

I

Facts and Travel

The Appellees are seeking to build a house on a vacant parcel of land described as Assessor's Lot 77, Plat 350 located on Glen Drive in Warwick, Rhode Island (Vacant Parcel). (Return of the Zoning Board of Review, Ex. A (Application).) The Vacant Parcel is zoned as a Residential A-7 District (A-7) and abuts a kettle pond. (Pls.' Mem. in Supp. of Appeal (Pls.' Mem.), Ex. Q (Warwick Zoning Board Decision), at 1.) The properties neighboring the Vacant Parcel are also zoned A-7 and contain residential structures. *Id.* at 2.

The building proposed by Appellees is a twenty-four foot by thirty-four foot two-story, single-family dwelling with forty feet of frontage. *Id.* at 1; Return of the Zoning Board of Review, Ex. A2. Pursuant to Table 2A, "Dimensional Regulations" of the City of Warwick Zoning Ordinance (Warwick Zoning Ordinance), a lot that has been zoned A-7 requires a minimum lot size of 7,000 square feet and 70 feet of frontage. Warwick Zoning Ordinance § 302, Table 2A, Dimensional Regulations. The Vacant Parcel is undersized, containing a total of approximately 3,764 square feet of land, thereby making this lot nonconforming by area according to Table 2A of the Warwick Zoning Ordinance. *Id.*; Return of the Zoning Board of Review, Ex. C6. Consequently, the building proposal requires approval by the Zoning Board for a dimensional variance to construct a new dwelling for residential use of a nonconforming lot pursuant to Warwick Zoning Ordinance 405.4(D). Warwick Zoning Ordinance § 405.4(D). Therefore, due to the requirements of the Warwick Zoning Ordinance, Appellees sought a dimensional variance. (Return of the Zoning Board of Review, Ex. A.)

A

First Zoning Board Hearing

On April 17, 2019, Appellees submitted their application to the Zoning Board for the required dimensional variance. (Application.) The application was heard and discussed before the Zoning Board on July 9, 2019 and October 8, 2019. *See* Hr’g Tr. Vol. I, July 9, 2019; *see also* Hr’g Tr. Vol. II, Oct. 8, 2019.

On July 9, 2019, the Zoning Board hearing began with statements by Daniel Geagan, from the Warwick Planning Department, who testified that the Warwick Planning Department recommended denial of a dimensional variance. (Hr’g Tr. Vol. I 5:13-9:14, July 9, 2019.) Then, the Zoning Board heard testimony of expert Edward Pimentel (Mr. Pimentel), who specializes in land use regulations. *Id.* at 11:5-12:7. Mr. Pimentel testified as to the controlling language of the Warwick Zoning Ordinance, specifically regarding § 405.4 and the Zoning Board’s ability to grant dimensional variances. *Id.* at 12:22-14:8. Mr. Pimentel further testified that the Vacant Parcel cannot comport with two portions of the regulation due to characteristics of the lot that were in place prior to the adoption of the zoning regulations. *Id.* at 14:23-15:3. Mr. Pimentel indicated that denying the dimensional variance for the proposed building would result in a loss of all beneficial use of the property, and that “this entire neighborhood, for [the] most part, is not in character with the current zoning[,]” so the project would not impact the character of the general neighborhood. *Id.* at 15:3-23. Finally, Mr. Pimentel testified that the hardships experienced by Appellees were from the unique characteristics of the lot and were not the result of any prior actions of the current ownership. *Id.* at 16:22-17:1.

Next, Kirk Andrews (Mr. Andrews), an expert land surveyor, testified regarding the Class I survey of the Vacant Parcel that he provided to the Zoning Board. *Id.* at 25-60. Mr. Andrews

testified that he followed standard procedures that a Rhode Island surveyor is required to follow and measured the property by determining the forty feet of frontage, then following the fence on the property line down to the edge of the pond, and then “surveyed along the edge of the water to determine the actual size of the lot.” *Id.* at 25:9-26:22. Mr. Andrews further testified that he used the edge of the pond to determine the size of the lot because the original plat showed the edge of the pond as the boundary line for the lot. *Id.* at 30:19-31:14.

At the conclusion of the expert testimony offered by Appellees, members of the public testified as to various concerns regarding the impact the proposed building would have on their property values. *Id.* at 72-90.

