**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS**

**NEWPORT, SC.** **SUPERIOR COURT**

**(FILED: August 22, 2017)**

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| **HENRY TARBOX and** | : | |
| **MARY TARBOX** | : | |
| *Plaintiffs* | : | |
| | : | **C.A. No. NC-2010-0667** |
| **v.** | | |
| | : | |
| **ZONING BOARD OF REVIEW** | : | |
| **FOR THE TOWN OF** | : | |
| **JAMESTOWN** | : | |
| *Defendant* | : | |

## DECISION

**VAN COUYGHEN, J.** Plaintiffs Henry and Mary Tarbox (Plaintiffs) have moved to recover litigation expenses pursuant to the Equal Access to Justice for Small Businesses and Individuals (the Act), G.L. 1956 §§ 42-92-1 et seq. Plaintiffs incurred the expenses—namely, attorney's fees and costs—while appealing from an adverse decision of the Zoning Board of Review for the Town of Jamestown (Zoning Board). Plaintiffs have successfully appealed the Zoning Board's decision and now seek to recover the litigation expenses incurred. The Zoning Board objects to Plaintiffs' motion. Jurisdiction is pursuant to § 42-92-3(b). For the reasons set forth herein, the Court grants Plaintiffs' motion and awards fees and costs in the amount of $32,341.21.

## I

## Facts and Travel

The parties have stipulated to the following facts. Plaintiffs are the owners of residential property (Property) located in the Town of Jamestown (Jamestown). See Joint Statement of Agreed Facts (Joint Statement) ¶ 1. The Property comprises approximately 11,427 sq. ft. and is located in a Residential 8000 sq. ft. (R8) Zone. See id. In an R8 Zone, the Jamestown Zoning

Ordinance requires a minimum of 8000 sq. ft. to construct a single-family dwelling and 15,000 sq. ft. to construct a two-household dwelling—a duplex. See id.; see also Jamestown Zoning Ordinance § 82-302. Duplexes, thus, are allowed as a matter of right so long as the lot has the requisite minimum square footage.

At some point, Plaintiffs decided to add a one-bedroom apartment to the Property. On or about September 22, 2010, Plaintiffs submitted an application to the Zoning Board for a lot area variance because the Property was undersized by 23.8%. See Joint Statement ¶ 2. On October 26, 2010, the Zoning Board took testimony and heard arguments on Plaintiffs' application. See id. at ¶ 3. At the conclusion of Plaintiffs' presentation, a member of the Zoning Board moved to approve Plaintiffs' application and grant the relief sought. See id. at ¶ 4. The motion did not pass[1] and the Zoning Board denied Plaintiffs' application. See id. The next day, October 27, 2010, the Zoning Board issued a written decision (Decision). See id. at ¶ 5.

Plaintiffs timely appealed the Decision to the Superior Court, and on March 8, 2013, this Court issued a written decision reversing the Zoning Board's denial and granting Plaintiffs' request for a dimensional variance. See id. at ¶ 7. In December of 2013, Plaintiffs moved for litigation expenses pursuant to the Act, and the Zoning Board timely objected. See id. at ¶ 8.

On March 7, 2014, Plaintiffs' motion came before a justice of the Superior Court. See id. at ¶ 10. The Court issued a bench decision—the Court issued an Order on May 8, 2014, memorializing its decision—denying Plaintiffs' motion. See id. The Court decided, sua sponte, that, for purposes of the Act, the Zoning Board was not an agency[2] and that the hearing before

[1] The Zoning Board voted 3-2 in favor of passing the motion; however, motions for variances require a four-fifths majority to pass.
[2] Pursuant to the Act, "[a]gency" means "any state and/or municipal board, commission, council, department, or officer, other than the legislature or the courts, authorized by law to make rules or to determine contested cases; to bring any action at law or in equity, including, but not

the Zoning Board was not an adjudicatory proceeding.[3] See id. On May 20, 2014, Final Judgment entered. See id. at ¶ 11.

Plaintiffs appealed the Order and entry of Final Judgment to the Rhode Island Supreme Court—the appeal was limited to the aspects of the Order and Final Judgment that contemplated Plaintiffs' request for litigation expenses. See id. at ¶ 12. The Supreme Court heard oral arguments on October 28, 2015 and issued its Opinion on March 15, 2016. See id. at ¶ 14. The Supreme Court concluded that the Zoning Board was an agency for purposes of the Act and that the hearing before the Zoning Board was an adjudicatory proceeding. See id. The Supreme Court quashed the Final Judgment and remanded the case for consideration of Plaintiffs' motion on the merits. See id.

