STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 24, 2022)

PETER DELPONTE,	:	
Appellant,	:	
	:	
v.	:	**C.A. No. PC-2021-07059**
	:	
THOMAS LOPARDO, ANTHONY PILOZZI, JOSEPH ANZELONE, RICHARD LOBELLO, and RICHARD FASCIA, in their capacities as members of the JOHNSTON ZONING BOARD OF REVIEW, and JOHN VERDECCHIA,	:	
Appellees.	:	

DECISION

PROCACCINI, J. Before this Court is Peter DelPonte's (Appellant) appeal from the November 1, 2021 written decision of the Zoning Board of Review (Zoning Board) of the Town of Johnston approving a dimensional variance for property owned by Appellee John Verdecchia (Petitioner). Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

At issue is Petitioner's plan to expand his 1,800 square foot, single-family residence in Johnston, Rhode Island. (Decision 1, ¶ 3.) Petitioner's lot is approximately 24,000 square feet. *Id.* at 1, ¶ 1. When the house was constructed, the area was zoned R-20—a residential district requiring 20,000 square feet for a single-family dwelling. *Id.* at 1, ¶ 7. Subsequently, however, Johnston amended its zoning ordinance, changing the zone for the subject area to R-40, requiring 40,000 square feet for a single-family dwelling. *Id.* at 1, ¶¶ 2, 8. As a result, the subject property became a nonconforming, substandard lot. *Id.* at 1, ¶ 3; Tr. 4:11-14, Oct. 28, 2021 (Tr.).

Petitioner purchased the property in August 1995, after the property was rezoned to R-40, and has lived there continuously. (Decision 1, ¶ 4; Tr. 27:1.) On October 4, 2021, he filed a petition with the Zoning Board (Petition) seeking a dimensional variance from the lot size restriction to construct an addition measuring sixteen feet by forty feet, eight inches and extending from the front of the residence. (Petition 3.) The Petition did not request any other variance or relief as to setback, height, or side-yard requirements. *Id.*

The Zoning Board held a public hearing on October 28, 2021 (the Hearing) in which Petitioner testified that he wished to make better use of the living space to accommodate cohabitating with a new partner. (Tr. 6:8-14.) He testified that the existing structure is an "awkward" L-shaped ranch with a garage on the front, left side and a living space that extends from the back of the garage toward the rear of the property and then to the right. *Id.* at 6:10-18; Floor Plan Rendering.[1] The remodel would fill in the negative "dead space" located at the front interior of the "L" to create a larger bedroom with a walk-in closet. (Tr. 6:15-21; Floor Plan Rendering.) The expansion would also permit Petitioner to relocate the laundry appliances from the basement to the first-floor bedroom to accommodate his needs as he "get[s] older and can't get up and down the stairs[.]" *Id.* at 6:19-7:5.

Thereafter, the Zoning Board heard argument in opposition by Appellant's counsel who contended that: (1) Petitioner created his own hardship by purchasing the property after the town enacted the R-40 zoning restriction; (2) Petitioner's need for more space amounted to mere inconvenience; and (3) Petitioner could conceivably redesign the interior of the home to satisfy

[1] The Record includes several architectural renderings prepared by a residential designer, including a "Cross Section," "Floor Plan," "Basement/Foundation," "Right-Side Elevation," and "Front Elevation."

his needs without expansion. *Id.* at 12:4-23. Appellant is an abutter owning property to the rear of Petitioner's property. (Decision 2, ¶ 17.)

At the conclusion of testimony and argument of counsel, the Zoning Board voted 5-0 to approve the Petition and published its decision in a written memorandum dated November 1, 2021 (the Decision). *Id.* at 1-3; Tr. 35:4-24. The Decision found hardship in the town's rezoning to R-40 and in the floor plan limitations of the existing structure and found that Petitioner sought the least relief necessary. (Tr. 35:4-14; Decision 1, ¶¶ 1-4.) Appellant timely appealed by filing a Complaint with the Superior Court on November 16, 2021.

