STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: December 11, 2018]

LINDA MOLLICONE	:	
	:	
V.	:	**C.A. No. PC-2010-6930**
	:	
KENNETH A. AURECCHIA, ANTHONY PILOZZI, JOSEPH ANZELONE, DOUGLAS JEFFREY, DENNIS CARDILLO IN THEIR CAPACITIES AS MEMBERS OF THE JOHNSTON ZONING BOARD OF REVIEW	:	

DECISION

MCGUIRL, J. Before this Court is an appeal from a decision of the Johnston Zoning Board of Review (Board), denying Linda Mollicone's (Plaintiff) application for a dimensional variance. At its October 28, 2010 public hearing, the Board voted five to zero in favor of denying the application after finding that the application did not propose a measure of relief which is the least necessary, and that the requested variance was not in compliance with the Comprehensive Plan of the Town. Plaintiff now asks this Court to reverse the Board's decision, arguing the decision was not supported by competent evidence and was clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

The Plaintiff is the owner of AP 48/1, Lot 28—a vacant, undeveloped lot—located at 8 Truman Street in the Town of Johnston (subject property). On September 24, 2010, Plaintiff submitted an application seeking a dimensional variance in order to construct a 28 feet by 48 feet single-family dwelling on the subject property. The subject property is located in an R-20 zoning district which allows single family dwellings. However, the subject property is approximately 13,000 square feet, and it is considered substandard in size as it does not contain the required 20,000 square feet minimum which is necessary to build in an R-20 zoning district without seeking a variance from the Board.

A public hearing was held on October 28, 2010, at which the Board heard testimony from the Plaintiff, her attorney Alfred Russo (Attorney Russo), David Marsocci[1] (Mr. Marsocci), and abutter Monica Spicer (Ms. Spicer). During the hearing, Attorney Russo noted that that Plaintiff previously had appeared before the Board with a proposal to build a 60 feet by 26 feet home, which was "considerably larger" than the proposal before the Board on October 28, 2010.[2] (Hr'g Tr. 4, Oct. 28, 2010.) The Board denied that requested variance, finding that the proposed home was too large for the area, thus necessitating the scaled down proposal which the Plaintiff submitted at the October 28, 2010 hearing. *Id*. at 4-5. In furtherance of the revised proposal, Mr. Marsocci testified, "[the Board] said downsize the house; [Plaintiff] downsized the house 12 feet." *Id*. at 20. In addition, Plaintiff's revised proposal did not require frontage or rear yard relief

[1] Mr. Marsocci was the builder of the proposed home.

[2] Attorney Russo indicated Plaintiff had appeared before the Board with the previous design approximately one year before the present hearing. (Hr'g Tr. 4, Oct. 28, 2010.)

as the previous application had; rather, the only relief the new proposal required was 7000 square feet from the 20,000 square feet required in an R-20 zone. *Id*. at 5-6.

After hearing the specifics of Plaintiff's request, the Board expressed hesitation in granting 7000 feet of relief because it may "open the door for everybody in R-20 to come in with the same size homes." *Id*. at 9. Furthermore, the Board indicated that it had "no way of knowing" if a proposed home is too large prior to the application being submitted; thus, it would be unable to "sit here and tell developers what to put there that we're going to approve." *Id*. at 12-13. Additionally, the Board did not believe that the proposed home would complement the existing aesthetics of the neighborhood and would "stick out like a sore thumb[;]" nevertheless, it believed that there were "other avenues to pursue" which would make the variance more acceptable to the Board. *Id*. at 9-10.

The Board heard testimony regarding flooding and water runoff issues in the neighborhood where the subject property is located. (Hr'g Tr. 25, Oct. 28, 2010.) The Board admitted and reviewed a memo prepared by Town Planner Pamela Sherrill (Town Planner), which indicated the proposed home would "increase stormwater runoff" and "aggravate existing drainage problems." (Zoning Board of Review Decision Ex. 1). In addition, the memo indicated that as a result of the March 30-31, 2010 storms, the "neighborhood was subject[ed] to unprecedented stormwater flow with damage to public and private property." *Id*. Accordingly, it was the Town Planner's professional opinion that any new development with impervious surfaces on the subject property would be inconsistent with goals and policies of the Town's Comprehensive Plan. *Id*. Similarly, the subject property's abutter, Ms. Spicer, testified that there are water problems in the neighborhood which "[were] definitely worse with the flood." (Hr'g Tr. 25, Oct. 28, 2010.) However, Ms. Spicer indicated that the "size of the house on that piece of

property, it would impede my – I guess privacy" and when asked if she was concerned that the proposed home would cause more water problems, she responded "[i]s that what happens? I don't know . . . ." *Id*. at 26.

