

STATE OF RHODE ISLAND

WASHINGTON, SC.

SUPERIOR COURT

(FILED: February 13, 2023)

CURTIS H. FISHER, EDNA J. FISHER,  
AMY SONDER, TOBIAH SONDER,  
CAROL L. GIBSON, TIMOTHY S. WASCO,  
DAVID S. WRENN, DEIRDRE B. WRENN,  
NATALIE COLETTA, STEVEN SANFORD,  
DAVID KEELEY, PAGE KEELEY,  
ROBERT J. MCDERMOTT, JAMES N.  
GENTNER, JOLENE G. ADKINS, and  
EDWIN T. BARNARD,

*Appellants,*

v.

EDWIN ANDREWS, JOHN V. GIBBONS,  
CYNTHIA WARREN, RANDY WIETMAN,  
and CHRISTOPHER ZANGARI, in their  
capacities as members of the ZONING  
BOARD OF REVIEW OF THE TOWN OF  
NORTH KINGSTOWN and WICKFORD  
SCHOOLHOUSE, LLC,

*Appellees.*

C.A. No. WC-2022-0134

**DECISION**

**TAFT-CARTER, J.** Before this Court for decision is a zoning appeal filed by numerous abutters (Appellants) of a vacant, historic property in Wickford Village—the former Wickford Elementary School (Wickford EL). Appellants appeal from the March 30, 2022 decision of the Town of North Kingstown Zoning Board of Review (Zoning Board) approving Appellee Wickford Schoolhouse, LLC’s (Petitioner) January 2022 application seeking four dimensional variances and two special use permits to renovate the Wickford EL for use as a residential condominium development. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

# I

## Facts and Travel

### A

#### The Wickford EL

The Wickford EL is located at 99 Phillips Street in North Kingstown, Rhode Island; more specifically described as Lot 109 on Tax Assessor's Plat 116. (Compl. ¶ 5.) The parcel is an existing conforming lot of record, approximately 6.12 acres in size and zoned within the Wickford Village Center (WVC) district. (R. at 585.) The schoolhouse building itself is an existing nonconforming structure, originally built in the mid- or late-1800s and expanded on several occasions prior to the adoption of the North Kingstown Zoning Ordinance. *Id.*

The original section of the building is a three-story schoolhouse with an approximately two-story pyramidal roof and limestone ornamentation.<sup>1</sup> *Id.* at 681. The roof of this section, at its peak, is approximately 60 feet in height. *Id.* at 613, 632. In the 1930-1940s, a "Bauhaus" or "flat box"-style addition was constructed that had the effect of doubling the square footage of the structure.<sup>2</sup> *Id.* at 681. It, too, is three-stories high but has a flat roof and is void of decorative ornamentation, as is typical of the utilitarian Bauhaus-style. *Id.* at 681-82. Shortly thereafter, two "art deco"-style stair towers were added to the east- and west-ends of the structure. *Id.* at 682. As it stands today, the Wickford EL occupies a building footprint of 11,063 square feet and has an

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<sup>1</sup> The Zoning Board's decision refers to this section of the building as the "original structure." *See, e.g., R. at 587.*

<sup>2</sup> The Zoning Board's decision refers to this section of the building as the "1948 addition." *See, e.g., R. at 582, 587.*

existing gross floor area of 33,159 square feet, excluding the attic space under the roof peak. *Id.* at 580, 632.

The Wickford EL is currently owned by the Town of North Kingstown (the Town), but it has sat unused and vacant for over a decade.<sup>3</sup> *Id.* at 581, 743, 747; Pls.' Br. 5. In 2019, the Town issued a request for proposal (RFP) to solicit plans to redevelop and make productive use of the long-vacant building. (R. at 581.) Ultimately, the RFP resulted in a Purchase and Sales Agreement between the Town and Petitioner. *Id.* Upon receiving the necessary planning and zoning approvals, the Town will finalize sale of the Wickford EL to Petitioner, who will then proceed with its rehabilitation and renovation plans to convert the Wickford EL into a thirty-nine-unit condominium development. *Id.* at 581, 586. The following illustration depicts the existing and

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<sup>3</sup> Although the Wickford EL building has stood vacant, it should be noted that the entirety of the parcel has not been unused. (R. at 569.) On the site, there also includes an active town playground and the former town meeting hall. *Id.* If Petitioner's Wickford EL redevelopment plan proceeds, the subject parcel will be subdivided and reduced to 4.68 acres in size, with the Town retaining the land on which the playground and old meeting hall sit, as well as retaining two separate segments of land that will merge with the abutting library parcel. *Id.* at 569, 637.

proposed volume and square footage of the structure, with the existing space shaded in grey and white and the proposed added space shaded in blue:



*Id.* at 624.

