STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC. **SUPERIOR COURT**

[Filed: March 25, 2019]

IRENE C. DAMASKOS TRUST, CHRISTOPHER R. HOSKING, JANE STEVENSON, RICHARD C. YOUNG and DEBORAH L. YOUNG,	:	
Plaintiffs,	:	
v.	:	**C.A. NO. NC-2017-0250**
CHRISTOPHER KIRWIN, HEIDI BLANK, CHARLES ALLOT, BART GRIMES and REBECCA MCSWENY, in the official Capacity as Members of the ZONING BOARD OF REVIEW OF THE CITY OF NEWPORT, CHARLES KOPPELSON, RICHARD PINER and VALERIE PINER,	:	
Defendants.	:	

DECISION

NUGENT, J. Before this Court is an appeal from a decision of the Zoning Board of Review of the City of Newport (Board), which granted a special use permit and a dimensional variance to Charles Koppelson, Richard Piner and Valerie Piner (collectively, Appellees). The Irene C. Damaskos Trust, Christopher R. Hosking, Jane Stevenson, Richard C. Young and Deborah L. Young (collectively, Appellants) seek reversal of the Board's decision. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The property at issue in this case is located at 214 Eustis Avenue, Newport, Rhode Island, and is otherwise known as Tax Assessor's Plat 30, Lot 059. (Combined Application for a

Special Use Permit & a Regulatory (Dimensional) Variance at 1) (Application). Richard W. and Valerie C. Piner own the property, which is located in an R-20 zone and contains 23,726.59 square feet. It has 100 feet of frontage along Eustis Avenue, and it also has 101 feet along Old Beach Road. *Id.* at 3. Currently, the property contains two residential structures. *Id.* The "main house" is a two-story Colonial fronting on Eustis Avenue and contains approximately 1779 square feet of living space, while the "Cottage" is a single level structure near Old Beach Road which contains approximately 480 square feet of living space. (Peter M. Scotti Real Estate Report at 1, Mar. 23, 2017.) Mrs. Piner's son, Charles Koppleson, lives in the "cottage." (Appl. Hr'g Tr. at 10, Mar. 23, 2017).

On September 26, 2016, Mr. Koppleson applied for a special use permit and a dimensional variance. (Application at 1.) Specifically, he sought

> "to demolish and remove the existing detached Cottage which contains the second dwelling unit on the premises, and construct a new detached 1½ story dwelling ("Bungalow") in approximately the same location of the existing cottage on the eastern side of the lot." *Id.* at 2.

The proposed new structure would contain approximately 2142 square feet of above grade living space. (James A. Houle Report at 2, Feb. 22, 2017.) The Application seeks dimensional relief from the lot coverage requirement and it will not intensify any existing dimensional nonconformities. (Application at 5.) The Board conducted a duly noticed hearing on March 23, 2017. (Tr. at 1.)

Testifying on behalf of the Application were the property owner, Mrs. Piner, Mr. Koppelson, Engineer Michael Russell (Mr. Russell),[1] and Real Estate Expert Peter M. Scotti

[1] Counsel for the Appellees introduced Mr. Russell as an engineer, and his Zoning Site Plan referred to him as a Registered Professional Engineer; however, there is no evidence in the record to indicate that the Board recognized Mr. Russell as an expert.

(Mr. Scotti). Real Estate Expert James A. Houle (Mr. Houle) and abutting neighbor Margaret Palmer (Ms. Palmer) testified against the Application.

Mrs. Piner testified that the property has been in her family since 1941. (Tr. at 9.) She stated that the cottage has been on the property since at least 1954. (*Id.* at 10.)

Mr. Koppelson testified that both he and his wife live in the cottage and that they need to "create a structure that can accommodate us and a growing family." *Id.* at 12. He stated that the cottage contains one bedroom, and although it is structurally adequate, it is not suitable for expansion due to a slope in the floor. *Id.* at 15. Mr. Koppelson informed the Board that the Planning Board had granted him permission to demolish the cottage. *Id.* at 16. Currently, the cottage only has a five-foot setback from a neighbor's property; however, the proposed structure would conform to the fifteen-foot setback requirement. *Id.* at 18.

