STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: November 19, 2024)

DANIEL KARTEN, MARISSA JOINSON, and TRACY JOINSON	:	
Appellants,	:	
v.	:	**C.A. No. PC-2022-02221**
TOWN OF WARREN ZONING BOARD OF REVIEW; PAUL ATTEMANN, ANDREW G. ELLIS, W. BARRETT HOLBY JR., JASON J. RAINONE, and CHARLES A. THIBAUDEAU, in their capacities as Members of the Zoning Board of Review of the Town of Warren	:	
Appellees.	:	

DECISION

PROCACCINI, J. As this Court considers the case before it, the sage words of Maya Angelou come to mind, "The ache for home lives in all of us, the safe place where we can go as we are and not be questioned."[1]

Before this Court is Daniel Karten, Marissa Joinson, and Tracy Joinson's (Appellants) second appeal from the September 16, 2020 written decision of the Warren Zoning Board of Review (Zoning Board) denying a special use permit for property owned by Daniel Karten and Marissa Joinson with Applicant Tracy Joinson. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

[1] Maya Angelou, ***All God's Children Need Traveling Shoes*** 196 (Random House 1986).

I

Facts and Travel

This case arises from a family's request for a special use permit to build a two-family dwelling. Daniel Karten (Mr. Karten) and Marissa Joinson (Ms. Joinson) are a married couple who own a single-family property at 24 Laurel Lane, Warren, Rhode Island (Property). (Compl. ¶¶ 2-3; Appellants' Preliminary Statement (Appellants' Prelim. Statement.).) In order to provide for the long-term housing needs of Ms. Joinson's mother, Mr. Karten, Ms. Joinson, and Ms. Joinson's sister, Tracy Joinson (Ms. Joinson's Sister), sought to build a two-family dwelling on the Property where Ms. Joinson's seventy-three-year-old mother and Ms. Joinson's Sister would live. (Appellants' Prelim. Statement at 3.) The Property is located in an R-10 zoning district, which allows for two-family dwellings with a special use permit. (Appellants' Prelim. Statement at 3; Warren Zoning Ordinance § 32-47.)

A

First Special Use Permit Application and Appeal

In 2020, the Appellants first embarked on what has now become a multi-year journey for approval to build a two-family dwelling on their Property. Mr. Karten, Ms. Joinson, and Ms. Joinson's Sister submitted a special use permit application to the Warren Zoning Board of Review on July 14, 2020 after they were first granted a dimensional variance from the Warren Planning Board allowing them to reduce the Property frontage from the required 120 feet to 90 feet in order to subdivide the lot to build a two-family home. (Compl. ¶ 8; *see* Appellants' Prelim. Statement at 3; Zoning Board Hr'g Tr. at 2:8-12, 21-23, Aug. 19, 2020 (First Hr'g Tr.).) In seeking the special

use permit, Appellants submitted an architectural plan for the proposed home showing that the design would make the two-family dwelling appear to be a single-family dwelling where Ms. Joinson's Sister would live on the second floor and Ms. Joinson's mother would live on the first floor. *See* Appellants' Prelim. Statement at 4; First Hr'g Tr. at 3:19-23.

On August 19, 2020, the Zoning Board held a hearing on the application via Zoom.[2] (Compl. ¶¶ 9-10.) Ms. Joinson's Sister first presented the proposed architectural design. (*See* First Hr'g Tr. at 4:1-3.) She stated that it was "important" to her that the proposed two-family dwelling would look "just like a single family" and that it would "fit with the esthetic of the neighborhood." *Id.* at 4:4-9.

Board Member W. Barrett Holby, Jr. (Board Member Holby) questioned how many other two-families were in the area because he had been in the area and did not realize there were two-families there. *Id.* at 7:3-10. The Appellants responded that they drove around the neighborhood as well and saw "one block over from us . . . there is a two-family with two separate entrances [,] [o]n Homestead within the Laurel Park neighborhood, there's a six-family," and "abutting [their] land at the back is a 67-unit apartment complex[.]" *Id.* at 7:11-21.

The Zoning Board then opened the hearing for members of the public to speak on the application. *Id.* at 8:5-10. Ms. Robin Remy expressed concern about how "putting in a two-family here just opens the door to start creating more two-families" and how two-families may be one or two blocks away, but they are "really not on that street" in

[2] The meeting was held on Zoom due to COVID-19 and the "Governor's Executive Order allowing teleconferenced meetings under the Open Meetings Act. . ." (Appellants' Prelim. Statement at 3.)

reference to where the Property is located. *Id.* at 8:13-9:3. She further stated her concern was that, in the future, the Property could be "rented out to two unrelated parties," and she was "concerned about the ripple effect of allowing" the two-family. *Id.* at 10:1-21. Next, Ms. Fletcher voiced support for the Property because she does not "see a problem with it at all" where it is a two-family home going on a large property and it will look like a one-family. *Id.* at 12:25-13:12. Mr. and Ms. McCanna expressed further concerns about the "possibilities of [the Appellants] doing other things" with their Property. *Id.* at 17:8-14. Ms. Dobbyn closed out the public testimony by voicing her concern for the "wildlife in this area" if more development would occur "some time down the road. . ." *Id.* at 25:9-26:3.

Once members of the public were finished speaking, Paul Attemann (Chairman Attemann) formally closed the public comment period and brought the application back to the Zoning Board members. *Id.* at 26:8-12. Chairman Attemann first asked the Appellants why they considered a two-family instead of an inlaw apartment.[3] *Id.* at 26:9-12. The Appellants explained that they looked into the inlaw apartment option, but they decided not to pursue it because they felt the Town of Warren's (the Town) 600 square foot mother-in-law unit requirement could negatively impact their mother's quality of life. *Id.* at 7:21-24; 26:15-27:9. They felt that their mother is "relatively young," and they want her to be comfortable and continue living in a way she currently is living, and the inlaw apartment restrictions did not allow her to do so. *See id.* at 26:15-27:9. The Appellants further emphasized that the Town "is looking to increase housing options,"

[3] Chairman Attemann likely brought this up because the inlaw apartment has different requirements under the Warren Zoning Ordinance than the special use permit for a two-family home.

they believe the Property would enhance the neighborhood and not have a "deleterious effect," and they do not believe the Property has "even the potential opportunity of having a negative impact on the quality of life here for anyone." *Id.* at 27:12-25.

Next, Chairman Attemann brought the hearing back to the Board Members for further discussion or a motion. *Id.* at 28:2-5. Town Planner Bob Rulli (Mr. Rulli) asked the Board Members if they had any other comments, and Andrew G. Ellis (Vice Chair Ellis), Jason J. Rainone (Board Member Rainone), Charles A. Thibaudeau (Board Member Thibaudeau), and Jason M. Nystrom (Board Member Nystrom) said no. *Id.* at 28:6-23. Board Member Holby commented that once the Zoning Board "let[s] one [two-family dwelling] in the door," he was worried it would "change the character of the neighborhood in 15 or 20 years[.]" *Id.* at 28:11-18. He further remarked he did not believe "it's a positive thing for the neighborhood." *Id.* at 28:16-18.

Vice Chair Ellis then made a motion to approve the Appellants' application, basing the motion on the testimony the Zoning Board had heard, and finding the application was "compatible with the neighboring land use and that a two-family is a residential use, and the prevailing area is of residential character." *Id.* at 28:25-29:12. Vice Chair Ellis further stated that "[t]here are a mix of housing types within the general vicinity of this location, including other two- and multifamily dwellings." *Id.* at 29:10-12. He added, "[t]here's no indication it will create a nuisance or a hazard. The plans submitted show that the house is being developed in conformance with the setbacks and other requirements for this development," and the application was "consistent with the prevailing pattern in its relationship to the street" because it "has its own driveway and access," preserving "public safety." *Id.* at 29:13-19. Vice Chair Ellis noted that the

Property appeared "to be compatible with the comprehensive plan, and the plan encourages diversity in the housing stock and encourages multigenerational living arrangements within the town." *Id.* at 29:19-22.

