STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 30, 2024)

MONTECATINI PROPERTIES, LLC	:	
Appellant,	:	
	:	
v.	:	**C.A. No. PC-2016-5148**
	:	
LORI CARLINO, CRAIG NORCLIFFE, DAVID IMONDI, PAULA McFARLAND, and MARK CAPUANO, in their capacity as Members of the City of Cranston Zoning Board of Review,	:	
Appellees.	:	

DECISION

K. RODGERS, J. Before this Court is Montecatini Properties, LLC's (Montecatini or Appellant) appeal from the City of Cranston Zoning Board of Review's (Zoning Board) decision denying Montecatini's application for dimensional relief. The Zoning Board found that the requested relief would impair the intent of the City's Comprehensive Plan, alter the general character of the surrounding area, and is not the least relief necessary.

Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons that follow, Montecatini's appeal is denied, and the Zoning Board's decision is affirmed.

I

Facts and Travel

Montecatini sought to construct a house on undeveloped property on Warman Avenue in Cranston, namely Lots 289 and 290 on Assessor's Plat 15/2 (the Property), which is located in an

A-6 zoning district. *See* R. at 57-58.[1] The Property consists of two adjacent lots owned by Montecatini which, combined, measure 4,000 square feet.[2] The zoning ordinances require a minimum lot size of 6,000 square feet in an A-6 zone. Cranston Code of Ordinances § 17.20.120.

The proposed house is a one-story, single-family residence measuring twenty-six feet by fifty-two feet. In its September 1, 2016 Application to the Zoning Board (the Application), Montecatini requested dimensional relief from the lot coverage, frontage, and side setback requirements contained in §§ 17.92.010 and 17.20.120 of the Cranston Code of Ordinances. *See* R. at 57-58. The proposed house would have side setbacks of seven feet on both sides, forty feet of frontage, and would result in 33.8 percent lot coverage. *Id.* The City's zoning ordinances, however, require minimum side setbacks of eight feet, at least sixty feet of frontage, and a maximum lot coverage of thirty percent in an A-6 zoning district. *See* Cranston Code of Ordinances § 17.20.120.

Montecatini's Application initially was reviewed by the City's Plan Commission (the Commission) on October 4, 2016. *See* R. at 67 and 76 (Commission's Recommendation, Oct. 4, 2016). The Commission found that the proposed structure would "result in a density of 10.89 units per acre[,]" which was not consistent with the Comprehensive Plan that called for a density of 3.64 to 7.26 units per acre. *See id.* With regard to the minimum frontage requirements, the Commission also compared Montecatini's request for relief to houses on Warman Avenue within 400 feet of the Property and concluded that those houses on Warman Avenue had an average of 86.8 feet of

[1] Page references to the Record correlate with the pagination of the Certificate of Zoning Board Records as electronically filed on February 18, 2017.

[2] Montecatini presumes that these two adjacent lots can be considered together for the purposes of its request for dimensional relief. Montecatini offers in its appeal that "it will assent to and take whatever action may be necessary to merge the [l]ots" if it prevails in the instant appeal. *See* Pl's Mem. in Supp. of its Appeal (Montecatini Mem.) at 3 n.4. For the purposes of this appeal, this Court will consider the lots together.

frontage, that the median frontage of those houses was 100 feet, and that no house on Warman Aveune had less than sixty feet of frontage. *Id.* The Commission recommended that the Zoning Board deny Montecatini's Application on the basis that the proposed house would be inconsistent with the Comprehensive Plan and would alter the general character of the surrounding area. *Id.*

Montecatini appeared before the Zoning Board on October 12, 2016. The only change made to Montecatini's proposed development following the Commission's review was a correction to the plan itself, placing the proposed structure twenty-five feet back from Warman Avenue rather than twenty feet, thus making the rear setback twenty-three feet rather than twenty-eight feet. *See* R. at 9, Tr. 4:2-18, Oct. 12, 2016 (Tr.); *see also* R. at 47. According to Montecatini, this change obviated the need for front setback relief.[3]

Frank DiZoglio (DiZoglio), whose family has owned the Property for decades, and William Coyle (Coyle), a real estate expert, testified before the Zoning Board. DiZoglio testified that his family has owned the Property since the mid-1970s and explained the series of title transfers that ended in Montecatini as the present owner. (R. at 9, 12, Tr. 4:22-6:23, 7:16-19.) He described Montecatini as a "family-related entity" and that title to the Property only has been transferred among family members, a family trust, and one other "family-related entity called the Falcon Group[.]" *Id.* at 11, Tr. 6:2-12.

