STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 26, 2020)

PATRICIA A. ENRIGHT	**:**	**C.A. No. PC-2010-4294**
	:	**C.A. No. PC-2010-5144**
v.	**:**	**C.A. No. PC-2013-1095**
	:	***(Consolidated Appeal)***
TOWN OF BRISTOL ZONING BOARD	**:**	
OF REVIEW, DENNIS HARDIMAN and	**:**	
LISA HARDIMAN	**:**	

DECISION

LICHT, J. Appellant Patricia A. Enright (Appellant or Ms. Enright) has filed this consolidated appeal from two decisions of the Town of Bristol Zoning Board (Zoning Board) sitting as the Planning Board of Appeal and one decision of the Zoning Board, sitting as a Board of Review. Each of these appeals seeks to prevent Leslie Gray and Georgina MacDonald (Owners or Applicants)[1] from creating a three-lot subdivision of their land in Bristol, Rhode Island. Ms. Enright asks this Court to (1) reverse the Planning Board of Appeal's decision approving Applicants' Proposed Plan (Master Plan Approval); (2) reverse the Zoning Board's decision granting Applicants' dimensional variances (Dimensional Variance Approval); and (3) reverse the Planning Board of Appeal's decision approving Applicants' Preliminary Plan (Preliminary Plan Approval). The Zoning Board has objected to the instant appeal. Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

[1] During the pendency of these appeals, the property was sold to new owners. To avoid confusion between the owners at the time of the application and the current owners, the Court will refer to the owners of the subject property as "Owners" or "Applicants."

I

Facts and Travel

A

Introduction

The Court pauses to note the lengthy delay that occurred in this case. One must wonder why this case, which is ten years old, is still pending. First, the property was placed on the market and then sold. Next, for some reason unknown to the Court, no one moved to assign this appeal for decision until 2015 when it was assigned to the Court on July 16, 2015. The Court was asked to take a view, which it did on October 29, 2015. The Court was then asked not to decide the case as the parties were trying to resolve their differences. They even went to a third-party mediator. Those efforts failed. A conference with the parties was held on September 5, 2018, at which time the Court was advised that the official tape of one of the Zoning Board meetings was inaudible. It was agreed the parties would work to reconstruct the testimony from that meeting. However, that did not happen, so finally in June 2019, the Court asked the parties to submit a scheduling order for memoranda, which they did, and the last brief was filed on September 15, 2019.

B

The Proposed Subdivision

Applicants owned the property located at 125 Poppasquash Road in Bristol, Rhode Island, otherwise known as Lot 2 on the Town of Bristol Tax Assessor's Map 182 (the Property) and lived in a single-family waterfront dwelling on the Property. Ms. Enright owns the abutting property located at 127 Poppasquash Point.[2]

[2] As an abutting landowner, it is undisputed that Ms. Enright is an aggrieved party for purposes of filing this appeal. *See* § 45-24-31(4) (defining aggrieved party as "[a]nyone requiring notice

The Property contains 5.3 acres of land and is located in an R-20 residential zoning district (Notice of Public Hearing, at 1, Apr. 5, 2010.), which requires the minimum lot frontage and lot width be 120 feet. (Town of Bristol Zoning Ordinances (Ordinance) Article IV § 28-111, Table B: Dimensional Table.) Applicants filed a proposed three-lot Minor Subdivision plan (the Subdivision Plan)[3] for the Property with the Bristol Planning Board (the Planning Board). The Subdivision Plan required dimensional variances from the lot frontage and width requirements from the Zoning Board and a regulatory waiver from the interior lot angle requirements from the Planning Board. (Bristol Technical Review Committee (TRC) Plan Review Notes at 1–2, Oct. 27, 2009.) The Planning Board requested that Applicants create two plans in addition to the Subdivision Plan: (1) a "Maximum Use Plan," showing the Subdivision Plan with phantom lines illustrating the full potential for future development; and (2) a "By-Right Plan," demonstrating the subdivision with three lots that conformed with the Ordinance and Regulations. (TRC Plan Review Notes at 2, Oct. 27, 2009.)

The Property contains several old stone walls totaling over 1000 feet.[4] There is a stone wall running the entire 372.01 feet of frontage along Poppasquash Road, except for a 14-foot opening, which constitutes the end of a driveway that leads to the existing residence (the Poppasquash Wall). Beginning approximately 50 feet east from Poppasquash Road and about 15

pursuant to this chapter"). Ms. Enright was entitled to notice because she owns an abutting property. *See* § 45-24-53.

[3] The Bristol Technical Review Committee (TRC) subsequently reclassified the application as one for a Major Subdivision because a Minor Subdivision plan must not require waivers or modifications. (Bristol Subdivision & Development Review Regulations (Regulations) § 2.3.)

[4] The parties attached the plans referred to above to their memoranda but because they had been reduced from 24" by 36", they were illegible. The Court asked for and received the full-sized plans and from them obtained the measurements stated herein. In addition, from those plans the Court created Exhibits A and B attached hereto which are not to scale and are provided for illustrative purposes only.

feet from each side of the driveway, there are two stone walls running parallel to the driveway at about 140 feet (the Driveway Walls). The Driveway Walls are about 44 feet from each other, and if extended westerly they would be perpendicular to Poppasquash Road. Then, about 16 feet from the eastern end of the Driveway Walls there are two stone walls: one running generally north for about 125 feet and the other generally south for about 165 feet, with each wall running almost to the northern and southern, respectively, boundary lines of the Property (the Lot Line Walls).

Under the Subdivision Plan, Applicants sought to subdivide the Property into three lots. Lot 1 contains about .68 acres of land and is bounded by the northern boundary of the Property, the northerly Lot Line Wall to the east, the northerly Driveway Wall to the south, and Poppasquash Road to the west. Lot 2 contains about .99 acres of land and is bounded by the southern boundary of the Property, the southerly Lot Line Wall to the east, the southerly Driveway Wall to the north, and Poppasquash Road to the west. Lot 3, a waterfront lot, contains 3.68 acres of land and the existing single-family dwelling. It is bounded to the east by Bristol Harbor, to the north and to the south by the northern and southern boundaries of the Property, and to the west by the Property Line Walls which form common boundaries with Lots 1 and 2, respectively. Lot 3 is connected to Poppasquash Road by a strip of land about 44 feet wide running from Poppasquash Road to the end of the Driveway Walls. As previously stated, within that strip of land is an existing driveway. Lots 1 and 2 would access Poppasquash Road by the grant of an easement from the end of the Driveway Walls to the existing driveway and then to Poppasquash Road.

