STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

[Filed: November 14, 2018]

PEAR NIKE, LLC and ARTHUR FRATTINI	:	
	:	
V.	:	**C.A. No. WC-2016-0618**
	:	
THE TOWN OF CHARLESTOWN ZONING BOARD OF REVIEW, Raymond Dreczko, Jr., Michael Chambers, Clifford Vanover, Joseph Quadrato, JoAnn Stolle, Robin Quinn, Steven J. Williams, Lara Wibeto, in their official capacities only as Members of the Zoning Board of Review of the Town of Charlestown	:	

DECISION

TAFT-CARTER, J. Before this Court is a zoning appeal from a Decision (Decision) of the Town of Charlestown Zoning Board of Review (Board), denying an Application for a Special Use Permit filed by Arthur Frattini (Mr. Frattini), on behalf of Pear Nike, LLC (Pear Nike) (collectively, Appellants). Jurisdiction is pursuant to G.L. 1956 § 45–24–69.

I

Facts and Travel

Pear Nike owns a 5000 square foot vacant lot (Property) on the corner of Third Street and Shore Way in Charlestown, Rhode Island, otherwise known as Lot 294, Plat 9. (Application at 1.) The property is located in an R-20 zoning district within the 100 year flood hazard boundary, which is classified as Flood Zone AE13, and it lies within the Coastal Salt Pond Special Area Management Plan. *Id.*; Letter from Jeffrey J. Campopiano, P.E. (Mr. Campopiano) ¶, Nov. 1, 2016. The Property is situated ninety-eight feet away from Green Hill Pond and eighty feet from a drinking water well. *See* Comprehensive Environmental Analysis at 1. As such, the proposal

required two variances from the Department of Environmental Management (DEM) in order to receive a permit to construct the proposed On-site Wastewater Treatment System [OTWS]. *See id.* The pond "runs along the opposite side of Shore Way, with access lots provided between the shoreline and Shore Way." *Id.* Pear Nike intends to "utilize one of those lots, lot 354, to provide drinking water supply to the home." *Id.* The Property is under the jurisdiction of a private home owners' association called the Sea Lea Colony Association. *See* Letter from Dave Landry, President of Sea Lea Colony Association, Nov. 13, 2010. The groundwater table on the site is twenty-four inches. (Letter from Mr. Campopiano at 1, Nov. 1, 2016.)

On December 9, 2014, Mr. Frattini filed an Application on behalf of Pear Nike with the Board for a dimensional variance seeking relief from the front yard setback, and for a special use permit[1] seeking permission to install an OWTS in a flood zone, pursuant to Art. XIII § 218-78 of the Zoning Ordinance of the Town of Charlestown (Ordinance).[2] (Application at 1-2, Dec. 9, 2014.) Attached to the Application was a Construction Permit from DEM. *See id.* at 2. The OWTS proposal included installation of composting toilets. (Decision at 1, Jan. 29, 2015.) The Board approved the request for dimensional relief by a vote of four to one; however, a motion to

[1] Although the Application sought both a dimensional variance and a special use permit, it appears that the Board would not have had the authority to simultaneously grant both types of relief. Unless expressly permitted under an ordinance, '"a dimensional variance [may] be granted only in connection with the enjoyment of a *legally permitted beneficial use*, [and] not in conjunction with a use granted by special use permit."' *Lloyd v. Zoning Bd. of Review for City of Newport*, 62 A.3d 1078, 1087 (R.I. 2013) (quoting *Newton v. Zoning Bd. of Review of City of Warwick*, 713 A.2d 239, 242 (R.I. 1998)) (emphasis in original); *see also* § 45-24-42(c) ("The ordinance additionally *may* provide that an applicant may apply for, and be issued, a dimensional variance in conjunction with a special-use permit.") (Emphasis added.) Any such permission must be contained in the special use permit provisions of the ordinance. The Ordinance for the Town of Charlestown does not contain any provision to allow such joint relief.

[2] Article XIII § 218-78 prohibits installation of On-site Wastewater Treatment System within designated zones except through the grant of a special use permit. It is undisputed that a special use permit for an OWTS is required for the subject Property pursuant to Art. XIII § 218-78.

approve the special use permit failed by a vote of three in favor and two opposed.[3] *Id.* at 1-2. Pear Nike appealed the denial of the special use permit, which appeal is pending in Superior Court. *See Pear Nike, LLC v. Town of Charlestown Zoning Bd. of Review,* WC-2015-0065.

