STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

[Filed: December 18, 2020]

BRUCE GARDNER and the CHARLES A. SWEET REVOCABLE TRUST, ***Plaintiffs,***	:	
v.	:	**C.A. No. WC-2019-0327**
TOWN OF CHARLESTOWN ZONING BOARD OF REVIEW and RAYMOND DRECZKO, MICHAEL CHAMBERS, CLIFFORD VANOVER, JOANN STOLLE, and JOHN LOVOY, in their capacity as Members of the Charlestown Zoning Board of Review, ***Defendants*****.**	:	

DECISION

TAFT-CARTER, J. Before this Court is the appeal of Bruce Gardner and the Charles A. Sweet Revocable Trust (collectively, Appellants), of a decision of the Town of Charlestown Zoning Board of Review (the Board) dated and recorded on May 31, 2019, denying their request for a Special Use Permit to install an Onsite Wastewater Treatment System in the special flood hazard area and within 100 feet of wetlands. Jurisdiction is pursuant to G.L. 1956 § 45-23-69.

I

Facts and Travel

Appellants are the owners of a vacant parcel of land located on Sea Lea Avenue, Charlestown Rhode Island. The property located in a R-20 zoning district is a nonconforming lot of record. It is identified by the Charlestown Tax Assessor as Lot 387 on Assessors Map 9. On November 16, 2018, Bruce Gardner, on behalf of Appellants, as the property owners, filed an

application requesting a Special Use Permit (SUP) pursuant to the Town of Charlestown Zoning Ordinance. (Application at 1.) The application sought permission pursuant to Article XIII, Chapter 218-78 of the Charlestown Zoning Ordinance for approval to construct and install an Onsite Wastewater Treatment System (OWTS). The Applicant proposed the construction of a two-bedroom single family residence that would be serviced by the OWTS. The OWTS was to be comprised of a composting toilet for black water and an ADVANTAX AX 20 system with a bottomless sand filter for gray water.

Prior History of the Sea Lea Property

On September 25, 2007, the Appellants applied to DEM for installation of a proposed ISDS on the Sea Lea property, seeking four variances from the DEM Rules and Regulations. *See* AAD Decision at 1-2 (Apr. 13, 2010). The DEM Office of Water Resources (OWR) issued a Notice of Denial on March 7, 2008, stating that "the Department determined that this project, as proposed, to be not in the best public interest as stated in SD 20.02." *Id.* at 1-2.

In response to Applicants' Motion for Statement of Grounds for Denial, OWR stated that "in spite of mitigating measures including proposed use of composting toilet, a separate advanced treatment ISDS for gray water and a system for recharge of groundwater using roof runoff, the Applicants did not meet the standard for approval of the variance application." *Id.* at 2. The OWR stated that, "ISDS regulations require setbacks of 150 feet, 100 feet and 10 feet respectively to coastal pond, private well and property line" and that "the design only affords 40 feet, 71 feet and 2 feet from these features." *Id.* The OWR also noted "the already degraded nature of Green Hill Pond and the risk of pollution of shallow wells." *Id.*

The Plaintiffs appealed from the Notice of Denial. An administrative hearing was held on August 24, August 25, and September 14, 2009, before the DEM Administrative Adjudication

Division (AAD), at which several witnesses were presented by Plaintiffs, including Dr. Daniel Urish, an expert in the area of hydrogeology (AAD Decision at 4); Joseph W. Frisella, an expert in professional engineering, installation, and design of ISDS systems including advanced systems and soil evaluation (AAD Decision at 7); and Mohamed Freij, principal sanitary engineer at DEM, who made the decision and recommendation that led to the denial of those applications by OWR (AAD Decision at 12). The DEM then recalled Mr. Freij as its sole witness, who was qualified as an expert in the area of professional engineering and land surveying. *Id.* at 14; *Bruce Gardner v. W. Michael Sullivan*, No. PC-2010-3979, 2014 WL 1397059, at *2 (R.I. Super. Apr. 7, 2014) (Matos, J.).

The AAD issued its Decision and Order on April 13, 2010, finding that Plaintiffs had "met their burden of proof by clear and convincing evidence that the proposed plan will not constitute a threat to public and private health, safety and welfare[,]" and that "OWR ha[d] not presented evidence to rebut the proof presented by the Applicants." (AAD Decision at 27.) The AAD hearing officer therefore found that OWR had improperly denied the application, and the hearing officer recommended that the application for the variances be granted. *Id.* However, the Director of DEM, pursuant to § 42-17.7-6, upheld the original denial. *See* Consent Agreement, AAD No. 08-007/ISA at B.6 (Nov. 28, 2016); *Gardner v. Sullivan*, 2014 WL 1397059, at *6.

The Plaintiffs appealed to Superior Court from DEM's denial of its ISDS application. *See generally Gardner v. Sullivan*, 2014 WL 1397059. The Court, in a written decision dated April 7, 2014, found that the Director of DEM had not adequately stated his rationale for rejecting the recommendation of the DEM Hearing Officer and, therefore, the Director's decision was in violation of constitutional and statutory provisions and otherwise affected by error of law. *Id.* at *9, *11. The Court remanded the case to the Director to make adequate findings of fact to support

the conclusions of law as to whether Plaintiffs had met their burden of proof by clear and convincing evidence that the proposed plan would not constitute a threat to public or private health, safety, or welfare. *Id.*, at *10, *11.

In lieu of further consideration and action by the Director, on November 28, 2016, Plaintiffs and DEM entered into a Consent Agreement pursuant to G.L. 1956 § 42-17.1-2 for the purpose of resolving Plaintiffs' appeal. *See* Consent Agreement, AAD No. 08-007/ISA at B.8 (Nov. 28, 2016). The Consent Agreement granted the variance to the Applicant and required the Applicant to upgrade an existing septic system in the area. (Tr. 6:6-13, Dec. 18, 2018 (Tr. I) (According to Attorney DeAngelis, "The consent agreement was based upon a process at D.E.M. which allows Applicants to come up with a neutral nitrate overload by not only their system but by participating in the repair of an existing system. An existing system in the Town of Charlestown owned by Mr. Michael Smith at 166 Ram Island Road was updated to new standards."); Consent Agreement at C.4.(b)-(d).) On December 21, 2016, Plaintiffs' newly resubmitted DEM application was approved under the terms of the Consent Agreement. *See* Pls.' Appl. OWTS Construction Permit (received Oct. 11, 2016).

Thereafter, the present application was filed seeking permission to install an OWTS in a special flood hazard area within 100 feet of wetlands. It is the denial of this petition, heard by the Board on December 18, 2018, February 19, 2019, March 19, 2019, and May 21, 2019, that is the subject of this appeal.

The December 18, 2018 Hearing

On December 18, 2018, Carolyn "C.J." Doyle (Ms. Doyle), a licensed professional civil engineer, was qualified as an expert in her profession. (Tr. I at 8.) Ms. Doyle testified on behalf of the Plaintiffs. She testified that a composting toilet would be installed to address the issues relating

to black water at the Sea Lea property.[1] *Id.* at 9-10. A gray water[2] system would also be installed with a 1500-gallon septic tank and an AX 20 ADVANTAX unit for additional treatment, as well as a U.V. disinfection unit in the pump chamber, which would then discharge through a bottomless sand filter. *Id.* at 10. Additionally, she explained that the new upgraded denitrification system installed at the Ram Island Road property would discharge less than 19 milligrams per liter of nitrates, helping to offset the additional nitrates introduced by the new proposed septic system at the Sea Lea property. *Id.* at 11.