On September 13, 2016, Plaintiffs filed a second Motion for Award of Reasonable Litigation Expenses Pursuant to the Act—the instant Motion. See id. at ¶ 15. After a series of continuances and chambers conferences on the matter, Plaintiffs' Motion was heard on March 30, 2017.

## II

## Standard of Review

Rhode Island "adheres to the 'American rule' that litigants generally are responsible for their own attorneys' fees and costs. . . However, attorneys' fees may be appropriately awarded, at

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limited to, injunctive and other relief; or to initiate criminal proceedings. This shall include contract boards of appeal, tax proceedings, and employment security administrative proceedings." Sec. 42-92-2(3).

[3] Pursuant to the Act, "[a]djudicatory proceedings" means "any proceeding conducted by, or on behalf of, the state, administratively or quasi-judicially, which may result in the loss of benefits; the imposition of a fine; the adjustment of a tax assessment; the denial, suspension, or revocation of a license or permit; or which may result in the compulsion or restriction of the activities of a party. Any agency charged by statute with investigating complaints shall be deemed to have substantial justification for the investigation and for the proceedings subsequent to the investigation." Sec. 42-92-2(2).

the discretion of the trial justice, given proper contractual or statutory authorization." Pearson v. Pearson, 11 A.3d 103, 108-09 (R.I. 2011) (internal quotations and citations omitted). "[T]he right to collect attorney's fees did not exist at common law and . . . such fees may be taxed only when there is either specific statutory authority or contractual liability." Eleazer v. Ted Reed Thermal, Inc., 576 A.2d 1217, 1221 (R.I. 1990) (citing Orthopedic Specialists, Inc. v. Great Atl. & Pac. Tea Co., 120 R.I. 378, 387-88, 388 A.2d 353, 357 (1978)).

This Court looks to the express language of the authoritative statute, in this instance the Act, and applies that statute as constructed. See id. "[The Act] is modeled on the Federal Equal Access to Justice Act, 28 U.S.C.A. § 2412 (West 1978). When a Rhode Island statute is modeled [after] a federal statute, this court 'should follow the construction put on it by the federal courts, unless there is strong reason to do otherwise.'" Krikorian v. R.I. Dep't of Human Servs., 606 A.2d 671, 674 (R.I. 1992) (quoting Laliberte v. Providence Redevelopment Agency, 109 R.I. 565, 575, 288 A.2d 502, 508 (1972) (citation omitted)).

**III**

**Analysis**

The Act "was propounded to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings, as defined in the act." Taft v. Pare, 536 A.2d 888, 892 (R.I. 1988). The Act aims to "eliminate for the average person the financial disincentive to challenge unreasonable governmental actions." U.S. v. Cacho-Bonilla, 206 F. Supp. 2d 204, 207 (D.P.R. 2002) (citation omitted). The Act does not, however, create an automatic right to fee shifting. "If the government can demonstrate that its position was substantially justified or that unusual circumstances existed which would make an award unjust, then the fee tree does not flower,

notwithstanding that the applicant is a prevailing party within the meaning of the statute." Sierra Club v. Sec'y of Army, 820 F.2d 513, 517 (1st Cir. 1987).

In the instant matter, the operative provision is § 42-92-3, which states in pertinent part:

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

Pursuant to § 42-92-3, the Zoning Board must demonstrate that it was substantially justified in the actions leading to the proceeding and in the proceedings themselves; otherwise, Plaintiffs are entitled to the reasonable litigation expenses incurred.

The Zoning Board does not challenge Plaintiffs' status as the prevailing party, as defined in the Act[4]; thus, the Court is left to determine whether the Zoning Board was substantially justified in its initial decision denying the Plaintiffs' request for a variance and in the proceedings that followed. If this Court finds that the Zoning Board's actions lacked the requisite justification, then it will exercise its discretion and determine the reasonable litigation expenses to which the Plaintiffs are entitled.

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[4] "'Party' means any individual whose net worth is less than five hundred thousand dollars ($500,000) at the time the adversary adjudication was initiated; and, any individual, partnership, corporation, association, or private organization doing business and located in the state, which is independently owned and operated, not dominant in its field, and which employs one hundred (100) or fewer persons at the time the adversary adjudication was initiated." Sec. 42-92-2(5).