Petitioner’s renovation design for the Wickford EL necessitated an application to the Zoning Board to request the following relief from the WVC district dimensional regulations and use restrictions (Wickford EL Application):

- A dimensional variance of 4,063 square feet from the 7,000 square foot maximum building footprint imposed by article II, § 21-93(b)(1) of the Town’s Zoning Ordinance to continue to accommodate the existing building footprint, *id.* at 580, 632;
- A dimensional variance of two stories to allow the proposed five-story structure to exceed the maximum of three stories allowed by article IV, table 2B of the Zoning Ordinance, *id.*;
- A dimensional variance of 22.32 feet to exceed the maximum building height allowance of thirty-five feet as prescribed in article IV, table 2B of the Town’s Zoning Ordinance, *id.*;
- A dimensional variance to allow off-street parking between the front of the building and Phillips Street, which would otherwise be prescribed by article XI, § 21-271 of the Town’s Zoning Ordinance, *id.*;

- A special use permit to allow for the proposed gross square footage of 55,540 square feet, which exceeds the 4,000 sq. ft. gross floor area limit of § 21-93(b)(1) and otherwise expands from the existing gross floor area of 33,159 square feet, *id.*; and
- A special use permit to allow a multi-family dwelling in excess of the three dwelling units allowed by article III of the Town’s Zoning Ordinance. *Id.*

## B

### The Olde Wickford Theatre

Simultaneous with its Wickford EL Application, Petitioner submitted a separate but related application for dimensional variances and special use permits to rehabilitate the Olde Wickford Theatre (Theatre) property (the Theatre Application)—a parcel containing a vacant theatre and two outbuildings that is proximately located across Phillips Street from the Wickford EL.<sup>4, 5</sup> *Id.* at 65-69. The Theatre Application requested approval to renovate the three existing buildings on the Theatre property to house eighteen condominiums. *Id.* at 68. Parking requirements necessitate that Petitioner’s design plan include thirty-one parking spaces for future Theatre residents. *Id.* at 221. The Theatre parcel, however, can accommodate only ten parking spaces; as a result, Petitioner plans to locate the twenty-one remaining spaces on the Wickford EL property, accessible via a crosswalk.<sup>6</sup> *Id.* As described in the Theatre Application, “[t]he Old [Wickford] Theat[re]

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<sup>4</sup> Although Appellants’ Complaint includes two counts—one appealing the Zoning Board’s decision as to the Wickford EL Application and one appealing approval of the Theatre Application—Appellants’ memorandum to this Court challenges only the legality of the Zoning Board’s approval of the Wickford EL Application. *Compare* Compl. ¶¶ 10-16, *with* Pls.’ Br. 2-3. This Decision will therefore limit its discussion to the Wickford EL and will discuss the Olde Wickford Theatre only to the extent necessary.

<sup>5</sup> The Olde Wickford Theatre is located at 84-90 Phillips Street in North Kingstown, more specifically described as Lots 40 and 41 on Tax Assessor’s Plat 92. (R. at 70.)

<sup>6</sup> The Wickford EL plans therefore show a total of ninety-two parking spaces—twenty-one for Theatre condominium residents, sixty required for Wickford EL residents plus one extra, and ten that Petitioner agreed to provide for the adjacent Town playground. (R. at 610.)

building is an integral part of the Wickford Elementary Project” and “[t]he two projects are being developed congruently.” *Id.* at 69.

## C

### **Zoning Board Meetings Addressing the Wickford EL Application**

In consideration of Petitioner’s Wickford EL Application, the Zoning Board conducted a public meeting on February 8, 2022 and recorded its approval of the Wickford EL Application in a March 30, 2022 meeting. *See generally id.* at 332-365, 653-758.

## 1

### **February 8, 2022 Meeting**

At the February 8, 2022 meeting, Petitioner’s counsel presented a series of witnesses to explain its Wickford EL redevelopment plan, and the Zoning Board also heard public comment.<sup>7</sup> *See generally* R. 653-740. At the close of testimony and public comment, Zoning Board members provided their preliminary assessments of the Wickford EL Application but did not make any formal findings of fact. *See generally id.* at 740-57.