Ms. Doyle further testified that she believed all the requirements and public health, safety, and welfare concerns had been met. *Id.* at 13 (stating "[i]t's way in excess of what you would typically do for a denitrification type of system" and "I cannot think of anything else that you could add to further treat the waste or minimize any potential impact"). Ms. Doyle stated that it was her opinion, based on "the level of treatment, the placement of the items on the site and the groundwater flow direction as determined by Dr. Urish," that granting the SUP would pose no threat to the drinking water supply in the Town of Charlestown. *Id.* at 14. However, on cross-examination, Ms. Doyle admitted that, while Dr. Urish's report indicated that "the groundwater flow direction is typically towards the coastal pond," the surface water could go in either direction because it "will follow the contours." *Id.* at 16. Ms. Doyle also admitted that she could not "stand here and tell you how much the drawdown will be," when asked about the potential effect of adding another shallow well less than ten feet from the neighbor's well. *Id.* at 20.

[1] When asked if they were "contemplating using an incinerating toilet," Ms. Doyle stated that it was a "[h]eat assisted composting toilet." (Tr. I at 58:24, 59:3-4.)
[2] Ms. Doyle acknowledged near the end of the hearing that even gray water contains "[b]acteria and pathogens," although "[d]efinitely to a lesser degree than black water." (Tr. I at 57.)

Board members Joseph Quadrato (Mr. Quadrato) and Cliff Vanover (Mr. Vanover) questioned Ms. Doyle about the design and square footage of the proposed house, stating that these facts were necessary for the Board. *Id.* at 23-25. Plaintiffs offered no definite building design. *Id.* at 25, 52:15-20 ("[F]rankly and candidly this parcel of real estate is on the market at present. The design of the house . . . should be left up to the potential purchaser in terms of where they want their toilet.").

Next, Nathan Godfrey (Mr. Godfrey) of Newport Appraisal Group, LLC testified on behalf of the Plaintiffs' application. He was also qualified as an expert witness. *Id.* at 26-27. Mr. Godfrey testified that, after visiting the lot and reviewing the file, the Charlestown Zoning Ordinance, and the Comprehensive Community Plan, he had concluded that the proposal would not alter or have any impact on the general character of the surrounding area or the community at large. *Id.* at 29:24-30:7 ("My opinion is here that you begin with a single-family residential neighborhood almost fully developed. This is an infill lot. You end up with a single-family residential neighborhood with this lot developed for a single-family residence. There's no change to the neighborhood."). Mr. Godfrey opined that, because "[t]hat is the use that the ordinance wants to see in this district," he could not "imagine there would be a traffic issue." *Id.* at 31.

Regina Lapolla (Ms. Lapolla), a neighbor, objected to the Application. She testified about her concerns regarding the proximity of the proposed well to the neighboring wells and the potential impact of the composting toilets on the drinking water. *Id.* at 34. She testified that the wells are very shallow, and that she puts water treatment in the wells such as water softening and de-rusting. *Id.* Ms. Lapolla was concerned that a composting toilet would either have a tub holding solid waste or a system that burns the waste, "releasing into the air the affects [*sic*] of that burnt waste." *Id.* at 34-35. She also questioned the fairness and logic behind "trading credits" for nitrate

offsets in this case, pointing out that the Ram Island Road property is "nowhere near the water," and that Green Hill Pond and Allens Cove are "already polluted." *Id.* at 35-36.

The applicants presented Jeffrey Balch (Mr. Balch), a land surveyor, to answer the topographical questions raised by Ms. Lapolla. Mr. Balch presented a survey that he prepared and testified that the survey was based on elevations of the existing ground. *Id.* at 39-40. He explained that any clearing of the land did not have an effect on the ground elevations but was only applicable to vegetation. *Id.* While being questioned about the "documentation on the water table and soil analysis," which he admitted was done in 2000, Mr. Balch stated that "[t]here hasn't been any significant changes to the neighborhood" since that time, which was greeted with laughter from the audience. *Id.* at 41. Members of the Board questioned whether it was appropriate to be "looking at a survey that's eighteen years old," and Ms. Lapolla stated that "[t]he area has changed significantly." *Id.* at 43. Ms. Lapolla then described the gradual process, since she bought her cottage fifteen years prior, of the neighborhood transitioning from a seasonal cottage community to one filled with year-round retired residents who had improved or remodeled their houses, often building bigger homes. *Id.* at 43-45.

Finally, Belinda Luscinskas (Ms. Luscinskas), a neighbor, testified. She testified about her concerns relating to the potential impact on her health due to the effect of increased nitrates on her well and also the impact on Green Hill Pond. *Id.* at 46-47. In particular, Ms. Luscinskas was concerned about the impact on her drinking water, stating that: "I rely on my drinking water, my well water for water. I don't have a bottle like some neighbors have." *Id.* at 47.

The Board then voted to continue the application to the February 19, 2019 regular meeting so that Applicant could provide information about the type and location of compostable toilets, as well as square footage of living space, in the proposed structure; Dr. Urish's reports; and

information regarding the OWTS. *Id.* at 50; *see* Letter from Board to Applicant (Dec. 21, 2018). Prior to their adjournment, the Board asked for additional details about how the Ram Island Road property had been picked for the offset program. (Tr. I at 51.) Attorney DeAngelis said he had sent letters to all the homeowners whose properties were on the Charlestown list of homes with deficient systems and was contacted by Mr. Smith. *Id.*

The February 19, 2019 Hearing

Prior to the February 19, 2019 hearing, Plaintiffs' attorney submitted a packet with the requested documents to the Board. *See* Tr. 3, Feb. 19, 2019 (Tr. II). During the meeting, the Plaintiffs, through counsel, were called upon to answer the Board's concerns regarding the application, the location of the ISDS system, as well as other issues that the Board determined relevant. The Board asked whether the house would be used year round or seasonally. It was disclosed that the house was intended to be used year round. The board questioned "[h]ow [you can] state that the house will be occupied year round" when there was then no owner or buyer. *Id.* at 4-6. These questions stemmed from concerns about the maintenance of the composting toilet system, particularly "in case of a power outage." *Id.* at 5. Board members also questioned the lack of building design, given the lot's size, stating that, when it came to situating the composting toilet system in the house, "[t]he system has to be below the toilets," and that "because the house is 12 feet from the property line, and . . . that system is like 12 feet long and 10 feet wide," it could conceivably be very close to a neighbor's property line. *Id.* at 8-9.

There were multiple questions and concerns regarding the Applicants' ability to dig a well "right on a property line" without "encroaching upon the abutter's property" and the Sea Lea Colony Homeowners Association's private road. *Id.* at 11. Attorney Ucci responded that use of the road for "a reasonable means" was allowed, and that "if anything was disturbed, we would

make them whole or if it's the fault of the well company, then they would do that." *Id.* at 12. The Board made several inquiries about Dr. Urish's 2006 study, questioning the use of data from 1927 and 1960 when there is more current data available, as well as doubting the usefulness of measurements taken in August "which is a dry month" when there are concerns about flooding and water levels. *Id.* at 14-15. Attorney Ucci said that, without Dr. Urish present, "[n]one of us would be prepared to accurately answer those" questions. *Id.* at 16-18.