## A

## Substantial Justification

The Zoning Board carries the burden of proving substantial justification. See Krikorian, 606 A.2d at 675 (explaining that the state must show that its positions were substantially justified). "In meeting the substantial-justification test, the [Zoning Board] must show 'not merely that its position was marginally reasonable; its position must be clearly reasonable, well founded in law and fact, solid though not necessarily correct.'" Id. (quoting Taft, 536 A.2d at 893). "[C]ourts are to examine both the prelitigation actions or inaction of the agency on which the litigation is based and the litigation position[.]" Schock v. U.S., 254 F.3d 1, 5 (1st Cir. 2001) (citation omitted).

Substantial justification means "that the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact." Sec. 42-92-2(7). The Court notes, however, that the "test of reasonableness in the precincts patrolled by the [Act] is different from that applied for purposes of determining whether agency action or inaction is 'reasonable' or 'unreasonable,' [in other words], arbitrary and capricious, under, say, the Administrative Procedure Act[.]" Sierra Club, 820 F.2d at 517. When assessing the reasonableness of an agency's positions for purposes of the Act, the "test breaks down into three parts: did the government have a reasonable basis for the facts alleged; did it have a reasonable basis in law for the theories advanced; and did the facts support its theory." U.S. v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985) (citing U.S. v. Cmty. Bank & Trust Co., 768 F.2d 311, 314 (10th Cir. 1985)). "This represents a middle ground between an automatic award of fees to a prevailing party and an award made only when the government's position was frivolous." Id. (citation omitted). The Court assesses the reasonableness of the government's actions, and to

pass scrutiny, the level of reasonableness must surpass "marginally reasonable"; the agency must demonstrate that its actions were instead "clearly reasonable." See Krikorian, 606 A.2d at 675.

The Zoning Board argues that it was substantially justified in each of its positions—namely, in its decision to deny the Plaintiffs' application for a dimensional variance and in the subsequent and ensuing litigation. Plaintiffs argue that this Court's decision to overturn the Zoning Board's initial ruling is definitive evidence that the Zoning Board's position was not substantially justified, and further, that the Zoning Board's actions subsequent to that decision were likewise without the requisite justification. Pursuant to § 42-92-3, the Zoning Board carries the burden of proving its position by a preponderance of the evidence; specifically, that its initial position and its position in the litigation that followed were substantially justified. Thus, the Court will review the positions in turn.

**1. Initial Position**

The Zoning Board's initial position is embodied in its October 27, 2010 written Decision denying Plaintiffs' application for a dimensional variance. This Court previously decided, after an exhaustive review of the record, that "the Zoning Board's [decision] was clearly erroneous in view of the reliable, probative, and substantial evidence." Tarbox v. Zoning Bd. of Review for Jamestown, 2013 WL 1088828, at *6 (R.I. Super. Mar. 8, 2013). Plaintiffs contend that the "law of the case" doctrine precludes a second review of the Zoning Board's Decision. Plaintiffs argue that this Court's earlier decision is decisive of the issue. The Zoning Board argues in opposition that the evidence it considered in making its decision to deny Plaintiffs' application, including the personal knowledge of the two dissenting board members, makes clear that that Decision was neither arbitrary nor capricious. A review of the record and the law makes clear, however, that

the standard is not arbitrary and capricious, and that based on the evidence before this Court, the Zoning Board was not substantially justified in denying the Plaintiffs' application.

This Court is not bound by its earlier determination that the Zoning Board's Decision was clearly erroneous. In other words, "[t]he mere fact that the government does not prevail is not dispositive on the issue of substantial justification." Schock, 254 F.3d at 5 (citing De Allende v. Baker, 891 F.2d 7, 13 (1st Cir. 1989)). "Conversely, that the government succeeded at some stage of the litigation does not by itself prove the requisite level of justification." Id. (citing Dantran, Inc. v. U.S. Dep't of Labor, 246 F.3d 36, 40 (1st Cir. 2001)). Instead, the Court makes an independent inquiry into the merits of the agency's position. See id.; Sierra Club, 820 F.2d at 513. This second inquiry is necessary because the standard for awarding reasonable litigation expenses—substantial justification—is separate and distinct from the grounds articulated in G.L. 1956 § 45-24-69(d) for reversing a zoning board's decision.[5] [6]

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[5] Pursuant to § 45-24-69(d), the Superior Court may:

> "[A]ffirm 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." Sec. 45-24-69(d).

