

EXHIBIT "1"

C.A. No. KC-2015-0359

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS KENT, SC. SUPERIOR COURT

Merkle v. Clark

Decided Oct 9, 2015

C.A. No. KC-2015-0359

10-09-2015

ROBERTA MERKLE, NORMA JEAN BASSETT, and KATHERINE GILMAN v. JUDITH CLARK, DAVID CLARK, ZONING BOARD OF REVIEW OF THE CITY OF WARWICK, and DONALD MORASH, RICHARD CORLEY, BEVERLY STURDAHL, JULIE FINN, and EVERETT O'DONNELL in their capacities as MEMBERS OF THE ZONING BOARD OF REVIEW OF THE CITY OF WARWICK.

ATTORNEYS: For Plaintiff: Susan A. Chiariello, Esq. For Defendant: Peter D. Ruggiero, Esq. Stephen A. Rodio, Esq.

GALLO, J.

DECISION GALLO, J. Before the Court is an appeal from a decision of the Zoning Board of Review of the City of Warwick (Zoning Board or Board), approving the dimensional variance application of Appellees Judith and David Clark (the Clarks or Appellees). Appellants Roberta Merkle, Norma Jean Bassett, and Katherine Gilman (Appellants) bring this appeal against the Clarks, as well as against the Zoning Board and its members, seeking to reverse the decision granting the Clarks dimensional relief. Jurisdiction in this Court is pursuant to G.L. 1956 § 45-24-69. For the reasons discussed below, this Court affirms the decision of the Zoning Board.

I

Facts and Travel

This action concerns property located at 243 Promenade Avenue in the City of Warwick, Rhode Island, noted on the Assessor's Map as Plat 373, Lots 184 and 185. The property, ² purchased by the Clarks in 2009, consists of a large primary residence as well as a separate "carriage house"¹ containing three garage stalls and a one-bedroom, second-floor apartment inhabited by Judith Clark's mother. The Clarks' property includes the adjacent lot directly north of the lot containing the Clarks' residence, which was formerly improved with a dwelling that has since been demolished, leaving only the primary residence and carriage house. The two lots together, which are to be merged by administrative subdivision, consist of about 20,140 square feet of land and are zoned A-15, meaning that they are to be "used for low density residential use, comprising not more than one single-family dwelling unit per lot area." Warwick Zoning Ordinances §§ 301.3, 300 Table 1.

¹ "A small building, usually part of an estate or adjacent to a main house, used for housing coaches, carriages, and other vehicles." Random House Dictionary of the English Language 393 (1987).

The property is located within a section of Warwick known as "Old Buttonwoods," a longstanding community originally established near the turn of the 20th century as a summer residence area, but now inhabited year-round. Appellants also reside within the bounds of Old Buttonwoods. Additionally present in Old Buttonwoods is the Buttonwoods Beach Association (BBA), an entity which owns the

private roadways and other common areas in that location, and which opposed the Clarks' petition for zoning relief.

The Clarks brought an application for zoning relief to the Zoning Board seeking a dimensional variance from local setback requirements to facilitate construction of an addition to the main dwelling consisting of a breezeway² and an attached garage. See Application for Variance 3 (Feb. 5, 2015); Warwick Zoning Ordinances §§ 200 Table 2A, 602.4. The carriage house was not to be altered. *3

² "A roofed open-air passage or porch connecting two buildings (as a house and garage) or forming a corridor between two halves of a building." Webster's Third New International Dictionary, 274 (1981).

The Zoning Board heard this petition on March 10, 2015. The Clarks were represented at the hearing, where they presented testimony from three expert witnesses: Mr. Harvey Wagner (Wagner), Mr. Thomas O. Sweeney (Sweeney), and Mr. Harry Miller (Miller). Appellants, among others, opposed this request through letters³ submitted to the Zoning Board and through the presentation of testimony at the hearing and the cross-examination of the Clarks' witnesses.

³ The letters in opposition to the Clarks' petition, as well as one in support, are included in the certified record of the Zoning Board.

