STATE OF RHODE ISLAND

KENT, SC. **SUPERIOR COURT**

(FILED: October 17, 2023)

SETH O'DONNELL and SOPHIA O'DONNELL, ***Appellants,***	:	
v.	:	**C.A. No. KC-2022-0065**
TOWN OF EAST GREENWICH ZONING BOARD OF REVIEW and RICHARD LAND, CHRISTOPHER MULHEARN, JODY SCEERY, MELODY ALGER, BARRY GOLDEN and DAVID COLLIER, in their capacities as Members of the Town of East Greenwich Zoning Board of Review; PATRICIA CARDI; and PAMELA UNWIN-BARKLEY ***Appellees.***	:	

DECISION

REKAS SLOAN, J. Before this Court is the zoning appeal of Seth and Sophia O'Donnell (Appellants) from the October 26, 2021 decision memorialized on January 11, 2022 (the Decision) of the Town of East Greenwich Zoning Board of Review (the Zoning Board) approving two dimensional variances for property owned by Appellee Patricia Cardi (Applicant).[1] Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Applicant owns real property located at 30 Rector Street, East Greenwich, Rhode Island (recorded as Tax Assessor's Map 085, Plat 001, Lot 414) (the Property). (Ex. 1; Ex. 2 at 3.) The

[1] Applicant and the Town of East Greenwich Zoning Board of Review are collectively referred to as the Appellees.

Property is located in a residential zone designated as R-10. (Ex. 1.) The Property also is located in the Town of East Greenwich's Historic District within the "Hill and Harbor area." (Ex. 8 at 3.) The structure on the Property is an early Victorian carriage barn which was originally an accessory structure and part of a neighboring property, 27 Marion Street. (Ex. 8 at 3-4.) The original Marion Street parcel was subdivided in 2006, thereby creating the Property which is a 17,759 square-foot parcel with 120.98 feet of frontage on Rector Street. *Id.* at 3. The Property's existing carriage barn home is located one foot and one inch from its northern boundary which is also Appellants' southern boundary. (Ex. 1; Ex. 2 at 3.) The Property is therefore nonconforming by dimension for the R-10 zone, which requires a fifteen-foot side yard setback. *See* § 45-24-31(52); Town of East Greenwich Zoning Ordinance § 260, Table 2.

A

Dimensional Variance Application

On June 28, 2021, Applicant filed a petition seeking two dimensional variances (the Application) to construct an addition that would include a "first floor primary bedroom . . . with a handicap-accessible bathroom." (Ex. 1; Tr. 5:11-17, Aug. 24, 2021). The addition, as proposed, would be located approximately five feet[2] from the northern boundary. (Ex. 1.) Applicant requested the following variances: (1) relief from the side yard setback requirements found in Chapter 260 of the Code of the Town of East Greenwich, Rhode Island (Town Code); Zoning Ordinance, Table 2 - Dimensional Regulations by Zone; and (2) relief from Town Code, Article V, Section 260-14(B) Nonconforming by Dimension. (Ex. 8 at 2; *see also* Ex. 1.) Such variances, if permitted, would allow Applicant to construct "a 24' x 26.6' one-story addition to the west side

[2] More precisely, the addition is five feet from the northern boundary on its easterly side and six feet from the northern boundary on its westerly side. (Ex. 2 at 3.)

of the existing house in the north side setback which constitutes . . . an intensification to the legal nonconforming property." *See* Ex. 8 at 2.

B

Historic District Commission

Prior to filing the Application with the Zoning Board, Applicant's architect, Pamela Unwin-Barkley (Ms. Unwin-Barkley), presented the design of the proposed addition (the Proposed Design) at a hearing before the East Greenwich Historic District Commission (HDC) on June 9, 2021 for preliminary "conceptual[] approv[al]." (Tr. 5:7-13, Aug. 24, 2021; *see generally* HDC Minutes[3] at 4-6.)

At the HDC hearing, Ms. Unwin-Barkley explained that the Proposed Design was intended to "match all the finishes, doors and windows to the existing conditions while also adding two (2) sky lights to match the existing three (3) sky lights." (HDC Minutes at 5.) She also stated that the existing wooden fence would be removed and replaced with a "wrought iron fence to extend from the new addition to the existing stone wall on the western edge of the property." *Id.* Finally, she noted that a dimensional variance would be required. *Id.* The Vice-Chairman of the HDC, Gregory Maxwell (Vice-Chairman Maxwell), stated that he "liked the proposal as it was simple in design[.]" *Id.* Vice-Chairman Maxwell further commented that the proposal "did not try to do much coupled with preserving the location of the carriage house doors/French doors but [one could] clearly see the original fabric of the carriage house" which he found to be "extremely important." *Id.* Vice-Chairman Maxwell pointed out that the Proposed Design is largely in the

[3] Pursuant to the Court's January 27, 2023 Order, the minutes of the HDC's June 9, 2021 meeting were allowed to be supplemented to the Certified Record and were filed in the docket on January 18, 2023. *See* Docket.

setback area, and "in his professional opinion[,] it would be horrible for the property [to build the addition outside the setback area and within the building envelope], because it would take away from the historic appearance of the carriage house as well as character defining elements of the building."[4] *Id.* at 6. Lastly, Vice-Chairman Maxwell requested that the HDC's statements be passed along to the Zoning Board; specifically, that "the HDC prefers the addition takes place where [Ms. Unwin-Barkley] has proposed it." *Id.*

Also at the hearing, the Chairman of the HDC, Matthew McGeorge (Chairman McGeorge), commented that the Proposed Design was "a relatively sensible evolution of the structure and property." *See id.* Chairman McGeorge found the addition to be "subservient to the primary structure and appropriate in terms of massing and scale." *Id.* Finally, Chairman McGeorge noted that the Proposed Design "is clearly pulled back further from the existing house, . . . showing as evidence [that] there was an attempt made to provide the least relief necessary." *Id.*

C

Proceedings Before the Zoning Board

In response to the Application to the Zoning Board, Appellants submitted an initial Letter of Objection on August 24, 2021 and a Further Letter of Objection on October 22, 2021. Appellants' Obj. Letter, Aug. 24, 2021 (Ex. 9); Appellants' Obj. Letter, Oct. 22, 2021 (Ex. 11). Appellants reside at 17 Marion Street, which abuts directly north of the Property. (Ex. 9 at 1.)

[4] Appellants request that this Court take judicial notice that, at the HDC hearing, Vice-Chairman Maxwell "observed that 'there is clearly room on the property for adding an addition within the building envelope.'" (Appellants' Reply 10, n.3.) However, Appellants fail to include the context of Vice-Chairman Maxwell's statements where he completed the sentence by stating "in his professional opinion it would be horrible for the property because it would take away from the historic appearance of the carriage house as well as character defining elements of the building." (HDC Minutes at 6.) Appellants' request ignores the HDC's rationale for preferring the Proposed Design, which is critical to their analysis.

Appellants object to the Application on several grounds. First, Appellants assert that the proposed addition fails to meet the requirements of the East Greenwich Zoning Ordinance[5] Section 260-14(B).[6] *Id.* If constructed, "[the Proposed Design] would be situated within the 15' required side yard setback area, coming to within 6' of the north property line on the west side of the addition and within 5' on the east side[.]" *Id.* Second, Appellants argue that Applicant failed to meet the requirements for a dimensional variance as defined under Section 260-6[7] and pursuant to Section 260-91 of the Ordinance. They state the Proposed Design neither exhibits a genuine hardship nor is it the least relief necessary, but rather, is merely a design preference. *Id.* at 2. Finally, the Appellants object on the ground that it would require "dramatic – and harmful – re-routing of the long-standing pole-to-house aerial electric service configuration" and thus impermissibly "alter the general character of the surrounding area." *Id.* at 3.