## a

### **Petitioner’s Witnesses**

## i

### **Paul Boghossian**

The Zoning Board first heard from Paul Boghossian (Boghossian), Petitioner’s primary developer. *Id.* at 659. Boghossian testified that he has worked in property development for thirty-five years, focusing on renovations for adaptive use, most often involving historic buildings. *Id.*

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<sup>7</sup> To the extent this Decision excludes certain testimony or comments, that is only because it is not relevant to the issues raised in this appeal.

at 661. As a relevant example of his prior work, he provided an overview of a project involving a vacant building in a small town—the former Hathaway Shirt Factory in Maine. *Id.* Boghossian explained that he successfully renovated the 250,000 square-foot derelict factory into a mixed-use space for lofts, offices, and retail. *Id.* at 661-62. Taking questions from the Zoning Board, Boghossian next explained that the Wickford EL design plans had been revised in response to “quite an outpouring of public opinion” to remove a landing and walkway to Academy Cove as well as a dock on the south end near the theater. *Id.* at 663.

**ii**

**Molly Titus**

Petitioner next called Molly Titus (Titus), a registered engineer from DiPrete Engineering, whom the Zoning Board accepted as an expert in civil engineering. *Id.* at 664-66. Titus first addressed the requested height and building story variances, explaining that “[t]he existing peak area of the schoolhouse with development in the final condition can sustain five stories[, s]o there are two stories of building additions proposed on the left-hand end of this building.” *Id.* at 668. She further testified that the Wickford EL’s existing height at its peak is 60.02 feet and that the “proposed addition is lower than the existing roof peak.” *Id.* at 669.

As to parking, Titus testified that the front of the building was the best location to site required handicap parking stalls, as well as one-way circulation for emergency vehicle access. *Id.* at 670. The proposed parking at the front of the building would be “screened from the road” by modifying the grade of the front landscape. *Id.* In Titus’s opinion, Petitioner’s Application represented the least relief necessary to renovate and make use of the Wickford EL. *Id.* at 672.

Titus also stated that the Wickford EL’s existing 33,159 gross floor area structure exceeds the WVC district limit of 4,000 feet and confirmed that Petitioner requested to further exceed that

limit by increasing gross floor area to 55,540 feet. *Id.* at 672-73. She testified that the building could support the proposed use of thirty-nine condominium units without disrupting the neighborhood or privacy of abutting owners, specifically with regard to noise and light glare, stating that “[t]here will be minimal site lighting . . . [and] dark sky compliance, down lit.” *Id.* at 674-76.

### iii

#### **John Grosvenor**

Petitioner next presented, and the Zoning Board recognized, John Grosvenor (Grosvenor) as an expert in the field of architecture. *Id.* at 679. Grosvenor testified that he specialized in historic preservation and had specifically been involved with five other school-to-residential redevelopment projects. *Id.* at 679-80. He clarified that the current attic space in the original schoolhouse section of the Wickford EL was not included in the existing 33,159 gross floor area calculation. *Id.* at 682. He stated that Petitioner’s proposal would make productive use of that attic space and would then add an additional 12,000 feet of gross floor area through the two-story addition. *Id.* at 682-83. Grosvenor further testified that the two-story addition would include one story of living space and one story to house the structure’s mechanical units—heat pump split systems and six air compressors. *Id.* at 683-84. In Grosvenor’s opinion, the rehabilitated Wickford EL would “feel very much the way it has been” and will continue to be “very recognizable as the school[.]” *Id.* at 684.

As to the issue of siting parking at the front of the building, Grosvenor stated that the existing grade of the front landscape would be raised slightly with planting at the top designed to screen the front parking area from view. *Id.* at 686. In Grosvenor’s opinion, siting the parking



spaces at the side of the building instead of the front would be even more visible to the surrounding area. *Id.*

iv

**Paul Bannon & Scott Rabideau**

Petitioner also presented the testimony of Paul Bannon (Bannon), an expert in transportation traffic engineering, and Scott Rabideau (Rabideau), an expert freshwater and coastal wetland biologist. *Id.* at 694-705. Bannon testified about the details of a traffic study he performed related to the Wickford EL and Theatre Applications and expressed his opinion that “there would be no traffic hazard or congestion[.]” *Id.* at 697-98. Rabideau testified to the environmental impact of the Wickford EL Application, concluding that the project would have an overall “positive impact” on the nearby coastal feature as a result of Petitioner’s plans to install infiltrated pavement, eliminate direct drainage into the nearby cove, remove an old septic system, and tie into the municipal sewer system. *Id.* at 705.

Petitioner’s attorney then concluded with a clarification of the future development site referenced in Petitioner’s design plan, explaining that Petitioner’s Purchase and Sales Agreement with the Town included a future option allowing Petitioner to request to develop a second condominium structure on the parcel, subject to future approval. *See id.* at 707-08; *see also id.* at 610 (“Location Map” showing “Potential Future Development up to 15 Units”). He further explained that Rhode Island condominium law requires disclosure to future buyers of where future development may occur. *Id.* at 708.