Mr. Wagner, an architect, was called first on behalf of the Clarks. He was accepted as an expert in design by the Zoning Board based upon his past appearances before the Zoning Board. Hr'g Tr. at 13-14 (Mar. 10, 2015). Wagner testified at length to the existing structural nonconformities on the primary residence and the proposed dimensions of the breezeway and garage. Id. at 14-17. Regarding the location of the garage, Wagner testified that the proposed location was the only reasonable one for an attached garage, given the layout of the land and the available space for the structure. Id. at 17,

18. Wagner also noted that the garage would not be constructed as finished living space, but instead would only have space for automobiles and storage. Id. at 18-19. Finally, Wagner offered his expert opinion that the proposed additions were consistent with the general design of the community, noting the design in general and the average lot coverage of structures were in accord with other existing structures in the neighborhood. Id. at 20-22.

In an extended colloquy, Mr. Corley of the Zoning Board questioned Wagner about the design and the possibility of reasonable alternatives to the proposed garage design. See id. at 26-31. Throughout the questioning, Wagner consistently maintained that the proposed location was the only one suitable for an attached garage and that alternative designs would be impractical or result in insufficient space for safe vehicle operation.

⁴ According to his testimony, siting the *4 garage elsewhere would require seventy to eighty feet of distance between the garage and main residence—an unreasonable option that was more than merely inconvenient, in his expert opinion. Id. at 27. Wagner explained his conclusion that maintaining the proposed siting of the garage while complying with setback requirements would result in the proposed construction obstructing the primary entrance to the residence, rendering it impossible to comply with the setback requirements. Id. at 28. Later in the hearing, Wagner was subject to cross-examination by opposing counsel and affirmed his conclusion that the proposed location was "the only location for the garage." Id. at 57-60.

The Board next heard from Mr. Sweeney as an expert in the field of real estate. Id. at 35-36. He testified to the nature of the parcel and offered his opinion that the proposed location for the garage was the only location consistent with the physical characteristics of the land. Id. at 37-39. He also noted that, in his opinion, the proposed additions were consistent with the general character of the neighborhood and that granting a variance for the proposed construction would be the least relief

necessary to enable the construction. Id. at 40-42. Sweeney concluded his testimony by opining that the proposed setbacks were consistent with those already in place for the main residence, and that to deny them would constitute a hardship amounting to a restriction on a lawfully permitted use of the property and would be more than merely inconvenient for the Clarks. Id. at 42-44.

Mr. Miller was the final witness to testify on behalf of the Clarks, after being certified as an expert land surveyor. Miller testified to the average setback on neighboring properties, which he measured at 3.6 feet, contrasting this to the five foot proposed setback for the garage and breezeway additions. Id. at 46-48. He also testified to the extent of the new setback, describing how the dimensions of the breezeway and garage required less relief from dimensional *5 requirements than the main house to which they would be attached, and stating that such a setback would not negatively affect the roads in the area. Id. at 48-50. He also offered his opinion that the proposed construction would not impact sight lines of motorists or pedestrians traveling on the roads adjacent to 243 Promenade Avenue. Id. at 50.

Two witnesses testified on behalf of the objecting parties, Mr. Edward Pimentel (Pimentel) and Mrs. Susan Martins-Phipps (Martins-Phipps). Pimentel testified first, after being duly certified as an expert in planning. Pimentel's testimony focused on what he characterized as the nonconforming use of the property—there being two residential structures upon the lot instead of the permitted one—and offered his opinion that the addition of the garage and breezeway intensified the nonconforming use of the property. Id. at 69-74. He also opined that the denial of a variance would not constitute a hardship upon the Clarks, nor would it amount to more than a mere inconvenience for the Clarks to site the proposed garage elsewhere. Id. at 74-75. Pimentel further explained that, in his expert opinion, any hardship that could be considered to exist was the result of

action by the Clarks. Id. at 75. Furthermore, he stated, in his expert opinion, the granting of any dimensional relief enabling the construction of the proposed attached garage would not amount to the least relief necessary to alleviate any hardship. Id.

Mrs. Martins-Phipps testified in her own behalf and as President of the BBA. Id. at 81-82. She testified to the normal role of the BBA in facilitating dialogue between neighbors in the event of home addition plans and stated that this was the first petition for zoning relief that was opposed by the BBA. Id. at 83-85. To her knowledge, she stated, other homes in Old Buttonwoods were generally about 2000 square feet, with no home over 4100 square feet, while her understanding was that the addition to the Clarks' home would result in about 6000 square feet of space. Id. at 85-86. Martins-Phipps also stated that no other home in the area had an *6 attached garage, and that most properties not conforming to setback requirements did so because of open porches. Id. at 86. Furthermore, Martins-Phipps asserted from the stand that no other home in the neighborhood had a garage facing inward towards the center of a lot, as the Clarks' proposed garage would, with all other garages facing outwards toward lot boundaries and/or roadways. Id. at 86-87. Martins-Phipps concluded her testimony by describing the character of the neighborhood at length and opining that, based on the features and design of the addition, she did not believe the proposed construction was in keeping with that character. Id. at 87-89, 92-94, 95.