The Subdivision Plan did not comply with some of the dimensional requirements of the Ordinance. Although there is more than enough frontage on Poppasquash Road for three lots, the boundaries of the proposed lots in the Subdivision Plan align with the existing stone walls and trees on the Property. As a result, Lot 2 and Lot 3 would not meet the dimensional requirements

for minimum lot frontage and width under the Ordinance[5] and would require variances from the Zoning Board. Further, Lot 3 would be a "flag lot,"[6] because it lacked the average-lot-depth to average-lot-width ratio required by the Regulations and would therefore require waivers from the Planning Board. In order to preserve the stone walls and the trees, Lot 1 and Lot 2 would access Poppasquash Road through existing breaks in the stone walls pursuant to an easement and over the existing driveway contained in Lot 3 and would not have access by a curb cut on Poppasquash Road.

The Maximum Use Plan depicted what the Property would look like if the Subdivision Plan was approved and if Lot 3 was further subdivided into six smaller lots, the maximum number of lots allowed under the Ordinance and Regulations.

Lastly, Applicants presented the By-Right Plan, which configured Lot 1, Lot 2, and Lot 3 in a way that conformed to frontage and width requirements of the Ordinance. Similar to the Subdivision Plan, Lot 1 and Lot 2 would access Poppasquash Road through an easement on the driveway in Lot 3. Also similar to the Subdivision Plan, in the By-Right Plan, Lot 3 would still be a "flag lot" and would require waivers from the average-lot-depth to average-lot-width ratio requirements in the Regulations. The By-Right Plan would not require dimensional variances.

The main distinction between the Subdivision and By-Right Plans is the placement of the boundary lines in relation to the existing stone walls. While the By-Right Plan would preserve the stone walls and tree lines using easement restrictions, Lot 1 would have a stone wall "running through it and dividing it into a 2/3, 1/3 scenario," (Zoning Board Decision, ¶ 5, Aug. 19, 2010),

[5] *See* Ordinance, Article IV § 28-111, Table B: Dimensional Table.
[6] A "[f]lag lot" is a "lot not meeting minimum frontage requirements, with the bulk of the property lying to the rear of other lots, and where access to the public road is by a narrow strip of land." Regulations § 10.1.

whereas the Subdivision Plan would align the existing stone walls and trees with the boundary lines of the lots. The Subdivision Plan was the only proposal in which the boundary lines aligned with the existing features on the Property.

C

Master Plan Approval

On January 12, 2010 and February 9, 2010, the Planning Board held two duly noticed public hearings on Applicants' Subdivision Plan. (Notice of Public Hearing, Jan. 12, 2010 & Feb. 9, 2010, respectively.) At the January 12, 2010 meeting,[7] Applicants indicated that the Subdivision Plan was designed to preserve the beauty of existing fixtures on the land and that the existing driveway would service the waterfront house and provide access for the two lots in the front pursuant to an easement.

Administrative Officer, Diane M. Williamson, the Director of Community Development for the Town of Bristol, testified in support of the Subdivision Plan. She testified that, in the By-Right Plan, the road could not be built with the stone walls and trees as they existed. She also certified that all the requirements for Master Plan review were complete.

Ms. Enright called Mr. Joseph D. Lombardo, a Licensed Land Use Planning Consultant, to offer expert testimony in opposition to the Subdivision Plan. Mr. Lombardo testified that Lot 3

[7] The transcript of the January 12, 2010 meeting is absent from the record due to a malfunction of the recording device used by the Planning Board, so the facts in this paragraph are gleaned from the Planning Board meeting notes and the parties' briefs. *See DiDonato v. Zoning Board of Review of Town of Johnston*, 104 R.I. 158, 161, 242 A.2d 416, 418 (1968) (reviewing the record on the basis of a summary prepared by the clerk of the zoning board in the absence of a written transcript).

Notably, an Order was entered on May 6, 2014 allowing the parties to prepare a Statement of Stipulated Facts to supplement the missing transcript in the record. Ms. Enright submitted two proposed Statements of Stipulated Facts, both of which Applicants objected to and refused to assent. Applicants have not served Ms. Enright with their own version of a Statement of Stipulated Facts.

needed a waiver for interior angles because it would be a "flag lot" and that the Subdivision Plan would require variances because it was not in compliance with the Ordinance's dimensional requirements or the Regulations.[8] He also testified that variances cannot be granted if an applicant's primary desire is to "realize greater financial gain." (*See* Ordinance Art. XI, § 28-409(c)(1)(b) (Variances and Special Use Permits)). The matter was continued to February 2010 for Master Plan Approval.

On February 9, 2010, after hearing public comment, the Planning Board issued its decision granting the waiver request for the interior lot angle and average-lot-depth to average-lot-width ratio requirements and adopted seventeen findings of fact. The findings of fact stated, in pertinent part, that:

> "4. The new lots for development, Lots l and 2, will have lot lines that run along and preserve historically important existing stone walls on the property. The character of this portion of Poppasquash Road is enhanced by mature trees and stone walls.
>
> . . . .
>
> "7. The proposed subdivision has permanent access to public streets. The proposed access to the lots will be combined using the existing driveway which eliminates the need for two additional curb cuts on Poppasquash Road and the traffic disruption that would cause and preserves the integrity of the existing stone wall along the road. An access easement is proposed within the width of the stone walls along the existing driveway for access by all three lots. This access easement also limits the location of the future driveways to an existing break in the stone walls from the common driveway to proposed Lots 1 and 2 to preserve the integrity of the walls.

[8] Section 8.6 of the Regulations requires the Planning Board to determine whether "[t]he proposed development is in compliance with the standards and provisions of the Town's [Z]oning [O]rdinance." Regulations, § 8.6(B). Further, Appendix F of the Regulations, entitled "Design and Construction Standards," delineates the requirements for lot design of a subdivision development.

> "8. The proposed subdivision is consistent with the general purposes stated in Article 1 of the Planning Board's subdivision and development review regulations.
>
> "9. The proposed subdivision is consistent with the 2009 Comprehensive Community Plan because it preserves significant Oak trees and stone walls and combines curb cuts/driveways onto Poppasquash Road. (Citation omitted.)
>
> "10. The proposed subdivision is not in compliance with the Zoning Ordinance as to the lot frontage and lot width for 2 of the proposed lots (Lots 2 and 3); however, the Board finds that the alternate "by - right" layout presented which conforms to the lot frontage and width requirements significantly impacts the trees and stone walls and therefore negatively impacts the character of the area. A variance will be applied for.
>
> "11. Proposed Lot 3 with the existing dwelling will have interior angles greater than 200 degrees. The Board finds that granting a waiver of this prohibition is in the best of interest of planning since the alternative "by-right" layout presented significantly impact the trees and stone walls." Planning Board Decision, Feb. 9, 2010.

The Planning Board's decision to approve the Subdivision Plan rather than the By-Right Plan was largely motivated by a finding that the By-Right Plan would significantly and negatively impact the integrity of "historically important existing stone walls on the [P]roperty." *Id.* ¶ 4. Accordingly, the Planning Board granted Master Plan Approval for the Subdivision Plan subject to the grant of the necessary dimensional variances by the Zoning Board. *Id.* ¶ 10.