**b**

**Public Comment**

Following Petitioner’s presentation, the Zoning Board opened the meeting to public comment and heard from ten individuals. *See generally* R. at 709-40. As is relevant to this appeal, members of the public expressed concern with the increased “mass” proposed to be added at the top of the building. *See id.* at 710 (asking “how big is big enough?”); *id.* at 713 (observing that the Wickford EL is already the largest building in the area); *id.* at 719 (expressing an opinion that the proposed design was “too big of a project for the space” and that Petitioner was “just trying to squeeze in as much as” it could); *id.* at 722-23 (stating that Petitioner’s design revisions had “slowly . . . increase[d] the scale and massing of the structure to swallow up the historic preciousness of the original building . . . to the point at which it has become very top heavy, totally over-scaled for this site” and disagreeing with any statement that there existed a need for fifty-seven new homes); *id.* at 731 (expressing that the proposed design was “top heavy”); *id.* at 734 (stating the design “looks like a spaceship has landed on the roof of that building”); *id.* at 739 (voicing a concern with “the shape of the building and its volume”). In a related written submission, two commentors suggested—without further explanation—that the proposed two-story addition could be reduced to one-and-a-half stories. *Id.* at 379.<sup>8</sup>

Commentors also expressed two additional concerns related to the size and “mass” of the proposal, specifically that: 1) the increased size would adversely impact “the architectural integrity of the building . . . [and the] purpose and spirit of the historic district[.]” *id.* at 710-11; and 2) the

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<sup>8</sup> The Court has reviewed the written public comments provided in the Record, which broadly reflect the same concerns voiced in the February 8, 2022 Zoning Board meeting. (R. at 366-412.) To the extent a written comment presented an issue or suggestion not expressed at that meeting, the Court will note the written comment in this section of the Decision so as to present a concise and organized review of the facts.

additional windows for the added floors would increase light pollution. *Id.* at 711-12 (citing nearby library as an example of existing light pollution); *id.* at 713 (worrying that “projecting light [was] going to be a nuisance” and encouraging fewer windows and dormers).

Finally, several members of the public expressed concern with Petitioner’s proposal to locate parking at the front of the building. *Id.* at 713-14, 717, 725-29. Commentors suggested various alternatives, including: 1) siting spaces at the rear and to the west of the building, *id.* at 714, 725; 2) forfeiting the future development area for parking spaces, *id.* at 717; and 3) reducing the number of units to thirty-four—as Petitioner had originally proposed—which would serve to resolve both the issues of building mass and parking. *Id.* at 728. Notwithstanding these proposals, commentors generally acknowledged the requirement that handicap spaces be sited close to the building entrance. *Id.* at 714, 717.

**c**

**Zoning Board Members’ Comments**

At the close of testimony and public comment, the Zoning Board members placed their initial impressions on the record. *See generally* 741-51. Four of the five voting members indicated their tentative approval. *Id.* at 743, 745-46, 749.

Further, two members made comments relevant to the issues raised in this appeal. First, notwithstanding his overall support for the Wickford EL Application, Member Zangari reiterated the suggestion that Petitioner consider waiving its right to future development in order to free up space to resolve the parking concerns. *Id.* at 747-48. Second, Member Kliever—the sole member inclined to vote against the Wickford EL Application—expressed concern with the proposed increased square footage and questioned whether the proposal constituted “the minimum necessary relief.” *Id.* at 749. He did not, however, propose or otherwise suggest any alternatives. *Id.*

Finally, several Zoning Board members commented on the current state of the Wickford EL, the Sisyphean efforts of the Town to minimally maintain it, and the prior failed efforts to rehabilitate it. Chairman Weitman, for example, relayed that the Town had considered a separate unsuccessful proposal four years prior and expressed that “not a lot of people . . . have the wherewithal, the expertise, the track record for restoring historic buildings and, of course, the deep pockets to pull this off.” *Id.* at 743. He noted the need to prevent the Wickford EL from deteriorating. *Id.* Member Warren shared that she had walked the property and noted that, despite the Town’s ongoing investments, the Wickford EL was “just crumbling.” *Id.* at 745-46. Member Zangari stated that he had also personally viewed the Wickford EL and observed graffiti, boarded up windows, and broken glass. *Id.* at 747. He described the building as “a blight in the middle of Wickford” and “an embarrassment to the Town.” *Id.* at 746-47. He further observed, as did Member Warren, that Petitioner’s Application was in line with the Town’s Comprehensive Plan, specifically to repurpose an existing structure, utilize existing infrastructure, and improve wastewater handling. *Id.* at 748-49. Finally, Alternate Member Andrews briefly shared some history of prior failed attempts to revitalize and make use of the Wickford EL, including a defeated bond initiative and past challenges to solicit viable development proposals. *Id.* at 750-51.