Mr. Vanover pointed out that, in his review of the Applicants' OWTS application to the DEM, he found that where the form asked, "are there wetlands within 200 feet of the O.W.T.S.[,]" the box is marked no. *Id.* at 21; *see* Pls.' Appl. OWTS Construction Permit (received Oct. 11, 2016). He went on to say that he found that the same box was checked on all prior applications to the DEM ("four through the years since '97"), which was "wrong." (Tr. II at 21.) Attorney Ucci acknowledged that "[i]t says, no," but claimed that, because "[e]veryone has always acknowledged that this is within close proximity to the wetlands," the box must have been "mischecked." *Id.* at 22. Despite Attorney Ucci's assurances that the "mischecked" box would not "have a bearing on how the site is looked at, what D.E.M. looks at," Mr. Vanover stated that "[i]t has a bearing in my opinion." *Id.* at 24.

Board members also expressed continuing concern about the proximity of the OWTS to the wells. *Id.* at 27. As a result, the Board requested testimony from the town's wastewater management officer, and Attorney Ucci offered to request a written response from Dr. Urish to some of the Board's questions. *Id.* at 29, 32. Finally, Mr. Vanover and Mr. Quadrato requested testimony at the next hearing from the Salt Pond Coalition regarding the condition of Green Hill Pond and Allens Cove. *Id.* at 33-34. Consequently, the Board voted to again continue the

application to the March 19, 2019 regular meeting. *Id.* at 36-37; *see* Letter from Board to Applicant (Feb. 25, 2019).

The March 19, 2019 Hearing

On March 19, 2019, C.J. Doyle testified specifically to "the concern of the board relating to whether or not there would be any intrusion on abutting properties." (Tr. 7, Mar. 19, 2019 (Tr. III).) Ms. Doyle stated that she had contacted a local contractor and "questioned him about what is typically done with wells in this area." *Id.* at 8. The contractor indicated to Ms. Doyle that a six-inch auger and casing would be used to go down twelve to fifteen feet, with minimal intrusion, and that the equipment would be parked in the actual site parcel. *Id.* at 8-9. When Board members followed up to ask about the roof drainage system, "sited right against the property line," Ms. Doyle said that care would have to be taken but that it could be done, perhaps using a "trench box." *Id.* at 10. Mr. Vanover pointed out that his measurements showed distances of seventy feet and six inches between the proposed well and the OWTS, and seventy feet between the neighbor's well and the pump chamber, which is "outside of your 71 that you requested from D.E.M., the variance." *Id.* at 12. Ms. Doyle stated that the D.E.M. approval requires a 71 foot distance and that she would be responsible, during construction, for maintaining that distance. *Id.* at 13.

Matthew Dowling (Mr. Dowling), of the Town of Charlestown Onsite Wastewater Management Program, testified that "[t]he use of the composting toilet, within the salt pond's region, will have minimal if not any impact on the watershed." *Id.* at 15. He also testified that seasonal use, as opposed to year-round use, should not create an issue with the composting system. *Id.* at 17. Regarding the compensatory mitigation at the Ram Island Road property, a requirement under the Consent Agreement, Mr. Dowling testified that the deficient system at the Ram Island Road property was actually upgraded and paid for by the town under an EPA grant, with a portion

paid for by the property owner. *Id.* at 16, 17. He did not know whether the Applicants had made a contribution to the Ram Island Road property owner's portion. *Id.* at 18.

Charles A. Sweet (Mr. Sweet), co-owner of the property with Applicant, testified that he had made a cash contribution toward the installation of the upgraded septic system. *Id.* at 20. Attorney DeAngelis stated that he had sent letters out to property owners in the Town of Charlestown who had deficient systems and that when Mr. Smith got in contact with him, he had put him in touch with the Applicants and "they negotiated a cash contribution towards his system." *Id.* at 21 ("Whatever he did after that in terms of getting a grant whether from the town or the government of the state or the government of the United States of America we are not aware."). Mr. Vanover expressed some incredulity at that time, stating that he "was led to believe all through this process that the Applicant would be paying for this system." *Id.*

Arthur Ganz (Mr. Ganz), president of the Salt Pond Coalition, testified about his concerns relating to potential flooding based on the seven-foot distance from the shoreline to the base level of the land. *Id.* at 23-24. He testified that buffer areas are required by the Coastal Resource Management Council in "all of the construction around the coastal salt ponds." *Id.* at 26. Mr. Ganz also noted that all of the lots in Sea Lea Colony were developed before town zoning and are "substandard by today's zoning." *Id.* at 29. During the Board's questioning of Mr. Ganz about erosion, Mr. Vanover raised the issue of a past violation by Applicants for brush cutting the Sea Lea property "back in 2013, '14." *Id.* at 30. Mr. Ganz said that "there would be less chance of native revegetation, recolonization there" in that case, but that "if planting were done, which should be done, it might help to hold that bank." *Id.* at 31. At that point, Mr. Vanover observed that when he was at the site "almost two weeks ago it's pretty clear that the grass, the vegetation in that 25 foot buffer zone has been cut" again. *Id.*

Ms. Lapolla testified again about her concerns relating to the distance between the septic system and the wells and the potential effect on the public health. *Id.* at 33. She asked the Board what her remedy would be if there was "an undue strain on the aquifer," such that her well ran dry and she had to "truck in water." *Id.* at 33-34. Ms. Lapolla then asked that it be put on the record "how much Charlestown paid" for the upgrade to the Ram Island Road property's system. *Id.* at 34. Mr. Dowling testified that the "total cost for the septic system at 166 Ram Island Road was $23,700," that the EPA grant covered seventy-five percent "which was $17,775," and that left the property owner paying $5,925. *Id.* at 35-36.

Finally, Ms. Lapolla asked the Board about the town's enforcement power, should a subsequent owner decide to "hav[e] a plumber come in and shift the pipes[.]" *Id.* at 34. To this concern, Attorney DeAngelis noted that a deed restriction was required under the Consent Agreement providing for only compost toilets, and that any switching around of the pipes would be a criminal act. *Id.* at 37. Mr. Dowling also stated that the town ordinance would require inspection at least once a year, including a plumbing inspection. *Id.* at 38.

The Board again voted to continue the application, to the May 21, 2019 regular meeting, for the purpose of rendering a decision. *Id.* at 60; *see* Letter from Board to Applicant (Apr. 3, 2019). The continuance was based in part upon lingering concerns raised by Ms. Lapolla and by a letter from Wayne H. Datz and his wife Karen Ruzzo, of 90 Sea Lea Avenue. Tr. III at 46, 49; *see* Datz Letter (expressing concerns about potable water quality, draining of the aquifer, enforcement, and displacement of vegetation).

The May 21, 2019 Hearing and Decision

On May 21, 2019, Mr. Dreczko moved to approve the application of the plaintiffs. He set forth his reasons and stated that "failure to grant this request means that the lot remains vacant and

it is not a buildable lot." (Tr. 13, 53, May 21, 2019 (Tr. IV).) He went on to say that the proposed use was consistent with the existing surrounding area, and that he had been reassured about the use of the composting toilet and the separation of the wells. *Id.* at 13-15. Mr. Dreczko further stated that his concerns over the possible impact to drinking water of the composting toilet had been answered at a town council meeting held on April 8, when Bianca Ross from the University of Rhode Island answered questions. *Id.* at 15. He also stated that there had been no testimony presented that the use would disrupt the neighborhood by "excess noise, light, glare or air pollutants." *Id.* at 17. Mr. Dreczko added that the other experts whose testimony influenced his vote included Mr. Dowling, *id.* at 13-14, Mr. Godfrey, *id.* at 15, Dr. Urish, *id.* at 16, and Mr. Frisella's testimony before DEM, *id.* at 17. Mr. Chambers echoed Mr. Dreczko, adding that he would be willing to approve with conditions: "[t]hat the lot be allowed to revegetate naturally to reduce runoff and possible soil erosion[,]" that there be "[n]o impervious surfaces[,]" that "shrubs [ ] be planted throughout the C.R.M.C. buffer area to minimize the surface erosion[,]" and that "the use of fertilizers [ ] not be allowed." *Id.* at 18-19.