Ms. Enright subsequently appealed the Master Plan decision to the Zoning Board, sitting as the Planning Board of Appeal. On May 25, 2010, the Zoning Board held a duly noticed public meeting and unanimously voted to uphold the Master Plan decision. It found no prejudicial procedural error or error of law or fact. (Zoning Board Minutes at 2–3, May 25, 2010.)

The Zoning Board issued its decision of the appeal of Master Plan approval on July 9, 2010. It found, *inter alia*, that there was competent evidence to rebut Mr. Lombardo's testimony; that § 6.8 of the Regulations afforded the Planning Board the power to grant waivers upon a finding

that the waiver is in "the best interest of good planning practice" or the design is consistent with the Town's Comprehensive Plan and Ordinance; and that permitting a subdivision contingent upon obtaining a dimensional variance was not an error because it is not the Planning Board's duty to predict what the Zoning Board will do, and "State law [] specifically provides for Planning Board decisions being conditioned on other approvals." (Planning Board of Appeal, Decision ¶¶ 1, 2, 3, July 9, 2010.) Appellant then filed an administrative appeal from that decision in Providence County Superior Court (PC-2010-4294).

D

Dimensional Variances

Following Master Plan Approval, Applicants applied for dimensional variances before the Zoning Board seeking relief from the Ordinance's lot frontage and width requirements. The Ordinance requires a 120-foot minimum lot width and frontage in an R-20 zoning district. (*See* Ordinance Art. IV, § 28-111, Table B.) Pursuant to the Subdivision Plan, Lot 2 had only 98.82 feet of frontage and 108 feet of lot width, and Lot 3 had only 43.63 feet of lot frontage on Poppasquash Road and 43.8 feet of lot width at its narrowest point between the Driveway Walls.[9]

On July 12, 2010, the Zoning Board conducted a hearing on the application for dimensional variance. (Tr. July 12, 2010.) Applicants testified on their own behalf, stating that the Property has "stone walls that date back to the late 1800's, the foundation of [the] house was placed there in the late 1800's and there are a number of special trees on the [P]roperty," specifically, "a double line of oak trees that are on the inside portion of the stone walls." *Id.* at 2:6–10. Applicants

[9] Lot 2 would require a 21.18-foot dimensional variance from the frontage requirement and a 12-foot variance from the width requirement; Lot 3 would require a 76.37-foot dimensional variance from the frontage requirement and a 76.92-foot variance from the width requirement. (Tr. 9:3-7, July 12, 2010.)

indicated that there was no alternative way to divide the property without "either taking down the main house and the stone walls and the oak trees" and that such a result would "create both a hardship and would be contrary to the Comprehensive Plan." *Id.* at 2:11–15. Applicants submitted that the Town's Comprehensive Plan contemplates "historic trees and stone walls as being very important components of [the] community." *Id.* at 39:18–20. The Applicants further testified that, if the dimensional variance were granted, the new lots would be enclosed by the existing stone walls and served by the existing driveway, which would become a common driveway for all three lots. *Id.* at 5:14–18. The Applicants testified that they structured the lots of the Subdivision Plan around the existing stone walls and trees and would have divided the lots more equally had those features not been there. *Id.* at 8:7-10. When asked about the By-Right Plan, Applicants indicated that, although it conformed with the 120-foot minimum lot requirements, they would still need a variance for the internal angles of the lots, and the existing features would have to be removed or destroyed.[10] *Id.* at 2, 10:6–14, 10:22–11:6.

Ms. Enright again presented Mr. Lombardo to offer expert testimony against the variances. *Id.* at 12. He testified that he believed the Applicants had not met the applicable standard for a dimensional variance; specifically, that the Applicants could subdivide the Property into three lots without suffering a hardship of "more than a mere inconvenience" by virtue of the By-Right Plan. *Id.* at 16:18–17:11.

Mr. Lombardo posited that under the By-Right Plan there is sufficient room to insert access driveways before the stone walls, eliminating the need for the common driveway, and that the

[10] The By-Right Plan creates three lots that comply with the Ordinance's frontage and width dimensional standards. *Id.* at 19:9–14. The Planning Board may make a finding that, even though the internal angles do not meet the Regulations, it would not create a flag lot; if it made such a finding, then the By-Right Plan would not need zoning approval. *Id.* at 11:11–16.

existing features on the land could "be accommodated without any destruction." *Id.* at 20–22; 28:4-5. He testified that through an easement on the existing driveway to Lot 3, access points to all three of the lots described in the By-Right Plan could be created without altering the tree line or stone wall. *Id.* at 19-21; 27. He further indicated that, in his opinion, the Property would be more profitable to Applicants if the zoning relief were granted, noting that Rhode Island law does not recognize greater financial gain as evidence of hardship for purposes of zoning relief. *Id.* at 30. Mr. Lombardo next testified that granting the variances would impair the intent and purpose of the Town's Comprehensive Plan as it would not match "the land use pattern that's present in the area," where the typical lot size is "bigger and longer to the water." *Id.* at 30:20-31:9. The Zoning Board inquired that, under the By-Right Plan, there would be an impediment for making reasonable use of the Property because a stone wall would "bisect [a] lot completely," whereas the Subdivision Plan would conform the boundaries to the stone walls. *Id.* at 33. In response, Mr. Lombardo suggested that a gate could be inserted in the stone wall, "something that would stay with the time period to make it look like it fit in." *Id.* at 34:1–8.

In closing, Ms. Enright's counsel asserted that the real motive behind the Applicants' Subdivision Plan was to "realize greater financial gain" because the variances would allow Applicants to potentially further develop the back lot into six additional lots.[11] *Id.* at 37. At the conclusion of Ms. Enright's case, Applicants addressed the Zoning Board and testified that they had no intention of further subdividing the land. *Id.* at 42.

The Zoning Board voted unanimously to grant the requested dimensional variances for Lot 2 and Lot 3 pursuant to the Subdivision Plan and placed a restriction on Applicants and any future

[11] The development potential for the back lot is illustrated in the Maximum Use Plan, which Applicants prepared at the instruction of the Planning Board. *Id.* at 39.

purchaser from altering or removing the stone walls in any way. *Id.* at 55–59. The Zoning Board member who moved for approval emphasized that the Applicants' hardship stemmed primarily from the position of the stone walls, noting the By-Right Plan would have a stone wall bisecting a lot, which would be an unusual and inconvenient characteristic. *Id.* at 55. He also noted that the age of the stone walls was sufficient to classify them as a unique characteristic of the Property, and that the Town's Comprehensive Plan calls for preservation of such landscape features. *Id.* at 56–57.

