2d at 694 (determining petitioners were entitled to relief where "a dimensional variance was necessary for petitioners to develop . . . [their property] for any permitted use").

From the above analysis, the Board made findings of fact entirely inconsistent with the record evidence. Mr. Pimentel testified that if the requested dimensional variances were not approved, the Board would effectively deny all beneficial use of the property by extinguishing any building envelope necessary to construct a single-family home, and he elaborated that approval of the dimensional variances would allow the Applicant to develop the property in a beneficial manner by constructing a single-family home consistent with homes in the surrounding area. Hr'g Tr. 18. It is indisputable that being denied any beneficial use of his property would be "more than a mere inconvenience" to the Applicant. Moreover, the Applicant's proposal was entirely consistent with the standards set forth in the Warwick Code of

Ordinances Section 906.3 that applies to considerations for granting a variance. The denial of this application is not supported by competent evidence in the record.

The Board's decision fails to rest on competent evidence and is therefore affected by error of law. See Kirby v. Planning Bd. of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993); see also Salve Regina Coll., 594 A.2d at 882. For that reason, the decision of the Zoning Board is vacated and the matter returned to the Zoning Board, with direction to grant the dimensional relief sought by the Applicant. To do otherwise would prevent the Applicant from developing his property for a beneficial use—constructing a single-family residence thereon—to which he is entitled.

IV

Conclusion

After a thorough review of the entire record, this Court finds that the Zoning Board's decision, which denied the Applicant dimensional variances to construct a single-family residence on a legal non-conforming lot, constituted an abuse of discretion; was not based on the reliable, probative, and substantial evidence of the record; and was clearly erroneous. Sec. 45-24-69(d)(5-6). Substantial rights of the Appellant have been prejudiced, § 45-24-69(d). Accordingly, this Court reverses the December 8, 2015 decision of the Zoning Board. Counsel shall submit an appropriate form of Order consistent with this Decision. In light of this reversal, the Board is ordered to issue the necessary variances to permit Applicant to construct the single-family home proposed by the Applicant, subject only to final approval of the CRMC.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	James McGowan v. Zoning Board of Review of the City of Warwick, et al.
CASE NO:	KC-2016-0074
COURT:	Kent County Superior Court
DATE DECISION FILED:	March 13, 2017
JUSTICE/MAGISTRATE:	Rubine, J.
ATTORNEYS:	
For Plaintiff:	Susan A. Chiariello, Esq.
For Defendant:	Peter D. Ruggiero, Esq.