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[5] Chapter 260 is hereinafter referred to as the "Ordinance."

[6] Section 260-14. Nonconforming by dimension.

> "(B) Any extension, addition or enlargement of a nonconforming structure shall comply with the dimensional regulations … of this chapter."

[7] Section 260-6 Terms Defined.

> "VARIANCE – Permission to depart from the literal requirements of this chapter as granted by the Zoning Board of Review. An authorization for the construction or maintenance of a building or structure or for the establishment or maintenance of a use of land which is prohibited by this chapter.
>
> > "A. There shall be only two categories of variance: a use variance or a dimensional variance.
> >
> > ". . .
> >
> > "(2) DIMENSIONAL VARIANCE – Permission to depart from the dimensional requirements of this chapter where the applicant for the requested relief has shown by evidence upon the record that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations."

Appellants' initial Letter of Objection included two alternative designs (Sketch(es)) to demonstrate a "plethora of less offensive alternative[] [designs]" than the Proposed Design. (Ex. 9 at 3; *see also* Ex. 9 at 4-5.) "Each [Sketch] display[ed] two separate alternative locations for the [p]roposed [a]ddition on the . . . Property such that it could be located entirely outside the side-yard setback while retaining the dimensions of 24' x 26.6' specified in the Application." (Appellants' Brief 3; *see also* Tr. 8:18-20, Oct. 26, 2021.) Appellants' first Sketch (First Sketch) suggestion was to build the addition on the southwest corner of the existing structure. (Tr. 8:18-19, Oct. 26, 2021.) The second Sketch (Second Sketch) would overlap the footprint of the house. *See* Tr. 9:10-12, Oct. 26, 2021.

The Zoning Board heard testimony and legal arguments relating to the Application on August 24, 2021 and October 26, 2021. *See* Tr. Aug. 24, 2021 and Oct. 26, 2021.

1

August 24, 2021 Hearing

The Zoning Board initially considered Applicant's requests for dimensional relief at an August 24, 2021 hearing.[8] *See generally* Tr. Aug. 24, 2021. Ms. Unwin-Barkley, in reliance on her prior experience as an architectural designer and a professor of design who works on historic properties, testified on Applicant's behalf regarding the Proposed Design, which was conceptually approved by the HDC. *See* Tr. 6:1-3, 16-21, Aug. 24, 2021. She stated that, to construct the addition with the intended primary bedroom and a handicap-accessible bathroom, "[t]he current tight floor plan [did] not afford the opportunity to modify within the existing footprint." (Tr. 5:18-19, Aug. 24, 2021.) She further testified that the Proposed Design would be "stepping back five

[8] The Transcript of the August 24, 2021 Zoning Board's meeting was supplemented to the Certified Record on January 27, 2023. *See* Docket.

feet on the north side on the existing design, which helps emphasize or at least note the difference between what is historic and what is new, which is a standard for historic preservation." (Tr. 6:3-9, Aug. 24, 2021.)

Ms. Unwin-Barkley concluded that the Proposed Design "preserves the character of the carriage house" and "fits the character of the neighborhood and enhances the value of the surrounding properties." *See* Tr. 6:1-3, 16-21, Aug. 24, 2021. She opined that there are "no other reasonable alternatives to address the program needs while [Applicant] maintains the historic character of the home." (Tr. 6:21-24, Aug. 24, 2021.)

In support of Applicant, the Lowes, Applicant's abutting neighbors, introduced a letter into the record for the Zoning Board's consideration.[9] *See* Ex. 13. Chairman Land read the Lowes' letter which stated that any other alternative design would likely require the removal of "mature trees," and "compet[e] with [the] clean lines and proportion of the carriage house[.]" *See* Tr. 11:1-12:10, Aug. 24, 2021. Also, Michael Gagne, the owner of abutting 27 Marion Street, which is the original parcel from which the Property was subdivided, testified in favor of Applicant, stating, "I reviewed the architecture plans. Love them. I think it stays within the character of that property, which unfortunately is not still the carriage house of my property, but . . . I share a boundary line [thus], I certainly have a vested interest in how that whole property looks. I think it's been tastefully done." *See* Tr. 12:20-13:2, Aug. 24, 2021.

[9] Neither party objected to entering the Lowes' letter into the record, even though the Lowes were not present at the August 2021 hearing. (Tr. 11:10-13, Aug. 24, 2021.)

Next, Appellants' counsel argued that their two Sketches[10] evidenced that the Applicant failed to show a genuine hardship and that the relief sought was not the least relief necessary. *See* Tr. 15:12-21, Aug. 24, 2021; *see also* Ex. 9.

The Zoning Board continued the matter to allow the parties an opportunity to discuss issues regarding the electric lines, reasoning that such issues could be dispositive of Appellants' objection.[11] *See* Tr. 21:16-24:20, Aug. 24, 2021. The Zoning Board next[12] considered the Application on October 26, 2021. *See* Ex. 17; *see also* Tr. 3:20-22, Oct. 26, 2021.

2

October 26, 2021 Hearing

The Zoning Board reconvened on October 26, 2021. *See generally* Tr. Oct. 26, 2021. Ms. Unwin-Barkley reiterated two points about the Proposed Design previously presented to and conceptually approved by the HDC, stating that: (1) it "preserves the original carriage house design and fabric," and (2) that the HDC "appreciated how . . . moving the addition 5 feet away or inside the north property line from the existing footprint of the carriage house helped differentiate old versus new in the construction. And that is a significant objective when . . . working in a historic context." (Tr. 6:22-24, 7:2-10, Oct. 26, 2021.) She further testified that the HDC found the overall

[10] Counsel for Appellants concede the two Sketches are not surveys. (Tr. 15:13-14, Aug. 24, 2021.)

[11] Applicant references an underlying issue regarding National Grid's placement of a utility pole as possibly being Appellants' true motivation in opposing the Application. *See* Ex. 9. The record contains statements suggesting that Appellants may withdraw their objection to the Application if the issue of electric line placement were resolved to their satisfaction. (Tr. 21:16-25, Aug. 24, 2021.)

[12] The August 24, 2021 meeting was continued to September 28, 2021; however, due to a lack of quorum at that September meeting, the next Zoning Board hearing was held on October 26, 2021.

design and layout to be a "sensible solution to the scope of work and the overall site." (Tr. 7:10-12, Oct. 26, 2021.)

In response to Appellants' objections, Ms. Unwin-Barkley testified that neither of Appellants' proposed alternative placements were reasonable and, based on her experience and education, "the HDC would not approve either one of the footprints." *See* Tr. 8:11-9:14, Oct. 26, 2021. Ms. Unwin-Barkley then cited several reasons as to why neither of Appellants' suggested Sketches were feasible. *See* Tr. 8-10, Oct. 26, 2021.

Ms. Unwin-Barkley testified that even though the First Sketch would fall "just inside the zoning setbacks," it would compete with the hierarchy of the austere 1830s carriage house. *See* Tr. 8:18-9:1, Oct. 26, 2021. She further testified that if the First Sketch were adopted, the "mechanical plumbing or vertical circulation, any of the circulation of the house, would be an unreasonable challenge." (Tr. 9:3-5, Oct. 26, 2021.) Further, constructing an addition in that location would not be a matter of simply "adding or extending to the footprint of the house, but it basically requires a whole secondary structure" that would, again, compete with the characteristics of the carriage house. (Tr. 9:5-9, Oct. 26, 2021.)