Mr. Koppelson then testified that the proposal is for a three-bedroom, "single-gable house with the gable front facing Old Beach Road[.]" *Id.* at 21, 27. He stated that the design would preserve his neighbors' sight lines of the nearby beach and pond, and that the size of the structure would increase from 480 square feet to 1428 square feet. *Id.* at 21 and 26. He stated that in order to build a three-bedroom house that would be low enough to the ground so as not to obstruct any views meant that he would need a 1.4 percent increase in lot coverage. *Id.* at 29-30. This would translate into a reduction of the footprint by approximately 330 square feet. *Id.* at 30. The existing cottage sits on a slab and does not conform to flood-zone requirements. *Id.* at 33.

Next to testify was Mr. Russell. *See id.* at 34. He testified that he prepared a site plan for the proposed structure. *Id.* at 34-35. He stated that the existing utilities for the cottage, such as electricity, water and gas, are all connected to the primary dwelling, and that this arrangement would remain in place for the new structure. *Id.* at 35, 36. However, he said that the old

cesspool servicing the cottage's wastewater would be replaced by a pump station or pump pit which would indirectly tie into the City's sewer service via the primary residence. *Id.* at 36. Mr. Russell stated that this arrangement would eliminate environmental concerns due to the proximity of the cottage to the pond. *Id.* at 37. The Chairperson of the Board pointed out that if the cesspool is within 200 feet of the pond, then the owner would be under a legal obligation to eliminate the cesspool regardless of the Application. *Id.* at 38.

Mr. Scotti was the final witness to testify in favor of the Application. *See id.* at 40. During his direct testimony, Mr. Scotti testified that the cottage probably was originally built as a garage and that it "looks to be . . . at the end of its useful economic life." *Id.* at 42. Mr. Scotti stated that he first analyzed whether the proposal sought the least relief necessary by reviewing five years of sales data for single family homes in Newport. *Id.* at 43. He then compared the gross living area of those properties with the gross living area of proposed new structure, and he determined that the new structure was below the mean and median figures for single family residences. *Id.* at 43-44. Mr. Scotti testified that the entire gross living area of the main house and the proposed structure was less than "the three most proximate two-family structures in the neighborhood." *Id.* at 44.

Mr. Scotti opined that not only is the proposal "absolutely consistent" and compatible with the surrounding area, but that the new structure actually would be an improvement to the neighborhood. *Id.* at 45. Mr. Scotti further opined that the Application was the minimum relief necessary because it was only seeking about a 1.5 percent increase in lot coverage on a 23,000 square foot lot. *Id.* at 47. To support this opinion, Mr. Scotti observed that relative to other single-family houses and two-family uses, the 1.5 percent deviation is "not a huge amount. It is consistent." *Id.* at 47.

On cross-examination, Mr. Scotti acknowledged that the Ordinance prohibits two principal dwellings on one lot. *Id.* at 48. He further stated that the instant Application involved "two units on a single lot[;]" specifically, "two buildings each containing one dwelling unit." *Id.* at 48, 49. Mr. Scotti later conceded that all of the two-family dwellings he had researched in the neighborhood were located in a single building. *Id.* at 49.

Thereafter, Mr. Houle took the stand to testify against the Application. *See id.* at 52. Mr. Houle stated that in his opinion, the Application failed to meet the requirements for either a dimensional variance or a special use permit. *Id.* at 54. He observed that the footprint of the new structure would be three times larger than that of the existing footprint and that it would be 3.3 times larger if the planned porch was added. *Id.* Mr. Houle also stated that:

> "because it's a story and a half, it contains 2,142 square feet above grade . . . [which] is actually significantly larger than the existing [1779 square foot primary] house; and in addition to that, i[t] has a footprint that is 28 percent larger than the existing house when the porches and the decks are included on both." *Id.* at 54-55.

He thus characterized the proposed structure as "a very large primary residence." *Id.* at 55.

Mr. Houle then testified that he had conducted a survey of the lot coverage for the twenty houses in the immediate neighborhood. *Id.* He found that "[t]he mean [lot] coverage in that area is 12 percent, and the median is 10.6" percent. *Id.* He stated that only four of the twenty lots exceeded lot coverage, and of those, three were "substantially substandard in terms of square footage." *Id.* 56. Referring to the lot coverage for the three properties containing two-family residences about which Mr. Scotti previously had testified, Mr. Houle stated that two of them were conforming lots with coverage of 11.9 percent and 13.8 percent, respectively. *Id.* He then stated that while the third, two-family residence had lot coverage of 23.5 percent, that particular

property was a 10,890 square foot substandard lot for which "[y]ou would maybe expect to see excess lot coverage[.]" *Id.*