At one point, Board Member Chambers brought up the status of the previous appeal by asking counsel for Mr. Frattini whether he intended to pursue the outstanding appeal from the denial of the special use permit for the composting toilet. (Tr. I at 44, Oct. 18, 2016.) Counsel for Mr. Frattini indicated that if the current application were denied, Mr. Frattini would continue to pursue that other appeal in Superior Court. *Id.*[4]

Meanwhile, Mr. Frattini filed the instant Application for a special use permit to install an OWTS. (Application, undated, at 1-2.) Attached to the Application was a second OWTS construction permit from DEM. *Id.* at 2. The Board conducted a duly noticed hearing over two days, October 18, 2016 (Tr. I), and November 15, 2016 (Tr. II).

Mr. Frattini testified on behalf of Pear Nike. He testified that although the previously applied-for-and-denied composting toilet is "a state-of-the-art thing" and "very good for the environment[,]" upon reflection, he figured that "possibly the composting part of it could get flooded out and that would be an environmental hazard." (Tr. I at 8.) He also speculated that "a future property owner[] may replace the toilets with conventional toilets illegally so it could

[3] Section 45-24-57 provides in pertinent part:

> "The concurring vote of four (4) of the five (5) members of the zoning board of review sitting at a hearing is required to decide in favor of an applicant on any matter within the discretion of the board upon which it is required to pass under the ordinance, including variances and special-use permits." Sec. 45-24-57(2)(iii).

[4] The Court takes judicial notice of the fact that Pear Nike's previous appeal is still pending. *See Goodrow v. Bank of Am., N.A.,* 184 A.3d 1121, 1126 (R.I. 2018) (reiterating that "[i]n Rhode Island, 'a court may take judicial notice of court records[.]'") (quoting *Curreri v. Saint*, 126 A.3d 482, 485 (R.I. 2015)).

actually bypass the composting toilet." *Id.* Accordingly, he testified that he "wanted to revise the plan with a new type of technology called Hydrokinetic" that has been "approved by DEM," and that basically its "the best system accepted by the state." *Id.* This new system only came on the market in the previous year. *Id.* at 26.

Mr. Frattini also testified that when he applied for his first DEM permit, DEM informed him that it was not inclined towards approving new systems for properties that required a DEM variance due to the impact that such systems have on nearby Green Hill Pond. *Id.* at 31. Mr. Frattini offered to upgrade a system for an existing three-bedroom house owned by a third party two streets away from Pear Nike's Property in return for a DEM permit. *Id.* at 31-33. Mr. Frattini testified that an individual named "Mohammed[,] who presumably was a DEM employee, informed him that because the then-proposed composting toilet was below the nitrate level, it would not be necessary for him to upgrade the other system. *Id.* at 32-33. He then testified that he had given his word to the homeowner, so he was "still going to fix the system because I think it's the right thing to do, and it's the right thing for the pond." *Id.* at 33. He later admitted that if the Board were to deny his current Application, he would be "under no obligation to fix the [other] system." *Id.* at 45-46.

Expert Civil Engineer Jeffrey J. Campopiano testified in favor of the Application. He stated that the property is located "in the middle of a densely developed neighborhood[,]" and consists of a small, grassy, flat lot, with an elevation of around six or seven feet above sea level. *Id.* at 13. He testified that the proposed hydrokinetic system would combine all of the waste stream from the house. *Id.* at 15. He then testified:

> "Typically, on a regular septic tank in a conventional drain field, you will have 24 hours of detention and treatment time within a septic tank. With the treatment options and pumps and recirculation in this Hydrokinetic model, there's about seventy

> hours of treatment time. That's one of the reasons why they can get the wastewater clean to the numbers that were never heard of before in the industry standards." *Id.* at 15.

Mr. Campopiano explained that although the industry standard for the project called for twenty milligrams of nitrogen per liter, the proposed system "has been tested and approved at ten," and that in some tests around the country, the results have seen numbers in the range of four to five. *Id.* Mr. Campopiano then described how the system operated, stating,

> "The way it operates is it has five tanks. The tanks have pumps. It lets little bits of the waste stream into the other partially treated wastewater and that both creates denitrification and nitrifying of the chemical stream to get it to be able to be released as nitrogen gas into the environment. Basically, 90 percent. It's removed to levels of drinking water quality." *Id.* at 15-16.

Mr. Campopiano stated that one of the conditions attached to the pertinent DEM construction permit requires Pear Nike to upgrade an existing OWTS located on a separate lot before the proposed OWTS can be constructed. *Id.* at 16-17; *see also* DEM Permits, dated May 10, 2013, and July 29, 2016. That separate lot contains a three-bedroom house with a conventional septic system. *Id.* at 17.

Mr. Campopiano testified that based upon his calculations, an existing three-bedroom house with a conventional septic system produces approximately thirty-five to thirty-six pounds of nitrogen per year. *Id.* He then stated that with the installation of hydrokinetic systems on both lots, the combined nitrogen output for the existing three-bedroom house and the proposed two-bedroom house would be approximately fifteen or sixteen pounds, which basically would translate into a fifty-five percent reduction in overall pollution currently being produced by the existing house alone. *Id.* at 17-18.

