STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: June 21, 2017)

MARSHA FISKE	:	
	:	
	:	
V.	:	**C.A. No. WC-2010-0305**
	:	
TOWN OF WESTERLY BOARD OF ASSESSMENT REVIEW	:	

Consolidated with

MARSHA FISKE	:	
	:	
	:	
V.	:	**C.A. No. WC-2007-0853**
	:	
TOWN OF WESTERLY BOARD OF ASSESSMENT REVIEW	:	

Consolidated with

MARSHA FISKE	:	
	:	
	:	
V.	:	**C.A. No. WC-2011-0468**
	:	
TOWN OF WESTERLY BOARD OF ASSESSMENT REVIEW	:	

DECISION

K. RODGERS, J. This matter returns to the Superior Court on three consolidated appeals from decisions of the Town of Westerly's Board of Assessment Review (the Board). The Appellant, Marsha Fiske (Appellant), owns real estate in the Town of Westerly (the Town) that is classified as farmland pursuant to the Rhode Island Farm,

Forest and Open Space (FFOS) Act, codified at G.L. 1956 §§ 44-27-1 et seq. (the Act). The thrust of Appellant's various appeals to this Court challenge the tax assessment attributed to the portion of her real estate that is not designated as farmland.

As discussed in a prior decision of this Court, Fiske v. Town of Westerly Board of Tax Assessment, No. WC 2006-0246, 2009 WL 3552788 (R.I. Super. Oct. 28, 2009) (Thompson, J.) (Fiske I), as well as herein, this Court has jurisdiction over this matter pursuant to § 44-27-6. For the reasons that follow, this Court modifies the Board's decisions on two of the three appeals and remands the third appeal to the Board for further proceedings consistent with this Decision.

I

Facts

Appellant purchased the subject property in 2002, which is located at 55 Watch Hill Road and designated as Tax Assessor's Plat 127, Lot 2. The lot consists of approximately 435,000 square feet, or roughly ten acres, that fronts Watch Hill Road to the east and is bordered on the west by the Pawcatuck River.

The property contains a three-story residence originally built in 1790 which has been renovated as recently as 2005; the residence measures approximately 5000 square feet. With the exception of a six-by-fourteen foot kitchen expansion with no corresponding foundation underneath, the original footprint of the residence has remained unchanged. The residence lies roughly 300 to 400 feet inland from the Pawcatuck River and is separated from the water by a heavy stand of trees and a large section of grassland. The heavy tree stand limits views of the river from the residence in the spring, summer and fall months due to foliage.

From 2002 to 2005, Appellant and her husband Eric Fiske (Mr. Fiske or, together with Appellant, the Fiskes) undertook certain interior and exterior renovations to the house, including replacing siding, windows, doors, roofing materials and decking, at a cost of approximately $400,000. See Tr. 8-10, 146, Dec. 17, 2009. A swimming pool was constructed on the property in 2004 in the general vicinity of the residence. There is a detached garage and a small outbuilding located on the property.

The shoreline of Appellant's property along the Pawcatuck River is rocky and provides limited recreational value. The water in that area of the Pawcatuck River is shallow and of poor quality, thus prohibiting fishing, bathing and other recreational activities such as shellfishing. The shoreline is rocky and sloped, restricting access to the water. However, Appellant owns a dock on the shore at the southern tip of the property, which is approximately 800 to 1000 feet from the residence, allowing access to deep sea commercial fishing. No recreational fishing takes place off the dock. The dock is shared with a neighbor who has an easement right to its use.

Farming activity occurs on the property, including pasturing sheep, maintaining an apiary for honey bees, harvesting lumber, and growing a stand of Christmas trees. See Tr. 24, 26-27, 58, Dec. 17, 2009.

Since June 2, 2004, the property has been designated by the Department of Environmental Management (DEM) as farmland under the FFOS Act. In accordance with § 44-27-3(c)(1), the Town thereafter classified Appellant's property as farmland for the 2004 tax year, effectively reducing the tax on 9.32 acres of the Appellant's 9.92 acres of property. The issues before this Court do not involve the designation of Appellant's

property as farmland, but rather the amount of the tax assessments in various calendar years applied to the remainder of Appellant's property.

II

Travel of the Case

A

The 2004 Assessment

As of December 31, 2003, Charles E. Vacca (Vacca), Westerly's Tax Assessor, assessed the total property value at $2,212,300, valuing the land at $1,513,900 and the buildings at $698,400. For tax year 2004,[1] based upon the FFOS classification, Vacca adjusted the property assessment. Specifically, a 30,000 square foot area around the house was carved out pursuant to DEM regulations implementing the Act's requirement that a "house site" be designated and valued separately from the farmland.[2] Vacca valued the 30,000 square foot house site at $1,225,800, retained the $698,400 assessment for the buildings, and valued the remaining 9.32 acres of farmland at $3300, for a total assessment of $1,927,500. The building valuation was determined by an adjusted replacement cost base rate of between $154.19 and $192.76 per square foot. According

[1] Because Westerly conducts its town-wide revaluations every three years, the Town's assessment as of December 31, 2003 carried forward to the assessment as of December 31, 2004, and until the next update in 2006. See § 44-5-11.6(2)(i). A town-wide revaluation of real estate was conducted in 2009. Id.

[2] Rules and Regulations for Implementation of the FFOS Act, R.I. Admin. Code 25-3-21:5(k) defines "farmland" as "any tract(s) of land, exclusive of house site" that meets any of a number of conditions outlined therein. "House site" is further defined therein as "the zoned lot size or one acre, whichever is smaller, containing a house, and land under and surrounding dwellings or devoted to developed facilities, such as tennis courts, pools, etc., related to the use of the residence." R.I. Admin. Code 25-3-21:5(n). The Appellant's property is zoned R-30, thereby requiring 30,000 square feet of land for its "house site."

to Vacca, Appellant received a tax valuation benefit of $284,800 for tax year 2004 by classifying the property as farmland under the FFOS Act.

Appellant appealed the 2004 assessment of the house site and buildings, first to Vacca on October 27, 2005, and then to the Board on December 29, 2005, arguing that the house site and the buildings were taxed disproportionately compared to neighboring properties. Vacca refused to make any change to the 2004 assessment. When the Fiskes appeared in front of the Board, they were unrepresented by counsel and submitted several documents to support their appeal, including the tax cards of thirteen properties that the Fiskes believed were comparable sites, letters of correspondence between the Fiskes and the Town's tax personnel, and maps showing the location of all other FFOS properties in Westerly. Each of the other FFOS properties identified by the Fiskes had building assessments based on an $84 per square foot unadjusted replacement cost base rate.

On February 16, 2006, the Board issued its decision, fixing the value of Appellant's house site at $1,001,400[3] and the value of the buildings at $716,100. See Fiske I, at *1.

