**STATE OF RHODE ISLAND**

**PROVIDENCE, SC.** **SUPERIOR COURT**

**(FILED: January 12, 2023)**

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| **PETTIS PROPERTIES, LLC,** | : | |
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| ***Appellant,*** | : | |
| | : | |
| **v.** | : | **C.A. No. PC-2021-00356** |
| | : | |
| **THE ZONING BOARD OF REVIEW OF THE CITY OF PROVIDENCE, and JAMES LOMBARDI, III, IN HIS CAPACITY AS TREASURER OF THE CITY OF PROVIDENCE** | : | |
| ***Appellees.*** | : | |

**DECISION**

**LANPHEAR, J.** Before the Court for decision is Pettis Properties' (Petitioner) Complaint appealing from the December 3, 2020 Resolution issued by the Zoning Board of Review of the City of Providence (Board). Jurisdiction is pursuant to G.L. 1956 § 45-24-69 (appeals to the Rhode Island Zoning Act of 1991 (Zoning Act)).

**I**

**Facts and Travel**

This case arises from an appeal by Petitioner challenging the Board's decision to deny Petitioner's request for a dimensional variance and a use variance to construct an electronic billboard at 58 Printery Street in Providence, Rhode Island filed on December 30, 2020. (Zoning Board of Review Resolution No. 2020-25, 1-2 (hereinafter Resolution).)

**A**

**Petitioner's First Application for Zoning Relief**

On May 12, 2011, Petitioner filed an application with the Board to seek a use and dimensional variance to build an electronic billboard. *Id.* at 2. The Board granted this application on July 27, 2011. *Id.* In August 2011, Charles Orms Associates appealed the Board's Resolution to grant Petitioner's application in the Superior Court. *Id.* The Superior Court remanded the application to the Board to make findings and conclusions regarding whether an animated billboard with a changing message was the least relief necessary. *Charles Orms Associates v. Zoning Board of Review of the City of Providence*, No. PC-2011-5879, 2014 WL 1246535 (R.I. Super. Mar. 14, 2014). The Board instructed Petitioner in writing to schedule a hearing on remand, but Petitioner declined to do so. (Resolution at 3.)

**B**

**Petitioner's Second Application for Zoning Relief**

On January 19, 2016, Petitioner filed a new application for zoning relief to construct the same billboard. *Id.* The Board voted unanimously to grant the second application. *Id.* Charles Orms Associates also appealed this second decision to grant Petitioner's zoning relief application to the Superior Court. *Id.*

> "On December 8, 2017, the Superior Court granted this second appeal, finding insufficient evidence to support the Board's conclusion that '. . . the electronic billboard was the least relief necessary to alleviate the Applicant's hardship,' noting there was no showing by the Applicants that any alternatives were considered. The Court declined to remand the matter to the Board, specifically stating that it would [*sic*] inappropriate and unfair." *Id.* (citing *Charles Orms Associates v. Zoning Board of Review*, PC-2016-4007, 2017 WL 6451987, (R.I. Super. Dec. 8, 2017).

## C

### Petitioner's Third Application for Zoning Relief

In August 2020, Petitioner filed a third new application for a "use variance and dimensional variances to allow the construction of a 112-[foot] tall two-face freestanding electronic message billboard [at 58 Printery Street]." *Id.* at 3-4. The Board voted to bar Petitioner's third application based on grounds of administrative finality. *Id.* at 5. The Board made the following factual findings pertaining to Petitioner's third application:

1. The redesignation of the location from C-4 zone to C-3 zone was immaterial because the current C-3 zone has "substantially the same prerequisites and requirements as the prior C-4 zone." *Id.* at 4.
2. Both the 2011 Ordinance and the current Ordinance prohibit billboards in all zoning districts within the city. *Id.*
3. Relief from the 2011 Ordinance and relief from the current Ordinance entail the same remedy: use variances for billboards and electronic billboards. *Id.* at 5.

