Watch Hill Fire District v. Westerly Zoning Board of Review (October 20, 2022)
https://www.courts.ri.gov/Courts/SuperiorCourt/SuperiorDecisions/21-0195-21-0199.pdf

Holding:

Rhode Island Superior Court affirmed the decision of the Westerly Zoning Board approving a dimensional variance for the renovation of a residence abutting Watch Hill Beach on a dimensionally pre-existing, non-conforming lot.

Key Takeaways:

1. Applicants seeking dimensional relief are not required to demonstrate a loss of all beneficial use.
2. Ownership of a grandfathered nonconforming lot may constitute substantial evidence of hardship (*DiDonato v. Zoning Board of Review of Town of Johnston)*

Facts:

The owner of 14 Larkin Road in the Watch Hill area of Westerly applied for a dimensional variance to renovate their existing residence built in 1938. The size of the subject parcel is 3,049 square feet in a zone of Westerly where the minimum lot size is 43,000 square feet for a single-family residence.

The existing structure consists of a first-floor garage, with a second floor containing two bedrooms, a kitchen, and a living area totaling 577 square feet.

The petitioner requested dimensional relief to renovate the home to:
(1) elevate the home to create two levels of living space totaling 1,128 square feet;
(2) renovate and reduce the size of the ground floor garage to 300 square feet;
(3) renovate the interior and exterior features of the home;
(4) add a second deck off of the new living level that would be larger than the existing deck;
(5) add a new roof deck to conceal heating and cooling appliances; and
(6) replace the existing cesspool with a denitrification system.

The Zoning Board voted 4-1 to approve the variance in March of 2021. Appellant, Watch Hill Fire District, challenged the Zoning Board's Decision in April of 2021, claiming the applicant did not meet the burden of proving a hardship, that the proposal did not seek the least relief necessary, and that the hardship does not result in more than a mere inconvenience.

Analysis:

1. **Hardship**

Appellants argued the ownership of a preexisting non-conforming lot is not a hardship, but a benefit.

The Court decided otherwise, citing to *DiDonato v. Zoning Board of Review of Town of Johnston*, stating "*ownership of a grandfathered nonconforming lot may constitute substantial evidence of hardship*". Because the property in scope is nonconforming with overlapping setbacks, the dimensional zoning standards create a situation where nothing could be legally built on the parcel without zoning relief.

The Court also cited testimony given before the Zoning Board where HUD recommended 960 square feet to be the standard for a minimally habitable single-family dwelling. The existing structure is only 577 square feet of living space.

Citing to *DiDonato* and HUD minimum living space recommendations, the Court found the Zoning Board's decision that a hardship existed due to the unique characteristics of the preexisting substandard lot and undersized structure was not clearly erroneous.

2. More than a Mere Inconvenience

The Court reiterated Rhode Island General Law requires applicants seeking dimensional relief 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*", also known as the *Viti* doctrine. The Appellants argued the Court should use the higher standard, stipulated in the Rhode Island General Law definition of dimensional variance, which sets the standard of a mere inconvenience to mean "*there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief from the dimensional regulations*" (R.I. Gen. Laws § 45-24-31(66)(ii)).

The Court decided that because the General Assembly amended the Rhode Island Zoning Enabling Act in 2002 to remove the "*no other reasonable alternative way to enjoy a legally permitted beneficial use*" language from the section of state law regarding dimensional variances (R.I. Gen. Laws § 45-24-41), **applicants seeking dimensional relief are not required to demonstrate a loss of all beneficial use** – despite the General Assembly's failure to concurrently update the Definitions section (R.I. Gen. Laws § 45-24-31(66)(ii)) to be consistent with R.I. Gen. Laws § 45-24-41).

The Court found the Zoning Board did not err in its finding that if the applicant did strictly comply to the Zoning Ordinance, the applicant "*could not have any reasonable full enjoyment of his property*."

3. Least Relief Necessary

The Appellants argued the applicant did not meet the "least relief" necessary burden because a reasonable alternative would be to "do nothing".

The Court determined that the facts on the record of expert testimony that "*the structure required new windows, shingles, and trim, as well as changes to entrances and stairs to comply with the building code*" and that public commentors including those opposing the project acknowledged the structure was in disrepair, support the Zoning Board did not act arbitrarily in finding the relief to be necessary.

Appellant also argued the applicant could "*weatherize the home without increasing its size or adding decks and bathrooms*".

The Court determined substantial evidence exists "*to support a conclusion that this suggestion was not viable due to the interplay between the extent of the structure's necessary renovations—summarized above—Petitioner's desire to improve the structure's flood resilience, and the HUD habitability standard for square footage in a single-family home*."

4. **Out of Character**

The Appellants argued the remodel of the structure is out of character of the neighborhood because it is too high and higher than it is wide or deep.

The Court found the proposal does not exceed the maximum height restriction for the zone, and further that Westerly's dimensional requirements do not consider three-dimensional mass, as the ordinance addresses only side, rear, front, and height requirements. Therefore, the Court found the record contained substantial evidence such that the Zoning Board's decision was not arbitrary or clearly erroneous.

5. **Demolition vs. Renovation**

The Appellants argued Westerly's Zoning Ordinance does not allow the construction of a new dimensionally nonconforming structure after the original structure is originally demolished. "*If a nonconforming building or structure is demolished or removed by or for its owner, it shall not be rebuilt or replaced except in conformity with the dimensional requirements of this Zoning Ordinance"* Westerly Zoning Ordinance § 260-32(C)(2).

The Court decided the "*Zoning Board's determination that the proposal did not involve a demolition because it did not tear down or raze the entire structure was reasonable in light of the plain language of the Zoning Ordinance and was otherwise supported by the record*." The record showed the petitioner's architect, the zoning official, and zoning board member who is a general contractor, were all in agreement the proposal was a renovation and not a demolition.

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