[6] In Taft, 536 A.2d at 892 (R.I. 1988), our Supreme Court explained that the Act "was propounded to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings[.]" The Supreme Court used the phrase "arbitrary and capricious" to describe the objective of the Act and not to set the standard of review to be applied in determining whether a prevailing party was entitled to the reasonable litigation expenses incurred. That standard has been clearly articulated, by this state's legislature and our Supreme Court, as "[s]ubstantial justification,"

In order to pass scrutiny under the substantial justification standard, the Zoning Board's Decision must have a reasonable basis in fact. An agency's failure to identify supporting evidence, such as a failure to "present[] . . . evidence to substantiate its claim factually," is indicative, though not conclusive, that a position is unreasonable. Hadden v. Bowen, 851 F.2d 1266, 1269 (10th Cir. 1988).

Plaintiffs' testimony at the hearing before the Zoning Board was undisputed and not rebutted. The Zoning Board's written Decision did not cite to any facts that would justify the dissenting minority's decision to deny the Plaintiffs' application. In fact, this Court reviewed the record in its earlier Decision and found that the opposite existed; that is, the evidence presented and the applicable law supported granting the Plaintiffs' application. A fresh review of the record and law makes clear that the Zoning Board's Decision was not only arbitrary, capricious, and clearly erroneous, but also unreasonable; the Decision had no basis in fact and was not supported by the law. See Krikorian, 606 A.2d at 675. As such, it cannot be said that the Zoning Board was substantially justified in its initial position.

**2. Position in the Proceedings**

A plain reading of § 42-92-2(7) makes clear that the substantial justification test is a two-part, inclusive test. See § 42-92-2(7) (stating that "the initial position of the agency, as well as the agency's position in the proceedings" must have a "reasonable basis in law and fact") (emphasis added). The Zoning Board maintains the burden of proving not just that it was substantially justified in its initial position, but also that it was substantially justified in the

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which requires that the government's position be clearly reasonable—founded in facts and legal theory that logically support the government's position. See § 42-92-2(7); Krikorian, 606 A.2d at 675. Though a decision found to be arbitrary and capricious may lack substantial justification, this Court cannot say, as a matter of law, that all arbitrary and capricious decisions lack substantial justification; therefore, a second, independent inquiry into the merits of the decision is necessary.

proceedings that followed. See id. Because this two-part test is inclusive, failing to pass scrutiny at either level is fatal, and thus entitles the prevailing party to the reasonable litigation expenses incurred. See generally § 42-92-3.

In the instant matter, the Zoning Board has failed to demonstrate that it was substantially justified in in its initial position. The facts in the record and the applicable law do not support the Zoning Board's position; simply put, the position maintained in the written Decision was not clearly reasonable. See Krikorian, 606 A.2d at 675. Thus, whether the Zoning Board was substantially justified in the proceedings that followed carries no weight in this Court's Decision.[7] The Zoning Board has failed to prove substantial justification by a preponderance of the evidence. As such, Plaintiffs are entitled to the reasonable litigation expenses incurred.

**B**

**Reasonable Litigation Expenses**

Plaintiffs are seeking $64,928.71 in litigation expenses—that figure includes 490.7 hours at the statutory rate[8] of $125 per hour and $3591.21 of miscellaneous costs. Plaintiffs provided

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[7] The Court notes that among the federal circuits there exists a school of thought that courts ought assess the individual pieces of the litigation and test for the requisite justification. The argument being that the Act's purpose—to protect litigants against the arbitrary and capricious actions of the government—would be undermined if those same government actors were assessed fees for actions that may have been substantially justified. See Goldhaber v. Foley, 698 F.2d 193, 194-95 (3rd Cir. 1983). Though noted, this Court declines to adopt that view, and instead elects to treat the "case as an inclusive whole, rather than as atomized line-items." Commissioner, I.N.S. v. Jean, 496 U.S. 154, 162 (1990) (citation omitted). Instead, the Court reads § 42-92-2(7) plainly and concludes that in order to preclude the award of attorney's fees to a prevailing party, the government must demonstrate that both "the initial position of the agency, as well as the agency's position in the proceedings, [had] a reasonable basis in law and fact." Sec. 42-92-2(7).