Mr. Campopiano then discussed the plans for the OWTS on the instant Property. *Id.* at 19. He testified that the Property is situated in an A12 flood zone, that the house will be elevated

by thirteen feet, and that the control panel for the OWTS will be located seventeen feet off the ground. *Id.* at 18, 19. He testified that in the event of a massive flood requiring evacuation, upon the homeowner's return, he or she simply would "turn the switch on and the system can operate just as it did before." *Id.* at 20. He then stated that because "the tanks are watertight[,]" seawater will be unable to penetrate any part of them, and that "[i]f the drain field gets wet, the drain field will dry off and it can be used again." *Id.* When questioned whether it would be possible for the system to be washed away by a flood, Mr. Campopiano responded: "No. The system is fully underground. Any storm water or water will basically go over the top of it and eventually dissipate and go away." *Id.*

According to Mr. Campopiano's Comprehensive Environmental Analysis Report, "[t]he proposed onsite well will not gather surface waters, as it will be constructed with a steel liner, and draws groundwater from deep within the earth, likely 300' down." (Comprehensive Environmental Analysis at 10.) Chairman Dreczko raised concern about the OWTS being within seventy-five feet of an existing well. (Tr. I at 24.) Mr. Campopiano testified the well is approximately eighty feet from the OWTS, and that he recently learned at a national seminar that wells do not have to be located 100 feet from an OWTS. *Id.* at 24, 25. He then opined that a 100-foot rule "is arbitrary[,]" and that considering that the pollution from the proposed system will be much lower than normal, a thirty-foot distance from the well would be sufficient. *Id* at 25-26. Mr. Campopiano also testified that the only well that might be affected by the OWTS is Mr. Frattini's own well. (Tr. II at 22.)

Mr. Dreczko later asked Mr. Frattini what type of system was being planned for the upgrade on the separate property. *Id.* at 25. He responded: "We haven't done any engineering

on that yet." *Id.* at 25-26. He then stated that he would "probably use an Advantax textile filter." *Id.* at 26.

The Town's wastewater manager, Matt Dowling, submitted a report to the Board on November 15, 2016, outlining ten conditions that should be implemented as part of any special use permit that the Board might grant. *See* Draft Special Use Permit Conditions. The conditions involved installation and testing requirements for the proposed OWTS and well, and for the OWTS upgrade on the separate lot. *See id.* The Applicants, through counsel, agreed to the conditions. (Tr. II at 5.)

At the hearing, the following colloquy took place between Board members and Mr. Dowling regarding the proposed Hydrokinetic system:

> "MR. DOWLING: The Hydrokinetic is a conditionally approved technology by DEM. DEM will currently allow for fifty approvals statewide. They are not at the fifty approvals yet, at this point in time. I believe there is roughly ten or so approvals statewide. Once these fifty approvals are cast out, the DEM will take a look at the analytical data from the ten systems that are required to be sampled under the program for functionality. And then at some point in time they will grant the system's full approval for statewide unlimited use.
> "MR. CHAMBERS: Should this model be constructed and placed would this constitute one of the approval units?
> "MR. DOWLING: Under the second bullet under the proposed conditions indicates that the installation of this system would be required to be utilized by the state as one of those ten test cases.
> "MR. VANOVER: Mr. Dowling, this is an experiment?
> "MR. DOWLING: They are conditionally approved. I don't think it's an experimental technology.
> "MR. VANOVER: It looks like one to me, when DEM is just approving a few.
> "MR. DOWLING: It's conditionally approved pending the results of the analysis." (Tr. II at 19-20.)

Robert Phelan—the owner of the property intended for the upgrade—testified that Mr. Frattini approached him and proposed upgrading the existing system on Mr. Phelan's property.

Tr. I at 57. Mr. Phelan stated that he thought that the proposal was "a no brainer for me[,]" because his current, old system would be replaced by "a state-of-the-art system[.]" *Id.*