In the discussion that preceded the vote, Mr. Quadrato noted that the only change made in the application between the DEM denial and the approval by way of the Consent Agreement was "the addition of Ram Island." (Tr. IV at 6.) Mr. Vanover asked Attorney DeAngelis if he was "aware that there were four previous applications made that were denied by D.E.M." and Attorney DeAngelis answered that he was not. *Id.* at 11-12. Subsequently, Board members Raymond Dreczko (Mr. Dreczko), Michael Chambers (Mr. Chambers), and JoAnn Stolle (Ms. Stolle) voted to approve the application, and Mr. Vanover and John Lovoy (Mr. Lovoy) voted to deny the application. *See* Decision at 1-3 (May 31, 2019); Charlestown Zoning Code § 218-22(J)(3) (requiring four votes for approval).

Mr. Quadrato, who did not participate in the vote, offered his comments "so the rest of the board c[ould] take them into consideration." *Id.* at 19. He pointed out that the Applicants would still not have DEM approval if not for the upgrade of the Ram Island Road property. *Id.* at 20. His concerns included that there was only a "2-foot distance of the gray water system from the neighbor's property line on the left side." *Id.* at 23. He cited the DEM engineer's testimony that "in nineteen years he had never seen the department grant a variance that close to the property line," due to lack of sufficient control and the possibility of releasing disturbed sewage onto the neighbor's property. *Id.* Mr. Quadrato also worried about the addition of a new well, given the "high water usage in the summer" which could create "reverse flow," and cited to Dr. Urish's statement that groundwater would fluctuate with pumping but be restored during periods of no pumping. *Id.* at 24-25. Mr. Quadrato concluded by saying that the Board acknowledged that it needed to listen to the DEM, but that the DEM had "only approved the property because of the lower nitrates from the two systems[,]" which "doesn't change a thing on Sea Lea Avenue." *Id.* at 27.

Mr. Vanover, voting against the application, specified that "public convenience and welfare will not be substantially served, if approved." *Id.* at 28; Decision at 2. He had concerns about property lines for the parcel and the adequacy of the survey that was performed and the fact that no "monuments" had been placed marking the boundary lines, indicating that "[w]ithout monuments located on the property, how will the public, the zoning board or the abutters know where the actual property line is?" (Tr. IV at 28-30; Decision at 3.) Mr. Vanover believed that a Class I survey should have been completed, and the Class III survey that was submitted was inadequate. (Tr. IV at 31; Decision at 3.) Consequently, he found the application "incomplete, deficient and lacking in credibility." (Tr. IV at 32; Decision at 3.) Mr. Vanover then pointed out

that the Applicant had been cited with a CRMC notice of violation on October 21, 2016, which stated that "you and your agent have undertaken clearing the buffer zone vegetation within 200 feet of a coastal feature and have failed to install permanent buffer zone markers." (Tr. IV at 34.) He testified again that "[o]n a site visit in February of 2019, it was absolutely clear that the grass and buffer had been cut again probably in late summer or early fall of 2018," and asked "how can we be assured they will do what they say they will[?]" *Id.* at 34-35.

Mr. Lovoy specified several reasons for his vote to deny the application, including concerns that Mr. Frisella had been a co-owner of the property, which could have been a conflict of interest. (Tr. IV at 36; Decision at 3.) Consequently, he did not find Mr. Frisella's testimony as to the cause of the bacteria in Green Hill Pond to be credible. (Tr. IV at 36-37; Decision at 3.) He stated that he saw "absolutely no evidence or testimony stating that granting this special use permit is in the public interest," but that the opposite was true. (Tr. IV at 38; Decision at 3.) His "most serious concern" was the threat it might pose to drinking water supplies, referencing testimony given by Ms. Lapolla as to the changing character of the neighborhood and the effect it was already having on her water pressure and well water. (Tr. IV at 39-40; Decision at 3-4.) Mr. Lovoy also noted the potential disruption to neighbors' enjoyment of the use of their property based on emissions or odor from the composting toilet. (Tr. IV at 40-41; Decision at 3-4.) Finally, he raised the continuing maintenance that a composting toilet calls for, including the monthly replacement of soap in a dispenser connected to the black water chamber. (Tr. IV at 41-42; Decision at 4.) Mr. Lovoy doubted whether a renter, for example, or a later owner who had not been part of the process would comply. (Tr. IV at 42; Decision at 4.) He stated that the levying of a fine would be no consolation to an abutting homeowner who has lost the use of their drinking water. (Tr. IV at 42-43; Decision

at 4.) In giving his final vote to deny, Mr. Lovoy stated that he would also incorporate the statements made by Mr. Quadrato and Mr. Vanover. (Tr. IV at 60.)

The written Decision of the Board was recorded in the Land Evidence Records of the Town of Charlestown at Book 447, Page 833, on May 31, 2019. The Appellants' Complaint was filed in this Court on June 18, 2019, seeking relief from the Board's Decision pursuant to G.L. 1956 § 45-24-69. (Compl. ¶ 3.) The Complaint alleges that "[t]he Decision is in contravention of Rhode Island law" because "[j]urisdiction over permits for septic systems in Rhode Island rests exclusively with the Rhode Island Department of Environmental Management[.]" *Id.* ¶ 7. According to the Complaint, the Decision "substituted RIDEM requirements with certain Board members' own, . . . in contravention of RIDEM's exclusive jurisdiction," among other things. *Id.* ¶ 9. Appellants allege that their application for a SUP "satisfies all applicable RIDEM requirements." *Id.* ¶ 10. Appellants ask that the Decision be reversed and that the Court enter an order granting Appellants' requested SUP. *Id.* at 3.

Appellants submitted their Memorandum of Law in Support of Appeal on April 30, 2020. The Board filed its Memorandum of Law in Opposition to Appellants' Appeal on August 3, 2020. The certified record was subsequently filed on September 29, 2020, for this Court's review.

II

Standard of Review

Section 45-24-69 governs zoning board appeals. When an aggrieved party appeals a decision of a zoning board of review to the Superior Court, the Superior 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." Section 45-24-69(d). On appeal, the Superior 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:
> "(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.*

It is the function of the Superior Court when reviewing such an appeal to "examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence." *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978). "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.'" *Iadevaia v. Town of Scituate Zoning Board of Review*, 80 A.3d 864, 870 (R.I. 2013) (quoting *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (further citation omitted)).

While the Court is not bound by the zoning board's determinations of law, it must give deference to the zoning board on findings of fact. *Pawtucket Transfer Operations, LLC*, 944 A.2d at 859. "The trial justice may not 'substitute [their] judgment for that of the zoning board.'" *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (quoting *Apostolou*, 120 R.I. at 509, 388 A.2d at 825). If the Court "'can conscientiously find that the board's decision was supported by substantial evidence in the whole record,'" the decision must be upheld. *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *Apostolou*, 120 R.I. at 509, 388 A.2d at 825). Furthermore, "where there is conflicting testimony . . . and substantial evidence exists on both sides of the controversy," it is generally true that "the board,

who had before it the individual witnesses and had the opportunity to judge their credibility, was in a better position than the court to resolve the conflict." *Mendonsa v. Corey*, 495 A.2d 257, 263 (R.I. 1985). This is a true because "the board is vested with discretion to accept or reject the evidence presented" and its "essential function is to weigh the evidence." *Bellevue Shopping Center Associates v. Chase*, 574 A.2d 760, 764 (R.I. 1990).