Petitioner argued that it should be allowed to present new evidence that an electronic billboard is the least relief necessary. *Id.* Petitioner sought to introduce evidence concerning lack of market interest in "static billboards." *Id.* However, the Board found that this evidence was "additional" evidence and not evidence that had been "unavailable" at the time of the prior applications. *Id.* Furthermore, the Board noted that it was "bound" by the Superior Court's 2017 Decision not to remand the matter to the Board for further evidence. *Id.*

## II

## Arguments

### A

### Petitioner

Petitioner argues that the Providence Zoning Board of Review has jurisdiction because the change from the 1994 Ordinance to the current Ordinance changed the relief requested by Petitioner. (Appellant's Mem. at 11-12.) Petitioner argues that under the prior laws, Petitioner required two use variances to operate the billboard, but under the zoning ordinances, Petitioner only requires a single use variance. *Id.* Petitioner also argues that it has new evidence (expert testimony concerning market conditions) demonstrating that a "traditional stagnant" billboard is insufficient relief and that an electronic billboard is the proper "least relief necessary." *Id.* at 13-14. Finally, Petitioner contends that the Board's legal conclusions as to the applicability of administrative finality are not entitled to deference by this Court. (Appellant's Reply Br. at 5.)

### B

### Respondents

The Board argues that administrative finality bars the application. (Mem. of Zoning Board of Review at 9-11.) The Board further argues that there are neither "internal" nor "external" material changes to render Petitioner's application dissimilar from its prior applications and thereby bar application of administrative finality. *Id.* at 11-20. Lastly, the Board argues that Petitioner is barred from presenting its "new evidence" because it was more properly "additional

evidence," which the Board lacked jurisdiction to hear, being bound by this Court's 2017 Decision[1] not to remand for further evidence. *Id.* at 20-21.

## III

## Standard of Review

The Superior Court's review of a zoning board decision 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 decisions which are:
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> "(1) In violation of constitutional, statutory, or ordinance provisions;
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> "(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." Section 45-24-69(d).

"It is the function of the Superior Court to '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) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). The term "'[s]ubstantial evidence . . . means 'such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and

[1] *Charles Orms Associates v. Zoning Board of Review of the City of Providence*, No. PC-2016-4007, 2017 WL 6451987, *7-8 (R.I. Super. Dec. 8, 2017) ("This proposal has serious implications well beyond the surrounding small industrial neighborhood. The Applicant has gotten two bites at the apple, and the objectors in the surrounding neighborhoods have shown their steadfast opposition. . . . Remanding this case is now inappropriate and would be unfair.").

means [an] amount more than a scintilla but less than a preponderance."' *Lischio v. Zoning Board of Review of Town of North 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)). This Court may not "substitute its judgment for that of the zoning board if it can conscientiously find that the board's decision was supported by substantial evidence in the whole record." *Apostolou,* 120 R.I. at 509, 388 A.2d at 825.

## IV

## Analysis

### A

### Applicability of Administrative Finality to Zoning Disputes

The case of *Costa v. Gagnon*, 455 A.2d 310 (R.I. 1983) is instructive regarding application of the doctrine of administrative finality. In *Costa,* the Costas were denied a variance to operate an auto body shop on their land in 1975. *Costa*, 455 A.2d at 311. One year later, the Costas filed a second petition citing existing nonconforming use and the need to comply with a 1974 state law requiring body shops to have at least 2,400 square feet as reasons to grant a zoning variance. *Id.* at 312. The Tiverton Zoning Board of Review granted the Costas' variance. *Id.* Aggrieved property abutters appealed that decision to the Superior Court, which reversed on other grounds. *Id.* at 311, 313. The Costas appealed to the Supreme Court, which affirmed the Superior Court's reversal, reasoning that (1) although the Costas' petitions advanced "different legal theories," both petitions sought essentially the same relief to permit and expand the nonconforming auto body shop use and that (2) the record was devoid of any evidence of a material change in circumstances. *Id.* at 313. *Costa* is distinguishable from the case at bar because the Board here expressly found that Petitioner's application was substantially similar to its earlier applications, and expressly found that there had been no material change from the earlier applications. (*See* Resolution at 5) ("The

Applicants seek the same sign (billboard) and the same relief from substantially the same prohibitions.").

Our Supreme Court has ruled that the doctrine requires that even successors in interest to an owner must establish that a substantial or material change has occurred. *See Audette v. Coletti*, 539 A.2d 520, 522 (R.I. 1988). The *Audette* Court rejected the notion that a lapse in a special zoning exception qualifies as a substantial or material change because that would allow a landowner to "evade conditions previously imposed without showing a change in circumstances to warrant departure from a prior administrative order." *Id.* (citing 5 Williams, *American Land Planning Law* § 146.03 (rev. 1985) (finding that when respondent's counsel incorporated his predecessor's proceedings into his own, he thereby conceded the operative legal finality of the prior proceedings to his own).