Mr. Frattini was questioned by Board members regarding the status of a well across the street on a small piece of property owned by Mr. Frattini, which is close to Green Hill Pond. The well would service the proposed house through a waterline running underneath the road between the two properties. Board Member Vanover described the "well" as "a 2 1/2 inch PVC pipe sticking up out of the ground 3 feet and capped off[,]" and he asked: "What kind of well is that"? (Tr. I at 34.) Mr. Frattini responded: "It's a well point which is actually driven into the water table. It's very common in sandy gravel areas." *Id.* Mr. Vanover then asked Mr. Frattini if he had obtained a permit for the well. *Id.* Mr. Frattini responded "Yes[,]" but when pressed further, he said "[t]echnically speaking you don't need a permit for a well believe it or not." *Id.* at 34-35. He then admitted that he had not sought a permit from the applicable agency; namely, the Coastal Resources Management Council (CRMC). *Id.* at 35. He further stated: "I put the well in. I have a well completion report[,]" and that he had "a preliminary test that shows the water is portable [*sic*]." *Id.* at 35, 36.[5] Although Mr. Frattini was not seeking relief for the well, Mr. Vanover stated that the issue went to the credibility of both Mr. Frattini and the proposal itself. *Id.*

Mr. Frattini testified that the former president of the Sea Lea Colony Association had given him permission to construct a waterline by digging across the roadway, and he provided the Board with a letter from that former President. *Id.* at 37; Tr. II at 13; *see also* Dave Landry Letter, Nov. 13, 2010.) However, Board Member Quadrato expressed concern that this

[5] After the October 18, 2016 hearing, Mr. Frattini submitted an Assent dated October 20, 2016 from CRMC granting Pear Nike "permission to [i]nstall a 2" well point on lot as shown on plan." Mr. Frattini did not submit the underlying plan.

permission may not still be valid because it had been given six years ago by an individual who no longer was president of the Association. (Tr. II at 13-14.) Board Member Stolle expressed the same concern. *See* Tr. II at 15 (stating "I'm also a little uncomfortable with the fact that this letter is so old and the gentleman is no longer the president.").

Abutter John Kearney testified that his well is seventy-five feet from the proposed OTWS. (Tr. I at 58.) He further testified one of the considerations he made when he purchased his property thirty years ago was that the setback requirements would not permit installation of an OSTW on Appellants' Property. *Id.* at 59. According to Mr. Kearney, "[t]here was no general meeting [of the Association] granting the right to go across the road and put a well in this location[,]" and that the current President of the Association "is completely opposed" to the proposal. *Id.* at 61, 63.

At the November 15, 2016 hearing, Mr. Kearney testified that according to one of his neighbors, CRMC informed her that there was no well on the site; rather, that it was "just a test PVC pipe." (Tr. II at 35.) He additionally testified that he had since spoken to the current Association President, who

> "confirmed that there was no board vote when [the former President] gave that letter. Expectations are that the current board would never grant an easement across the road to put a well several feet from a polluted body of water." *Id.*

At the conclusion of the testimony, the Board voted to close the public portion of the hearing. (Tr. II at 36.) The Board members then discussed the Application. *Id.* at 36-64. Mr. Quadrato stated that two issues concerned him: "First off, forgive me, but I've seen a lot of credibility issues in this presentation. There are so many discrepancies." (Tr. II at 41.) The other issue was the fact that DEM conditioned its permit on installing a septic tank on a completely unrelated property located approximately one-quarter of a mile away. *Id.* at 41-42.

Mr. Quadrato stated that "[f]rom my understanding, there were two [DEM] variances that were not met with that property. It was too close to the wells, and it was too close to the salt pond. Redoing a system a quarter of a mile away doesn't fix these things. I don't think it's fair to the people that live on Third Avenue to still have to deal with this system coming in." *Id.* at 43; *see also id.* at 42 ("Just because we are reducing nitrates from a quarter of a mile away that didn't have any benefit on them."). He later stated "I have to look at the effect it has on the people in the immediate area. I don't see where renewing or approving that other system is going to help the wells or the salt pond in front of the property." *Id.* at 63.

Mr. Quadrato also observed that Mr. Frattini had admitted that DEM would not have given a permit for the proposal because it failed to meet requirements for proximity to two wells and proximity to the pond. *Id.* at 42-43. Board Members Stolle, Quinn, Dreczko, and Quadratto all commented about they would have appreciated testimony from a representative of DEM concerning the proposal and/or more expert testimony from Mr. Dowling. *See id.* at 43-44; 55-56; 57. Mr. Dreczko suggested that the hearing should be reopened to determine if they could bring in a representative from DEM. *Id.* at 55-56.

Mr. Vanover expressed concern about installing a brand new, untested system. *Id.* at 47 (asking "how can we be assured that problems with this design will not crop up within a few years . . . ."). He also commented about the continuing deterioration of Green Hill Pond, "especially in the area adjacent to Sea Lea Colony." *Id.* at 48.

Mr. Dreczko introduced a Motion to Approve the Application. The motion included the ten conditions contained in Mr. Dowling's report, as well as a requirement that the Property not only have access to potable water, but that it obtains an easement to access the well across the street. *Id.* at 59. The Board voted to deny the Application by a vote of three to two. *Id.* at 63-

64. On November 18, 2016, the Board issued a written decision, denying the Application for a special use permit. The Appellants timely appealed the decision to this Court.