Board Member Rainone seconded the motion, and Vice Chair Ellis and Chairman Attemann also voted in support of granting the application. *Id.* at 30:5-23. Board Members Holby and Thibaudeau voted no. *Id.* at 30:17-19. The result was three Board Members in support of the motion and two against the motion. *Id.* at 30:5-24. Under Rhode Island statute and the accompanying Warren Ordinance, the Appellants needed four out of five Board Members to support the motion for the application to be granted. *See* § 45-24-57(2)(iii); *see also* Warren Zoning Ordinance § 32-21. Thus, the Appellants' special use permit application fell one vote short of the four votes needed to grant the application.

The Appellants inquired about what the standards for a special use permit were. (First Hr'g Tr. at 31:8-10.) Mr. Rulli told them that they can appeal the Zoning Board's decision. *Id.* at 31:15-16. Though the vote was finished already, the two "no" voters were asked to put on the record why they voted no. *Id.* at 32:1-5. Board Member Thibaudeau stated, "My problem is the Laurel Lane, I don't see the two-families on there. It just doesn't seem, in my opinion, to fit the neighborhood." *Id.* at 32:10-12. Board Member Holby stated, "I don't think the special use will be compatible with the neighboring land uses. It's setting a precedent and I don't want, I think individually the house looks like a single-family…but I, I don't see it being compatible with that street, as I've driven around it." *Id.* at 32:14-20.

As far as whether it would create a hazard, Board Member Holby stated that "I don't see that the special use will not create a hazard in the neighborhood. I don't think that two-family, if it was built, would create a hazard." *Id.* at 32:20-23. As far as whether it was compatible with the community comprehensive plan, he stated that "I just don't believe that whatsoever" that a two-family home would be part of the comprehensive plan on Laurel Lane. *Id.* at 32:23-33:2. About whether public convenience and welfare will be served, he stated, "I think it's just the opposite." *Id.* at 33:3-4. He stated that "at least two [people] are questioning" the Property, and he thought the Zoom meeting limited the number of community members who would have objected to the application. *Id.* at 33:3-11. He finished by stating, "I don't think it's a good thing for the neighborhood." *Id.* at 33:12.

The Zoning Board issued a written decision denying the application on September 14, 2020 (Compl. ¶ 14; Appellees' Brief in Response to Prelim. Statement at 3 (Appellees' Br. in Resp.)), and Applicants appealed the decision to Superior Court on September 24, 2020. (Compl. ¶ 15.)

B

First Appeal to Superior Court

On October 28, 2021, this court found that the Zoning Board did not make sufficient findings of fact or conclusions of law and remanded the decision back to the Zoning Board. *Karten et al. v. Town of Warren Zoning Board of Review et al.*, No. PC-2020-06734, Oct. 28, 2021, McGuirl, J. at 13. In making this ruling, Justice McGuirl found that the Zoning Board decision was "written in such a way that suggests" that the application was granted. *Id.* at 10. The Court found that the Zoning Board's decision

"lays out the supporting Board Members' reasons clearly, stating each of the four [Warren Zoning Ordinance § 32-21 Special Use Permit Standards] grounds that must be met for an application to be granted and providing clear findings of fact to support the grounds." *Id.*

In contrast, this Court found that the dissenting two votes "did not provide sufficient findings of fact." *Id.* at 11. The Court found that the two dissenting Board Members both provided "conclusional rather than factual" statements to support their dissents and, "because neither of the dissenting Board Members made sufficient findings of fact to support their decisions to deny the application, judicial review of the ultimate Decision is not permitted at this stage." *Id.* at 12-13. Thus, the Court remanded the case back to the Zoning Board "to make sufficient findings of fact consistent with this Court's Decision." *Id.* at 13.

C

Second Zoning Board Hearing

The Zoning Board, once again, heard the special use permit application on February 16, 2022. (Compl. ¶ 23.) The Zoning Board did not allow the Applicants to present evidence or argue in the hearing. (Compl. ¶ 24.) The Zoning Board did not introduce more evidence on their own or allow the Town to present evidence to support the application or allow facts to be introduced to support the denial of the application. (Appellees' Br. in Resp. at 3-4.) Instead, the Zoning Board Members decided to reargue based solely on the first hearing from August 19, 2020. *See* Appellees' Br. in Resp. at 3-4. In preparing for the meeting, the Zoning Board Members read the application record,

transcript from the previous hearing, the court decision, and all related documents. *See* Zoning Board Hr'g Tr. 4:17-5:5, Feb. 16, 2022 (Second Hr'g Tr.).

The Zoning Board then commenced their discussion with the idea that "findings of fact must be derived from the record and only from the record." *Id.* at 5:14-18. First, now-Chairman Ellis summarized his view that the record showed that the Property is "compatible with the neighboring land use" because (1) "it is. . . [a] two-family, [which] is a residential use," (2) "the prevailing area is of residential character," and (3) "there's a mix of housing types within the general vicinity of the area[.]" *Id.* at 7:18-8:3. Chairman Ellis confirmed the Zoning Board knew the Property was compatible from community members who spoke and the Appellants who presented at the first hearing. *Id.* at 8:4-10. Board Members Thibaudeau and Holby questioned whether the record was accurate because they were unsure if the mix of housing types, such as multi-families, were actually present in the neighborhood. *See id.* at 8:8-9.) Board Member Holby then suggested the Zoning Board do a site visit, but the Town Solicitor, Benjamin Ferreira, reiterated his advice that the members were only to rely on the record, and the Zoning Board was not able to start a *de novo* review even if they found the record did not provide sufficient evidence to determine findings of fact. *See id.* at 8:11-13.

Next, Chairman Ellis stated that the majority of the Zoning Board felt the record showed that the Property would not cause any nuisance or hazard because "the testimony showed that the plans submitted would be developed in conformance with the setbacks and other requirements for this development." *Id.* at 16:15-19. In response, Board Member Thibaudeau stated that, in his opinion, "Laurel Lane is all single-family housing, so maybe, maybe an occasional inlaw apartment, but if [we approve a two-family], now

you're changing the neighborhood." *Id.* at 17:2-5. "You're changing the values," he continued. *Id.* at 17:7.

The Board Members went back and forth over what evidence to consider and what not to consider. *See id.* at 21-32. After some discussion, Board Member Thibaudeau pondered, "I don't think we're going to reach an agreement." *Id.* at 33:1-2.

In looking for support of his "no" vote, Board Member Holby then looked to the first hearing transcript and stated, "I think on page 4, line 6, Ms. Joinson admits that a two-family does not fit the neighborhood." *Id.* at 33:3-4 (citing First Hr'g Tr. 4:4-9). At the first hearing, Ms. Joinson, in describing the architectural plan, said, "[s]o you'll notice that it looks just like a single family, which is the intent and important to me, so that it, although there are some other multifamily housing units in the neighborhood, I would like it to look like a single-family, just esthetically; and, you know, believe that it does fit with the esthetic of the neighborhood."). Board Member Holby contended that this statement shows that "[the Property] [d]oes not fit the neighborhood, even though she's trying to make the house look like it fits[.]" (Second Hr'g Tr. at 33:15-16.) He continued, "[I]t's still, you know, a wolf in sheep's clothing, is still a wolf. It's still going to have the extra cars. It's still going to have, become a rental unit eventually. It's still going to do those things that this neighborhood does not want." *Id.* at 33:17-21.

