

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**NEWPORT, SC.**

**SUPERIOR COURT**

**[FILED: February 10, 2014]**

<b>MARC BARD</b>	:	
	:	<b>C.A. No. NC 2008-0575</b>
<b>v.</b>	:	
	:	
<b>ZONING BOARD OF REVIEW</b>	:	
<b>OF THE TOWN OF JAMESTOWN</b>	:	
<b>et al.</b>	:	
	:	

---

<b>MARC BARD</b>	:	<b>C.A. No. NC 2012-0104</b>
	:	
<b>v.</b>	:	
	:	
<b>COASTAL RESOURCES</b>	:	
<b>MANAGEMENT COUNCIL and</b>	:	
<b>ANNE MAXWELL LIVINGSTON, in</b>	:	
<b>her capacity as Chairperson of the</b>	:	
<b>Coastal Resources Management Council</b>	:	

**DECISION**

**GALLO, J.** This matter is before the Court on the appeals of Plaintiff Marc Bard from the decisions of the Zoning Board of Review of the Town of Jamestown (the Zoning Board) and the Coastal Resources Management Council (CRMC). These proceedings both relate to Mr. Bard's plans to construct a personal residence on a waterfront lot in the Town of Jamestown, Rhode Island. Mr. Bard purchased the subject property in 2008. The lot's buildable area is confined by the Town of Jamestown's front yard setback requirements and coastal buffer and setback requirements.

Mr. Bard's separate requests for variances addressed to the Zoning Board and CRMC were denied. Timely appeals were filed by Mr. Bard from both decisions which appeals, on motion, were consolidated for decision. Jurisdiction is pursuant to R.I.G.L. 1956 §§ 45-24-69 and 42-35-15.

### **Facts and Travel<sup>1</sup>**

In February of 2008, Mr. Bard purchased a waterfront lot designated as tax assessor's plat 12, lot 87, located on Clark's Village Lane in Jamestown, Rhode Island. The lot consists of approximately 16,800 square feet of land, but, due to its waterfront location and topography, only the 8,500 square feet closest to the road is developable. (Zoning Board Dec., Aug. 27, 2008; CRMC Dec., Feb. 3, 2012.) Coastal Management Resources Program (CRMP) regulations require that a fifty foot buffer zone be maintained measured from the inland-most coastal feature, which, in this case, was determined to be the top of the bluff. CRMP § 150. While the total depth of the lot is approximately 139-149 feet, the depth from Clarke's Village Lane to the top of the bluff ranges between seventy-two to eighty-two feet.<sup>2</sup> (CRMC Dec., Feb. 3, 2012.) Additionally, the Jamestown Zoning Ordinance requires a thirty foot front yard setback from the road. See Jamestown Zoning Ordinance § 82-302, Table 3-2.

Strict adherence to the applicable zoning and CRMC regulations would effectively render his property unbuildable, therefore, Mr. Bard embarked upon an effort to secure necessary variances. He first sought a Preliminary Determination from the CRMC. Mr. Bard's plans proposed the building of a home thirty-eight feet wide by twenty-seven and one-half feet deep with a twenty-four foot wide attached garage and an eight foot deep second story deck off the

---

<sup>1</sup> These facts are drawn from the records of both the Zoning Board and CRMC proceedings; they are common to both appeals.

<sup>2</sup> The shape of the lot complicates the provision of dimensions. The coastal property line follows the shoreline.

back. CRMC staff, in response to the request for a Preliminary Determination, indicated they could not support the proposal as then presented because the plans did not appear to satisfy the requirements outlined in § 120 of the CRMP, Coastal Setback Variance Criteria. Citing potential problems such as pollutants and erosion, the staff recommended a “[r]eduction in [the] project scope.” The Preliminary Determination made clear that “all local and town approvals must be obtained, as well as ISDS approval from DEM/ISDS,” prior to the applicant submitting his formal application to the CRMC. The CRMP makes clear that “[p]rior to requesting approval for a CRMC variance, in those instances where a variance would be obviated if a variance for a setback were acquired from the local municipality, the applicant must first exhaust his remedies before the local municipality.” Sec. 120(D) CRMP. Mr. Bard received approval from the DEM for his proposed Individual Sewage Disposal System (ISDS) in March of 2008. DEM/ISDS application.

