STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: March 15, 2022)

DAVID A. CALDWELL, JR. and ERNESTINE MERCURIO *Appellants,*	:	
v.	:	**C.A. No. WC-2018-0005**
THE ZONING BOARD OF REVIEW OF THE TOWN OF NARRAGANSETT and CHRISTOPHER ALMON, JOSEPH PAGLIA, JAMES MANNING, GERALDINE CITRONE, JOHN KENNEDY, in their capacities as Members of the Zoning Board of Review *Appellees,*	:	
and	:	
COLLEEN COLABELLA *Defendant Intervenor.*	:	

DECISION

TAFT-CARTER, J. Before this Court for decision is the zoning appeal of David A. Caldwell, Jr. (Caldwell) and Ernestine Mercurio (Mercurio) from the December 18, 2017 Decision (Decision) of the Zoning and Platting Board of Review of the Town of Narragansett (Board). In that Decision, the Board denied Caldwell and Mercurio's request for a Front-yard Setback Variance from Section 6.4 of the Narragansett Zoning Ordinance and a Special Use Permit from the Coastal Resources Overlay District for Section 4.4 of the Narragansett Zoning Ordinance. An intervenor, Colleen Colabella (Intervenor Colabella), joined as a defendant in opposition of Caldwell and Mercurio's appeal. For the reasons set forth in this Decision, this Court affirms the Decision of the Board. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Mercurio is the owner of two abutting vacant lots (Lots) located on Pocono Road in Narragansett, Rhode Island, designated as Lots 221 and 241 on Assessor's Plat L by the Town of Narragansett. (Application at 1.) The Lots comprise an area of 9,157 square feet. *See* PB Project Summary at 1, Nov. 7, 2017. Caldwell and his spouse, Christina Caldwell, have an equitable interest in the property by virtue of a Land Purchase and Sales Agreement with Mercurio. (Compl. ¶ 6.) On or about March 20, 2017, Mercurio and Caldwell (collectively, Appellants) filed an application (Application) to construct a single-family detached dwelling on the Lots. (Compl. ¶ 7.)

The Lots abut Pocono Road in the front, two residential properties on the sides, and the Atlantic Ocean in the rear. *See* Appellants' Mem. Attach. A (Appraisal). Adjacent to the Lots is a public access path to the beach. *See id.* According to the 1960 tax assessor's maps, the path is referred to as a right-of-way and is not part of the Lots. (Tr. 50:18-51:10, Nov. 16, 2017.) The Lots are located in an R-10 Residential Zoning District and within the Special Flood Hazard Area Overlay District. (Application at 1; PB Project Summary at 1, Nov. 7, 2017.) An R-10 Residential Zoning District requires lots to be 10,000 square feet. *See* Narragansett Zoning Ordinance § 6.4. In addition to the Lots' already restricted size, approximately 3,884 square feet of the Lots are unbuildable due to rocky beach and shoreline. (PB Project Summary at 2, Nov. 7, 2017.) There are "coastal features" in the rear of the property, including a coastal cobble beach and a riprap

revetment.[1] *Id.* As a result, approximately 5,273 square feet of land can be considered for development (before taking any setback requirements into consideration). *Id.*

Appellants' original Application sought approval to construct a thirty foot by sixty-two foot irregularly shaped dwelling on the Lots. (PB Project Summary at 1, Nov. 7, 2017.) The proposed three-story, four-bedroom structure would have been thirty-nine feet in height. *Id.* The original proposed structure would have covered 1,722 square feet. *Id.* The proposed project (Project) was later amended to request construction of a thirty foot by fifty-two-foot structure, which would have reduced the lot coverage to 1,452 square feet. (Decision at 1, Dec. 18, 2017.)

The Project required a Variance and Special Use Permit from the Coastal Resources Overlay District. (PB Project Summary at 1, Nov. 7, 2017.) Section 4.4 of the Narragansett Zoning Ordinance defines coastal resource overlay districts as extending inland 200 feet from coastal features. Narragansett Zoning Ordinance § 4.4. Under this ordinance, an applicant cannot build within the 200-foot radius, unless the applicant obtains a variance and special use permit. *Id.* For the Project, Coastal Resources Management Council (CRMC) stated that the "coastal feature(s) shall be the coastal (cobble) beach and the riprap revetment and the inland edge . . . of the top of the revetment." (PB Project Summary at 2, Nov. 7, 2017.) The Appellants cannot build within 200 feet from the inland edge of the riprap revetment without a Variance and Special Use Permit. *See* Narragansett Zoning Ordinance § 4.4; PB Project Summary at 2, Nov. 7, 2017. The amended proposal placed the dwelling 24.5 feet from the coastal feature, requiring a 175.5-foot Variance and a Special Use Permit from the Coastal Resources Overlay District pursuant to § 4.4 of the

[1] "A loose assemblage of broken stones erected in water or on soft ground as a foundation." *American Heritage Dictionary* 1503 (4th ed. 2000) (defining "riprap").

Narragansett Zoning Ordinance. (PB Project Summary at 1, Nov. 7, 2017; Decision at 1, Dec. 18, 2017.)

The Project also required a Variance from the Dimensional Regulations. (PB Project Summary at 1, Nov. 7, 2017.) Dimensional Regulations of § 6.4 of the Narragansett Zoning Ordinance require a minimum front-yard setback of twenty-five feet in an R-10 Residential Zoning District. Narragansett Zoning Ordinance § 6.4. As proposed, the Project would have a front-yard setback of 14.3 feet. (PB Project Summary at 2, Nov. 7, 2017.) As such, the applicants requested a 10.7-foot Front-yard Setback Variance from the Dimensional Regulations under § 6.4 of the Narragansett Zoning Ordinance. *Id.* at 2.

Planning Board Project Summary

On November 7, 2017, the Town of Narragansett Planning Board (Planning Board) released a project summary (Project Summary), including its recommendation. (PB Project Summary at 4, Nov. 7, 2017.) In making the recommendation, the Planning Board received and reviewed information and plans from the Appellants and other supplementary documents[2] during its October 17, 2017 meeting. *Id.*

[2] A site review application must include written recommendations concerning the proposed subdivision from the CRMC in the form of a preliminary determination as provided in the Rhode Island Coastal Resources Management Program, or any applicable Special Area Management Plans. The application must also include Rhode Island Department of Environmental Management verified locations of coastal features within the subdivision parcel or within 200 feet of the perimeter of the subdivision parcel. Other materials that applicants must submit include a drainage plan and calculation by a Registered Professional Engineer, utilities plan, grading plan in sufficient detail to show proposed contours for all grading proposed for on and off-site construction, as well as property boundaries and adjacent streets. Applicants must submit these materials and more with their application to the Planning Board, which then makes a preliminary recommendation for the Board. *See* Narragansett Zoning Ordinance § 18.2.