After some tangential discussion, Board Member Holby made a motion to deny the application and Board Member Thibaudeau seconded the motion. *Id.* at 42:10-25. In support of the motion, Board Member Holby stated that the special use permit would not be compatible with the neighboring land uses, and, in support, cited the following from the record. *Id.* at 43:4-6. ("On page 19, line 3, it's stated that it is not appropriate to

discuss what happened at the planning board and why they granted the subdivision[.]") *Id.* at 43:6-8. He does not think this is correct because the Planning Board's reasons for approving the dimensional variance "can sway members' thinking and lead to accusations of lack of transparency by Mr. McCanna on page 20, line 13." *Id.* at 43:8-15. He also cited testimony by Mr. Karten from "page 7, line 16" stating that "the six-family and the 67-unit apartment complex is part of the Laurel Lane neighborhood and the Laurel Park; this, I believe, is completely false." *Id.* at 43:16-20. He continued that the two dwellings "use Metacom Avenue and Homestead Avenue to go in and out of their residences. They also have chain link fences or heavy brush or plantings to keep people out of their complexes, [and] that also keeps them separate from the Laurel Lane neighborhood. The launching ramp, park, [and] beach are for the Laurel Park residences only, not for the apartment complexes. Homestead and Almeida Streets are not included in the Laurel Park Lane neighborhood." *Id.* at 43:22-44:5. Continuing under the first standard, he stated, "The two-family proposed will not be compatible with the surrounding neighborhood." He again cited to "page 4, line 6," where he contended that "Ms. Joinson admits that a two-family does not fit the neighborhood." *Id.* at 44:5-8. He continued, "She wants her family to look like a single family, a wolf in sheep's clothing is still a wolf. Two-families, as we know, will add cars, traffic, renters, and change the character of the neighborhood; that is pretty much common sense." *Id.* at 45:15-19. Finally, he points to the record that Ms. Remy and Mr. McCanna "backs [the no votes] up," and he said he walked through the neighborhood and he "only found people very much opposed to this new change in their neighborhood[.]" *Id.* at 45:20-46:2. He also again contends that the first hearing limited who could attend based on it being on Zoom.

Id. at 45:23-25. Board Member Thibaudeau also notes that Ms. Joinson's statement on "page 4 on line 4" shows that she is "admitting that [she's] building to look like a single-family because there are all single-families." *Id.* at 46:7-16.

Regarding the second standard about whether the Property would create a nuisance or hazard in the neighborhood, Board Member Holby first stated that "[t]he special use will not create a hazard in the neighborhood; yes, it will create a gradual change to the neighborhood," *id.* at 48:4-6, then could not find record support for his contention that the Property would create a nuisance or hazard, stating that "I think I'm going to have to leave Number 2 [Standard] out." *Id.* at 49:17-18. He then stated, "Well, I'm disagreeing with what I said previously, a special use will create a hazard in the neighborhood." *Id.* at 50:6-8. He based this view on his own testimony and experience on the Zoning Board that he believes the Property would create a gradual change to the neighborhood. *See id.* at 58:13-59:2; 59:19-22. He also cited to Ms. Remy's testimony that the Property eventually "could become an unrelated party moving in there, [and] it could become a rental of college kids, [and] it could become a rental we don't know what." *Id.* at 60:17-20.

For the third standard on whether the application is compatible with the community comprehensive plan, Board Member Holby stated, "I believe that it will not be compatible with the comprehensive plan" because "nowhere is the community comprehensive plan advocating, advocating degrading or changing the neighborhood, especially in the diverse housing stock." *Id.* at 51:3-13. He continued, "The change in the character of the neighborhood will not . . . be economically beneficial to the Town of Warren. In fact, it will cheapen, degrade, and overcrowd the area." *Id.* at 51:13-16.

Regarding the fourth standard about whether public convenience and welfare is served by the special use, Board Member Holby stated, "No, I don't believe that the public convenience and welfare will be served. Approval of Application 20-37 will hurt, degrade, and cheapen the Laurel Park neighborhood." *Id.* at 55:13-16. In citing support, he referenced the two members of the public who spoke at the first hearing in opposition to the application. *Id.* at 57:2-7. He argued that the public opposition shows that public convenience and welfare would not be served because "they don't want their streets, you know, they're small houses and small streets and they don't want it to be overcrowded." *Id.* at 57:12-14.

Once Board Member Holby concluded the findings of fact on the motion to deny the application, Chairman Ellis asked each member to vote on the motion to deny the application. *Id.* at 63:5-16. Board Members Holby and Thibaudeau voted yes on the motion to deny; Board Members Nystrom, Rainone, and Chairman Ellis voted no to deny the application. *Id.*

Next, Board Member Rainone made a motion to approve the application. *Id.* at 64:1-5. In addressing whether the application was compatible with neighboring land uses, he stated that "it will be compatible with the neighboring land use, citing testimony of Ms. Fletcher . . . where she speaks of the fact that this will be a, that multi-families are a part of the neighborhood and that she, in and of herself being an abutter of the property, supports the project." *Id.* at 64:6-25 (citing First Hr'g Tr.). He also cited to the Appellants' testimony where they said that they do not want "to have a negative impact on the neighborhood." (Second Hr'g Tr. at 64:14-19.) He also made note that the

objections around the Property seemed not to be an issue with the Property itself but related to future potential use. *See id.* at 65:1-12.

On whether the application will create a nuisance, he stated, "Based on the plan provided in the original application, we find that this, this construction project would conform to all of the necessary setbacks and looking at the plan in general, it appears that it is consistent with the building pattern in the neighborhood, insomuch as the proposed structure is roughly similar in size and scope to the other buildings in that particular section of the neighborhood. The plans submitted include provisions for off-street parking, so there would be no road obstructions associated with this particular project[.]" *Id.* at 65:13-24. He also noted that "neighborhood evolution and the inevitable passage of time are not intrinsically a hazard. All land uses change over time and it is not for this board to define what is or is not abruptive change." *Id.* at 65:24-66:3.

Regarding whether the application would be compatible with the comprehensive plan, he cited the Warren Comprehensive Plan: "Land Use Policy Number 2 states that it is a goal to preserve the scale of the Town as characterized by the size and massing of the building patterns of contained development areas separated by relatively open spaces. As noted previously, the proposed building is roughly the same size and scale as all of the adjacent buildings." *Id.* at 66:4-11. He continued that "Policy Number 3 under Land Use Policies speaks to ensuring the compatibility of contiguous land uses without sacrificing the diverse pattern of uses in this area. This would still be a residential use, despite the fact that more than one resident would be living in a single building." *Id.* at 66:11-16. He stated, "Land Use Policy 9.1 states that revising zoning to include provisions for density adjustments, which allow for secondary units, apartments, and duplexes in areas where

utilities are readily available and environmental conditions will accommodate such additional uses, that was completed in 1997. So it is an accomplishment of this Town, by virtue of the option for a special use permit, to allow a two-family residence in this neighborhood, this is a use that the Town had considered." *Id.* at 66:16-25. Board Member Nystrom also made note that the Appellants considered doing an inlaw apartment but decided against it based on their mother's situation. *Id.* at 67:19-68:6.

Regarding public convenience and welfare being served, he stated that "it is always a good idea to allow your mother-in-law or your grandfather to live with you. Multi-generational households are broadly recognized these days as a positive to the younger generations. So encouraging those living arrangements within the Town of Warren can always be considered in the public's best interest." *Id.* at 67:1-8.

Chairman Ellis put the motion to approve to a vote. *Id.* at 68:14-15. Predictably, the vote remained the same—three votes in favor of approving the application and two votes denying the application—and the application was once again denied. (Compl. ¶ 27; Appellees' Br. in Resp. at 4; *see* Second Hr'g Tr. at 68:15-25.)

Appellants filed their Complaint with this Court on April 20, 2022 seeking a reversal of the Zoning Board's permit denial, a granting of the special use permit, damages, and reasonable attorney fees and costs. (*See* Compl.) Additionally, the Appellants seek relief under the Rhode Island Equal Access to Justice for Small Businesses and Individuals Act (EAJA), G.L. 1956 chapter 92 of title 42 and seek relief

under a Tortious Interference with Existing and Prospective Economic Advantage Theory.[4] (Compl. ¶¶ 38-59.)

The Zoning Board recorded its written decision after the second hearing on April 25, 2022. (Appellees' Br. in Resp. at 4; *See* Certified Zoning Board Remand Decision.)

II

Standard of Review

The Superior Court's review of a zoning board decision is governed by § 45-24-69(d), which provides:

> "The 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. The 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." Section 45-24-69(d).

[4] The Applicants also sought relief under a Due Process Rights violation theory, but that Count has since been dismissed by the U.S. District Court for the District of Rhode Island. (Order, May 5, 2023 (Smith, J.).)

"It is the function of the Superior Court to 'examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.'" *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). Substantial evidence is "'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.'" *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981)).

