STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

[Filed: August 27, 2018]

CHRISTOPHER CALLACI,	**:**	
Plaintiff/Appellant,	**:**	
v.	**:**	**C.A. No. WC-2017-0171**
	:	
ZONING BOARD OF REVIEW OF	**:**	
THE TOWN OF EXETER, TRADE	**:**	
WIND INVESTMENTS, LLC, AND	**:**	
CAROL J. MANN,	**:**	
Defendants/Appellees.	**:**	

DECISION

TAFT-CARTER, J. Christopher Callaci (Mr. Callaci), an abutting landowner, appeals the June 22, 2018 remand decision (Decision) of the Zoning Board of Review of the Town of Exeter (Zoning Board), granting Trade Wind Investments, LLC's petition for dimensional variances to construct a house on property located at 350 William Reynolds Road, Exeter, Rhode Island. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, this Court affirms the Zoning Board's decision.

I

Facts and Travel

Trade Wind Investments, LLC (Trade Wind) of 567 South County Trail, Suite 111, Exeter, Rhode Island submitted an application to the Town of Exeter for dimensional relief for property located at 350 William Reynolds Road, Exeter, Rhode Island (the Property) on January 18, 2017. (Zoning Appl.) The Property, owned by Carol J. Mann (Ms. Mann), consists of .65 acres or 28,314 square feet. (Zoning Appl.) It is situated in Zoning District CR-5 and is a pre-existing, nonconforming plot of land. (Zoning Appl.; Zoning Bd. Hr'g Tr. (Tr.) 11-12, Mar. 9,

2017. Trade Wind sought to construct a 1600 square foot, three bedroom, single-family dwelling on the Property. (Decision; Zoning Appl.; Tr. 4.) The zoning application requested dimensional relief "under Exeter Zoning Ordinance, Article II, Section 2.4.2.1 (acreage); 2.4.2.2 (street frontage); 2.4.2.4 (front setback); 2.4.2.6 (left and right side setbacks)[;] and 2.4.2.7 (rear setback) to construct a 3 bedroom single family dwelling." (Decision; Zoning Appl.) Trade Wind specifically requested the following dimensional relief:

	Ordinance Requirement	Variance Requested
(1) Min. lot area	5 acres	4.35 acres
(2) Min. frontage	350 ft.	220 ft.
(3) Min. front yard setback	100 ft.	14 ft.
(4) Min. right side yard setback	100 ft.	62 ft.
(5) Min. left side yard setback	100 ft.	59 ft.
(6) Min. rear setback	150 ft.	49 ft.

(Zoning Appl.)

A public hearing was held by the Zoning Board on March 9, 2017. At the conclusion of the hearing, the Zoning Board granted Trade Wind's application by a vote of four to one with Board Member McMillan opposing Trade Wind's application. (Tr. 74.) However, the decision granted the application by a vote of five to zero. (Decision.) The approval was conditioned on the building of the proposed dwelling in accordance with the plans submitted to this Zoning Board on the hearing date. (Tr. 72-74.)

The Zoning Board recorded its written decision on March 24, 2017. (Decision.) Mr. Callaci filed a timely appeal on April 12, 2017. The Zoning Board filed its objection on December 6, 2017.

On April 4, 2018, after finding the decision insufficient for judicial review for failing to identify how each individual member voted, and because the decision lacked non-conclusory findings of fact, this Court remanded this matter to the Zoning Board for a new decision. The Zoning Board prepared and recorded the new decision on June 27, 2018.

Mr. Callaci argues that Ms. Mann, and not Trade Wind, is the applicant in this matter, and that she created her own hardship by settling a case via a consent judgment that reduced the size of the subject lot from 0.93 acres to 0.65 acres. He maintains that this Court should reconsider the merits of the case underlying the consent judgment. Mr. Callaci contends that the Zoning Board also erred by finding that the plan was the least relief necessary and finding that the plan did not impair the intent and purpose of the zoning ordinance.

The Zoning Board maintains that it lacks jurisdiction to question the validity of a Superior Court judgment. The Zoning Board avers that the proposed home's reasonable size and the preexistence of a non-conforming lot does not impair the intent of the ordinance and does not constitute more than the least relief necessary.

II

Standard of Review

Section 45-24-69 provides the Superior Court with the specific authority to review zoning board decisions. The statute sets forth that:

> "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).

Judicial review of an administrative action is "essentially an appellate proceeding." *Notre Dame Cemetery v. R.I. State Labor Relations Bd.*, 118 R.I. 336, 338, 373 A.2d 1194, 1196 (1977). 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 quotations omitted)).