The Staff Comments of the Project Summary noted the total area of the Lots, the portion of the Lots that was beach and therefore undevelopable, and the approximately 5,273 square feet of the Lots which was buildable. *Id.* at 2. The Planning Board acknowledged the Town of Narragansett's height restriction of thirty-five feet. *Id.* State law allows for the freeboard[3] to be removed from this calculation, and, as a result, the Planning Board found the Project was in compliance with the height restriction. *Id.* The Planning Board indicated that a CRMC Staff Geologist commented in the CRMC's written recommendation that "this dwelling footprint is larger than many of the surrounding dwellings." *Id.* at 1-2. In a previous application to construct a dwelling on the Lots, "CRMC staff noted that the dwelling '*should be reduced in size to the absolute minimum.*'" *Id.* at 3.

Based on the materials "[a]s submitted, Staff contends this project is not the least variance necessary from either the front-yard lot line, or the coastal feature, nor does it serve to enhance the protection of the environmentally sensitive feature(s)." *Id.* at 3. The Planning Board explained that "the Front-yard Setback Variance only serves to allow for a much large[r] dwelling than this compromised lot should support." *Id.* The Staff Comments concluded:

> "As submitted, Staff contends this [P]roject is not the least variance necessary from either the front-yard lot line, or the coastal feature, nor does it serve to enhance the protection of the environmentally sensitive feature(s). There are alternatives to the proposed [P]roject that would still yield a beneficial use of this property." *Id.*

[3] Freeboard is essentially raising a structure's first floor to a height about the minimum base flood elevation and is statutorily defined as

> "[a] factor of safety expressed in feet above the base flood elevation of a flood hazard area for purposes of floodplain management. Freeboard compensates for the many unknown factors that could contribute to flood heights, such as wave action, bridge openings, and the hydrological effect of urbanization of the watershed." Sec. 45-24-31(29).

In response to the Planning Board's findings, Appellants reduced the length of the proposed dwelling presented to the Board from thirty feet by sixty-two feet to thirty feet by fifty-two feet. (Decision at 2, Dec. 18, 2017.)

The November 16, 2017 Hearing

After the Planning Board issued its recommendation, Appellants submitted the Application to the Board on March 20, 2017. *See* Compl. ¶ 7. A public hearing was scheduled and held on November 16, 2017, at which Appellants presented expert testimony and members of the public were permitted to share their support for or object to the proposal.

1. Testimony of David Caldwell, Jr.

Caldwell testified on behalf of the Project and as an expert in the field of residential construction. (Tr. 4:11-5:7, Nov. 16, 2017.) Caldwell acknowledged that he and his family were the purchasers of the Lots. *Id.* at 5:11-13. Caldwell testified that he intended to use the property as a vacation home but did not exclude the possibility of living there permanently in the future. *Id.* at 5:14-20. Caldwell explained that the size of the Project was reduced at the recommendation of the Planning Board to increase the side-yard setback. *Id.* at 6:1-18. Caldwell described the dwelling as irregularly shaped with a depth of thirty feet on one end and twenty-seven feet on the other. *Id*. at 6:21-25.

Caldwell further testified that, in his opinion, the depth of the house "would not be considered excessively wide[.]" *Id*. at 7:14-25. He went on to explain that the depth is "fairly minimal in the zone of what would be considered normally -- anything beneath that, would be getting pretty small." *Id.* at 8:1-3. Caldwell noted that there was an elevator proposed in the plans, for his mother's use. *Id.* 8:7-9. Additionally, Caldwell reported that the Project proposed a base floor elevation of fifteen feet and a base flood elevation of seventeen feet. *Id.* at 8:20-9:4.

The Board questioned Caldwell about the new design and asked him to clarify the layout of the home. *Id.* at 10:8-15:3. Caldwell explained that the design was rushed, and the interior had not yet been redesigned. *Id.* at 12:18-21. Caldwell explained that one side of the house is thirty feet deep to accommodate the elevator. *Id.* at 13:12-16. When asked about the possibility of narrowing the side opposite the elevator, Caldwell responded that "[i]t would be possible." *Id.* at 13:21-14:2.

Next, Caldwell presented an aerial photograph of the neighborhood. *Id.* at 16. Caldwell pointed to two properties on the plan with similar front-yard setbacks. *Id.* at 16:17-17:2. *Caldwell* contended that one of the properties was closer to the street than the Project. *Id.* at 16:25-17:2. *An* audience member interjected that the property was not closer; however, a Board member agreed with Caldwell that the property did look closer to the street. *Id.* at 17:5-9.

2. Testimony of Craig Richard Carrigan

The next witness to testify was Craig Richard Carrigan (Carrigan), a registered professional engineer in the State of Rhode Island. *Id.* at 17:23-18:9. The Board was familiar with Carrigan and recognized him as an expert in the field of professional engineering. *Id.* at 18:12-15. Carrigan testified that he recently revised and submitted the plan that was the focus of the proceedings. *Id.* at 18:17-19:3. Carrigan confirmed that the Lots are vacant, zoned R-10 (residential), have a failed seawall section, and are the last undeveloped lots on Pocono Road. *Id.* at 19:10-14.

Carrigan explained that he "sited the house on the property to try to maximize the distance from the coastal feature, which is the back of the existing seawall" (the revetment). *Id.* at 20:12-15. Carrigan explained the need for dimensional variance was to obtain a better setback from the coastal feature. *Id.* at 22:11-17. Carrigan also clarified that, when siting the dwelling, he had the option of encroaching closer to either the revetment or the road. *Id.* at 22:18-22. Seawall

reconstruction was proposed, partially at the request of the CRMC. *Id.* at 23:11-14. The Board later questioned Carrigan concerning the revetment. *Id.* at 28-29. He explained that the wall would not be as high as the adjacent properties but that there were plans to add to the wall. *Id.* at 28:10-29:2. Carrigan stated that the revetment would consist of boulders; the revetment would not be reinforced with concrete or anything else and would consist simply of riprap. *Id.* at 29:3-9.