On August 19, 2010, the Zoning Board memorialized its findings in a written decision. (Zoning Board Decision Aug. 19, 2010). It found that the Applicants' "hardship [was] due to the unique characteristics of the subject land" because "the lot contains historic stone walls . . . and their positions are such that they create natural-looking boundary lines." *Id.* ¶ 1. The Zoning Board found that, under the By-Right Plan, an existing stone wall would bisect a lot "creating an unusual characteristic, having a wall running through a long narrow lot, which would restrict development of that lot." *Id.* It also found that the Subdivision Plan was consistent with the Comprehensive Plan because it "call[s] for the preservation of significant cultural and historic land features, such as existing trees and stone walls." *Id.* ¶ 3. In response to Ms. Enright's assertion that the Applicants' primary motive was to realize greater financial gain, the Zoning Board found, in pertinent part, as follows:

> "Though there has been some contention that the reason that the [A]pplicants have presented the [Subdivision Plan], as opposed to the By Right Plan, would be to allow for six additional building lots in the future, under present zoning requirements. And it appears that the By Right Plan would probably reduce that number by one lot. However, the [A]pplicants testified that it is their desire to create a subdivision that would maintain the character of the property by preserving the stone walls along the southeastern boundary of Lot No.1. Furthermore, it would be speculative to say that the [A]pplicants have arranged the [] Subdivision [P]lan in order that

> someone in the future may be able to create six house lots on what is proposed as Lot No.3 . . . . The difference in future development between the By Right Plan and the [Subdivision Plan] is not substantial." *Id.* ¶ 2.

Finally, the Zoning Board concluded that granting the requested variance was the "least relief from the . . . Ordinance necessary to remove the aforementioned hardship" and that the "hardship that would be suffered by the [Applicants] if the dimensional variance were not granted would amount to more than a mere inconvenience, because . . . Lot No.1 on the By-Right Plan would have a substantial impediment to development with the stone wall running through it and dividing it into a 2/3, 1/3 scenario." *Id.* ¶¶ 4, 5. Thereafter, Ms. Enright appealed the decision to the Providence County Superior Court (PC-2010-5144).

E

Preliminary Plan Approval

After receiving the requisite dimensional variances, Applicants returned to the Planning Board for Preliminary Plan Approval on April 10, 2012. At the hearing, the TRC recommended approval of the Plan. (Planning Board Minutes at 2, Apr. 10, 2012.)[12] Further, Applicants submitted that they would file a conservation easement on the Property to preserve the historic features and to prohibit additional development beyond the three proposed lots. *Id.* at 2. The Planning Board unanimously approved the Preliminary Plan and issued its decision on May 29, 2012. (Planning Board Decision, May 29, 2012.) Ms. Enright subsequently appealed the Preliminary Plan decision to the Zoning Board, sitting as the Planning Board of Appeal, arguing clear error or lack of support from the weight of the evidence.

[12] Appellant did not provide the Court with a transcript of the April 10, 2010 hearing and, thus, the facts are gleaned from the Planning Board Minutes notes.

On October 1, 2012, the Zoning Board, sitting as the Planning Board of Appeal, voted to uphold the decision approving the Preliminary Plan. (Zoning Board Decision, Mar. 4, 2013.) In its decision, the Zoning Board found that the flag lot created under the Subdivision Plan was consistent with the Regulations because the Zoning Board granted a dimensional variance for the frontage of the lot. *Id*. at 1. It also found that the Applicants satisfied the requisite standard for waivers and modifications of the Regulations because the "tree line, driveway and stone walls" are "features of considerable historic and cultural significance, and [] they are worthy of preserving." *Id.* The Zoning Board also noted that preservation of such features was consistent with the Town's Comprehensive Plan. *Id.* The Zoning Board found that approving the Preliminary Plan was not clear error because whatever deficiencies existed regarding the Ordinance requirements were addressed by the dimensional variances. The Zoning Board stated the "evidence appears to support the decision that was made" given the witness testimony and five pages of meeting minutes notes. *Id.* at 2. In conclusion, the Zoning Board found:

> "Given the previous granting of the dimensional variances by the Zoning Board, and given that the imposition of a conservation easement on the property restricts future development, which without such easement might have raised some concerns about the maximum possible development of that lot being potentially eight lots, the Board finds that there is not any clear error on the part of the Planning Board in the rendering of its decision approving the Preliminary Plan . . . ." *Id.*

Ms. Enright then filed an administrative appeal of that decision in Providence County Superior Court (PC-2013-1095).

Before this Court are Ms. Enright's appeals from the Zoning Board's decision to uphold Master Plan and Preliminary Plan Approval pursuant to § 45-23-71 and Ms. Enright's appeal from the Zoning Board's decision to grant dimensional variances pursuant to § 45-24-69. The Court will address each appeal in turn.

II

Standard of Review

Regarding these cases, the Superior Court has jurisdiction over the appeals of the Master Plan and Preliminary Plan decisions of the Zoning Board of appeal pursuant to § 45-23-71 and of the variance from the decision of the Zoning Board of review pursuant to § 45-24-69. Both of those sections allow the Court to reverse or modify any 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, ordinance or [] board regulations provisions;
> "(2) In excess of the authority granted to the [] board 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." Sections 45-23-71(c) and 45-24-69(d).

Under these statutes, this Court "will neither weigh the evidence nor pass upon the credibility of witnesses nor substitute its findings of fact for those made at the administrative level." *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977). Instead, this Court must limit its review to '"a search of the record to ascertain whether the board's decision rests upon 'competent evidence' or is affected by an error of law."' *Munroe v. Town of East Greenwich*, 733 A.2d 703, 705 (R.I. 1999) (quoting *Kirby v. Planning Board of Review of Middletown*, 634 A.2d 285, 290 (R.I. 1993)).

Our Supreme Court defines '"reasonably competent evidence"' as '"any evidence that is not incompetent by reason of being devoid of probative force as to the pertinent issues."' *Restivo v. Lynch*, 707 A.2d 663, 668 (R.I. 1998) (quoting *Zimarino v. Zoning Board of Review of City of*

Providence, 95 R.I. 383, 386, 187 A.2d 259, 261 (1963)). Thus, this Court will only reverse an administrative agency's factual findings if they are "totally devoid of competent evidentiary support in the record." *Milardo v. Coastal Resources Management Council of R.I.* 434 A.2d 266, 272 (R.I. 1981).

However, "[q]uestions of law determined by the administrative agency are not binding upon [this Court] and may be freely reviewed to determine the relevant law and its applicability to the facts presented in the record." *State, Department of Environmental Management v. State, Labor Relations Board*, 799 A.2d 274, 277 (R.I. 2002). Thus, factual findings of an administrative agency are afforded great deference, and questions of law are reviewed *de novo*. *Iselin v. Retirement Board of Employees' Retirement System of R.I.*, 943 A.2d 1045, 1049 (R.I. 2008).

The two-step procedure of these administrative appeals—from the Planning Board to the Zoning Board sitting as the Planning Board of Appeal—has been likened to a funnel. *Environmental Scientific Corp. v. Durfee*, 621 A.2d 200, 207–08 (R.I. 1993). The Planning Board sits "as if at the mouth of the funnel" and analyzes all of the evidence, opinions, and issues in order to arrive at a decision. *Id*. at 207. However, the Board of Appeal is at the "discharge end" of the funnel and does not have the benefit of personally receiving the information considered by the Planning Board. *Id*. at 207–08. Our Supreme Court has held that the "further away from the mouth of the funnel that an administrative official is . . . the more deference should be owed to the factfinder." *Id*. at 208.