[3]It appears the Appellant misstates what this value reflects. In her brief to this Court on the instant consolidated appeals, she states that the Board had reduced the Fiskes' total land assessment from $1,229,100 ($1,225,800 for the house site and $3300 for the remainder of the 9.32 acres of farmland) to $1,001,400, Appellant's Br. at 6. However, this Court's earlier decision, Thompson, J. presiding, cites this value as reflecting the house site only. Fiske I, at *1. This discrepancy does not affect the ultimate outcome of these consolidated cases.

B

Fiske I

Unsatisfied with the Board's February 16, 2006 decision, on April 19, 2006, Appellant filed an appeal to this Court, Thompson, J. presiding. See Complaint, Fiske v. Town of Westerly Board of Tax Assessment, No. WC 2006-0246.

The parties requested and were permitted to supplement the record on appeal to this Court.[4] Appellant filed a formal appraisal by Raymond Lueder (Lueder), who offered an assessment of a 49,199 square foot undeveloped lot to serve as the house site. Fiske I, at *2. Lueder's appraisal reviewed five comparable sales that all fell within a range of $230,000 to $310,000, including one comparable sale of a property "with a distant or limited water view and because it was located relative (sic) far away from the beaches." Id. Lueder ultimately concluded, after making adjustments for location, view, access to public utilities, etc., that the proper appraisal for the Appellant's 49,199 square foot house site was $275,000. Id.

In response, the Board submitted materials including a "Statement of Fact" which purported to represent the facts and rationales upon which Vacca relied in making his determination. Id. Vacca explained in the "Statement of Fact" that he interpreted the law to require "'the assessor to assess the base lot[5] at a fair and full cash value, excluding land used for farming purposes, . . . [and] to recognize that the amenities of the base lot still exist; extensive water views and access to the river for boating and bathing.'" Id. (quoting

[4]The technical failure in recording the proceedings below, as demonstrated by a blank audiotape, precipitated the need to supplement the record on appeal in order to provide the Court with a record upon which to base its review of the 2004 tax assessment. See Fiske I, at *2.

[5] Vacca's Statement of Fact and subsequent testimony before the Board on remand, as well as the Court in Fiske I, use "base lot" and "house site" interchangeably.

Statement of Fact at 1). Vacca further stated that he "did not define a [house site] 'by a metes and bounds description . . . but rather by its inherent rights similar to all other waterfront properties. The open space designation does not preclude the owner from enjoying the extensive water views, access to deep water for bathing and boating, or the privacy that nearly ten acres affords.'" Id. (citing Statement of Fact at 2). Vacca offered that he valued Appellant's house site using the same guidelines as another FFOS-designated, waterfront property located at 7 Niantic Avenue, to which he assigned the base lot in excess of $7,500,000. Id. The Board also asserted that Appellant had incorrectly brought the appeal under the FFOS appellate procedure of § 44-27-6, when it should have been brought under § 44-5-26, the general tax appeal statute, because the Appellant only challenged the house-site portion of the assessment and not the propriety of the assessment of the 9.32 acres of farmland.

i

Jurisdiction

As a threshold matter, the Court determined that Appellant's appeal from the Board's February 16, 2006 decision was properly brought pursuant § 44-27-6, which provides for a ninety-day appeal period under the FFOS Act, and rejected the Board's argument that the appeal was required to be filed within thirty days under § 44-5-26(b).[6] Fiske I, at *5. The Fiske I Court ruled as follows:

> "Were the Court to accept the Appellee's interpretation of § 44-27-6 as allowing appeals of a joint assessment only as to the FFOS portion of the assessment, the result would be a procedural quagmire. Appellants seeking to challenge a single assessment would be required to file two separate

[6] The thirty-day appeal period that the Board contends is applicable in these cases is set forth in the form which must be filed to properly perfect an appeal, the language of that form being specified in § 44-5-26(b).

> appeals, one within thirty days of the board's decision, and a second within ninety days. These appeals would then proceed, one based on the de novo trial type hearing provided for in § 44-5-29 ("the petition is subject to all provisions of law as to time for pleading, assignment day, and all other incidents applicable to an action at law originally commenced in the superior court"), including even the possibility of a jury under § 44-5-30. Meanwhile, the twin appeal would proceed through the Superior Court under the traditional judicial review standard applicable to administrative appeals and limited to the evidence contained in the record under § 44-27-6. However, it is only through the legal fiction created by the FFOS that the farmland exists independently from the house-site, for all other purposes, the farmland and the house-site are one parcel. By acquiring an FFOS designation, a homeowner forfeits the right to develop the FFOS designated land; and the owner cannot sell the house-site without the farmland or vice-versa. Although the farmland and the house-site may be assessed separately, the lot nevertheless remains one legally recognized parcel. Further, a twin appeal procedure requires the owner of one parcel of land to potentially bear the burden and expense associated with appealing two tax assessments. Requiring an owner to proceed with two separate tax appeals from the assessment of one parcel places an undue burden on the owner, and the Court will not ascribe such a nonsensical intent to our General Assembly. When construing statutes, this Court will not interpret statutory schemes in such a manner as to reach an absurd result. See Peck v. Jonathan Michael Bldrs., Inc., 940 A.2d 640, 643 (R.I. 2008)." Id. at * 4.

The Court concluded that when property which includes "both FFOS and non-FFOS designations is assessed simultaneously, appeals seeking to challenge that assessment are properly brought under § 44-27-6." Id. at *5.

ii

Sufficiency of Evidence

The Court in Fiske I additionally found that the Board failed to present the Court with competent evidence to establish the procedures and methodology upon which Vacca made his decision, and that the Statement of Fact merely contained "general statements of the law governing tax assessors coupled with general principles of assessment." Id. at *6. On the other hand, this Court held that Appellant presented substantial evidence upon

which her requested relief could be granted, including numerous tax cards of properties she believed to be comparable, maps and charts of the locations of those properties, and substantial evidence that her property was assessed far in excess of those properties. Id. at *7.

iii

Directive on Remand

Finally, after engaging in a lengthy analysis of the FFOS Act and tax assessments, see id. at *7-10, the Court held in Fiske I that Vacca and the Board made an error of law when they ignored the FFOS classification of the land surrounding the house site. The Court concluded that the Board's approach entirely contradicted the purposes and language of the Act, which was to provide lower tax assessments in order to encourage the preservation of farm, forest and open space lands. Id. at *10. Thus, the Court ordered the case to be remanded to the Board to determine a new assessment with specific directions that the Board may not categorize the house site as waterfront property, that it "may consider the property's sweeping water views," and that "the best manner to conceive of the Fiskes' ownership of the farmland with river frontage is as an easement for water access." Id. at *11.

C

Hearing and Decision on Remand

The Board held a hearing on remand on December 17, 2009, at which Mr. Fiske again testified on behalf of Appellant. Mr. Fiske presented a list summarizing the assessed land values of twelve 30,000 square foot house sites along Watch Hill Road, ranging from $101,400 to $210,600 as of 2003. (WC 2010-0305 Appellant's App. at 67.)