Carrigan testified that the property would be serviced by public sewage and public water. *Id.* at 23:3-8. Roof drainage would be routed to the rain garden located in the corner of the Lots. *Id.* at 23:15-17. This drainage plan was reviewed and approved by the town engineering department. *Id.* at 24:17-24. Carrigan explained that a silk fence would be installed as sedimentation and erosion control measures during construction. *Id.* at 25:5-10. He continued that, "[f]rom an engineering standpoint," the Project will not degrade the value of any tidal waters or existing water quality, and that the Project would not increase the volume or velocity of any storm water runoff. *Id.* at 25:17-26:5. Carrigan testified that the Project would improve the value of any shoreline storm or hurricane buffer by the reconstruction of the revetment. *Id.* at 26:6-10. Carrigan concluded his testimony by stating that the Project would not pose a threat to public health and would not injure the appropriate use of any surrounding property. *Id.* at 27:10-12.

3. Testimony of Scott Rabideau

Scott Rabideau (Rabideau) also testified on behalf of the Appellants. *Id.* at 31. Rabideau is a wetland biologist and was acknowledged as an expert in wetland biology. *Id.* at 32:18-22. Rabideau reiterated Carrigan's sentiment that the Project would improve the structural shoreline protection. *Id.* at 36:22-37:10. As a wetland scientist, Rabideau opined that the proposed Project would be consistent with the neighborhood. *Id.* at 37:11-19. Rabideau also stated that the proposed Project would not degrade existing water quality, that the storm water management would be in

accordance with the town and State standards, and that any storm water runoff would go through the rain garden prior to infiltration and discharge. *Id.* at 37:20-38:8.

Rabideau was asked if he identified any habitat for fish, shellfish, or wildlife that would be negatively impacted by the Project. *Id.* at 38:9-11. Rabideau acknowledged a habitat offshore but stated that the Project would not impact "anything on the beach or sea with the revetment." *Id.* at 38:12-15. Rabideau concluded that the Project would not have any impact on wildlife habitat or shoreline erosion. *Id.* at 38:22-23, 39:2-5.

Further, Rabideau testified that the Project would not diminish the value of the shoreline feature but rather would improve the integrity of the revetment. *Id.* at 39:17-23. The Board asked about historical photographs of the revetment. *Id.* at 40. Rabideau explained that, over time, portions of the shoreline eroded prior to the revetment being put in place and that if something was not done about the failed revetment section, the erosion could continue. *Id.* at 40:9-43:8. More importantly, Rabideau explained that if erosion began behind the wall, CRMC would not allow someone to refill with soil, and the only solution would be to move the revetment further inland to the soil. *Id.* at 42:8-14. Rabideau opined that the revetment should be shored up and appropriately fixed. *Id.* at 43:12-14.

The Board also asked about the possibility of removing the Project from the floodplain. *Id.* at 43:18-44:12. Rabideau explained that CRMC also addressed this in its report recommending a smaller house. *Id.* at 44:13-45:20. Rabideau explained that the geologist gave two options: 1) make sure the house is high enough, with enough freeboard to take into account the current level of potential flooding and future potential levels; or 2) "reduce the width of the house and get it out of the flood zone." *Id.* at 44:13-45:17. Rabideau testified that the current proposal fulfilled the first option. *Id.* at 44:13-45:1.

4. Testimony of George Daglieri

Next to testify on behalf of the Appellants was George Daglieri (Daglieri), who is a certified real estate appraiser and licensed real estate broker. *Id.* at 46:20-47:5. The Board acknowledged his expertise in the field of real estate appraisal. *Id.* at 47:7-11. Daglieri had prepared a written report for the Project. *Id.* at 47:14-16.

Daglieri testified that the area was once comprised mostly of summer cottages but that the area is rapidly changing into a mixed-use area with both summertime and year-round residents. *Id.* at 48:5-10. The written report was a brief neighborhood analysis, with pictures. *Id.* at 47:19-24. In summarizing the written report, Daglieri explained that the neighborhood is very dense with numerous small cottages, average homes, and many new homes. *Id.* at 48:19-25. Daglieri explained that the house to the north, a direct abutter, had lot coverage of about nineteen percent and that the house is close to the road, as pointed out by Carrigan. *Id.* at 51:16-22. Daglieri also discussed a property at 42 Pocono Road that has a 1,624 square foot footprint, covering twenty-three percent of the lot. *Id.* at 53:7-10. Daglieri concluded his testimony by stating that larger dwellings (as opposed to small cottages) were the trend and that "it's become a more affluent society every day." *Id.* at 54:5-11.

5. Testimony of Abutters

Abutters and others also shared their opinions on the Project. *Id.* at 76-104. Intervenor Colabella testified that she has lived across the street for thirty years and has seen the Lots "slowly slip into the sea." *Id.* at 78:16-22. Intervenor Colabella also testified that Mercurio has let the Lots decline, despite being contacted and encouraged to repair the seawall. *Id.* at 78:23-79:2. Intervenor Colabella argued that "[m]uch of the reason that this lot is now unbuildable is because of the landowner doing absolutely nothing to maintain her property for the 45 years that she had owned

the land" and that the need for the variance is self-inflicted. *Id.* at 79:3-8. Kathleen Larkin (Larkin) explained that her family previously owned Pocono Road and developed the area for over thirty years. *Id.* at 83:15. Larkin stated that a map presented to the Board was old and that since Hurricane Sandy there was much more erosion.[4] *Id.* at 84:2-4.

At the conclusion of the hearing, the Board heard closing arguments and then set a date to issue a written decision. *Id.* at 87-104.

Written Decision

The Board issued a written decision on December 18, 2017. (Decision at 1, Dec. 18, 2017.) Based on the information presented at the public hearing and the testimony given, the Board made thirty-six findings of fact. *Id.* The Board found that the Lots are approximately 9,157 square feet in area and located in an R-10 Residential Zoning District. *Id.* The Board noted that the Project did not comply with the Dimensional Regulations of Section 6.4 of the Narragansett Zoning Ordinance because the Project proposed a 14.3-foot Front-yard Setback but Section 6.4 requires a Front-yard Setback of at least 25 feet. *Id.* The Board found the Project would be located in the Coastal Resources Overlay District, and the proposed improvements would be located approximately 24.5 feet from the coastal feature. *Id.* Additionally, the Board indicated that the Project is located in a Federal Emergency Management Agency flood zone with a Base Flood Elevation of seventeen feet. *Id.* at 2. Next, the Board wrote that the proposed building height is thirty-nine feet and is allowed under state law within the Special Flood Hazard Area. *Id.* The Board also explained that CRMC noted that the coastal feature was to be calculated by the inland edge of the revetment. *Id.* The Board also explained that the CRMC Staff Geologist commented that a smaller dwelling could be constructed outside the floodplain and that the proposed dwelling

[4] It is unclear from the transcript alone to what section of the Lots Larkin was referring.

footprint was larger than many of the surrounding dwellings. *Id.* Finally, the Project was approved in relation to the supplementary drainage requirements, complies with the parking area requirements, and complies with the Land Use component of the Comprehensive Plan. *Id.* The Board's Decision also summarized the testimony given at the public hearing. *Id.* at 2-5.