Regarding the dimensional variances, the Superior Court must "examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence." *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (internal quotation omitted). 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." *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (internal quotations omitted). If the Court "can conscientiously find that the board's decision was supported by substantial evidence in the whole record," then the decision must stand. *Lloyd*, 62 A.3d at 1083 (internal quotation omitted).

III

Analysis

A

Master Plan Approval

Ms. Enright argues that the Planning Board did not have the authority to grant the waiver that Applicants requested as part of their Master Plan application because it was inconsistent with the Ordinance, specifically because variances were required for Lot 1 and Lot 2. The Zoning Board argues that the Planning Board had the authority to grant the waiver under § 45-23-62, and that the granting of the variance was consistent with § 45-24-41 and the Ordinance § 28-409.

As a preliminary matter, a planning board has the power to grant waivers or modifications to subdivision regulations. *See* § 45-23-62(b). Specifically, a planning board may grant such a waiver

> "where the literal enforcement of one or more provisions of the regulations is impracticable and will exact undue hardship because of peculiar conditions pertaining to the land in question or *where waiver and/or modification is in the best interest of good planning practice and/or design as evidenced by consistency with the municipality's comprehensive plan and zoning ordinance*." *Id.* (emphasis added).

Moreover, the granting of waivers can be conditional. *See* § 45-23-62(d). The subdivision statute specifically addresses when an applicant needs both a waiver and a zoning variance. In such

circumstances, the applicant must first obtain a planning board recommendation and then proceed to the zoning board of review. *See* § 45-23-61.

In this case, Applicants requested a waiver from the Town's prohibition of interior angles over 200 degrees. *See* Regulations Appendix F(C)(3)(b). As previously noted, the Zoning Board, in its decision approving the Master Plan, made the following findings:

> "9. *The proposed subdivision is consistent with the 2009 Comprehensive Community Plan because it preserves significant Oak trees and stone walls* and combines curb cuts/driveways onto Poppasquash Road. (Citation omitted.)
>
> . . . .
>
> "11. Proposed Lot 3 with the existing dwelling will have interior angles greater than 200 degrees. *The Board finds that granting a waiver of this prohibition is in the best of interest of planning since the alternative "by-right" layout presented significantly impact the trees and stone walls*." Planning Board Decision, Feb. 9, 2010. (emphasis added).

The Zoning Board expressly found that granting the requested waiver was consistent with the Comprehensive Plan as it would preserve unique features on the Property, would allow the lot lines to align with existing stone walls and tree lines, and was in the best interest of planning. Therefore, the Planning Board's grant of Applicants' requested waiver was made with proper authority and is supported by findings of fact consistent with the statute.

Ms. Enright further contends that the proposed waiver is inconsistent with the Ordinance because variances were required for Lot 1 and Lot 2 for lot frontage and width. To that end, the Planning Board found:

> "10. The proposed subdivision is not in compliance with the Zoning Ordinance as to the lot frontage and lot width for 2 of the proposed lots (Lots 2 and 3); . . . . A variance will be applied for." *Id.*

Then, as permitted by the statutes previously cited, the Planning Board granted Master Plan Approval, subject to "[r]eceipt of variances from the Zoning Board on the lot width and lot frontage for proposed Lots 2 and 3." *Id.* at 3.

Because Applicants subsequently received such variances from the Zoning Board, Ms. Enright's argument must fail as the granting of Master Plan Approval was consistent with the Ordinance.

Ms. Enright further argues that waiver was inappropriate for Lot 3 because the Planning Board found that a shed and patio would remain as accessory structures on Lot 2. She argues that the presence of those structures will be in violation of the Ordinance because you cannot have an accessory structure where there is no principal structure. However, the Zoning Board correctly asserts that the issue of whether the presence of those accessory structures on Lot 2 would violate the Ordinance pending development of a principal structure has no bearing on whether allowing interior angles greater than 200 degrees for Lot 3 qualifies for a "good planning practice" waiver. Applicants may work with the building and zoning departments once this subdivision reaches Final Plan approval and, at that time, the appropriate parties may determine if any variances are needed for the existing accessory structures pending development on Lot 2. For now, Ms. Enright's argument is too speculative; construction of the principal structure on Lot 2 may very well be completed before any additional variance is required.

Ms. Enright's arguments regarding the waiver miss the mark. Under § 45-23-62(b), the ultimate inquiry is whether the proposed waiver "is in the best interest of good planning practice and/or design." The statute invites this finding to be "*evidenced by* consistency with the municipality's comprehensive plan and zoning ordinance," which the Planning Board outlined in its decision. *Id.* (emphasis added). The Planning Board cited numerous provisions of the Town's

Comprehensive Plan in finding that Lot 3's configuration was "good planning." For example, paragraph nine of the Planning Board's finding in its February 9, 2010 decision states that "[t]he proposed subdivision is consistent with the 2009 Comprehensive Community Plan because it preserves . . . Oak trees and stone walls and combines curb cuts/driveways onto Poppasquash Road," citing "Goal 1 of the Natural, Historical and Cultural Element 'Protect Bristol's natural landscape and resources for present and future generations'[;] Policy B 'Conserve and Manage natural resources in a manner that stresses long term character of the town'[;] Policy D of Goal 2 'Identify and protect historic, cultural and natural landscapes, planting and features within Bristol.'" Planning Board Decision, Feb. 9, 2010. The Planning Board's decision is supported by sufficient findings of fact, and this Court affords great deference to those findings. *See Iselin*, 943 A.2d at 1049.

Ms. Enright also asserts that the proposed access to Poppasquash Road from Lot 1 and Lot 2 fails to comply with Regulations § 8.6(E). Section 8.6(E) provides:

> "All proposed development projects and all subdivision lots shall have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered compliance with this requirement." Section 8.6(E).

This section coincides with the statutory requirements of § 45-23-60(a)(5), which contains similar language:

Ms. Enright argues that the only way to comply with that requirement is to have Lot 1 and Lot 2 connect directly to Poppasquash Road and not by way of the easement over the driveway on Lot 3.

The apparent purpose of § 45-23-60(a)(5) is to prevent the creation of land-locked lots that are without access to a public street. Although access to the public street must be physical and permanent, there is no language in the statute or in the Regulations to suggest that access to a

public road must be directly from a curb cut. Lot 1 and Lot 2 are allowed permanent physical access to Poppasquash Road by virtue of an easement over Lot 3. Indeed, Ms. Enright's primary witness, Mr. Lombardo, acknowledged before the Zoning Board that an easement is sufficient access to a public road:[13]

> "Q: But it's not having access to Poppasquash Road through its frontage?
>
> "Mr. Lombardo: *It doesn't need to if you granted an easement.* And if the Board puts a restriction on it that it can't have it. But physically it has access if it needed to[.]" (Tr. 26:1-6, July 12, 2010) (emphasis added).