On the issue of the buildings assessment, Mr. Fiske submitted a document summarizing adjusted building base rates for eleven neighboring waterfront properties ranging from $101.61 to $132.95 per square foot. (WC 2010-0305 Appellant's App. at 77.) Mr. Fiske also presented his homeowner's insurance policy in effect from May 5, 2003 to May 5, 2004, which set a guaranteed house replacement cost at $583,918 with a replacement value estimated at $139.03 per square foot. (WC 2010-0305 Appellant's App. at 71.)

With regard to the house site assessment, Appellant presented the testimony and report of a local real estate broker and appraiser, Stephen O. McAndrew (McAndrew). McAndrew's appraisal determined the value of a 30,000 square foot house site on Appellant's property in 2003 was $285,000, based upon three comparable sales in 2003 with corresponding adjustments as noted. (WC 2010-0305 Appellant's App. at 108.) McAndrew's appraisal took into consideration the Court's directive in Fiske I that the house site was to be considered as an interior rather than a waterfront site, but also incorporated the property's waterfront-like attributes; namely, its waterview and dock access. He visited the property and testified that "[i]t certainly has a view, but this is not an expansive view by any stretch of the imagination." Tr. 100, Dec. 17, 2009. McAndrew reviewed the April 2003 sale of a property located at 43 Watch Hill Road that had many similar qualities to that of the Appellant's property. The property at 43 Watch Hill Road has a water view, water access via a right-of-way to Mastuxet Cove on the Pawcatuck River where the owners keep a boat, and is situated a few hundred feet northeast of the Appellant's property. Vacca had assessed a 30,000 square foot house site at 43 Watch Hill Road at only $183,600. Id. at 102. Appellant's house site was assessed

far in excess of each of the comparable sites identified by McAndrew and in excess of the 30,000 square foot house site at 43 Watch Hill Road.

McAndrew also considered other properties in the area, testifying that many of them contained strips of land granting access to docks, each of which granted "access far superior to the subject's access" and "views that are far superior." Id. at 103. While not using these properties as "comparable sales" because they were not the subject of a recent sales transaction, McAndrew commented that the assessments of each demonstrated that water view and water access via these strips of land add between 8% and 14% to the value of the land. He concluded that it was reasonable, then, that Appellant's house site assessment would reflect a 10% increase in value based upon the water view and dock access. By comparison, his appraisal of $285,000 for Appellant's house site far exceeds a 10% increase in value from the $183,000 house site assessment at 43 Watch Hill Road. Id. at 102-104.

Vacca submitted his own appraisal that expressly rejected the directive on remand to consider the property as not being waterfront but as having "an easement for water access." See Fiske I, at *11. Vacca again decided to determine the assessment based on the highest and best use of the entire property, calculating the market value of the 30,000 square foot house site to be $998,000 as of 2003. In his appraisal, Vacca noted that he considered the use as a residential home surrounded by farmland, but that the property could be marketed as waterfront property "with an inground pool, detached garage, deep water dock, spectacular views, and water access." (WC 2010-0305 Appellant's App. at 141.) Vacca went on to remark that, considering the best use of the property, a potential buyer could remove the property from the FFOS program and further subdivide the

property into additional building lots. Specifically, Vacca considered that "[t]he subject's inclusion in the [FFOS] Program in no way diminishes the appeal of the property to the market for buyers of waterfront homes and the related boating, bathing, and view amenities." Id. Vacca utilized five sales from January 1, 2001 to July 30, 2004, and the corresponding assessments of the 30,000 square foot house sites on each, to conclude that Appellant's house site is valued at between $960,000 and $1,195,000." (WC 2010-0305 Appellant's App. at 152.) Additionally, he relied upon five properties on Watch Hill Road, and the corresponding assessments of the 30,000 square foot house sites on each, to fine tune his assessment of Appellant's house site at $998,000. (WC 2010-0305 Appellant's App. at 152-53.)

Vacca testified before the Board that he did not think the Legislators intended to draw a 30,000 square foot lot that did not encompass things that might have fallen within the farmland. Tr. 65-66, Dec. 17, 2009. He rejected the notion that, as Tax Assessor, he was required to draw circles or squares in a piece of property to identify what is included in a 30,000 square foot house site. Id. Finally, when asked whether he appraised the property as having an easement for water access, Vacca responded, "I would not have appraised it as an easement. They own the property . . . [the Fiskes] have every right to use their property as they see fit. They can remove that property from Farm, Forest and Open Space in a heartbeat." Id. at 142-144.

In December of 2009, members of the Board viewed the property themselves, determining that the property's water views were powerful and that the water views remained "significant" even in other months of the year. See Mins. of Board Meeting at 2, Mar. 17, 2010; Appellant's App. at 155. The Board thereafter concluded that Vacca's

assessment was reasonable and upheld the assessment. Appellant was notified of the Board's decision in a letter dated March 19, 2010. Appellant appealed the decision to this Court on May 7, 2010. (WC 2010-0305.)

D

The 2006 Assessment

Appellant also appealed the $2,195,200 assessment as of December 31, 2006, which included a house site assessment of $1,448,000. The Board heard that appeal on November 7, 2007, prior to this Court's decision of October 28, 2009 in Fiske I.

At the November 7, 2007 hearing, Appellant, through counsel, presented similar documents as were provided at the initial hearing before the Board regarding the 2004 assessment, including tax assessor cards for other residential properties located on Tax Assessor's Plat 127. Additionally, an updated appraisal by Lueder was offered, demonstrating that the 49,199 square foot house site on Appellant's property could not extend to the water front and was valued at $330,000 as of December 31, 2006. (WC 2007-0853 Appellant's App. at 414.) At the November 7, 2007 hearing before the Board, Appellant's counsel also offered evidence of property located at 43 Watch Hill Road, the 30,000 square foot portion of which was assessed at $250,000 as of December 31, 2006, and the appraisal of the residential building thereon was assessed at $135 per square foot.[7]

Without any opposing evidence introduced by Vacca, the Board voted to deny Appellant's appeal. The Board's letter to Appellant dated November 27, 2007 claimed to

[7]This is the same property which the Board was offered evidence at the December 2009 remand hearing discussed supra, but which appraisal thereon was $183,000 for the 30,000 square foot house site as of December 31, 2003, rather than $250,000 as of December 31, 2006.

have "reviewed sales, comparable assessments, neighborhoods, and any other factors pertinent to [the] assessment," but did not include what those comparable sites were or how they were weighed against Appellant's property. (WC 2007-0853 Appellant's App. at 468.) Appellant appealed the Board's decision to this Court on December 24, 2007. (WC 2007-0853.)