Based on the findings of fact and the testimony presented at the public hearing, the Board found that the relief requested was not the least relief necessary. *Id.* at 5. The Board explained that the Appellants did not meet the legal burden of "demonstrating that the proposed Project seeks the least relief necessary from either the front-yard lot line, or the coastal feature, nor does it serve to enhance the protection of the environmentally sensitive feature(s)." *Id.* The Decision went on to say that "only approximately 5,273 [square feet of the Lots] can be considered for development." *Id.* The Board ruled that the proposed structure was too large for the constrained Lots but, more importantly, noted that Caldwell testified that a smaller dwelling could be constructed. *Id.* The Board found that a reduction in the dwelling footprint would serve to reduce the length and/or linear distance of the front-yard setback variance requested and would also increase the distance from the coastal feature thereby reducing the size of the variance requested from Coastal Resources Overlay District. *Id.*

As a result, "[b]ased upon the adoption of Staff findings, the entirety of the record which the Board incorporates herein and foregoing findings of fact," the Board concluded that "the application for a variance was not the least relief necessary." *Id.* A motion was made to deny the requested relief and passed unanimously (5-0). *Id.* at 6.

On January 2, 2018, Appellants filed the present Complaint, appealing the Board's Decision. On February 8, 2018, Intervenor Colabella filed a Motion to Intervene as a party defendant, noting that she "will be directly and significantly affected by the outcome in this

action[.]" (Mot. to Intervene, 2.) Appellants objected to Intervenor Colabella's Motion to Intervene. However, this Court issued an order granting the motion on February 22, 2018.

II

Standard of Review

Superior Court review of zoning board decisions is governed by § 45-24-69(d). That section 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." Sec. 45-24-69(d)

The Superior Court must "'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). Substantial evidence is defined as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." *Iadevaia v. Town of Scituate Zoning Board of Review*, 80 A.3d 864, 870 (R.I. 2013) (quoting *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (internal quotation marks omitted)). If the Court finds

that the zoning "board's decision was supported by substantial evidence in the whole record," then the zoning board's decision must stand. *Lloyd*, 62 A.3d at 1083. However, if the decision of the board does not contain sufficient findings of fact and conclusions of law for our Court to adequately review the decision, the Court will remand the matter to the board so that the board may issue a ruling that is complete and susceptible to judicial review. *See Irish Partnership v. Rommel*, 518 A.2d 356, 359 (R.I. 1986) (returning matter to the zoning board of review).

III

Analysis

Appellants challenge the sufficiency of the Board's Decision denying the requested dimensional variance and special use permit, arguing that the Board's Decision "was clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record." (Appellants' Mem. 8.) Specifically, Appellants argue that the Board improperly based the Decision on one factor, that the relief sought was "not the least relief necessary." *Id.* The Board requests that this Court affirm the Decision and deny Appellants' appeal. (Board's Mem. Opp'n Appeal (Board's Mem.) 9.) Intervenor Colabella also requests that this Court uphold the Board's Decision, arguing that the Decision was supported by the weight of the evidence. (Intervenor Colabella's Mem. Opp'n Appeal (Intervenor Colabella's Mem.) 15.)

A

Dimensional Variance

At issue in this case is the propriety of the Board's Decision denying the Appellants' request for dimensional variances. Appellants argue that a line by line review of the Board's Decision shows "that each facet of the Board's reasoning was clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record, arbitrary and capricious, and

characterized by an abuse of discretion or clearly unwarranted exercise of discretion. (Appellants' Mem. 9.) The Board contends there were sufficient findings to support the conclusion that the Appellants' Application did not meet the required criteria. (Board's Mem. 6.) Intervenor Colabella argues that the Board's Decision was supported by the weight of the evidence and the relief Appellants requested was not the least relief necessary. (Intervenor Colabella's Mem. 11.)

In granting a dimensional variance, a zoning board must find that an applicant satisfied the requirements of §§ 45-24-41(d)(1-4) and (e)(2). Section 45-24-41 governs dimensional variances. The applicants have the burden of proof and must present evidence to the zoning board of review demonstrating the following:

> "(1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(a)(16);
> "(2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;
> "(3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and
> "(4) That the relief to be granted is the least relief necessary." Sec. 45-24-41(d).

Additionally, § 45-24-41(e)(2) requires the applicant to submit evidence showing that "the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience." Sec. 45-24-41(e)(2); *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 691 (R.I. 2003). In *Lischio*, our Supreme Court held that "more than a mere inconvenience" "means that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property." *Id.* The applicant for a dimensional variance has the burden of proof on each and every prong of the standard. *See, e.g.*,

Christy v. Zoning Board of Review for City of Warwick, No. KC 04-0247, 2005 WL 2476231, at *7 (R.I. Super. Oct. 4, 2005).

1

Hardship

The first element of this analysis requires applicants to demonstrate "[t]hat 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[.]" *New Castle Realty Co. v. Dreczko*, 248 A.3d 638, 647 (R.I. 2021) (quoting § 45-24-41(d)(1)).

Appellants argue that the Board abused its discretion by failing to acknowledge that the constraints of the Lots present a hardship and that dimensional relief is required to construct any dwelling on the Lots. (Appellants' Mem. 12-14.) Appellants argue that, instead, the Board improperly used the Lots' constraints as a reason for denial in its Decision. *See id.* at 13, 15. Additionally, Appellants maintain that Caldwell did not create the Lots' constraints and also argue that "[c]iting the prior owner's caretaking, or lack thereof, of the property, without any expert testimony to support that contention, should not and cannot be a basis for a board's decision to deny[.]" *See id.* at 12-14. Specifically, Appellants reference the following portion of the Board's Decision as problematic:

> "Although the [Lots] measure[] 9127 sq. ft.[,] approximately 3884 sq. ft. of the [Lots] is comprised of rocky beach and shoreline. That leaves only approximately 5273 sq. ft. of land that can be considered for development . . . The Applicant is seeking relief to construct a 52 ft. long, 27-30 ft. wide, 3-4 bed, 3-4 bath home with a three story elevator. The Board finds that this proposed structure is too large a structure for this constrained lot. Mr. Caldwell, the proposed developer of the lot, testified that a smaller dwelling could be constructed on the lot." *See id.* at 12, 13-14. (citing Decision at 5, Dec. 18, 2017.)

