

Carl I. Bomar and Bethany Bomar v. The Gloucester Zoning Board of Review No. PC-2020-07835 (October 6, 2022)

<https://www.courts.ri.gov/Courts/SuperiorCourt/SuperiorDecisions/20-07835.pdf>

Holding:

Rhode Island Superior Court affirmed the Town of Gloucester Zoning Board of Review’s decision to approve a dimensional variance for the construction of a new single-family home within the Town’s side yard setback and on a parcel deficient in lot depth.

Key Takeaways:

1. The Court affirmed the Zoning Board’s decision, relying on the record of the Zoning Board meeting which showed four expert witnesses testified in support of the Applicant finding the proposed location of the new single-family dwelling was in the most appropriate location given existing wetlands and ledge, and that the new home would not negatively impact surrounding property values.
2. “If expert testimony before a zoning board is competent, uncontradicted, and impeached, 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)

Facts:

Owner of undeveloped land in Gloucester applied for dimensional relief to the Zoning Board to construct a 1,624 square foot, two-bedroom, single-family dwelling. The relief requested was for a minimum side yard width of 18 feet instead of the 35 feet required and a minimum rear yard depth of 60 feet instead of the 100 feet required.

The Applicant’s site plan would utilize an individual well and separate septic system and was approved by Rhode Island Department of Environmental Management (RIDEM).

At the August 2020 Planning Board meeting, the Gloucester Planning Board provided a positive recommendation to the Zoning Board. The recommendation found the dimensional relief would not be inconsistent with the Gloucester Comprehensive Community Plan.

At the September 2020 Zoning Board meeting the Applicant presented four expert witnesses:

1. A land surveyor who testified the proposed house and location was influenced by the physical characteristics of the property, explaining the presence of wetlands and ledge required the proposed location “*was the most logical location for the house.*”
2. A septic system designer and soil site evaluator who testified the proposed location of the house “*is in the best location to develop this particular piece of property.*”
3. A wetland scientist who testified the plan was “*the most reasonable alternative for development of the lot under the Freshwater Wetland Program rules.*”
4. A real estate appraiser who testified the proposed single-family dwelling “*was consistent with and complementary to other single-family properties in the area and would have no negative impact on surrounding property values.*”

Zoning Board voted unanimously to grant the requested relief. Abutting neighbors appealed the Zoning Board's decision.

Analysis:

1. Least Relief Necessary

The Appellant argued the evidence on the record demonstrates the dimensional relief requested was not the least relief necessary because the Applicant had an alternative design of a smaller house that could be built without zoning relief.

The Applicant argued the Zoning Board's decision should be upheld because it supported each element statutorily required for a dimensional variance to be granted and that the unsigned sketch of the design of a smaller house was not legally competent evidence.

The Court decided it was satisfied the Zoning Board's decision was supported by substantial evidence and that the expert witnesses who testified at the Zoning Board meeting provided evidence that the size and location of the proposed house was due to the septic system approved by DEM, the unique characteristics of the property including ledge and wetlands, and that the house was placed in an appropriate location.

The Court found the Applicant also satisfied the burden of "*there is 'no other reasonable alternative' that would allow the Applicant to enjoy a legally permitted beneficial use of the property*" if the application was denied.

The Court found the proposed home on the alternative plan was located in a different area of the property, closer to ledge and wetlands, which would have prevented the plan from being approved by DEM. The record from the Zoning Board showed that the alternative plan was never submitted to DEM for septic system or wetlands approval, and that the Zoning Board found the alternative design to be an odd and illogical shape, supporting the board's view that the alternative footprint was unreasonable.

2. Expert Witnesses Answering to the Alternative Footprint

Appellant argued the "*Zoning Board's decision not to question the Applicants and their expert witnesses on the viability of the alternative footprint was an abuse of discretion that impermissibly shifted the burden of proof away from the Applicants*".

The Court decided "*there is no merit to Appellants' contention that the Zoning Board improperly shifted the burden of proof in the variance inquiry away from the Applicants... the Zoning Board concluded that the Alternative Footprint was "not a viable alternative" to Applicants' proposal and declined to afford it dispositive weight. As such, the Zoning Board did not excuse Applicants from their evidentiary burden, but instead made "an informed and record-supported decision" that the burden had been satisfied.*"

During the Zoning Board hearing, the attorney for the Appellant asked the Zoning Board Chair *“that the experts be posed the question, and that is, would any of their expert opinions change, if the alternate footprint design that needed no dimensional relief were used in lieu of the footprint that is being put forth this evening.”*

The Court decided that the Appellant’s counsel did not cross examine the expert witnesses himself, and was not prevented from doing so. Because there is no law requiring cross examine witnesses, the Court found no reversible error in the Zoning Board’s decision.

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