As to Appellants' Second Sketch, Ms. Unwin-Barkley testified that it would "really undermine the significance of the historic features of this carriage house." (Tr. 9:10-14, Oct. 26, 2021.) She testified that her Proposed Design intended to have nine-foot custom doors to match the dwelling's existing characteristics and that simply "covering or removing any of those doors [as in the Second Sketch] was never an option because it basically pulls all the historic significance away from the house." (Tr. 9:15-20, Oct. 26, 2021.)

Based upon Ms. Unwin-Barkley's experience and expertise as an architect, designer, and as a professor of design "who lives in the neighborhood and who does a lot of work [in the area],"

including work for the objecting Appellants, she testified that she tries to "create compatible design features that relate to the scale, the orientation, and the overall style of existing conditions." (Tr. 9:22-10:4, Oct. 26, 2021.) Significantly, she testified that she did "many studies to make this work," and that the "footprint [of the Proposed Design] was very carefully considered" and that its design sought to connect the addition's wiring to the existing utilities, circulation, and overall aesthetic approach of the house. (Tr. 10:10-16, Oct. 26, 2021.)

In contrast, Appellants' counsel argued that no alternative design was presented to the HDC and that Appellants' Sketches demonstrated that Applicant's Proposed Design was merely a design preference. *See* Tr. 12:21-14:20, Oct. 26, 2021. Ms. Unwin-Barkley testified that she "provided all the abutters the designs way before [she] presented it to HDC. So they all had these in hand. So there was no big surprise. They've always been able to comment, but they never did." (Tr. 21:12-16, Oct. 26, 2021.)

The Zoning Board then discussed the Application on the record. Chairman Richard Land (Chairman Land) stated that he found Ms. Unwin-Barkley's testimony sufficient and that she adequately addressed the issues Appellants raised despite the fact that she had not been qualified as an expert at the hearings.[13] *See* Tr. 30:20-31:6, Oct. 26, 2021; *see* Ex. 17 at 13-14. He further stated that, based on Ms. Unwin-Barkley's past designation as an expert before the Zoning Board, including with respect to Appellants' prior application, the Zoning Board equated her testimony to that by an expert witness. *See id.*

[13] Appellants did not contest at any of the Zoning Board hearings, nor do they contest in this appeal, that the Zoning Board's consideration of Ms. Unwin-Barkley as an expert was in error. (Appellants' Br. 4; *see* Ex. 17 at 3.) Rather, Appellants argue there was no factual basis for her expert opinion. (Appellants' Reply at 3 and 5.)

Chairman Land stated that he believed Ms. Unwin-Barkley's testimony indicated that she had considered other alternatives and that she "presented what she believed was the most appropriate design to the HDC . . . ." (Tr. 31:7-10, Oct. 26, 2021.) Chairman Land further noted that "applicants are [not] required to turn over every . . . single possible stone in designing or seeking relief before this board." (Tr. 31:10-13, Oct. 26, 2021.) Instead, he found that Applicant had presented testimonial evidence from Ms. Unwin-Barkley that provided a sufficient factual basis for the Zoning Board to conclude that Applicant would suffer a genuine hardship and that "the hardship from which the Applicant seeks relief is due to the unique characteristics of the subject land and not the general characteristics of the surrounding area." *See* Tr. 33:10-13, Oct. 26, 2021. Chairman Land continued, "[t]he hardship is not the result of any prior action by the [A]pplicant and does not result primarily from the desire to realize greater financial gain." *See* Tr. 33:20-23, Oct. 26, 2021; *see also* Ex. 17 at 14.

Moreover, Chairman Land stated Ms. Unwin-Barkley's testimony supported a finding that "granting the relief will not alter the general character of the surrounding area or impair the purpose or intent of the zoning ordinance or the comprehensive plan." (Tr. 34:5-8, Oct. 26, 2021.) Procedurally, Chairman Land recognized that Applicant had satisfied this requirement by obtaining HDC approval of the Proposed Design. (Tr. 34:9-11, Oct. 26, 2021.)

Chairman Land determined that, again, based on Ms. Unwin-Barkley's testimony, Applicant "satisfied [her] requirement, . . . [that] [t]he relief to be granted is the least relief necessary," "notwithstanding the suggestion that an alternative location" of the Proposed Design might be acceptable as well. (Tr. 34:12-18, Oct. 26, 2021.) Chairman Land concluded that, based on the testimony presented by Ms. Unwin-Barkley, Applicant satisfied the requirement that, if her

requested relief were denied, the hardship suffered would amount to more than a mere inconvenience. (Tr. 33:3-7; 34:19-23, Oct. 26, 2021.)

The Zoning Board announced its decision at the October 26, 2021 hearing, voting 4-1 in favor of the Application. (Ex. 14.) Thereafter, the Zoning Board recorded its written Decision reflecting the above findings and conclusions on January 11, 2022. *See generally* Ex.17.

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;
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> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
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> "(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).

This 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 the*

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.'" *New Castle Realty Co. v. Dreczko (New Castle)*, 248 A.3d 638, 643 (R.I. 2021) (quoting *Iadevaia v. Town of Scituate Zoning Board of Review*, 80 A.3d 864, 870 (R.I. 2013)).

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. 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 be affirmed. *Lloyd*, 62 A.3d at 1083. This deference to a zoning board's factual determinations "is due, in part, to the principle 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.'" *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (quoting *Monforte v. Zoning Board of Review of City of East Providence*, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)).

If the board's decision does not contain sufficient findings of fact and conclusions of law to permit judicial review, 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).

Where a challenge to a board decision rests on an issue of law, the Superior Court conducts a *de novo* review. *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 791 (R.I. 2005).

III

Analysis[14]

A

Dimensional Variance Standard

An applicant for a dimensional variance must satisfy five elements. First, the applicant must satisfy the requirements under § 45-24-41(d).

> "(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." Section 45-24-41(d).

[14] On appeal, Appellants assert that the Zoning Board erred in finding that Applicant had satisfied the requirements for a dimensional variance as set forth in the Ordinance. However, the "power to grant variances is a direct grant of authority from the legislature to boards of review and can be neither enlarged nor restricted by provisions contained in local ordinances." *Gardiner v. Zoning Board of Review of the City of Warwick*, 101 R.I. 681, 703-04, 226 A.2d 698 (1967); *see also Watch Hill Fire District v. Westerly Zoning Board of Review*, Nos. WC-2021-0195, WC-2021-0199, 2022 WL 14676055, at *8 (R.I. Super. Oct. 20, 2022.) While Ordinance §§ 260-91(A) and (C) are substantially similar to § 45-24-41(d)-(e), this Court's review of the record evidence is restricted to the statutory requirements of § 45-24-41(d)-(e) in determining whether the Zoning Board erred in granting Applicant's request for dimensional variances. *See id.* Thus, to avoid duplicative analyses, this Court has consolidated the parties' arguments, as both § 45-24-41(d)-(e) and Ordinance §§ 260-91(A) and (C) contain essentially the same language. *See* § 45-24-41(d)-(e); *see also* Ordinance §§ 260-91(A) and (C).

Finally, the applicant must show 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).

B

Hardship Due to Unique Characteristics of the Land

Section 45-24-41(d)(1) (and Ordinance § 260-91(A)(1))

To obtain a dimensional variance, an applicant first must 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; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(a)(16)." Section 45-24-41(d)(1).

