STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 10, 2021)

LINDA MOLLICONE	:	
	:	
v.	:	**C.A. No. PC-2019-10887**
	:	
THOMAS LOPARDO, CHAIRPERSON ANTHONY PILOZZI, JOSEPH ANZELONE, RICHARD LOBELLO, AND RICHARD FASCIA, IN THEIR CAPACITIES AS MEMBERS OF THE TOWN OF JOHNSTON ZONING BOARD OF REVIEW	:	

DECISION

VOGEL, J. Linda Mollicone brings this appeal from a decision of the Zoning Board of Review for the Town of Johnston (the Board) denying her application for a dimensional variance. This Court exercises jurisdiction over this appeal pursuant to G.L. 1956 § 45-24-69. For the reasons set forth in this Decision, the Court denies her appeal and upholds the Board's decision.

I

Facts and Travel

On September 24, 2010, Ms. Mollicone filed an application with the Board seeking permission to build a 28 foot by 48 foot single-family residence on an undersized lot. Application for Dimensional Variance, September 24, 2010 (Application); (PC-2010-6930, Decision, December 11, 2018 (McGuirl, J.) (Superior Court Decision) at 2). Ms. Mollicone owns a vacant, undeveloped 13,000 square foot lot in Johnston at 8 Truman Street. The property is located in an R-20 zoning district which allows single-family dwellings on lots of at least 20,000 square feet in size. (Superior Court Decision at 2.) Ms. Mollicone's lot is undersized by 7,000

feet, and she seeks a dimensional variance to construct the residence on her non-conforming lot. (Application.)

Ms. Mollicone first appeared before the Board on October 28, 2010.[1] At the end of the hearing, the Board voted unanimously to reject the Application and, on November 8, 2010, issued its written decision denying Ms. Mollicone the relief she sought. (Superior Court Decision at 4.) Ms. Mollicone took a timely appeal from that decision. The Court determined that the record before the Board was inadequate to enable the Board to make the required findings of fact and conclusions of law. *Id.* at 15. The Court also found that the November 8, 2010 decision included boilerplate language and that the Board failed to explain its reasoning for denying the Application. *Id.* at 10. The Court criticized the findings of fact as bearing little if any relation to the conclusions drawn therefrom. *Id.* The Court remanded the case to the Board "for a new hearing [*de novo*], followed by a decision with adequate findings of fact and conclusions of law in accordance with § 45-24-61."[2] *Id.* at 16.

Ms. Mollicone next appeared before the Board in support of her Application for a dimensional variance on September 26, 2019. Ms. Mollicone testified on her own behalf and presented no other witnesses. She did not provide any testimony suggesting expertise in any area related to land use. Ms. Mollicone responded to a series of leading questions asked by her attorney to which she provided mainly one-word answers, "yes" and "no." In responding to the leading questions, Ms. Mollicone opined: 1. That the land could not be used for any purpose

[1] The September 24, 2010 Application was not Ms. Mollicone's first application for a dimensional variance to construct a residence on the property. In her initial application, approximately a year earlier, Ms. Mollicone sought permission to build a much larger home on the property. The Board denied that request based on the size of the proposed structure. Superior Court Decision at 2.

[2] "The zoning board of review shall include in its decision all findings of fact and conditions, showing the vote of each participating member . . ." Sec. 45-24-61.

other than a single-family dwelling due to the R-20 zoning; 2. That the planned dwelling would be in keeping with neighborhood properties; 3. That her proposed structure would not depreciate the value of other houses; 4. That she was seeking the least amount of relief necessary for the lot; and 5. That no other minimum relief would satisfy her application. Board Hr'g Tr., Sept. 26, 2019 (Board Hr'g Tr.) at 9-10.

At the close of the testimony, Board Member Richard Fascia made a motion to deny the Application seconded by Board Vice-Chairperson Anthony Pilozzi. *Id.* at 15-17. Mr. Fascia offered "findings of fact" in support of his motion. He stated:

> "Though Miss Mollicone is certainly passionate about this piece of property, she's also a biased applicant. She's also not a disinterested party and to my knowledge, not a real estate expert, not a land use expert, not an architect. I'm concerned that this piece of property, or I should say the structure that may be built upon it, might not fit necessarily in with the character of the neighborhood. I don't know that this is the least amount of relief necessary, but what I don't know is what bothers me, and for that reason, once again, I would make a motion to deny this application as it stands." *Id.* at 15-16.