Additionally, shared driveways are consistent with and encouraged by the Town's Comprehensive Plan and are often considered better planning practice because they decrease the number of curb cuts onto public roads and can assist with traffic. In the Comprehensive Plan, Policy C to Goal 2 ("Circulation Element") states that the Town ought to "[o]nly consider new curb cuts if there is no other way to access a property" and "[c]onsider a process of interconnecting abutting properties as a method to reduce curb cuts." Again, this sentiment was acknowledged by Ms. Enright's primary witness, Mr. Lombardo, before the Zoning Board. He stated, "*as a Planner, I would advocate [for] a single driveway*, and in the use of easements that's done fairly typically in this kind of circumstance." (Tr. 26:7-10, July 12, 2010.) (emphasis added). Because Ms. Enright affirmatively argued for the easement/single driveway arrangement as part of the By-Right Plan, her attack of that same arrangement before this Court lacks credibility and must fail.

[13] Ms. Enright presented this witness in arguing for the By-Right Plan. The Court notes that Ms. Enright's argument in favor of the By-Right Plan before the Zoning Board, where her witness stated that an easement was sufficient for public road access to land-locked lots, is contradictory to the position that she argues to the Court in her appeal, where she submits that direct access via a driveway or curb cut is required.

To summarize, the statute does not require that access to a public street be directly from a driveway or a curb cut. The easement over Lot 3 that allows Lot 1 and Lot 2 access to Poppasquash Road is sufficient.

Accordingly, the Court finds the Planning Board's grant of Applicants' waiver and Master Plan Approval rests on competent evidence and was otherwise not in violation of any statute or regulation.

B

Dimensional Variance

Section 45-24-41(e)(2) states, in pertinent part:

> "In granting a dimensional variance, that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience. The fact that a use may be more profitable or that a structure may be more valuable after the relief is granted is not grounds for relief."

Additionally, in granting a variance, a zoning board must find evidence "[t]hat the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area[.]" Section 45-24-41(d)(1). A zoning board must also find evidence that the hardship "does not result primarily from the desire of the applicant to realize greater financial gain," that a grant of the variance will not "impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based," and that "the relief to be granted is the least relief necessary." *Id.* at (2)-(4).

First, Ms. Enright contends that aligning the lot lines with the stone walls and trees is "not the type of permanent, natural, insurmountable impediment that force[s] a property owner to seek dimensional relief." Enright Brief at 24. A literal enforcement of the frontage requirements could require significant destruction of the existing features which are of historical, architectural and

aesthetic significance which constitutes a sufficient hardship under the *Viti* standard and its progeny. Under *Viti*, applicants for a dimensional variance need only show that the hardship that would result from the denial of a request for dimensional relief amounts to more than a mere inconvenience. *Viti v. Zoning Board of Review of City of Providence*, 92 R.I. 59, 166 A.2d 211 (1960). As such, applicants "who want[] to establish a right to dimensional relief [a]re not required to demonstrate a loss of all beneficial use of the parcel in the absence of . . . dimensional relief." *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 691 (R.I. 2003) (citing *Viti*, 92 R.I. at 64-65, 166 A.2d at 213). In reviewing whether a finding of hardship satisfies the *Viti* standard, the Court looks to whether "the board act[ed] arbitrarily or in excess of its jurisdiction in granting the application." *Gardiner v. Zoning Board of Review of City of Warwick*, 101 R.I. 681, 691, 226 A.2d 698, 704 (1967); *see, e.g., Travers v. Zoning Board of Review of Town of Bristol*, 101 R.I. 510, 514, 225 A.2d 222, 224 (1967) (holding that the *Viti* standard was satisfied when applicant wanted to build a non-conforming garage in order to "'give [his] tenants a little yard'").

Ms. Enright misreads the requirements for obtaining a dimensional variance and cites no legal support for her assertion that Applicants needed to show an "insurmountable impediment." The record reflects that Applicants will suffer more than a mere inconvenience if the granting of the dimensional variance is not affirmed. The Zoning Board, in its decision, found that, in the absence of dimensional relief, Applicants would suffer a hardship amounting to more than a mere inconvenience because "the proposed Lot No.1 on the By Right Plan would have a substantial impediment to development with the stone wall running through it and dividing it into a 2/3, 1/3 scenario." (Zoning Board Decision, ¶ 5, Aug. 19, 2010.) Accordingly, the Zoning Board's

decision finding that Applicants suffered more than a mere inconvenience was not an abuse of discretion or clearly erroneous.

Next, Ms. Enright argues that the tree line and stone walls are not unique characteristics or fixtures of the land, but rather "mere features of the landscape." Enright Brief at 24. As previously discussed, the Zoning Board made the requisite findings that Applicants' "hardship [was] due to the unique characteristics of the subject land" because "the lot contains historic stone walls . . . and their positions are such that they create natural-looking boundary lines." (Zoning Board Decision, ¶ 1, Aug. 19, 2010). It also found that the preservation of these historic walls was consistent with the Town's Comprehensive Plan because it specifically "call[s] for the preservation of significant cultural and historic land features, such as existing trees and stone walls." *Id.* ¶ 3. In light of the great deference afforded to the findings of an administrative agency, the Zoning Board's finding in this regard was valid. *Iselin*, 943 A.2d at 1049.

Ms. Enright further argues that the hardship was self-created by Applicants, resulting primarily from their desire to realize greater financial gain and was not the least relief necessary. Again, however, the Zoning Board made specific findings concerning these assertions.

In support of her position, Ms. Enright relies on *Sciacca v. Caruso*, 769 A.2d 578 (R.I. 2001), arguing that where a proposed subdivision would leave a property dimensionally nonconforming, the hardship is considered self-created by virtue of the applicant asking for approval in the first place. This argument is misplaced for a number of reasons. First, the Supreme Court decided *Sciacca* a year before the General Assembly amended § 45-24-42 in 2002 to lessen the burden of proof necessary to obtain dimensional relief.[14] *See* § 45-24-42(d)(2), as amended by

[14] Prior to the 2002 amendment of § 45-24-42, an applicant seeking a dimensional variance was required to show "more than a mere inconvenience," "mean[ing] that there is no other reasonable

P.L. 2002, ch. 218, § 1. So the standard applied in that case is inapplicable following *Viti* and its progeny. Second, even if the Court were to apply *Sciacca*, the facts of that case are distinguishable from the case at bar. In *Sciacca*, the applicant sought to divide one substandard lot into two substandard lots, which was not allowed by the zoning ordinance. *Sciacca*, 769 A.2d at 584. The applicant therefore "sought relief from dimensional zoning requirements that became applicable to her substandard lot only because of her earlier illegal subdivision of the property before the planning board." *Id.* Here, the Ordinance permitted Applicants to create up to eight lots on the Property. So Applicants' request for dimensional relief was not motivated by a desire to create additional lots that would not have been otherwise permitted under the Ordinance. As such, the Zoning Board was well within its discretion to find that the hardship was caused by existing stone walls and tree lines, which Applicants had no part in creating. *See* Ordinance § 28-409(c)(1)(b).