The record of the Board clearly establishes that the Board considered the unique character of the land. For instance, the Board heard testimony from Carrigan explaining that the need for dimensional variance was to obtain a better setback from the coastal feature. (Tr. 22:11-17, Nov. 16, 2017.) Carrigan also testified that, when siting the dwelling, he had the option of encroaching closer to either the revetment or the road. *Id.* at 22:13-22.

> "[BOARD MEMBER]: . . . why are we trying to put the house closer to the road?
>
> "[CARRIGAN]: To obtain better setback from the actual coastal feature and protect that . . . particular resource, sorry.
>
> "[BOARD MEMBER]: So when you were laying out the house, you had an option of either encroaching closer to the rip-rap wall on the coastal feature or a little bit closer to the road?
>
> "[CARRIGAN]: That is correct." *Id.*

Furthermore, the portion of the Decision's text to which Appellants cite demonstrates that the Board recognized the Lots' constraints because the Board specifically noted that the rocky beach and shoreline prevented development on a portion of the "constrained lot." (Decision at 5, Dec. 18, 2017.) Later in the Decision, the Board also noted that a reduction in the size of the dwelling would "reduce the size of the variance requested[,]" which demonstrates that, contrary to Appellants' argument, the Board understood some dimensional relief would be required to construct a home on the property. *See id.* As such, Appellants' argument that the Board failed to consider the Lots' constraints is without merit.

Similarly, Appellants' argument that the Board used the dimensional limitations against the Applicant and as a reason for denial contradicts the text of the Decision, which states three separate times that the Board's reason for denial was that the Appellant failed to demonstrate the

relief was the least relief necessary.[5] *See id.* At no point in the Decision did the Board state that Appellants failed to meet their burden of proving "[t]hat the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure[.]" *See id.*; *see also* § 45-24-41(d)(1).

Appellants' argument that a zoning board cannot cite to a prior owners' lack of caretaking as a reason for denial is misplaced for two reasons. First, Appellants' contention that Caldwell had nothing to do with the physical constraints ignores that Mercurio is also an applicant on this Project and § 45-24-41(d)(2) requires that the hardship necessitating a dimensional variance "not [be] the result of any prior action of the *applicant*" and "not result primarily from the desire of the *applicant* to realize greater financial gain[.]" *See New Castle Realty Co.*, 248 A.3d at 647 (quoting § 45-24-41(d)(2)) (emphasis added). Second, although the Board noted hearing such testimony in the Findings of Fact portion of the Decision, the Board did not cite self-created hardship or the prior owner's lack of caretaking as a reason for denying Appellants' request for a dimensional variance. (Decision at 4, Dec. 18, 2017.) In summarizing testimony from the public hearing, the Board wrote only that Intervenor Colabella "argued that Mrs. Mercurio has neglected the lot and has not maintained the seawall." *Id.* This statement was supported by testimony from Intervenor Colabella that Mercurio had not cared for the property and refused to repair the riprap revetment on numerous occasions. (Tr. 78:23-79:2, Nov. 16, 2017.) Intervenor Colabella also testified that "[m]uch of the reason that this lot is now unbuildable is because of the landowner doing absolutely

[5] First, the Board wrote that the Project did not meet the following element: "1. That the relief to be granted is the least relief necessary" and did not list any other reasons. *See id.* Second, the first sentence in the Decision's body paragraph states "that the Applicant has not met its legal burden by demonstrating that the . . . Project seeks the least relief necessary . . ." *See id.* Third, the final sentence of the Decision's body paragraph states that "the Board concluded that the application for a variance was not the least relief necessary." *See id.*

nothing to maintain her property for the 45 years that she had owned the land" and that the need for the variance "is self-inflicted." *Id.* at 79:3-8. As such, the Board accurately described Intervenor Colabella's argument, but the Board was not using this argument as a basis for denial.

In sum, Appellants' arguments in relation to hardship are not supported by the very text of the Decision to which Appellants cite, because the Board never indicates failure to demonstrate hardship or lack of self-created hardship as a reason for denial. *See generally* Decision, Dec. 18, 2017. Moreover, in Appellants' own memorandum, they argue that "the Board based its decision on one sole factor that the relief sought was 'not the least relief necessary[.]'" (Appellants' Mem. 8.) As such, there was no abuse of discretion.

2

Least Relief Necessary

Appellants argue the Board's Decision was clearly erroneous in view of the evidence of the whole record and specifically note that the Board based its Decision on one factor. *Id.* Appellants argue that the first sentence of the Board's Decision, finding "that the Applicant has not met its legal burden by demonstrating that the proposed Project seeks the least relief necessary from either the front-yard lot line, or the coastal feature . . ." is flawed because the determination conflicts with itself. (Decision at 5, Dec. 18, 2017; Appellants' Mem. 9.) Specifically, Appellants argue that any structure will require both an encroachment into the Coastal Overlay zone and the front yard setback. (Appellants' Mem. 10.) As a result, Appellants argue that evidence of the inability to construct a home without dimensional relief was sufficient to demonstrate that Appellants had sought the least relief necessary. *Id.* at 10-11. The Board and Intervenor Colabella argue that Appellants failed to submit evidence that the requested relief was the least relief necessary and that the evidence before the Board supported the Board's Decision. (Board's Mem.

6; Intervenor Colabella's Mem. 11.) Intervenor Colabella also points out that "[n]o evidence was submitted into the record to demonstrate why the size of the structure was reasonably necessary or whether the structure could be redesigned in a manner to reduce the extent of the dimensional variance requested[.]" (Intervenor Colabella's Mem. 13.)

As an initial matter, this Court shall examine whether it is erroneous for a zoning board to deny a dimensional variance based on one factor, that the applicant failed to prove the requested relief was the least relief necessary, as required by § 45-24-41(d)(4). The Rhode Island Supreme Court examined this issue in *New Castle Realty Co. v. Dreczko*, cited *supra*. In *New Castle Realty Co.*, the Supreme Court upheld a trial justice's decision affirming a zoning board's denial of an applicant's request for a dimensional variance to build a house on an undersized lot, in which the trial justice found that the applicant had failed to establish that the requested relief was the least relief necessary. *New Castle Realty Co.*, 248 A.3d at 638, 641, 648. The trial justice did not cite to any additional reasons for affirming the zoning board's denial of the dimensional variance. *See New Castle Realty Co. v. Dreczko, Jr.*, No. WC-2015-0161, 2018 WL 325033 (R.I. Super. Jan. 3, 2018). Additionally, the applicant for a dimensional variance has the burden of proof on each and every prong of the standard. *See, e.g.*, *Christy*, 2005 WL 2476231, at *7.