The Zoning Board continued consideration of the Wickford EL Application to allow time to hear testimony related to the Theatre Application. *Id.* at 753.

## 2

### **March 30, 2022 Meeting**

At the March 30, 2022 meeting, the Zoning Board formally voted 5-0 in favor of the Wickford EL Application, approving the four requested dimensional variances, the two requested special use permits, and a written decision reflecting the Zoning Board’s findings and conclusions

as to the same. *See generally id.* at 341-49. Referencing the detailed record relating to the Wickford EL Application, the Zoning Board generally did not discuss the application during the meeting, but instead referred to its draft written decision, which it had provided in advance to Petitioner and abutters' counsel. *Id.* at 335-36. Member Zangari did, however, explain why he voted to approve the parking variance despite his previous suggestion that Petitioner consider waiving its future development rights to allow for parking in that area of the parcel. *Id.* at 345. He expressed that, regardless of whether Petitioner gave up the future development site, handicap parking would still be necessary at the front of the building and environmental concerns would militate against siting parking at the rear of the structure. *Id.* at 346.

The Zoning Board also voted unanimously to approve the Theatre Application. *See generally id.* at 358-64.

## **D**

### **The Zoning Board's Recorded Decision & The Instant Appeal**

The Zoning Board immediately recorded its approval in a March 30, 2022 written Zoning Board of Review Decision (Zoning Board Decision). *Id.* at 580. After summarizing Petitioner's witness testimony, the Zoning Board Decision enumerated findings of fact for each of the six requested areas of relief and recorded the Zoning Board's unanimous approval for the dimensional variances and special use permits. *Id.* at 585-91.

In a section titled "Applicable Documents," the Zoning Board Decision lists not only the February 8, 2022 meeting minutes, but also the Town's Comprehensive Plan, Petitioner's Application, a site plan, various building plans, a Staff Report to the Zoning Board of Review, dated January 28, 2022 (Staff Report), and a memorandum from the Town's Planning Commission, dated January 27, 2022 (Planning Commission Memo). *Id.* at 580-81. Given the

length of the Zoning Board Decision, the Planning Commission Memo, and the Staff Report, relevant sections of those documents will be further discussed in the appropriate section of the Analysis, *infra*.

On April 19, 2022, Appellants timely appealed the Zoning Board’s Decision. *See generally* Compl.

## II

### Standard of Review

The Superior Court’s review of zoning board decisions 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).

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 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.

Questions of law are reviewed *de novo*. *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 791 (R.I. 2005).

### **III**

#### **Analysis**

##### **A**

#### **Dimensional Variance Standard**

To obtain a dimensional variance, an applicant carries the burden of establishing before the zoning board: 1) the existence of a hardship that amounts to more than a mere inconvenience, is not otherwise caused by the applicant, “and does not result primarily from the desire of the applicant to realize greater financial gain”; 2) “[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”; and 3) “[t]hat the relief to be granted is the least relief necessary.” Section 45-24-41(d)-(e); *see also* North Kingstown Zoning Ordinance § 21-14(a)-(b).

Before this Court, Appellants challenge three of the four dimensional variances approved for the Wickford EL Application, specifically the Zoning Board’s decision to grant relief from the: 1) maximum building height limitation; 2) maximum building story allowance; and 3) limitation on parking between the building front and Phillips Street. (Pls.’ Br. 2.) As to all three claims of

error, Appellants argue that the dimensional variances do not “relieve a hardship amounting to ‘more than a mere inconvenience,’” and exceed “‘the least relief necessary.’” *Id.* (quoting § 45-24-41(d)-(e)).

“‘[M]ore than a mere inconvenience’ . . . mean[s] that an applicant must show that the relief [sought] is reasonably necessary for the full enjoyment of [a] permitted use.” *DiDonato v. Zoning Board of Review of Town of Johnston*, 104 R.I. 158, 164, 242 A.2d 416, 420 (1968). There must be substantial evidence in the record showing that the adverse impact to the applicant if the variance is denied is more than a denial of the applicant’s mere “preferable alternative to compliance.” *Westminster Corp. v. Zoning Board of Review of City of Providence*, 103 R.I. 381, 387, 238 A.2d 353, 357 (1968).

Further, it is not enough that an applicant seeking a dimensional variance show hardship; it must also demonstrate “[t]hat the relief to be granted is the least relief necessary.” Section 45-24-41(d)(4). “Least relief” means that “the burden is on the property owner to establish that the relief sought is minimal to a reasonable enjoyment of the permitted use to which the property is proposed to be devoted.” *Standish-Johnson Co. v. Zoning Board of Review of City of Pawtucket*, 103 R.I. 487, 492, 238 A.2d 754, 757 (1968).