Next, in conjunction with a report he submitted to the Zoning Board, *see id.* at 59-66, Coyle testified that the Property's small size is a unique characteristic of the land that justifies relief. *Id.* at 20, Tr. 15:1-19. He also stated that the size of the Property is a result of the area's original subdivision and, therefore, not the result of any prior action of the Appellant. *Id.*, Tr. 15:5-19. He went on to explain that because many buildings in the neighborhood are closer to each other than

[3] There is no plan included in the Certified Record that reflects such changes.

permitted by the zoning ordinances, granting dimensional relief from the minimum required side setbacks would not alter the general characteristics of the surrounding area. *Id.* at 21, Tr. 16:8-14. He maintained that the relief requested was the least relief necessary because "in order to build a home to current standards, [the proposed] design would be the smallest house that [Montecatini] could [construct] and keep it as . . . one story." *Id.*, Tr. 16:15-25. He added that "[o]bviously, [the house could be made] smaller, but it would have to be kind of a tall, narrow building in order to get the same number of square feet on a two-story building." *Id.* at 22, Tr. 17:1-4. Finally, he opined that, "should the variance requested not be granted, the hardship by the owners would be more than a mere inconvenience." *Id.*, Tr. 17:5-8.

When asked by a member of the Zoning Board whether there were any other lots in the neighborhood or surrounding area that are 4,000 square feet, Coyle could only state that "[t]here were several" lots which were "smaller than 6,000 [square feet] within the neighborhood." *Id.* at 23, Tr. 18:13-23.

After hearing from members of the public speaking in opposition to the Application, *see id.* at 25-26, Tr. 20:23-21:3, the Zoning Board unanimously voted to deny Montecatini's Application. *Id.* at 3-4. The Zoning Board's Notice of Decision was recorded in the Cranston land evidence records on October 14, 2016. *Id.* at 2. Like the Commission, the Zoning Board "found that the [A]pplication was not consistent with the [C]omprehensive [P]lan" because the Property is located in an area designated to have "7.26 to 3.64 units per acre" and that granting the Application would "result in a density of 10.89 units per acre." (R. at 3, Findings of Fact ¶ 1[4]; *cf.* R. at 67 and 76.) The Zoning Board also found that the request for relief to construct a house with

[4] The Zoning Board's decision, as included in the Certified Record, appears to be a portion of the minutes from the Zoning Board meeting on October 12, 2016. *See generally* R. at 3-4.

forty feet of frontage was less than the average and median frontage of nearby lots on Warman Avenue. *See* R. at 4, Findings of Fact ¶¶ 2, 3; *cf.* R. at 67 and 76. In addition, the Zoning Board found that "the proposed new dwelling does not meet the required side yard setbacks of [eight] feet[.]"[5] (R. at 4, Findings of Fact ¶ 7; *cf.* R. at 67 and 76.) The Zoning Board found that "the house was too large for the lot and was not the least relief necessary" (R. at 4, Findings of Fact ¶ 12) and that the Application "would alter the general character of the surrounding area, and impair[] the intent and purpose of the [z]oning [o]rdinance, and the Comprehensive Plan upon which the ordinance is based." *Id.*, Findings of Fact ¶ 8. The Zoning Board ultimately concluded that the Application was not consistent with the City's Comprehensive Plan and was not the least relief necessary. *Id.*, Findings of Fact ¶ 13.

Montecatini appealed the Zoning Board's decision to the Superior Court on November 2, 2016.