Next, Ms. Enright argues that the Zoning Board erred in granting a variance because the hardship "result[ed] primarily from the desire of the applicant to realize greater financial gain." Section 45-24-41(d)(2); *see* Ordinance § 28-409(c)(1)(b). In support, she cites Applicants' refusal to deed restrictions limiting development on Lot 3 and Applicants' statement before the Zoning Board that, while she and her husband have no intention of further subdividing the land because they are near retirement age and plan to sell the Property, Applicant "ha[s] no knowledge of what a future user would want to do" with the Property." (Tr. 42, July 12, 2010.)

Ms. Enright's argument fails because the Zoning Board directly addressed this contention and found it to be speculative:

> "[A]pplicants testified that it is their desire to create a subdivision that would maintain the character of the property by preserving the stone walls along the southeastern boundary of Lot No.1.

alternative to enjoy a legally permitted beneficial use of one's property." *Sciacca*, 769 A.2d at 582 n.6 (alteration in original).

> Furthermore, it would be speculative to say that the [A]pplicants have arranged the Proposed Subdivision plan in order that someone in the future may be able to create six house lots on what is proposed as Lot No.3 . . . ." (Zoning Board Decision, ¶ 2, Aug. 19, 2010.)

Furthermore, Ms. Enright completely ignores the fact that Applicants, at the Preliminary Plan stage, *did* agree to a restriction preventing further subdivision or development on Lot 3. Applicants also granted a conservation easement, which was recorded, to the Bristol Land Conservation Trust (BLCT) imposing a restriction that limited the development of the Property into the three lots contemplated in the Subdivision Plan and that "the [P]roperty cannot be further subdivided beyond three lots." (Planning Board Decision, ¶ 17, Apr. 10, 2012.) Indeed, Ms. Enright must be aware of this restriction as she attached a copy of the conservation easement as an exhibit to her appeal. Appellant's Ex. 18. She cannot credibly argue now that Applicants' application for a dimensional variance was motivated by a desire to further subdivide Lot 3. Accordingly, the Zoning Board's finding that the application was not motivated by a desire to realize greater financial gain was proper and entitled to deference.

Finally, Ms. Enright argues that the requested dimensional variances are not the least relief necessary to avoid the asserted hardship. She argues that the By-Right Plan could preserve the stone walls and trees without requiring dimensional relief because access to Lot 1 and Lot 2 could be accessed through an easement on the existing driveway to Lot 3. However, the record reflects that the Subdivision Plan is the only plan where all of the stone walls and trees are aligned with the lot lines. Under the By-Right Plan, the stone walls do not align with lot lines. As a result, the Zoning Board concluded that granting the requested variance was the "least relief from the . . . Ordinance necessary" because "Lot No. 1 on the By Right Plan would have a substantial impediment to development with the stone wall running through it and dividing it into a 2/3, 1/3 scenario." (Zoning Board Decision, ¶¶ 4-5, Aug. 19, 2010). Based on this finding, the Court is

satisfied that the grant of Applicants' dimensional variance application was the least relief necessary.

In sum, because the Zoning Board appropriately made positive findings on each of the relevant standards for granting a dimensional variance pursuant to § 45-24-41, its grant of the requested variances was proper and the Zoning Board's decision is upheld.

C

Preliminary Plan Approval

The Planning Board's Preliminary Plan decision and the Zoning Board's, sitting as the Planning Board of Appeal, Preliminary Plan decision are based on the same considerations and are subject to the same Regulations and Ordinance as those involved in the Master Plan Approval decisions. Therefore, for brevity's sake, the Court refers to its reasoning for upholding Master Plan Approval and incorporates it in affirming the Preliminary Plan Approval.

IV

Conclusion

Having thoroughly reviewed the record in these consolidated appeals, and for the foregoing reasons, this Court is satisfied that the decisions of the Zoning Board are supported by reliable, probative, and substantive evidence, and are neither an abuse of discretion, clearly erroneous, nor otherwise affected by error of law. The substantial rights of Ms. Enright have not been prejudiced. Accordingly, Ms. Enright's appeals are denied and dismissed. Counsel for the Zoning Board shall prepare a judgment consistent with this Court's Decision.