**B**

**The "Substantial Similarity" Standard**

> "What constitutes a material change will depend on the context of the particular administrative scheme and the relief sought by the applicant and should be determined with reference to the statutes, regulations, and case law that govern the specific field. The changed circumstances could be internal to the application, as when an applicant seeks the same relief but makes important changes in the application to address the concerns expressed in the denial of its earlier application. Or, external circumstances could have changed, as when an applicant for a zoning exception demonstrates that the essential nature of land use in the immediate vicinity has changed since the previous application. Finally, there is a burden on the administrative decision-maker to articulate in its decision the specific materially changed circumstances that warrant reversal of an earlier denial of the relief sought." *Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, 755 A.2d 799, 811 (R.I. 2000).

The Superior Court has also noted that a material change in "external" circumstances may also include zoning changes, changes in the law, and changes in the characteristics of a neighborhood.

*See Fryburg v. Warwick Zoning Board of Review*, No. KC-90-926, 1991 WL 789759, at *2 (R.I. Super. Feb. 25, 1991).

Overall, "[t]his rule places a burden on the applicant to identify the substantial changes since the prior application." *Johnston Ambulatory*, 755 A.2d at 811. The rule is "not entirely preclusive" if a claimant can satisfy this "'light'" burden. *Commerce Park Commons, LLC v. Immunex Manufacturing Corp.*, No. KC-01-0860, 2002 WL 1804062, at *4 (R.I. Super. July 2, 2002) (quoting *Johnston Ambulatory*, 755 A.2d at 810).

A review by the Superior Court of an agency's decision regarding the substantial similarity of a petitioner's application to that of an application previously submitted by the same petitioner and previously adjudicated by the agency is bound by the substantial evidence standard. *IRW Real Estate v. City of Providence Zoning Board of Review*, No. PC-2014-0294, 2014 WL 7007511, at *4 (R.I. Super. Dec. 8, 2014) (finding that zoning relief request for billboard proposal was not substantially similar to prior request based on "record evidence that the requested billboard was placed at a narrower angle to address aesthetic concerns and further away from abutting properties"). In other words, the Superior Court should not substitute its judgment regarding the applicability of administrative finality for that of the agency's unless there is a lack of substantial evidence in the record to support the agency's conclusion. *See id.* (citing *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004). When a subsequent claim for administrative relief is identical to a prior claim and there is an absence of evidence in the record to show a change in circumstances, that is sufficient for the Superior Court to bar the claim based on administrative finality. *Greenvale Farm, LLC v. Zoning Board of Review for the City of Portsmouth*, No. NC-2010-0169, 2014 WL 5780909, at *5 (R.I. Super Oct. 30, 2014).

Although the role of the Superior Court in reviewing changes in material circumstances is a limited role, that role is expanded when the agency has not actually made a finding.

The *Johnston Ambulatory* Court noted that,

> "if the department has made a finding of fact that there had been a material change in circumstances and pointed to evidence to support that finding, a trial justice would likely abuse his or her discretion by independently reviewing the evidence and rejecting the department's finding." *Johnston Ambulatory,* 755 A.2d at 813.

Here, the Board has expressly made factual findings with respect to the substantial similarity of Petitioner's most recent application to its prior applications and with respect to a lack of a material change in internal or external circumstances. This Court may not substitute its own findings of facts in place of the Board's determinations. Accordingly, the Court's review is limited to examining the record to determine if there is substantial evidence to support the Board's judgments. The Court's analysis will proceed to examine whether substantial evidence exists on the record to support the Board's finding of substantial similarity, then the Court's analysis will proceed to examine whether substantial evidence exists on the record to support the Board's findings of a lack of internal or external material change.

**1. Petitioner Has Not Met Burden to Show an "Internal" Material Change in Its Zoning Relief Application**

Here, the record is devoid of any evidence showing that an internal material change has occurred. Unlike the applicant in *May-Day Realty Corp. v. Board of Appeals of City of Pawtucket*, 107 R.I. 235, 267 A.2d 400 (1970), who showed a substantial change in construction plans from ten buildings to one large building, Petitioner has not provided any evidence that its plan to construct an electronic billboard differs in any substantial way from its earlier proposals. In *IRW Real Estate*, the applicant met its "light" burden by demonstrating a material change in circumstances by proposing to build its billboard at a different angle and a different distance from

abutters than it had proposed in its earlier application. Here, Petitioner has not adduced any evidence to show that its newest proposal differs from its earlier proposals.