II

Standard of Review

Section 45-24-69(a) grants the Superior Court jurisdiction to review decisions from local zoning boards. Such review 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:

[5] The Zoning Board also found that the proposed house would require relief from the minimum twenty-five-foot front setback. (R. at 4, Findings of Fact ¶ 7.) This issue appears to have been mistakenly addressed by the Zoning Board given the corrected plan that Montecatini's attorney presented at the start of the October 12, 2016 hearing. *See* R. at 9, Tr. 4:2-18. However, the front setback issue is not central to this Court's analysis of the entire record and the issues on appeal.

> "(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."

This Court "reviews the decisions of a plan commission or board of review under the 'traditional judicial review' standard applicable to administrative agency actions." *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I. 1998) (internal quotation omitted). This Court is "limited to a search of the record to determine if there is *any competent evidence* upon which the agency's decision rests. If there is such evidence, the decision will stand." *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977) (emphasis added). This Court may not substitute its judgment for that of the zoning board's with respect to the weight of evidence, questions of fact, or credibility of the witnesses. *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986).

The Court must consider '"the entire record to determine whether 'substantial' evidence exists to support the board's findings."' *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). "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." *Caswell v. George Sherman Sand & Gravel Company, Inc.*, 424 A.2d 646, 647 (R.I. 1981).

III

Analysis

Montecatini's principal contentions on appeal are that the requested relief is consistent with the Comprehensive Plan and that the proposed house would not significantly alter the characteristics of the area surrounding the Property. *See generally* Montecatini's Mem. The Zoning Board asserts first that Montecatini lacks standing to bring this action in Superior Court, *see* Appellee's Mem. in Supp. of Zoning Board's Decision (Appellee's Mem.) at 5-6, and that, even if it did have standing, there is substantial evidence in the record to support the Zoning Board's denial of the relief requested. Appellee's Mem. at 6-10.

A

Standing

As a preliminary matter, Appellees argue that Montecatini lacks the capacity to sue because its certificate of organization was revoked by the Rhode Island Secretary of State on June 8, 2016, and that it remains revoked today. *See* Appellee's Mem. at 6; *see also id.* at Ex. 2 (Cert. of Revocation). Appellees contend that the Rhode Island Limited Liability Act (the Act), G.L. 1956 chapter 16 of title 7, prohibits a limited liability corporation (LLC) from asserting a legal action in its name upon revocation of its certificate of organization. *See* Appellee's Mem. at 5 (citing §§ 7-16-2(15), 7-16-4(5), 7-16-42(b)). Thus, Appellees maintain that Montecatini lacks standing to lodge its appeal to the Superior Court. *Id.* at 6. This issue is raised for the first time on appeal to this Court, despite Montecatini's revoked status being the same at the time its Application was before the Commission and the Zoning Board in October 2016.

The Act provides that an LLC in good standing has the power to possess real estate and initiate legal action, among other powers. *See* § 7-16-4(1), (5). An LLC remains in good standing

so long as it maintains a valid certificate of organization issued by the Secretary of State. *See* §§ 7-16-4(1), 7-16-5, 7-16-7, 7-16-8. The Act also provides the Secretary of State the ability to "withdraw the certificate of revocation and retroactively reinstate the [LLC] in good standing as if its certificate of organization . . . had not been revoked[,]" so long as it was not revoked for fraud or misrepresentation, and the LLC submits the appropriate documentation. *See* § 7-16-43 (citing § 7-16-41(a)(3)-(6)). The timeframe in which the Secretary of State may reinstate the LLC in good standing is at least ten years after issuing the certificate of revocation. *See* § 7-16-43(a).[6]

The sole document Appellees submit to this Court in support of their assertion, the Certificate of Revocation, does not provide the basis for the Secretary of State's decision. *See* Appellees' Mem. at Ex. 2. There is no evidence *vel non* that the revocation was based upon fraud or misrepresentation. Because Montecatini's certificate of organization was revoked in June 2016, there is still time for Montecatini to return to an LLC in good standing. *See* § 7-16-43(a). Therefore, this Court is not satisfied that Montecatini is without standing to press its appeal of the Zoning Board's decision and will proceed to consider the merits of the instant appeal.