In *Cassese v. Zoning Board of Review for the Town of Middletown*, No. NC-2010-0293, 2012 WL 115456 (R.I. Super. Jan. 11, 2012), the court upheld the zoning board's grant of dimensional relief when the applicant's alleged hardship was *partially* due to their own personal circumstances. *Cassese*, 2012 WL 115456, at *6 n.2. The applicant sought dimensional relief to "construct a second floor addition to the[ir] dwelling" while "maintain[ing] the setbacks in their current state[.]" *See id.* at *1. Originally, the applicant's dwelling was nonconforming due to its "lack of setback on both the east and west borders." *Id.* The appellees argued that, although the applicant indicated that "[she] would enjoy a handicapped-accessible bathroom if the proposed variances were granted," the court nonetheless concluded that "the [a]pplica[nt] included . . . valid grounds—such as . . . need for additional space, functionality, and betterment of the neighborhood." *Id.* at *6. Thus, the *Cassese* court concluded that the applicant had met her burden

showing that there was "[a] hardship . . . attributed to the unique characteristics of the lot and the house that sits on it; [and that] it [was] not due to any physical disability." *Id.*

Similarly, in *Hayes v. Charlestown Zoning Board of Review*, No. WC-2020-528, 2022 WL 16559085 (R.I. Super. Oct. 26, 2022), the petitioner applied for dimensional relief seeking to demolish her existing one-story vacation home, a nonconforming structure, and to rebuild a three-story, full-time residence. *See Hayes*, 2022 WL 16559085, at *1, 2. Petitioner's property was located within a flood zone, triggering Federal Emergency Management Agency (FEMA) requirements. *Id.* at *1. To comply with FEMA regulations, petitioner was required to fill her existing basement, resulting in a loss of 1,500 square feet. *Id.* Thus, petitioner sought to build a three-story residence to compensate for the lost basement space. *Id*. Additionally, petitioner's property was located within fifty feet of coastal wetlands, triggering Coastal Resources Management Council (CRMC) regulations. *Id*. at *2. CRMC "expressed a preference for using the existing foundation and remaining further away from the coastal feature." *Id*. at *3. In compliance, petitioner's proposed plan used her existing footprint as "the most feasible and practical way to place the house and [have] the least environmental impact." *Id.*

The trial justice in *Hayes* concluded that, based on the "substantial additional evidence in the record establishing [the p]etitioner's unique hardship," . . . "[the court would] not substitute its judgment for that of the [z]oning [b]oard." *Id.* at *12; *see also Rathkopf's The Law of Zoning and Planning*, § 58:20 at 58-129 (2003) ("Hardship must relate to some characteristic of the land for which the variance is requested, and must not be *solely* based on the needs of the owner.") (emphasis added). The trial justice noted that petitioner's hardship did not relate *solely* to petitioner's needs. *Id.* at *12. Indeed, petitioner's personal circumstances changed, "and the property [would] no longer be used as a vacation home, but as her primary residence. *Id.* (citing

to *Cassese*, 2012 WL 115456, at *6 n.2 (observing prior case law has not foreclosed consideration of personal circumstances as *a factor* in a hardship analysis)). Petitioner "desire[d] more space to accommodate her evolving use of the structure" and sought to "make the structure more amenable to full-time use and more resilient." *Id.* at *12. However, the trial justice continued, "[p]etitioner . . . wishe[d] to avoid further encroachment on her immediate neighbors and the coastal feature by utilizing the existing foundation." *Id.* Therefore, the trial court was satisfied that the zoning board's analysis of § 45-24-41(d)(1) was correct. *Id*.

This court previously has opined that § 45-24-41(d)(1) "strictly limits what types of disabilities may be considered in determining whether a variance is appropriate. Old age and speculative disabilities are not included." *Alpert v. Middletown Zoning Board of Review*, No. 2003-0436, 2004 WL 1542238, at *5 (R.I. Super. June 28, 2004). The *Alpert* court concluded that, to justify dimensional relief, a hardship must "relate to some characteristic of the land for which the variance is requested, and must not be *solely* based on the needs of the owner." *Id.* (emphasis added).

In the instant appeal, the Property is a prior nonconforming structure that currently sits one foot - one inch from the northern property line. *See* Ex. 1. It is also a historic property within the "Hill and Harbor area" of East Greenwich. *See* Ex. 8 at 3.

At the outset, Appellants assert that any hardship the Applicant claims is "illusory," stating that "the Proposed Addition could have been constructed outside the 15' side-yard setback, in compliance with the [Ordinance]." (Appellants' Br. 9; *see also* Appellants' Reply 7.) In summary, Appellants argue that Applicant's hardship is due to her "preference for maintaining the historical features," not due to the "unique characteristics of the subject land." (Appellants' Br. 9; Appellants' Reply 9; *see* § 260-91(A)(1).) Appellants ignore other provisions of the Ordinance

which mandate that any property within a historic district obtain approval from the HDC before any "construction, alteration, repair, relocation, removal or demolition of new or proposed structures and accessories[.]" *See* Ordinance § 260-59.

Appellants also argue that, because Ms. Unwin-Barkley testified that the purpose of the Proposed Design is to aid Applicant with her physical disability due to old age, Applicant's alleged hardship is rooted in the very type of hardship § 45-24-41(d)(1) prohibits—"physical . . . disability of the applicant." (Appellants' Br. 10; Appellants' Reply 8; *see* § 260-91(A)(1); *see also* Tr. 7:1-3, Oct. 26, 2021; § 45-24-41(d)(1) (requiring "[t]hat the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure . . . and *is not due to a physical . . . disability of the applicant*, excepting those physical disabilities addressed in § 45-24-30(a)(16)[15] (emphasis added))). This argument ignores that "'it is well recognized that the irregular shape or other peculiar characteristics of a parcel may constitute a hardship unique to the property which justifies the granting of a variance.'" *Cassese*, 2012 WL 115456, at *6 (quoting 3 *Rathkopf's The Law of Zoning & Planning* § 58:11, at 58-68 to 58-69 (4th ed., rev. 2006)).

While Appellants cite to *Alpert* in support of their arguments, such reliance is misguided because there is substantial record evidence that Applicant's physical disability was not the *sole* factor the Zoning Board relied upon in reaching its conclusion. (Appellants' Br. 10; *see* Ex. 17 at 14.) The Zoning Board acknowledged that Applicant's Proposed Design was made to accommodate her physical disability associated with old age. (Ex. 17 at 2; Tr. 5:11-17, Aug. 24, 2021.) However, like *Cassese*, the Zoning Board, here, correctly determined that Applicant's

[15] Section 45-24-30(a)(16) requires zoning ordinances to address providing opportunities for reasonable accommodations in order to comply with the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., which protects individuals who develop disabilities because of aging. The record does not provide details about Applicant's disability other than references to aging and a need for a handicap accessible bathroom. *See* Ex. 17 at 14.

alleged hardship was, in fact, due to the unique characteristics of the subject land, and not solely based on Applicant's physical disability from aging. *See* Ex. 17 at 14; *see also Cassese*, 2012 WL 115456, at *6. Chairman Land specifically noted that "while [Appellants' counsel] pointed out the subject property is 125 feet wide, the existing structure is one foot from the property line. Requesting relief that maintains consistency with the existing structure and the existing nature of the property satisfies this particular condition." (Ex. 17 at 14.)

Furthermore, Ms. Unwin-Barkley stated that "[t]he current tight floor plan does not afford the opportunity to modify within the existing footprint." (Tr. 5:18-19, Aug. 24, 2021.) As to the historic preservation restrictions on the Property, she testified that the HDC "appreciated . . . the fact that [the Proposed Design would] move[] the addition [five] feet away or inside the north property line from the existing footprint . . . help[ing] differentiate old versus new . . . construction . . . a significant [historical] objective." (Tr. 7:4-9, Oct. 26, 2021.) Ms. Unwin-Barkley further testified that the Application "is very consistent with a typical situation of most homes of the [historic] district that [were] all built prior to today's building codes." (Tr. 8:4-7, Oct. 26, 2021.) Additionally, at the HDC meeting, Vice-Chairman Maxwell requested that the HDC staff "pass along his comments to the ZBR that the HDC prefers the addition takes place where the designer has proposed it." (HDC Minutes at 6.)