III

Analysis

Appellants ask this Court to reverse the Board's Decision. (Appellants' Mem. Supp. Appeal (Appellants' Mem.) 1-2.) Appellants argue that the dissenting members of the Board committed reversible error in denying their request for a SUP. (Appellants' Mem. 13-27.) Specifically, they claim the Board abused its discretion, committed errors of law, and made factual determinations that were clearly erroneous in light of credible and uncontroverted evidence. *Id.* at 13. The Board requests that the Court deny and dismiss the appeal, and instead affirm its Decision. (Zoning Board's Mem. Opp'n Appellants' Appeal (Board's Mem.) 22.) As a general matter, the Board states that their Decision was neither arbitrary nor capricious and is supported by substantial evidence, or the lack thereof, contained in the certified record. (Board's Mem. 21-22.)

Special Use Permits for Waste Near Water Bodies

Section 218-78 of the Charlestown Zoning Ordinance (Water bodies) states that "[n]o facility designed to leach liquid wastes into the soil shall be located in areas[3] outlined below, except

[3] Section 218-78 of the Charlestown Zoning Ordinance limits the use of OWTS systems in the following areas:

> "(1) Within one hundred feet of a boundary of a fresh water or coastal wetland as defined by Rhode Island General Laws §§ 2-1-14 and 2-1-20.
> "(2) That area of land within two hundred feet of the edge of any flowing body of water having a width of ten feet or more and that

by the granting of a special use permit." Charlestown Zoning Ordinance § 218-78. A special use is defined in § 45-24-31(62) as "[a] regulated use that is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42."

The Charlestown Zoning Ordinance specifies the seven enumerated standards that the Board must consider and the applicant must meet for approval of a special use permit:

> "A. A special use permit *may* be approved by the Board following a public hearing if, in the opinion of the Board, that *evidence to the satisfaction of the following standards has been entered into the record* of the proceedings:
> "(1) The public convenience and welfare will be substantially served;
> "(2) It will not result in adverse impacts or create conditions that will be inimical to the public health, safety, morals and general welfare of the community.
> "(3) The requested special use permit will not alter the general character of the surrounding area or impair the intent or purpose of this Zoning Ordinance or the Comprehensive Plan upon which this Ordinance is based;
> "(4) That the granting of a special use permit will not pose a threat to drinking water supplies;
> "(5) That the use will not disrupt the neighborhood or the privacy of abutting landowners by excessive noise, light, glare, or air pollutants;
> "(6) That the sewage and waste disposal into the ground and the surface water drainage from the proposed use will be adequately handled on site;
> "(7) That the traffic generated by the proposed use will not cause undue congestion or introduce a traffic hazard to the circulation pattern of the area." Charlestown Zoning Ordinance § 218-23 (emphasis added).

> area of land within one hundred feet of the edge of any flowing body of water having a width of ten feet or less; and
> "(3) That area of land within one hundred feet of the edge of any intermittent stream; and
> "(4) The area of land defined as a one hundred year flood hazard boundary indicated by Zone A or Zone V on the official Flood Insurance Rate Maps of the Town of Charlestown prepared by the Federal Emergency Management Agency and dated September 30, 1995 and any and all revisions thereto." Charlestown Zoning Ordinance § 218-78(A).

The general rule is that "the applicant for a special use permit has the burden of showing that the proposed use meets the standards required by the ordinance." 3 Rathkopf, *The Law of Zoning and Planning* § 61:34 (4th ed., Nov. 2020 Update). This is true "no matter how vague and indefinite or how specific the standards may be," and is "inherent in the nature of the application, and the accepted order of things." *Id.* ("Few applicants for a special permit can expect that the use sought is theirs for the asking. Applicants often make detailed and elaborate presentations, sometimes running on for hours and even multiple sessions of the hearing. Experts abound, and testify on a wide variety of subjects."); *see also Sea View Cliffs, Inc. v. Zoning Board of Review of Town of North Kingstown*, 112 R.I. 314, 319, 309 A.2d 20, 23 (1973); *Iannuccillo v. Zoning Board of Review of Town of Warren*, 103 R.I. 242, 243-44, 236 A.2d 253, 254-55 (1967).

Our Supreme Court has further declared that an applicant for a special use permit first "must establish that the relief sought is reasonably necessary for the convenience and welfare of the public." *Toohey v. Kilday*, 415 A.2d 732, 735 (R.I. 1980). In doing so, the petitioner "need show only that 'neither the proposed use nor its location on the site would have a detrimental effect upon public health, safety, welfare and morals.'" *Id.* at 736 (quoting *Hester v. Timothy*, 108 R.I. 376, 385-86, 275 A.2d 637, 642 (1971)); *see Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (stating that the "satisfaction of a 'public convenience and welfare' pre-condition will hinge on a showing that a proposed use will not result in conditions that will be inimical to the public health, safety, morals and welfare") (quoting *Nani v. Zoning Board of Review of Town of Smithfield*, 104 R.I. 150, 156, 242 A.2d 403, 406 (1968)).

A

The Board's Consideration of the DEM Decision

Appellants first argue that the dissenting members of the Board failed to adequately weigh and consider DEM's approval of the proposed OWTS, making their denial arbitrary and capricious. (Appellants' Mem. 14-17.) On the other hand, the Board contends that they gave adequate consideration to the DEM approval, noting that "RIDEM and the Board have distinct responsibilities." (Board's Mem. 8, n.1.)

In support of their argument, Appellants rely heavily and solely on the holdings of three Superior Court cases. *See* Appellants' Mem. 14-17 (citing *Holmes v. Town of Charlestown Zoning Board of Review*, No. WC 2008-0387, 2010 WL 1280471 (R.I. Super. Mar. 26, 2010) (Thompson, J.); *Dunn v. The Town of Charlestown Zoning Board of Review*, No. WC-2003-0710, 2007 WL 4471142 (R.I. Super. Nov. 30, 2007) (Thompson, J.)[4]; *Kulak v. Zoning Board of Review of Town of Charlestown*, No. WC05-0440, 2006 WL 2556054 (R.I. Super. Sept. 1, 2006) (Rubine, J.)). These decisions, while thoughtful and learned, are nonprecedential and distinguishable.

The Rhode Island Supreme Court has acknowledged generally that "[u]nder the doctrine of *stare decisis*, courts should adopt the reasoning of earlier judicial decisions if the same points arise again in litigation." *Woonsocket School Committee v. Chafee*, 89 A.3d 778, 792 (R.I. 2014) (internal quotations omitted). It is important, however, to note that "lower court decisions are neither binding . . . nor do they establish precedent," *Impulse Packaging, Inc. v. Sicajan*, 869 A.2d 593, 600 n.14 (R.I. 2005) (finding that petitioner "relies on two decisions of the Appellate Division and in doing so erroneously assigns both weight and significance to them where there is none to

[4] This case is listed on Westlaw as *Migel v. The Town of Charlestown Zoning Board of Review*, No. WC 2003-0710, 2007 WL 4471142 (R.I. Super. Nov. 30, 2007).

be found," as well as "misconstru[ing] both cases"). In fact, this rule has been applied in federal court recently as a maxim of Rhode Island law. *See Gardner v. Larkin*, C.A. No. 19-139JJM, 2020 WL 831860, at *33 n.36 (D.R.I. Feb. 20, 2020), *report and recommendation adopted*, C.A. No. 19-139-JJM-PAS, 2020 WL 1502300 (D.R.I. Mar. 30, 2020) ("In Rhode Island, this Court may consider Superior Court decisions in light of the guidance of the Rhode Island Supreme Court, which has held that they 'are neither binding[,] . . . nor do they establish precedent.'") (quoting *Impulse Packaging, Inc.*, 869 A.2d at 600 n.14).