E

The 2009 Assessment

The final assessment at issue in this case is the December 31, 2009 assessment in which Vacca appraised Appellant's property at $1,885,200, valuing the 30,000 square foot house lot at $1,207,500[8] and the building and amenities at $674,300. In the May 26, 2011 hearing before the Board, Appellant again, through Mr. Fiske and counsel, introduced much of the same evidence and testimony, including McAndrew who submitted a new appraisal due to changing market values which valued the 30,000 square foot house site at $550,000. As directed by the Court in Fiske I, McAndrew again appraised the 30,000 square foot house site as having a water view and water access, but not as waterfront. McAndrew testified that he found only one comparable sale in the area on Timothy Drive, a waterfront property on the Pawcatuck River with the same R-30 zoning designation with excellent water views. That property was assessed at $550,000 and sold for $650,000. McAndrew referenced in his testimony three other properties: the $270,000 assessment of the 30,000 square foot house site at 43 Watch Hill Road, which

[8]Appellant's brief references the total land assessment of $1,210,900, see Appellant's Br. at 14, but the Tax Assessor card clearly indicates the breakdown of that land as the 30,000 square foot area valued at $1,207,500; a one-acre area valued at $2000; a 2.25-acre area valued at $700; and a six-acre area valued at $700. (WC 2011-0468 Appellant's App. at 334.) Among these land valuations, it is only the house site assessment that is at issue.

he noted as being an inland lot, having a miniscule view but also having an easement to the Pawcatuck River over an abutting property, Tr. 58-59, May 26, 2011; 53 Watch Hill Road, which is an inland property with seasonal water views from the upper stories of the house and no water access, which had an assessed value of the 30,000 square foot house site of $277,000, Id. at 60; and 233 Watch Hill Road, which is waterfront, has dock access to a cove in the Pawcatuck River and a superior water view, and has a total assessed value of $721,600. Id. at 60-61.

In the course of the May 26, 2011 hearing, Vacca and the Board were highly critical of the Fiskes' refusal to allow Vacca or his staff access to the subject property for valuation purposes. Id. at 21-28. However, Mr. Fiske testified that Vacca's colleague, David Thompson, had been to the subject property in 2005, subsequent to all the Fiskes' renovations, and that there were no further renovations or improvements to the property since 2005. Id. at 42.

The Board unanimously denied the appeal, stating at its June 8, 2011 decision-making meeting that the Board had reviewed comparable properties and found that the Appellant's assessment was in line with those of surrounding water property owners. Tr. 3, June 8, 2011. Board members also stated as reasons for denying the appeal that Appellant did not testify on her behalf and instead relied on her husband to testify and that the Assessor has been denied access to the house since 2005. Id. at 2-3. The Board sent a letter to the Appellant on June 17, 2011, notifying her of its decision and stating again that it had "reviewed sales, comparable assessments, neighborhoods, and any other factors pertinent to [the] easement," but without including any specific information of

what was reviewed. (WC 2011-0468, Appellant's App. at 358.) Appellant appealed that decision on July 13, 2011. (WC 2011-0468.)

III

Standard of Review

This Court's review of the Board's decisions is governed by § 44-27-6(c), which provides, in pertinent part, that:

> "The court shall not substitute its judgment for that of the board of assessment review, or city or town council, as to the weight of the evidence on question of fact. The court may affirm the decision of the board of assessment review, or city or town council, 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 board of assessment review, or city or town council, by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Id.

As this standard of review is analogous to the standard applied by this Court in reviewing administrative agency decisions, see Munroe v. Town of East Greenwich, 733 A.2d 703, 705 (R.I. 1999), this Court "'must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" Salve Regina Coll. v. Zoning Bd. of Review of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). The term "[s]ubstantial evidence" is defined as "'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" Lischio v. Zoning Bd. of

Review of N. Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). '"[A]n administrative decision can be vacated if it is clearly erroneous in view of the reliable, probative, and substantial evidence contained in the whole record.'" Auto Body Ass'n of R.I. v. State Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I. 2010) (quoting Costa v. Registrar of Motor Vehicles, 543 A.2d 1307, 1309 (R.I. 1988)).

However, this Court reviews determinations of law de novo; determinations of law "are not binding upon [the Court] and may be freely reviewed to determine the relevant law and its applicability to the facts presented in the record." Dep't of Envtl. Mgmt. v. Labor Relations Bd., 799 A.2d 274, 277 (R.I. 2002) (citing Carmody v. R.I. Conflict of Interest Comm'n, 509 A.2d 453, 458 (R.I. 1986)). Statutory construction is subject to de novo review. Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009). In engaging in statutory construction, this Court "must give effect to every word and every phrase in a statute according to its plain and ordinary meaning whenever it is possible and/or rational to do so." State v. Peterson, 722 A.2d 259, 265 (R.I. 1998). Additionally, this Court must "strive to adopt a construction of a statute that avoids an absurd or unjust result." Berman v. Sitrin, 991 A.2d 1038, 1049 (R.I. 2010).

IV

Analysis

Appellant urges this Court to reverse the decisions of the Board that denied her appeals from the assessments dated December 31, 2004, December 31, 2006, and December 31, 2009. Specifically, Appellant seeks an entry of judgment reducing the 2004 assessment of the house site to $285,000 and the building assessment to

$518,065.15, and reducing the 2009 assessment of the house site to $550,000. Appellant further asks this Court to remand her appeal of the 2006 assessment to the Board to consider evidence of value of the 30,000 square foot house lot in light of the Court's October 28, 2009 decision in Fiske I.[9] Appellant asserts that she is entitled to such judgments because the Board defiantly refused to heed the directive of this Court on remand and made little or no findings of fact to support its decisions, and because its various decisions were in contravention of the weight of the evidence presented at each hearing. Thus, Appellant asserts that the Board's decisions are affected by errors of law and are clearly erroneous in view of the substantial evidence of the record.

The Board responds by asserting many of the same arguments raised in the previous appeal to this Court. The Board reiterates that this Court lacks the authority to review the appeals from the 2004 and 2006 assessments because they were untimely filed.[10] It further asserts that the Board's decisions were not legally erroneous; in fact, the Board specifically takes issue with the legal interpretation of the FFOS Act discussed in Fiske I and the conclusion that Vacca's assessment should have considered the

[9] Because the appeal from the 2006 assessment was heard by the Board and thereafter filed with this Court prior to the Fiske I decision, Appellant did not introduce evidence of, and the Board did not consider, the house site assessment based upon a 30,000 square foot area (as opposed to a 49,199 square foot area considered by Lueder) that had a water view and easement-like water access, and not as waterfront.

[10] The Board appears to concede that the appeal from the 2009 assessment was filed within thirty days and therefore was timely, whether governed by § 44-27-6 or § 44-5-26(b). See the Board's Br. at 6-9. With respect to the appeal from the 2006 assessment, the Board misstates the travel of that case, erroneously relying on dates from the initial appeal from the 2004 assessment (WC 2006-0246) as the dates of the Board's decision (February 16, 2006) and Appellant's appeal therefrom (April 19, 2006). See Appellant's Br. at 7. The Board's decision on the 2006 assessment was issued by letter to Appellant on November 27, 2007, and an appeal was taken within thirty days, on December 24, 2007. Accordingly, it is only the 2004 assessment that could possibly be time barred under the Board's theory.

Appellant's property to have an easement to the water. Finally, the Board argues that each of the assessments was correctly valued based on comparable properties considered by Vacca and the Board.