This Court's review of the record reveals that, in assessing the element of "hardship due to unique characteristics of the land," the Zoning Board considered several factors—(1) the historical nature of the Property, that being an accessory structure built in the 1880s that was once part of a main house; (2) the comments made by Vice-Chairman Maxwell at the HDC hearing; (3) the fact that the existing historic structure is located one foot from the northern property line; and (4) Applicant's wish to construct a first-floor primary bedroom with a handicap-accessible bathroom

to accommodate her personal circumstances. (Tr. 15:25-16:2, Aug. 24, 2021; HDC Minutes at 5-6; Ex. 17 at 8, 14; Tr. 5:14-17, Aug. 24, 2021.) Accordingly, this Court is satisfied that the Zoning Board's decision, in concluding that Applicant sufficiently alleged a hardship based on the unique characteristics of the land and not solely based on physical disability, was supported by substantial evidence—that is, more than a scintilla but less than a preponderance—and thus, satisfied her burden under § 45-24-41(d)(1). *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 690 (R.I. 2003); *Cassese*, 2012 WL 115456, at *6 n.2; *see also* § 45-24-41(d)(1).

C

Nature of the Hardship

Section 45-24-41(d)(2) (and Ordinance § 260-91(A)(2))

On appeal, Appellants do not challenge the Zoning Board's finding that Applicant met her burden under § 45-24-41(d)(2). *See* § 45-24-41(d)(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[.]").

Indeed, the record reflects that the Zoning Board properly addressed this requirement in granting Applicant's requested relief. Specifically, Chairman Land noted in the Decision that Applicant satisfied the requirement under § 45-24-41(d)(2) because "[she] did not place her home on the property line"; "[the] [P]roperty has been there a lot longer than [Applicant] ha[s] lived there and perhaps any of us have lived on the earth"; and "there [was] certainly no evidence that [Applicant sought the requested relief] for financial gain." *See* Ex. 17 at 14.

Therefore, this Court need not address Applicant's burden under § 45-24-41(d)(2) any further because Appellants do not raise this issue on appeal and the record reflects that the findings of the Zoning Board are supported by substantial evidence.

D

General Character of the Surrounding Area and Intent of the Ordinance

Section 45-24-41(d)(3) (and Ordinance § 260-91(A)(3))

Appellants next argue that the Zoning Board erred in finding that granting the variance would neither alter the general character of the surrounding area nor impair the purpose of the zoning ordinance or comprehensive plan on which it is based, in violation of § 45-24-41(d)(3) and Ordinance § 260-91(A)(3). *See* Appellants' Br. 11. Pursuant to § 45-24-41(d)(3), an applicant seeking a dimensional variance must present evidence sufficient to support a finding "[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." Section 45-24-41(d)(3). For example, proposed designs involving "massive or out of place [structures]" or "eliminat[ion] [of] the front yard or sidewalk in a residential neighborhood" would alter the general character of the surrounding area. *Lischio*, 818 A.2d at 693.

At the outset, the Court notes that Appellants previously cited concerns about National Grid's electric lines that service the homes of Applicant, Appellants, and other abutting neighbors. (Ex. 9 at 3.) Specifically, Appellants argued that the construction of the Proposed Design would require relocation of the electric lines and therefore alter the general character of the surrounding area. *Id.* However, both parties acknowledged at the October 2021 Zoning Board hearing that the issue was no longer a concern for the Application; instead, the electric lines issue was solely the responsibility of National Grid. *See* Tr. 25:12-17; 26:2-4, Oct. 26, 2021. Based upon counsels' representations before the Zoning Board, this Court will not further address the electric lines as this issue is not within the purview of the instant appeal. *See id.*

In the instant appeal, Appellants argue that the HDC's conceptual approval and Ms. Unwin-Barkley's testimony were insufficient to demonstrate that Applicant's Proposed Design would not "alter the general character of the surrounding area" or "impair the purpose or intent of the zoning ordinance or the comprehensive plan" as required by § 45-24-41(d)(3) and Ordinance § 260-91(A)(3). (Appellants' Br. 11; *see also* § 45-24-41(d)(3); Ordinance 260-91(A)(3).) In support, Appellants assert that HDC's approval of the Proposed Design "is not a substitute for substantial evidence that could support such a finding." (Appellants' Reply 12.) Moreover, Appellants maintain that, even if the Zoning Board were permitted to rely on the HDC's conceptual approval, the record lacks guidelines or criteria in which the HDC relied upon in granting the conceptual approval of the Proposed Design. *Id.*

Contrary to Appellants' argument, this Court's review of the HDC Minutes reveals evidence of the standards the HDC applied in reaching its decision granting conceptual approval. *See* HDC Minutes at 2 and 5. At the beginning of the June 9, 2021 HDC meeting, Chairman McGeorge stated, "the HDC considers local standards as well as Federal guidelines. . . . The Board members identify properties and character defining features and historical and architecturally significant to the district that are taken into consideration . . . The Board determines the standards that apply[.]" *Id.* at 2. The record reflects that the HDC applied two standards in reviewing the Proposed Design:

> "Mr. McGeorge stated Commission standards 4 and 5 apply to the application. *Standard 4* states that proposals for architectural changes or alterations shall be appropriate to the original design of the building or to later changes that have acquired significance of their own. *Standard 5* states new construction includes substantial additions or modifications to the exterior of existing buildings. The design of new construction need not be an exact or modified copy of historic styles and could be totally different in concept. However, all proposals for new construction shall be compatible with the

> surrounding buildings in size, scale, materials and siting, as well as with the general character of the historic district." *Id.* at 5.

As this Court mentioned above, and upon the HDC's application of Standards 4 and 5, Vice-Chairman Maxwell expressed his support for the Proposed Design's simplicity as it "did not try to do much coupled with preserving the location of the carriage house doors/French doors," while keeping the original fabric of the carriage house visible. *Id.* Also, at the HDC hearing, Chairman McGeorge praised the Proposed Design to be "a relatively sensible evolution of the structure and property" and "subservient to the primary structure and appropriate in terms of massing and scale." *Id*. at 6. At the October 2021 hearing, Chairman Land stated that the Zoning Board could conclude Applicant satisfied the requirement that the Proposed Design "[would] not alter the general character of the surrounding area or impair the purpose or intent of the zoning ordinance or the comprehensive plan" because "Applicant went to the HDC first." (Tr. 34:5-11, Oct. 26, 2021.)

Appellants argue that the Zoning Board erred in accepting the HDC's conceptual approval as substantial evidence, where it ultimately found that the Proposed Design did not violate Ordinance § 260-91(A)(3). (Appellants' Br. 13.) In *New Castle*, the Supreme Court addressed the level of deference a zoning board may afford another agency's conclusions regarding topics within that agency's purview. *New Castle*, 248 A.3d at 645-46. In that case, the applicant requested a special use-permit and a dimensional variance to construct a house and install a septic system on a pre-existing nonconforming lot. *Id.* at 640. Although the Department of Environmental Management (DEM) already approved the project, *id.* at 641, the zoning board rejected the application, opining that the project would have a negative impact on the wetlands. *Id.* at 646. However, there was no expert testimony to support this conclusion and the members of "the zoning board lacked the specialized knowledge necessary to refute DEM's decision itself." *Id.* at 645. On

review, the Supreme Court concluded that "an applicant for zoning relief ought to be able to rely on permits granted by DEM with respect to those matters uniquely within DEM's expertise." *Id.* at 646. The Court noted that, although the DEM permit did not constitute "conclusive evidence," it was "entitled to deference" in the absence of competent evidence to the contrary. *Id.* Accordingly, the Zoning Board was permitted to consider the HDC's conceptual approval of the Proposed Design for, among other things, preservation of the historic aspects of the Property and the surrounding area.

