

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

(FILED: May 16, 2018)

HENRY W. ARCHETTO, MARIA A. :  
ARCHETTO, PAUL H. ARCHETTO, LINDA :  
C. ARCHETTO, and MARIA A. :  
ARCHETTO-HICKMAN :

v. :

C.A. No. NC-2015-0377

THE ZONING BOARD OF REVIEW OF THE :  
TOWN OF JAMESTOWN AND RICHARD :  
BOREN, JOSEPH LOGAN, DEAN WAGNER, :  
RICHARD CRIBB, RICHARD ALLPHIN, :  
JUDITH BELL, AND TERRENCE :  
LIVINGSTON IN THEIR CAPACITIES AS :  
MEMBERS OF THE ZONING BOARD OF :  
REVIEW OF THE TOWN OF JAMESTOWN, :  
AND CHRISTIAN R. SMITH :

**DECISION**

**VAN COUYGHEN, J.** In this zoning appeal, Henry W. Archetto, Maria A. Archetto, Paul H. Archetto, Linda C. Archetto, and Maria A. Archetto-Hickman (collectively, Appellants) seek judicial review of a decision of the Zoning Board of Review of the Town of Jamestown (Board). The decision approved Defendant Christian R. Smith’s (Applicant or Mr. Smith) Application for a dimensional variance. Jurisdiction is pursuant to G.L. 1956 § 45–24–69.

**I**

**Facts and Travel**

The Applicant is the owner of a property located in the Town of Jamestown, and further described as Lot No. 264 on Tax Assessor’s Plat No. 1 (the Property). (Application at 1.) The Property is situated in an RR80 zone, contains approximately 63,609 square feet, and does not

have any frontage on a public street. *Id.* at 1 and 3. The land is delineated on a plat called Conanicut Park that was drawn by John Mullin and recorded in the land evidence records in approximately 1873. (Board’s Decision at 1.) Our Supreme Court has described this plat as follows:

The plat plan covers an extensive area at the northern end of the island. At the time this plat plan was drawn, all of Conanicut Park was owned by the Conanicut Land Company. It is clear that the company’s intention was to develop Conanicut Park into a residential neighborhood. The plat plan reveals a subdivision including more than 2,000 lots, many streets, parks, groves, ponds, and even an area labeled ‘Steamboat Landing’ . . .

Most of Conanicut Park remains undeveloped today . . . [A] great many of the streets shown on the plat plan do not exist, [and] . . . Conanicut Park is actually a relatively heavily wooded area with considerable brush and briar . . . [D]evelopment of this plat according to the plat plan was halted in the late 1800s because of a contaminated well and an outbreak of typhoid fever among the residents of that time. *Gammons v. Caswell*, 447 A.2d 361, 362–63 (R.I. 1982).

The Applicant’s Property is bordered by a paper street called Circuit Avenue. Circuit Avenue has access to East Shore Road via another paper street called Providence Avenue. (Ex. 8D.)<sup>1</sup> Although Providence Avenue traverses East Shore Road, this Decision only is concerned with the westerly portion of that paper street. Said portion is forty feet wide and abuts several properties, one of which belongs to Appellants. The Appellants’ property is described as Lot No. 184 on Tax Assessor’s Plat No. 1 (the Archetto property). (Ex. 8C and Tr. at 13, July 28, 2015 (Tr. I).) Currently, in order to access the Archetto property, Appellants use a driveway that is located entirely within the area delineated as Providence Avenue.

On June 19, 2015, Applicant sought relief from Article 3, Section 82-302, Table 3-2 of the Zoning Ordinance for the Town of Jamestown (Ordinance), which requires 200 feet of

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<sup>1</sup> The exhibits referred to in this Decision are taken from the record below.

frontage on a public road in order to construct a single-family residence on the Property. (Application at 3.) To achieve access from East Shore Road, Applicant proposed extending the existing driveway further along Providence Avenue in order to meet Circuit Avenue, eventually culminating with a turnaround on the Applicant's Property. Specifically, Applicant proposed "a 12-foot wide driveway with 5-foot buffers on either side." (Tr. I at 13.)

Prior to a hearing on the matter, Applicant obtained an "insignificant alteration permit" from the Rhode Island Department of Environmental Management (Ex. 8F.), as well as a septic permit (Ex. 8G.) and "a permit from the Department of Transportation for the intersection of the driveway and East Shore Road, because East Shore Road is a highway." (Tr. I at 17.) The Applicant also obtained approval for the plan from the Jamestown Fire Department (Ex. 8I.) and the Jamestown Planning Office. (Ex. 8K.)