At the conclusion of the hearing, the Board voted five to zero to deny the application. *Id*. at 27. Immediately prior to the vote, the Board indicated that the application was deficient as Plaintiff did not meet "their burden of proof that they're seeking the least amount of relief necessary" and "secondly, considering the Town Planner's opinion, I think we need to take that into consideration . . . ." *Id*. Thereafter, the Board issued a written decision on November 8, 2010, which articulated similar reasons for denial which the Board found during the hearing. (Zoning Board of Review Decision at 2.) Specifically, the decision indicated that denial was necessary as Plaintiff's petition did not propose the least necessary measure of relief and that the relief sought was not in compliance with Goal LU-4 and LU-6 of the Comprehensive Plan. *Id*. at 2; Zoning Board of Review Decision Ex. 1. Plaintiff filed a timely appeal, and the matter was assigned to this Court on November 25, 2015. (Compl. 1.). The record was supplemented in March 2016, and decision is herein rendered.

II

Standard of Review

In reviewing the decision of a zoning board of review, the Superior Court is bound by § 45-24-69 and "shall not 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). "The court may affirm the decision . . . or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced" by "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." *Id.*

When reviewing questions of fact, the court must "'examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" *Mill Realty Assocs. v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *DeStefano v. Zoning Bd. of Review of City of Warwick*, 122 R.I. 241, 245-46, 405 A.2d 1167, 1170 (1979)). "'Substantial evidence means 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.'" *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (quoting *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981)). The court must sustain a zoning board's decision if it '"can conscientiously find that the board's decision was supported by substantial evidence in the whole record."' *Lloyd v. Zoning Bd. of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 508, 388 A.2d 821, 825 (1978)).

Additionally, with respect to zoning board decisions, our Supreme Court has emphasized that "'a zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review.'" *Bernuth v. Zoning Bd. of Review of Town of New Shoreham*, 770 A.2d 396, 401 (R.I. 2001) (quoting *Thorpe v. Zoning Bd. of Review of Town of N. Kingstown*, 492 A.2d 1236, 1237 (R.I. 1985)); *see also Hooper v. Goldstein*, 104 R.I. 32, 44, 241 A.2d 809, 815 (1968). Absent

adequate findings, it is appropriate for this Court to remand the case to the zoning board for additional proceedings. *See Bernuth*, 770 A.2d at 399.

III
Analysis
A
Notice Requirement

A necessary aspect of an appeal of a zoning board decision is notice. Although not addressed by either party, this Court observes the requirements of notice set forth in § 45-24-69.1. Section 45-24-69.1 states in pertinent part:

> "(a) Whenever an aggrieved party appeals a decision of a zoning board of review to the superior court pursuant to the provisions of § 45-24-69, the aggrieved party shall also give notice of the appeal to those persons who were entitled to notice of the hearing set by the zoning board of review. The persons entitled to notice are set forth and described in § 45-24-53.
> "(b) Notice of the appeal shall be mailed to those parties described in § 45-24-53 within ten (10) business days of the date that the appeal is filed in superior court not counting Saturdays, Sundays, or holidays." Sec. 45-24-69.1.

Thus, the same individuals and entities entitled to notice of an initial public hearing held by a zoning board should receive notice of a subsequent appeal filed by an aggrieved party. However, In *Jeff Anthony Properties*, the Supreme Court specifically addressed the effect of an appellant's failure to comply with § 45-24-69.1. The Court stated:

> "Although the Legislature clearly stated that zoning appeals are to be 'governed' by §§ 45-24-69 and 45-24-69.1, it did not go so far as to denominate the notice provisions of § 45-24-69.1 as conditions precedent to jurisdiction. Absent clear statutory language that the ten-day notice requirement is jurisdictional, we conclude that a party's failure to so comply does not automatically require that it forfeit its right to appeal an adverse decision of a zoning board. We do not believe the Legislature intended such a draconian result." *Jeff Anthony Props. v. Zoning Bd. of Review of Town of N. Providence*, 853 A.2d 1226, 1231-32 (R.I. 2004).

The *Jeff Anthony Properties* decision essentially provides that a Superior Court justice may exercise their discretion to dismiss an appeal due to failure to comply with notice requirements but this should be done only after the trial justice has "consider[ed] the reasons, if any for lack of compliance, as well as any prejudice to the interested party who was not properly notified." *Id*. Moreover, dismissal by a Superior Court justice for inadequate notice would be subject to review. *Id*.