B

Second Zoning Board Hearing

On October 8, 2019, the Zoning Board reconvened and Appellees submitted further testimony. (Hr’g Tr. Vol. II 5-50, Oct. 8, 2019.) Mark Boyer (Mr. Boyer), an expert land surveyor, testified regarding his evaluation of Mr. Andrews’s survey of the Vacant Parcel. *Id.* at 12:10-21. He testified that Mr. Andrews was correct to use the pond edge as the “boundary on the record plat as being the property line.” *Id.* at 12:21-23. Mr. Boyer provided the Zoning Board with research depicting the property as it was in 1920, when the plat was created, compared to the property in 1944 and 1950 when the federal government issued United States Geological Survey quad sheets (a topographic map) on the elevation of the land, and the property as it was in 2019. *Id.* at 13:3-17:18. Mr. Boyer also testified that the measurable changes in the land over time explained the

discrepancy between the square footage on the plat and that shown in Mr. Andrews's survey. *Id.* at 17:21-24.

Public comment was again allowed before the Zoning Board voted. *Id.* at 49-74. The public comment again was primarily concerned with the impact the proposed building would have on the neighboring property values as well as the size of the house. *Id.* Following the conclusion of the public comments, George Shuster (Mr. Shuster), a member of the Zoning Board, stated that the lot is a legal nonconforming lot, that the house design fits into the neighborhood, and that the application should be granted. *Id.* at 74:15, 75:2-22. The Zoning Board then voted to grant the petition. *Id.* at 76:3-77:10.

The Zoning Board's written decision was issued on October 11, 2019 and memorialized the vote made at the October Zoning Board hearing. *See* Warwick Zoning Board Decision (Decision) at 3. The Zoning Board agreed with Appellees' experts that: (1) the hardship was due to the unique characteristics of the undersized subject land; (2) the hardship was not the result of a prior action and did not result from Appellees' desire to realize financial gain; (3) the granting of the dimensional variance would not alter the general characteristics of the surrounding area; and (4) the requested relief was the least relief necessary. *Id.* Therefore, the Zoning Board voted unanimously to grant the application for a dimensional variance. *Id.*

Appellants, who own property neighboring the Vacant Parcel, filed a timely appeal in the Kent County Superior Court on November 3, 2019. *See* Compl. ¶ 2. Appellants requested that this Court reverse the Zoning Board's Decision granting the application for a dimensional variance as to the proposed plan for constructing a two-story, single-family dwelling on the Vacant Parcel. (Compl. ¶ 8.)

II

Standard of Review

The Superior Court has jurisdiction to hear appeals from zoning boards of review pursuant to § 45-24-69. When reviewing a local zoning board's decision, § 45-24-69(d) mandates the following:

“[t]he 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.” Section 45-24-69(d).

Our Supreme Court requires this Court to “review[] the decisions of a . . . board of review under the ‘traditional judicial review’ standard applicable to administrative agency actions.” *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I. 1998) (quoting *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977)). Judicial review of an administrative agency is essentially an appellate proceeding. *See Notre Dame Cemetery v. R.I. State Labor Relations Board*, 118 R.I. 336, 339, 373 A.2d 1194, 1196 (1977). Accordingly, “[t]he trial justice lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute his or her findings of fact for those made at the administrative level.” *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986) (citing *E. Grossman & Sons, Inc.*, 118 R.I. at 285-86, 373 A.2d at 501). However, the applicant always bears the burden to demonstrate why the requested relief should be granted.

See DiIorio v. Zoning Board of Review of City of East Providence, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969) (requiring “an applicant seeking relief before a zoning board of review to prove the existence of the conditions precedent to a grant of relief”).

In reviewing a zoning decision, the Court ““must examine the entire record to determine whether ‘substantial’ evidence exists to support the board’s findings.”” *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). ““Substantial evidence . . . means 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)). If the Court ““can conscientiously find that the board’s decision was supported by substantial evidence in the whole record[,]”” it must uphold that decision. *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)).

III

Analysis

On appeal, Appellants raised the following issues: (1) the Zoning Board Decision was based upon clear error of law, since the decision provided no basis for granting the dimensional

variance; and (2) the Zoning Board erroneously cited to outdated standards of review for a dimensional variance. (Pls.’ Mem. 14, 18.)