Petitioner argues that since it only requires a single use variance rather than two, this constitutes a material change in circumstances. Although it is true that the relief now sought by Petitioner is not *technically* identical to the relief sought before, the relief sought is *essentially* the same—a use variance. Although Petitioner now seeks relief from *technically* different sections of the ordinance than in previous applications, the relief sought is *essentially* the same. *See Costa*, 455 A.2d at 313 (barring subsequent claim for relief based on "different legal theories"). Therefore, the relief sought is "substantially similar" and does not warrant reversal of the Board's earlier decision.

**2. Petitioner Has Not Met Burden to Show an "External" Material Change in Its Zoning Relief Application**

Here, Petitioner seeks to proffer evidence

> "as to the lack of feasibility or interest in the billboard industry to construct traditional billboards. In addition, those experts were prepared to present data on the recent development of billboards, national trends, and local market information. Further, the applicant was prepared to present hard evidence as to the significant cost differential in maintaining and operating a traditional billboard versus an electronic billboard." (Appellant's Mem. at 14.)

However, Petitioner's contention that this is a material "change" in circumstances is specious. The Board found that this evidence was additional and was not unavailable during the earlier applications' proceedings. Furthermore, while the evidence tends to suggest that a "static billboard" would be insufficient as relief in this case, the evidence does not suggest that these conditions did not also exist in 2011 and 2016 during proceedings for the first two applications for relief. In order to meet their burden here, Petitioner would need to prove to the contrary that a static billboard would have been adequate relief at the time of the earlier applications—but that

some material change in external conditions in the interim period now renders that relief inadequate. Petitioner failed to even suggest it could not have reasonably known about or discovered this evidence at the time of the earlier applications. Petitioner didn't suggest that some interim event was responsible for the change in circumstances. The record is devoid of any such contentions; therefore, Petitioner has not met this burden.

Petitioner contends the redesignation of the premises constituted a material change in circumstances to bar application of administrative finality. The Board's response succinctly addressed this argument put forth by Petitioner. The Board concluded that the current zoning prerequisites and requirements are "substantially the same" as those under the prior zoning designation. (Resolution at 4.) Billboards were prohibited in all city zones under the 2011 Ordinance and are prohibited under the Current Ordinance. *Id.* Although on-site "electronic message signs" are permitted, "off-premise signs with electronic display screens" are not. *Id.* Under the 2011 Ordinance and the Current Ordinance, "animated signs" and "electronic signs with a changing image" are not materially different. *Id.* at 5.

> "In summary, both the 2011 Ordinance and the currently applicable Ordinance require use variances for billboards and for electronic billboards. The Applicants seek the same sign (billboard) and the same relief from substantially the same prohibitions." *Id.*

Petitioner's hyper-technical contention that if granted a use variance it would no longer need to demonstrate that an electronic billboard is the least relief necessary amounts to an elevation of form over substance because the Board has already denied the grant of such a use variance on the very same facts.

Finally, the Court disagrees with Petitioner's contention that the Court owes no deference to the Board's decision to apply the doctrine of administrative finality. Rather, "[t]he determination of whether circumstances have materially or substantially changed sufficiently to

warrant reversal of an earlier decision is a finding that must be made in the first instance by the administrative decision-maker and not by this Court." *Johnston Ambulatory,* 755 A.2d at 812. Competent evidence exists on the record to support the Board's finding. Further review of the evidence to draw new conclusions would wrongfully supplant the Board's judgment and constitute an abuse of discretion by this Court.

## V

## Conclusion

For the reasons stated herein, the Court affirms the decision of the Board.

**RHODE ISLAND SUPERIOR COURT**
***Decision Addendum Sheet***

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| **TITLE OF CASE:** | **Pettis Properties, LLC v. The Zoning Board of Review of the City of Providence, et al.** |
| **CASE NO:** | **PC-2021-00356** |
| **COURT:** | **Providence County Superior Court** |
| **DATE DECISION FILED:** | **January 12, 2023** |
| **JUSTICE/MAGISTRATE:** | **Lanphear, J.** |
| **ATTORNEYS:** | |
| **For Plaintiff:** | **Nicholas J. Hemond, Esq.**<br>**Brandon P. Ruggieri, Esq.** |
| **For Defendant:** | **Lisa Dinerman, Esq.** |