In the present matter, Plaintiff filed her complaint on November 24, 2010. However, the required notices were not mailed to interested parties until March 5, 2016.[3] During that nearly six year period, the appeal actively remained open and subject to sporadic activity. Exercising its discretion, this Court does not believe a dismissal would be appropriate at this time. Interested parties eventually were provided otherwise compliant notice via mail in March 2016.[4] Furthermore, any potential interested parties were likely not prejudiced by the delay in notice of appeal because the initial denial of the variance prevented construction on the subject lot. In

[3] Pursuant to § 45-24-69.1, interested parties are those entitled to notice as set forth in § 45-24-53, which provides in pertinent part:

> "(d) Where a proposed amendment to an existing ordinance includes a specific change in a zoning district map, but does not affect districts generally, public notice shall be given as required by subsection (a) of this section, with the additional requirements that:
> "(2) Written notice of the date, time, and place of the public hearing and the nature and purpose of the hearing shall be sent to all owners of real property whose property is located in or within not less than two hundred feet (200') of the perimeter of the area proposed for change, whether within the city or town or within an adjacent city or town. Notice shall also be sent to any individual or entity holding a recorded conservation or preservation restriction on the property that is the subject of the amendment. . . ." Sec. 45-24-53(d)(2).

[4] Based on the record, there appear to be no intervenors, no action taken by interested parties subsequent to compliant notice other than by those named in the complaint, and no claimed prejudice as a result of delayed notice.

addition, the March 2016 notice still provided ample opportunity for interested parties or intervenors to participate in the appeals process if they so desired. *See Jeff Anthony Props.*, 853 A.2d at 1231-32 (holding trial court erred in granting summary judgment on behalf of intervenors when intervenors weren't prejudiced by late notice and could participate in proceedings). Indeed, the only party prejudiced by the delayed notice appears to be the Plaintiff herself as the denial of the variance she sought—and lengthy appeal—has delayed a ruling on her appeal. Although notice requirements were noticeably delayed, dismissal of the appeal is not warranted at this time. Accordingly, the Court proceeds to a review of the substantive record as provided to determine the adequacy of the Board's decision.

B

Adequacy of the Board's Decision

On appeal, Plaintiff contends that the Board's decision was not supported by competent evidence and was clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Moreover, Plaintiff contends that the Board erroneously placed undue emphasis on the opinion rendered by the Town Planner who found the requested variance "inconsistent with the Comprehensive Plan." (Zoning Board of Review Decision Ex. 1.) She further alleges that the record discloses that stormwater runoff from one specific storm was the only reason the Board denied the application. Plaintiff contends the Board overlooked other evidence such as the size of the lot being larger than all but one abutting neighbor, the relief sought was minimal compared to the significantly smaller lots in the area, and that the Board was informed that the proposed home was actually 26 feet by 36 feet, rather than 28 feet by 48 feet, as originally stated in the application and decision.[5] By adopting and incorporating the opinion of the Town Planner in its

[5] The size of the proposed home presented to the Board is under contention and will be discussed later in this decision.

written Decision, Plaintiff contends the Board failed to address hardship, characteristics of surrounding areas, or that the Plaintiff proposed a smaller home than originally planned.

Conversely, the Board contends that its members conducted their due diligence and properly outlined the facts and reasoning on which it based its denial of the variance application. Further, the Board argues that the Plaintiff provided the Board with lay testimony and arbitrarily chose a size for the proposed home that it thought would be small enough to satisfy the Board. Additionally, the Board contends that its members clearly understood the law that they applied, and they provided appropriate analysis during the public hearing when a member "realize[d] it's a legal nonconforming lot of record" upon which the Plaintiff was allowed to build on, just with a smaller proposed home. (Hr'g Tr. 8, Oct. 28, 2010.) In conclusion, the Board argues that the entirety of the record supports its findings of fact and subsequent denial of the dimensional variance.