## **B**

### **Height & Building Story Allowance**

As to the maximum height and building story allowance, Appellants argue that “‘full enjoyment’ does[ not] mean the ability to ‘max out’ the potential for development.” (Pls.’ Br. 16.) In support of this argument, Appellants cite to two cases comparing “economic impracticality” and “economic impossibility,” as well as a summation of those cases by a noted local zoning expert that “economic impossibility, not economic impracticality, is the touchstone for deciding whether



‘full enjoyment’ can be exercised within the dimensional requirements of the law, at least in cases involving commercial uses.” *Id.* (quoting Roland F. Chase, *Viti Revisited, or, Just What is a Zoning “Deviation”?*, 22 Suffolk U. L. Rev. 315, 327 (1988)); *see also Westminster Corp.*, 103 R.I. at 388, 238 A.2d at 358 (citing evidence that limiting building height would render project “financially impossible”); *Apostolou*, 120 R.I. at 509, 388 A.2d at 826 (referencing evidence showing that compliance with the zoning ordinance would be “economically impractical”). Appellants contend that, because there was no evidence before the Zoning Board that limiting the Wickford EL development plan to three stories would create an “economic impossibility,” its approval of the Application was in error. *Id.* at 17.

Neither the Legislature, our Supreme Court, nor the North Kingstown Zoning Ordinance dictates that “economic impossibility” is the legal minimum to justify approval of a dimensional variance. In fact, in the law review article cited by Appellants, Mr. Chase himself casts doubt on whether his impracticality-impossibility distinction “is really accurate” as “a statement of the law.” *See Chase, supra*, at 327 n.70. In this Court’s considered view, it is *not* an accurate statement of the law.

The case law addressing “economic impracticality” and “economic impossibility” must be read in the context of the appropriate standard of review, which is to assess “the reasonableness of the action of the zoning board *on the basis of the evidence before it.*” *Apostolou*, 120 R.I. at 508, 388 A.2d at 825 (emphasis added). With that in mind, the fact that “economic impossibility” constituted substantial evidence to justify an approval of dimensional relief in *Westminster* does not mean that such evidence is the *only* evidence that can justify a variance. *See Westminster Corp.*, 103 R.I. at 388, 238 A.2d at 358. Appellants’ argument wrongfully elevates the sufficient condition of “economic impossibility” to a necessary condition for all dimensional relief. *Cf.*

*United States v. Sweeney*, 611 F.3d 459, 471 (8th Cir. 2010) (where a prior judicial opinion did not evince an intent to prescribe an exclusive definition, defendant’s narrow interpretation “confuse[d] a sufficient condition for a necessary condition” and failed to appreciate that “one way . . . is not the only way”). Accordingly, an applicant seeking a dimensional variance need not show “economic impossibility” to establish that denial of the requested relief would amount to more than a mere inconvenience.

Appellants next contend that the Wickford EL redevelopment plan’s value to the community as a whole has nothing (“zippo”) to do with the legal standard for assessing a dimensional variance. (Pls.’ Br. 17-18.) To the contrary, our Supreme Court has instructed that “to deny the applicant a fuller use of his property and at the same time serve no public interest would be arbitrary and an abuse of discretion.” *Travers v. Zoning Board of Review of Town of Bristol*, 101 R.I. 510, 514, 225 A.2d 222, 224 (1967). Although the facts in *Travers* are plainly distinguishable, the Court was nevertheless clear that public interest does factor into a zoning board’s determination. *Id.* Here, the public interest factors implicated by the Wickford EL Application include historic preservation, light pollution, environmental protection, and traffic congestion; and on each of those topics Petitioner presented un rebutted expert testimony favorable to its Application. *Cf. id.* at 515, 225 A.2d at 224-25 (“To deny the requested relief would serve no public interest. In the circumstances we cannot say that the board acted arbitrarily or abused its discretion.”).

Appellant’s further attempt to bolster its argument that “public policy has zippo to do with hardship” by quoting § 21-309(a) of the Town’s Zoning Ordinance actually provides considerable

support for the Zoning Board's approval of Petitioner's Application. (Pls.' Br. 17-18 (internal quotations omitted).) Section 21-309(a) states:

“Buildings or structures nonconforming by dimension are likely to cause overcrowding and congestion and contribute to unhealthy conditions and are contrary to the purposes of this chapter. Buildings or structures that are nonconforming by dimension cause disruption to the comprehensive land use pattern and confer upon the owners a position of unfair advantage.” (North Kingstown Zoning Ordinance § 21-309(a).)