Here, unlike in *Dunn*, the record shows that both dissenting members of the Board made clear evaluations of the value of the DEM approval in this case. *Compare Dunn*, 2007 WL 4471142 (finding troubling "the Board's seeming complete disregard of the expert opinions and determinations implicit in DEM's approval of the proposed ISDS"); *with* Tr. IV at 6, 11-12, 20, 23, 27. Not only did the dissenting members refer to the evidence presented at the DEM hearings, they explicitly questioned the degree to which the DEM approval could be relied upon to alleviate their concerns about the impact of the proposal contained in the application upon which they were voting. *See* Tr. IV at 23 (consideration of DEM engineer testimony by Mr. Quadrato, incorporated into Mr. Lovoy's dissenting vote); Tr. IV at 6, 11-12, 20, 27 (noting four prior applications denied by DEM, with the only change being the offset on the Ram Island Road property). Mr. Vanover raised the erroneously checked box on the application form at the February hearing, and Mr. Quadrato raised the issue of the nitrate offset contribution made by the Applicants in order to secure their consent agreement with DEM at the May hearing. Tr. II at 21-24; Tr. IV at 6, 11-12, 20, 27; *see* Pls.' Appl. OWTS Construction Permit (received Oct. 11, 2016). When Mr. Quadrato concluded his remarks, which were incorporated into Mr. Lovoy's dissenting vote, *see* Tr. IV at 60, he explicitly acknowledged that the Board needed to listen to the DEM but qualified that

statement by saying that the DEM "only approved the property because of the lower nitrates from the two systems." Tr. IV at 27. Three members of the Board thus established that because Appellants did not receive an approval based solely on the merits of their proposal, the value of the DEM approval in resolving questions about public safety and welfare was in question.

Therefore, unlike the situation in *Holmes*, the Board here could not say with surety that the DEM approval stood for a thorough and careful review of the merits of the project under the standards. *See Holmes*, 2010 WL 1280471, at *15 (stating "DEM is uniquely positioned . . . to assess the viability of applications for permits to alter fresh water wetlands" and that "the Board's decision does not provide any reason why the Board's environmental concerns were not alleviated by DEM's thorough and expert review of the ISDS"). Furthermore, unlike in *Kulak*, the wells at issue in this case were not backup wells but instead were the sole suppliers of drinking water for certain neighbors who testified before the Board. *See Kulak*, 2006 WL 2556054, at *4 (finding "a lack of credible evidence to support the dissenting determination that this approved ISDS system will contaminate the drinking water supply" because "this area is serviced by a public water system and the only reason for reverting to the 'backup wells' would be if the public system failed"); *see also* Tr. I at 46-47 (testimony of Ms. Luscinskas).

This Court finds that it was not arbitrary or capricious for the dissenting members to weigh the value of the DEM approval, either generally or under these circumstances. Credibility and weight are determinations for the factfinder. *See Bellevue Shopping Center Associates*, 574 A.2d at 764; *Mendonsa*, 495 A.2d at 263. The Rhode Island Supreme Court has recognized that where "[t]he Legislature in its wisdom established two different forums for control over the coastal environment" when it "could have assigned both functions to the same agency[,]" it is likely that the Legislature "considered the need for special types of expertise in the discharge of the separate

but similar functions of both agencies." *Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266, 273 (R.I. 1981). Consequently, Appellants' argument here is unpersuasive.

B

The Dissenting Votes

Appellants next argue that the dissenting members abused their discretion and that their decisions were affected by errors of law and clearly erroneous in light of the reliable, probative, and substantial evidence presented, because their application meets the requirements for a SUP. (Appellants' Mem. 20-28.) The Board responds that it gave the necessary consideration to the expert testimony of Appellants' witnesses, as well as the lay testimony of neighbors, finding some testimony credible and competent and some not. (Board's Mem. 10-13 (regarding Ms. Doyle's testimony), 13-14 (regarding Mr. Balch's testimony), 14 (regarding Ms. Lapolla's testimony).) The Board also points out that the dissenting votes by Mr. Vanover and Mr. Lovoy were supported by their own personal knowledge of the area. *Id.* at 14-15.

Where there is "no competent evidence to offset that offered by [Appellants'] experts in support of the special [use,] . . . the denial of the application [is] arbitrary and an abuse of the discretion with which the board is vested." *Goldstein v. Zoning Board of Review of City of Warwick*, 101 R.I. 728, 732-33, 227 A.2d 195, 198 (1967). However, "[t]he board may take into consideration probative factors within their knowledge in denying the relief sought and their decision will not be disturbed if disclosed therein are the conditions by which they were motivated." *Id.* at 733, 227 A.2d at 199 (citing *Heffernan v. Zoning Board of Review of City of Cranston*, 50 R.I. 26, 144 A. 674 (1929)). Furthermore, should members of a zoning board "tak[e] a view" of the property in question in order to acquire probative personal knowledge, so long as

they "relat[e] their resulting observations to the evidence adduced by the applicant in the reasons for their decision," then "a decision denying the application will not be arbitrary." *Id.* at 733, 227 A.2d at 199 (citing *Bloch v. Zoning Board of Review of City of Cranston*, 94 R.I. 419, 421, 181 A.2d 228, 229 (1962)). Information "obtained by board members as the result of their inspection of the property under consideration" may "certainly constitute[ ] legally competent evidence upon which a finding may rest, . . . if the record discloses the nature and character of the observations upon which the board acted." *Perron v. Zoning Board of Review of Town of Burrillville*, 117 R.I. 571, 576, 369 A.2d 638, 641 (1977).

1

Mr. Vanover's Vote

Appellants argue that Mr. Vanover's vote to deny the Applicants' special use permit was arbitrary and capricious because it was premised on the Applicants' failure to satisfy a nonexistent requirement. (Appellants' Mem. 17-19.) This resulted in an abuse of discretion and error of law. *Id.* Yet, Mr. Vanover's discussion of the difference between the Class I and Class III Surveys did not include a *mandate* that a Class I survey was required. Rather, the discussion states that a Class I survey should have been done, under these particular circumstances. Tr. IV at 28-32 (stating that a Class I Survey "should have been done for this lot").

Seven of the thirteen requirements for a submittal for a SUP application relating to water bodies are information about proximity, locations, and dimensions. *See* Charleston Zoning Ordinance § 218-78(C)(1)-(4), (11)-(13). There is ample evidence contained in the record that Mr. Vanover and other Board members were looking for reassurance from Applicants about the degree of intrusion onto abutting property that would be caused by the construction and continuing operation of the proposed OWTS and well. *See* Tr. II at 11, 27; Tr. III at 7-13; Tr. IV at 23, 28-32;

Decision at 2-3. Consequently, Appellants were on notice from both the statutory requirements for their application and the statements of Mr. Vanover and others in prior hearings that precise measurements were called for. *See* Charlestown Zoning Ordinance § 218-78(C)(12) (requiring "[p]recise reference points to locate the property and the proposed ISDS site" as part of a complete application for a SUP relating to water bodies); Tr. II at 27 (Ms. Stolle: "I keep looking at this map and the concern I'm holding onto is the distance from the septic system to the wells which I find to be critical. The map is a little confusing."). *Contra Holmes*, 2010 WL 1280471, at *12-13 (finding necessity of objective published criteria as to type of storm water management plan to design, based on notice principles).