The Zoning Board unanimously voted to approve the petition for relief on that date and filed a formal decision on April 2, 2015. Id. at 105-06. The instant appeal timely followed.

II Standard of Review

Review of a zoning board decision by the Superior Court is governed by § 45-24-69(d), which provides that:

"[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. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:

- "(1) In violation of constitutional, statutory, or ordinance provisions;
- "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
- "(3) Made upon unlawful procedure;
- "(4) Affected by other error of law;
- "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
- "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 45-24-69(d).

7 *7

In reviewing the decision of a zoning board, a trial justice "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." Lischio v. Zoning Bd. of Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)).

As to questions of fact, the Court may not "substitute its judgment for that of the zoning board of review . . ." Curran v. Church Cmty. Hous. Corp., 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)). This deference is afforded to a zoning board due to the fact that "a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance." Monforte v. Zoning Bd. of Review of E. Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). A decision may only be vacated upon a finding that it is clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record. von Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 399 (R.I. 2001); see § 45-24-69(d)(5).

III Analysis

In asking the Court to reverse the decision of the Zoning Board, Appellants present three issues on appeal. As a threshold issue, Appellants contend that the written decision of the Zoning Board is deficient in explaining its findings, reasoning, and conclusions, and therefore *8 must be reversed. They next contend that the decision of the Zoning Board was in error because the grant of dimensional relief enlarges a building containing a nonconforming use on the property, in contravention of the City of Warwick's zoning ordinances. Finally, Appellants argue that the evidence presented by Appellees fails to meet the requisite burden of proof to obtain a dimensional variance and that the Zoning Board decision is therefore clearly erroneous in light of the reliable, probative, and substantial evidence on the record.

A The Sufficiency of the Board's Decision

Appellants argue to the Court that the decision of the Zoning Board is inadequate as a matter of law and requires reversal. This presents a threshold

issue, as local zoning boards are obligated to spell out their conclusions and reasoning by stating their findings of fact and conclusions of law in a written decision. Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001). Findings made by a zoning board must be "factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany." Id. (quoting Irish P'ship v. Rommel, 518 A.2d 356, 358 (R.I. 1986)). The decision must show that board members "resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles"; in the absence of appropriate findings the decision of a zoning board may be either remanded or reversed. Irish P'ship, 518 A.2d at 358 (quoting May-Day Realty Corp. v. Bd. of Appeals of Pawtucket, 107 R.I. 235, 239, 267 A.2d 400, 403 (1970)); see also id. at 358-59.

The Zoning Board's decision, although brief, contains both findings of fact and conclusions of law that satisfy these requirements. The findings of fact describe the property in question, including the two dwelling units on the property, and identify that the proposed *9 addition is to be attached to the main house. The findings go on to recount, in brief, testimony to the Board regarding the design of the addition as well as the nature of the Old Buttonwoods neighborhood.

In applying these findings to the requisite standards, the Zoning Board reached independent conclusions on each element to be considered, holding that all relevant criteria were met. First, the Zoning Board held that the hardship to be suffered by the Clarks was not due to the general characteristics of the area but instead resulted from the unique characteristics of the subject land. Its conclusion noted that the main dwelling "is an older home built in the late 1800's" and "does not comply with the current setback requirements." Zoning Bd. Decision at 2 (Apr. 2, 2015). In considering the next factor, the Board determined that "[t]he configuration of the lot and the location of the dwelling on the lot is not due to any prior

action of the petitioner," in keeping with its finding that the house existed in its present configuration since the 1800's. Id. The Board went on to find and conclude that the grant of the variance would be in keeping with the character of the neighborhood. Next, considering the degree of relief afforded, the Board noted that "[t]he proposed addition and garage would be located further from the property lines than the existing dwelling." Id. at 3. Finally, judging a denial of the application to amount to more than a mere inconvenience for the Clarks, the Zoning Board found that "[d]ue to the layout of the dwelling and the location of the dwelling on the lot the proposed location for the addition is the only reasonable area to construct the addition." Id.