[8] At the time this lawsuit was commenced, the statutory rate set forth in § 42-92-2 was $125 per hour. In 2016, the legislature increased the rate to $150. See § 42-92-2(6)(i) (stating that "[t]he award of attorney's fees may not exceed one hundred fifty dollars ($150) per hour, unless the court determines that special factors justify a higher fee"). Plaintiffs, however, initiated their pursuit of fees prior to the 2016 amendment, and thus seek to recover 490.7 hours at the rate of

invoices for the hours expended and the costs incurred, as well as the affidavits of Attorney Turner C. Scott (Plaintiffs' Expert). The litigation expenses are associated with the original hearing before the Zoning Board, the subsequent administrative appeal to the Superior Court, the initial motion for reasonable litigation expenses pursuant to the Act, the appeal to the Rhode Island Supreme Court, and the instant renewed motion for reasonable litigation expenses. In opposition, the Zoning Board has provided the affidavit of Attorney John F. Kenyon (Zoning Board's Expert). The Zoning Board's Expert opined that while some of the fees and costs incurred were reasonable—specifically, 200 hours and the miscellaneous costs incurred throughout the litigation—most were not.[9]

This Court "determines the reasonableness of the fee by considering the factors enumerated in Rule 1.5 [of the Rules of Professional Conduct.]" (Rule 1.5.) Keystone Elevator Co. v. Johnson & Wales Univ., 850 A.2d 912, 921 (R.I. 2004) (citing Colonial Plumbing & Heating Supply Co. v. Contemporary Constr. Co., 464 A.2d 741, 743 (R.I. 1983)). Rule 1.5 identifies the following factors (the Factors):

> "(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> "(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> "(3) the fee customarily charged in the locality for similar legal services;
> "(4) the amount involved and the results obtained
> "(5) the time limitations imposed by the client or by the circumstances;

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$125 per hour, which comes out to $61,337.50, plus costs in the amount of $3591.21, for a sum total of $64,928.71.

[9] The Zoning Board's Expert found that the miscellaneous costs incurred throughout the litigation were reasonable, and this Court agrees. The primary point of contention is the number of hours expended by Plaintiffs' counsel in litigating this case subsequent to March 12, 2013; that is, the hours expended by Plaintiffs subsequent to the Decision in the administrative appeal.

> "(6) the nature and length of the professional relationship with the client;
> "(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
> "(8) whether the fee is fixed or contingent." Rule 1.5.

"Each of these factors is important, but no one is controlling." Palumbo v. U.S. Rubber Co., 102 R.I. 220, 224, 229 A.2d 620, 622-23 (1967). To aid the Court's assessment, and to establish a record, the parties must submit expert affidavits on the reasonableness of the fees. See Colonial Plumbing & Heating Supply Co., 464 A.2d at 744 (holding that a trial justice could not determine the reasonableness of fees without the aid of expert testimony and supporting affidavits, and rejecting the notion that the Court could take judicial notice of regularly accepted methods of computing legal fees). The Court reviews and considers the competing affidavits, with appropriate weight given to each.

The Court's assessment begins with a lodestar; that is, the number of hours expended multiplied by an hourly rate. See Matter of Schiff, 684 A.2d 1126, 1131 (R.I. 1996) (explaining that the "starting point or 'lodestar' for determining the reasonableness of a fee is 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate'") (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The lodestar is then adjusted, if necessary, after considering the factors enumerated in Rule 1.5. In the instant matter, the lodestar is $61,337.50—490.7 multiplied by $125.

A review of the expert affidavits reveals that this case turns on, principally, Rule 1.5's first factor—the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly. See Rule 1.5(a)(1). The Zoning Board and its expert witness contend that the time expended subsequent to the administrative Decision—446.8 hours—is unreasonable. In particular, the Zoning Board's Expert contends that

the time expended on "Legal research" and "Preparation of motions, memorandums, and affidavits," after this Court's decision regarding the administrative appeal, was "a great deal more than reasonably required, especially compared to the amount of time spent on Court in this matter." Suppl. Aff. of Attorney Kenyon, ¶¶ 5:3-4, 6. The Zoning Board's Expert opined that in light of Rule 1.5 a reasonable expenditure of time would have been a total of 200 hours for the entire case. Id. at ¶ 7.