B

The Zoning Board's Decision

The Application was submitted in September 2016; thus, this Court must review the Zoning Board's decision under the statute that existed when the Application was submitted. *See East Bay*

[6] At the time the Certificate of Revocation was issued and Montecatini submitted its Application to the Zoning Board, the statute provided that the Secretary of State may reinstate the LLC in good standing "[w]ithin ten (10) years after issuing a certificate of revocation[.]" *See* § 7-16-43(a), as enacted by P.L. 2012, ch. 67, § 1, and ch. 72, § 1 (eff. May 14, 2012 through July 13, 2021). Section 7-16-43(a) has since been amended to extend the timeframe to twenty years. *See* § 7-16-43(a), as enacted by P.L. 2021, ch. 385, § 3 and ch. 386, § 3 (eff. July 13, 2021). Regardless of whether the applicable timeframe is ten or twenty years, there is still time for Montecatini to return to an LLC in good standing following the June 2016 revocation of its certificate of organization.

Community Development Corporation v. Zoning Board of Review of the Town of Barrington, 901 A.2d 1136, 1144 (R.I. 2006). At the time the Application was submitted, § 45-24-41 provided that:

> "(d) In granting a variance, the zoning board of review . . . shall require 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
>
> "(4) That the relief to be granted is the least relief necessary." Sec. 45-24-41 (P.L. 2016, ch. 527, § 4 (eff. Aug. 11, 2016).)

When considering whether to grant relief in the form of a dimensional variance, the zoning board of review also must find "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." *See* § 45-24-41(e).

1

Comprehensive Plan

On appeal, Montecatini argues that the requested relief would not impair the intent of the City's Comprehensive Plan. *See* Montecatini's Mem. 11-13. It asserts that the Comprehensive Plan acknowledges that most of the surrounding lots are substandard sizes, that the City routinely grants variances "when properties are 5,000 square feet," and that the Comprehensive Plan recommends "changing regulations to reflect the higher density" and to "reduce the number of variances that are required to . . . allow expansions to preexisting . . . lots in an expedited manner."

Id. at 11-12 (citing Cranston's 2010 Comprehensive Plan, at 31). Appellees maintain that the requested relief would impair the intent of the Comprehensive Plan. (Appellee's Mem. 6-10.)

Appellees concede that the City routinely grants variances when properties are 5,000 square feet; however, they assert that the requested relief goes beyond the intent of the Comprehensive Plan. *See id.* at 8. However, the Property here measures 4,000 square feet, and is substantially smaller than such 5,000 square foot lots. Appellant's own expert could not identify any lots in the surrounding area as being 4,000 square feet but rather could only attest that there were several lots smaller than 6,000 square feet without specifying how much smaller. (R. at 23, Tr. 18:13-23.) Even a cursory review of the 400' radius map appears to show that the Property is indeed substantially smaller than the surrounding parcels. *See* R. at 43-44. Appellant's reliance on certain language of the City's 2010 Comprehensive Plan, as applied to this Property, is unavailing.

Further, even if this Court accepted Appellant's proposition that the City's 2010 Comprehensive Plan warranted relief to permit development of a 4,000 square foot lot in an A-6 zone, there is no similar leniency as it relates to the maximum lot coverage assigned to properties in an A-6 zone.

There is substantial evidence in the record which supports the Zoning Board's finding that the Appellant's proposed development on a 4,000 square foot lot in an A-6 zone, which is significantly undersized, is not consistent with the Comprehensive Plan.

2

Altering the General Character of the Surrounding Area

In addition to being inconsistent with the Comprehensive Plan, evidence on the record reflects that the requested relief would alter the general characteristics of the surrounding area.