A

Law of the Case

As a threshold matter, this Court must address the law of the case and this Court's earlier decision remanding the 2004 assessment to the Board.

The law of the case doctrine holds that, "'after a judge has decided an interlocutory matter in a pending suit, a second judge, confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling.'" Paolella v. Radiologic Leasing Assocs., 769 A.2d 596, 599 (R.I. 2001) (quoting Commercial Union Ins. Co. v. Pelchat, 727 A.2d 676, 683 (R.I. 1999)). The purpose of the law of the case doctrine is to ensure "the stability of decisions and avoid[ ] unseemly contests between judges that could result in a loss of public confidence in the judiciary." Commercial Union Ins. Co., 727 A.2d at 683. The law of the case doctrine, however, is a flexible rule that may be disregarded when a subsequent ruling can be based on an expanded record. Goodman v. Turner, 512 A.2d 861, 864 (R.I. 1986). Moreover, the doctrine should not be invoked to "perpetuate a clearly erroneous earlier ruling." Paolella, 769 A.2d at 599; see also Chavers v. Fleet Bank (RI), N.A., 844 A.2d 666, 677–78 (R.I. 2004).

1

Jurisdiction

First, this Court finds that the Court's earlier decision concluding that Appellant's appeal from the February 16, 2006 is governed by § 44-27-6 and not § 44-5-26(b) is not clearly erroneous. Moreover, there is no expanded record in these consolidated appeals that would lead this Court to conclude any differently than the Court did in Fiske I on the issue of jurisdiction.

The general rule for appealing a tax assessment to the Superior Court is that, "except for cases brought in equity, the only avenue of appeal from an assessment of taxes upon a ratable estate is to file an appeal pursuant to § 44–5–26." Nunes v. Marino, 707 A.2d 1239, 1244 (R.I. 1998) (citing Wickes Asset Mgmt., Inc. v. Dupuis, 679 A.2d 314, 322 (R.I. 1996)). However, the General Assembly provided an exception to that general rule when it enacted the FFOS Act. The FFOS Act provides the following remedial procedure for property classified as farmland:

> "(f) Any landowner aggrieved by: (1) the cancellation of a designation [as farmland] under subsection (b) of this section or the denial of an application, filed in accordance with the provisions of subsections (c) and (d) of this section, by the assessor of a city or town for a classification of land as farmland; or (2) the use value assessment placed on land classified as farmland by the assessor; has the right to file an appeal within ninety (90) days of receiving notice, in writing, of the denial or the use value assessment with the board of assessment review of the city or town. . . .
>
> "(g)(2) . . . Decisions of the board of assessment review, or city or town council, may be appealed to the superior court pursuant to § 44-27-6." Sec. 44-27-3.
>
> Section 44-27-6, in turn, provides that:
>
> "Any person or persons jointly or severally aggrieved by a decision of the board of assessment review, or city or town council, may appeal to the superior court for the county in which the municipality is situated by filing

> a complaint stating the reasons of appeal within ninety (90) days after the decision has been filed in the office of the board of assessment review, or city or town council." Sec. 44-27-6 (emphasis added).
>
> Finally, § 44-27-12 reads in pertinent part:
>
> "The board of assessment review . . . shall hear and render a judgment on all appeals of:
>
> . . .
>
> "(4) Landowners aggrieved by the use value assessment set by the local assessor[.]" Sec. 44-27-12.

The Rhode Island Supreme Court has determined that § 44-27-6 allows appeals to be taken from "decisions made by a board of assessment review concerning the cancellation of the previous designation of property as farmland, § 44–27–3; forest land, § 44–27–4; or open space land, § 44–27–5, or the use-value assessment placed on land classified as either farmland, forest land, or open-space land." Nunes, 707 A.2d at 1244 (citing Denault v. Fitzgerald, 593 A.2d 453, 455 (R.I. 1991)).

Here, Appellant appealed the Town's assessment of her property to the Board in accordance with § 44-27-3(f)(2) and thereafter to this Court in accordance with § 44-27-6, taking issue specifically with the assessment in light of the property's FFOS designation. This case fits squarely into the Nunes Court's articulation of the types of board decisions that should be appealed through the FFOS Act, such as decisions on "the use-value assessment placed on land classified as either farmland, forest land, or open-space land." Nunes, 707 A.2d at 1244. But for the classification under the FFOS, the 30,000 square foot house site is not carved out of Appellant's property in accordance with R.I. Admin. Code 25-3-21:5(n) and assessed separate and apart from the farmland. Thus, in challenging the Board's assessment of the house site portion of the FFOS-

designated parcel, Appellant is appealing the use value assessment applied to her land as set by Vacca. See Nunes, 707 A.2d at 1244; see also § 44-27-3(f)(2), § 44-27-12(4).[11]

The Board's contention that § 44-5-26 provides the exclusive procedure for any appeal from a tax assessment simply ignores the clear language of the FFOS Act. Additionally, the Board's reliance on Nunes as requiring Appellant to proceed under § 44-5-26 rather than § 44-27-6 is misplaced. In Nunes, the taxpayer had voluntarily removed their property from the FFOS program but thereafter contested the imposition of a land use change tax under § 44-5-39. The Supreme Court concluded that the appeals process provided in the FFOS Act was no longer applicable to the taxpayer's property given its removal from the program. Nunes, 707 A.2d at 1244.

The Court's prior analysis of appealing the assessment of a house site under a separate statute, § 44-5-26, from the rest of Appellant's property as requiring different appellate procedures leading to "a procedural quagmire" is also persuasive. Fiske I, at *4-5. Indeed, as noted in the Court's earlier decision and quoted supra at 7-8, it is that procedural quagmire and absurd result that the Court is constrained to avoid. See Fiske I, at *4 (citing Peck, 940 A.2d at 643). This Court reaffirms the decision that Appellant's appeal was properly brought under § 44-27-6 for all the reasons articulated in Fiske I, which serves as the law of the case. See id.

2

Compliance With Remand Directive

These consolidated appeals also raise the same issue before the Court in Fiske I regarding whether Vacca committed an error in assessing Appellant's house site at its

[11] Notably, § 44-27-12(4) does not qualify the "use value assessment" as applicable to only the farmland portion of land. Cf. § 44-27-3(f)(2).

best and highest fair market value. The Court in Fiske I crafted a directive on remand to the Board that the house site was to be considered as having easement-like access to the water rather than as waterfront property as Vacca had been treating it. Appellant contends that that directive was defiantly and improperly disregarded by Vacca and the Board on remand as well as in the 2006 and 2009 assessments. The Board responds that Vacca properly treated the house site differently from the land designated as farmland because the house site is excepted from such designation and therefore does not benefit from the tax reduction afforded by the FFOS designation.

This Court concludes that the analysis in Fiske I and the Court's directive on remand were not clearly erroneous. Additionally, as with the jurisdictional issue, there is no expanded record in these consolidated appeals that would lead this Court to conclude any differently than this Court did in Fiske I . Accordingly, it serves as law of the case.