### **Zoning Board Appeal**

Armed with the DEM approval and the Preliminary Determination from the CRMC, Mr. Bard applied for a front yard setback variance from the Town of Jamestown. The Zoning Board held two public hearings on Mr. Bard’s application: one on June 24, 2008 and the second on August 26, 2008. Mr. Bard proposed that the front yard setback be reduced from thirty feet to fifteen feet. His plans contemplated his also securing a variance from CRMC granting relief from the required buffer.

Laura Krekorian, Mr. Bard’s architect, testified as a witness on his behalf. She testified that she toured the surrounding area and based her design on the “common themes that came” from her observations. (Tr. 8, June 24, 2008.) She outlined the dimensions of the proposed two-story home. Id. at 10. Ms. Krekorian stated that her professional opinion is that the proposed

design would fit into the surrounding neighborhood and fit into the island of Jamestown as a whole. Id. at 9. She added that, in her opinion, the proposed residence would not “in any way alter the general characteristics of the neighborhood.” Id.

Registered engineer and land surveyor, Joseph Frisella, testified. Mr. Frisella explained that the CRMC setbacks are measured from the top of the coastal bluff—which constituted the inland-most coastal feature. Id. at 18. He testified that the proposed residence would be situated thirty-six feet from the top of the bluff at the northeast corner and thirty-five feet from the top of the bluff at the southeast corner.<sup>3</sup> Id. Mr. Frisella also discussed the ISDS and the possibility of erosion. Mr. Frisella testified that the DEM had already approved the ISDS, and that the system would be adequate for the three-bedroom home. Id. at 21. He stated that he had no “engineering concerns with regard to erosion issues.” Id. at 22.

Also testifying in support of Mr. Bard’s application was Scott P. Rabideau, a coastal biologist and the principal of a private wetland consulting firm. Mr. Rabideau served as Mr. Bard’s consultant with regard to his CRMC variance request. Mr. Rabideau reviewed CRMC’s Preliminary Determination and its significance in the CRMC permitting process. Id. at 31. Drawing from correspondence from Mr. Fugate, CRMC Executive Director, Mr. Rabideau informed the Zoning Board that CRMC was expected to “press for the maximum setback possible off that coastal bluff,” and that “the applicant has every responsibility to go forward with any option available to the applicant to minimize the amount of variance thereby maximizing the amount of that setback from the coastal bluff.” Id. at 32. For that reason, Mr. Rabideau opined, the front yard setback relief sought by Mr. Bard was the least relief necessary were he to stand any chance of success in securing CRMC approval:

---

<sup>3</sup> These dimensions assume that the requested fifteen foot front yard variance was granted.

“Q. In your opinion, Mr. Rabideau, is the relief being sought by the applicant the least relief necessary in order to have some success or some chances of success at Coastal Resources Management Counsel?

“A. Absolutely. If it were possible, we would try to seek more relief to get closer to the road and away from that [coastal] buffer. This is, in my opinion, the minimum relief necessary.” Id. at 34-35.”

Mr. Rabideau also stated that if the Zoning Board denied Mr. Bard’s application for the front yard setback variance, the denial would be more than a mere inconvenience. Id. at 35. Mr. Rabideau explained that if the zoning variance was denied, the CRMC application “would be denied and [Mr. Bard] would . . . lose the ability to utilize this residential lot for that purpose.” Id.

George Daglieri, a licensed real estate broker and a licensed appraiser, also testified on Mr. Bard’s behalf. Mr. Daglieri opined Mr. Bard’s plan would be consistent with the goals and purposes of the Jamestown Comprehensive Plan. Id. He testified that it was his opinion that the granting of the requested variance would not in any way alter the general characteristics or impair the intent or the purpose of the Zoning Ordinance and would not negatively impact the surrounding property values. Id.

The Zoning Board heard testimony from a number of neighboring property owners. The bulk of the testimony of neighbors focused on concerns over erosion and the stability of the bluff which constituted the “coastal feature” of the property. Neighbor Varougan Karentz offered his observations relative to erosion during rainstorms and the instability of the bank, urging that “the 50 foot [coastal] setback or whatever requirement should be maintained.” Id. at 66. Others raised concerns over the density of the surrounding area and the size of the proposed residence. Id. at 77, 81.

