STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 28, 2021)

DANIEL KARTEN, MARISSA JOINSON, and TRACY JOINSON *Plaintiffs,*	:	
v.	:	**C.A. No. PC-2020-06734**
TOWN OF WARREN ZONING BOARD OF REVIEW, PAUL ATTEMANN, ANDREW G. ELLIS, W. BARRETT HOLBY, JR., JASON J. RAINONE, and CHARLES A. THIBAUDEAU, in their Capacities as Members of the Zoning Board of Review of the Town of Warren *Defendants*.	:	

DECISION

MCGUIRL, J. Plaintiffs Daniel Karten, Marissa Joinson, and Tracy Joinson (collectively, Appellants) appeal the Zoning Board of Review for the Town of Warren's (Zoning Board or Board) decision (Decision) denying their application for a special use permit (SUP). The Appellants sought an SUP to build a two-family dwelling in an R10 zoning district on the land located on 24 Laurel Lane, Warren, Rhode Island, Lot 202 on Assessor's Plat 13D. Jurisdiction is pursuant to G.L. 1956 §§ 9-30-1 and 45-24-69.

I

Facts and Travel

Daniel Karten and Marissa Joinson, two of the Appellants, are a married couple and are both the record owners of property located at 24 Laurel Lane, Warren, Rhode Island (Property). Compl. ¶¶ 2-3; Appellants' Mem. 2. The other Appellant, Tracy Joinson, the sister of Marissa

Joinson, is the applicant for the SUP that would apply to the Property. Compl. ¶ 4; Appellants' Mem. 2. Appellants submitted an SUP to the Zoning Board to build a two-family dwelling on the Property on July 14, 2020[1] so that Tracy Joinson and the Joinsons' mother could both reside on the Property. Compl. ¶ 8; Zoning Board Hr'g Tr. (Tr.) at 3:4-7, 11-15, 3:19-4:3, Aug. 19, 2020. The Property is located in an R-10 zoning district. Compl. ¶ 8. Per the Town of Warren's Zoning Ordinance (Warren Ordinance), Section 32-47, two-family dwellings are allowed in an R-10 zone with an SUP.[2] The Appellants filed their SUP application with the Board after obtaining approval from the Planning Board and receiving a prior dimensional variance "reducing the frontage required from 120 feet to 90 feet" for the proposed new dwelling. Tr. at 2:8-12. The hearing on the SUP application was held on Wednesday, August 19, 2020 via Zoom. Compl. ¶ 9.

At the hearing, the Appellants noted that the proposed two-family dwelling would "look[] just like a single family" in order to fit with the "esthetic of the neighborhood," despite "some other multifamily housing units" being "in the neighborhood." Tr. at 4:4-9. When Board Member W. Barrett Holby (Board Member Holby) asked about how many other two-families were in the area, as he had driven down the street and did not realize there were two-families there, the Appellants stated they could not access that specific information, but while driving in the neighborhood, they saw "one block over from us . . . there is a two-family with two separate entrances," and "[o]n Homestead, within the Laurel Park neighborhood, there's a six-family . . .

[1] Appellants state in their memorandum that they submitted this application on July 16, 2020. Appellants' Mem. 2.

[2] Section 32-45 of the Warren Ordinance provides where the letter "S" is indicated in a particular zone, "[t]he use is permitted only by special use permit in the designated zoning district. Such special use permit may be granted by the zoning board of review under the procedures and standards outlined in article III and article V, and elsewhere in this ordinance." *Id.* Section 32-47 requires the property owner obtain a special use permit from the zoning board to construct a two-family dwelling in an R-10 zone.

and . . . abutting our land . . . is a 67-unit apartment complex[.]" *Id.* at 7:3-21. The Appellants also shared their belief that the proposal would "provide more diversity in the housing." *Id.* at 4:11-12. Further, the Appellants explained that they did not file an application for a "mother-in-law unit," though there were some "scattered . . . around [the neighborhood,]" due to the Joinsons' mother's age and how Warren's 600 square foot mother-in-law unit requirement could negatively impact their mother's quality of life. *Id.* at 7:21-24; 26:15-27:9.

