STATE OF RHODE ISLAND

WASHINGTON, SC. **SUPERIOR COURT**

(Filed: December 21, 2023)

CHARLESTOWN FARMS, LLC and PECKHAM CHARLESTOWN FARMS, LLC,	:	
Plaintiffs,	:	
v.	:	**C.A. No. WC-2021-0434**
TOWN OF CHARLESTOWN ZONING BOARD OF REVIEW; RAYMOND DRECZKO, JR., JIM ABBOTT, SHEILA M. ANDREW, ROBIN W. QUINN, and LARA WIBETO all solely in their capacities as Members of the Town of Charlestown Zoning Board of Review; TOWN OF CHARLESTOWN, and IRINA GORMAN in her capacity as Treasurer of the Town of Charlestown,	:	
Defendants.	:	

DECISION

TAFT-CARTER, J. Before the Court for decision is Charlestown Farms, LLC (Charlestown Farms) and Peckham Charlestown Farms, LLC's (Peckham Charlestown Farms) appeal of the Town of Charlestown Zoning Board of Review's (Zoning Board) affirmance of a Notice of Violation and Determination Letter issued by the Building/Zoning Official (Building Official). Jurisdiction is pursuant to G.L. 1956 § 45-24-69.

I

Facts and Travel

Peckham Charlestown Farms owns 565 Alton Carolina Road in Charlestown, Rhode Island (the Property). (Zoning Appeal Application #1557 for Charlestown Farms dated July 29, 2021 (Application) at 1.)[1] Charlestown Farms conducts business on the Property pursuant to a leasehold interest between Peckham Charlestown Farms and Charlestown Farms. (Mem. of Law in Supp. of Pls.' Appeal of the Zoning Bd.'s Decision (Appeal) 2.) The Property is identified by the Charlestown Tax Assessor as Plat 24. *Id*. Plat 24 is comprised of approximately 119 acres and divided into three lots: Lot 3 (approximately 26 acres), Lot 4 (approximately 49 acres), and Lot 4-1 (approximately 43.55 acres). (Submittal #15: Title Run.)

As background, Lot 4 was created in 1951 by a deed conveyance. (Zoning Board Decision (Decision) 3.) Charlestown Farms purchased Lot 4 on March 15, 2019 from Morrone Land Company, LLC/Morrone Trucking Sand and Gravel, Inc. (MTSG). (Submittal #13: Deeds.) Although the 1974 Town of Charlestown Zoning Ordinance, Article IV, § 218 (1974 Ordinance) prohibits "extractive industry," Lot 4 was grandfathered in as a pre-existing legal nonconforming use. (Submittal #4: Zoning Certificate.)

During a February 11, 2020 inspection of Lot 4, the Building Official reported that Charlestown Farms had a newly installed 20.7 foot by 93 foot reinforced concrete equipment pad for the installation of an electric wash plant and associated conveyor systems.[2] Following the

[1] Some documents in the Certified Record (the Record) are marked as enumerated exhibits or submittals and will be identified in this Decision by the exhibit or submittal number and the document titles, followed by a page number where appropriate. Many of the documents in the Record are internally paginated; for clarity purposes, any citation to a page number in this Decision is in reference to the internal pagination, if applicable.

[2] It is not clear from the Record why the Building Official initially inspected Lot 4 on February 11, 2020. However, Appellees assert that Charlestown Farms sought a permit for the installation

inspection, the Building Official requested information regarding Charlestown Farms' plan—specifically, information about the electric washer and water pump system's noise levels; the area and extent of the proposed extraction of material; and a description of the past, current, and proposed extraction activity with specific evidence that the proposed activity will not have a substantially different or adverse impact on the neighborhood. (Submittal #8: E-mail Correspondence.)

On March 3, 2020, Thomas Miozzi, on behalf of Charlestown Farms, responded with the following: a 2007 letter from Timothy Behan (2007 Behan Letter) of TJB Engineering stating that MTSG has been conducting a gravel extraction operation on Lot 4, and MTSG will be installing a sand washing facility to remove fines from the on-site sands in the "immediate future"; specifications on the wash plant; a report on decibel levels for the water pump; an area map; and a list of the activities that have been performed in the past and continue to be performed on the Property. *See id*.; Submittal #9: 2007 Behan Letter. The list stated the following:

> "[b]lasting & crushing of rock / ledge"; "[h]ammering of oversized blasted rock / ledge"; "[s]and excavation (drag Line)"; "[w]ashing of sand"; "[l]oading of trucks"; "[s]ale of mined & excavated material"; "[p]rocessing of broken asphalt & concrete into usable material"; "[s]torage (outside) of any and all equipment used in the above processes"; and "[s]tockpiling of processed materials." (Submittal #8: E-mail Correspondence.)

Lot 3 was created in 1893 by deed conveyance. (Decision 3.) On March 15, 2019, Charlestown Farms purchased Lot 3 from Pawcatuck River Properties, LLC. (Submittal #13: Deeds.) Lot 4-1 was originally part of Lot 4 and created by deed conveyance in 1987. (Submittal

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of an electric service to power a sand washing plant in early February 2020. *See* Appellee's Mem. of Law in Opp'n to Appeal (Opp'n) 2.