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by § 45-24-69(d), which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
> "(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).

"It is the function of the Superior Court to '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)). The term "'[s]ubstantial 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)). This Court may not "substitute its judgment for that of the zoning board if it can conscientiously find that the board's decision was supported by substantial evidence in the whole record." *Apostolou*, 120 R.I. at 509, 388 A.2d at 825.

III

Analysis

A

Adequacy of Findings and Conclusions

Appellant first faults the Zoning Board's Decision as lacking adequately articulated findings and conclusions, thereby rendering it incapable of judicial review. (Appellant's Mem. 7.) The Zoning Enabling Act of 1991 mandates that "[t]he zoning board of review shall include in its decision all findings of fact[.]" Section 45-24-61(a). Our Supreme Court has also "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 v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396, 401 (R.I. 2001) (quoting *Cranston Print Works Co. v. City of Cranston*, 684 A.2d 689, 691 (R.I. 1996)).

As will be further discussed below, the Zoning Board's written Decision and the Hearing transcript contain sufficient factual determinations and reference the proper legal standard for

dimensional variances, as found in §§ 45-24-41(d) and (e)(2). Findings four through eleven in the written Decision discuss facts supporting a hardship determination; finding twelve references Petitioner's testimony that he did not seek financial gain; findings fourteen and fifteen relate to the character of the area; and findings thirteen and sixteen document facts relating to whether the addition is the least relief necessary.

Although the Decision does not explicitly reference § 45-24-41(e)(2), as will be further discussed *infra*, the Hearing transcript and Decision adequately demonstrate that the Zoning Board considered the issue of whether the hardship was more than a mere inconvenience. *Accord New Castle Realty Co. v. Dreczko*, 248 A.3d 638, 644 (R.I. 2021) (reviewing record to identify "minimally sufficient findings to enable judicial review").[2]

B

Dimensional Variance Standard

Appellant further argues that the Zoning Board's Decision was clearly erroneous in the absence of substantial evidence in the record, specifically that the Decision lacked: (1) necessary expert testimony to establish that the proposed addition would not conflict with the character of the neighborhood nor diminish the value of surrounding property; (2) sufficient evidence to show that the relief sought was the least amount necessary; and (3) sufficient evidence to support the conclusion that Petitioner would suffer an adverse impact amounting to "more than a mere inconvenience" in the absence of relief. (Appellant's Mem. 6.) In sum, Appellant challenges the

[2] Appellant's reliance on *Kaveny v. Town of Cumberland Zoning Board of Review*, 875 A.2d 1 (R.I. 2005) to the contrary is unavailing. *Kaveny* involved a proposed 343-unit condominium development in an Agricultural zone with numerous abutters. *Id.* at 4. The Court acknowledged that the standard of review was "deferential" but "contingent upon *sufficient* findings of fact by the zoning board." *Id.* at 8 (emphasis added). The sufficiency of findings relating to a large-scale condominium project is distinct from those supporting an application for a sixteen-foot addition requiring only lot-size relief.

propriety of the Zoning Board's Decision with respect to: (1) § 45-24-41(d)(3), character of the surrounding area; (2) § 45-24-41(d)(4), least relief necessary; and (3) § 45-24-41(e)(2), inconvenience.[3]

1

§ 45-24-41(d)(3): General Character of the Surrounding Area

In granting a dimensional variance, an applicant has the burden of presenting evidence sufficient to support a finding "[t]hat the granting of the requested variance will not alter the general character of the surrounding area . . . ." Section 45-24-41(d)(3). Here, the Zoning Board relied on Petitioner's evidence that "the structure as expanded will easily be consistent with the style and quality of the other structures on [the] road" and that the "expanded structure . . . will . . . be within the general character of the area." *See* Decision 2, ¶ 14; *see also* Petition 2; Front Elevation. No contradictory evidence was introduced to detract from the weight of Petitioner's testimony and architectural renderings.