If the Court finds that the zoning "board's decision was supported by substantial evidence in the whole record," then the zoning board's decision must stand. *Lloyd*, 62 A.3d at 1083. However, as stated in § 45-24-69(d)(5)-(6), if this Court finds that the Zoning Board's decision was "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record," or "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion," then the Court may remand the case for further proceedings or vacate the Zoning Board's decision. *See Bernuth v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396, 399 (R.I. 2001).

Questions of law are reviewed *de novo*. *Tanner v. Town Council of Town of East Greenwich*, 880 A.2d 784, 791 (R.I. 2005). "In this Court's *de novo* review, a zoning board's determinations of law, like those of an administrative agency, 'are not binding on the reviewing court; they may be reviewed to determine what the law is and its applicability to the facts.'" *Pawtucket Transfer Operations, LLC v. City of Pawtucket*,

944 A.2d 855, 859 (R.I. 2008) (quoting *Gott v. Norberg*, 417 A.2d 1352, 1361 (R.I. 1980)). The reviewing court gives deference to the decision of the zoning board, the members of which are presumed to have special knowledge of the rules related to the administration of zoning ordinances. *See Monforte v. Zoning Board of Review of City of East Providence*, 93 R.I. 447, 449-50, 176 A.2d 726, 728 (1962). This deference, however, must not rise to the level of "blind allegiance." *Citizens Savings Bank v. Bell*, 605 F. Supp. 1033, 1042 (D.R.I. 1985) (citing *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983)).

III

Analysis

It is well settled that a zoning board decision must include findings of fact and conclusions of law in order for this Court to engage in any meaningful analysis of the merits of any appeal from a decision. *Bernuth*, 770 A.2d at 401. This Court is tasked with deciding

> "whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles. Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany. These are minimal requirements. Unless they are satisfied, a judicial review of a board's work is impossible." *Id.* (internal quotation omitted).

Additionally, the Court will not search the record for supporting evidence, nor decide for itself what is proper in the circumstances when a zoning board fails to state findings of fact. *Id.* Ultimately, there were sufficient findings of fact which this Court could consider to determine whether substantial evidence exists in the record to support the Zoning Board's decision.

A

Special Use Permit Standard

"The zoning enabling act, set forth in chapter 24 of title 45 of the General Laws, mandates that local zoning ordinances provide for the issuance of special-use permits, to be approved by the zoning board of review." *Lloyd*, 62 A.3d at 1085 (citing § 45-24-42(a)). The local zoning ordinance must: (1) "[s]pecify the uses requiring special-use permits in each district"; (2) "[d]escribe the conditions and procedures under which special-use permits . . . may be issued"; and (3) "[e]stablish criteria for the issuance of each category of special-use permit that shall be in conformance with the purposes and intent of the comprehensive plan and the zoning ordinance of the city or town[.]" Section 45-24-42(b)(1)-(3).[5]

The Warren Zoning Ordinance permits the Zoning Board to grant special use permits for two-family dwellings in R-10 zones when the use meets the following standards:

> "A. They will be compatible with the neighboring land uses;
> "B. They will not create a nuisance or a hazard in the neighborhood;
> "C. They will be compatible with the comprehensive community plan; and
> "D. The public convenience and welfare will be served." Warren Zoning Ordinance § 32-30.

[5] Section 45-24-42(b) was replaced with P.L. 2023, ch. 305, § 1 effective January 1, 2024. However, the appropriate standard for appeal is "the law in effect at the time when the applicant . . . submitted its application for a permit to the zoning board[,]" absent a "clear expression of retroactive application." *East Bay Community Development Corporation v. Zoning Board of Review of Twon of Barrington*, 901 A.2d 1136, 1144 (R.I. 2006). Hence the previous version of §45-24-42(b) is applicable.

"When reviewing a special use permit application for the extension of a nonconforming use or structure, or for the change in a nonconforming use to another nonconforming use as provided in article XII of this ordinance, the board shall, in addition to the standards in section 32-30 above, apply the following standards:

> "1. The proposal will not result in the creation of, or increase in, any undesirable impacts related to the use, such as excessive noise, traffic or waste generation;
> "2. The general appearance of the nonconforming development will not be altered in a way so as to heighten or make more aware its nonconformity, and where possible, will be improved so as to be more consistent with the surrounding area;
> "3. It will not have a negative impact on the natural environment or on any historic or cultural resource; and
> "4. The resulting nonconforming development will be a beneficial use to the community." Warren Zoning Ordinance § 32-31(A).

B

Substantial Evidence Does Not Exist to Support Denial of Special Use Permit

Under § 45-24-69(d)(5), a court may reverse or modify a zoning board's decision if the substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record." Appellants argue that the reliable, probative, and substantial evidence of the record shows that the special use permit denial was clearly erroneous and review of the record shows that substantial evidence does not exist to deny the permit. (Appellants' Prelim. Statement at 14.) Appellees argue that the decision was supported by substantial evidence and Appellants

failed to support their claim that the decision was otherwise deficient. (Appellees' Br. in Resp. at 5.)

A zoning board decision is supported by "substantial evidence" if, considering the record as a whole, the board's decision was reasonable. *SNET Cellular, Inc. v. Angell*, 99 F. Supp. 2d 190 (D.R.I. 2000). "Substantial evidence" is 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. *New Castle Realty Company v. Dreczko*, 248 A.3d 638, 643 (R.I. 2021). The Court finds that substantial evidence does not exist to support the denial of Appellants' special use permit application.

1

Section 32-30(A): Compatible with the Neighboring Land Uses

To grant a special use permit, the Zoning Board must find that the prospective use is compatible with the neighboring land uses. Warren Zoning Ordinance § 32-30(A). The Zoning Board found that the special use permit application would not be compatible with neighboring land uses, and Appellees argued that Board Member Holby's findings on the first standard were supported by testimony on the record. (Appellees' Br. in Resp. at 6-7.) Specifically, Appellees argue that Board Member Holby relied on testimony from the public in finding that "it is common sense that two family dwellings verse [sic] a one family dwelling will add cars, traffic, renters, and change the character of the neighborhood." (Appellees' Br. in Resp. at 7.)

To support the denial of the application, Appellees contend that Board Member Holby relied on testimony from Daniel Karten, Ms. Joinson's Sister, and Ms. Remy. (Appellees' Br. in Resp. at 7.) First, Board Member Holby essentially utilized Mr.

Karten's testimony to infer that there were no other non-single-family dwellings in the area. *See* Second Hr'g Tr. at 43-44. At the second hearing, Board Member Holby pointed to Mr. Karten's testimony from "page 7, line 16" stating that "the six-family and the 67-unit apartment complex is part of the Laurel Lane neighborhood and the Laurel Park; this, I believe, is completely false." *Id.* at 43:16-20 (referencing Mr. Karten's testimony at the first hearing). After Board Member Holby asked whether there were other two-families in the area, Mr. Karten testified that there was a six-family "within the Laurel Park neighborhood" and a "67-unit apartment complex" that was "abutting [the] land at the back[.]" (First Hr'g Tr. at 7:16-19.)

Board Member Holby expressed his opinion regarding the two mentioned properties:

> "[The two dwellings] use Metacom Avenue and Homestead Avenue to go in and out of their residences. They also have chain link fences or heavy brush or plantings to keep people out of their complexes, [and] that also keeps them separate from the Laurel Lane neighborhood. The launching ramp, park, [and] beach are for the Laurel Park residences only, not for the apartment complexes. Homestead and Almeida Streets are not included in the Laurel Park Lane neighborhood." (Second Hr'g Tr. at 43:22-44:5.)

Based on his opinion that the two properties were not actually in the neighborhood, he stated, "The two-family proposed will not be compatible with the surrounding neighborhood." *Id.* at 44:5-6.

Though Board Member Holby was compelled to deny the application based on Mr. Karten's testimony, a reasonable mind would not accept Mr. Karten's testimony as adequate to deny the application. Mr. Karten testified that a sixty-seven-unit apartment complex abutted his land and there was a six-family dwelling on a neighboring street

(First Hr'g Tr. at 7:16-19.) His testimony shows there are at least two instances of a non-single-family property in the neighboring area and, thus, the Property would be compatible in the neighborhood because the neighborhood did not exclusively contain single-family homes.