This Court's task is to review the whole record and determine whether there is substantial evidence to support the Board's Decision. *See Lloyd*, 62 A.3d at 1083 (quoting *Apostolou*, 120 R.I. at 507, 388 A.2d at 824); Decision at 5, Dec. 18, 2017. "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." *Caswell v. George Sherman Sand & Gravel Co.*, 424 A.2d 646, 647 (R.I. 1981) (citing *Apostolou*, 120 R.I. at 508, 388 A.2d at 824–25).

In *New Castle Realty Co.*, the Supreme Court reasoned that there was substantial evidence to support the trial justice's finding that the applicant's requested relief did not reflect the least relief necessary. *New Castle Realty Co.*, 248 A.3d at 648-49. In determining that there was substantial evidence, the *New Castle Realty Co.* Court pointed to statements made in the record. *Id.* at 648. The Court pointed to a board member's finding that the applicant was "unwilling to consider suggestions of trying to move the house further back, further away from the wetlands by making it smaller or by just making it a two-bedroom house." *Id.* (internal quotations omitted). The Court also noted that during the public hearings, a land surveyor was asked whether a smaller house had been considered, and the land surveyor responded, "[w]e felt that the 22x32 was actually quite conservative" and, further, that a two-bedroom had not been considered because it affected the value of the property and was not popular. *Id.* The Supreme Court found that these statements were substantial evidence to support the trial justice's finding that the applicant failed to demonstrate that the requested relief was the least relief necessary. *Id.* at 648-49.

The present case is comparable to *New Castle Realty Co.* Here, as in *New Castle Realty Co.*, the applicant sought a dimensional variance to build a house on an undersized lot. *See id.* at 641. In the present case, the Board relied on testimony by Caldwell that the size of the proposed dwelling could be reduced. (Decision at 2, 5, Dec. 18, 2017; Tr. 13:21-14:2, Nov. 16, 2017.)

> "[BOARD MEMBER]: So would it be possible, in your opinion, to narrow the house on the other side?
>
> "[CALDWELL]: I'm sorry. Which side?
>
> "[BOARD MEMBER]: The opposite side from the elevator, where it's 27 feet.
>
> "[CALDWELL]: It would be possible, yes." *Id.*

Furthermore, the Board also heard testimony from Rabideau that a smaller home could be constructed. (Tr. 43:18-45:12.)

> "[BOARD MEMBER]: . . . Mr. Rabideau, the staff has commented that the lot appears to have enough area outside of the special flood hazard area situating a dwelling without the need for development within the floodplain. Do you have an opinion with respect to that?
>
> "[RABIDEAU]: . . . if you look at where the floodplain is . . . if you wanted to cut the house back, you know, in this location, it could be out - - it could be out of that floodplain." *Id.*

Rabideau acknowledged that the CRMC noted there was an option to construct a smaller house on the property. (Tr. 44:13-45:4.) He testified that the CRMC provided the "second option would be you could reduce the width of the house and get it out of the flood zone." *Id.*

The Board also reviewed the Planning Board's Project Summary, in which the Planning Board explained that "the Front-yard Setback Variance only serves to allow for a much [larger] dwelling than this compromised lot should support." (PB Project Summary at 3, Nov. 7, 2017.) The Planning Board also indicated that a CRMC Staff Geologist commented in the CRMC's written recommendation that "this dwelling footprint is larger than many of the surrounding dwellings." *Id.* at 1-2. In a previous application to construct a dwelling on the Lots, "CRMC staff noted that the dwelling '*should be reduced in size to the absolute minimum.* '" *Id.* at 3. The Staff Comments concluded:

> "As submitted, Staff contends this [P]roject is not the least variance necessary from either the front-yard lot line, or the coastal feature, nor does it serve to enhance the protection of the environmentally sensitive feature(s). There are alternatives to the proposed [P]roject that would still yield a beneficial use of this property." *Id.* at 3.

Caldwell's admission and Rabideau's testimony to the possibility of decreasing the size of the dwelling provides evidence that Appellants did not seek the least relief necessary. *See New*

Castle Realty Co., 248 A.3d at 648. The Planning Board's Project Summary also affirms that the Appellants did not seek the least relief necessary.

It is well settled that "if expert testimony before a zoning board is competent, uncontradicted, and unimpeached, it would be an abuse of discretion for a zoning board to reject such testimony." *Murphy v. Zoning Board of Review of Town of South Kingstown*, 959 A.2d 535, 542 (R.I. 2008). At the time of Caldwell's testimony, Caldwell was testifying as an expert in residential construction. Further, Rabideau is a wetland biologist expert. As such, the Board would have abused its discretion had the Board ignored the testimony of Caldwell and Rabideau. *See id.*

"The burden is upon the applicant to show 'that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property[.]'" *New Castle Realty Co.*, 248 A.3d at 648 (quoting § 45-24-31(66)(ii)). As argued by Intervenor Colabella, Appellants failed to demonstrate why a smaller house was not a reasonable alternative. *See* Intervenor Colabella's Mem. 13. Intervenor Colabella's attorney testified, "it's hard to argue that [four bedrooms, four baths, and an elevator is] the least you need to enjoy a reasonable, beneficial use of the . . . property." (Tr. 58:10-23, 60:11-15, Nov. 16, 2017.) The record is devoid of any evidence indicating that the proposed Project was the minimum size necessary for Appellants to '"enjoy a legally permitted beneficial use of the subject property[.]'" *See New Castle Realty Co.*, 248 A.3d at 648 (quoting § 45-24-31(66)(ii)).

The Rhode Island Supreme Court has held that an applicant's perceived need for more living space does not satisfy the requirement that an applicant show the resulting hardship from a denial is greater than a "mere inconvenience." *DiDonato v. Zoning Board of Review of Town of Johnston*, 104 R.I. 158, 164, 242 A.2d 416, 420 (1968). In *DiDonato*, the Supreme Court found

that the applicant would not have suffered more than a mere inconvenience if the applicant was not granted a dimensional variance from front-yard and side-yard restrictions. *Id*. at 164, 242 A.2d at 420. The Court found that the applicant had only shown "merely that he would suffer a personal inconvenience" by having to build a smaller house that conformed to the lot restrictions. *Id.*

Likewise, in the instant case, Appellants demonstrated to the Board "merely that [the Appellants] would suffer a personal inconvenience." *See id.* While the Appellants may need dimensional variances due to the nature of the Lots, Appellants' desire to erect a three-story, four bed, four bath home with an elevator is a perceived need for more living space. *See id.* Caldwell testified that the proposed elevator was for his mother's use. (Tr. 8:7-9, Nov. 16, 2017.) Here, the record establishes that Appellants would only suffer a personal inconvenience. As such, the Board had substantial evidence from which to find that a reduction in the dwelling footprint would not be greater than a mere inconvenience.