Several constituents then spoke on the record, both in support of and against the SUP. Ms. Robin Remy (Ms. Remy), of 21 Avenue A, questioned whether the two-family home and the 67-unit apartment complex belonged in "that lane-type neighborhood" and if the granting of this permit would just "open[] the door to start creating more two-families" in the neighborhood. *Id.* at 8:13-24; 10:1-11. To this point, Board Member Holby voiced a similar concern, stating that "[i]t seems to me that [the SUP] changes the character of the . . . street or the neighborhood." *Id.* at 9:5-7. Vice Chair Andrew G. Ellis (Vice Chair Ellis) replied that a single street does not make up a neighborhood and reiterated that the proposed build would appear to be a single-family home. *Id*. at 9:8-15. Ms. Remy further opined her concern about how, should the family structure change, the property could be "rented out to two unrelated parties." *Id.* at 10:1-5. Chairman Paul Attemann (Chairman Attemann) then reminded the Board that applications are to be assessed based on the current needs of the property owner, rather than "conjur[ing] . . . what other property owners might anticipate. . . . " *Id.* at 10:24-11:8.

James and Karen McCanna, of 36 Fairview Drive, expressed further concerns about the "possibilities of [the Appellants] doing other things" with their property. *Id.* at 17:8-14. Following the McCannas' testimony, Chairman Attemann restated that "[a]nyone in an R10 zone has the right . . . to petition for a two-family with [an] [SUP] application to the [B]oard." *Id.* at 23:16-22. Board

Member Holby then questioned if granting the SUP "set[s] a precedent . . . for Laurel Lane[.]" *Id.* at 23:25-24:2. Vice Chair Ellis responded that "we're considering one request for a two family . . . not . . . granting permission for people to start coming and asking for two-families[.]" *Id.* at 24:3-12.

Closing out the testimony was Barbara Dobbyn, of 7 Almeida Drive, which abuts the Appellants' land. She voiced her concern for the "wildlife in this area," should more development occur. *Id.* at 25:9-26:3. Ms. Dobbyn clarified, however, that her concerns were about "development that could occur some time down the road" and the existing wildlife, not with "the development on the street." *Id.* at 25:19-24. She also stated that she felt "this may not be the right venue to raise that issue" but felt like she needed to go on the record with her concern. *Id.* at 26:1-3.

When Bob Rulli, Town Planner, (Mr. Rulli) inquired if the other Board Members had any other comments, Vice Chair Ellis and Board Members Jason J. Rainone, Charles A. Thibaudeau (Board Member Thibaudeau), and Jason M. Nystrom all answered in the negative. *Id.* at 28:6-23. However, Board Member Holby commented that once one SUP is "let . . . in the door," he was worried it would "change the character of the neighborhood in 15 or 20 years[.]" *Id.* at 28:11-18. He further remarked he did not believe this was positive for the neighborhood. *Id.* at 16-18.

Vice Chair Ellis then made a motion to approve the Appellants' application, basing the motion on the testimony the Board had heard, finding the SUP was "compatible with the neighboring land use and that a two-family is a residential use, and the prevailing area is of residential character." *Id.* at 28:25-29:12. Vice Chair Ellis further stated that "[t]here are a mix of housing types within the general vicinity of this location, including other two- and multifamily dwellings." *Id.* at 10-12. He added, "[t]here's no indication it will create a nuisance or a hazard.

The plans submitted show that the house is being developed in conformance with the setbacks and other requirements for this development," and the SUP was "consistent with the prevailing pattern in its relationship to the street . . . [i]t [would have] its own driveway and access," preserving "public safety." *Id.* at 13-19. Vice Chair Ellis noted that the build appeared "to be compatible with the comprehensive plan, and the plan encourages diversity in the housing stock and encourages multigenerational living arrangements within the town." *Id.* at 19-22. Vice Chair Ellis stated the increase in the diversity of the housing stock and meeting the need for helping multigenerational living also supported a finding "that the public convenience and welfare would be served[.]" *Id*. at 29:23-30:2.