On January 11, 2018, a Justice of this Court found that the November 18, 2016 Decision failed to clearly articulate its finding of fact and conclusions of law. Accordingly, he remanded the matter to the Board directing it to make such written findings of fact and conclusions of law. On March 8, 2018, the Board issued a more detailed written Decision, which is the subject of this Decision.

In its March 8, 2018 Decision, the Board essentially summarized Mr. Dreczko's Motion to Approve and the reasoning supporting his motion. (Decision at 1.) The Motion to Approve portion of the Decision stated that the proposed "OWTS system is projected to be a better performing system than any of the systems in the neighborhood; that by upgrading the second system the nitrates are being reduced by approximately 50% +/- than what exists with the current existing system[.]" *Id.* at 1. It then stated that "if the proposal will reduce the nitrates by 50% +/- on two properties vs. the existing one it can't have an adverse impact[.]" *Id.* It also stated "that the well is not only potable but the easement is granted to cross the road to get water to the subject site[.]" *Id.* In addition, it stated that the proposal would not threaten drinking water supplies, and that although "the separation requirements will be 80' as opposed to 100' feet[,] [it] still meet[s] the standards and therefore would not be a threat to the neighbors or the resident of this project[.]" *Id.* The Motion observed "that the proposed OWTS system has been accepted by DEM with the conditions that have been placed on the performance of the system." *Id.* Mr. Dreczko and Mr. Chambers voted to approve the Motion.

The Decision stated that Mr. Quadrato voted to deny the Application and listed reasons for his vote. Both Ms. Stolle and Mr. Vanover concurred with Mr. Quadrato's findings of facts and conclusions of law in their entirety. *Id.* at 2. Those findings were as follows:

> "there are a number of discrepencies [*sic*] among the written and verbal testimony which to me raised credibility issues with this application; the written testimony stated that the well would be constructed with a steel liner and likely be down 300'; later on in presentation it changed to an existing well down 20' in 2" PVC pipe, that's quite a difference from the likely 300' feet in the steel pipe; then we were told the well had passed potability water when in reality only 3 parameters were tested out of the 16 which the State of Rhode Island requires for a CO; and plus this testing was done back in 2011; and this is contrary to what Mr. Dreczko stated that the property has potable water because it does not, it has not passed the Rhode Island requirements for potable water[.]" *Id.*

The Board, through Mr. Quadrato, then addressed the existence of an easement to run a water line under the road:

> "next we were told that they had approval from the Association President to run the water line under the road, when we received a copy of this letter it was dated November 13, 2010 and was signed by the President who is no longer on the Board of Sea Lea Colony Association; a current Association member also testified that the applicant does not have current approval; once again contrary to what Mr. Dreczko stated that he had permission to cross the street; I don't see the permission[.]" *Id.*

Next, the Board addressed the fact that there are three wells within the required one hundred foot radius that could be affected by the OWTS, and it disagreed with Mr. Campopiano's assertion that "these required setbacks [are] just an arbitrary number." *Id.* Instead, the Board found that the "application would pose a threat to the drinking water especially for the three wells within the 100' radius. *Id.*

The Board observed that but for the imposition of a condition to upgrade an unrelated property located one quarter mile away, DEM would not have granted the construction permit.

Id. It then found that this upgrade "changes nothing for the people on Third Avenue, there still are three wells with a 300' [*sic*] radius setback and the OWTS would be less than 100' from Green Hill Pond and there still is a 24" water table[.]" *Id.* The Board also questioned the credibility of the testimony concerning what type of system would be installed for the upgrade. *Id.* It observed that all of Mr. Campopiano's calculations were based upon installation of a Hydro-Kinetic system at both locations, but that Mr. Frattini later admitted that "they haven't done any engineering on that yet and are hoping to use the existing drain fields if it passes a float test[.]" *Id.* The Board concluded that there were "some serious credibility issues with this application . . . [and] reject[ed] this application and protect the public convenience and welfare and safety of the people that live on Third Avenue[.]" *Id.* Mr. Vanover made separate findings of fact and conclusions of law in the Decision. *Id.* at 2-3.[6]

The Court now will address the merits, if any, of this appeal. Additional facts will be provided in the Analysis portion of this Decision.

II

Standard of Review

Section 45-24-69(a) grants jurisdiction to the Superior Court to review a local zoning board's decision. Such review is governed by § 45-24-69(d), which provides:

> "The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or

[6] Mr. Vanover made unsupported findings about the poor performance of previously approved OWTS systems, and he posited that the alleged problems those systems suffered also could occur with the new system proposed in this case. (Decision at 2-3.) However, the Court disregards such comments as mere hearsay and will not consider them in the Analysis portion of this Decision.

