

*RH McLeod Family LLC, et al., C.A. No. WC-2021-495, Shawmut Ave LLC, C.A. No. WC-2021-496, 4 Spray Rock, LLC, C.A. No. WC-2021-497 v. Westerly Zoning Board of Review, et al. (March 9, 2023)*

**Holding:**

Rhode Island Superior Court affirmed the decision of the Westerly Zoning Board of Review to approve the Applicant’s dimensional variance request to demolish their preexisting nonconforming single-family dwelling to construct a new single-family dwelling located within the side-yard setbacks.

**Link to Decision:** <https://www.courts.ri.gov/Courts/SuperiorCourt/SuperiorDecisions/21-497.pdf>

**Key Takeaways:**

1. The Court gave judicial deference to the Westerly Zoning Board of Review’s decision; that although the Applicant is voluntarily razing his existing non-conforming house to build a new house which still would not conform to zoning, the ordinance “*does not strip the owner of the right to a dimensional variance that he would otherwise be afforded if the lot were unimproved.*”
2. The Court found the Appellant’s argument that the applicant failed to prove a “*loss of all beneficial use*” to be an incorrect interpretation of *New Castle*, and reaffirmed the “**Viti**” **Doctrine**, which found that “*landowners who wanted to establish a right to dimensional relief were not required to demonstrate a loss of all beneficial use*”.
3. The Court reiterated the correct standard to meet dimensional relief is that “*an applicant must show that the relief he is seeking is reasonably necessary for the full enjoyment of his permitted use.*”

**Facts:**

Applicant owns property located at 2 Spray Rock Road in Westerly, RI. The parcel is a preexisting, nonconforming lot of record, with a single-family home that is also pre-existing and nonconforming to the Westerly Zoning Ordinance, in rear, right-,left-side setbacks and for maximum impervious surface.

Applicant proposed to raze the existing 1,741 square foot home and build a new 1,597 square foot home in the center of the parcel. The Applicant’s proposed design would require left and right-yard setbacks of five feet (15 feet proposed, 20 feet required).

On October 6, 2021, the Westerly Zoning Board of Review voted 4-1 to approve the requested relief. Appellants, who include abutting property owners, appealed to Superior Court.

<b>Dimensional Requirements MDR-30</b>	<b>Required</b>	<b>Existing</b>	<b>Proposed</b>	<b>Requested Variance</b>
Maximum Impervious	22.5%	33.9%	15.7%	Meets Standard
Maximum Height	35'	Unknown, but one story	34'7"	Meets standard
Front Yard	35'	132.3'	82'	Meets Standard
Right Side Yard	20'	4.9'	15'	5'
Left Side Yard	20'	15.7'	15'	5'
Rear Yard	40'	0'	53.5'	Meets Standard

## Analysis:

### 1. More Than a Mere Inconvenience

Appellants argued the Zoning Board did not use the correct hardship standard required by RI General Law § 45-24- 41(e)(2). Appellants argued the applicant must prove “*there is no other reasonable alternative way to enjoy a legally permitted beneficial use of the subject property unless granted the requested relief*”, citing to *New Castle Realty Co. v. Dreczko*, 248 A.3d 638 (R.I. 2021) (*New Castle*).

The Court found the Appellant’s argument to be an incorrect interpretation of *New Castle*, and reiterated the “*Viti*” Doctrine, which found that “*landowners who wanted to establish a right to dimensional relief were not required to demonstrate a loss of all beneficial use*”. The court reiterated the correct standard to meet dimensional relief is that “*an applicant must show that the relief he is seeking is reasonably necessary for the full enjoyment of his permitted use.*”

The Court found that denying the requested relief would prevent the full enjoyment of the permitted residential use, because a denial would force the Applicant to remain in a nonconforming location or force the Applicant to construct an unreasonably narrow home which would be out of character with the neighborhood, create structural challenges, create an inefficient use of space, and create “*more severe non conformities*”.

As a result, the Court found there was substantial evidence on the record to support the Zoning Board’s finding that the Applicant satisfied the “more than a mere inconvenience” standard.

### 2. Least Relief Necessary

Appellants argue the Applicants failed to establish their proposed design was the “least relief necessary”. Appellants argued the property owner could weatherize the existing home, and make upgrades instead of asking for relief, or build a smaller home that did not require relief.

The Court disagreed, finding that the Zoning Board identified two hardships (1) the narrow width of the lot which creates a constrained building envelope, and (2) the physical attachment of the existing structure to the adjacent property. Therefore, renovating the existing structure would

result in the continuance of more significant nonconformance with the Zoning Ordinance than the proposed application.

The Court also found the expert testimony from both architects identified challenges to building a smaller home and that a smaller home would not be in character with the neighborhood and would result in unique building practices. The Court found the record showed that alternative plans were proposed, but those alternatives were not reasonable.

### **3. Demolition**

Appellants challenged the Zoning Board’s decision, arguing it violated Westerly’s Zoning Ordinance, arguing that because the current house is proposed to be demolished voluntarily by the owner, any new construction of the site must fully comply with the town’s dimensional regulations.

The Court deferred to the Zoning Board’s decision that the Ordinance “*does not prohibit an owner from applying for a dimensional variance*” it “*only prohibits an owner from voluntarily demolishing a structure and rebuilding that same structure by right.*”

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