Second, Board Member Holby alleged that Ms. Joinson's Sister's testimony showed that the application was not compatible with neighboring land uses. *See* Second Hr'g Tr. at 44-45. He cited to "page 4, line 6," where he contended that "Ms. Joinson admits that a two-family does not fit the neighborhood." *Id.* at 44:5-8. He stated, "She wants her family to look like a single family, a wolf in sheep's clothing is still a wolf. Two-families, as we know, will add cars, traffic, renters, and change the character of the neighborhood; that is pretty much common sense." *Id.* at 45:15-19. Board Member Thibaudeau also noted that Ms. Joinson's Sister's statement on "page 4 on line 4" shows that she is "admitting that [she's] building to look like a single-family because there are all single-families." *Id.* at 46:9-16.

In the Court's opinion, a reasonable mind could only conclude the opposite based on Ms. Joinson's Sister's testimony. At the first hearing, Ms. Joinson's Sister described the architectural plan:

> "So you'll notice that it looks just like a single family, which is the intent and important to me, so that it, although there are some other multifamily housing units in the neighborhood, I would like it to look like a single-family, just esthetically; and, you know, believe that it does fit with the esthetic of the neighborhood." (First Hr'g Tr. at 4:4-9.)

This testimony indicated that Appellants have thoughtfully designed the Property to be esthetically compatible with a neighborhood that primarily includes single-family homes. Not only does the statement fail to provide a scintilla of evidence that the

Property is not compatible, it supports a conclusion that the Property would be compatible.

Board Member Holby pointed to the record that Ms. Remy "back[ed] [the no votes] up," (Second Hr'g Tr. at 45:20-23), because she "questioned whether the presence of a two-family dwelling on Laurel Lane would change the neighborhood's character" (Appellees' Br. in Resp. at 7), and Board Member Holby said he walked through the neighborhood and "only found people very much opposed to this new change in their neighborhood[.]" (Second Hr'g Tr. at 46:1-2.)

Under § 45-24-69(d)(5), findings, inferences, conclusions, and decisions require "reliable, probative, and substantial evidence." Zoning board members are permitted to rely on their own knowledge or inspection of the area, but they have to disclose these personal observations on the record and cannot base conclusions on mere speculation. *See New Castle Realty Co.*, 248 A.3d at 645. Here, both Ms. Remy and Board Member Holby's opinion about potential future changes in the neighborhood are based on mere speculation about something that may happen in an undefined future and are insufficient to constitute a scintilla of evidence to deny the application.

Further, both "no" voting Board Members failed to provide any factual findings or personal observations on the record to support their conclusions. Board Member Thibaudeau stated, "My problem is the Laurel Lane, I don't see the two-families on there. It just doesn't seem, in my opinion, to fit the neighborhood." (First Hr'g Tr. at 32:10-12.) Board Member Holby stated, "I don't think the special use will be compatible with the neighboring land uses. It's setting a precedent and I don't want, I think individually the house looks like a single-family . . . but I, I don't see it being compatible with that street,

as I've driven around it." *Id.* at 32:14-20. Neither Board Member followed up his opinion with any concrete factual findings to support this conclusion, and, therefore, these mere speculations and opinions are insufficient to support the denial of the application.

Accordingly, there was insufficient record evidence on which the Zoning Board based its finding that the application was not compatible with neighboring land uses.

2

Section 32-30(B): Will Not Create a Nuisance or a Hazard in the Neighborhood

To grant a special use permit, the Zoning Board must find that the prospective use will not create a nuisance or a hazard in the neighborhood. Warren Zoning Ordinance § 32-30(B). Appellants argue that Appellees' evidence that the Property created a hazard or nuisance should fail because the testimony is conclusory and based on potential impacts to future residents or housing values. (Appellants' Prelim. Statement at 17.) Appellees argue that the decision was supported by more than a scintilla of evidence because Board Member Holby relied on Ms. Remy's testimony that Appellants' property may be used for rental purposes in the future, and Board Member Holby cited decreased housing values. (Appellees' Br. in Resp. at 8.)

First, Appellees argued that Ms. Remy's statements indicated that the proposed application would create a nuisance or hazard in the neighborhood because a two-family dwelling may attract disruptive residents. (Appellees' Br. in Resp. at 8.) Appellees point to Ms. Remy's testimony at the first hearing that "down the road, the family structure may change. Somebody may move and now there's a two-family home that could be rented out to two unrelated parties and could become a rental, could become a rental of

college kids, could become a rental of we don't know what." (Appellees' Br. in Resp. at 8.) Again, mere speculation alone is insufficient for the substantial evidence necessary to support special use permit decisions. *See New Castle Realty Co.*, 248 A.3d at 645. Here, Ms. Remy's entire testimony relied on speculation about what "may" or "could" happen "down the road" if things change and the result could be "we don't know what."

Next, Appellees argued that the proposed application would create a nuisance or hazard in the neighborhood because the proposed application could cause decreased housing values. (Appellees' Br. in Resp. at 8.) In support, Appellees cite *Toohey v. Kilday*, 415 A.2d 732, 737 (R.I. 1980) and the proposition that a board can consider probative factors within its knowledge. (Appellees' Br. in Resp. at 8.) In *Toohey*, the Court held that "the testimony offered by the remonstrants on adverse traffic conditions and neighboring property values was lacking in probative force and since the board failed to reveal the nature of its knowledge of the character of the subject area, we hold that the trial justice was correct in finding that the evidence was inadequate to support the board's conclusions." *Id.* at 738. In arriving at this holding, the Court first stated that it has "uniformly held since 1965 that the lay judgments of neighboring property owners on the issue of the effect of the proposed use on neighborhood property values and traffic conditions have no probative force in respect of an application to the zoning board of review for a special exception." *Id.* at 737. In regard to a board member expressing his view on traffic considerations, the Court found that the zoning board "stated merely that it was 'well familiar with the area in question and knows of its character,'" and the Court reasoned that this alone was insufficient to conclude that the applicant should not prevail. *Id.* at 737-38.

Similarly here, Board Member Holby stated that he thinks that the "special use will create a hazard in the neighborhood" (Second Hr'g Tr. at 50:6-8) based on his own opinion and experience on the Zoning Board. *See id.* at 58:13-59:2; 59:19-22. In concluding that the Property would result in decreased housing values, Board Member Holby did not demonstrate on the record how such predictive knowledge is within his realm of expertise. He neither alleged he was an expert on housing prices nor alleged his conclusion was based on studying property values in the area. He simply concluded that the application would cause decreased housing values, and this is not enough to amount to even a scintilla of probative evidence.

Appellees further implied that board "members' knowledge of the housing market" is sufficient to meet the low burden required to demonstrate that an application could create a nuisance or hazard in the neighborhood. *See* Appellees' Br. in Resp. at 11-12. As *Toohey* demonstrates, a board member can consider probative factors within its knowledge *if* said board member "reveal[s] the nature of its knowledge of the character of the subject area[.]" *Toohey*, 415 A.2d at 737-38. Here, Board Member Holby does nothing on record to state how he has any knowledge of the housing market other than his own opinion and experience as a board member. Therefore, the Court is not persuaded that Appellees provided any evidence to support the application denial.

Accordingly, there was insufficient evidence in the record upon which the Zoning Board based its finding that the application would create a nuisance or hazard in the neighborhood.

3

Section 32-30(C): Compatible with the Comprehensive Community Plan

To grant a special use permit, the Zoning Board must find that the prospective use is compatible with the comprehensive community plan. Warren Zoning Ordinance § 32-30(C). Appellants argue that Appellees' reasoning that the permit is not compatible with the comprehensive plan was insufficient because Appellees do not point to any provisions within the Warren Comprehensive Plan that support their conclusion. (Appellants' Prelim. Statement at 18.) Appellees argue that Board Member Holby's findings on Standard (C) are "justified by [Appellants'] failure to present competent evidence" to support the standard. (Appellees' Br. in Resp. at 7.) In support, Appellees cite to *Krikor Dulgarian Trust v. Zoning Board of Review*, No. PC-2012-5114, 2013 LEXIS 161, at *30 (R.I. Super. Aug. 22, 2013), and the proposition that a zoning board "is presumed to have special knowledge of matters that are part of their administration of the zoning ordinance." (Appellees' Br. In Resp. at 9.)