#15: Title Run; Decision 3.) Charlestown Farms purchased Lot 4-1 on May 14, 2019 from Robert W. Kenyon. (Submittal #13: Deeds.)

The parties dispute how the lots have been utilized over time. Charlestown Farms has presented evidence that all three Lots were used for a sand and gravel operation dating back to 1950 (Lots 4 and 4-1) and 1983 (Lot 3). *See* Exhibit C: Kenyon Aff. Charlestown Farms asserts that "Lots 3 and 4-1 previously had mining roads, been cleared of trees in certain areas, contained extraction pits, and there has never been, on either parcel, an overt abandonment of the [e]xtractive [i]ndustries use." Appeal 3; *see also* Exhibit B: 1939 Aerial Photograph. Additionally, Charlestown Farms asserts there is evidence of quarry roads on the lots prior to 1974. *See* 1962 Aerial Photograph; 1972 Aerial Photograph. However, the Town of Charlestown asserts that Lots 3 and 4-1 have been forested lots with some wetland areas since 1939. (Mem. to Zoning Board dated Aug. 20, 2021 at 2.) Further, the Town of Charlestown asserts that there was no evidence of mining roads, extraction, or quarrying roads on Lot 3 until sometime between 1985 and 1988, and on Lot 4-1 until spring 2021. *Id.* The Building Official further asserts that a pond and/or water—a required feature to wash sand—did not appear on Lot 4 until 2007. *Id.*

A

July 14, 2021 Notice of Violation

On July 14, 2021, the Building Official issued a Notice of Violation (NOV) to Charlestown Farms. (Submittal #1: Building/Zoning 04-21.) The NOV stated that the newly constructed, reinforced concrete equipment pad located on Lot 4 was constructed without the required building permits in violation of G.L. 1956 § 23-27.3-113.1. *Id.* The NOV ordered that "all work on said structure must [cease and desist] immediately until all required Building

Permits are obtained from the Charlestown Building Department." *Id*. Further, the NOV required that "all applicable inspections must be performed prior to the use and/or occupancy of said new construction." *Id*.

B

July 14, 2021 Determination Letter

Also on July 14, 2021, the Building Official issued a "Determination Letter"[3] to Charlestown Farms. (Submittal #1: Building/Zoning 03-21 (Determination (Det.) Letter) 1.) The Building Official agreed with Charlestown Farms' contentions, made in the March 3, 2020 correspondence, that it performed blasting and crushing of rock, hammering of rock/ledge, sand excavation, loading of trucks, sale of mined and excavated material, outside storage of equipment, and stockpiling of processed materials. *Id*.; *see* Submittal #8: E-mail Correspondence. However, the Building Official took issue with two of the activities, namely: "'*[p]rocessing of broken asphalt & concrete into usable material*'" and "'*washing of sand*.'" (Det. Letter 1.) (emphasis in letter). The Building Official explained that:

> "the Town has no evidence of any processing of off-site material ever taking place at [Plat 24] and the washing of sand appears to have begun at some point during 2007, an illegal expansion of use at the time that would have required a Special Use Permit of which one has not been issued." *Id*.

The Building Official further explained that Charlestown Farms had not been issued approvals or permits for their portable pumps and generators to be used for the wash plant. *Id*.

Regarding Lot 4, the Building Official acknowledged the Property's current use as an "Extractive Industry is a legal non-conforming use[.]" *Id*. As such, the Building Official stated that Charlestown Farms could continue extraction activities on other parcels if "it can be

[3] This letter is not specifically labeled as the "Determination Letter"; however, both parties reference the letter as such. For the sake of clarity, this Court will do the same.

determined that such intent existed prior to adoption of the restrictive zoning ordinance." *Id*. The Building Official confirmed that excavation activities were taking place on Lot 4 prior to the Town of Charlestown's Zoning Ordinance (Ordinance). *Id*. However, the Building Official explained, "[t]he additional use of the property for the washing of sand, . . . processing of broken asphalt and concrete, the new permanent power service equipment, and installation of new structures, all would have a substantially different and adverse impact on the neighborhood." *Id*. The Building Official concluded that such uses were "an expansion/intensification of a non-conforming use" and "require[d] a Special Use Permit from the Zoning Board of Review pursuant to Article VI, Section 218-39D of the Ordinance."[4] *Id*. In conclusion, the Building Official stated that, in order for Charlestown Farms to obtain building permits for the proposed expansion, they must obtain Development Plan Review approval and a Special Use Permit by the Zoning Board. *Id*. at 2.