As discussed, Petitioner offered un rebutted expert testimony that the Wickford EL development would cause no traffic hazard or congestion and that the project would have an overall “positive impact” environmentally. (R. at 697-98, 705.) Multiple Zoning Board members and the Planning Commission concluded that Petitioner's redevelopment proposal complied with the Town's Comprehensive Plan in numerous aspects, including in its repurposing of an existing structure and improvement of wastewater handling. *Id.* at 635, 746, 748-49. 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).

While it may be true, as Appellants' claim, that our “Supreme Court has never equated the ‘more than a mere inconvenience’ standard with the inability to achieve public policy goals,” (Pls.' Br. 17-18), the Court has also never stated that evidence of a town's protracted inability to rehabilitate a prominent derelict municipal property is irrelevant to the “more than a mere inconvenience” standard. *See Armory Revival Co. v. Carlson*, C.A. No. PC 96-3119, 1997 WL 839878, at \*4 (R.I. Super. Jan. 16, 1997) (including fact of owner's sixteen years of failed efforts to rehabilitate a structure as evidence of hardship amounting to more than a mere inconvenience); *see also Vitti v. Zoning Board of Adjustment of City of Pittsburgh*, 710 A.2d 653, 658 (Pa. Commw.

Ct. 1998) (recognizing blight and dilapidation are relevant considerations in variance determinations). Appellants' continued striving for a bright line rule that would serve to deny Petitioner's Wickford EL Application repeatedly ignores that there generally is no such rule—the substantial evidence standard “is made of rubber, not of wood. It can be stretched north, and it can be stretched east or south or west. And the courts are both willing and able to do the stretching, in accordance with what they deem to be the needs of justice.” *Apostolou*, 120 R.I. at 508, 388 A.2d at 824.

In sum, the standard for a dimensional variance does not require “economic impossibility,” nor does it require that a zoning board close its collective mind to public interest factors and the town or taxpayers' reasonable interest in the relief requested. The proper standard is simply whether there is substantial evidence in the record to support the zoning board's conclusion—i.e., “*relevant* evidence that a reasonable mind might accept as adequate”—that the adverse impact to the applicant is more than a mere denial of a personal preference. *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) (emphasis added)); *Westminster Corp.*, 103 R.I. at 387, 238 A.2d at 357.

Here, the record reflects that the Wickford EL has sat vacant for more than fifteen years and that the Town has undertaken numerous failed attempts to rehabilitate the structure. (R. at 637, 743, 750-51.) At the RFP stage, Petitioner was clear that the Wickford EL redevelopment project was a small-scale effort, and Petitioner was interested in other congruent development opportunities as part of its proposal. See Hathaway Holdings Wickford Elementary School Redevelopment Proposal, at 5 (Oct. 7, 2019), <https://www.northkingstownri.gov/>

DocumentCenter/View/3245/Hathaway-NCA.<sup>9</sup> Further, notwithstanding public comment to the contrary, it is worth noting that although Petitioner’s initial proposal included thirty-four condominium units and its final Wickford EL Application includes thirty-nine, the additional units are not the result of increased height or building stories. *Compare id.* at 3, 16 (disclosing two-story addition proposal in Executive Summary of initial RFP response and in design renderings) *with R.* at 629. Denying Petitioner the ability to construct the two-story addition would erase one full unit and the bedrooms of ten other units, thereby eliminating a significant percentage of the proposed condominium units. *See R.* at 586, 619-20. It would also eliminate the proposed location of the building’s mechanical units. *Id.* at 683-84. Further, Petitioner’s expert architect’s un rebutted testimony was that the addition was necessary to unify the current disparate design of the building while making productive use of the existing attic space.<sup>10</sup> *Id.* at 682-84. As a specialist in historic preservation, he further testified before the Planning Commission that “the proposed aesthetics, scale, and context are fully supported by [the Rhode Island Historical

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<sup>9</sup> The Staff Report incorporates the RFP and related proposal materials by reference. (R. at 637.)  
<sup>10</sup> Appellants contend that “unifying ‘varying architectural styles’ is an aesthetic concern divorced from [dimensional] variance standards[.]” (Pls.’ Br. 20.) A reviewing court must determine whether there exists substantial evidence in the record to support the zoning board’s determination—i.e., “such *relevant* evidence that a reasonable mind might accept as adequate to support a conclusion.” *Pawtucket Transfer Operations, LLC*, 944 A.2d at 859 (emphasis added). To borrow from Rule 401 of the Rhode Island Rules of Evidence, “relevant evidence” means “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” R.I. R. Evid. 401. Architectural design is an integral and important consideration in any property development plan, for both the property owner and the surrounding community, and it is therefore relevant to whether a variance denial adversely impacting that interest is a hardship. *Cf.* § 45-24-41(d)(3) (dimensional relief must “not alter the general character of the surrounding area”). This is especially true where, as here, the building permit for the property development plan at issue is “conditioned upon final review and approval of the building elevations by [RIHPHC].” (R. at 577.)