A

Clear Error of Law

Appellants first argued that the Decision was based upon clear error of law because the Zoning Board did not provide a factual basis for granting the dimensional variance in its Decision. *Id.* at 14.

Section 904 of the Warwick Zoning Ordinance grants the Zoning Board the power “[t]o authorize upon application, in specific cases of hardship, variances in the application of the terms of this ordinance.” Warwick Zoning Ordinance § 904. The Zoning Board “is vested with discretion . . . to determine on a case by case basis whether the variance is proper given the character of the surrounding area and the nature of the property.” *Lischio*, 818 A.2d at 692 (quotations omitted). A dimensional variance is defined as:

“[p]ermission to depart from the dimensional requirements of a zoning ordinance, where the applicant for the requested relief has shown, by evidence upon the record, that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations.” Section 45-24-31(66)(ii).

The issuance of a dimensional variance is guided by Warwick Zoning Ordinance 906.3(B). Warwick Zoning Ordinance § 906.3(B). A dimensional variance will only be granted if the Zoning Board is satisfied with the evidence presented at the public hearings discussing the variance. Warwick Zoning Ordinance § 906.3(A).

An applicant seeking a dimensional variance needs to demonstrate ““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, which means that *there is no other reasonable alternative to*

enjoy a legally permitted beneficial use of one's property.” *Sciacca v. Caruso*, 769 A.2d 578, 583 (R.I. 2001) (quoting § 45-24-41(d)(2)). The zoning board of review will then make evidentiary findings concerning the requirements of § 45-24-41 and “shall include in its decision all findings of fact.” *Von Bernuth v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396, 401 (R.I. 2001).

Appellants alleged that the “record does not provide evidence which explains the hardship, but instead attempts to relate the hardship” to the characteristics of the lot. (Pls.’ Mem. 18.) After an examination of the record, this Court is convinced that the record does provide evidence which explained Appellees’ hardship. Appellees’ lot is classified as an A-7 residential zone in Warwick. (Decision at 1.) Section 301 of the Warwick Zoning Ordinance provides information with the specific requirements an A-7 residential lot needs to meet in order to build on the property. Warwick Zoning Ordinance § 301. The requirements state that the minimum lot area needs to be at least 7,000 square feet to build. Warwick Zoning Ordinance § 302, Table 2A. The size of Appellees’ lot was contested at the Warwick Zoning Board of Review hearings, with descriptions ranging from 2,500 square feet (the original record plat) to 3,765 square feet (testimony of Mr. Boyer, expert surveyor), but it was undisputed that the lot area did not meet the 7,000 square feet requirement. (Hr’g Tr. Vol. II 74:11-15, Oct. 8, 2019.)

The Vacant Parcel was part of a larger plat that was divided into smaller lots in 1920. *Id.* at 13:3; Return of Zoning Board of Review, Ex. C1 (1924 Deed). The lot remained vacant and Appellees acquired the property in 2001 by quit claim deed. (Return of Zoning Board of Review, Ex. C7 (Quit Claim Deed).) The hardship established was the size of the vacant lot not meeting the 7,000 square feet requirement to build, a hardship that existed long before the zoning ordinance was put in place. Appellees are not able to change the size of the lot to meet the area size

requirement. They testified at the July hearing that, “[w]e can’t acquire more land area. We can’t add additional land area to increase the lot size. We [can’t] add additional area to increase the lot frontage. The hardship results from the unique characteristics of the lot.” (Hr’g Tr. Vol. I 16:19-23, July 9, 2019.) Appellees also stated, “[t]o deny what we are asking for would, in reality, deny complete beneficial use of the property because there’s nothing else that you can do besides put a single-family home on this [lot].” *Id.* at 10:13-17.

An argument was made at the hearing by Daniel Geagan, from the Warwick Planning Department, that there is a reasonable alternative use for the lot which was in direct opposition to Appellees’ proposed application:

“The Department finds a reasonable alternative for this lot is to *continue to be used as an amenity* providing access to the pond for nearby interior lots, and that such use is both beneficial and economically reasonable as such access would provide an increase in value of nearby properties as an amenity and use of the subject property.” *Id.* at 8:21-9:5 (emphasis added).