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).

Our Supreme Court mandates this Court to "review[] the decisions of a . . . board of review under the 'traditional judicial review' standard applicable to administrative agency actions." *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I. 1998). Accordingly, the Court '"lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level."' *Id.* at 666 (quoting *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986)). In performing this review, the Court "may 'not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.'" *Curran v. Church Cmty. Housing Corp.*, 672 A.2d 453, 454 (R.I. 1996) (quoting § 45-24-69(d)). However, the applicant always bears the burden to demonstrate why the requested relief should be granted. *See DiIorio v. Zoning Bd. of Review of City of E. Providence*, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969) (requiring "an applicant seeking relief before a zoning board of review to prove the existence of the conditions precedent to a grant of relief").

In reviewing a zoning decision, the 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 City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Bd. of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). '"Substantial evidence"' is defined as '"such relevant evidence that a reasonable mind might

accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" *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., Inc.*, 424 A.2d 646, 647 (R.I. 1981)). If the Court '"can conscientiously find that the board's decision was supported by substantial evidence in the whole record,"' it must uphold that decision. *Mill Realty Assocs. v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *Apostolu v. Genovesi*, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)).

III

Analysis

The Appellants contend that the Board's Decision was clearly erroneous in light of the reliable and substantial evidence in the record, and they maintain that they satisfied their burden for a special use permit. They further aver that the Decision arbitrarily and capriciously disregarded DEM's approval of a permit for the OWTS, and that it was not supported by the necessary findings of fact and conclusions of law.[7]

A special use "is a conditionally permitted use[.]" *Bernstein v. Zoning Bd. of Review of City of E. Providence*, 99 R.I. 494, 497, 209 A.2d 52, 54 (1965). It is defined as "[a] regulated use that is permitted pursuant to the special-use permit issued by the authorized governmental entity, pursuant to § 45-24-42." Sec. 45-24-31(62). Consequently, it is

> "not an exception to a zoning ordinance, but rather it is a use to which the applicant is entitled if it meets the objective standards in the zoning ordinance for special exception approval. The allowance of a special exception use in a particular zoning district indicates legislative acceptance that the use is consistent with the municipality's zoning plan and that the special exception use, if the

[7] It is this latter contention that necessitated a remand of the matter to the Board. Thereafter, on March 8, 2018, the Board issued the second, more detailed Decision that this Court now will review.

> applicable objective standards are met, does not adversely affect the public interest of health, safety, and welfare." McQuillin, *Law of Municipal Corporations* § 25:170.60 (3d ed. 2010, 2018 Cumulative Supplement).

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

The Ordinance specifies the standards that the Board must follow in approving a special use permit:

> "A. A special use permit may be approved by the Board following a public hearing if, in the opinion of the Board, that evidence to the satisfaction of the following standards has been entered into the record of the proceedings:
>
> > "(1) The public convenience and welfare will be substantially served;
> > "(2) It will not result in adverse impacts or create conditions that will be inimical to the public health, safety, morals and general welfare of the community.
> > "(3) The requested special use permit will not alter the general character of the surrounding area or impair the intent or purpose of this Zoning Ordinance or the Comprehensive Plan upon which this Ordinance is based;
> > "(4) That the granting of a special use permit will not pose a threat to drinking water supplies;

> "(5) That the use will not disrupt the neighborhood or the privacy of abutting landowners by excessive noise, light, glare, or air pollutants;
> "(6) That the sewage and waste disposal into the ground and the surface water drainage from the proposed use will be adequately handled on site;
> "(7) That the traffic generated by the proposed use will not cause undue congestion or introduce a traffic hazard to the circulation pattern of the area." Ordinance § 218-78.

Section 218-78 of the Ordinance, entitled "Water bodies[,]" requires a special use permit for an OWTS under certain conditions. It provides:

> "A. Generally. No facility designed to leach liquid wastes into the soil shall be located in areas outlined below, except by the granting of a special use permit. Exception: The repair or alteration of an existing waste disposal system.
>
> > "(1) Within one hundred feet of a boundary of a fresh water or coastal wetland as defined by Rhode Island General Laws §§ 2-1-14 and 2-1-20.
> > "(2) That area of land within two hundred feet of the edge of any flowing body of water having a width of ten feet or more and that area of land within one hundred feet of the edge of any flowing body of water having a width of ten feet or less; and
> > "(3) That area of land within one hundred feet of the edge of any intermittent stream; and
> > "(4) The area of land defined as a one hundred year flood hazard boundary indicated by Zone A or Zone V on the official Flood Insurance Rate Maps of the Town of Charlestown prepared by the Federal Emergency Management Agency and dated September 30, 1995 and any and all revisions thereto." Ordinance § 218-78.