Again, a zoning board must disclose on the record the observations or information upon which it acted. *Toohey*, 415 A.2d at 738. Here, the two "no" voting Board Members failed to disclose any facts or information to demonstrate why they denied the application based on this standard. When asked whether the Property was compatible with the community comprehensive plan, Board Member Holby stated that, "I just don't believe that whatsoever" that a two-family home will be part of the comprehensive plan on Laurel Lane. (First Hr'g Tr. at 32:23-33:2.) Board Member Holby stated, "I believe that it will not be compatible with the comprehensive plan" because "nowhere is the community comprehensive plan advocating, advocating degrading or changing the

neighborhood, especially in the diverse housing stock." (Second Hr'g Tr. at 51:3-13.) He continued, "The change in the character of the neighborhood will not . . . be economically beneficial to the Town of Warren. In fact, it will cheapen, degrade, and overcrowd the area." *Id.* at 51:13-16. Similarly, Board Member Thibaudeau stated that, in his opinion, "Laurel Lane is all single-family housing, so maybe, maybe an occasional inlaw apartment, but if [we approve a two-family], now you're changing the neighborhood." *Id.* at 17:2-5. "You're changing the values," he continued. *Id.* at 17:7.

Conclusory statements that do not point to any concrete observations or facts are not sufficient to amount to substantial evidence because conclusory statements do not reveal a board member's personal knowledge of the comprehensive plan or whether the application would be consistent or not with the plan. In contrast, the "yes" voting Board Members cited the plan to show it does support two-family properties: "Comprehensive Plan prevents a two-family dwelling in Plaintiffs [sic] neighborhood is contravened by the majority on the Zoning Board who cited Policy No. 2 (scale of buildings), Policy No. 3 (land use policies), and Policy No. 9.1 (density) to show that the special use permit application is consistent with the Plan." (Appellants' Prelim. Statement at 18.)

Based on the "no" voting Board Members' lack of any probative or substantial evidence on the record to support their "no" votes, it was clearly erroneous to deny the application.

4

Section 32-30(D): Public Convenience and Welfare Will Be Served

To grant a special use permit, the Zoning Board must find that public convenience and welfare will be served by approving the special use permit. Warren Zoning Ordinance § 32-30(D). Appellants argue that Appellees failed to provide any evidence regarding this standard that the public convenience and welfare will not be served. (Appellants' Prelim. Statement at 19.) Appellees argue that Board Member Holby's findings on Standard (D) are "justified by [Appellants'] failure to present competent evidence" in regard to the standard. (Appellees' Br. in Resp. at 7.) Specifically, Appellees argue that Board Member Holby's statement that "he did not find any evidence on the record that showed public convenience and welfare will be served" constituted "substantial evidence because it is a matter in which the [Zoning Board] is presumed to have special knowledge." (Appellees' Br. in Resp. at 9 (citing *Krikor*, 2013 LEXIS 161, at *30).

A zoning board may base its decision on the personal knowledge or observations of its members, so long as the record discloses the nature and character of those observations. *See Restivo v. Lynch*, 707 A.2d 663, 666 (R.I. 1998). Here, Board Member Holby failed to disclose any personal knowledge or observations on the record to support that the application would not serve public convenience or welfare.

When asked whether public convenience and welfare will be served, Board Member Holby stated, "I think it's just the opposite." (First Hr'g Tr. at 33:3-4.) He stated that "at least two [people] are questioning" the Property, and he thought the Zoom meeting limited the number of community members who would have objected to the

application. *Id.* at 33:3-11. He finished by stating, "I don't think it's a good thing for the neighborhood." *Id.* at 33:12. At the second hearing, Board Member Holby stated, "No, I don't believe that the public convenience and welfare will be served. Approval of Application 20-37 will hurt, degrade, and cheapen the Laurel Park neighborhood." (Second Hr'g Tr. at 55:13-16.) In citing support, he referenced the two members of the public who spoke at the first hearing in opposition to the application. *Id.* at 57:2-7. He argued that the public opposition shows that public convenience and welfare would not be served because "they don't want their streets, you know, they're small houses and small streets and they don't want it to be overcrowded." *Id.* at 57:12-14.

Here, Board Member Holby provides conclusory statements that the Property will do "the opposite" of serving public convenience and welfare, will not be "a good thing for the neighborhood," and "will hurt, degrade, and cheapen" the neighborhood. His only record support for these statements are the two members of the public who opposed the project. The members of the public who testified against the application were (1) Ms. Remy whose biggest concern was the "ripple effect" of what could happen to the property in the future if it was rented to "unrelated parties" (First Hr'g Tr. at 10:1-21), (2) Mr. and Mrs. McCanna who were concerned with the "possibilities of [the Appellants] doing other things" with the Property, *id.* at 17:8-14, and (3) Ms. Dobbyn who was concerned about the effect to wildlife "down the road." *Id.* at 25:9-26:3. Though the Court understands the neighbors' concerns, it was not reasonable for Board Member Holby to rely entirely on these speculative statements that the Property could have an effect on the neighborhood in the future to conclude that public convenience and welfare would not be served.

Accordingly, there was insufficient record evidence on which the Zoning Board based its finding that the application would not serve public convenience and welfare.

C

Abuse of Discretion to Deny Special Use Permit

Under § 45-24-69(d)(6), a court may reverse or modify a zoning board's decision if the substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Appellants argue that the Zoning Board Members who voted to deny the permit exceeded the authority granted to them by Rhode Island statutes and Warren Zoning Ordinances, and they abused their discretion. (Appellants' Prelim. Statement at 10.) Specifically, Appellants argue that the two "no" voters exceeded the authority granted to them by statute because they are contending that two-family dwellings are not permitted in the area when the Zoning Ordinance allows for them in R-10 zones. (Appellants' Prelim. Statement at 13.) Additionally, Appellants argue that all four of Warren Zoning Ordinance § 32-30 criteria for approval of a special use permit were met, as seen by the majority of the Zoning Board finding that the criteria were met, and the denial of the special use permit was an abuse of discretion. *Id.* Appellees argue that Appellants' argument that the ordinance allows for two-family homes with special use permits is unpersuasive because the Appellants are arguing that the use is "presumptively harmonious with surrounding land uses" and that is not the case where two Board Members voted that the dwelling would not be compatible, and that is enough to deny the application based on Warren Zoning Ordinances. (Appellees' Br. in Resp. at 12-14.)

The purpose of special use permits is to allow for conditionally permitted uses. *Nani v. Zoning Board of Review of Town of Smithfield*, 104 R.I. 150, 242 A.2d 403 (R.I. 1968). These conditionally permitted uses have criteria that "essentially are conditions precedent to the board's exercise of its authority to act affirmatively on an application for a special-use permit." *Lloyd*, 62 A.3d at 1086. "When the conditions precedent are satisfied, it is an abuse of discretion to deny the requested special-use permit." *Id.* (citing *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 882 (R.I. 1991)).

Here, the Property is located within an R-10 zone. Warren Zoning Ordinance § 32-47. R-10 zones allow for two-family properties when § 32-30 criteria or conditions precedent are met. *See* Warren Zoning Ordinance § 32-30.

The two Board Members who denied the application acted arbitrarily and abused their discretion because their bases for denying the application were conclusory in nature and not supported by any facts. Board Member Holby continuously relied on conclusory statements in his pursuit to deny the application, both at the first hearing and the second hearing.