Alternatively, Appellants rely on *Mercurio v. Zoning Board of Review of the Town of Narragansett*, No. WC 2006-0056, 2007 WL 4471143 (R.I. Super. Nov. 20, 2007), to support their argument. In *Mercurio*, the applicants requested a special use permit and dimensional variance to construct a single-family home on an undersized lot. *Mercurio,* 2007 WL 4471143, at *1. In *Mercurio*, there was testimony that the applicants sought to build a "very small home" and that the property contained a riprap wall. *Id.*, at *2. The *Mercurio* court "[found] no competent, probative evidence to support the Board's ultimate finding" that the appellants had not satisfied each of the four requirements. *Id.*, at *8. The *Mercurio* court found that appellants requested the least relief necessary because without the requested relief they would not be able to make any beneficial use of the property. *Id.*, at *14. In *Mercurio*, "there was testimony that the grading and excavation that

[had] been proposed [was] the minimum necessary in order to construct the proposed single-family dwelling." *Id.,* at *9.

While the square footage of the Lots and the presence of the riprap revetment wall in this case are similar to the characteristics of the property in *Mercurio,* the case is nonetheless distinguishable. *See id.,* at *2. While there was testimony that the proposal in *Mercurio* was the "minimum necessary[,]" the instant record is devoid of evidence that Appellants' proposal is the least relief necessary, and instead, Caldwell admitted to the possibility of reducing the dwelling size. *See id.,* at *9; Tr. 13:21-14:2, Nov. 17, 2017. Further, in *Mercurio,* the proposed dwelling measured twenty feet by thirty-two feet, while Appellants' amended proposed structure measures thirty by fifty-two feet. *See Mercurio*, 2007 WL 4471143, at *2. Appellants' proposal for a three-story home was hardly the "very small home" proposed in *Mercurio. Contra id.* Appellants' proposal is not the least relief necessary "to enjoy *any* legally permitted beneficial use of their property" as was the case in *Mercurio*. *Id.,* at *12.

For the aforementioned reasons, this Court finds that the record reflects substantial evidence to support the Board's finding that Appellants' proposed use of the Lots is not the least relief necessary to be able to enjoy a reasonable use of the property.

3

Testimony Considered

Appellants argue that the Board abused its discretion by (1) failing to consider expert testimony and (2) considering lay testimony of neighbors. (Appellants' Mem. 11, 17.) First, Appellants take issue with the following language in the Board's Decision: "nor does [the Project] serve to enhance the protection of the environmentally sensitive feature(s)." *Id.* at 11. Appellants contend that this language demonstrates that the Board abused its discretion by ignoring expert

testimony from Carrigan and Rabideau about how the Project would not harm, or could even improve, the failed seawall. *Id.* at 11-12. However, in its Findings of Fact, the Board notes that, "Mr. Carrigan also testified that the house was sited so as to maximize the distance from the coastal feature. He also stated that he had obtained a Preliminary Determination from CRMC which requested reconstruction of the seawall." (Decision at 3, Dec. 18, 2017.) The Board noted "[Rabideau] stated that in his opinion the project would not have any adverse impact on the coastal feature. He stated that the repair of the revetment on the lot is necessary to maintain the strength of the shoreline protection . . ." *See id.* As such, the Board did not fail to consider expert testimony.

Second, Appellants cite the following sentence in the Board's Decision: "Additionally the Board finds that a reduction in the size of the dwelling would increase the distance of the dwelling to the coastal feature and reduce the size of the variance requested from Section 4.4." (Appellants' Mem. 17; Decision at 5, Dec. 18, 2017.) After citing this sentence, Appellants do not readily identify any precise problem with the sentence. *See* Appellants' Mem. 17. Rather, Appellants argue that "lay opinions of the neighbors[] do not represent probative, credible testimony upon which a board can rest its decision" and cite to real estate broker, Daglieri's, testimony about the effect of the Project on the neighborhood. *Id.* Here, Appellants are attempting to argue they established their burden of proving '"[t]hat 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[.]"' *See New Castle Realty Co.*, 248 A.3d at 647 (quoting § 45-24-41(d)(3)). However, the Board stated in the Findings of Fact that "[t]he project, as proposed, complies with the Land Use component of the Comprehensive Plan."[6]

[6] In arriving at this finding, the Board heard testimony from Daglieri that the neighborhood has many new homes, "the majority of which are typical to what is being proposed[.]" (Tr. 48:25-49:1, Nov. 16, 2017.) Daglieri explained that the area was once comprised mostly of summer cottages

(Decision at 2, Dec. 18, 2017.) This indicates that the Board did not question whether Appellants met their burden of proving § 45-24-41(d)(3) or base its Decision on testimony of abutters. *See id.*

Further, this Court "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." *Restivo v. Lynch*, 707 A.2d 663, 666 (R.I. 1998) (internal quotation omitted). Instead, the Superior Court "'examine[s] the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" *Lloyd*, 62 A.3d at 1083 (quoting *Apostolou*, 120 R.I. at 507, 388 A.2d at 824). This Court finds that the Board's denial of Appellants' requested dimensional variance was supported by substantial evidence.

B

Special Use Permit

Finally, Appellants contend that the Board failed to address the Special Use Permit, arguing that it is an error of law. (Appellants' Mem. 18.) Appellants contend that "it does not appear that the Board actually voted upon the Appellant[s'] special use permit request. None of the six standards enunciated in Ordinance 12.5 were addressed with any specificity by the Board." *Id.* Appellants point out that "any structure on this location will require both an encroachment into the Coastal Overlay zone and [a] front yard setback." *Id.* at 10. Appellants further reiterate this point, explaining that "[s]imple arithmetic shows that <u>any</u> structure, from a doghouse to a 3-4 bedroom home, would absolutely require a variance (and special use permit) based on Section 4.4." *Id.* The

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but that the area is rapidly changing into a mixed-use area with both summertime and year-round residents. *Id.* at 48:5-10. Further, Rabideau opined that the proposed Project would be consistent with the neighborhood. *Id.* at 37:11-19. The Board noted hearing such testimony in its Decision. (Decision at 3, Dec. 18, 2017.) Although Attorney Landry pointed out that twenty-three of the thirty-six houses had footprints of less than 1,000 square feet with one, two, or three bedrooms, the Board did not find Appellants failed to prove this element. *See* Tr. 63:21-24; Decision at 2, Dec. 18, 2017.

Board argues that there was ample testimony on the Special Use Permit, but hardly any testimony about the criteria and proof necessary to grant a dimensional variance. (Board's Mem. 8.)