Mr. Houle later opined about whether the Ordinance permits two primary dwellings on a single lot. *Id.* 56-57. According to Mr. Houle, the Application was seeking "to completely remove an existing nonconforming use and replace it with a larger nonconforming use." *Id.* at 57. In his opinion, such a situation "runs contrary to the intent of the Zoning Code," and with the housing goals of the Comprehensive Plan. *Id.* at 57 and 58-59. He further stated that "the requested variance, in my opinion, will alter the general character of the surrounding area[,] [because] [i]t will place two, large primary dwelling units on one site by increasing the density beyond the capacity of the lot and somewhat overcrowding the neighborhood." *Id.* at 58. Mr. Houle further opined that because "[t]here are two principal dwelling units not permitted by right or special use[,]" the Application should have required a use variance. *Id.* at 60.

Ms. Palmer was the final witness to testify. *See id.* at 72. She expressed concern about the size of the proposed structure and how it would increase density in the neighborhood. *Id.* She also stated that the proposal possibly could cause an "increase [in] the flooding on Old Beach Road." *Id.* At the conclusion of the arguments of counsel, the Chairperson closed the hearing. *Id.* at 78.

Prior to deliberations, the City's Zoning Officer advised the Board that in his opinion, the Application was not one for a use variance; rather, it was an Application for two permitted uses on one lot. *Id.* at 79. He further stated that if the City Council had intended to treat such an Application as one for a use variance, then it would have done so under Section 17.04.050(B) of the Ordinance, which lists prohibited uses that necessarily would require a use variance. *Id.* at 78-79.

During deliberations, one Board Member observed that the requested variance only constituted a small percentage increase in lot coverage, and that he believed that the Application demonstrated sensitivity to the neighbors because it did not propose a mansion and took into account the visual impact on the neighbors. *Id.* at 80-81. He also noted that there already exists a cottage on the site and that "these Petitioners are interested in making it better. They want to grow a family there." *Id.* at 80.

Another Board Member stated that "[i]n granting the dimensional variance, it's more than an inconvenience and hardship on the family to try to live in that particular cottage as is." *Id.* at 81. Although he expressed concern that the proposed structure could have been located in such a way as to have less of a visual impact on the neighbors and that perhaps the structure could have been a little less high, he nevertheless stated that he supported the Petition because the variance itself was minimal. *Id.* at 81-82.

Although the Chairperson did not have a problem, *per se*, with two dwelling units being on one lot, she expressed unease that the proposed structure would be almost triple the size of the existing cottage. *Id.* at 82; *see also id.* at 83 ("So I'm not particularly persuaded by the fact that you need to have a three-bedroom house of that size."). One other Board Member said that she didn't believe that the proposal was "injurious to the neighborhood in any way." *Id.* However, she was pleased that the proposed structure would no longer encroach on a setback, and felt that the request was "very minor." *Id.* at 84.

Taking into account the willingness to pull the structure out of the setback and to build a one-and-one-half story house, as opposed to two stories, the final Board Member to speak found that the Application was the least relief necessary. *Id.* at 85. He also observed that there was no evidence in the record to show that the proposal was an inappropriate use of the property, or that

it would have a negative impact on the surrounding area. *Id.* Thereafter, the Board voted in favor of the Application for a dimensional variance and a special use permit by a vote of four to one. *Id.* at 85. The Board members later signed a written decision memorializing their votes, and it was recorded in the City of Newport Land Evidence Records, Book 2672 at Page 275, on May 24, 2017.[2]

Additional facts will be provided in the Analysis portion of this Decision.

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:
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> > "(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;

[2] Curiously, it was counsel for the Applicants who prepared the written decision; however, considering that the Board members signed and adopted the decision, this Court will review said document as if it had been written by the Board. *See May-Day Realty Corp. v. Bd. of Appeals of Pawtucket*, 107 R.I. 235, 240, 267 A.2d 400, 403 (1970) (advising "zoning boards that it is common practice for administrative bodies to request counsel to submit proposed findings of fact and conclusions of law and to seek the assistance of their legal advisers in the decision-writing process").

> "(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., Inc.*, 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 of 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

The Appellants contend that the Board erred in finding that two single-family dwellings on a single lot were a permitted use under the Ordinance. They additionally maintain that the existing use—two single-family dwellings on a single lot—was a legal nonconforming use, and that the Board erred in treating the proposal as a dimensional nonconformity requiring a special use permit rather than as an Application for a use variance.