At the first hearing, he commented that once the Zoning Board "let[s] one [two-family dwelling] in the door," he was worried it would "change the character of the neighborhood in 15 or 20 years[.]" (First Hr'g Tr. at 28:11-18.) He further remarked he did not believe "it's a positive thing for the neighborhood[.]" *Id.* at 28:16-18. When going over the four criteria under § 32-30, he relied only on conclusory statements to justify his denial. For § 32-30(A), he stated, "I don't think the special use will be compatible with the neighboring land uses. It's setting a precedent and I don't want, I

think individually the house looks like a single-family . . . but I, I don't see it being compatible with that street, as I've driven around it." *Id.* at 32:14-20. His conclusion fails to articulate reasons that show the Property is not compatible because it merely suggests that he has driven around and only seen single-family homes, and because this is a single-family home only in looks, it would not be compatible. Under § 32-30(B), he stated, "I don't see that the special use will not create a hazard in the neighborhood. I don't think that two-family, if it was built, would create a hazard." *Id.* at 32:20-23. This conclusion states that the Property will not create a hazard and so would meet the criteria under § 32-30(B). Under § 32-30(C), he stated that "I just don't believe that whatsoever" that a two-family home will be part of the comprehensive plan on Laurel Lane. *Id.* at 32:23-33:2. This conclusory statement fails to state any fact to support his conclusion. Under § 32-30(D), he stated, "I think it's just the opposite" because "at least two [people] are questioning" the Property, and he thought the Zoom meeting limited the number of community members who would have objected to the application. *Id.* at 33:3-11. He finished by stating, "I don't think it's a good thing for the neighborhood." *Id.* at 33:12. As stated, *supra*, these two members of the public rely solely on speculative concerns that do not address whether the application supports the criteria. Board Member Thibaudeau also relied on conclusory statements to support his denial of the application. He stated, "My problem is the Laurel Lane, I don't see the two-families on there. It just doesn't seem, in my opinion, to fit the neighborhood." *Id.* at 32:10-12. These bases for denying the application were clearly conclusory in nature, not supported by any facts, and arbitrary.

At the second hearing, the "no" voting Board Members again relied on conclusory statements that were arbitrary when making their decision to deny the application. Board Member Holby focused on how the Property was a "wolf in sheep's clothing." (Second Hr'g Tr. at 33:17-21; 45:15-19.) He contended that "[the Property] [d]oes not fit the neighborhood, even though she's trying to make the house look like it fits," *id.* at 33:15-16, and a "wolf in sheep's clothing, is still a wolf." *Id.* at 33:17-21. The Court does not find this conclusion compelling because the neighborhood allows for two-family properties with a special use permit, and the house was designed to be as compatible as possible with the prevailing, but not exclusively permitted, use in the neighborhood. Though Board Member Holby cited tangible concerns, such as potential increased traffic and potential future renters, these concerns arbitrarily rely on Board Member Holby's preconceived ideas about what negatives could result from the application. He failed to state on record how he knows traffic would increase, and he failed to present any expert testimony on traffic considerations. For potential future renters, he failed to provide any facts to support that the Property would be rented to someone outside the family.

Further, Board Member Holby explained how "[t]he change in the character of the neighborhood will not . . . be economically beneficial to the Town of Warren" and "will cheapen, degrade, and overcrowd the area," *id.* at 51:13-16, but he failed to state on the record how this would occur. Board Member Thibaudeau stated that, in his opinion, "if [we approve a two-family], now you're changing the neighborhood," *id.* at 17:2-5, and "[y]ou're changing the values," *id.* at 17:7, without articulating any reasonable basis for having this view.

All the reasoning for denying the application rested exclusively on conclusory personal opinions without articulating facts underlying these personal opinions, and, therefore, the Board Members abused their discretion by acting on conclusory opinions without any facts on record to support their opinions and denial of this special use permit.

Further, the two Board Members who denied the application acted arbitrarily and abused their discretion because all their concerns were speculative in nature and all their supporting public testimony was also speculative in nature.

Board Member Holby based his vote solely on speculative testimony from members of the public who were against the special use permit. Ms. Remy expressed concern about how "putting in a two-family here just opens the door to start creating more two-families" and how two-families may be one or two blocks away, but they are "really not on that street" in reference to where the Property is located. (First Hr'g Tr. at 8:13-9:3. She further stated that her concern was, in the future, the Property could be "rented out to two unrelated parties" and she was "concerned about the ripple effect of allowing" the two-family. *Id.* at 10:1-21. Mr. and Ms. McCanna expressed further concerns about the "possibilities of [the Appellants] doing other things" with their Property. *Id.* at 17:8-14. Ms. Dobbyn closed out the public testimony by voicing her concern for the "wildlife in this area" if more development would occur "some time down the road." *Id.* at 25:9-26:3. All the public testimony relied on what could happen to the neighborhood in a hypothetical future without basing their concerns on what would happen in the present day with the application approval.

Though zoning board members can rely on their own knowledge regarding zoning matters, the Zoning Board must include the basis on which it rests its knowledge. *New*

Castle Realty Co., 248 A.3d at 645. The two "no" voting Board Members relied exclusively on conclusory opinions and speculative opinions about what could happen in the future, and these bases are arbitrary and capricious because there is nothing on the record to show tangible and reliable facts supporting the denial of the application. Therefore, the Board Members abused their discretion.

D

Substantial Evidence Exists to Support Grant of Special Use Permit

Under § 45-24-61(a), a zoning board must include in its decisions "all findings of fact and conditions, showing the vote of each participating member." The decision must include "findings of fact and reasons for the action taken." *Sciacca v. Caruso*, 769 A.2d 578, 585 (R.I. 2001). The findings must be "factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany." *Id.*

In the present case, the Zoning Board failed in its decision to provide a factual basis for denying the special use permit, as seen above. Under such circumstances, our Supreme Court has instructed that this Court should not "'search the record for supporting evidence or decide for itself what is proper[.]"' *Bernuth*, 770 A.2d at 401 (quoting *Irish Partnership v. Rommel*, 518 A.2d 356, 358 (R.I. 1986)). Rather, the reviewing court may "remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced . . ." Section 45-24-69(d). It is well accepted, however, that a 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 College v.*

Gallison, 572 A.2d 61, 62 (R.I. 1990). Rather, 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 remand . . . " *Id.* at 63.

This Court's review is limited to ensuring that the Zoning Board's factual findings are supported by the record and that its conclusions of law are correct based on its findings. As seen above, the Zoning Board failed to support its denial of the special use permit based on its failure to make the required findings of fact and conclusions of law.

In determining whether a second remand is appropriate, this Court must decide whether the Appellants presented adequate evidence to the Zoning Board in the first instance to support their request for a special use permit.

This Court finds that there is reliable, probative, and substantial evidence on the record to support granting the special use permit. Under the first standard of Warren Zoning Ordinance § 32-30, there are sufficient findings of fact that the Property was compatible with neighboring land uses. Chairman Ellis summarized his view that the record showed that the Property is "compatible with the neighboring land use" because (1) "[it is a] two-family, [which] is a residential use," (2) "the prevailing area is of residential character," and (3) "there's a mix of housing types within the general vicinity of the area[.]" (Second Hr'g Tr. at 7:18-8:3.) Ms. Joinson's Sister presented the proposed architectural design and testified that the Property would "fit with the esthetic of the neighborhood." (First Hr'g Tr. at 4:1-9.) Board Member Rainone stated that "it will be compatible with the neighboring land use, citing testimony of Ms. Fletcher . . . where she speaks of the fact that . . . multi-families are a part of the neighborhood and that she, in

and of herself being an abutter of the property, supports the project." (Second Hr'g Tr. at 64:6-14 (citing First Hr'g Tr. at 13:1-12).)

Under the second standard of Warren Zoning Ordinance § 32-30, there are sufficient findings of fact that the Property would not create a nuisance or hazard. Board Member Rainone stated: "Based on the plan provided in the original application, we find that this, this construction project would conform to all of the necessary setbacks and looking at the plan in general, it appears that it is consistent with the building pattern in the neighborhood, insomuch as the proposed structure is roughly similar in size and scope to the other buildings in that particular section of the neighborhood. The plans submitted include provisions for off-street parking, so there would be no road obstructions associated with this particular project[.]" (Second Hr'g Tr. at 65:13-24.) He also noted that, "neighborhood evolution and the inevitable passage of time are not intrinsically a hazard. All land uses change over time and it is not for this board to define what is or is not abruptive change." *Id.* at 65:24-66:3.