The definition of special use is "[a] regulated use that is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42." Sec. 45-24-31(62). When the special use permit requirements are met, it is an abuse of discretion for a zoning board to deny the application. *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 882 (R.I. 1991). As mentioned previously, the Lots are located within a Coastal Resources Overlay District, which the Board noted in the Findings of Fact portion of the Decision. (Decision at 1, Dec. 18, 2017.) The Narragansett Zoning Ordinance defines Coastal Resources Overlay Districts as "areas of the town where natural physical limitations render the land unsuitable for development without restrictions." Narragansett Zoning Ordinance § 4.1. Narragansett Zoning Ordinance § 4.4(b) provides that, in order to erect a structure on a site within a Coastal Resources Overlay District, the Board must grant a special use permit.

As a preliminary consideration, in Rhode Island, an applicant can only obtain a special use permit in conjunction with a dimensional variance if the municipality's zoning ordinance specifically permits the two forms of relief to be granted simultaneously. *See* §§ 45-24-42(c), 45-24-41(d)(2); *Lloyd*, 62 A.3d at 1087. Section 45-24-42(c) provides that a zoning ordinance "may provide that an applicant may apply for, and be issued, a dimensional variance in conjunction with a special-use. . ." Sec. 45-24-42(c). Our Supreme Court has noted that "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.

The Narragansett Zoning Ordinance provides that the Board

> "may grant a dimensional variance from the front, side, and rear yard requirements of section 6.4 or 6.5 for a single-family dwelling and

> accessory structures in conjunction with a special use permit, provided the relief granted does not have the effect of allowing a structure to be placed closer to a wetland or coastal feature as described in section 4.3 or 4.4." Narragansett Zoning Ordinance § 12.4.

Appellants requested a dimensional variance from § 6.4, which § 12.4 specifically enumerates that a zoning board is generally permitted to grant in conjunction with a special use permit. Narragansett Zoning Ordinance § 12.4. The relief would not "have the effect of allowing a structure to be placed closer to a . . . coastal feature as described in section . . . 4.4" because the front-yard setback variance would have permitted Appellants to move the structure further away from the coastal features in the rear of the Lots. *See id.* As such, § 12.4 would have authorized the Board to simultaneously grant a dimensional variance from § 6.4 and a special use permit under § 4.4, providing the requirements for a special use permit were met.

The Zoning Enabling Act allows a zoning board to issue a special use permit only pursuant to the provisions of the local zoning ordinance. Sec. 45-24-42. In the Town of Narragansett, the portion of the code that provides standards for procuring a special use permit is § 12. Pursuant to § 12.5, the Board cannot grant a special use permit unless the Board finds the following:

> "(1) That the use will comply with all applicable requirements and development and performance standards set forth in sections 4 and 7 of this ordinance; except that the board may grant a variance from dimensional setbacks incorporated in the development standards of section 4.3(4) of the coastal and freshwater wetlands overlay district, and section 4.4(c) of the coastal resources overlay district, in accordance with the requirements of section 11 of this ordinance;
> "(2) That the use will be in harmony with the general purpose and intent of this ordinance and the comprehensive plan of the Town of Narragansett;
> "(3) That the granting of the special use permit will substantially serve the public convenience and welfare;
> "(4) That the use will not result in or create conditions inimical to the public health, safety, morals, and general welfare;
> "(5) That it will not substantially or permanently injure the appropriate use of the surrounding property;

> "(6) In addition to the above, the zoning board of review shall consider:
>
> "a. Access to air, light, views, and solar access.
>
> "b. Public access to water bodies, rivers and streams.
>
> "c. The conservation of energy and energy efficiency." Narragansett Zoning Ordinance § 12.5.

Section 12.5(1) specifically requires variances from 4.4(c) to be "in accordance with . . . section 11 of [the] ordinance." Narragansett Zoning Ordinance § 12.5(1). Section 11.4 sets forth the "[s]tandards to be met in granting any variance" which requires "[t]hat the relief to be granted is the least relief necessary." Narragansett Zoning Ordinance § 11.4(4). Once again, whether the relief to be granted was the least relief necessary had been repeatedly addressed; substantial evidence supported the Board's finding that the proposed Project did not request the least relief necessary, including Caldwell's testimony that the structure could be smaller.

Additionally, as our Supreme Court has explained, '"[i]f the special use could not exist without the dimensional variance, the zoning board of review shall consider the special use permit and the dimensional variance together to determine if granting the special use is appropriate based on both the special use criteria and the dimensional variance evidentiary standards."' *Lloyd*, 62 A.3d at 1087 (quoting § 45-25-42(c)). Clearly from Appellants' own argument, the special use cannot exist without a dimensional variance. Therefore, the evidentiary standards of § 11 of the Narragansett Zoning Ordinance were certainly relevant and applicable to the Board's Decision on the special use permit. This includes the aforementioned requirement "[t]hat the relief to be granted is the least relief necessary." Narragansett Zoning Ordinance § 11.4(4). Contrary to Appellants' belief, the Board did consider the special use permit, but that consideration also relied on whether Appellants sought the least relief necessary.

The Board's Decision states that "the Applicant has not met its legal burden by demonstrating that the proposed Project seeks the least relief necessary. . ." (Decision at 5, Dec.

18, 2017.) To support this finding, the Board noted Caldwell's testimony about the possibility of constructing a smaller house on the Lots. *Id.* The Board posited that a reduction in the size of the dwelling would reduce the size of the variance requested from § 4.4. *Id.*

Based on the evidentiary standards required for a dimensional variance and because the special use permit cannot be granted without a dimensional variance, the Board's Decision properly included the special use permit analysis together with the dimensional variance analysis. Although the Board had the authority to simultaneously grant a special use permit and a dimensional variance in this case, the record evidence did not support granting either form of relief.

IV

Conclusion

After review of the entire record, this Court finds that the Board's Decision was supported by the substantial and probative evidence on the record and was not clearly erroneous, arbitrary or capricious, made upon unlawful procedure, in violation of ordinance provisions, or an abuse of discretion. Substantial rights of the Appellants have not been prejudiced. Accordingly, the Board's Decision recorded on December 18, 2017 is affirmed. Appellants' appeal is therefore dismissed. Counsel for the Board shall submit an appropriate order for entry in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**David A. Caldwell, Jr., et al. v. Zoning Board of Review of the Town of Narragansett, et al. and Colleen Colabella**
CASE NO:	**WC-2018-0005**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**March 15, 2022**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**James M. Callaghan, Esq.; Steven H. Surdut, Esq.**
For Defendant:	**Stephen H. Marsella, Esq.**
For Intervenor:	**William Landry, Esq.; Matthew J. Landry, Esq.**