In response, Appellees contend that the Court should give deference to the Board's interpretation of the Ordinance, which historically has treated detached single family structures on a single lot as being dimensionally nonconforming permitted uses. They maintain that the Board always has allowed two dwelling units on one lot as a matter of right in an R-20 zone, and it is only because the two dwellings are in separate structures that there exists a dimensional nonconformity.

At issue in this case is whether the Ordinance permits the construction of two single-family dwelling units on one lot. As such, the Court must review the language of the Ordinance.

It is axiomatic that "the rules of statutory construction apply equally to the construction of an ordinance." *Mongony v. Bevilacqua,* 432 A.2d 661, 663 (R.I. 1981). This Court "review[s] questions of statutory interpretation *de novo.*" *Tanner v. Town Council of E. Greenwich*, 880 A.2d 784, 791 (R.I. 2005). In conducting a *de novo* review, it must be remembered that "a zoning board's determinations of law, like those of an administrative agency, are not binding on the reviewing court; they may be reviewed to determine what the law is and its applicability to the facts." *Pawtucket Transfer Operations, LLC*, 944 A.2d at 859 (quoting *Gott v. Norberg*, 417 A.2d 1352, 1361 (R.I. 1980)) (internal quotations omitted).

It is well-settled that "when a statute contains clear and unambiguous language, this Court interprets the statute literally and gives the words their plain and ordinary meanings." *Casale v. City of Cranston*, 40 A.3d 765, 768 (R.I. 2012). If the language of a statute "is clear on its face, then the plain meaning of the statute must be given effect and this Court should not look elsewhere to discern the legislative intent." *Chambers v. Ormiston*, 935 A.2d 956, 970 (R.I. 2007). Thus, "[w]hen presented with a clear and unambiguous enactment, there is no room for statutory construction, and the statute will be literally applied, attributing the plain and ordinary meaning to its words." *Ret. Bd. of Emps.' Ret. Sys. of State v. DiPrete*, 845 A.2d 270, 279 (R.I. 2004).

However, "when the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency, or board, charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized." *Pawtucket Transfer Operations, LLC*, 944 A.2d at 859-60 (citing *Flather v. Norberg*, 119 R.I. 276, 283 n.3, 377 A.2d 225, 229 n.3 (1977)). In addition, "[o]ur process of statutory construction further involves a 'practice of construing and applying apparently inconsistent statutory provisions in such a manner so as to avoid the inconsistency.'" *Kells v. Town of Lincoln*, 874 A.2d 204, 212 (R.I. 2005) (citing *Montaquila v. St. Cyr*, 433 A.2d 206, 214 (R.I. 1981)).

Nevertheless, "[a]lthough [the Court] must give words their plain and ordinary meanings, in so doing [it] must not construe a statute [. . .] in a way that would result in absurdities or would defeat the underlying purpose of the enactment." *O'Connell v. Walmsley*, 156 A.3d 422, 428 (R.I. 2017) (quoting *Commercial Union Ins. Co. v. Pelchat*, 727 A.2d 676, 681 (R.I. 1999)) (internal quotations omitted). Accordingly "[i]f a mechanical application of a statutory

definition produces an absurd result or defeats legislative intent, this [C]ourt will look beyond mere semantics and give effect to the purpose of the act." *Id*. at 428.

In the instant matter, the Board purportedly granted both a special use permit and a dimensional variance. It is well-settled that unless an ordinance provides otherwise, '"a dimensional variance [may] be granted only in connection with the enjoyment of a *legally permitted beneficial use*, [and] not in conjunction with a use granted by special permit.'" *Lloyd*, 62 A.3d at 1087 (emphasis in original) (quoting *Newton v. Zoning Bd. of Review of Warwick*, 713 A.2d 239, 242 (R.I. 1998)). Stated otherwise, "the General Assembly intended that a use granted by special-use permit may coexist with a dimensional variance only when a municipality's zoning ordinance so provides." *Lloyd*, 62 A.3d at 1087. As the Court in *Lloyd* observed, "[t]he Newport Ordinances d[id] not allow a special-use permit and dimensional variance to be granted in conjunction with each other" in 2013. *Id.* Since then, the City Council has not amended the Ordinance to make any such allowance; consequently, the Board acted in excess of its statutory authority in granting a special use permit in conjunction with a dimensional variance.