In Fiske I, the Court engaged in an extensive analysis regarding whether Vacca's methodology of transferring the value of the total site to the house site and taxing the house site as waterfront property defeated the purpose of the FFOS Act. See generally Fiske I, at *7-10. It is not necessary for this Court to reiterate that entire analysis here. The pertinent portion of the Court's decision, with which this Court entirely agrees, sought to reconcile the competing interests between taxing land based on the development potential of the parcel, which is the standard practice for valuing land for taxation,[12] and promoting the preservation of farm, forest, and open space land. After

[12] Importantly, as was pointed out in Fiske I, § 44-5-12 provides:

> "(a) All real property subject to taxation shall be assessed at its full and fair cash value, or at a uniform percentage of its value, not to exceed one

reciting the policy objectives behind the FFOS Act, as set forth in § 44-27-1,[13] the Court in Fiske I reasoned as follows on that issue:

> "The FFOS Act seeks to balance these competing concerns. First, the Act limits a tax assessor's ability to consider any aspects of a property's use other than the designated FFOS category. Section 44-5-12(a)(2). This is accomplished by limiting the size of the area an assessor may exclude from the FFOS land, and by limiting the way the use is categorized. Thus, for example, an assessor may consider a property's agricultural value only if it enjoys a farmland classification. Then, in recognition that the FFOS designations might severely hamper municipalities' ability to raise tax revenue, house-sites sized the smaller of a zoned lot size or 30,000 square feet are permitted to be carved out. These house-sites can be freely taxed on their residential use. In essence, the FFOS Act works to reduce the pressures of development by shrinking the size and scope of land that is subject to normal tax burdens. Thus, because the goal of the FFOS Act is to 'prevent the forced conversion of farm, forest, and open space land to more intensive uses as the result of economic pressures caused by the assessment for purposes of property

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> hundred percent (100%), to be determined by the assessors in each town or city; provided, that:
> . . .
> (2) In assessing real estate that is classified as farm land, forest, or open space land in accordance with chapter 27 of this title, the assessors shall consider no factors in determining the full and fair cash value of the real estate other than those that relate to that use without regard to neighborhood land use of a more intensive nature[.]" Sec. 44-5-12 (emphasis added).

[13]Entitled "Legislative declaration," that section provides:

> "(1) That it is in the public interest to encourage the preservation of farm, forest, and open space land in order to maintain a readily available source of food and farm products close to the metropolitan areas of the state, to conserve the state's natural resources, and to provide for the welfare and happiness of the inhabitants of the state.
> "(2) That it is in the public interest to prevent the forced conversion of farm, forest, and open space land to more intensive uses as the result of economic pressures caused by the assessment for purposes of property taxation at values incompatible with their preservation as farm, forest, and open space land.
> "(3) That the necessity in the public interest of the enactment of the provisions of this chapter is a matter of legislative determination." Sec. 44-27-1 (emphasis added).

> taxation at values incompatible with their preservation,' the FFOS Act represents an attempt to reduce the marginal difference between a property's current use as agricultural land and its potential developmental use. Section 44-27-1(2)." Fiske I, at *10.

Thus, the Court decided that

> "Vacca's assessment method of transferring the value lost in the farmland to the house-site undermines and frustrates the purposes of the FFOS. This method reduces or eliminates the tax benefits the legislature sought to provide to incentivize the preservation of open space. In obtaining an FFOS designation for her lands, Appellant forfeited the right to develop her land to its fullest extent, a right that prior to the designation constituted a portion of the property's value. The Town may not now tax her land as though she retained those rights." Id.

This Court agrees with the reasoning in Fiske I and concludes that in order to effectuate the purpose of the Act to preserve farm, forest, and open space land, the house site must be valued based on its actual use as a residence, considering certain attributes such as the view of the water during certain times of the year and the swimming pool, but the house cannot be assessed based upon the entire property's development potential. Additionally, as stated in Fiske I, because the farmland itself is waterfront and the house site cannot be considered "waterfront" property, an assessment should attribute the house site's access to the water, including the deep sea dock. The law of the case requires, and this Court agrees, that the most appropriate way to attribute water access to an inland property is to value the house site as if it had an easement to the waterfront, but not as waterfront property, as well as recognizing the seasonal waterviews enjoyed by the residence and scenery of house site.

B

Error of Law

Having concluded, then, that the law of the case requires that Appellant's house site must be valued based on its actual use as a residence, considering certain attributes such as the view of the water during certain times of the year and having easement-like access to the water, it follows that each of the assessments of the house site in 2004, 2006 and 2009, which assessed Appellant's house site based upon the highest and best use of the whole property, was affected by error of law.

Unquestionably, Vacca's assessments of the house site since 2004 have been based upon the developmental potential of Appellant's entire ten-acre parcel, notwithstanding the restrictions on development imposed by the FFOS designation. On remand after Fiske I, Vacca submitted the following to the Board at the December 17, 2009 hearing:

> "55 Watch Hill Road could be marketed as a waterfront property containing a 4,383-square-foot custom home . . . The potential buyer could then remove the property from the Program and further subdivide the parcel into additional building lots, or remain in the Program . . . The subject's inclusion in the Program in no way diminishes the appeal of the property to the market for buyers of waterfront homes and the related boating, bathing, and view amenities." (WC 2010-0305 Appellant's App. at 141) (emphasis added).

Vacca also testified that he did not assess the property as having an easement to the water, but instead assessed the house site as being waterfront property. Based on these factors, Vacca determined that "the highest and best use of the subject property would be at least three (3) building lots, one of which is improved with the current home." (WC 2010-0305 Appellant's App. at 145.)

The Board determined that Vacca's assessment was fair and reasonable and no change was warranted. Thus, the Board's decision to uphold Vacca's 2004 assessment also constituted clear error of law. In upholding Vacca's decision that the house site could be valued based on its potential as three building lots, the Board affirmed an assessment based exactly on factors which § 44-5-12(a)(2) prohibits—the development potential of the entire 435,000 square foot lot. To drive this point home, Vacca testified at the hearing that the Fiskes "have every right to use their property as they [see] fit. They can remove that property from [FFOS] in a heartbeat." Tr. 144, Dec. 17, 2009. That statement is exactly the type of valuation consideration that the FFOS designation is intended to prevent. Indeed, Vacca and the Board fail to recognize that the inclusion of Appellant's property in the FFOS program does diminish the fair value of the house site based on the restrictions imposed to continue to use the designated property as farm land for a period of years, or otherwise be subject to a substantial land use change tax. See § 44-5-39. In short, the full and fair value of the house site must take into consideration that Appellant forfeited the development potential by placing her property in the FFOS program. The assessments upheld by the Board did not take that into consideration but instead imposed an excessive assessment based upon the very development potential that Appellant no longer enjoys.