Petitioners are not required to proffer expert testimony as to the character of the area. In *Lischio*, the Supreme Court provided examples of when a proposal would alter the general character of a surrounding area. *See Lischio*, 818 A.2d at 693 (structures that are "massive or out of place" or a variance that would "eliminate the front yard or sidewalk in residential area"). In that case, no expert was required to determine that a dimensional variance for road frontage for a

[3] On appeal to this Court, Appellant wisely does not press the argument asserted at the Zoning Board Hearing that Petitioner created the hardship by purchasing the property knowing of its R-40 zone. *See DiDonato v. Zoning Board of Review of Town of Johnston*, 104 R.I. 158, 163, 242 A.2d 416, 419 (1968) ("Inasmuch as the ordinance makes it impossible for lot 386 to be used for any permitted use, it is apparent that petitioner has met the requirement of establishing unnecessary hardship[.]"). Appellant similarly does not press his prior argument that Petitioner's request is purely to realize financial gain. In any event, Petitioner testified without contradiction that he sought to expand the living space to cohabitate with his girlfriend, has no plans to sell the property, and planned to live there indefinitely. (Tr. 6:8-12, 26:22-24, 27:1-8.)

landlocked lot would not adversely impact the surrounding area. *Id.* A similar result is warranted here, where Petitioner seeks a small addition within the town's current setback and height limits.

Appellant's reliance on *Hester v. Timothy*, 108 R.I. 376, 275 A.2d 637 (1971)—to support the proposition that expert testimony is required to show that "neither the proposed use nor its location on the site would have a detrimental effect upon public health, safety, welfare and morals"—is misplaced. *Id.* at 385-86, 275 A.2d at 642. *Hester* involved a *use* variance, not a *dimensional* variance. *Id.* at 386, 275 A.2d at 642. The demanding standard applied to use variance requests is inapposite. The Town of Johnston has already determined through its Comprehensive Plan that a setback-compliant, single-family residence does not have a detrimental effect in an R-40 zone. *See Lischio*, 818 A.2d at 693 ("when seeking dimensional relief for *lawfully permitted uses* the review should not focus on the use of the parcel because a legislative determination has been made previously that the use is appropriate and does not adversely affect the general character of the area").

2

§ 45-24-41(d)(4): Least Relief Necessary

The dimensional variance standard further requires that an applicant demonstrate "[t]hat the relief to be granted is the least relief necessary." Section 45-24-41(d)(4). Although Appellant states that there is no evidence in the record that Petitioner's proposed addition was the least relief necessary, the written Decision and Hearing transcript show otherwise. The Zoning Board found that the addition did not require the structure be expanded closer to any neighbor and cited the review conducted by the Town Planning Department, which raised no objection and agreed that the planned addition necessitated the least possible variance to expand

the structure.[4] *See* Decision 2, ¶¶ 13, 16; *see also* Zoning Petition 3; Tr. 34:10-24. The Zoning Board also considered that Petitioner has no ability to expand the size of his lot. (Decision 1, ¶ 6; Tr. 8:18-23.) Further, the Zoning Board discussed that the proposal does not include an additional bathroom and does not require installation or expansion of a septic system or a well. (Tr. 9:16-23.) This Court's mandate is not to second-guess the Zoning Board but rather to "'examine 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). The findings outlined above constitute "more than a scintilla" of evidence and satisfy the standard for affirmance. *Caswell*, 424 A.2d at 647 ("[s]ubstantial evidence . . . means [an] amount more than a scintilla but less than a preponderance").