However, even if the Board did have the authority to simultaneously grant a special-use permit and a dimensional variance, the record evidence would not have supported the granting of a special use permit. Section 17.108.020(G) of the Newport Code of Ordinances (Ordinance) governs special use permits. It provides in pertinent part:

> "Special use permits shall be granted only where the zoning board of review finds that the proposed use or the proposed extension or alteration of an existing use is in accord with the public convenience and welfare, after taking into account, where appropriate:
>
> > "1. The nature of the proposed site, including its size and shape and the proposed size, shape and arrangement of the structure;

> "2. The resulting traffic patterns and adequacy of proposed off-street parking and loading;
>
> "3. The nature of the surrounding area and the extent to which the proposed use or feature will be in harmony with the surrounding area;
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> "4. The proximity of dwellings, churches, schools, public buildings and other places of public gathering;
>
> "5. The fire hazard resulting from the nature of the proposed buildings and uses and the proximity of existing buildings and uses;
>
> "6. All standards contained in this zoning code;
>
> "7. The comprehensive plan for the city." Sec. 17.108.020(G).

The record reveals that the Applicants did not introduce any evidence with respect to, among other things, traffic patterns; the proximity of places of public gatherings; whether the proposed use would be in harmony with the surrounding area; and fire hazards. Consequently, the Board was not in a position to determine whether the proposed use would be "in accord with the public convenience and welfare." Sec. 17.108.020(G). Indeed, the Board did not make any findings of fact or conclusions of law to support the granting of a special use permit. Consequently, even if it did have the authority to simultaneously grant a special use permit and a dimensional variance, the Board erred in granting a special use permit without making the requisite statutory findings of fact and conclusions of law. *See id.*

Nevertheless, in its decision, it appears that the Board actually considered the Application as being a request for dimensional relief only. The Board specifically found "[t]hat single family residential and two family residential uses are allowed by right in the R-20 Zone for lots of twenty thousand (20,000) square feet." (Decision at 10, ¶12.) It also found that "[t]he proposed reconstruction of the 'Cottage' and the ongoing residential use of the property with two separate

single family residential structures on a single lot, constitutes a dimensional nonconformity which requires a Dimensional Variance." *Id.* at ¶16.

Considering that the Board found that two separate residential structures on a single lot are allowed by right, it would not have been necessary for the Board to grant a special use permit. Indeed, in the body of the decision, the Board only made findings and conclusions as they related to a dimensional variance.

Section 17.108.010 of the Ordinance, entitled Variances, provides in pertinent part:

> "5. In granting a variance, the zoning board of review shall require that evidence of the following standards shall be entered into the record of the proceedings:
>
> > "a. That the reasons set forth in the application justify the granting of the variance and that the variance, if granted, is the minimum variance that will make possible the reasonable use of the land, building or structure;
> >
> > "b. That the variance will not be injurious to the neighborhood or otherwise detrimental to the public welfare, and will not impair the intent or purpose of the zoning code or the comprehensive plan upon which this zoning code is based;
> >
> > "c. 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; and
> >
> > "d. 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.
>
> "6. The zoning board of review shall, in addition to the above standards, require that evidence be entered into the record of the proceedings showing that:
>
> . . .
>
> > "b. In granting a dimensional variance, that the hardship that will be suffered by the owner of the subject property if the dimensional variance is not granted shall amount 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 shall not be grounds for relief[.]" Sec. 17.108.010(B)(5), (6)(b).

Before addressing whether the Board made the required findings and conclusions for granting a dimensional variance, the Court first must determine if the relief itself was permitted under the Ordinance.

Chapter 17.28 of the Ordinance governs the requirements for R-20 residential districts. An R-20 residential district is:

> "an area of medium density residential development. This district occurs in areas adjacent to the R-10 district and is characterized by larger minimum lot size requirements. The intent of this district is to maintain the nature of the established residential pattern in these areas." Sec. 17.28.010.

Pursuant to the R-20 use regulations "The following uses are permitted by right: 1. Single-family dwellings; 2. Two-family dwellings; . . . " Sec. 17.28.020(A)(1)(2). Multifamily dwellings require a special use permit from the Board in an R-20 zone. Sec. 17.28.020(B)(1). A "single-family dwelling" is defined as "a building containing one dwelling unit[;]" a "two-family dwelling" is defined as "a building containing two dwelling units[;]" and a multifamily dwelling is defined as "a building containing three or more dwelling units." Sec. 17.08.010 – Definitions. Notably, in defining a two-family dwelling, the Ordinance employs the term "building" in the singular, not in the plural. *Id.* A building is defined as "any structure used or intended for supporting or sheltering any use or occupancy." *Id.*