It has consistently been held that "there must be in the record competent evidence to support [the board's] findings, otherwise its action will be deemed an abuse of the discretion vested in it by the ordinance." *Melucci v. Zoning Bd. of Review of City of Pawtucket*, 101 R.I. 649, 652, 226 A.2d 416, 418 (1967) (citing *Del Toro v. Zoning Bd. of Review of Town of Bristol*, 82 R.I. 317, 107 A.2d 460 (1954)). In addition, it has long been held that "a zoning board of review is required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review." *Bernuth*, 770 A.2d at 401 (citing *Cranston Print Works Co. v. City of Cranston*, 684 A.2d 689, 691 (R.I. 1996)). Overall, our Supreme Court noted, "[i]t is the function of the Superior Court to 'examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" *Mill Realty Assocs.*, 841 A.2d at 672 (quoting *DeStefano*, 122 R.I. at 245, 405 A.2d at 1170); *see also*

Apostolou, 120 R.I. at 507, 388 A.2d at 824. Without adequate findings of fact, '"it would be difficult to sustain the board's decision . . . in view of the inadequate record kept by it and also because of the inadequacy of the statement summarizing its decision.'" *Sciacca v. Caruso*, 769 A.2d 578, 585 (R.I. 2001) (quoting *Souza v. Zoning Bd. of Review of Town of Warren*, 104 R.I. 697, 699, 248 A.2d 325, 327 (1968)).

Here, the findings of fact contained in the Decision bear little to no relation to the conclusions which are consequently drawn from those findings. *See Irish P'ship v. Rommel*, 518 A.2d 356, 358-59 (R.I. 1986) (holding zoning board's token consideration in decision amounted to "recital of a litany"); *Hopf v. Bd. of Review of City of Newport*, 102 R.I. 275, 230 A.2d 420 (1967) (holding conclusion or insufficient evidence warrants reversal of zoning board decision).

A review of the instant Decision indicates boilerplate denial language in which the Board fails to explain its reasoning for denial based on failure of the Plaintiff to seek minimum relief. The Decision provides in pertinent part:

> "1. The subject property in [*sic*] known as Assessor's Plat 48/1, Lot 28, and contains approximately 13,000 sq. ft.
> "2. The Applicant is the owner of the property.
> "3.The Applicant is proposing to construct a 28' x 48' single family dwelling on the premises.
> "4. Dimensional variances have been petitioned for under Article III, Section F, Table III-F-1 for:

	DIMENSION	**MINIMUM REQUIRED**	**PROPOSED**	**RELIEF REQUESTED**
LOT:	**— SIZE**	**20,000' sq.**	**13,000' sq.**	**7,000' sq.**
SETBACK:	**— REAR**	**50'**	**36.1'**	**13.11'**

> "5. The premises in question are [*sic*] located in an R-20 zone which requires 20,000 sq. ft.
>
> "Based upon the foregoing, the Board denies the petitioner[']s application for a dimensional variance. As to the relief requested:

> "1.The Zoning Board of Review based their denial on a finding of fact that the Applicant's petition as it stands does not propose a measure of relief which is the least necessary.
> "2. The Zoning Board of Review relied on the Town Planner[']s written memorandum and opinion that the relief requested was not in compliance with the Comprehensive plan. Said memorandum is incorporated by reference into this written decision and attached as Exhibit 1." (Zoning Board of Review Decision at 1-2).

Here, the Board made factual findings regarding the size of the lot, size of the proposed home, and the relief requested by the Plaintiff. Where the Board has "fail[ed] to disclose the basic findings upon which its ultimate findings are premised," it is not the duty of this Court to "search the record for supporting evidence" or "decide for [itself] what is proper in the circumstances." *Hooper v. Goldstein*, 104 R.I. 32, 45, 241 A.2d 809, 815-16 (1968). This Court fails to see findings of fact within the written decision which can reasonably relate to a conclusion that the Plaintiff failed to propose a measure of relief which is the least necessary.

In its decision, the Board failed to explain how the relief requested is not the least amount necessary. Decisions must be tailored to each property, to address the appropriate facts and evidence related to each individual piece of property, and set forth clear reasons that support the denial. *See Sciacca*, 769 A.2d at 585. Here, the Board simply recited the size of the lot and the proposed relief with no clear reason indicated why said relief was not appropriate. Moreover, the Town Planner's opinion, which was incorporated into the Board's decision, makes no mention of least relief sought nor indicates any factual findings related to lot size.

Of particular note is the finding of the Board relating to the proposed size of the home. After review of the October 28, 2010 hearing transcript, the Court is unable to determine if the Board was made aware that the proposed size of the home was 26 feet by 36 feet at said hearing, as the Plaintiff contends. *See Kaveny v. Town of Cumberland Zoning Bd. of Review*, 875 A.2d 1,

8 (R.I. 2005) (quoting *Irish P'ship*, 518 A.2d at 359) (noting that when the "'zoning board fails to state findings of fact, the [C]ourt will not search the record for supporting evidence or decide for itself what is proper in the circumstances'"). However, excerpted testimony—submitted by the Town as part of the official record—before the Johnston Zoning Board of Review labeled, "Excerpt from Oct[.] 09 meeting," indicates that the Plaintiff was "proposing to build . . . a 26 [feet] by 36 [feet] single-family home." (Oct. 09 Tr. at 1.)