III

Analysis

A

The Consent Judgment

As an initial matter, this Court notes that each of Mr. Callaci's arguments on appeal relate to a Superior Court consent judgment dated January 4, 2011, which redefined the subject lot's property lines, decreasing its size from 0.93 acres to 0.65 acres. (Consent J., Jan. 4, 2011.) Mr. Callaci questions the propriety and import of this consent judgment and the manner in which it

was reached; indeed, he seeks to relitigate the three consolidated cases that concluded with the consent order in the context of this administrative appeal.

In addition to arguing that the consent judgment is not valid, Mr. Callaci contends that Ms. Mann's acquiescence to the settlement of the property line dispute amounted to her creating the hardship that these variances seek to mitigate. He argues that the requested variances impair the intent and purpose of the zoning ordinance because the lot was reduced in size by the consent judgment. He also avers that the requested variances are not the least relief necessary, again because the lot's original dimensions would not have required a variance to build the single-family home contemplated in Trade Wind's application. All of Mr. Callaci's arguments are based on the reduction in lot size effectuated by the consent judgment.

The cases underlying the consent judgment were litigated over a period of six years—that judgment has long been final and is binding on the Zoning Board. The Zoning Board does not have the power to overrule a Superior Court judgment. *See* § 45-24-57(1). The Superior Court, and not a zoning board, has jurisdiction over actions related to title of real property. 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[.]"). Any challenge to the Consent Judgment is improper in the context of an administrative appeal and is immaterial to the Zoning Board's decision. Therefore, the Consent Judgment is outside the scope of this Court's review of the Zoning Board's decision. Now, this Court turns to its review of the Zoning Board's decision.

B

The Zoning Board's Decision

Dimensional variances are governed by the Zoning Enabling Act of 1991 (the Act), §§ 45-24-1 *et seq.* Section 45-24-41 of the Act provides the standard that a zoning board must apply to an application for a dimensional variance:

> "In granting a variance, the zoning board of review, or, where unified development review is enabled pursuant to § 45-24-46.4, the planning board or commission, 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).

Additionally, evidence must be presented demonstrating 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." Sec. 45-24-41(e)(2).

First, the Zoning Board found that the hardship from which Trade Wind sought relief was due to the unique characteristics of the property that are not typical for the surrounding area. *See*

§ 45-24-41(d)(1). Specifically, the Zoning Board found that the hardship was the result of the lot's small size—a feature unique to the lot. *See Winters v. Zoning Bd. of Review of City of Warwick*, 80 R.I. 275, 279, 96 A.2d 337, 340 (1953) (holding that the hardship must not be personal in nature, but associated with the characteristics of the property). Evidence was presented at the hearing which demonstrated that the minimum lot size in the area was five acres, yet the subject lot was only 0.65 acres in size, and that the lot predated the zoning ordinance. (Tr. 7, 21, 52.) Of the surrounding forty-three properties, only one lot is smaller in size than the subject lot, and thirty-four of those lots are more than double the size of the subject lot. (Tr. 21.)

The Zoning Board also found that the hardship was not due to any action by Trade Wind or Ms. Mann, as the lot had been undersized since prior to enactment of the zoning ordinance. *See* § 45-24-41(c)(2). Interpreting § 45-24-41(d)(2), our Supreme Court has held that

> "'a variance may not be granted to the owner of a substandard lot where such lot was created by the deliberate conduct of the applicant. . . . An area variance may not be granted to solve the problem of an applicant . . . who proposed to divide [her] property into two substandard parcels.'" *Sciacca v. Caruso*, 769 A.2d 578, 583 (R.I. 2001) (quoting *Rozes v. Smith*, 120 R.I. 515, 521, 388 A.2d 816, 820 (1978)).

The Court went on to conclude that "[t]his language instructs zoning boards and reviewing courts that the grant of a requested zoning variance is improper when, among other reasons, the alleged hardship results from 'any prior action of the applicant.'" *Id.* at 584 (quotation omitted). In *Sciacca*, our Supreme Court held that the applicant's "prior action caused the planning board to subdivide her single-conforming lot into two substandard-sized parcels, thereby creating the undersized lot in question. This 'prior action' resulted in the self-created hardship that she later used as the basis for her variance." *Id.* In contrast, the record here reflects that the subject lot has been under the five-acre minimum since well before the zoning ordinance was adopted and

before Ms. Mann became the lot's owner. (Tr. 12.) Neither Ms. Mann nor Trade Wind caused the lot to fall below the five-acre threshold.