[4] Article VI, Section 218-39D states:

> "Change of Use/Intensification. The Zoning Board of Review may, as a special use permit, allow for the change of a nonconforming use to a nonconforming use of a more restrictive character to more closely adhere to the purposes and intent of this Ordinance. If a lawful nonconforming use is changed to a conforming use, it may not be changed back to a nonconforming use. A pre-existing nonconforming use of a building, structure, or land may be added to, enlarged, expanded or intensified by an additional footprint of not more than 50 percent in excess of the existing floor area, land or intensity used only if such addition, enlargement, expansion or intensification is approved by the issuance of a special use permit by the Zoning Board of Review, pursuant to the provisions of § 218-23 of this Ordinance, provided that any such alteration complies with all other dimensional and area requirements of this Ordinance in effect at the time such relief is sought." Submittal #2: Town of Charlestown Zoning Ordinance, Current Sections (Ordinance).

Regarding Lots 3 and 4-1, the Building Official explained that Lot 3 contained "encroachment of extraction activity" and "extraction equipment" and Lot 4-1 contained "significant land clearing." *Id.* The Building Official stated that extractive industries are permitted to "continue on the site of their original extraction and may only be permitted to expand to other real property by Special Use Permit if the property had been acquired prior to the effective date of the Ordinance, adopted July 8, 1974." *Id.*; *see also* Ordinance, Article VI, § 218-37(I)(14). Additionally, extractive industry activity is prohibited "on all parcels within the Town of Charlestown unless it is established that said use pre-existed zoning as adopted on July 8, 1974 or established by Special Use Permit between July 8, 1974, and July 1, 1998." *Id*; *see also* Ordinance, Article VI, § 218-38. The Building Official determined that extractive activities "encroach[ed] into [Lot] 3 . . . between 1985 and 1988 with a substantial increase in activity during the summer of 2019." *Id.* The Building Official stated that there was "neither evidence of a Special Use Permit for [L]ot 3, nor any evidence of extraction on the property taking place pre-zoning." *Id.*

The Determination Letter ordered the following activities to "cease and desist immediately": "the processing of broken asphalt & concrete, the washing of sand, the clearing of [Lot] 4-1, as well as the construction work for the installation of the new equipment[.]" *Id.* Additionally, it ordered "all extraction of . . . [L]ot 3 [to] cease and desist immediately and all extraction equipment, if still located upon [L]ot 3, [to] be removed from said parcel within thirty (30) days of service of this notice." *Id.*

C

Zoning Board Hearings

On July 29, 2021, Charlestown Farms[5] filed an Application with the Zoning Board, appealing the NOV and Determination Letter. *See* Application. In support of its Application, Appellants submitted various exhibits, including: an aerial photograph of the Property taken in 1939 by RIGISDATA[6] (Exhibit B: 1939 Aerial Photograph) and an affidavit of Robert W. Kenyon (Kenyon Affidavit), the former owner of Lot 4-1 (Exhibit C: Kenyon Aff.). *See* Decision 2. The Building Official submitted, among other things, the 1974 Ordinance and current amendments to the Zoning Ordinance (Submittal #2: Ordinance); RIGIS images of Lots 3, 4, and 4-1 from 1939 to spring 2021 (Submittal #6: RIGIS Imagery); and correspondence from 2008 between Joseph Morrone of MTSG and the Building Official wherein MTSG requested "a letter of zoning for its pre-existing gravel bank" and asserted that MTSG "is grandfathered for the selling of aggregate products other than asphalt and concrete" (2008 Morrone Letter) (Submittal #4: Zoning Certificate). *See id*. at 2.

In consideration of the Application, the Zoning Board conducted hearings on September 1, 2021 (September 1 Hearing) and September 7, 2021 (September 7 Hearing) (collectively, the Hearings). Appellants presented additional exhibits at the Hearings, including aerial photograph maps of the Property taken in 1939, 1962, and 1972 (the 1939 Map, the 1962 Map, and the 1972

[5] While the appeal was pending, on October 29, 2021, Peckham Charlestown Farms purchased the Property from Charlestown Farms. (Mot. to Dismiss, Ex. A.) On February 1, 2022, Appellees filed a Motion to Dismiss, asserting that Peckham Charlestown Farms was an indispensable party to the action because it was the present owner of the Property. *Id*. at 1. On February 15, 2022, Charlestown Farms amended the Complaint to add Peckham Charlestown Farms as an additional appellant. (Am. Compl.) Hereinafter, both appellants will be collectively referred to as Appellants.

[6] *RIGIS: Rhode Island Geographic Information System*, State of Rhode Island – Division of Statewide Planning, https://info.rigis.org/pages/about.

Map, respectively; collectively, the Aerial Maps) (Appellants' Exhibits #4 – #6) and a 2016 Purchase Order for "Pond Beach Sand Restoration" by MTSG (Purchase Order) (Appellants' Exhibit #9: Purchase Order # 160688). *See* Decision 3.