There would be no error here if Mr. Vanover's dissatisfaction with the survey was merely one example that supported his conclusion that the application was "incomplete, deficient and lacking in credibility." Decision at 4; *see* Tr. IV at 31 (Where Mr. Vanover stated: "Absolute precision and accuracy are necessary due to the fact that the proposed well O.W.T.S. and underground portions of the roof drainage system are placed within inches of or up against the property line as shown in the plan. . . . A Class III Survey is just not sufficient for the site."). However, by relying solely on the supposed insufficiency of the survey in his denial, Mr. Vanover disregarded the clear evidence before the Board. His denial was not based upon competent evidence within the record. Rather, he tossed aside and ignored sufficient substantial evidence while searching for an evidentiary record that he desired. *See Iadevaia*, 80 A.3d at 875 (declining "to read into the ordinance a requirement that the drafters of the ordinance clearly omitted"). Consequently, his vote is arbitrary and capricious, constituting an abuse of discretion, because it is not supported by substantial evidence itself and instead contradicts "the reliable, probative, and

substantial evidence" in the record. *Salve Regina College*, 594 A.2d at 882; *see Iadevaia*, 80 A.3d at 870.

2

Mr. Lovoy's Vote

Appellants next argue that Mr. Lovoy's decision to deny the application constituted an abuse of discretion, was affected by errors of law, and was clearly erroneous in light of the reliable, probative, and substantial evidence presented. (Appellants' Mem. 19.) Specifically, Appellants argue that they presented competent, uncontroverted, and unimpeached evidence, meeting their burden under the special use permitting statute. *Id.* However, the certified record before the Court only partially supports this.

The Rhode Island Supreme Court has stated that rejection of expert testimony that is competent, uncontradicted, and unimpeached "would be an abuse of discretion." *Murphy v. Zoning Board of Review of Town of South Kingstown*, 959 A.2d 535, 542 (R.I. 2008) (citing *Bonitati Bros., Inc. v. Zoning Board of Review of City of Cranston*, 99 R.I. 49, 55, 205 A.2d 363, 366-67 (1964)). However, it is also true that "'there is no talismanic significance to expert testimony [and it] may be accepted or rejected by the trier of fact.'" *Murphy*, 959 A.2d at 542 (quoting *Restivo v. Lynch*, 707 A.2d 663, 671 (R.I. 1998)). This means that the Board may reject expert testimony "particularly when there is persuasive lay testimony on the actual observed effects of prior residential construction." *Restivo*, 707 A.2d at 671. In other words, if the record contains evidence that an expert's opinion was discredited, attacked, or impeached, it cannot be said that it remains uncontradicted or that a board's rejection of that expert testimony constitutes abuse of discretion. *See Murphy*, 959 A.2d at 542 n.6 (citing *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1157 (R.I. 2006); *Restivo*, 707 A.2d at 671).

The rationale underlying Mr. Lovoy's vote was premised on the fact that his "most serious concern"—the potential effect of the OWTS on the drinking water—had not been abated by any of the testimony. Tr. IV at 39-40; Decision at 3-4. Appellants relied heavily on Dr. Urish's study to contend that their proposal would not affect the drinking water. *See* Tr. I at 14 (providing Ms. Doyle's testimony that it was her opinion, based on "the level of treatment, the placement of the items on the site and the groundwater flow direction as determined by Dr. Urish," that granting the SUP would pose no threat to the drinking water supply). Yet the clear record establishes that the value of Ms. Doyle's testimony with respect to Dr. Urish's study was diminished. *See* Tr. I at 16 (admitting that while Dr. Urish's report indicated that "the groundwater flow direction is typically towards the coastal pond," the surface water could go in either direction because it "will follow the contours"); Tr. I at 20 (admitting that she could not "stand here and tell you how much the drawdown will be," when asked about the potential effect of adding another shallow well less than ten feet from the neighbor's well).

Then, after Appellants' surveyor was laughed at by those present when he claimed that there hadn't been "any significant changes to the neighborhood" since relevant documentation regarding the water table and soil analysis was done in 2000, multiple Board members questioned the general utility of Dr. Urish's study, given its age and the changes in the neighborhood since the study had been performed. *See* Tr. I at 41, 43. Subsequently, Ms. Lapolla testified to her own personal knowledge of the changes that had actually occurred in the neighborhood since the time of Dr. Urish's study, including the remodeling of seasonal cottages to provide larger year-round living spaces with new irrigation systems. *Id.* at 43-45. That testimony was competent evidence. *See Restivo*, 707 A.2d at 671 (finding that "lay testimony describing physical facts and conditions does constitute evidence from which the [zoning] board could fairly draw inferences").

Yet, the record is void of evidence establishing that any changes to the neighborhood resulted in a loss of well pressure. *Contra* Decision at 4 (purporting to base decision on neighbor's testimony that "[s]he's losing pressure in her well water"). The closest statements are those by Ms. Lapolla and Mr. Datz that they were worried about an increased strain on the aquifer. *See* Tr. III at 33-34; Datz Letter 2 (expressing concerns about draining of the aquifer given neighbor's recent additions of laundry machine and dishwasher). While it is appropriate for the Board to consider the worries of neighbors, those concerns are not competent evidence upon which the Board can base its Decision. *See Perron*, 117 R.I. at 575, 369 A.2d at 641 (stating that "the fears expressed by some of the neighbors concerning possible unfavorable conditions that might result were the application to be granted . . . are not an adequate basis for denying an application for a special exception").

Furthermore, Mr. Lovoy's statement that he saw "absolutely no evidence or testimony stating that granting this special use permit is in the public interest" and claiming that the opposite was true was clearly erroneous, as well as being a misstatement of the relevant law. *See* Tr. IV at 38; Decision at 3; *see also* Section 45-24-69(d). As Appellants point out, they are not required to show a use that advances the public interest. *See* Appellants' Mem. 20; *Salve Regina College*, 594 A.2d at 880 (holding that "a zoning board 'may not deny granting a special exception to a permitted use on the ground that the applicant has failed to prove that there is a community need for its establishment'") (citing *Toohey*, 415 A.2d at 735; *Nani*, 104 R.I. at 151, 242 A.2d at 404). Furthermore, there was uncontroverted evidence in the record from Appellants' expert witness, Ms. Doyle, and from Mr. Dowling, the Town's On-Site Wastewater Manager, speaking to the effectiveness of the OWTS proposed and its likely minimal impact on the watershed. Tr. I at 13; Tr. III at 15. Evidence submitted by Mr. Godfrey also established that a residential use would be

consistent with the Comprehensive Plan without creating a burdensome traffic increase. Tr. I at 27-31.

Accordingly, the Decision is affected by clear error of law, clearly erroneous in light of the evidence, arbitrary and capricious, and characterized by abuse or unwarranted exercise of discretion. *See* § 45-24-69(d). The Court finds only a scintilla of relevant evidence that reasonable minds might accept as adequate to support the conclusions reached by the dissenting members. *Iadevaia*, 80 A.3d at 870. This is insufficient. Consequently, because the Board had ample opportunity to examine the actual and substantial evidence presented in support of this application, the Court reverses its Decision. *See Holmes*, 2010 WL 1280471, at *16 (stating "courts are cautious to avoid a remand that gives a board a second chance to make findings which can be unduly prejudicial to appellants by causing unreasonable delay and further litigation expenses") (citing *Roger Williams College v. Gallison*, 572, A.2d 61, 62-63 (R.I. 1990)).