Regardless, Applicant did not merely rest on the HDC's conceptual approval but also introduced uncontradicted expert testimony from Ms. Unwin-Barkley. *See generally* Trs. Aug. 24, 2021, Oct. 26, 2021. Our Supreme Court has stated that:

> "'[w]hile it is generally true that 'there is no talismanic significance to expert testimony and it may be accepted or rejected by the trier of fact,' . . . it is also true 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."' *New Castle*, 248 A.3d at 645 (citing *Murphy v. Zoning Board of Review of Town of South Kingstown*, 959 A.2d 535, 542 (R.I. 2008) (brackets omitted) (quoting *Restivo v. Lynch*, 707 A.2d 663, 671 (R.I. 1998)).

Ms. Unwin-Barkley testified that the Proposed Design "preserves the character of the carriage house" and "fits the character of the neighborhood and enhances the value of the surrounding properties." *See* Tr. 6:1-3, 16-21, Aug. 24, 2021. She also testified that the Proposed Design "[was] very consistent with a typical situation of most homes of the district that [were] all built prior to today's building codes. And the HDC staff saw no significant [objections] to [Applicant's] request, and they seemed to think that it was . . . matching past practices." (Tr. 8:4-10, Oct. 26, 2021.) Her testimony was uncontroverted. Although the burden is not on Appellants to present an expert witness, it would have been an abuse of discretion for the Zoning Board to

have rejected Ms. Unwin-Barkley's testimony regarding the shortcomings of Appellants' Sketches because her testimony was competent, uncontradicted, and unimpeached. *See New Castle*, 248 A.3d at 645 (citation omitted). Additionally, the Zoning Board considered the supporting letter from Applicant's abutting neighbors, the Lowes, and the supporting testimony from the owner of abutting 27 Marion Street, Michael Gagne. *See* Tr. 11:1-13:2, Aug. 24, 2021.

Therefore, this Court is satisfied that the "competent, uncontradicted, and unimpeached" testimony from Ms. Unwin-Barkley, the supportive letter from the Lowes, and the testimony of Mr. Gagne was substantial record evidence the Zoning Board considered in concluding that "the [Proposed Design] . . . [does] not alter the general character of the surrounding area." *See New Castle*, 248 A.3d at 644, 645 (citation omitted). Thus, Applicant met her burden on this element under § 45-24-41(d)(3).

Appellants next argue that Applicant has failed to provide evidence that "the granting of the requested variance will not . . . impair the intent or purpose of the . . . [O]rdinance or the comprehensive plan." (Appellants' Br. 14; *see* § 45-24-41(d)(3).) A comprehensive plan acts as a strategic planning document, "identify[ing] the goals and policies of the municipality for its future growth and development[.]" G.L. 1956 § 45-22.2-6(b)(1). The plan provides municipal governments with a "rational basis for the long-term physical development of [the] municipality," in addition to assisting the municipality "avoid conflicting requirements and reactive land use regulations and decisions." Section 45-22.2-3(a)(1). East Greenwich's Comprehensive Plan[16] (EG Plan) details "goals, objectives, and policies of the Town of East Greenwich for its future growth and development[.]" EG Plan at 1.

[16] Comprehensive Plans And State Approval Status | Rhode Island Division of Statewide Planning, (ri.gov)

Chapter Five of the EG Plan, "Historic and Cultural Resources," emphasizes the municipality's goals to preserve historic resources and cultural heritage. *See* EG Plan at 59. It stresses the importance of evaluating new developments for their impact on historic features. *See id*. Ms. Unwin-Barkley's testimony that the Proposed Plan "preserves the character of the carriage house," "fits the character of the neighborhood[,] and enhances the value of the surrounding properties" is strong support for this plan's compliance with EG Plan's goals. *See* Tr. 6:1-3, 16-21, Aug. 24, 2021. Further, Vice-Chairman Maxwell's conclusion that an addition other than the Proposed Plan "would take away from the historic appearance of the carriage house as well as character defining elements of the building" provides additional support. HDC Minutes at 6. Accordingly, this Court is satisfied that the Proposed Design complies with EG Plan's goals to preserve historical features and characteristics, and thus, is satisfied that the Proposed Design will not "impair the intent or purpose of the . . . comprehensive plan[.]" *See* EG Plan at 59; *see also* § 45-24-41(d)(3).

Appellants assert that Ordinance §§ 260-13 and 14 express an intent to eliminate dimensional nonconformances. (Appellants' Br. 11; Appellants' Reply 14; *see also* Ordinance § 260-13, 14.) However, the Ordinance also includes a definition of "variance" as "[p]ermission to depart from the literal requirements of this chapter as granted by the Zoning Board of Review." *See* Ordinance § 260-6. This is similar to the statutory definition under § 45-24-31(66). Clearly, the language in the Ordinance itself grants the Zoning Board authority to vary from the policies stated in §§ 260-13 and 14, "where the applicant … has shown by evidence upon the record that there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations." *See* Ordinance § 260-6. Chairman Land noted that the Application "fits right in with a standard type

of request that [the Zoning Board] receive[s]." Tr. 24:22-24, Oct. 26, 2021. Most importantly, Ms. Unwin-Barkley testified that there are "no other reasonable alternatives to address the program needs while [Applicant] maintains the historic character of the home." (Tr. 6:21-24, Aug. 24, 2021.)

Based on the record from Ms. Unwin-Barkley's testimony at the HDC Meeting and the two Zoning Board hearings, as well as the findings of the HDC, the Zoning Board's decision that Applicant met her burden under § 45-24-41(d)(3) was supported by substantial evidence in the record.

E

Least Relief Necessary

Section 45-24-41(d)(4) (and Ordinance § 260-91(A)(4))

Appellants argue that the requested variances were not the least relief necessary in light of their proposed Sketches. (Appellants' Br. 17; Appellants' Reply 10-11; *see also* § 45-24-41(d)(4); Ordinance § 260-91(A)(4); *see also New Castle*, 248 A.3d at 648). They further maintain that Ms. Unwin-Barkley's testimony anticipating the HDC's rejection of alternatives was speculative and lacked factual foundation. (Appellees' Br. 18; Appellants' Reply 10-11; Appellants' Sur-Reply 3.)