1

September 1, 2021 Hearing

At the September 1 Hearing, the Zoning Board began by identifying the two main issues before it: (I) "the washing of sand" on Lot 4 and (II) "the use of Lots 3 and 4-1 for extractive industry"—specifically, "the rights of Lot 4-1 and Lot 3." (Hr'g Tr. 8:18-9:6, Sept. 1, 2021.)

i

Lot 4

Because the parties dispute whether washing on Lot 4 constitutes "extractive industry" or if it is a prohibited expansion or intensification of the nonconforming use, the Zoning Board heard arguments from counsel regarding the definition of "extractive industry." *See id*. at 6:22-65:23. Appellants' attorney, John Pagliarini (Attorney Pagliarini), noted that the definition of "extractive industry" in the current Zoning Ordinance (Article IV, § 218, adopted in 2010) (Current Ordinance) is defined to include "washing." *Id*. at 12:17. Therefore, he argued "[Appellants] have the legal right on Lot 4 to do what [the Current Ordinance] says." *Id*. at 30:24-31:2. Counsel for the Building Official, Peter Skwirz (Attorney Skwirz), asserted that despite "washing" falling under the label of "extractive industries," the key inquiry is "[w]hat were [Appellants] doing" because "[Appellants] can continue to do that." *Id*. at 24:18-25:4. Attorney Skwirz insisted that the label "extractive industry" is not exhaustive of the types of uses a property can be used for. *See id*. at 25:4-6. Therefore, he contended that since Appellants were

not washing on Lot 4 prior to 1974, the nonconforming use should only include the activities that were being done on Lot 4 prior to 1974—critically *not* washing.

Next, the Building Official explained his determination that the washing of sand is an increase and intensification of the nonconforming use. *See id*. at 50:20-51:19. Previously, he explained, Appellants were "graveling up to the lot lines" and increasing "from two trucks a year to 100 trucks a year[.]" *Id*. at 51:9-10. Such conduct was "not an expansion because they [were] doing the same thing. They [were] doing it more." *Id*. at 51:11-12. However, if there is a change, such as new equipment or processors, there is an expansion. *See id*. at 51:12-19. He explained that "washing of sand brings in all new equipment, all new processors. You have to have pumps[,] . . . some form of electricity[,] . . . [and] this big wash plant. It's an increase. It's an intensification." *Id*. at 50:24-51:5.

ii

Lots 3 and 4-1

The Zoning Board then addressed whether "Lots 3 and 4-1 carry legal non-conforming rights for extractive industry?" *Id*. at 66:14-15. Attorney Pagliarini began by explaining that because Lot 4 was subdivided to create Lot 4-1, Lot 4-1 must have the same legal nonconforming rights of extractive industry as Lot 4. *See id.* at 67:11-17. He then presented the Aerial Maps, aerial photographs taken by RIGISDATA and overlayed with lines by Commonwealth Engineers. *Id*. at 67:24; 69:14; 70:17. Attorney Pagliarini explained that the Aerial Maps show roads and "existing wetlands today that were created because of the activities of the gravel mining that occurred on that site." *Id*. at 73:11-14. Thus, they show that Lots 3 and 4-1 were "used by multiple parties through time as gravel on all three parcels." *Id*. at 73:21-22. On the 1939 Map, he asserted that there were, what appeared to be, dug pits on both Lots 3 and

4-1. *Id*. at 68:5-6. On the 1962 Map, Attorney Pagliarini asserted that the pits appear to be "full of water[,]" meaning that "manmade wetlands were created from these pits." *Id*. at 69:16-19. He insisted that the 1962 Map shows "a mining road that leads to the dug areas that were previously shown on the 1939 [M]ap." *Id*. at 70:14-16. Then, on the 1972 Map, he asserted "that there are mining roads that have been cut into Lot 4-1" and "a series of roads on Lot 3." *Id*. at 71:10-13.

In support, Attorney Pagliarini introduced the Kenyon Affidavit, which provides that the Kenyon family acquired Plat 24 (including Lots 4 and 4-1) in November 1950 and Lot 3 in December 1983. *See id*. at 71:24-72:2; Exhibit C: Kenyon Aff. ¶¶ 1-2. The Kenyon Affidavit states that all three lots, Lots 3, 4, and 4-1, were utilized for the family's sand and gravel business from the acquiring of the land through the present. (Exhibit C: Kenyon Aff. ¶ 10.) Attorney Pagliarini asserted that "[Mr. Kenyon's] recollection lines up with the aerial photographed evidence that has been presented to [the Zoning Board] this evening." (Hr'g Tr. 72:19-22, Sept. 1, 2021.) In conclusion, Attorney Pagliarini asserted that the Maps are "photographic evidence that dispute[] the [Building Official's] determination that there were no mining roads or mining on Lots 3 and 4-1 prior to the adoption of the [1974 Ordinance]." *Id*. at 71:19-23. Chairman of the Zoning Board, Ray Dreczko (Chairman Dreczko), questioned why the Kenyon Affidavit was completed in several different fonts, to which Attorney Pagliarini was unable to explain. *See id*. at 96:14-97:6.

Attorney Skwirz, the Building Official, and Chairman Dreczko challenged Attorney Pagliarini's conclusions. *Id*. at 78:9-10; 78:17-19; 79:24-86:20. The Building Official relied on various images of the Property between 1939 and 2021.[7] *See* Submittals #6 & #7: RIGIS Images.