Under the third standard of Warren Zoning Ordinance § 32-30, there are sufficient findings of fact that the Property was compatible with the comprehensive community plan. The Zoning Board cited multiple policies that show the Property is consistent with the Comprehensive Plan, including "Policy No. 2 (scale of buildings), Policy No. 3 (land use policies), and Policy No. 9.1 (density)." (Appellants' Prelim. Statement at 18; *see* Second Hr'g Tr. at 66-67.)

Under the fourth standard of Warren Zoning Ordinance § 32-30, there are sufficient findings of fact that the Property served the public convenience and welfare. Vice Chair Ellis noted that "the plan encourages diversity in the housing stock and

encourages multigenerational living arrangements within the town." (First Hr'g Tr. at 29:20-22.) Board Member Rainone stated that "it is always a good idea to allow your mother-in-law or your grandfather to live with you. Multi-generational households are broadly recognized these days as a positive to the younger generations. So encouraging those living arrangements within the Town of Warren can always be considered in the public's best interest." (Second Hr'g Tr. at 67:1-8.) Therefore, the factual findings support that there was sufficient evidence to support all criteria under Warren Zoning Ordinance § 32-30 and grant the special use permit.

The Zoning Board failed to present record evidence to support its denial of the application after the first hearing. Upon remand from this Court, the Zoning Board again failed to present substantial evidence to support its denial of the application. It is clear to the Court that a second remand would be futile on the state of the record and that a remand for the taking of more evidence would be "inappropriate." *Roger Williams College*, 572 A.2d at 63. As Board Member Thibaudeau articulated during the hearing, "I don't think we're going to reach an agreement." (Second Hr'g Tr. at 33:1-2.)

Therefore, the Court finds substantial evidence on the record to support the granting of the special use permit.

IV

Additional Claims

Appellants seek relief under two additional claims. First, Appellants seek attorneys' fees pursuant to the EAJA. Appellants aver that Appellees' denial of the special use permit was without substantial justification, and, thus, Appellants have a claim for relief under the EAJA. (Compl. ¶¶ 39-43.) Appellees contend that relief should

be denied because Appellants should not prevail on their zoning appeal and the Zoning Board's actions were substantially justified. (Appellees' Br. in Resp. at 19.)

Section 42-92-3 provides:

> "(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(a)(b).

Under § 42-92-3(b), a party has a claim for fees and other expenses if they receive an unfavorable decision on the underlying merits at the administrative level, appeal to the appropriate court, and the party is successful in the appeal. *Rollingwood Acres, Inc. v. Rhode Island Department of Environmental Management*, 212 A.3d 1198, 1205 (R.I. 2019); *see also* § 42-92-3(b). "[W]hether a party may recoup litigation expenses hinges on whether the administrative agency was substantially justified in its actions." *Rollingwood Acres, Inc.*, 212 A.3d at 1205; *see also* § 42-92-3.

An administrative agency is substantially justified when "the initial position of the agency, as well as the agency's position in the proceedings, ha[d] a reasonable basis in

law and fact." *Rollingwood Acres, Inc.*, 212 A.3d at 1205 (quoting § 42-92-2(7)). "[P]ursuant to the EAJA substantial justification test, the state 'must show not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct.'" *Id.* (quoting *United States v. 1,378.65 Acres of Land*, 794 F.2d 1313, 1318 (8th Cir. 1986)).

Here, Appellees do not contest that Appellants' underlying claim was based on an adjudicatory proceeding conducted by an administrative agency. Additionally, the Court finds that Appellants prevail on their underlying claim. Now, the burden shifts to Appellees to prove their position was substantially justified.

Appellees argue that substantial justification is a low bar, and a zoning board can lose on appeal but still win against an EAJA claim. (Appellees' Br. in Resp. at 20.) They argue EAJA is typically awarded in egregious circumstances, and, in the present case, the Zoning Board relied on relevant lay testimony to applicable zoning standards and, therefore, did not apply "erroneous legal standards," rely on "irrelevant lay testimony," or reject "uncontroverted expert testimony." *Id.* at 21-22.

In support of their argument that there was substantial justification, Appellees cited two Rhode Island Superior Court cases that held the zoning board did not have substantial justification: *Cobble Hill Development, LLC v. Zoning Board of Review of the Town of Foster*, No. PC05-3089, 2007 WL 3236712 (R.I. Super. Sept. 28, 2007) and *Perrotti v. Zoning Board of Review of the Town of Jamestown*, No. NC-2007-0323, 2008 WL 1926743 (R.I. Super. Mar. 11, 2008). (Appellees' Br. in Resp. at 21-22.) The court in *Perrotti* found that the zoning board did not have substantial justification because the appellant provided "considerable evidence" with experts, the "testimony went

uncontroverted by any evidence of probative value," and the Board "did not address the general criteria for a special use permit[.]" *Perrotti*, No. 2008 WL 1926743. In *Cobble Hill*, the court found that the zoning board did not have substantial justification because the board's decision and arguments were not well grounded in law or fact. *Cobble Hill Development, LLC*, 2007 WL 3236712, at *17. As to law, the court found that the board relied on erroneous legal standards when it relied on a stricter standard for applicants than what was actually required by statute, and it used an improper factor in determining whether to grant the variance. *Id.*

Here, the Court finds that the Zoning Board's position was substantially justified. Though the Zoning Board's denial was not supported by reliable, probative, and substantial evidence of the record and constituted an abuse of discretion, the Zoning Board relied on statutory language and criteria under Warren Zoning Ordinance § 32-30 in forming its denial of the permit. Appellants did not provide considerable evidence and did not provide expert testimony that the Zoning Board chose to ignore. There was no overwhelming factual support to grant the permit that the Zoning Board Members who denied the application ignored. Further, though the Zoning Board Members who denied the motion relied on a misguided standard because they believed their experience on the Zoning Board could be used as part of the basis for determining a permit approval or denial, their standard was not erroneous where Rhode Island case law supports the position that zoning boards can rely on their own knowledge regarding zoning matters. *New Castle Realty Co.*, 248 A.3d at 645.

Similar to the cases cited by the Appellees, the Court finds that the Appellees did not apply erroneous legal standards, rely on irrelevant lay testimony, or reject

uncontroverted expert testimony. "'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). The question of substantial justification is not the same as the question on the merits of the appeal; instead, it is "what the Government was substantially justified in believing the law to have been." *Rollingwood Acres, Inc.*, 212 A.3d at 1205 (internal quotations omitted).

This Court finds that the Zoning Board was substantially justified because the Zoning Board Members had a reasonable basis for what they believed the law to be and factual support based on that reasonable belief. Accordingly, Appellants' request for an award of attorneys' fees and expert fees under the EAJA is hereby denied.

Additionally, Appellants seek a remedy under a Tortious Interference with Existing and Prospective Economic Advantage claim. (Compl. ¶¶ 53-59.) Appellants allege that Appellees intentionally and improperly interfered with Appellants' efforts to build a two-family dwelling and caused Appellants substantial economic damages, including the increased costs to build a two-family dwelling at the present time. (Compl. ¶¶ 54-58.) Because this Court reverses the Zoning Board decision and orders the granting of the special use permit application, the tortious interference claim shall be placed on the Superior Court motion calendar for any further action deemed necessary.

V

Conclusion

After carefully reviewing the entire record, this Court finds that the Zoning Board's denial of the special use permit was not supported by reliable, probative, and substantial evidence on the record, that it was made upon unlawful procedure, and it

constituted an abuse of discretion. The Court also finds that there is reliable, probative, and substantial evidence on the record to support granting the special use permit. Accordingly, the decision of the Zoning Board is reversed, and the Zoning Board is ordered to grant Appellants' special use permit application forthwith, plus costs.

Counsel shall confer and submit to this Court forthwith an agreed upon form of order and judgment consistent with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Daniel Karten, et al. v. Town of Warren Zoning Board of Review, et al.**
CASE NO:	**PC-2022-02221**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**November 19, 2024**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
For Plaintiff:	**Fausto Anguilla, Esq.**
For Defendant:	**Michael Desisto, Esq.** **Stephen J. Antonucci, Esq.** **Anthony Desisto, Esq.** **Mark E Hartmann, Esq.**