These findings and conclusions reflect a reasoned consideration of the statutory criteria in light of the evidence adduced at the Zoning Board hearing. The Zoning Board clearly examined the unique characteristics of the subject lot in this case and concluded that the hardship was due to the presence of an older, historical home with a nonconforming footprint and not the area in *10 general. The Zoning Board's conclusion that no prior action of the applicants created the hardship likewise reflects the lengthy existence of the building and lot in their current configuration. The Board heard specific testimony that enabled it to conclude that there was no other reasonable location for the attached garage and that the relief sought was the least necessary, as the garage would "be located further from the property lines than the existing dwelling." Id. Lastly, the Board's conclusion on the "more than a mere inconvenience" standard clearly credits the testimony of the Appellees' experts while rejecting that of the Appellants' experts. These conclusions reflect the resolution of evidentiary conflicts based on the requisite factual findings and the application of the appropriate legal criteria to the facts. See Irish P'ship, 518 A.2d at 358.

The decision and certified record presented in this case are not of the "barebones" nature that precludes meaningful judicial review of agency determinations. See Sciacca, 769 A.2d at 585. The reasons for the actions of the Zoning Board are clear from its decision and from the evidence presented to the Court in the records of its proceedings. The Board's written decision and the certified record submitted are not in violation of statutory or ordinance provisions.

B

Expansion of a Nonconforming Structure

Appellants next urge the Court to reverse the Zoning Board's decision on the basis that the granting of a dimensional variance will enable an expansion or addition to a building containing a pre-existing nonconforming use created by the presence of the one-bedroom apartment atop the carriage house. Appellants contend that the language of § 401.3 of the Warwick Zoning Ordinances renders both the primary home and the carriage house nonconforming by use, because although both house single-family residences—

11 permitted uses in *11 the zone—the presence of both on the same lot violates the requirement that there be only one single-family dwelling on any lot, leaving two structures that contain nonconforming uses. See also Warwick Zoning Ordinances § 304.4. Section 402.5 also prohibits the expansion of buildings containing nonconforming uses, therefore prohibiting, according to Appellants, the grant of a dimensional variance for such a purpose. See Warwick Zoning Ordinances § 402.5. Appellees respond that § 401.3 regulates both land and structures; the presence of two residences on the lot violates only a numerical restriction relating to the overall use of the land and does not infringe upon use restrictions for buildings and structures, as each building contains a permitted use—a single-family dwelling. Essentially, Appellees argue, the lawful nonconformity by use in this case is a use of the land in general by the presence

of too many structures, while the use contained within each structure on the property is lawful by the relevant zoning restriction.

A nonconforming use is a use that is a "lawfully established use of land, building, or structure [but] which is not a permitted use in the zoning district in which it is located . . ." Warwick Zoning Ordinances § 401.3. The use restriction relevant to this action is provided for in § 304.4 of the Warwick Zoning Ordinances. It provides, in pertinent part, that "[i]n no case shall there be more than one residential building and its accessory buildings on one lot . . ." Specifically, the zoning ordinances of the City of Warwick provide that "[a] building or structure containing a nonconforming use shall not be added to or enlarged in any manner, including any addition or enlargement of floor area or volume, unless the use contained within such building or structure, including such addition and enlargement, is made to conform to the use regulations of the zone in which it is located." Warwick Zoning Ordinances § 402.5.

Restrictions upon nonconforming uses are "basically restrictions against change in the nonconforming use, [or] against an enlargement or

12 expansion of the use or of the structure in *12 which it is carried on." 4 Arden Rathkopf & Daren Rathkopf, The Law of Zoning and Planning § 73.6 (4th ed. 2015). The extent of a nonconforming use is determined by the uses actually existing at the time the property became nonconforming. See 7 Patrick J. Rohan, Zoning and Land Use Controls § 41.03(3)(c) at 41-92 (2002). The scope of nonconforming uses is strictly construed as they are "'detrimental to a zoning scheme, and the overriding public policy of zoning . . . is aimed at their reasonable restriction and eventual elimination.'" Town of Richmond v. Wawaloam Reservation, Inc., 850 A.2d 924, 934-35 (R.I. 2004) (quoting RICO Corp. v. Town of Exeter, 787 A.2d 1136, 1144-45 (R.I. 2001)).