[7] Attorney Pagliarini objected to the conclusions the Building Official drew from the RIGIS Images after 1974. *See id*. at 86:2-93:6. He claimed they were irrelevant to the question before

The Building Official concluded that the 1972 Image showed "no quarrying, no graveling on Lots 3 or 4-1[,] [and] [no] roads." (Hr'g Tr. 82:16-18, Sept. 1, 2021.) He asserted that neither the 1981 Image nor the 1985 Image show evidence of quarrying. *See id*. at 83:9-11; 16-18. In the 1988 Image, the Building Official asserted that "there's absolutely graveling in Lot 3" and that "encroachment started some time between 1985 and 1988." *Id*. at 83:21-24. In the 2019 Image, he asserted that "[t]his is where you see the encroachment start[] intensifying." *Id*. at 84:20-22. The Building Official explained that encroachment occurred onto Lot 3 by clearing and graveling more. *See id*. at 84:23-85:2. However, in 2019, there was still no quarrying, no clearing, and no roadways on Lot 4. *See id*. at 85:13-16.

Chairman Dreczko said he found it difficult to interpret the images, especially because there appeared to be a glare where Attorney Pagliarini attested there was a pit. *See id*. at 97:7-98:1. Further, he questioned why Appellants were not able to produce larger photographs for the Zoning Board to review. *See id*. at 98:1-7. Finally, Chairman Dreczko insisted that there was "nothing definitive in front of" him. *Id*. at 98:19. For example, the spring 2021 image showed that Appellants stopped excavating right on Lot 4-1's property line and did not excavate past the lot line, while Attorney Pagliarini asserted that Appellants believed they had the right to excavate on Lot 4-1. *See id*. at 104:20-105:5.

Several Zoning Board members suggested that Appellants present an expert to explain the Maps. *See id*. at 115:23-24 (Zoning Board Member Mr. Stokes: "I suggest you bring a photo expert in and then we can settle this . . ."); *id*. at 117:15-17 (Chairman Dreczko: "We need to have evidence of what we are factually looking at so we can make a determination."). However, Attorney Pagliarini rested his case, stating "I'm done . . . . I'll agree to the stipulation that there

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the Zoning Board, which is whether Lots 3 and 4-1 have a legal nonconforming right to gravel based on their use prior to the 1974 Zoning Ordinance. *Id*.

will be no further presentation of any information . . . . I believe I have met my burden. . . . I rest with clarity and an explanation point." *Id*. at 121:18-21; 122:4; 123:1-2. Thereafter, the Zoning Board moved to continue the hearing to September 7, 2021. *Id*. at 124:4-10.

September 7, 2021 Hearing

At the September 7 Hearing, multiple Alton Carolina Road residents testified in opposition to the Application during public comment. *See* Hr'g Tr. 6:4-5; 6:24-37:17, Sept. 7, 2021.

Regarding Lot 4, Catherine Gibson testified to the gravel bank's expansion and intensification, in both truck traffic and size of the gravel bank since she came to the neighborhood in 1970. *See id*. at 7:6-9; 8:14-16. Nick Testa (Mr. Testa) insisted that the Zoning Board should make Appellants stop and remove the concrete pad. *See id*. at 11:21-24. Regarding Lots 3 and 4-1, Mr. Testa explained that the roads which Appellants assert are old quarry roads once used for quarrying and mining are, in fact, old fire roads that were dug by Amtrak to hold water following a 1954 train fire. *See id*. at 16:6-7; 10-12; 17:15-17. He further testified that Appellants' blasting is noisy; John Pater and Ann Klumbis also testified to the noisiness of Appellants' operations, thus emphasizing the increase in equipment use on the Property. *See id* at 12:16-19; 24:17; 37:20-21; 38:18-21.

Next, Brenda Pater testified that she used to walk the Property as a kid with her father and go to the gravel bank; however, she does not remember ever seeing a pond other than the Pawcatuck River—thus contradicting Appellants' assertions that Lot 4 was previously used for washing because a pond would be a required feature for sand washing. *See id*. at 18:16-17; 18:23-24; 19:2-3.

Then, John Winkelman (Mr. Winkelman), based on his experience as a civil engineer with a coastal engineering specialty, asserted that Appellants' "blasting of granite and bedrock is an intensification expansion." *Id*. at 30:1-3: *see also id*. at 28:10-11. He explained that there is currently forty-four acres of land between his home and Appellants' land, but expansion could bring blasting—and the trucks and noise that come along with it—within 100 feet of his house. *See id*. at 26:13-17. Mr. Winkelman insisted that the aerial photographs presented by Appellants do not show evidence of extraction, mining roads, or quarry pits. *See id*. at 31:9-13. Rather, Mr. Winkelman believes that Lot 4-1 contained natural wetlands, not ponds for mining or quarry pits, since at least 1939. *See id*. at 31:22-23.

Thereafter, the Zoning Board voted unanimously to deny the Application. *Id*. at 60:8-10.