At a second hearing on August 26, 2008, the objecting neighbors, then represented by counsel, presented a number of additional witnesses. First to testify was Michael Grey, Town Engineer for the Town of Jamestown. In preparation for his testimony, Mr. Grey had reviewed Mr. Bard's application and scheduled an on-site meeting with Mr. Frisella. (Tr. 6, Aug. 26, 2008.) During that meeting, they viewed the "coastal feature," the slope extending down the bluff, and the composition of the soil. Id. at 6-7. Mr. Grey's testimony focused on the potential of the construction of the house to cause drainage and erosion problems. Mr. Grey stated: "[I]f there is a house constructed on this property . . . I don't believe it will effect [sic] the drainage . . . within Clarke's Village Road; however, I do feel that if it's not properly managed . . . it could cause further erosion of the embankment." Id. at 12.

Mr. Grey then confirmed the measurements of the property: at its deepest, there is eighty-three feet from Clarke's Village Lane to the inland-most coastal feature. Mr. Grey testified that, based on his understanding of the coastal buffer and setback restrictions, there is a fifty-foot setback, and within that fifty-foot setback, twenty-five feet must be maintained in its natural vegetative state. Id. at 26. Therefore, if the CRMC required only fifty feet from the inland-most coastal feature and Mr. Bard did not receive relief from the Zoning Board, he would be left with a total depth of three feet on which to build his home. Id. at 25.

Richard Pastore, a professional engineer, was the next to testify on behalf of the objectors. He expressed the opinion that the size of the proposed house would cause a "channelized flow" of surface water resulting in increased erosion. Id. at 36.

Michael Lenihan also testified on behalf of the objectors. He stated that he is a certified general appraiser in addition to being an attorney specializing in land use matters. Id. at 56. Mr. Lenihan had inspected the Property prior to the hearing. Id. at 57. He described the area,

generally, as “small lots with small houses on them.” Id. at 58. He opined that Mr. Bard’s proposed residence was larger than needed and, therefore, the relief requested was not the least relief necessary. While he conceded that there are three or four larger houses in the area, all of which were built recently, he testified that he did not believe the relief requested was the least relief necessary because he does not think the lot “needs a house this big” and because there are many homes in the area that are smaller than the home proposed by Mr. Bard. Id. at 59-60.

The hearing of Plaintiff’s application was concluded on August 26, 2008, following which the Board voted to deny Mr. Bard’s application. A written decision was issued on August 27, 2008 and posted on September 24, 2008. According to the Board, its decision was based on the following findings of fact:

- “1. Said property is located in a [sic] R40 zone and contains 16,800 sq. ft.
- “2. The actual buildable area of the lot available is 8500 sq. ft. because of the topography.
- “3. The proposed footprint is 1643 sq. ft. which is a large percentage of the buildable area (approx. 19 %).
- “4. Numerous objectors spoke in opposition to the application.
- “5. No one spoke in favor of the application.
- “6. There are serious concerns about erosion which would be exacerbated by a foundation.
- “7. There are concerns about storm water control.
- “8. Expert testimony by Mr. Pastore stated that the plans presented were inadequate, that in his opinion there would be substantial storm water runoff that would be affected by this dwelling causing erosion to the barrier because it would be redirected from a sheeting flow across the property to a directed runoff.
- “9. He also testified that there was substantial risk of crashing waves that would exceed the velocity line, which cuts across almost the middle of this property.
- “10. Mr. Frisella testified as the engineer for the applicant. His plan indicated that the coastal feature eroded over a number of years by both storm water runoff and wave action. This testimony seemed consistent with Mr. Pastore’s testimony on the subject. No plan was presented by the applicant to address erosion.

“11. Mr. Pastore also testified that the width of the house would exacerbate the amount of funneling of the storm water runoff and that a smaller house would create less funneling of that effect.

“12. Members of the Board knew of many houses in the coastal areas and other areas of Jamestown that are no more than 20 feet wide which is far less than this particular application.

“13. The proposed house size is not the least relief necessary.”  
(Board’s Dec., Aug. 27, 2008.)

On appeal, Mr. Bard asserts that the Board’s decision must be reversed because it is clearly erroneous, an abuse of discretion, and in excess of the Board’s statutory authority. Furthermore, Mr. Bard argues the decision is improperly based on irrelevant evidence of drainage, wave action, and erosion and that there was no competent evidence supporting the denial of the setback variance—the sole issue before the Board.

The Board argues that the Court must defer to its decision as it is supported by the record. The Zoning Board maintains that Mr. Bard failed to present sufficient evidence that the requested variance was the least relief necessary. The Board believes that the size of the proposed residence could reasonably be reduced.

This Court’s review of a Zoning Board’s decision is governed by § 45-24-69. Subsection (d), in relevant part, 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.