The Ordinance defines the term "use" as "the purpose or activity for which land or buildings are designed, arranged, or intended, or for which land or buildings are occupied or maintained." *Id*. A non-exclusive list of prohibited uses in the City may be found in Sec. 17.04.050(B). ("It is intended that any use not included in this zoning code as a permitted use is

prohibited. To assist in the interpretation of such permitted uses, the following uses, *the list of which is not intended to be complete,* are specifically prohibited: . . . ") (Emphasis added). This list is silent with respect to whether two single-family residences are prohibited on one lot. *Id.* However, Sec. E of that provision specifically prohibits more than one principal residence per lot. *See* Sec. 17.04.050(E). ("No more than one principal residential building shall be permitted on a lot except in the case of transient guest facilities and multifamily dwellings and as otherwise provided in this zoning code.") A "principal structure" is defined as "the building on a lot where a use is conducted." Sec. 17.08.010.

Although the Court must give weight and deference to the Board's interpretation of the Ordinance, it may not do so if the Board's interpretation is unauthorized or clearly erroneous. *See Pawtucket Transfer Operations, LLC*, 944. A.2d at 859-60. As the Court may not construe the plain and ordinary language of a statute in a way that would defeat its underlying purpose, it follows that the Court should not give deference to a Board's interpretation of the plain and ordinary language of an ordinance that would achieve a similar result. *See O'Connell*, 156 A.3d at 428 (stating that the Court must not construe the plain and ordinary language of a statute "in a way that would result in absurdities or would defeat the underlying purpose of the enactment").

In its decision, the Board found "[t]hat single family residential and two family residential uses are allowed by right in the R-20 Zone for lots of twenty thousand (20,000) square feet." (Decision at 10, ¶12). However, the Ordinance does not make any reference to single-family residential and two-family residential *uses*; rather, it refers to single-family residential and two-family residential *dwellings*. Sec. 17.28.020(A). Clearly, the actual use in both instances is exactly the same: residential dwellings. *Id.*

As noted previously, a dwelling is a single building that contains one, two, or three or more dwelling units. Sec. 17.08.010. Although the Board contends that the City Council's failure to include among its list of prohibited "uses" the construction of two single-family residences on one lot as evidence that such construction is permitted by right, this interpretation ignores the clear and unambiguous language contained in § 17.04.050(E). which specifically prohibits the construction of more than one principal residential building on a single lot. *See id.* ("No more than one principal residential building shall be permitted on a lot except in the case of transient guest facilities and multifamily dwellings and as otherwise provided in this zoning code.") Clearly, the construction of two single family principal residential buildings on a single lot would violate this prohibition.

Indeed, to interpret the Ordinance to permit such construction would defeat the underlying purpose of creating an R-20 district as an "area of medium density residential development[,]" that is "characterized by larger minimum lot size requirements" and "adjacent to the R-10 district[.]" Sec. 17.28.010. Furthermore, the Board's interpretation essentially would permit the Board to convert an R-20 property into an R-10 property. This would be akin to impermissible spot zoning. *See Verdecchia v. Johnston Town Council*, 589 A.2d 830, 832 (R.I. 1991) ('"Spot zoning' is a term normally applied to changes in the zoning classification of a relatively small tract of land, making its use incompatible with the rest of the district.")

In view of the foregoing, the Court concludes that the Board erroneously interpreted the Ordinance and acted in excess of its statutory authority to permit the construction of two single family residences on a single lot. Accordingly, the Court need not address the propriety of treating the Application as one for a dimensional variance.

IV

Conclusion

After a thorough review of the entire record, this Court finds that the decision of the Board is clearly erroneous, is made upon improper procedure, is in violation of Ordinance provisions, is in excess of the Board's authority, is arbitrary and capricious and characterized by abuse of discretion, and is affected by clear error of law. Substantial rights of the Appellants have been prejudiced. As such, the decision of the Board granting a dimensional variance and special use permit to the Applicant is vacated. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Irene C. Damaskos Trust, et al. v. Christopher Kirwin, et al.

CASE NO: NC-2017-0250

COURT: Newport Superior Court

DATE DECISION FILED: March 25, 2019

JUSTICE/MAGISTRATE: Nugent, J.

ATTORNEYS:

For Plaintiff: Jeremiah C. Lynch, III, Esq.

For Defendant: Christopher J. Behan , Esq.
Girard Galvin, Esq.
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