He noted that he would have been more comfortable had the applicant presented expert testimony from an experienced certified land use expert. *Id.* at 16.

In seconding the motion, Mr. Pilozzi added his own "findings of fact" and referred to the lack of expert testimony. He stated, "We've heard from the owner, and that's it. There's nothing touching on the least relief necessary, so I'll base my second on that." *Id.* at 16-17.

Without further discussion, the Chairperson called for a roll call vote, and each member voted to deny the application. *Id.* at 17.

On October 29, 2019, the Board issued its written decision. It was relatively brief and solely comprised of sections cut and pasted from the hearing transcript and from the applicable statutory requirements for granting of a dimensional variance. *See* § 45-24-41.

Rather than review the pertinent evidence, the Board cut and pasted all of Ms. Mollicone's hearing testimony. Board Decision at 1-2. The Board Decision included a section entitled "Findings of Fact and Decision of the Zoning Board of Review." *Id.* at 3. However, rather than providing a list of its findings of fact and articulating its decision, the Board cut and pasted the hearing transcript beginning with Mr. Fascia's motion through the roll call vote. *Id.* at 3-4.

Ms. Mollicone took a timely appeal from that decision to this Court.

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by § 45-24-69(d). Section 45-24-69(d) 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."

When reviewing a decision of a zoning board, the trial justice "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." *DeStefano v. Zoning Board of Review of the City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167,

1170 (1979) (internal quotation omitted). The term '"substantial evidence"' has been 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 Board of Review of Town of North 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)).

In conducting its review, the trial justice "may 'not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.'" *Curran v. Church Community Housing Corp.*, 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)). The deference given to a zoning decision is due, in part, to the fact "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." *Monforte v. Zoning Board of Review of City of East Providence*, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). With respect to questions of law, however, this Court conducts a *de novo* review; consequently, the Court may remand the case for further proceedings or potentially vacate the decision of the Board if it is "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record[.]" *Bernuth v. Zoning Board of Review of the Town of New Shoreham*, 770 A.2d 396, 399 (R.I. 2001); *see also* § 45-24-69(d)(5).

a

Adequacy of the Board's Decision

The Court would be remiss not to express disappointment at the form of the Board Decision, particularly in light of the remand order from another Justice of this Court.

The Legislature has mandated that "[t]he zoning board of review shall include in its decision all findings of fact . . . ." Sec. 45-24-61. In addition, the Supreme Court has long held that '"a zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review."' *Bernuth*, 770 A.2d at 401 (quoting *Cranston Print Works Co. v. City of Cranston*, 684 A.2d 689, 691 (R.I. 1996)).

Thus, this Court '"must decide whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles."' *Bernuth*, 770 A.2d at 401 (quoting *Irish Partnership v. Rommel*, 518 A.2d 356, 358 (R.I. 1986)). The findings must be factual rather than conclusional, and the application of the legal principles must be something more than a recital of a litany. *Bernuth*, 770 A.2d at 401. These are minimal requirements and, unless satisfied, judicial review of a zoning board decision is impossible. *Id.* Furthermore, "when the board fails to state findings of fact, the court will not search the record for supporting evidence or decide for itself what is proper in the circumstances." *Irish Partnership*, 518 A.2d at 359.

In *Sciacca v. Caruso*, 769 A.2d 578 (R.I. 2001), our Supreme Court cautioned zoning boards and their attorneys to ensure that zoning board decisions on variance applications address the evidence in the record, and determine whether that evidence either meets or fails to satisfy each of the legal preconditions set forth in § 45-24-41(c) and (d). *See Sciacca*, 769 A.2d at 585. The Court then noted that such a specification of evidence in the decision would greatly aid the Superior Court in undertaking any requested review of zoning board decisions. *Id.*

With respect to dimensional variances, § 45-24-41 provides in pertinent part:

> "(d) 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.
> "(e) The zoning board of review, or, where unified development review is enabled pursuant to § 45-24-46.4, the planning board or commission, shall, in addition to the above standards, require that evidence is entered into the record of the proceedings showing that: . . .
> "(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. The zoning board of review, or, where unified development review is enabled pursuant to § 45-24-46.4, the planning board or commission has the power to grant dimensional variances where the use is permitted by special-use permit if provided for in the special use permit sections of the zoning ordinance." Sec. 45-24-41.