Finally, in the absence of clear legislative direction on how to value the house site separately from other FFOS-designated land, this Court is constrained to consider the valuation in light of the purposes of the Act. As mentioned above, the purpose of the Act is to "encourage the preservation of farm, forest, and open space land in order to maintain a readily available source of food and farm products" and "to prevent the forced

conversion of farm, forest, and open space land to more intensive uses as the result of economic pressures caused by the assessment for purposes of property taxation at values incompatible with their preservation[.]" Sec. 44-27-1(1)-(2). To allow an inflated assessment of the house site based on the development potential of the entire property runs afoul of the purpose of the FFOS Act. If the Appellant were bound by a tax assessment on the house site comparable to that of the house site without any FFOS designation, then she would likely feel the "economic pressures . . . of property taxation at values incompatible with their preservation," and might consider removing the property from the FFOS program. Id. at (2). This Court is unwilling to consider an interpretation of the statute so contrary to the clear purposes and intentions of the General Assembly.

Additionally, basing the house site as waterfront property contravenes the FFOS Act's recognition that the farmland portion of the property be assessed based upon its actual use. The land classified as farmland extends to the waterfront.[14] To assess the 30,000 square foot house site as waterfront as well fails to recognize that the waterfront farmland is restricted in its use, ignores the law of the case, and would place economic pressure on the Appellant that was sought to be avoided by preserving the farmland in the first instance.

The Board's approval of the 2006 and 2009 tax assessments suffers from the same error of law as the Board's decision on remand of the 2004 tax assessment. The value of

[14] Even accepting Vacca's contention that he is not required to identify a metes and bound description of a 30,000 square foot house lot, draw circles or squares within Appellant's property or otherwise, it cannot reasonably be claimed that any 30,000 square foot site which necessarily includes the residence, outbuilding, and swimming pool, see R.I. Admin. Code 25-3-21:5(m), extends through the classified farmland and to the waterfront. See, e.g., Appellant's App. at 407.

both the 2006 and 2009 house site assessments were built upon the earlier assessment in 2004 after the property was classified as farm land, having increased from $1,225,800 for the house site in 2004 to $1,448,000 in 2006, and then decreased to $1,207,500 in 2009 (likely due to market factors following the housing crisis that began in 2008). It stands to reason, then, that the rationale used by Vacca in 2004 carried over in 2006 and 2009.

Additionally, the Board fully acknowledged on appeal from the 2009 assessment that it considered comparable waterfront properties in denying the appeal and upholding the 2009 house site assessment. See Tr. 3, June 8, 2011.

For all these reasons, this Court concludes that the Board's decision on each of the appeals was affected by error of law in that each house site assessment was based upon the development potential of the entire property, as well as being considered waterfront property.

C

Substantial Evidence

In Fiske I, the Court found that the Board's decision was not supported by substantial evidence. This Court finds that decision persuasive and applicable in the instant appeals from the 2004 assessment, as well as from the 2009 assessment. The Board considered nearly identical information in the initial hearing that was the subject of Fiske I, again on remand from the 2004 assessment, and in the most recent appeal from the 2009 assessment, and reached the same conclusion in each, all without the support of substantial evidence.

The Board's decision on remand of the house site assessment and the building assessment in 2004 was not supported by substantial evidence. In addition to not

containing factual findings in the decision, as discussed infra, the Board, and Vacca, failed to articulate the value that was added by the water views and water access, the only two factors mentioned by the Board. See Mins. of Board Meeting at 2, Mar. 17, 2010; Appellant's App. at 155. Those factors are only a couple of the many factors that go into considerations of property valuation. "'Significant factors that affect comparability include location and character of the property, proximity in time of the comparable sale, and the use to which the property is put.'" Serzen v. Dir. of the Dep't of Envtl. Mgmt., 692 A.2d 671, 674 (R.I. 1997) (quoting Warwick Musical Theatre, Inc. v. State, 525 A.2d 905, 910 (R.I. 1987)). In the Board's discussion of its decision that took place on March 17, 2010, Board members only mentioned "powerful" water views from several vantage points in Appellant's house and yard and the home's "very close and relatively easy" water access, without mentioning any other factors that go into valuation of property. See Mins. of Board Meeting at 2, Mar. 17, 2010; Appellant's App. at 155.

Furthermore, in regard to those two factors that were mentioned, the Board visited the property in December and decided that the views present at that time of year were so significant that they supported Vacca's assessment, but failed to consider that the views were greatly diminished during other times of the year. There was also evidence in the record that the water access was limited by a rocky shoreline, making bathing and other recreational activities limited, if not impossible, yet the Board made no mention of how that weighed in the valuation. In any event, there was no discussion by the Board of how Appellant's seasonal waterview and/or easement-like water access compared to the waterfront properties Vacca utilized in crafting the house site assessment; Vacca's assessment was simply rubber-stamped. Id.

Similarly, the Board failed to make any findings or consider any evidence about the valuation of the buildings as presented by the Fiskes, including the homeowner's insurance policy with a replacement cost substantially lower than Vacca's assessment, and several comparable neighboring properties that were valued based on adjusted building base rates significantly below that attributed to the Appellant's property. Without evidence to contradict the Appellant's asserted valuation, the Board nonetheless affirmed Vacca's building assessment which was in no way supported by substantial evidence in the record.

The Board asserts that it was entitled to grant "great deference" to the expertise of Vacca and that evidence presented by non-experts "carries less weight and may in some circumstances be properly excluded from evidence altogether." See Board's Br. at 10, 12. The Board proposes that it was entitled to dismiss the evidence presented by Mr. Fiske because he was neither an expert nor the owner of the property. The Board cites to L'Etoile v. Dir. of Pub. Works, 89 R.I. 394, 153 A.2d 173 (1959) for this proposition, a case that does not in any way relate to an administrative board's review of evidence. See id. at 402, 153 A.2d at 178. Appellant responds that the Board is a quasi-judicial body intended to operate as a neutral arbiter. As such, the Board may not conduct itself in such a biased fashion as to routinely rely on Vacca and disregard evidence presented by the taxpayer because that conduct violates the basic tenets of due process that require a board to grant notice to a taxpayer and a meaningful opportunity to be heard.

Administrative bodies, pursuant to the Rhode Island Administrative Procedures Act, frequently depart from the rules of evidence that apply in a civil superior court. See

G.L. 1956 § 42-35-10.[15] "Generally, administrative agencies are allowed to consider hearsay evidence when making a determination." Craig v. Pare, 497 A.2d 316, 320 (R.I. 1985). "Section 42-35-10 clearly permits a departure from the rules of evidence 'when necessary to ascertain facts not reasonably susceptible of proof under those rules, . . . (where) it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.'" Sterling Shoe Co. v. Norberg, 411 F. Supp. 128, 132 (D.R.I. 1976). Thus, the Board had the ability to hear testimony that may not have been admissible in Superior Court and may have abused its discretion and violated Appellant's due process rights in ignoring competent and probative evidence.