Additionally, the Zoning Board heard testimony about the proposed construction's impact on the character of the neighborhood. Mr. Callaci contended that the small lot size, if built upon, would alter the character of the neighborhood. (Tr. 29-30.) Our Supreme Court has held that "the review should not focus on the use of the parcel because a legislative determination has been made previously that the use is appropriate and does not adversely affect the general character of the area." *Lischio v. Zoning Bd. of Review of Town of N. Kingstown*, 818 A.2d 685, 693 (R.I. 2003). The Supreme Court offered two examples of how a dimensional variance could alter the character of a surrounding neighborhood:

> "For example . . . a request for a height variance for a permitted use would result in a structure so massive or out of place as to alter the general character of the surrounding area. Another example would be a side-yard variance that would eliminate the front yard or sidewalk in a residential neighborhood, a result completely incompatible with the surrounding parcels." *Id.* at 693.

The building of a home on the lot is, in itself, incapable of impermissibly altering the character of the surrounding neighborhood because, as our Supreme Court has instructed, it is a use permitted by right; thus, the legislature had already concluded that it is an appropriate use in this zone. *See id.* The Zoning Board discussed the character of the surrounding area during its deliberations. (Tr. 59-63.) Based upon the fact that some other lots in the area were of similar size, including one smaller in size, with similar sized homes, the Zoning Board concluded that the proposed construction would not alter the character of the neighborhood or impair the intent of the zoning ordinance. (Decision 5.)

The Zoning Board also concluded that the requested relief was the least relief necessary because the proposed home was to be built in the center of the lot, thus not requiring more than

the minimum variance in each direction. *See* § 45-24-41(d)(4); *Kenlin Properties, LLC v. City of E. Providence*, 139 A.3d 491, 500 (R.I. 2016) (holding that variances are "a constitutional safety valve to prevent confiscation of one's property from burdensome zoning ordinance regulations[,]" and that variances are therefore "strictly construed to limit relief to the minimum variance which is sufficient to relieve the hardship."). The Zoning Board also found that the proposed home was of a reasonable size and similar to the size of homes in the area, which suggests that a smaller home, which would require smaller variances, would be inadequate to resolve the hardship caused by the small lot. (Tr. 7, 65.)

Finally, because the applicant would be denied a use permitted by right without dimensional relief, the Zoning Board found that denying relief from the zoning ordinance would result in a hardship amounting to more than a mere inconvenience. *See* § 45-24-41(e)(2). Our Supreme Court has held that the 2002 amendment to § 45-24-41(d)(2), which requires that the applicant demonstrate only "that the hardship [the applicant would suffer] if the dimensional variance is not granted amounts to more than a mere inconvenience," reinstated the judicially created *Viti* Doctrine. *Lischio*, 818 A.2d at 691 (citing *Viti v. Zoning Bd. of Review of City of Providence*, 92 R.I. 59, 64-65, 166 A.2d 211, 213 (1960)). The *Viti* doctrine provided that "for an applicant to obtain a dimensional variance, the landowner needed to show only an adverse impact that amounted to more than a mere inconvenience." *Id.* (citing *Sciacca*, 769 A.2d at 582). Here, as Trade Wind seeks relief from the dimensional restrictions of the zoning ordinance for a use available by right—to build a residence—and without the desired relief, it would be unable to build a reasonable sized home, the Zoning Board's conclusion that denial of relief would result in more than a mere inconvenience is well-supported.

After a thorough review of the record, this Court finds that each of these findings of fact, and the conclusions drawn therefrom, is supported by substantial evidence. *See Iadevaia*, 80 A.3d at 870 (defining "substantial evidence" as an "amount more than a scintilla but less than a preponderance"). Accordingly, this Court will not disturb these findings. Therefore, this Court will affirm the Zoning Board's Decision.

IV

Conclusion

After review of the entire record, this Court finds the Zoning Board's Decision was supported by the substantial and probative evidence of the record and was not arbitrary or capricious, or affected by error of law. It was not clearly erroneous. Substantial rights of the Appellant have not been prejudiced. Accordingly, the Zoning Board's Decision is affirmed.

Counsel shall prepare the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Christopher Callaci v. Zoning Board of Review of the Town of Exeter, et al.
CASE NO:	WC-2017-0171
COURT:	Washington County Superior Court
DATE DECISION FILED:	August 27, 2018
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
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