When reviewing a zoning board’s findings of fact, a trial justice “must examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.” Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981). Our Supreme Court has repeatedly defined “substantial evidence” as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [a]n amount more than a scintilla but less than a preponderance.” Id. (quoting Apostolou v. Genovesi, 120 R.I. 501, 507, 388 A.2d 821, 824-25 (1978)). Further, the scope of a zoning board’s jurisdiction is limited to the application before it; therefore, the substantial evidence on which it relied must be relevant to that application. See Allen v. Zoning Bd. of Review of City of Warwick, 75 R.I. 321, 66 A.2d 369, 370 (1949). This Court may “reverse the decision of the zoning board . . . ‘in the event that the decision . . . was made in excess of statutory authority[,] . . . was clearly erroneous in view of the evidence, or was [otherwise] arbitrary or capricious.’” Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 7-8 (R.I. 2005) (quoting Curran v. Church Cmty. Hous. Corp., 672 A.2d 453, 454-55 (R.I. 1996)).

In this case, the application before the Zoning Board was for relief from a front yard setback requirement. The Zoning Ordinance required a front yard setback of thirty feet, and the applicant was requesting that he be allowed a front yard setback of fifteen feet. In making its determination of whether to grant a variance, the Zoning Board was required to consider evidence that addressed the following standards:

“(1) That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(16);

“(2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;  
“(3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and  
“(4) That the relief to be granted is the least relief necessary.”  
Sec. 45-24-41(c).

Additionally, the Board was required to find that “the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience.” Sec. 45-24-41(d).

This Court finds that the decision of the Zoning Board is unsupported by the evidence and the findings of fact on which the Board rests. Indeed, much of the evidence presented at the hearings and the Board’s concerns as reflected by its factual findings had no bearing on the standards for a dimensional variance. As set forth above, the Board entertained, and even solicited, testimony on issues such as erosion, stability of the bluff, storm water runoff control, and the effect of wave action along the coast. In doing so, the Board improperly usurped the role of the CRMC and exceeded its statutory authority.

It is the task of this Court to review the Zoning Board’s decision and to verify that it is supported by “such *relevant* evidence that a reasonable mind might accept as adequate.” Caswell, 424 A.2d at 647 (emphasis added). Erosion, wave action, and bank stability are wholly irrelevant to the standards applicable to a request for a dimensional variance. Insofar as the Board’s decision rested on these irrelevant concerns, its decision is invalid. See Appeal of O’Hara, 131 A.2d 587 (Pa. 1957) (“To refuse a proposed use for a reason which has no substantial relationship to the standards provided by the ordinance is beyond the powers . . . of the [Zoning] board.”); see also Mercurio v. Zoning Bd. of Review of Town of Narragansett,

2007 WL 4471143 (J. Thompson, R.I. Super. 2007) (finding the zoning board exceeded its authority when it denied an application for special use permit based on “the property’s location in a V19 Flood Zone combined with the absence of a fifty foot setback from the coastal feature.”); Board of Educ. of City of Clifton v. Zoning Bd. of Adjustment of City of Clifton, 978 A.2d 325 (N.J. Super. 2006) (remanding the case for rehearing “since a large portion of the zoning board’s Resolution address[ed] issues outside of its jurisdiction.”)

Furthermore, if these environmental concerns have any bearing on the matter before the Board, it would be that they demonstrate the importance of situating the residence as far away from the coastal feature as possible. Therefore, when considered in relation to Mr. Bard’s front yard setback request, these concerns are more supportive of the need for, and reasonableness of, the requested relief. The neighbors who testified in objection to Mr. Bard’s application were actually supportive of his dimensional variance request to the extent that they recognized and confirmed the sensitivity of the coastal feature.

The only criteria set forth in § 45-24-41 that the Board addressed in its decision was whether the relief requested was the least relief necessary. The Board concluded that it was not, relying, inter alia, on the knowledge of board members that there are many houses in Jamestown smaller than that proposed by Mr. Bard. On appeal, the Board argues that Mr. Bard did not present sufficient evidence that he could not reduce the size of the house, thereby reducing the amount of relief necessary.

However, it is clear from the record that given the buildable area of the lot in question, particularly the lot depth to the inland edge of the coastal feature (top of the bluff), even a substantial reduction in the size of the proposed residence would not avoid encroachment on the

fifty-foot coastal buffer and thus, the need for front yard and for coastal relief.<sup>4</sup> Moreover, according to Scott Rabideau, Mr. Bard's coastal biologist with extensive experience in coastal regulatory matters, the dimensional relief requested was the minimum necessary for plaintiff to have any chance of success in securing a permit from CRMC.