Board Member Rainone seconded the motion. *Id.* at 30:5. Board Member Rainone then voted in support of granting the SUP, along with Board Member Ellis and Chairman Attemann. *Id.* at 30:5-23. Board Members Holby and Thibaudeau both voted "[n]o." *Id.* at 30:17-19. The result was three Board Members in support of the motion and two against the motion. *Id.* at 30:5-24. Under the statute and Warren Ordinance, the Appellants needed four out of five of the Board Members to support the motion for the motion to be granted. *See* § 45-24-57(2)(iii), *see also* Warren Ordinance § 32-31. Thus, the Appellants' SUP application fell one vote short of the four votes needed to grant the application. *Id.*

After the vote, Appellant Tracy Joinson asked what grounds the SUP application failed to meet, to which she did not receive a specific answer. Tr. at 31:8-10. Instead, she was told "in the opinion of the board in voting on the motion, two members did not support [Vice Chair Ellis's] motion that all four standards were met." *Id.* at 11-14. Mr. Rulli then informed Tracy Joinson about the appeal process. *Id.* at 15-16. The two Board Members who voted "no" were then asked to speak on the record as to why they voted against the application. *Id.* at 32:1-5. Board Member

Thibaudeau expressed his "problem [was] the Laurel Lane, [he] [doesn't] see the two-families on there," and, in his opinion, "[i]t just doesn't seem. . . to fit the neighborhood." *Id.* at 32:10-12.

Board Member Holby then stated he disagreed with Vice Chair Ellis's findings, that he did not "think the special use will be compatible with the neighboring land uses" and further expressed his concern about setting a precedent. *Id.* at 14-17 He explained he didn't see the "special use" as being compatible with the street because he had "driven around it," and he didn't see "two-families being part of the comprehensive plan on Laurel Lane." *Id.* at 32:20-33:2. He also opined that the public convenience and welfare would not be served, stating "at least two [Laurel Lane residents] are questioning" the build, and that the venue of Zoom negatively impacted his decision, stating "when we're all out of the house and their other neighbors have a greater ability to object to these things and better reasoning, then there are more people for it, I might change my position on that," but he doubted it. *Id.* at 33:3-12.

The Zoning Board recorded its Decision denying the Appellants' application for an SUP on September 14, 2020. *See* Zoning Board Decision. Appellants timely filed their appeal with this Court on September 24, 2020. *See* Compl.

II

Standard of Review

Pursuant to § 45-24-69, the Superior Court possesses appellate jurisdiction to review a zoning board's decision and "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 may affirm the decision . . . or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced" by "findings, inferences, conclusions, or decisions" that 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." *Id.*

The Superior Court must "examine the whole record to determine whether the findings of the zoning board [are] supported by substantial evidence." *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (internal quotation omitted). Substantial evidence is "'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.'" *Pawtucket Transfer Operations, LLC, v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (quoting *Caswell v. George Sherman Sand & Gravel Co.*, 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,"' the decision must be upheld. *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)).

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 Town of New Shoreham*, 770 A.2d 396, 399 (R.I. 2001); *see also* § 45-24-69(d)(5).