D

The Zoning Board's Decision

The Zoning Board recorded its written Decision (the Decision) on September 8, 2021. *See generally* the Decision. In denying the appeal, the Zoning Board made the following conclusions:

> "[W]e do not find in the record before us, that the term "Extractive Industry" was a defined term in the 1974 Zoning Ordinance.
>
> ". . .
>
> "Charlestown Farms has not presented sufficient credible evidence on the actual and specific use of Lot 4, or the intent of the landowner, at the time of the enactment of the 1974 Zoning Ordinance.
>
> ". . .
>
> "Charlestown Farms has not provided the Board with sufficient credible evidence, whether through documents or witness testimony, to support its assertion that sand washing occurred on

> Lot 4 or is customary to a use existing on Lot 4 prior to the enactment of the 1974 Zoning Ordinance.
>
> ". . .
>
> "Charlestown Farms has not submitted sufficient credible evidence to meet its burden of proof as to the use of Lot 3, Lot 4, and Lot 4-1. Moreover, the Board is unable to determine any intent on the future use of the property by the landowner by merely viewing historical aerial photographs or recorded deeds without more supporting evidence. It appears to the Board that there has been a sand and gravel use on Lot 4 over the years and prior owners subdivided Lot 4 as indicated by the Deeds; the Board does not find sufficient evidence to conclude that there has been, whether by actual use or intent of a prior landowner, sand and gravelling [*sic*] use, or intent, on Lot 3 or Lot 4-1.
>
> "We find that Mr. Testa's testimony about fire lanes and water pits for the purposes of storing water in the event of a fire along the rails and Mr. Winkelman's testimony regarding the interpretation of aerial photos and naturally occurring water features as referenced by elevation maps were both quite credible." *Id*. at 4-7.

As to the first issue, the sand washing on Lot 4, the Zoning Board determined that sand washing was not a customary use of extractive industry at the time the 1974 Ordinance was enacted because that Ordinance did not define "Extractive Industry." *Id*. at 4. Before the Zoning Board, Appellants had asserted that washing should be permitted on Lot 4 because "washing" is listed in the Current Ordinance's definition of "Extractive Industry." *See* Hr'g Tr. 12:11-17, Sept. 1, 2021. The Zoning Board further explained that the definition of "Extractive Industry" in the Current Ordinance, relied upon by Appellants, is not determinative. (Decision 4.) The Current Ordinance's definition, the Zoning Board reasoned, is not pertinent to the customary uses of an extractive industry at the time that Lot 4 was granted its nonconforming use status. *See id.*

The Zoning Board disregarded the Kenyon Affidavit because it did not mention sand washing, was devoid of any information about the document's preparer, and was created using

several different fonts. *Id*. at 5. The Zoning Board similarly was not persuaded by the Purchase Order, which Appellants asserted showed evidence of sand washing, but did not explicitly state "sand washing." *Id*. The Zoning Board further was unpersuaded by the 2008 Morrone Letter because it made "no mention of sand washing, never mind mention of the actual use of Lot 4 prior to [the 1974 Ordinance]." *Id*. at 6. Finally, the Zoning Board also rejected Appellants' contention that the Aerial Maps showed the existence of a quarry road, in the absence of expert testimony. *Id*.

Turning to the second issue, the existence of a pre-existing legal nonconforming use for Lots 3 and 4-1, the Zoning Board concluded that Appellants did not provide sufficient evidence as to the use or intent of prior landowners. *Id*. at 7. The Zoning Board reasoned that the Kenyon Affidavit lacked information regarding the prior owners' intent and timeline, therefore it was unconvinced that the lots were used for extractive industry activities. *Id*. at 5.

In review of the Maps presented by Appellants, the Zoning Board similarly was unconvinced by the Appellants' assertions that they showed evidence of prior quarrying or mining on Lots 3 and 4-1. *Id*. at 6. As to Appellants' assertion that the 1939 Map featured a pond, the Zoning Board opined that it was simply a solar glare. *Id*. As to Appellants' contention that a perfectly straight black line on one of the Maps was a road on Lot 4-1 used for extractions, the Zoning Board posited that known roads are often depicted with non-perfect white lines; Appellants failed to provide an explanation. *Id*. As to the physical Maps, the Zoning Board requested larger and/or electronic versions to allow the members to view the images easier, but Appellants failed to provide such. *Id*.

Finally, the Zoning Board found Mr. Testa and Mr. Winkelman's testimony credible and rejected Appellants' assertions that there were quarry roads, ponds, or mining on Lots 3 and 4-1. *Id*. at 7.

II

Standard of Review

The Superior Court's review of zoning board decisions 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:
> "(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." Section 45-24-69(d).

The 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) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 507, 388 A.2d 821, 824 (1978)). "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.'" *Iadevaia v. Town of Scituate Zoning Board of Review*, 80 A.3d 864, 870 (R.I. 2013) (quoting *Pawtucket Transfer Operations, LLC v. City of*

Pawtucket, 944 A.2d 855, 859 (R.I. 2008)). If the Court finds that the zoning "board's decision was supported by substantial evidence in the whole record[,]" then the zoning board's decision must stand. *Lloyd*, 62 A.3d at 1083. If the decision of the board does not contain sufficient findings of fact and conclusions of law to permit judicial review, the Court will remand the matter to the board so that the board may issue a ruling that is complete and susceptible to judicial review. *See Irish Partnership v. Rommel*, 518 A.2d 356, 359 (R.I. 1986).