### 1. Rule 1.5(a)(1)

The United States Supreme Court has cautioned that "[a] request for attorney's fees should not result in a second major litigation." Hensley, 461 U.S. at 437. In the instant matter, there can be no doubt that the 446.8 hours spent in pursuit of fees and costs has far eclipsed the 50.2 hours dedicated to the application for a zoning variance and the subsequent administrative appeal. Since this Court's decision overturning the Zoning Board's 2010 Decision, Plaintiffs have moved for litigation expenses and been denied, succeeded in an appeal before this state's Supreme Court, and moved once more for litigation expenses in this Court. Additionally, there have been numerous chambers conferences, hearings, pleadings, and supplemental filings. The hours committed by attorneys on both sides of the lawsuit are not insignificant.

This Court exercises a broad grant of discretion when it determines the amount of a reasonable fee. See Hensley, 461 U.S. at 436-37 (explaining that "[t]here is no precise rule or formula for making these determinations . . . [t]he court necessarily has discretion in making this equitable judgment"); Sorenson v. Mink, 239 F.3d 1140, 1146 (9th Cir. 2001) (stating that a court "has wide latitude in determining the number of hours that were reasonably expended by the prevailing lawyers, but [that] it must provide enough of an explanation to allow for meaningful review of the fee award"); Johnson v. Kakvand, 192 F.3d 656, 661 (7th Cir. 1999)

(explaining that "courts possess wide latitude in fashioning appropriate sanctions and evaluating the reasonableness of the attorneys' fees requested"). In fact, "[i]t is well within the authority of the trial justice to make an attorneys' fees award determination after considering the circumstances of the case." Keystone Elevator, 850 A.2d at 920 (explaining that a trial justice who observes firsthand the work product of counsel is better suited to assess the course of litigation and the quality of counsel). The particular circumstances of a case provide context to the Rule 1.5 analysis and guide the Court in its assessment of the reasonable time and labor a case likely required based on the novelty and difficulty of the questions involved. See Rule 1.5(a)(1). When a statutory basis exists for awarding fees, the Court determines in its discretion the reasonableness of the fees to be awarded. See Blue Cross & Blue Shield of R.I. v. Najarian, 911 A.2d 706, 710 (R.I. 2006) (stating that "[g]enerally, when such contractual, statutory or legal basis exists, 'the award of attorneys' fees rests within the sound discretion of the trial justice'") (quoting Women's Dev. Corp. v. City of Central Falls, 764 A.2d 151, 162 (R.I. 2001)).

The Court is troubled by inconsistencies in the record. Plaintiffs' counsel provided invoices that were detailed and thorough; yet, the expert affidavits, and Plaintiffs' Summary of Arguments, contain figures that cannot be reconciled.[10] This Court will not "engage in a line-by-line review of time records or [ ] 'drown in a rising tide of fee-generated minutiae'" to decide this case. Sherwood Brands of R.I., Inc. v. Smith Enters., Inc., No. Civ. A. 00-287T, 2002 WL 32157515, at *2 (D.R.I. Sept. 5, 2002) (quoting U.S. v. Metro. Dist. Comm'n, 847 F.2d 12, 15 (1st Cir. 1988)). Rule 1.5(a)(1) instructs the Court to consider the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal

[10] This Court cannot determine from the Zoning Board's Expert's affidavits which 200 hours he believes were reasonably incurred; the references made in both affidavits are not clear. Additionally, the hours identified in Plaintiffs' counsel's invoices, mathematically, do not add up to the hours identified in Plaintiffs' Summary of Arguments.

service properly, and in doing so, the Court treats this case an inclusive whole. See Al-Harbi v. I.N.S., 284 F.3d 1080, 1084-85 (9th Cir. 2002) (citation omitted).

This Court has conducted a thorough review of the record, Plaintiffs' counsel's invoices, the myriad pleadings and filings, both those in support and those in opposition to this motion, and the expert affidavits. This Court has personally observed the nature of this litigation throughout its various stages. Additionally, the Court has considered the novelty and difficulty of the questions involved and the skill required to properly perform the legal service. See Rule 1.5(a)(1). In light of these considerations, and the discretion afforded this Court in determining what a reasonable number of hours ought to be under the circumstances, this Court finds that the hours charged by Plaintiffs' counsel were not reasonable and will reduce the hours accordingly.

**2. Rule 1.5(a)(2) – (8)**

In light of this Court's assessment of the first factor, which it finds to be determinative of the issue, a brief discussion of factors two through eight and the experts' opinions as to those factors is appropriate. Factor two concerns the likelihood that Plaintiffs' counsel was forced to decline representing other clients as a result of the instant litigation. See Rule 1.5(a)(2). The record contains no evidence that Plaintiffs' counsel refused other clients. As such, the second factor does not affect the Court's analysis.