In *New Castle*, our Supreme Court held that '"an applicant seeking a dimensional variance has the burden before the zoning board of showing that a factual basis appears in the record to support the proposition that there is 'no other reasonable alternative' that would allow the applicant to enjoy a legally permitted beneficial use of the property."' *New Castle*, 248 A.3d at 647 (quoting *Bernuth v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396, 401 (R.I. 2001)). The Court declared that a zoning board's "failure to consider *reasonable* alternatives or proposals

is substantial evidence that an applicant has not satisfied the requirements of § 45-24-41(d)(4)." *RH McLeod Family LLC et al. v. Westerly Zoning Board of Review*, Nos. WC-2021-0495, WC-2021-496, WC-2021-497, 2023 WL 2486928, at *9 (R.I. Super. Mar. 9, 2023) (citing *New Castle*, 248 A.3d at 648) (emphasis added). In addition, the Rhode Island Supreme Court has held that zoning boards are not required to consider other permitted uses, *including uses that require no relief whatsoever*, when ruling on a request for a variance. *See Westminster Corp. v. Zoning Board of Review of City of Providence*, 103 R.I. 381, 389-90, 238 A.2d 353, 358 (1968) (concluding that "[applicants] are entitled to relief upon the establishment of the necessary ground therefor, . . . whether or not the ordinance provides for other permitted uses"). In other words, just because an alternative proposal is possible to implement does not make it reasonable. "It is not necessary that the Zoning Board precisely identify the point of impossibility and only approve a request that falls just on the side of possible—the standard is whether there exists a "reasonable alternative," not a speculatively "possible" alternative." *RH McLeod Family LLC*, 2023 WL 2486928, at *10.

Here, the Zoning Board did, in fact, consider alternative designs, particularly the two Sketches created by Appellants, but determined that they were unreasonable. *See* Ex. 17 at 8-11. Ms. Unwin-Barkley testified before the Zoning Board that the HDC would not have approved either alternative for several reasons. *See supra* I.C.2.; Tr. 8:13-15, Oct. 26, 2021. Significantly, Ms. Unwin-Barkley testified that there are "no other reasonable alternatives to address the program needs while [Applicant] maintains the historic character of the home." (Tr. 6:21-24, Aug. 24, 2021.) The Decision acknowledged this testimony. *See* Ex. 17 at 13.

As to the First Sketch—which suggested construction on the southwest corner of the existing structure—Ms. Unwin-Barkley conceded that it would fall "just inside the zoning setbacks." *See* Tr. 8:18-21, Oct. 26, 2021. However, Ms. Unwin-Barkley testified that this

alternative "would really compete with the hierarchy of the [pretty] austere c. 1830s carriage house[,]" and the mechanical and plumbing circulation would become an "unreasonable challenge." (Ex. 17 at 7; *see* Tr. 8:23-9:9, Oct. 26, 2021.)

The Zoning Board further relied on Ms. Unwin-Barkley's conclusion that the Second Sketch's plan to construct the addition in a manner that would overlap the footprint of the house would "undermine the significance of the historic features of the [Property.]" *See* Ex. 17 at 7; Tr. 9:10-14, Oct. 26, 2021. Finally, Ms. Unwin-Barkley testified that the Proposed Design "[was] very consistent with a typical situation of most homes of the district that [were] all built prior to today's building codes. And the HDC staff saw no significant [objections] to [Applicant's] request, and they seemed to think that it was . . . matching past practices." (Tr. 8:4-10, Oct. 26, 2021.) She concluded by stating that, based on "[her] experience and education . . . the HDC would not [have] approve[d] either one of the [suggested alternative] footprints." (Tr. 8:11-15, Oct. 26, 2021.) In addition, at the HDC hearing, Chairman McGeorge noted that the Proposed Design "is clearly pulled back further from the existing house, . . . showing as evidence [that] there was an attempt made to provide the least relief necessary." (HDC Minutes at 6.)

The Zoning Board correctly found that both Sketches were unreasonable based on Ms. Unwin-Barkley's testimony that they would compromise the existing structure's historic nature and internal circulation systems. *See* Ex. 17 at 13-14. This Court has stated, "[i]t would be a futile endeavor if the Zoning Board required evidence of lesser alternatives that would violate other elements of the dimensional variance standard." *RH McLeod Family LLC,* 2023 WL 2486928, at *10 (internal citation omitted). Moreover, the Court may not "substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact." Section 45-24-69(d). The record shows that the Sketches were submitted by Appellants' counsel prior to the

hearing and were thus part of the record before the Zoning Board at the hearing. *See* Ex. 9 at 3-5. Not only did Applicant's expert explicitly testify that the Sketches were not viable options, the Zoning Board could also reasonably draw that inference from the expert's proffered opinion. *See* Tr. 6:19-22, Aug. 24, 2021. Consequently, the record is comprised of Applicant's requested variance with concern for compliance with the requirements of the historic "Hill and Harbor area" of East Greenwich. *See generally* Ex. 8 at 3.

Although the record shows that the Sketches were considered by the Zoning Board, Appellants' counsel concedes that the Sketches were not professional surveys. (Tr. 15:12-14, Aug. 24, 2021.) No expert testified in support of the Sketches, but Ms. Unwin-Barkley, the only expert, testified that the Sketches were unreasonable and would impose conditions that would diminish the historic nature of the carriage house and disrupt the Property's existing structure as a whole. *See generally* Trs. Aug. 24, 2021, Oct. 26, 2021.

Notwithstanding Appellants' assertion that the Zoning Board's reliance on Ms. Unwin-Barkley's testimony was insufficient, 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." (Appellants' Br. 15; *Murphy v. Zoning Board of Review of Town of South Kingstown*, 959 A.2d 535, 542 (R.I. 2008).) The Zoning Board considered Ms. Unwin-Barkley as an expert and weighed her testimony. *See* Ex. 17 at 13. In sum, Applicant presented expert testimony that the requested variances represented the least relief necessary.

For these reasons, this Court finds the Zoning Board's conclusion that Applicant met her burden in showing that the Proposed Design is the least relief necessary under § 45-24-41(d)(4) was based upon substantial evidence.

F

Hardship Amounting to More than Mere Inconvenience

Section 45-24-41(e)(2) (and Ordinance § 260-91(C))

Pursuant to § 45-24-41(e)(2), an applicant must show 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). In proving that the hardship would be "more than mere inconvenience," an applicant must show that the relief she is seeking is reasonably necessary for the full enjoyment of her permitted use. *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). In *Alpert*, this court reversed the zoning board's decision on the ground that the applicants failed to present evidence "probative on the issue of whether a conforming home was objectively unreasonable[,] whether or not taking into account the surrounding properties." *Alpert*, 2004 WL 1542238, at *7. The *Alpert* court stated that, although the applicants had an expert testify, the record nonetheless failed to show "actual proof of objective unreasonableness [and] would require more than th[e] expert['s] bare statements of opinion." *See id.* Our Supreme Court has stated that the mere inconvenience test "must be applied reasonably and realistically." *Travers v. Zoning Board of Review of Town of Bristol*, 101 R.I. 510, 514, 225 A.2d 222, 224 (1967); *see Alpert*, 2004 WL 1542238, at *5 (quoting *Travers*, 101 R.I. at 514, 225 A.2d at 224).

Here, Appellants argue that the Zoning Board's finding that Applicant satisfied § 45-24-41(e)(2) was erroneous for two reasons. (Appellants' Br. 20-23.) First, Appellants assert that under *Alpert*, the Proposed Design was a design preference and that it did not amount to the requisite hardship as required under § 45-24-41(e)(2). *Id.* at 21; *see also* § 45-24-41(e)(2). In fact, Appellants maintain that their Sketches demonstrate that it is possible for Applicant to build an

addition that "could comply with the side-yard setback requirement, be located on the . . . Property . . . and not be any smaller than the proposed dimensions of 24' x 26.6'." (Appellants' Br. 22; *see* Ex. 9 at 4-5.) In Appellants' view, Applicant could construct an addition that connects directly to the residence in a way that complies with the Ordinance. (Appellants' Reply 5-10.) However, as noted above, these Sketches were not surveys, nor testified to by an expert proffered by Appellants. *See id.; see also* Tr. 15:12-14, Aug. 24, 2021. Instead, it is clear from the record that the Zoning Board considered Appellants' Sketches and remained unconvinced that both the First Sketch and Second Sketch were feasible proposals based on Ms. Unwin-Barkley's testimony.