III

Analysis

In their Appeal, Appellants argue that the Zoning Board lacked subject matter jurisdiction to issue its Decision. (Appeal 1.) Appellants maintain that the Decision of the Zoning Board should be reversed and nullified because the Zoning Board lacks the statutory authority to determine the existence or extent of Appellants' legal pre-existing nonconforming use. *See* Appeal 5, 7.

Second, Appellants contend that if this Court determines the Zoning Board had jurisdiction, the Decision should be reversed because: (1) the administrative record was defective and not timely filed in accordance with § 45-24-69, *id*. at 11-13; (2) the Decision mischaracterized the doctrine of diminishing assets because the Zoning Board incorrectly examined the date of acquisition of the Property, *id*. at 13-16; and, (3) the Building Official improperly relied on the aerial images because they contain disclaimers warning that they are not reliable, *id*. at 16-17. Finally, Appellants alternatively request that they be allowed to present additional evidence because they now have an expert to interpret the photographs. *Id*. at 17-18; *see also* Mem. of Law in Supp. of Pls.' Mot. for Leave to Present Add'l Evid. (Mot. for Leave) 7.

A

Adequacy of the Administrative Record

Before addressing subject matter jurisdiction, this Court must first address Appellants' arguments regarding issues with the Record. First, Appellants argue the Court should reverse the Decision because the Record was filed outside of the thirty-day deadline as provided in § 45-24-69.[8] (Appeal 11.) Specifically, the Zoning Board was served with a copy of the Complaint on October 28, 2021 but did not file the Record with the Court until June 14, 2022. *See* Docket; June 14 Return of Records. The Record was accompanied by a Certification indicating that the filing contained the "complete copy of the Record[.]" (June 14 Return of Records at 2.) Thereafter, on September 6, 2022, the Zoning Board refiled the Record, along with the same Certification, and added the transcripts from the Hearings (the Transcripts). *See* September 6 Return of Records.

However, there is no remedy for untimely filing. *See* § 45-24-69. In the interest of judicial economy, this Court will review this appeal despite the untimely filing.

Appellants additionally assert that the Zoning Board's certification accompanying the June 14 Return of Record was a "material misrepresentation" since it did not contain the Transcripts. (Appeal 11-12.) As a result, Appellants state they do not have confidence in the accuracy of the Record. *Id*. at 12. This Court is not persuaded by Appellants' assertions because Appellants had the opportunity to file an objection when the Records were filed. Further, this Court is satisfied that the Record as provided by the Zoning Board on September 6, 2022 contains all the exhibits and documents in which the Decision relied. Seeing as Appellants failed

[8] Section 45-24-69 provides, in relevant part: "[t]he zoning board of review shall file . . . the record of the case . . . with the clerk of the court within thirty (30) days after being served with a copy of the complaint." Sec. 45-24-69(a).

to take any action to contest the timeliness or completeness of the Record until this present Appeal, this Court concludes that the Record before the Zoning Board was not defective and proceeds with the merits of the appeal.

B

Authority of the Zoning Board

Appellants argue that the Zoning Board lacked the authority to both (1) "issue a declaratory judgment in the form of determining the scope and extent of [Appellants'] nonconforming use of the gravel operation" and (2) "determine the existence or extent of [Appellants'] legal preexisting nonconforming use[.]" (Appeal 7, 9.)

"Zoning boards are statutory bodies[,] . . . empowered to hear appeals from the determinations of administrative officers made in the enforcement of the zoning laws and in addition they may authorize deviations from the comprehensive plan by granting exceptions to or variations in the application of the terms of local zoning ordinances." *Olean v. Zoning Board of Review of Town of Lincoln*, 101 R.I. 50, 52, 220 A.2d 177, 178 (1966). Pertinently, § 45-24-57 grants the zoning board of review the powers and duties "[t]o hear and decide appeals . . . where it is alleged there is an error in any order, requirement, decision, or determination made by an administrative officer or agency in the enforcement or interpretation of this chapter, or of any ordinance adopted pursuant hereto[.]" Sec. 45-24-57(1)(i).[9] When hearing appeals, zoning boards act as appellate bodies and "have all the powers of the officer from whom the appeal was taken." *Ajootian v. Zoning Board of Review of City of Providence*, 85 R.I. 441, 446, 132 A.2d

[9] The Town of Charlestown's Zoning Ordinance similarly provides that the powers and duties of the zoning board of review include: "[t]o hear and decide appeals in a timely fashion where it is alleged there is error in any order, requirement, decision, or determination made by an officer or commission in the enforcement or interpretation of this Ordinance, or of any section adopted pursuant hereto[.]" Zoning Ordinance, Article IV, § 218-22(A).