3

§ 45-24-41(e)(2): More than a Mere Inconvenience

A petitioner's final hurdle is 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." Section 45-24-41(e)(2). Appellant argues that Petitioner's subjective need for additional space is "mere inconvenience." In support, Appellant looks to *DiDonato v. Zoning Board of Review of Town of Johnston*, 104 R.I. 158, 242 A.2d 416 (1968) where the Supreme Court affirmed a zoning board's determination that variances from front- and side-yard

[4] Appellant argued before this Court that the Zoning Board's partial reliance on the Town Planner's report was in error because no one from the Planning Department attended the hearing to be cross-examined. Appellant's attorney did not object, however, when the Zoning Board's legal counsel read the Town Planner's recommendation into the record, nor did he request an opportunity to cross-examine the Town Planner. (Tr. 34:6-35:3.) "It is not incumbent upon an appellate court to consider a question not raised in the lower tribunal unless it be an error of law exhibited on the face of the record or one involving public policy." *Dean v. Zoning Board of Review of City of Warwick*, 120 R.I. 825, 828-29, 390 A.2d 382, 384 (1978).

restrictions could not be justified by petitioner's growing family standing alone. *DiDonato*, 104 R.I. at 164, 242 A.2d at 420.

Appellant fails to appreciate several salient distinctions between *DiDonato* and the case at bar. First, as to the facts, *DiDonato* involved front- and side-yard encroachments, while Petitioner's request does not implicate any height or lot-line restrictions. To be sure, but for the rezoning from R-20 to R-40, Petitioner would not need a variance for his planned addition. (Tr. 14:17-23.) Second, the applicable standard of review is deferential and looks not for a preponderance of evidence, but only for substantial supporting evidence. As a result, similar cases can have differing outcomes that are nevertheless upheld on appeal as long as the evidentiary record is adequate. *Accord H. J. Bernard Realty Co. v. Zoning Board of Review of Town of Coventry*, 96 R.I. 390, 394, 192 A.2d 8, 11 (1963). That the *DiDonato* Court upheld a variance denial is therefore not in fatal contradiction with this Court's decision to uphold the grant of a variance. Further, as observed in another Superior Court decision, "[t]he *DiDonato* Court did not hold that family size is an impermissible consideration in zoning applications and does not rule out consideration of growing family size as *a factor* in any such analysis." *Cassese v. Zoning Board of Review for the Town of Middletown*, No. NC-2010-0293, 2012 WL 115456, at *6 n.2 (R.I. Super. Ct. Jan. 11, 2012) (emphasis added).

In this matter, evidence in the record as to the undersized lot, when considered with numerous other relevant factors, constituted substantial evidence of hardship amounting to more than a mere inconvenience. At the October Hearing, board members and Petitioner discussed that the R-40 zone change was designed to impact lots without sewer access but that Petitioner's lot does in fact have sewers, indicating a conflict between the Zoning map and the Comprehensive Plan. (Tr. 5:20-6:1, 8:24-9:6; Decision 1, ¶¶ 8-10.) They further discussed

Petitioner's need for more space due to an additional occupant in the home, the awkward and inefficient design of the home, and the benefit of laundry facilities on the living level. (Tr. 3:16-4:16, 6:11-7:5.) Standing alone, these additional factors arguably may not amount to "more than a mere inconvenience," but taken together, the Zoning Board did not act arbitrarily, and Petitioner's requested relief is reasonably necessary for the full enjoyment of his property. *See DiDonato*, 104 R.I. at 164, 242 A.2d at 420 ("[W]e define the words 'more than [a] mere inconvenience' to mean that an applicant must show that the relief he is seeking is reasonably necessary for the full enjoyment of his permitted use.").

IV

Conclusion

For the reasons stated above, this Court affirms the Decision of the Zoning Board. Counsel shall prepare the appropriate order.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Peter DelPonte v. Thomas Lopardo, et al.**
CASE NO:	**PC-2021-07059**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 24, 2022**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
For Plaintiff:	**Frank R. Saccoccio, Esq.**
For Defendant:	**Joseph R. Ballirano, Esq.** **Lauren E. Jones, Esq.**