C

The Equal Access to Justice Act

Finally, Appellants argue that they are entitled to attorneys' fees under the Equal Access to Justice Act (the EAJA or the Act). (Appellants' Mem. 28-29.) The Board asks the Court to reject Appellants' request for attorney fees, arguing that they acted with substantial justification in rendering their Decision. (Board's Mem. 21.)

The EAJA was enacted to "mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings." *Taft v. Pare*, 536 A.2d 888, 892 (R.I. 1988). The Act outlines the requirements for an individual or small business to recoup attorney's fees under the EAJA, stating:

> "(a) Whenever *the agency* conducts *an adjudicatory proceeding* subject to this chapter, the adjudicative officer shall award to a

> *prevailing party reasonable litigation expenses* incurred by the party *in connection with that proceeding*. The adjudicative officer will not award fees or expenses if he or she finds that the agency was *substantially justified in actions leading to the proceedings and in the proceeding itself*. The adjudicative officer may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust. The award shall be made at the conclusion of any adjudicatory proceeding, including, but not limited to, conclusions by a decision, an informal disposition, or termination of the proceeding by the agency. The decision of the adjudicatory officer under this chapter shall be made a part of the record and shall include written findings and conclusions. No other agency official may review the award.
>
> "(b) If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses shall be made by that court in accordance with the provisions of this chapter." Section 42-92-3 (emphasis added).

A plaintiff seeking reasonable litigation expenses must establish the following elements: "(1) an adjudicatory proceeding; (2) conducted by an agency; (3) wherein the plaintiff was a prevailing party; (4) who incurred reasonable litigation expenses; (5) in connection with the adjudicatory proceeding and; (6) where the agency's initial position and position throughout the proceedings was not substantially justified." *Preston v. Town of Hopkinton*, No. WC-2017-0470, 2020 WL 356692, at *3 (R.I. Super. Jan. 16, 2020).

It is undisputed that the matter under consideration herein is an adjudicatory proceeding conducted by an agency. *See* Appellants' Mem. 28; Board's Mem. 21 (arguing only that "the Board acted with substantial justification"); *Tarbox v. Zoning Board of Review of Town of Jamestown*, 142 A.3d 191, 201, 203 (R.I. 2016) (holding that "a zoning board qualifies as an agency under the [EAJA]" and that "the hearing on the variance application" was "an adjudicatory proceeding under the [EAJA]"). Furthermore, this Court has determined that Appellants are a "prevailing party." *See Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 603 (2001) (defining the term "prevailing party" as a "party in whose

favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.—Also termed *successful party*") (quoting *Black's Law Dictionary* 1145 (7th ed. 1999)). This is so because this Court's reversal and remand creates and guarantees a "judicially sanctioned change in the legal relationship of the parties," *Id.* at 605, providing Appellants with the benefit they were denied, *see Preston*, 2020 WL 356692, at *8.

At issue here is whether the agency's initial position and position throughout the proceedings was substantially justified. This Court has previously stated that "[a] finding that an agency's positions were not substantially justified is a prerequisite to an award of attorney's fees." *Preston*, 2020 WL 356692, at *10. This is mandated under Section 42-92-3(a) of the EAJA, which provides that "[t]he adjudicative officer will not award fees or expenses if he or she finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself." "Substantial justification" means that "the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact." Section 42-92-2(7).

According to the Board, it acted with substantial justification. *See* Board's Mem. 21. However, the Board has not provided this Court with its argument in support of that contention, instead requesting a hearing on the matter "[i]f the Court sustains the Appellants' appeal herein." *Id.* Appellants claim that the decision of a zoning board is not substantially justified where the evidence in the record is "'undisputed and witness testimony is unrebutted.'" Appellants' Mem. 29 (quoting *Smith v. The Warwick Zoning Board of Review*, Nos. C.A. KC-95-378, C.A. KC-96-229, 1997 WL 1526539, at *3 (R.I. Super. Dec. 23, 1997)). However, as discussed above, some of the Appellants' evidence was in fact disputed and some of the expert testimony offered was diminished. *See* Tr. I at 16 (Ms. Doyle's testimony) (admitting that while Dr. Urish's report

indicated that "the groundwater flow direction is typically towards the coastal pond," the surface water could go in either direction because it "will follow the contours"); Tr. I at 20 (admitting that she could not "stand here and tell you how much the drawdown will be," when asked about the potential effect of adding another shallow well less than ten feet from the neighbor's well).

This Court has determined that the dissenting votes were affected by clear errors of law and clearly erroneous in light of the evidence of this case. *See* Analysis, *supra*; § 45-24-69(d). The standard applied by this Court in doing so, articulated above, required a finding that the *decision* of the Board was not supported by substantial evidence. *Apostolou*, 120 R.I. at 507, 388 A.2d at 824. The standard for finding substantial justification under the EAJA, however, looks at the reasonableness of the Board's initial position and position throughout the proceedings. *See Taft*, 536 A.2d at 893 (adopting the Eighth Circuit's standard of interpretation of the term "substantial justification," necessitating a showing that the agency's actions leading to the proceedings and in the proceeding itself "'be clearly reasonable, well founded in law and fact, solid though not necessarily correct.'") (quoting *United States v. 1,378.65 Acres of Land, More or Less, Situate in Vernon County, State of Missouri*, 794 F.2d 1313, 1318 (8th Cir. 1986)).

Here, as outlined above, it was clearly reasonable for the Board, as factfinder, to question the value of the DEM consent agreement as evidence, given the nitrate offset trading it was based on. *See Bellevue Shopping Center Associates*, 574 A.2d at 764; *Mendonsa*, 495 A.2d at 263. Similarly, it was clearly reasonable under the circumstances for the Board to take a position throughout the proceedings that questioned the sufficiency of the evidence as to the boundaries of the lot in question. *See* Charlestown Zoning Ordinance § 218-78(C)(12) (requiring "[p]recise reference points to locate the property and the proposed ISDS site" as part of a complete application for a SUP relating to water bodies). Finally, given the diminishment of Ms. Doyle's

testimony under questioning and the competent lay evidence from Ms. Lapolla about changes to the neighborhood, it was clearly reasonable for the Board to weigh the value of Dr. Urish's dated study. *See* Tr. I at 16, 20, 41, 43-45.

Consequently, because the Board's initial position and position throughout the proceedings was substantially justified, the Court finds that Appellants are not entitled to an award of "reasonable litigation expenses" under the EAJA. *See Preston*, 2020 WL 356692, at *3; Section 42-92-3 ("The adjudicative officer will not award fees or expenses if he or she finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself.").

IV

Conclusion

After a thorough review of the entire record, this Court finds that the Appellants have carried their burden of showing that the Application for the SUP was not "inimical to the public health, safety, morals and welfare." *Salve Regina College*, 594 A.2d at 880. The Decision of the Zoning Board of Review is affected by clear error of law, clearly erroneous in light of the evidence of this case, arbitrary and capricious, and characterized by abuse or unwarranted exercise of discretion. *See* § 45-24-69(d). Consequently, substantial rights of the Appellants have been prejudiced and the Decision denying Appellants' application for a SUP is reversed. Appellants' request for attorney's fees pursuant to the EAJA is denied. Counsel for Appellants shall submit an appropriate order for entry in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Bruce Gardner and the Charles A. Sweet Revocable Trust v. Town of Charlestown Zoning Board of Review, et al.
CASE NO:	C.A. No. WC-2019-0327
COURT:	Washington County Superior Court
DATE DECISION FILED:	December 18, 2020
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
For Plaintiff:	Joseph DeAngelis, Esq.; Joshua S. Parks, Esq.; Robert E. Craven, Jr., Esq.
For Defendant:	Wyatt A. Brochu, Esq.