Further, our 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 (internal quotation omitted). Judicial review of a board's decision is impossible "unless the board . . . ma[kes] factual determinations and applie[s] appropriate legal principles in such a way that a judicial body might reasonably discern the manner in which the board ha[s] resolved evidentiary conflicts." *Cranston Print Works Co. v. City of Cranston*, 684 A.2d 689, 691 (R.I. 1996). This Court will "neither search the record for supporting evidence nor will [it] . . . decide for [itself] what is proper in the circumstances." *Id*. at 692 (internal quotation omitted); *see also Berg v. Zoning Board of Review of City of Warwick*, 64 R.I. 290, 293, 12 A.2d 225, 226 (1940) ("even though there be a stenographic or otherwise substantial report of the testimony, we do not intend to speculate as to the grounds on which such a board bases its decision"). As observed by our Supreme Court,

> "'The issue here . . . is not one of form, but the content of the decision; and what . . . must [be] decide[d] is whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles. Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany. These are minimal requirements. Unless they are satisfied, a judicial review of a board's work is impossible.'" *Irish Partnership v. Rommel*, 518 A.2d 356, 358-59 (R.I. 1986) (quoting *Zammarelli v. Beattie*, 459 A.2d 951, 953 (R.I. 1983)).

III

Analysis

Adequacy of the Board's Decision

Here, the Court must consider whether the Zoning Board's Decision included sufficient findings of fact and conclusions of law to permit review of the Decision itself.

The Rhode Island Legislature has mandated that "[t]he zoning board of review shall include in its decision all findings of fact . . ." Sec. 45-24-61(a). In addition, the Rhode Island 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.*, 684 A.2d at 691). 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*, 518 A.2d at 358).

Further, the findings must be factual rather than conclusional, and the application of the legal principles must be something more than a recital or 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.

With respect to SUPs, the Warren Ordinance provides "[u]ses requiring the granting of a special use permit in this ordinance shall be permitted by the Zoning Board of Review, following a public hearing, only if in the opinion of the board, such uses meet the following standards:

> "A. They will be compatible with the neighboring land uses;
> "B. They will not create a nuisance or a hazard in the neighborhood;

> "C. They will be compatible with the comprehensive community plan; and
> "D. The public convenience and welfare will be served." Warren Ordinance § 32-30.

Further, for an SUP to be granted, "the concurring vote of four (4) members of the board shall be required to decide in favor of an applicant in a matter involving a . . . . special use permit, upon which it is authorized to pass under the terms of this ordinance. *Id.* § 32-21.

Pursuant to both the Rhode Island General Laws and the Warren Ordinance, four out of the five Board Members were required to vote in support of the SUP for it to be granted. *See* § 45-24-57(2)(iii), *see also* Warren Ordinance § 32-21. Here, the Zoning Board's Decision reflects only three Board Members voted in support of the Appellants' SUP application, and two Board Members dissented. Board Decision at 3-4. Accordingly, the Appellants' application was denied. *See generally* Board Decision.

Although this application was not granted, the Decision was written in such a way that suggests that it was. *Id.* The Decision lays out the supporting Board Members' reasons clearly, stating each of the four above-mentioned grounds that must be met for an application to be granted and providing clear findings of fact to support the grounds. *Id.* Three Board Members found the SUP would "be compatible with the neighboring land uses" as there is a "mix of housing types within the general vicinity of this area, including two-family . . . dwellings.[3] *Id.* at 3. The supporting Members also stated the SUP "will be compatible with the comprehensive community plan," since "[t]he plan encourages diversity in the housing stock and . . . multi-generational living arrangements. *Id.* Finally, the supporting Board Members recognized that public convenience

[3] It bears noting that there was no conflict in the supporting and dissenting Board Member's findings as to whether a nuisance or hazard would be created in the neighborhood. Board Decision at 3.

and welfare would be served, positing the SUP application would help "to increase the diversity of housing stock and [meet] a need for helping encouraging multi-generational family living in the Town." *Id.* at 4.

The dissenting opinions, however, did not provide sufficient findings of fact. *Id.* The first dissenting Board Member's (Dissenting Board Member 1) no vote simply stated that "Laurel Lane does not have two-family dwellings, and the one proposed would not seem compatible with the neighborhood. *Id.* There is no evidence stated in the Decision to support his finding, and it is in direct conflict with the other supporting Board Members' findings. *Id.* Therefore, this contention is conclusional, not factual. *Bernuth*, 770 A.2d at 401. As such, it is not the Court's job to "search the record for supporting evidence or decide for itself what is proper in the circumstances." *Irish Partnership*, 518 A.2d at 359.