At the end of the testimony, Board Member Fascia provided the factual and legal basis for the motion he was making to deny the application. Vice-Chairperson Pilozzi offered the basis for his decision to second the motion. The other Board Members voted in favor of the motion to deny the Application without explanation. It appears that by cutting and pasting Mr. Fascia and Mr. Pilozzi's comments into the section entitled "Findings of Fact and Decision of the Zoning Board of Review," the Board intended to incorporate Mr. Fascia and Mr. Pilozzi's comments into the Board Decision. Although the Court accepts that as the Board's intent, it certainly would

have been preferable to have written out those findings within the four corners of the Board Decision. The manner in which the Board Decision was written barely escaped a second remand by this Court as being ambiguous. It was a disappointing way to discharge important responsibilities.[3]

b

Burden of Proof

The law is clear as to the evidence the Board must consider when deciding whether to approve or deny an application for a dimensional variance. The Board "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), *New Castle Realty Co. v. Dreczko*, 248 A.3d 638, 647 (R.I. 2021).

In this case, Ms. Mollicone attempted to meet these requirements by serving as the only witness on behalf of the Application. Her attorney asked her a series of leading questions aimed at presenting evidence on each of these requirements. Without objection, she gave one-word answers to each of those questions. Mr. Fascia correctly stated that she offered no evidence that

[3] The Court urges the Board and its counsel to take greater care in writing decisions.

she possessed any expertise in these areas. He noted that she was "not a disinterested party and to [his] knowledge, not a real estate expert, not a land use expert, not an architect." Board Hr'g Tr. at 15.

The fact that Ms. Mollicone was permitted to offer this testimony does not mean that the Board was required to accept it or give it any weight. The Board was entitled to consider a nonexclusive list of factors in determining what weight, if any, to give her testimony, including bias, the manner in which she testified, and her level of expertise and competence in the areas in which she opined. The Board sat as the trier of fact, the judges of the credibility of witnesses and the weight they would give to the testimony and other evidence.

It is well established that although a trier of facts should not reject uncontradicted testimony arbitrarily, it may be rejected on credibility grounds. In rejecting uncontradicted testimony, the fact finder must clearly, albeit briefly, provide the reasons for rejecting the witness' testimony. *Lombardo v. Atkinson-Kiewit,* 746 A.2d 679, 688 (R.I. 2000). "[T]he trier of fact is not bound to accept the testimony of a witness merely because there is no direct testimony contradicting it where it contains inherent improbabilities or contradictions, which alone or with other circumstances in evidence affect its weight or credibility." *Paquin v. Providence Washington Insurance Co.,* 106 R.I. 267, 270, 259 A.2d 115, 117 (1969).

In this case, Mr. Fascia and Mr. Pilozzi provided clear reasons for rejecting Ms. Mollicone's uncontradicted testimony. This Court must defer to the Board on its credibility findings. "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." Sec. 45-24-69(d). The Court cannot conclude that the Board's assessment of Ms. Mollicone's testimony was clearly erroneous or arbitrary, capricious, or characterized by an abuse of discretion. *See* i*d.* Although the Board should have

done a clearer and better job of articulating its credibility findings than cutting and pasting from the hearing, it is sufficiently clear that in its section entitled "Findings of Fact and Decision of the Zoning Board of Review," the Board was rejecting the testimony of the sole witness who testified on behalf of the Application. The Court defers to that finding. Having rejected the only testimony offered by Ms. Mollicone on the requirements set forth under § 45-24-41(d), she could not possibly have met her burden, and the Board correctly denied the Application.

III

Conclusion

After review of the entire record, this Court finds that the Board Decision was based upon substantial evidence sufficient to support its findings. The appeal is denied.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Mollicone v. Lopardo, et al.**
CASE NO:	**PC-2019-10887**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 10, 2021**
JUSTICE/MAGISTRATE:	**Vogel, J.**
ATTORNEYS:	
For Plaintiff:	**Donald R. Lembo, Esq.**
For Defendant:	**Joseph R. Ballirano, Esq.**