In light of the foregoing, the Board decision to deny Mr. Bard's request altogether on the ground that it was not the least relief necessary was not supported by the substantial evidence of record and was arbitrary. It is evident from the record that the overriding concern is moving the house as far away from the coastal feature as possible and that reducing the size of the house would have little, if any, impact on the amount of relief necessary from the Zoning Board. The evidence is clear that the relief requested was necessary for Mr. Bard to have a reasonable chance of success before the CRMC.

The Court finds that the substantial, competent, and virtually uncontroverted evidence before the Board does not support its denial of Mr. Bard's application. The evidence supported a finding that Mr. Bard's request for a fifteen foot variance was reasonable in light of the proposed use of the lot and the need to accommodate CRMP concerns. Further, the record was devoid of any evidence tending to show that reducing the front yard setback would adversely impact the surrounding area or significantly impair the intent of the ordinance. See §41-24-41(c)(3). The testimony of the objectors and their experts failed to raise any substantial concerns associated with the proposed reduced front yard. Where the record contains no competent, reliable evidence for denial of an application, the zoning board has abused its discretion and its decision may not stand. See Salve Regina College v. Zoning Bd. of Review of City of Newport, 594

---

<sup>4</sup> It was disclosed during the proceedings before CRMC that regulations also require a construction setback of twenty-five feet from the inland edge of the coastal buffer zone, thus yielding a required setback (inclusive of the buffer zone) of seventy-five feet. CRMP §§ 140, 150.

A.2d 878, 882 (R.I. 1991) (quashing the board’s decision and remanding the case “since the board had no . . . expert testimony or evidence in the record adverse to [the applicant] upon which it could base its” denial of the application.)

The expert testimony and evidence before the Zoning Board did, however, support the proposition that denial of Mr. Bard’s request would amount to more than a mere inconvenience. Mr. Rabideau testified that if the Zoning Board denied Mr. Bard’s request, he stood no chance of success before the CRMC. Mr. Rabideau’s expert opinion was that if the zoning variance was denied, the CRMC application “would be denied and [Mr. Bard] would . . . lose the ability to utilize this residential lot for that purpose.” Losing the ability to use one’s land for its permitted use certainly amounts to more than a mere inconvenience. See Lischio v. Zoning Bd. of Review of Town of North Kingstown, 818 A. 2d 685, 693-94 (R.I. 2003).

For the foregoing reasons, this Court finds that the decision of the Zoning Board was arbitrary, in excess of its statutory authority, clearly erroneous in light of the probative evidence of the whole record, and that Mr. Bard’s substantial rights were unduly prejudiced. The decision of the Board is reversed, and Mr. Bard’s application for a fifteen-foot variance from the thirty-foot front yard setback requirement is granted.

### **CRMC Appeal**

Mr. Bard’s application to the CRMC was heard at four separate meetings: December 14, 2010; January 25, 2011; February 8, 2011, and April 12, 2011. In his application to CRMC, Mr. Bard reduced the proposed depth of the house from twenty-seven and one-half feet to twenty-four feet. The following passage from the report of CRMC staff engineer Kenneth Anderson concisely states the predicament of Mr. Bard relative to the application for CRMC approval of his development plans:

“The proposed structure is located a minimum of 18.8’ from the bluff crest. A minimum buffer of 8’ is proposed, therefore, the project requires a 42’ (84%) buffer zone variance. The 18.8’ setback is 56.2’ (approx. 75%) variant to the required setback. Note that the total lot depth ranges from 72’ minimum to approx. 82’ maximum (front/landward property line to inland edge of coastal feature), therefore, it is not possible to site the structure in accordance with RICRMP requirements. Obtaining full relief from the Town front yard setback (30’) would result in the dwelling “coastal” setback of approx. 49’.”

The testimony before CRMC focused on potential erosion concerns, the ISDS, drainage issues and control, wave action and the stability of the bluff and shoreline. Many of the witnesses that had testified before the Zoning Board also gave testimony before the Council. Dr. Peter Rosen, a coastal geologist, testified for Mr. Bard. He opined, in sum, that the proposed construction of the Bard residence would not adversely impact the stability of the bluff. (Tr. 124, Dec. 14, 2010.) On the other hand, the Council heard testimony from Mr. Pastore, an expert witness for the objectors, that, if built, the house “would have a deleterious effect on the . . . stability of the bluff.” (Tr. 58, Jan. 25, 2011.) On February 14, 2012, the CRMC issued a written Decision denying Mr. Bard’s permit application.