It is undisputed that the Property is located within a flood zone; thus, Appellants were required to acquire a special use permit for the proposed OTWS.

The Appellants maintain that Mr. Dreczko's Motion to Approve the Application provided the necessary findings of fact and conclusions of law required under § 218-23 of the Ordinance. They then contend that the Board ignored these findings, as well as the uncontested

expert testimony of Mr. Campopiano and Mr. Dowling. They further assert that the Board arbitrarily and capriciously disregarded DEM's approval of the proposed OWTS.

In his motion, Mr. Dreczko stated that if the combined output of nitrates from the proposed OTWS system and the upgraded system "will reduce the nitrates by 50% +/- on two properties vs. the existing one[,] it can't have an adverse impact; it will not alter the surrounding area or impair the intent or purpose of the Ordinance[.]" (Decision at 1.) He also found that "the well is not only potable but the easement is granted to cross the road to get water to the subject site." (Decision at 1.)

The Board took issue with these findings, stating that despite Mr. Frattini's claim of potability to the contrary, only three of the necessary sixteen parameters for potability had been tested back in 2011. *Id.* at 2. They also noted that although the written submissions represented that the well would contain a steel liner with steel pipes buried down about three hundred feet deep, the oral testimony revealed that the existing well consisted of a twenty foot PVC pipe sunk into the ground. *Id.* In addition, it pointed out that there was a serious question about the enforceability of the 2010 approval given by a former Association President to run a water line under the road. *Id.* Although the Application did not seek permission to install a well, the Board found that the inconsistent representations concerning the well raised serious credibility issues. *Id.*; *see also Restivo,* 707 A.2d at 666 (stating that the Court "lacks [the] authority to . . . to pass upon the credibility of witnesses"); *Murphy v. Zoning Bd. of Review of Town of S. Kingstown*, 959 A.2d 535, 542 n.6 (R.I. 2008) (recognizing that "expert testimony proffered to a zoning board is not somehow exempt from being attacked in several ways"). Here, many of Mr. Frattini's representations directly contradicted testimony and written submissions proffered by Mr. Campopiano.

With respect to the location of the well, the Board found that there were possibly three wells within the required one hundred foot setback from an OWTS. Decision at 2. Indeed, the record reveals that Appellants' own well was located approximately eighty feet from the proposed OWTS. The Board rejected Mr. Campopiano's opinion that the required setback was "just an arbitrary number." *Id.*

The record reveals that Mr. Campopiano testified that he recently had attended a national seminar where he allegedly learned that wells do not have to be located 100 feet from an OWTS. (Tr. I at 24.) He opined that with reductions in amount of nitrates being emitted from OWTS systems, the weaker concentrations would merit a reduction in the required setback. *Id.* at 24-25. However, his opinion was not supported with any calculations or scientific documentation. Consequently, the Court finds that the Board did not err in rejecting Mr. Campopiano's declaration that the one-hundred foot setback was an arbitrary number. *See, e.g., Rodriquez v. Kennedy*, 706 A.2d 922, 924 (R.I. 1998) (rejecting expert testimony as speculative where expert failed to conduct necessary tests). Indeed, even if it was an arbitrary number, it nevertheless still remains the legal setback requirement for wells in Rhode Island.

The Appellants contend that the Board did not give due deference to the rigorous permitting process that DEM necessarily must have employed when it granted the construction permit, and that it also failed to provide adequate findings of fact to justify ignoring the construction permit. *See Mill Realty Assocs.*, 841 A.2d at 681 (Flanders, J., dissenting) (stating that applicant's "ability to obtain DEM approval indicated that its planned private well and [OWTS] would not create a public safety concern with respect to its use of water on the property"). However, the record reveals that by Mr. Frattini's and Mr. Campopiano's own

admissions, DEM would not have granted the permit without it being conditioned on upgrading an OWTS system on an unrelated lot located one-quarter mile away. *See* Tr. I at 16, 31.

The Board expressed concern about Mr. Frattini's admission, and although Mr. Frattini tried to walk it back by stating that a DEM employee told him the condition wasn't necessary for his first permit application because emissions from the then-proposed composting toilet were below acceptable nitrate levels, the same condition was attached to the second construction permit for a proposal that was planned to emit even less nitrates than the composting toilet. Moreover, while Mr. Frattini allegedly informed the DEM employee that he would upgrade the other system even if it was not required, he later testified that if denied an OWTS permit, he would be under no obligation to install the upgrade. *See* Tr. I at 32-33, 46; *see also Soucy v. Martin*, 121 R.I. 651, 656, 402 A.2d 1167, 1170 (1979) (stating "inferences drawn from contradictory evidence are properly within the domain of the trier of facts").