It appears that Appellants are requesting this Court to review the Sketches *de novo* rather than applying the proper standard pursuant to § 45-24-69(d). *See* § 45-24-69(d) ("[t]he court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact"). This Court must not conduct a separate factual inquiry but must, instead, evaluate whether the Zoning Board relied upon substantial evidence in reaching its conclusion that Applicant met her burden under § 45-24-41(e)(2).

Second, Appellants argue that the Zoning Board should not have accepted Ms. Unwin-Barkley's testimony as to the hardship requirements of the dimensional variance based on her opinion as to what the HDC would or would not approve—without any factual basis to support it. *See* Appellants' Reply 5. In support, Appellants cite to *Perry v. Town of Burrillville Zoning Board of Review*, No. PC-2007-3323, 2012 WL 6215595 (R.I. Super. Dec. 6, 2012) for the proposition that, "[i]f the expert fails specifically to set forth the factual basis for his conclusion, the court must disregard his testimony." (Appellants' Reply 5; *see also Perry*, 2012 WL 6215595, at *8.) Appellants contend that *had* Ms. Unwin-Barkley's testimony included or addressed the standard

the HDC had relied on in its evaluation of Applicant's request, her testimony would have sufficiently established a factual basis for finding substantial evidence of hardship under § 45-24-41(e). (Appellants' Reply 5-6.)

This Court notes that Appellants have conflated their arguments regarding whether the Zoning Board erred in finding that Applicant met her burden under § 45-24-41(d)(1) with § 45-24-41(e)(2).[17] *See* Appellants' Reply 3-10; *see also* § 45-24-41(e)(2). However, Appellants' argument that the Decision is not supported by substantial record evidence is meritless because the record reveals that the Zoning Board relied on *both* Ms. Unwin-Barkley's testimony and the HDC Minutes in reaching its Decision granting the requested relief. *See* Appellants' Br. 23; Ex. 17.

The alleged hardship here is distinguishable from the hardship addressed in *Alpert*—where that applicant's hardship did not amount to more than mere inconvenience. *See* Appellees' Br. 19-20; *see contra Alpert*, 2004 WL 1542238, at *8. Unlike *Alpert*, here, the Zoning Board had substantial evidence before it, in the form of Ms. Unwin-Barkley's testimony and the HDC Minutes, to decide that there was no other reasonable design. (Tr. 8:11-10:16; Oct. 26, 2021; Ex. 17 at 13-14; *see contra Alpert*, 2004 WL 1542238, at *7-8.) The Zoning Board found Ms. Unwin-Barkley's testimony was "actual proof" that Applicant would suffer an "objectively unreasonable" hardship if she were forced to apply either Sketch as proposed by Appellants. *See* Ex. 17 at 14; s*ee contra Alpert*, 2004 WL 1542238, at *7-8.

For example, at the Zoning Board's October 2021 hearing, Ms. Unwin-Barkley testified that Applicant's requested variances were "very consistent with a typical situation of most homes

[17] Specifically, Appellants conflate their arguments, particularly in their Reply, by arguing both §§ 45-24-41(d)(1) and 45-24-41(e)(2) together, asserting that the Zoning Board incorrectly found Applicant met her burden on both elements in seeking dimensional relief. (Appellants' Br. at 20-23; Appellants' Reply 3-10.)

of the district that [were] all built prior to today's building codes." (Tr. 8:4-7, Oct. 26, 2021; *see generally* Tr. 5-6, Aug. 24, 2021.) In her professional opinion, Ms. Unwin-Barkley opined that both of Appellants' suggested alternatives were unreasonable and that, contrary to Appellants' claim that the alternatives were only a matter of "shifting" the Proposed Design, the alternatives would diminish the historic characteristics of the existing structure or require constructing a secondary structure making the "mechanical plumbing or vertical circulation, [or] any of the circulation of the house, . . . an unreasonable challenge." (Tr. 8:18-20, 9:2-14, Oct. 26, 2021.) Accordingly, the Zoning Board concluded that, if Applicant's request were denied, she would not have access to the full enjoyment of the permitted residential use and it would force her to apply for a variance that could disrupt the integrity of the historic carriage house. *Id.*; *see generally* Tr. 8:11-10:16, Oct. 26, 2021.

Appellants argue that the Zoning Board failed to consider their Sketches. (Appellants' Br. 23.) However, during Ms. Unwin-Barkley's testimony, the Zoning Board specifically asked her why the HDC would not have accepted the Sketches had they been presented to the HDC. (Tr. 20:10-24, Oct. 26, 2021.) The Zoning Board further asked Ms. Unwin-Barkley what hardships Applicant would suffer if Appellants' Sketches were adopted. (Tr. 20:10-21:16, Oct. 26, 2021.) Ms. Unwin-Barkley explained at length why the Sketches were unreasonable. *See* Tr. 5:18-19; 6:1-22, Aug. 24, 2021; Tr. 30:21-24, Oct. 26, 2021.

Appellants characterize the alternative Sketches as a "smoking gun" that reveals the Zoning Board's "least relief necessary" finding was "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record[.]" (Appellants' Br. 17-20; Section 45-24-69(d)(5).) However, this Court cannot agree with Appellants' characterization because the Sketches were simply one piece of evidence that the Zoning Board was entitled to weigh and reject in favor of

Applicant's evidence. *See Lloyd*, 62 A.3d at 1089. This Court further disagrees with Appellants' assertion that the Zoning Board "disregard[ed] th[e] evidence in the record [of the alternative Sketches], without sufficient explanation, [and that it] was an unwarranted exercise and abuse of discretion sufficient for the Court to overturn the Zoning Board's Decision." *See* Appellants' Reply 7. It is clear from the record that the Zoning Board did not disregard the alternative Sketches, but, instead, inquired about them and elicited extensive testimony explaining their lack of feasibility. (Tr. 8:11-10:16, Oct. 26, 2021.) Again, zoning boards are not required to consider other permitted uses, *including uses that require no relief whatsoever*, when ruling on a request for a variance. *See Westminster Corp.*, 103 R.I. at 389-390, 238 A.2d at 358 (emphasis added). Just because an alternative proposal is possible to implement does not make it reasonable. "It is not necessary that the Zoning Board precisely identify the point of impossibility and only approve a request that falls just on the side of possible—the standard is whether there exists a "reasonable alternative," not a speculatively "possible" alternative." *RH McLeod Family LLC*, 2023 WL 2486928, at *10.

After examining the record, this Court is satisfied that the Zoning Board's Decision was supported by substantial evidence based on Ms. Unwin-Barkley's uncontested testimony, the HDC Minutes, and all other relevant filings that were part of the record thereof in deciding whether Applicant met her burden under § 45-24-41(e)(2).

IV

Conclusion

After reviewing the entire record, for the reasons stated above, this Court finds that the Zoning Board applied the proper legal standard for a dimensional variance in accordance with § 45-24-41(d)-(e) and Ordinance § 260-91 and also finds that its Decision is supported by substantial evidence in the record. This Court therefore affirms the Decision of the Zoning Board granting Applicant's request for dimensional relief. Counsel for the Appellees shall prepare the appropriate order in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**O'Donnell v. Town of East Greenwich Zoning Board of Review, et al.**
CASE NO:	**KC-2022-0065**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**October 17, 2023**
JUSTICE/MAGISTRATE:	**Rekas Sloan, J.**
ATTORNEYS:	
For Plaintiff:	**William R. Landry, Esq.**
For Defendant:	**James Moretti, Esq.** **Amy Hall Goins, Esq.**