The 400 foot radius map and a corresponding plat map show a marked difference in the size and frontage of the Property as compared to the surrounding parcels on Warman Avenue, Manilla Avenue, Oregon Avenue, Hillside Avenue, Watkins Avenue, and Miles Avenue.[7] *See* R. at 43-46. The Commission reported in its Recommendation that none of the houses on Warman Avenue have less than sixty feet of frontage, and that the average and median frontage of nearby houses is 86.8 feet and 100 feet, respectively. *See* R. at 67 and 76, ¶¶ 2, 3. Montecatini did not refute that before the Zoning Board through its real estate expert or otherwise. The Zoning Board did not err in adopting those same findings. *See* R. at 4, Findings of Fact ¶¶ 2, 3. Indeed, the plat map reveals frontage dimensions on Warman Avenue, and no other frontage measures less than fifty feet. *See* R. at 45-46. Thus, the Zoning Board's finding that smaller-than-average frontage and side setbacks, as requested in Montecatini's Application,[8] would alter the general characteristics of the surrounding area was reasonable and is supported by legally competent evidence in the record.

[7] Several Oaklawn Avenue properties are also included in the 400-foot radius map and the plat map, some of which appear to be commercial properties and therefore subject to a different zone. This Court is not in any way comparing the size and/or frontage of the Property to any such commercial properties, nor does it appear anywhere in the record that the Zoning Board did.

[8] Contrary to its Application and its presentation to the Zoning Board requesting side setback variances from the required eight feet in an A-6 zone, Montecatini now takes the position that it does not require any side setback variance. Relying upon § 17.20.090(F) of the Cranston Code of Ordinances, Montecatini states that the Property is composed of two contiguous substandard lots of record as defined by § 17.88.010(B), and therefore the minimum required side-yard setback is only five feet. *See* Montecatini Mem. at 5 n.6 (citing Cranston Code of Ordinances §§ 17.88.010(A); 17.20.090(F)). However, the Property does not meet the definition of "contiguous substandard lots of record," which requires that the contiguous lots be owned *by the same person as of January 1, 1966*. Cranston Code of Ordinances §§ 17.88.010(B) (emphasis added). Here, the Tax Assessor Title Cards show that as of January 1, 1966, Lot 289 was owned by William Turner, whereas Lot 290 was owned by Bennie and Sam Billincoff. R. 84, 90. Accordingly, the Property is not "contiguous substandard lots of record" as defined by § 17.88.010(B), and therefore is still subject to the minimum required eight-foot side setback.

3

Least Relief Necessary

Next, Montecatini argues that the requested relief is the least necessary because, although a two-story house would not require side setback relief, "the house would then end up narrow and tall and not as aesthetically pleasing[.]" *See* Montecatini's Mem. 21. Coyle testified before the Zoning Board that, "in order to build a home to current standards, [the proposed] design would be the smallest house that [Montecatini] could [construct] and keep it as . . . one story." (R. at 21, Tr. 16:15-25.) However, he also added that "[o]bviously," the house could be made smaller, "but it would have to be kind of a tall, narrow building in order to get the same number of square feet on a two-story building." *Id.* at 22, Tr. 17:1-4. Beyond aesthetic considerations, Montecatini does not explain why its proposed single-story home with a footprint that exceeds the maximum lot coverage and requires side setback variances is the least relief necessary. Indeed, by its expert's testimony, the proposed building is *not* the least relief necessary. The Zoning Board's finding that the requested relief is not the least relief necessary is supported by legally competent evidence because Montecatini could construct a two-story house and therefore comply with the maximum lot coverage and setback requirements.

* * *

There is substantial evidence on the record which supports the Zoning Board's finding that the relief requested in the Application would impair the intent of the Comprehensive Plan upon which the pertinent zoning ordinances are based, and that the requested relief would alter the general character of the surrounding area. Furthermore, the Zoning Board's finding that the requested relief is not the least relief necessary is supported by substantial evidence on the record. Thus, the Court holds that the Zoning Board's denial of the Application was justified.

IV

Conclusion

After reviewing the entire record, this Court finds the decision of the Zoning Board of Review to be supported by substantial evidence on the record and not otherwise in error. Accordingly, Appellant's appeal is denied, and the Zoning Board's decision is affirmed.

Counsel for Appellees shall submit a judgment consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Montecatini Properties, LLC v. City of Cranston Zoning Board of Review**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 30, 2024**
JUSTICE/MAGISTRATE:	**K. Rodgers, J.**
ATTORNEYS:	
For Plaintiff:	**Americo M. Scungio, Esq.**
For Defendant:	**Stephen H. Marsella, Esq.**