In its Decision, the Board questioned Mr. Campopiano's calculations regarding the level of nitrates from the combined systems, and also questioned the credibility of the Application itself. (Decision at 2.) It noted that the calculations in the written submissions, as well as in Mr. Campopiano's testimony, were based upon installation of two Hydro-Kinetic systems. The Board then found that when Mr. Frattini was questioned about what type of system was being planned for the upgrade on the separate property, he responded that "they haven't done any engineering on that yet and are hoping to use the existing drain fields if it passes a float test." *Id.* The Board found that "this is totally contrary to everything else we've been hearing . . . ." *Id.* The Board also observed that Mr. Frattini stated that he would "probably go with an Advantax Textile System, filter system" for the upgrade, and it found that "once again, this is contrary, he states everything was all revolved around the kinetic, Hydro-Kinetic, now we're hearing about

engineering that hasn't even been done yet, once again some serious credibility issues with this application[.]" *Id.; see also Restivo,* 707 A.2d at 666 (recognizing the Court's lack of authority "to pass upon the credibility of witnesses").

Mr. Campopiano's written report and testimony was based upon the installation of two Hydro-Kinetic systems. *See* Comprehensive Environmental Analysis at 6 ("The proposal is to design and install the Hydro-Kinetic Model 600 FEU at both locations.") The construction permit states that "[P]roposed system upgrade for the existing house at 54 Shore Dr. (Lot 284) must be conformed prior to conformance of this permit." (DEM Permit, Aug. 3, 2016.) The construction permit does not specify what type of OTWS must be installed for the upgrade; but, if DEM relied upon the Comprehensive Environmental Analysis and its resulting calculations, then it is conceivable that the construction permit may have been issued based upon what appears to be misleading information.[8]

Even assuming that Mr. Campopiano's calculations of projected decrease in nitrates from both properties using the Advantax Textile System were the same those for the Hydro-Kinetic systems, the Board stated that it was concerned about the effect that the proposed OWTS system would have on the immediate neighbors, rather than the effect that the overall proposal would have on an area located one quarter mile away. Decision at 2 (expressing the admirability "of replacing old problematic existing systems but not if it creates a negative impact for people living in another area"). This Court finds that the Board was not clearly erroneous in concluding that there would be an increase in nitrates in the immediate area of the Property due to the installation of any OWTS system in the neighborhood, and that but for the condition to upgrade another property located one-quarter mile away from the subject Property, the construction

[8] As stated *supra*, several members of the Board stated in closed session that they would have preferred that a member of DEM had testified at the hearing.

permit would not have been granted. While DEM may have had a laudable objective to decrease overall pollution in Green Hill Salt Pond, the Board did not err in finding that this objective would impose an impermissible burden on the immediate neighbors.

As previously stated, this Court "lacks [the] authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level." *Restivo,* 707 A.2d at 666. It is clear that the Board's Decision to deny the permit rested in large part on its credibility findings. In its Decision, the Board pointed out numerous inconsistent representations offered by Mr. Frattini regarding the type of well, the potability of the water, the purported easement, and the OTWS system to be used for the upgrade. Thus, even though the expert opinion in this case may not have been disputed by contrary experts, it was contradicted by Mr. Frattini's own inconsistent representations. *See Murphy*, 959 A.2d at 542 (recognizing that "there is no talismanic significance to expert testimony [and it] may be accepted or rejected by the trier of fact[;]" indeed, it is only where "expert testimony before a zoning board is competent, uncontradicted, and unimpeached, [] would [it] be an abuse of discretion for a zoning board to reject such testimony").

IV

Conclusion

After a thorough review of the entire record, this Court finds that the Appellants failed to carry their burden of showing that the Application for the special use permit was not "inimical to the public health, safety, morals and welfare." *Salve Regina Coll.*, 594 A.2d at 880. The Decision of the Zoning Board is not clearly erroneous, is not made upon improper procedure, is not in violation of ordinance provisions, is not in excess of the Zoning Board's authority, is not arbitrary and capricious, is not characterized by abuse of discretion, and is not affected by clear

error of law. Substantial rights of the Appellants have not been prejudiced. As such, the Decision of the Zoning Board denying Appellants' application for a special use permit is affirmed.

Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Pear Nike, LLC and Arthur Frattini v. The Town of Charlestown Zoning Board of Review, et al.
CASE NO:	WC-2016-0618
COURT:	Washington County Superior Court
DATE DECISION FILED:	November 14, 2018
JUSTICE/MAGISTRATE:	Taft-Carter, J.
ATTORNEYS:	
For Plaintiff:	John F. Kenyon, Esq.
For Defendant:	Wyatt A. Brochu, Esq.