Here, the evidence that the Board claims it could disregard was that evidence presented by Mr. Fiske. The Board claims that Mr. Fiske was somehow incompetent to present evidence because he was neither an owner of the property nor an expert in house valuation. A close review of the evidence presented by Mr. Fiske demonstrates that he was not attempting to introduce his own expert opinion testimony, but was rather providing the Board with copies of relevant documentary evidence, including the homeowner's insurance policy and a document summarizing adjusted building base rates for neighboring properties. This evidence was neither controverted nor attacked as inaccurate copies of relevant evidence. Therefore, the Board should have considered the

[15] "In contested cases: (1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs. Agencies shall give effect to the rules of privilege recognized by law. Objections to evidentiary offers may be made and shall be noted in the record. Subject to these requirements, when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form . . ." Sec. 42-35-10.

documentary evidence presented, and in failing to articulate findings of fact such as why the Board believed such evidence to be inappropriate comparable properties, the Board failed to demonstrate sufficient evidence to support its decision.

In contrast to the lack of evidence upon which the Board based its decision of the appeal from the 2004 assessment, this Court finds that the Appellant did present substantial evidence to support her proposed valuation for the 2004 assessment. In addition to the tax cards of thirteen properties believed to be comparable, submitted at the first hearing and appeal, the Fiskes presented an appraisal from McAndrew that valued the house site substantially lower than Vacca did. McAndrew identified several comparable properties that he used in determining his appraisal, articulated the reasons why he believed they were comparable, and based his assessment on Vacca's assessment of those comparable properties. McAndrew also introduced evidence to the Board of other properties that had water views and water access, and calculated the exact percentage that those attributes added to those properties' tax assessments. He stated at the hearing the following:

> "[W]hat those strips offer these houses on the east side of the river, access far superior to the subject's access; and secondly, views that are far superior. If you want to see what those contribute to value, if you think that somewhere in my appraisal that I'm conservative, these assessments range, these strips add to value 8 percent, 12 percent, 9 percent, [and] 14 percent. So, the only thing that can be of, you know, what the range and the added value is now it's 10 percent. I have shown you the assessment to the property two away from the subject is valued at 183 [thousand dollars] and I'm at 285 [thousand dollars]. That far exceeds 10 percent, correct?" Tr. 103-04, Dec. 17, 2009.

Thus, he explained that his appraisal of the Appellant's property erred on the side of a higher valuation of the Appellant's house site for water access compared to those other properties. Furthermore, McAndrew considered the water access as an easement, as

directed on remand, while Vacca continued to consider factors in contravention of the statute and this Court's prior decision.

Similarly, the Board's decision to uphold Vacca's 2004 assessment of the buildings on Appellant's property was not supported by substantial evidence. Vacca estimated the buildings' assessments based on an unadjusted base rate of $200 per square foot for the first floor and $192.76 for the second floor. The Board simply affirmed Vacca's assessment without remarking on comparable building assessments. In contrast, Appellant presented her homeowner's insurance policy—which affords guaranteed replacement coverage—that appraised the buildings at $584,500. Appellant additionally presented evidence of several neighboring waterfront properties that were assessed by Vacca at significantly lower adjusted base rates. Those properties averaged $120.70 per square foot for the first floor living area, producing an assessment of Appellant's buildings about 60% higher than those of neighboring waterfront properties. Furthermore, the average base rate for buildings just one block inland from the water was even lower. Thus, based on the average adjusted base rate of neighboring properties, and adding to that value the other buildings on Appellant's property, a total assessment for the buildings would be $518,065.15. Appellant, therefore, demonstrated by substantial evidence that the assessment of her buildings was substantially higher than the fair market value, and that the appropriate valuation should be $518,065.15.

Finally, the Board's decision to uphold the 2009 tax assessment on the house site is also not supported by substantial evidence. Vacca appraised the property at $1,885,200, appraising the 30,000 square foot house site at $1,207,500 and the buildings at $674,300. Appellant introduced much of the same evidence and testimony through

witnesses, including McAndrew, who submitted a new appraisal of the house site at $550,000. The Board denied the appeal, stating at the hearing that it reviewed comparable properties and found that Appellant's assessment was in line with those of surrounding water property owners. Board members also commented that Appellant did not testify on her behalf, and instead, that her husband testified at the hearing, and that Vacca had been denied access to the house since 2005. Tr. 2-3, June 8, 2011.

The factors cited by the Board were irrelevant to the task of reviewing Vacca's assessment. First, there is no rule or requirement that the property owner herself must testify. Instead, she is afforded the opportunity to present the Board with competent evidence to support her claim that the property was valued substantially higher than was fair. Appellant did so with both the expert testimony of McAndrew and with the evidence presented by her husband, a witness with personal knowledge, and the evidence about which he testified was submitted with documentation for the Board to review. Second, Vacca's assistant, Thompson, testified at the May 25, 2011 hearing that he had visited the property in 2005 and spent significant time on the property. Furthermore, no improvements or renovations were made on the property after 2005, and therefore, there was no reason for the Fiskes to allow additional building inspections.

The Board's decision to uphold Vacca's 2009 assessment of the property was not supported by substantial evidence, while Appellant presented substantial evidence to support her contention that the house site should have been valued at $550,000.

D

Remedy

When reviewing a board of assessment review decision, the Superior Court "may affirm the decision . . . or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced . . . " Sec. 44-27-6(c). This Court finds that substantial rights of the Appellant have been prejudiced under subsections (c)(4) and (5), that the various decisions of the Board are affected by error of law and are clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record on each appeal.

This Court asserts its authority under § 44-27-6(c) to modify the decisions of the Board and finds that Appellant is entitled to the following judgment:

(a) In case number WC 2010-0305, the Board's decision on the December 31, 2004 tax assessment is modified and the assessment on Appellant's house site is reduced to $285,000 and the assessment of the buildings is reduced to $518,065.15;

(b) In case number WC 2011-0468, the Board's decision on the December 31, 2009 tax assessment is modified and the assessment on Appellant's house site is reduced to $550,000;

(c) In case number WC 2007-0853, judgment shall enter vacating the Board's decision and remanding the appeal to the Board to consider evidence of value of the 30,000 square foot house site, considering its seasonal waterview and water access, and not as waterfront or based on the development potential of the entire parcel.

V

Conclusion

For all of these reasons, this Court enters judgment for the Appellant on WC 2010-0305 and WC 2011-0468 because the Board committed reversible error of law and failed to support its decision with substantial evidence in the record. This Court remands WC 2007-0853 to the Board for further proceedings.

Counsel for Appellant shall submit a judgment and order for entry consistent with this Decision.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Marsha Fiske v. Town of Westerly Board of Assessment Review**
CASE NOS:	**WC-2010-0305 consolidated with WC-2007-0853 consolidated with WC-2011-0468**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**June 21, 2017**
JUSTICE/MAGISTRATE:	**K. Rodgers, J.**
ATTORNEYS:	
For Plaintiff:	**Kelly M. Fracassa, Esq.** **John J. Kupa, Esq.**
For Defendant:	**John C. Levanti, Esq.** **Matthew T. Oliverio, Esq.**