This Court notes that the inadequate record from the "Oct[.] 09" meeting indicates the transcript is a "Rough Draft for Johnston Zoning Board Only," is incomplete as it contains transcript pages 33-36 and 41-44, and the actual date of the hearing cannot be verified based solely upon its handwritten title. *See Sciacca*, 769 A.2d at 585. Moreover, the record was not certified or contained any other required formalities which allow this Court to review its substantive contents upon appeal. In addition, the inconsistent and possibly contradictory record regarding the size of the proposed home further indicates the insufficient decision rendered by the Board, which failed to indicate an alleged amendment to the size of the proposed home sought on the subject property.

In its decision, the Board also concluded that the requested relief was not in compliance with the Comprehensive Plan with respect to flood and runoff concerns. Specifically, the Board adopted the Town Planner's opinion that "[a]ny new development with impervious surfaces (roof, driveway, etc.) in this plat would increase stormwater runoff" which would be adverse to town policies LU-4L and LU-6b.[6] (Zoning Board of Review Decision Ex. 1). This finding was

[6] The Comprehensive Town Plan policies and goals which were relied upon by the Town Planner and later adopted into the written decision of the Board provide in pertinent part:

made in the context of "unprecedented stormwater flow" which occurred as a result of March 30-31, 2010 storms.[7] *Id*. Moreover, the Board heard testimony from abutter Monica Spicer, who indicated that "[t]here's always been kind of a regular [water] problem, but it was definitely a lot worse [during the storm] than it was." (Hr'g Tr. 25, Oct. 28, 2010), *But see Salve Regina Coll. v. Zoning Bd. of Review of City of Newport*, 594 A.2d 878 (R.I. 1991) (holding lay testimony of neighbor on effect of proposed use on neighborhood property values and traffic conditions has no probative force regarding application before zoning board of review). However, the nature of the storm in question and the resultant water issues, coupled with the passage of time since the Board's decision, preclude adequate review by this Court at this time. Further examination is required to determine if flood and runoff problems persist or whether the "unprecedented

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> "Goal LU-4 Improve the compatibility of residential developments with their surroundings and the capacity of the land to support this type of development.
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> "Policy LU-4L Medium Density Land Use – Residential Lot Density range of 14,000 square feet to 35,000 square feet. Delineate one or more residential zoning districts designations for a minimum lot size of 14,000 square feet to 35,000 square feet. Consider incorporating, at a minimum, the following zoning districts: . . . R-20 Zone (Single family, 20,000 Square Feet minimum) . . . .
>
> "Goal LU-6 Maintain a sustainable rate of population growth which is consistent with the ability of the Town to provide essential services, to achieve a stable tax rate, and to protect environmental, historic and cultural resources.
>
> "Policy LU-6b Require landowners, builders and developers to address the cumulative impacts of the use, or proposed use, of their properties on the community. Each must pay his/her fair share of the community impact of the proposed use. Such impacts include, but are not limited to, water supply and sewage disposal, groundwater protection, traffic flow . . . ." (Zoning Board of Review Decision Ex. 1).

[7] Plaintiff duly notes that March 2010 storms caused water runoff and flood issues in Rhode Island and across the northeast.

storm[s]" which closely preceded the Town Planner's opinion, was an extreme aggregator of an otherwise benign situation. *See Iadevaia v. Town of Scituate Zoning Bd. of Review*, 80 A.3d 864 (R.I. 2013). Of course, it is the prerogative of the Board to arrive at a similar conclusion after a further hearing. Currently, the approximately eight-year-old evidence before this Court renders it impractical to adequately exercise its appellate review. Accordingly, this matter is remanded to the Board for further examination of whether flood and stormwater issues relating to the subject property are in compliance with the Comprehensive Plan.

The Court recognizes that remand for further proceedings "should not be exercised in such circumstances as to allow [parties] another opportunity to present a case when the evidence presented initially is inadequate." *Roger Williams Coll. v. Gallison*, 572 A.2d 61, 62 (R.I. 1990). The remand "should be based upon a genuine defect in the proceedings in the first instance, which defect was not the fault of the parties seeking the remand . . . ." *Id.* Here, the Court has found defects in the written decision rendered by the Board which are of no fault of the Plaintiff. Therefore, remand is appropriate here.