It is well settled that the rules of statutory construction apply to the construction of a municipal ordinance. West v. McDonald, 18 A.3d 526, 532 (R.I. 2011). If a legislative enactment's language is clear and unambiguous, the Court will "interpret it literally" and give its words their plain and ordinary meaning. Id. In examining an unambiguous statute, "there is no room for statutory construction and [the Court] must apply the statute as written." State v. Greenberg, 951 A.2d 481, 489 (R.I. 2008) (quoting State v. DiCicco, 707 A.2d 251, 253 (R.I. 1998)).

There is no contention that § 402.5 is ambiguous, and its words should therefore be interpreted literally and given their plain meaning. The language of § 402.5 of the Zoning Ordinances of the City of Warwick applies only to "building[s] or structure[s] containing a nonconforming use." Single-family dwellings are a permitted use within the A-15 zone in which the Clarks' property is located. See Warwick Zoning Ordinances § 300 Table 1. The addition of a garage to a residence is also permitted, as § 601.1 specifically allows the construction of a private garage as an accessory use. Warwick Zoning Ordinances § 601.1. *13

The nature of the nonconforming use here is that two single-family residences are present on the lot. There is no suggestion that the use contained within each building in any way violates the zoning ordinance. Even the strictest construction of the scope of the use carried on in each building reveals a permitted use—a single-family dwelling. The nonconformity instead arises out of the presence of multiple dwelling structures on the land, as opposed to arising out of the uses carried on within those structures. See Warwick Zoning Ordinances §§ 301.3, 300 Table 1. While the use of the lot is a nonconforming use, the uses contained within the buildings conform to the applicable use restrictions. Nor do the Warwick Zoning Ordinances provide that the presence of multiple residential buildings on a single lot renders an otherwise permitted use within any such building nonconforming. The Warwick

Zoning Ordinances instead appear to countenance a nonconforming use of land separate from a nonconforming use contained within a building. See Warwick Zoning Ordinances § 200.106(a).⁴ The question is not whether a nonconforming use exists, but whether § 402.5's prohibition of the addition to or enlargement of a building containing a nonconforming use applies to the Clarks' residence. By the plain and literal meaning of its terms, it does not.

⁴ Section 200.106(a) defines a nonconforming use as: "[a] lawfully established use of land, building, or structure which is not a permitted use in that zoning district. A building or structure containing more dwelling units than are permitted by the use regulations of a zoning ordinance shall be nonconforming by use." Warwick Zoning Ordinances § 200.106(a) (emphasis added). -----

It is "axiomatic" that the Court "will not broaden statutory provisions by judicial interpretation unless such interpretation is necessary and appropriate in carrying out the clear intent or defining the terms of the statute." Iselin v. Ret. Bd. of Emps.' Ret. Sys. of R.I., 943 A.2d 1045, 1049-50 (R.I. 2008). As § 402.5 has clear and unambiguous language, the plain meaning of that language will govern. The plain meaning of § 402.5 only prohibits addition to or enlargement of buildings containing nonconforming uses, not addition to or enlargement of *14 buildings on a lot containing a nonconforming number of structures. Section 402.5 therefore does not apply in this instance and cannot prohibit the proposed addition to the Clarks' residence. The building in question does not contain a nonconforming use, as it is a detached, single-family dwelling in a zone allowing such a building. The proposed construction of the garage is a permitted accessory use in the zone as well. As § 402.5 only prohibits addition to or enlargement of "building[s] or structure[s] containing a nonconforming use," the

Warwick Zoning Ordinances do not prohibit the addition to the Clarks' residence. The Zoning Board's decision was not affected by error of law.

C

The Board's Decision

Appellants also argue that the decision of the Zoning Board was unsupported by substantial evidence and was clearly erroneous. In considering whether the decision of a Zoning Board is supported by substantial evidence and is not clearly erroneous, the Court looks to the statutory requirements set forth by the General Assembly. With respect to dimensional relief, § 45-24-41(c) provides, in pertinent part:

"In granting a variance, the zoning board of review requires that evidence to the satisfaction of the following standards is entered into the record of the proceedings:

"(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 . . . ;

"(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

*15 "(4) That the relief to be granted is the least relief necessary." Sec. 45-24-41(c).