Factors three and eight concern the fee charged by Plaintiffs' counsel. See Rule 1.5(a)(3) and (8). At the time this lawsuit was commenced, the Act provided for a rate of $125 per hour. Plaintiffs' counsel requests the $125 rate, but also argues that applying the CPI-U index for inflation would be appropriate. See Pls.' Supporting Mem. 22. The Court has discretion to award an increased hourly rate if the Court finds that special factors justify doing so. The Court has considered counsel's argument, as well as the concurring recommendation from Plaintiffs'

Expert, and declines to apply the CPI-U index. The Court finds that there are no special factors to justify a higher rate. Whether the fee was fixed or contingent—the eighth factor in Rule 1.5—does not affect this Court's analysis.

The fourth factor concerns the amount involved and the results obtained. See Rule 1.4(a)(4). Plaintiffs were ultimately granted dimensional relief. As such, the amount involved is not a relevant consideration. As to the results obtained, Plaintiffs' counsel successfully litigated an administrative appeal before this Court as well as the Supreme Court. Plaintiffs' counsel has successfully litigated this Case throughout its various stages.

Factors five and six likewise have little impact on the analysis. The record is devoid of any reference to client-mandated or circumstantial time limitations—the fifth factor—and it does not provide any insight regarding the nature and length of the professional relationship with the client—the sixth factor. See Rule 1.5(a)(5) – (6). Any impact that the length of the relationship may have had on Plaintiffs' counsel was contemplated in this Court's assessment of the second factor; that is, the likelihood that representing the Plaintiffs precluded the representation of other clients.

The seventh factor contemplates the experience, reputation, and ability of counsel. See Rule 1.5(a)(7). This Court observed Plaintiffs' counsel and he appeared to represent his client competently.

**3. The Amount of Fees Awarded**

Plaintiffs are the prevailing party in an adjudicatory proceeding, and the Zoning Board failed to prove that it was substantially justified in its actions; as such, Plaintiffs are entitled to the reasonable litigation expenses incurred. See § 42-92-3. However, that the hours spent in pursuit of legal fees exceeded the hours spent on the original litigation, by a factor of nine, is

indicative that the hours exceeded what could be considered reasonable. Additionally, the fact that one of the issues contemplated in this case was successfully litigated before the Supreme Court does not negate that the case as a whole contemplated issues of law that could hardly be described as novel or complex. Thus, in light of the factors enumerated in Rule 1.5, the issues associated with the records and expert affidavits, and the equitable considerations that guide this Court's analysis, it is the Court's assessment that 230 hours at the rate of $125 per hour, totaling $28,750 is reasonable. Of these hours, the Court finds that fifty hours to appear before the Zoning Board and litigate the administrative appeal were reasonable. The Court also finds that 140 hours to litigate the issues associated with the Act in the Superior Court and the Supreme Court were reasonable. Finally, the Court finds that forty hours to litigate the amount of the fee in Superior Court were reasonable. In addition, Plaintiffs are awarded the $3591.21 in costs requested, which the Zoning Board did not challenge and this Court found to be reasonable.

## IV

## Conclusion

Plaintiffs are the prevailing party in an adjudicatory proceeding, and the Zoning Board acted without the requisite justification. As such, Plaintiffs are entitled to the reasonable litigation expenses incurred. However, based on the factors articulated in Rule 1.5, and this Court's observation of the circumstances of this case, the hours requested have been reduced to 230 at the statutory rate of $125 per hour, plus reasonable costs as outlined above. The parties shall confer and submit an order for entry.

**RHODE ISLAND SUPERIOR COURT**

***Decision Addendum Sheet***

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| **TITLE OF CASE:** | **Henry Tarbox and Mary Tarbox v. Zoning Board of Review for the Town of Jamestown** |
| **CASE NO:** | **NC-2010-0667** |
| **COURT:** | **Newport County Superior Court** |
| **DATE DECISION FILED:** | **August 22, 2017** |
| **JUSTICE/MAGISTRATE:** | **Van Couyghen, J.** |
| **ATTORNEYS:** | |
| **For Plaintiff:** | **Peter J. Brockmann, Esq.** |
| **For Defendant:** | **Wyatt A. Brochu, Esq.** |