However, no evidence was presented at either hearing to support the notion that Appellees’ property had been used by interior lots to gain access to the pond. *See generally* Hr’g Tr. Vol. I, July 9, 2019; *see also* Hr’g Tr. Vol. II, Oct. 8, 2019. While there were originally building restrictions in the 1924 deed to the property, those restrictions no longer exist and related to the type of building that could be built on the Vacant Parcel and did not relate to providing interior lots with access to the water through the property. (Hr’g Tr. Vol. II 9:22-10:3, Oct. 8, 2019.) Additionally, a locked fence has been surrounding the property line for years, which furthers the notion that this lot was not used to provide the interior lots with access to the pond. (Hr’g Tr. Vol. I 37:4-8, 11-12, July 9, 2019.)

Appellees stated that they plan “to sell the land, if it’s buildable,” but the mere fact that building a house on the vacant lot would make the property more valuable does not alter the fact

that owners of real property have the right to develop their land. (Hr’g Tr. Vol. II 73:12-13, Oct. 8, 2019.) If the dimensional variance was not granted, Appellees would not be able to build a residence and the land would remain vacant and unused.

The record provides ample evidence which explains Appellees’ hardship and that the Zoning Board therefore provided a sufficient factual basis in its Decision for granting the dimensional variance.

B

Use of Appropriate Standards

Appellants contended that the Zoning Board used outdated standards of review when making its decision in this case, thus acting in error of law. (Pls.’ Mem. 18.)

Appellants correctly noted that § 45-24-41(d) governed the requisite standard a zoning board of review must use to grant a dimensional variance. *See* § 45-24-41(d). However, the standards in § 45-24-41(d) are restated in § 906.3(A) of the Warwick Zoning Ordinance, which the Zoning Board correctly applied to the case at bar. *See id.*; *see also* Warwick Zoning Ordinance § 906.3(A); Decision at 3. Consequently, because the Zoning Board did not apply an outdated standard of review, all that remains is for this Court to review the Zoning Board’s application of the correct standard for any error of law or procedure.

Section 906.3(A) states, in relevant part:

“In granting a variance, the board shall require that evidence to the satisfaction of the following standards be 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 the general characteristics of the surrounding area, and is not due to the physical or economic disability of the applicant (For handicapped access. *See* section 304.10)[;]

“(2) That said 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 characteristic of the surrounding area or impair the intent or purpose of this zoning ordinance or the comprehensive plan of the city; [and]
“(4) That the relief to be granted is the least relief necessary.”
Warwick Zoning Ordinance § 906.3(A).

Here, the Zoning Board’s Decision set forth an analysis as to why the application was granted pursuant to § 906.3(A) of the Warwick Zoning Ordinance. (Decision at 3-4.) In the Decision, after the Zoning Board cited the specific evidence supporting the granting of Appellees’ application, the Zoning Board then addressed each of the standards set forth in § 906.3(A). *Id.* at 2-3. The Zoning Board found that the hardship that Appellees experienced was due to the unique characteristics of the subject lot, specifically that the lot was undersized. *Id.* at 3. The Zoning Board then found the hardship and configuration of this lot is not the result of any prior actions of the applicant. *Id.* Further, the Zoning Board found that granting the variance was the least relief necessary and that the variance would not alter the general characteristics of the surrounding neighborhood. *Id.* Therefore, the Zoning Board properly followed the governing statutes for granting a dimensional variance, in that the Zoning Board provided each standard and recited the supporting evidence under that standard for each finding. *Lett*, 510 A.2d at 960.

Consequently, this Court is convinced that the Zoning Board applied the proper standard when it issued its Decision granting Appellees’ dimensional variance.

IV

Conclusion

This Court holds that the Zoning Board's Decision was supported by substantial evidence presented on the record and was not made in clear error of law, and that the Zoning Board applied the proper standards when issuing their Decision. The appeal of Appellants is hereby denied. Counsel shall submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Richard Curci and Gail Curci v. Zoning Board of Review of the City of Warwick, et al.

CASE NO: KC-2019-1240

COURT: Kent County Superior Court

DATE DECISION FILED: December 2, 2021

JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:

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