Preservation and Heritage Commission (RIHPHC),]” an entity that will maintain oversight of Petitioner’s design. *Id.* at 571, 635, 679-80.

In light of this substantial, competent, and un rebutted evidence, the Zoning Board did not err in determining that denying the height and building story variance request would amount to more than a mere inconvenience for Petitioner. *See Apostolou*, 120 R.I. at 509, 388 A.2d at 825 (stating that a reviewing 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”); *see also Armory Revival Co.*, 1997 WL 839878, at \*4.<sup>11</sup>

## C

### Front Parking

As to the twenty-four parking spaces sited at the front of the building, the substantial, competent, and uncontradicted evidence before the Zoning Board was that the front of the building provided the best location for the three required handicap spaces and one-way circulation for emergency vehicle access. (R. at 670.) Accordingly, whether Petitioner requires three spaces or twenty-four, it still must obtain a variance from § 21-271 of the Town’s Zoning Ordinance, and its hardship arises, at minimum, from the requirement that handicap parking be situated in the closest possible area to the building entrance. *Id.* at 588, 670. Appellants do not challenge this hardship determination. (Pls.’ Br. 26 (taking issue with only the twenty-one nonhandicap spaces).)

Therefore, having established hardship, whether Petitioner’s requested relief is necessary to ameliorate that adversity goes to the issue of whether it has requested the least relief necessary. *See* § 45-24-41(d)(4). As Appellants recognize, due to the Wickford EL’s proximity to Academy

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<sup>11</sup> Appellants arguments pertaining to the “least relief necessary” requirement overlap with and duplicate their hardship claims. *See* Pls.’ Br. 20 (arguing that aesthetic concerns are irrelevant and Petitioner failed to prove “economic impossibility” before the Zoning Board). Having already addressed these arguments, the Court will not dedicate a separate section to restate the same.

Cove, the only viable areas to situate these twenty-one parking spaces are the front of the building or the reserved future development area. (Pls.’ Br. 22.) Petitioner selected the former option, but Appellants urge consideration of the latter. Our Supreme Court has held that a petitioner must consider “reasonable alternatives” to satisfy the § 45-24-41(d)(4) “least relief necessary” requirement for a dimensional variance. *New Castle Realty Co. v. Dreczko*, 248 A.3d 638, 647 (R.I. 2021).

Appellants’ proposal, however, is not reasonable. Requiring a property owner to forever waive a fully and fairly negotiated future development opportunity to make space for twenty-one parking spaces, when doing so would not eliminate, alter, or lessen the variance requested, is simply not reasonable. *Hayes v. Charlestown Zoning Board of Review*, No. WC-2020-528, 2022 WL 16559085, at \*14 (R.I. Super. Oct. 06, 2022) (stating that abutters’ proposal that property owner reduce only the width of the top floor, which would not reduce overall building footprint or have any impact on the requested variance, was unreasonable). Section 21-271 of the Town’s Zoning Ordinance is concerned with the *fact* of parking, not the *quantity* of parking. See art. XI, § 21-271 (“Wickford Village Center District—Off-street parking shall be located, to the maximum extent feasible, at the rear of the building. No new off-street parking shall be located between the street line and the building face containing the principal entrance.”) Even if Petitioner relocated the twenty-one nonhandicap spaces, the fact remains that handicap spaces and emergency access would still be sited at the front of the building, necessitating the currently proposed grade change, the currently proposed vegetative screening, and the currently requested dimensional variance.

The Zoning Board did not abuse its discretion when it approved a variance to allow twenty-four parking spaces at the front of the building, crediting Petitioner’s un rebutted expert testimony that the front of the building was the best available option and discrediting an alternative proposal

that would have no ameliorating effect on the relief requested. *Cf. Hayes*, 2022 WL 16559085, at \*14.

#### **IV**

#### **Conclusion**

For the foregoing reasons, this Court finds that the Zoning 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 otherwise an abuse of discretion. Accordingly, the Zoning Board Decision is affirmed. Counsel shall submit an appropriate order for entry in accordance with this Decision.





**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** Curtis H. Fisher, et al. v. Zoning Board of Review of the Town of North Kingstown, et al.

**CASE NO:** WC-2022-0134

**COURT:** Washington County Superior Court

**DATE DECISION FILED:** February 13, 2023

**JUSTICE/MAGISTRATE:** Taft-Carter, J.

**ATTORNEYS:**

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**For Appellees:** Matthew F. Callaghan, Jr., Esq.; John J. Kupa, Jr., Esq.