On appeal, Mr. Bard argues that the CRMC’s decision was not based on competent evidence, that the undisputed evidence before the CRMC supports the granting of the variance, and that the decision should be reversed. The CRMC counters that when presented with contradicting expert testimony, its credibility determinations are owed deference and that because the decision rests on competent evidence, reversal is inappropriate.

This Court’s review of a decision by the CRMC is governed by R.I.G.L 1956 § 45-35-15. In pertinent part, that section instructs:

“The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for

further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

“(1) In violation of constitutional or statutory provisions;

“(2) In excess of the statutory authority of the agency;

“(3) Made upon unlawful procedure;

“(4) Affected by other error or law;

“(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

“(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Sec. 45-35-15(g).

The provision that sanctions remand for further proceedings was “intended as a safety valve, permitting the reviewing court to require a second look at situations and conditions which might not warrant a reversal, but which, to the court reviewing the record, would indicate to it that the [agency] may have acted on incomplete or inadequate information.” Lemoine v. Dep’t of Mental Health, Retardation & Hospitals, 113 R.I. 285, 290, 320 A.2d 611, 615 (1974) (quoting State ex rel. Gunstone v. State Highway Comm’n, 72 Wash. 2d 673, 434 P.2d 734 (1967)). Further, if an agency’s decision has recognized that a change in circumstances may warrant a reversal of an earlier decision, remanding the case to that agency for consideration of further evidence may be necessary. See Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 813 (R.I. 2000); Lemoine, 113 R.I. at 290, 320 A.2d at 614.

In the case at hand, the question before the CRMC was whether circumstances justify granting Mr. Bard permission to construct a residence on his waterfront lot which plans request relief from the buffer zone and setback regulations of CRMP. The Council acknowledged that the evidence on the issue, particularly the environmental impact of Mr. Bard’s construction plans and whether his request met the goals and policies of the CRMP was extensive and conflicting. (CRMC Dec., Feb. 3, 2012.) Plainly, Mr. Bard’s need to encroach upon the coastal buffer and setback is directly tied to his need to set back his residence from the street to comply with the

front yard setback regulation of the Jamestown Zoning Ordinance. At the time of consideration of Mr. Bard's application by CRMC, the Zoning Board had rejected Mr. Bard's request for even partial relief from the thirty-foot setback requirement. The comments of several council members evidenced puzzlement and consternation over the action of the Zoning Board. (Tr. 100, 103-03, April 12, 2011.) Notably, CRMC expressly indicated its willingness to reconsider its decision in Mr. Bard's application, should he be granted front yard setback relief.<sup>5</sup>

All things considered, the Decision of this Court reversing the decision of the Zoning Board's denial of Mr. Bard's variance requests amounts to a change in circumstances sufficient to warrant reconsideration by the CRMC of the Plaintiff's permit application. See Johnston Ambulatory Surgical Associates, 755 A.2d 799.

### **Conclusion**

The Court finds that the decision of the Jamestown Zoning Board was arbitrary, in excess of its statutory authority, and clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. As a result, the Plaintiff's substantial rights were unduly prejudiced and the decision of the Zoning Board is reversed. With respect to the action of CRMC, this matter is remanded for reconsideration of the Plaintiff's application in light of this Court's Decision on the appeal from the decision of the Jamestown Zoning Board. Counsel shall submit the appropriate judgment for entry.

---

<sup>5</sup> "The Council bases this denial on the application request presently before it. In the event the applicant were to receive full relief from the Town of Jamestown zoning requirements or were to make a substantial modification to the size of the house, the Council could reconsider this matter." (CRMC Dec. ¶ 56, Feb. 3, 2012.)





**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

---

**TITLE OF CASE:** Marc Bard v. Zoning Board of Review of the Town of Jamestown, et al.; Marc Bard v. Coastal Resources Management Council, et al.

**CASE NO:** C.A. No. NC 08-0575; C.A. No. NC 12-0104

**COURT:** Newport County Superior Court

**DATE DECISION FILED:** February 10, 2014

**JUSTICE/MAGISTRATE:** Gallo, J.

**ATTORNEYS:**

For Plaintiff: Joseph DeAngelis, Esq.

For Defendant: Wyatt A. Brochu, Esq.; Brian A. Goldman, Esq.