Moreover, the Court believes the approximately eight-year time period between the initial decision by the Board and review by this Court has altered the composition of the Board. When the members of the Zoning Board on remand after appeal are different from the members that originally heard the case, the Zoning Board must reconsider the matter before a decision may be rendered. *Ryan v. Zoning Bd. of Review of Town of New Shoreham*, 656 A.2d 612, 614 (R.I. 1995) (citing *Coderre v. Zoning Bd. of Review of City of Pawtucket*, 103 R.I. 575, 577, 239 A.2d 729, 730 (1968)); *Bellevue Shopping Ctr. Assocs. v. Chase*, 556 A.2d 45, 46 (R.I. 1989). The Zoning Board, however, does not have to grant a completely new hearing, if current board members can participate in the remanded decision and issue findings of fact after they review a

sufficient transcript of the testimony. *See Lombardi v. Kooloian*, 560 A.2d 951, 952 (R.I. 1989) (citing *Lewandoski v. Vt. State Colleges*, 457 A.2d 1384 (Vt. 1983); *Vehslage v. Rose Acre Farms, Inc.*, 474 N.E.2d 1029 (Ind. Ct. App. 1985)).

Presently, this Court is not satisfied based on the state of the record below that the Board could make the appropriate findings of fact and conclusions of law, as required by the statute, ordinance, and this Decision without a rehearing. The nature of the March 2010 flood, lack of clarity regarding size of the proposed home, changes in context of the area since the Board's decision, and issues with notice of the appeal necessitate a fresh review of the application to satisfy due process. It is this Court's belief that reliance on a dated record would preclude a sufficient review and adequate decision by the newly composed Board.[8] As such, the matter is remanded for a properly advertised *de novo* hearing. *See Coderre*, 103 R.I. at 577, 239 A.2d at 730 (holding a hearing *de novo* is a condition precedent to a valid decision on remand when composition of zoning board has changed).

Moreover, the Board should be mindful that a zoning application that is substantially complete and has been submitted for approval to the appropriate reviewing authority shall be reviewed under the provisions of the applicable zoning ordinance in force at the time the application was submitted. Sec. 45-24-44(a), (c). Section 45-24-44 in pertinent part provides:

> "(a) A zoning ordinance provides protection for the consideration of applications for development that are substantially complete and have been submitted for approval to the appropriate review agency in the city or town prior to enactment of the new zoning ordinance or amendment.

[8] Based upon review of the record, the Court believes that two members of the currently constituted Johnston Zoning Board of Review were not present and/or members of the Board during the October 28, 2010 hearing. The October 2010 decision indicates that then Co-Chair Pilozzi, Secretary Anzelone, and alternate member Cardolillo participated in the proceedings. To the Court's knowledge, members Aurecchia and Jeffrey also participated in the October 2010 proceedings but are no longer members of the Board.

> "(c) Any application considered by a city or town under the protection of this section shall be reviewed according to the regulations applicable in the zoning ordinance in force at the time the application was submitted." Sec. 45-24-44(a), (c).

Pursuant to § 45-24-44, The Code of the Town of Johnston states:

> "Applications for development that are substantially complete and have been submitted for approval to the appropriate review agency in the Town of Johnston prior to enactment of this chapter or any amendment to this chapter shall be considered vested. An application shall be considered substantially complete when all required documents, including plans, together with required fees, are received by the official designated herein to receive such applications." Johnston, Rhode Island, Code of Ordinances ch. 340, § 134.

Accordingly, this statute created vested rights in the applicant to have a substantially complete zoning application considered under the ordinances in effect at the time of submission of the application. *Id*.

IV

Conclusion

Based on its review, this Court finds that the decision is arbitrary and in violation of statutory mandates. Accordingly, this Court hereby remands the matter to the Town of Johnston Zoning Board of Review for a new hearing, followed by a decision with adequate findings of fact and conclusions of law in accordance with § 45-24-61. Pursuant to § 45-24-44, the application is to be reviewed under the ordinances in force at the time of the submission of the application.

Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Linda Mollicone v. Johnston Zoning Board of Review, et al.
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COURT:	Providence County Superior Court
DATE DECISION FILED:	December 11, 2018
JUSTICE/MAGISTRATE:	McGuirl, J.

ATTORNEYS:

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