The hearings were held on July 28, 2015 (Tr. I.), September 22, 2015 (Tr. II.), and November 17, 2015 (Tr. III.) Mr. Smith testified on his own behalf (Tr. I at 12-25.) Attorney Robert E. Flaherty spoke on behalf of Mr. Henry Archetto (Tr. III at 11-22.), and abutter Paul Sullivan also testified. (Tr. III at 23-24.) At the conclusion of the hearing, the Board unanimously voted in favor of the Applicant and granted the dimensional variance.

Additional facts will be supplied in the analysis portion of this Decision as needed.

## 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 “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.’” *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)). 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**

In their Amended Complaint, the Appellants contend that they have an unperfected claim to Providence Avenue under the Doctrine of Adverse Possession and that as a result, the Board did not have authority to grant the requested relief because it will adversely impact land that is purportedly owned by Appellants. They further maintain that because the Town of Jamestown (the Town) did not acquire or accept Providence Avenue, and because there exist none of the conditions for a legitimate exercise of the Town’s police power, the Board did not have the authority to authorize any use for Providence Avenue. The Appellants did not raise any substantive objections to the actual variance itself.

In response, Applicant and the Town maintain that not only is the issue of ownership of Providence Avenue a legally unrelated matter, it is irrelevant to the granting of the dimensional variance. They additionally assert that although Appellants raised the ownership issue below, the Board could not address such contention because it did not have jurisdiction. Instead, they aver that there exists substantial evidence in the record to support the granting of the dimensional variance, and that Appellants essentially have waived any objection to the variance because they have failed to properly raise the issue.

## A

### Providence Avenue

As previously stated, Appellants posited that they have an unperfected adverse possession claim to Providence Avenue, and that, as a result, the Board did not have authority to grant Applicant access to the Property via Providence Avenue. However, such allegation misconstrues the Board's decision, as there is nothing contained therein which grants Applicant access to Providence Avenue.

At the hearing, the Board's Chairman questioned the ownership of Providence Avenue and whether, if the Board were to grant the Application, there might be a subsequent dispute over ownership of the paper street. (Tr. I at 8.) Counsel for the Applicant replied:

We don't have the answer to that. We're not asking the board to make any statement regarding the legal status of Providence [Avenue]. We're saying that we will build the road pursuant to all the specifications that were agreed by the Town. And if we can't build it, we can't build it. *Id.* at 9.

He further stated that Applicant was not seeking "th[e] board to exercise any kind of decision-making over the status of the road." *Id.*

Indeed, had Applicant requested the Board to make any such decision, it would not have had jurisdiction to do so. *See* G.L. 1956 § 8-2-14(a) ("The superior court shall have original jurisdiction of all actions at law where title to real estate or some right or interest therein is in issue . . ."). Counsel for the Applicant later reiterated that "[w]e're not asking for any right or permission from the Town of Jamestown to use its road. We have made that very clear that this is a paper road." (Tr. III at 13.) Thereafter, the Chairman of the Board acknowledged that the Board did not have jurisdiction over title issues, but then pointed out that "we do have jurisdiction over the application." *Id.* at 21.

In its decision, the Board adopted findings of fact made by the Planning Commission; namely,

- a) That Providence Avenue and Circuit Avenue are paper streets and a portion of Providence Avenue is utilized by an abutter.
- b) The Town has not accepted Providence Avenue or Circuit Avenue as public streets.
- c) The applicant does not propose exclusive use of this paper street. (Decision at 2.)

Recognizing that there may exist potential adverse possession claims to the paper streets at issue, the Board properly acknowledged that it “does not have subject matter jurisdiction to decide adverse possession.” *Id.* at 3.

Thus, despite Appellants’ claim that the Board authorized Applicant’s use of Providence Avenue, nothing in the Board’s decision supports any such conclusion. Rather, the Board restricted its decision to the granting of the requested dimensional variance from the frontage requirements of the Ordinance, while leaving any potential adverse possession challenges concerning the ownership of the paper street to a later proceeding, if any, in the Superior Court.

## **B**

### **The Dimensional Variance**

The Appellants did not challenge the granting of the dimensional variance either before the Board or to this Court, pursuant to § 45-24-41. It is not clear whether they were required to challenge the dimensional variance when the matter was before the Board. *See E. Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Barrington*, 901 A.2d 1136, 1153 (R.I. 2006) (“This Court has not explicitly held that the raise-or-waive doctrine applies to administrative proceedings . . . .”). However, by not challenging the propriety of the Board’s granting of the dimensional variance in this Court, Appellants have waived any such challenge. *See Warwick Hous. Auth. v. McLeod*, 913 A.2d 1033, 1037 (R.I. 2007) (stating “arguments not made before the Superior

Court are deemed waived, under our well-settled “raise or waive” rule”). However, even if Appellants had raised the matter on appeal, the Court is unable to discern any error in the Board’s decision.