The second dissenting Board Member's (Dissenting Board Member 2) findings also do not provide the sufficient factual findings required for judicial review. Board Decision at 4. According to the Decision, Dissenting Board Member 2 stated he did not think the SUP would be compatible with the neighboring land uses, that the SUP "seems to be setting a precedent" and "doesn't seem compatible with [Laurel Lane]." *Id.* He further contended he did not see a two-family as a part of the comprehensive plan of Laurel Lane. *Id.* Finally, he alleged the public welfare and convenience would not be served, citing the testimony of the abutters. *Id.*

Dissenting Board Member 2's assertions as to the SUP's compatibility with neighboring uses and the comprehensive plan are in direct conflict with the supporting Board Member's findings and fail to "state the evidence on which it relies" to support such findings. *Our Lady of Mercy Greenwich, Rhode Island v. Zoning Board of Review of Town of East Greenwich*, 102 R.I. 269, 274, 229 A.2d 854, 857 (1967) (stating the board of review must state the evidence on which

it relies for the Court to decide whether a decision was based on competent evidence and not made arbitrarily); *see also Hopf v. Board of Review of City of Newport*, 102 R.I. 275, 289, 230 A.2d 420, 428 (1967) (clarifying that where the evidence is conflicting, a decision that fails to give the reasons and the ground(s) upon which it is predicated and point out the evidence in which the ultimate finding(s) are based will be returned to the board for completion and clarification). Like Dissenting Board Member 1's statements, Dissenting Board Member 2's statements are conclusional rather than factual. *Bernuth*, 770 A.2d at 401.

Dissenting Board Member 2 does cite some evidence to support his assertion about the public welfare and convenience not being met—based on the testimony of the abutters. Board Decision at 4. However, this is as far as he goes, no specifics as to the testimony on which he relies are given, nor does he give evidence to support his other conclusions for denying the application. *Id.* Where the Board fails to give reasons for denying relief and the evidence in question is in conflict, it is not the Court's role to speculate. *See Bilodeau v. Zoning Board of Review of City of Woonsocket*, 101 R.I. 73, 74, 220 A.2d 224, 225-26 (1966); *see also Our Lady of Mercy Greenwich*, 102 R.I. at 273-74, 229 A.2d at 857. As stated earlier, "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. As such, Dissenting Board Member 2's statements regarding the public welfare and convenience also lack the factual findings required by this Court. This assertion, like the others provided, is conclusional, rather than factual, and there still exist unresolved evidentiary conflicts. *Bernuth*, 770 A.2d at 401 (quoting *Irish Partnership*, 518 A.2d at 358).

Accordingly, because neither of the dissenting Board Members made sufficient findings of fact to support their decisions to deny the application, judicial review of the ultimate Decision is

not permitted at this stage. Board Decision at 4; *Bernuth*, 770 A.2d at 401. As such, this Court remands the Decision back to the Zoning Board to make the required sufficient findings of fact and conclusions of law supporting the Decision, as needed to permit judicial review. *See Roger Williams College v. Gallison*, 572 A.2d 61 (R.I. 1990); *Ridgewood Homeowners Association v. Mignacca*, 813 A.2d 965 (R.I. 2003).

IV

Conclusion

This Court finds that the Zoning Board did not make sufficient findings of fact or conclusions of law which are required by this Court to support the denial of the Appellants' SUP request. Therefore, the Zoning Board Decision must be remanded back to the Zoning Board to make sufficient findings of fact consistent with this Court's Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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DATE DECISION FILED:	**October 28, 2021**
JUSTICE/MAGISTRATE:	**McGuirl, J.**
ATTORNEYS:	
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For Defendant:	**Anthony DeSisto, Esq.**