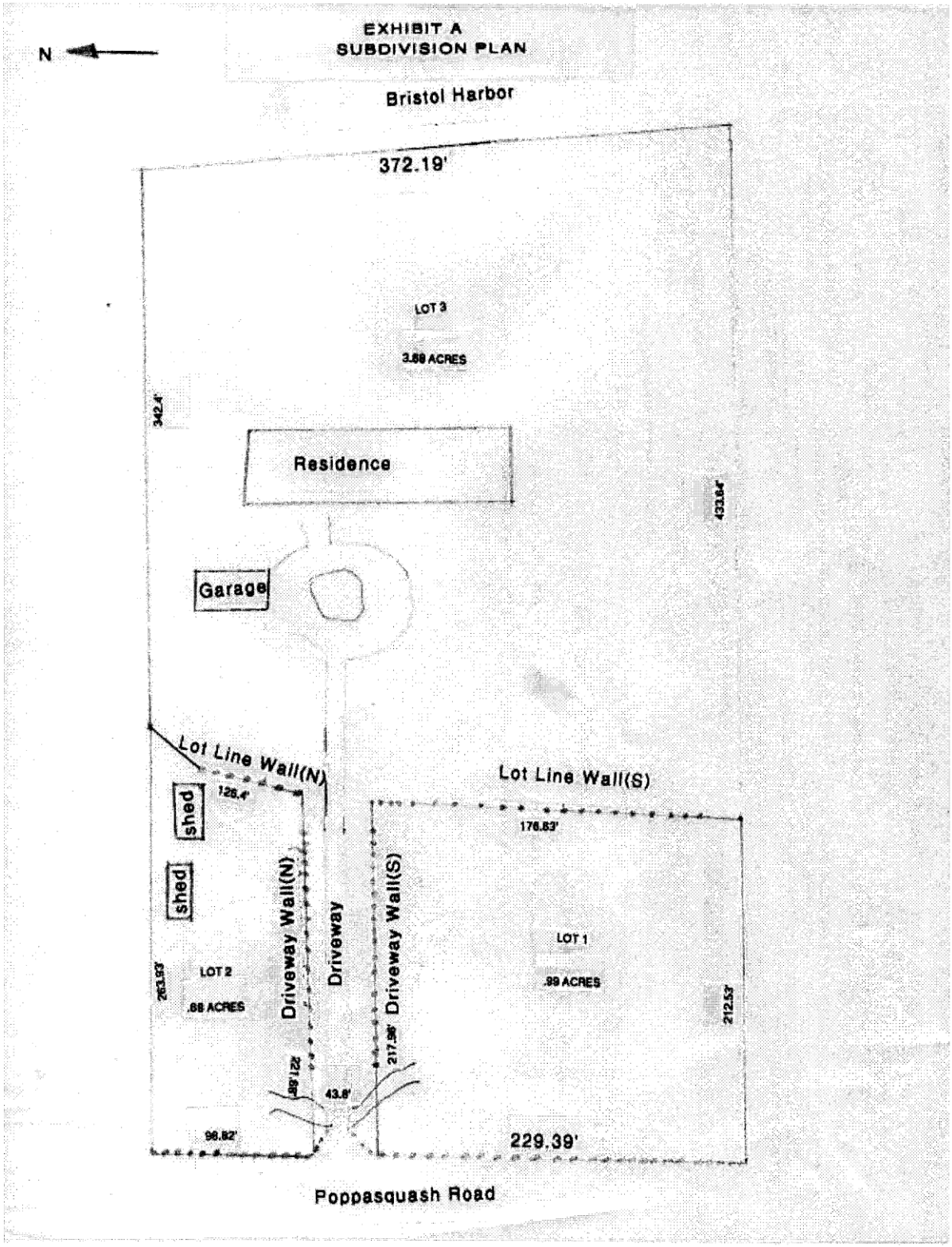
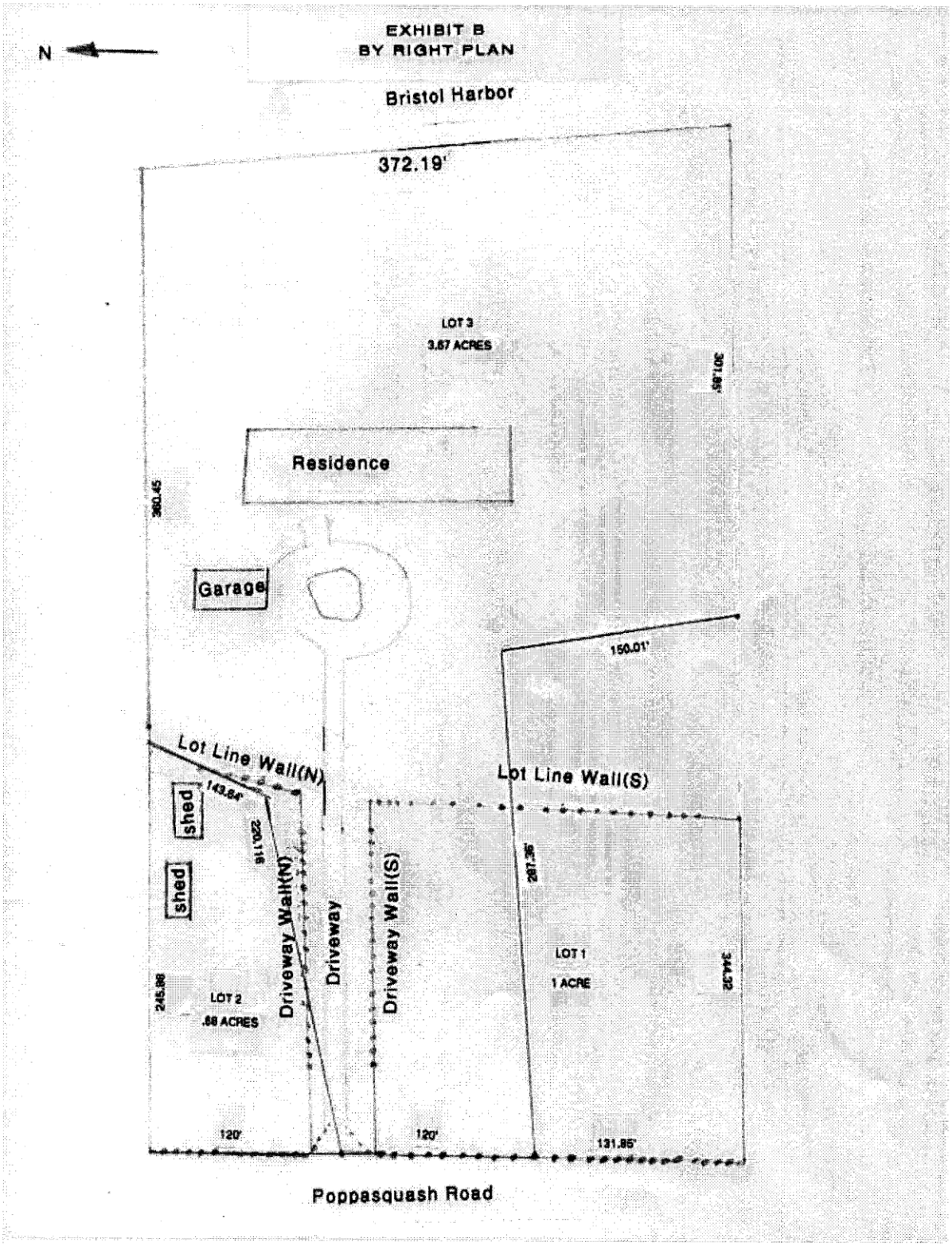


EXHIBIT A
SUBDIVISION PLAN
N
Bristol Harbor
372.19'
LOT 3
3.88 ACRES
342.4'
Residence
433.64'
Garage
Lot Line Wall(N)
126.4'
Lot Line Wall(S)
176.83'
shed
shed
Driveway Wall(N)
Driveway
Driveway Wall(S)
217.98'
LOT 1
.99 ACRES
212.53'
263.93'
LOT 2
.88 ACRES
89.22'
43.8'
96.82'
229.39'
Poppasquash Road


N
EXHIBIT B
BY RIGHT PLAN
Bristol Harbor
372.19'
LOT 3
3.67 ACRES
307.85'
Residence
360.45'
Garage
150.01'
Lot Line Wall(N)
143.84'
Lot Line Wall(S)
shed
shed
220.11'
Driveway Wall(N)
Driveway
Driveway Wall(S)
287.36'
LOT 1
1 ACRE
344.32'
245.88'
LOT 2
.68 ACRES
120'
120'
131.85'
Poppasquash Road

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Patricia A. Enright v. Town of Bristol Zoning Board of Review, Dennis Hardiman and Lisa Hardiman**
CASE NO:	**PC-2010-4294** **PC-2010-5144** **PC-2013-1095** **(*Consolidated Appeal*)**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**May 26, 2020**
JUSTICE/MAGISTRATE:	**Licht, J.**
ATTORNEYS:	
For Plaintiff:	**Scott T. Spear, Esq.** **Karen A. Pelczarski, Esq.**
For Defendant:	**Andrew M. Teitz, Esq.** **Nancy Letendre, Esq.** **Evan S. Leviss, Esq.**