Section 45-24-41 delineates the requirements for obtaining a variance. It provides, in pertinent part:

In granting a variance, the zoning board of review . . . shall require that evidence to the satisfaction of the following standards is entered into the record of the proceedings:

- (1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(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. Sec. 45-24-41(d).

Furthermore,

The zoning board of review . . . shall, in addition to the above standards, require that evidence is entered into the record of the proceedings showing that:

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- (2) 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. The 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. Sec. 45-24-41(e).

In Rhode Island, our Supreme Court has found that “[a] dimensional variance for road frontage for an otherwise landlocked lot [was] not of such size or degree that it would adversely



impact the surrounding neighborhood or impair the intent of the zoning ordinance, it merely reduce[d] the frontage necessary to obtain access to a public street.” *Lischio*, 818 A.2d at 693. The *Lischio* case involved two landlocked contiguous parcels with no frontage on a public street. *Id.* at 687. The owners of the parcels sought a dimensional variance by proposing an access road through another property which they owned. *Id.* The Supreme Court held that a dimensional variance was “necessary . . . for any permitted use” allowed on the parcels. *Id.* at 694.

In this case, Applicant seeks relief from the two-hundred foot frontage on a public road requirement so that he could construct a single-family residence on the Property. As the Property is located in a residential zone, the proposed single-family residence would be a permissible use and would “not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan . . . .” Sec. 45-24-41(d)(3). Accordingly, “the inquiry is confined to the extent and nature of the dimensional relief requested by the [Applicant].” *Lischio*, 818 A.2d at 693.

In its decision, the Board stated that paper streets that appear on recorded plats are owned by the people who recorded those plats; however, they also are subject to private rights-of-way that belong to owners who purchased their lots in reliance upon the recorded plats. (Decision at 2.) However, the Board acknowledged that such property may be obtained through adverse possession in another forum. *Id.* at 3. Furthermore, relying on *Lischio* for support, the Board concluded that where a lot is landlocked with no frontage on a public road, then a dimensional variance is necessary for an owner to enjoy any legally permitted use of the property. *Id.* at 2-3.

It is undisputed that the Property does not enjoy any frontage on a public road. It also is undisputed that both Providence Avenue and Circuit Avenue are paper streets delineated on the Conanicut Park plat and recorded in the Town’s land evidence records.

There is nothing in the record to suggest that the single-family residence proposed by Applicant would impair the intent or purpose of the Ordinance or Comprehensive Plan. However, it is clear that because Applicant does not have any frontage on a public street, he requires a dimensional variance for *any* development of his lot. It also is clear that “without dimensional relief [Applicant] would be left with no other reasonable alternative to enjoy *any* legally permitted beneficial use of [his] property.” *Lischio*, 818 A.2d at 695.

Whether Applicant ultimately is successful in accessing his Property via Providence Avenue is not relevant in this case. The Appellants’ argument—that Applicant had other means of access to his property—is of no moment. In its decision, the Board limited relief only from the Ordinance’s frontage requirements, leaving intact any title challenge that interested parties possibly may bring in the future in the Superior Court. Thus, even if Appellants successfully challenge ownership of a portion of Providence Avenue through adverse possession, thus necessitating an alternative means of access to the Property, the fact remains that Applicant would still need relief from the frontage requirements contained in the Ordinance. Consequently, the Court concludes that the Board did not err in granting relief prior to the resolution of a hypothetical challenge to the title of the paper road.

#### **IV**

#### **Conclusion**

After a review of the entire record, this Court finds that the Board’s decision was supported by the reliable, probative, and substantial evidence, was not arbitrary and capricious, and was not in violation of statutory, ordinance, and zoning board provisions. The Board’s decision also was not affected by error of law and was not characterized by an abuse of

discretion. Substantial rights of the Appellants have not been prejudiced as a result. Accordingly, this Court affirms the Board's decision to grant the dimensional variance.

Counsel shall submit an appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** Henry W. Archetto, et al. v. The Zoning Board of Review of the Town of Jamestown, et al.

**CASE NO:** NC-2015-0377

**COURT:** Newport County Superior Court

**DATE DECISION FILED:** May 16, 2018

**JUSTICE/MAGISTRATE:** Van Couyghen, J.

**ATTORNEYS:**

**For Plaintiff:** Robert E. Flaherty, Esq.

**For Defendant:** Wyatt A. Brochu, Esq.