Furthermore, § 45-24-41(d)(2) requires that "in granting a dimensional variance, [evidence on the record 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." Sec. 45-24-41(d)(2). The Supreme Court has previously held that meeting the "more than a mere inconvenience" standard does not require an applicant for a dimensional variance to prove that there is no other reasonable alternative to enjoy a legally permitted beneficial use of one's property. See Lischio, 818 A.2d at 691-92. The current language of § 45-24-41(d)(2) re-establishes the Viti doctrine: applicants for dimensional variances need only show that denial would lead to an "adverse impact that amount[s] to more than a mere inconvenience." Id. at 691; § 45-24-41(d)(2).

It is well established that the Court may not substitute its judgment for that of the Zoning Board. Curran, 672 A.2d at 454. The Court's review, constrained by statutory mandate, is limited: the Court may not independently weigh the evidence before the Zoning Board and come to a different conclusion. Sec. 45-24-69(d). The Court may only determine whether substantial evidence exists on the record to support a zoning board's decision and whether the decision is clearly erroneous in light of that evidence. See von Bernuth, 770 A.2d at 399. The evidence presented before the Zoning Board in the case at bar far surpasses the low threshold of a scintilla required by law. Reviewing the truly substantial body of evidence presented at the Zoning Board hearing, the Court cannot conclude that the decision of the Zoning Board was clearly erroneous in light of the reliable, probative, and substantial evidence of record.

The Zoning Board, at the March 10, 2015 hearing, received a great deal of testimony on all relevant issues. Mr. Wagner testified that the proposed location of the attached garage was *16 the only suitable site on the property, and that it was impractical for such a garage to be constructed elsewhere on the land due to the unique characteristics of the land itself. Hr'g Tr. at 17, 18. Under cross-examination, Wagner again stated that the proposed location would be the only suitable location on the property; although the

Clarks possessed additional land upon which they might construct a garage, Wagner's testimony was that siting it in any such location would be more than a mere inconvenience. Id. at 57-60. Wagner also spoke to the consistency of the proposed designs with the standards of the community. Id. at 20-22. Mr. Sweeney, testifying as a real estate expert, stated his opinion that the design of the proposed addition was consistent with the community, and that based on his assessment of the land, there was no other location in which to place a garage, leaving the Clarks with more than a mere inconvenience if denied a variance. Id. at 40-42. Sweeney also stated that the need for the variance was not due to any prior actions of the Clarks. Id. at 40. Mr. Miller testified in detail concerning the average setback in the neighborhood and the proposed design's conformity with that standard, and noted that the Clarks were seeking the least relief that would allow construction of the attached garage. Id. at 46-48. Miller also offered testimony that the proposed addition would not negatively affect sight lines and visibility for vehicles travelling on Cooper Ave. Id. at 50. Miller testified to the degree of relief necessary, and how the proposed addition was located as far back as possible within the space available; further back than the line of the main residence. Id. at 48-50. In short, there was substantial evidence available for the Zoning Board to consider bearing on all relevant statutory criteria.

Appellants direct the Court to the testimony of their own expert, Mr. Pimentel, and to that of Mrs. Martins-Phipps in support of their argument that it should be clear from an examination of the evidence that the application should have been denied. Inviting the Court to conclude that ^{*17} the Zoning Board clearly erred in its conclusions by directing attention to contrary evidence merely asks this Court to weigh the evidence presented to the Zoning Board and reach a different conclusion. The Court may not do so. Curran, 672 A.2d at 454; § 45-24-69(d). Even if the Court were

inclined to view the evidence differently, it cannot "substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact." Sec. 45-24-69(d).

In sum, substantial evidence exists on the record to support the Zoning Board's decision. The mere presence of contrary evidence on the record cannot support a conclusion that the Zoning Board clearly erred in its determinations. Neither is there any indication that the Zoning Board overlooked the evidence Appellants raise; it appears clear that the Board simply weighed the evidence as the finder of fact and disagreed with Appellants. The Zoning Board therefore did not clearly err in reaching its decision in light of the reliable, probative, and substantial evidence of the record.

IV Conclusion

Upon review of the entire record, the Court finds that the decision of the Zoning Board was based upon reliable, probative, and substantial evidence and is not clearly erroneous. The decision was not arbitrary, capricious or in violation of statutory provisions. No error of law affects the Board's decision, and there has been no abuse of discretion. The substantial rights of the Appellants have not been prejudiced. Accordingly, the Court affirms the decision of the Zoning Board.

Counsel shall submit to the Court for entry an appropriate order and judgment reflecting this

¹⁸ Decision. ^{*18} **ATTORNEYS:**

For Plaintiff:

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