836, 839 (1957). Accordingly, the zoning board may interpret an ordinance to determine whether a use is conforming or nonconforming; however "local zoning boards lack[] the authority to issue declaratory judgments regarding the pre-existing use of property[.]" *Bellevue-Ochre Point Neighborhood Association v. Preservation Society of Newport County*, 151 A.3d 1223, 1230 (R.I. 2017) (*Bellevue-Ochre*).

In other words, the zoning board may "confirm[] that a[n] [*existing*] 'use, structure, building or lot either complies with or is legally nonconforming to the provisions of [the applicable ordinance,]" but it may not "provide information concerning . . . *proposed* uses, structures, buildings or other development." *Tompkins v. Zoning Board of Review of Town of Little Compton*, No. C.A. 2001-204, 2003 WL 22790829, at *4 (R.I. Super. Oct. 29, 2003) (emphasis in original). As such, trial justices—not zoning boards—have the authority to determine the extent and scope of a nonconforming use when a property owner seeks to conduct a substantially different use on the property than previously done. *See Town of Coventry v. Forsons Realty LLC*, 276 A.3d 910, 914 (R.I. 2022) ("'a change of use occurs when the proposed use is *substantially different* from the nonconforming use to which the premises were previously put'") (quoting *Cohen v. Duncan*, 970 A.2d 550, 565 (R.I. 2009)) (emphasis in original).

The Court now turns to Appellants' contention that the Zoning Board lacked subject matter jurisdiction to determine the scope and extent of its nonconforming use of the gravel operation and the existence or extent of its legal pre-existing use. (Appeal 7, 9.) Because of the different factual inquiries before the Zoning Board as between Lot 4 and Lots 3 and 4-1, the Court analyzes the authority of the Zoning Board with respect to Lot 4 and to Lots 3 and 4-1 separately.

1

Lot 4

Appellants challenge the Zoning Board's conclusion that its washing activities on Lot 4 constitute an unlawful expansion of a prior nonconforming use. Lot 4 is grandfathered to have a legal nonconforming use for extractive industry because the land was used for gravel bank operations prior to the 1974 Ordinance. *See* Submittal #4: Zoning Certificate. Here, the Zoning Board concluded that the Building Official's determination that washing is an expansion of the prior nonconforming use was correct. (Det. Letter 1.) This conclusion was a determination as to the extent and scope of the nonconforming use, which exceeds the Zoning Board's authority.

At the Hearings, the Zoning Board inquired into Appellants' proposed uses of the Property, namely: washing. *See* Hr'g Tr. 50:22-51:19, Sept. 7, 2021. In determining whether a use is being continued, a zoning board is not allowed to inquire beyond the present status of the premises. *See RICO Corporation v. Town of Exeter*, 787 A.2d 1136, 1144 (R.I. 2001) (*RICO*) (holding that the zoning board exceeded its authority when it reviewed proposed blasting uses of the plaintiff's property); *Olean*, 101 R.I. at 51, 220 A.2d at 178 (explaining how the zoning board exceeded its authority when it "pronounce[d] that [a school's] use was legally established and that the premises could continue to be used as they had been continually since 1958").

The Zoning Board's determination of the scope and extent of Lot 4's nonconforming use was beyond the Zoning Board's authority. The Zoning Board reviewed evidence with respect to whether the conclusion of the Building Official was correct when he determined that the sand washing on Lot 4 was an intensification or expansion of the existing nonconforming use. In making its determination, the Zoning Board conducted a factual inquiry in which they thoroughly reviewed the evidence and determined that Appellants did not meet their burden of

showing that Lot 4 was used for sand washing prior to 1974. For instance, the Zoning Board reviewed the 1974 Ordinance and concluded that "[t]he term 'Extractive Industry' was not a defined term in [that Ordinance.]" (Decision 5.) The Zoning Board also reviewed the Kenyon Affidavit to determine whether Lot 4 was used for washing prior to 1974; the Zoning Board concluded that the affidavit was "not persuasive" because it did not mention washing, rather it "state[d] that there was a 'sand and gravel' use on Lot 4[,]" but such assertions "[are] not in dispute[.]" *Id*. Further, the Zoning Board examined the Purchase Order and 2008 Morrone Letter; neither of which addressed sand washing. *Id*. at 5-6. In conclusion, the Zoning Board stated that "[Appellants] ha[ve] not provided the [Zoning] Board with sufficient credible evidence, whether through documents or witness testimony, to support its assertion that sand washing occurred on Lot 4 or is customary to a use existing on Lot 4 prior to the enactment of the 1974 Zoning Ordinance." (Decision 6.)

The Zoning Board lacks authority to determine the scope and extent of Appellants' sand washing and gravel activities on Lot 4. As explained, their inquiry involved more than a confirmation as to whether Lot 4 had a nonconforming use.[10] In fact, the Zoning Board reviewed proposed activities of washing, an activity which was not listed on the Ordinance's definition of extractive industry. This Court "may reverse or modify the [Zoning Board's] decision if

[10] This Court notes that had the Zoning Board's inquiry been limited to whether Lot 4 has a legal nonconforming use for extractive industry, such a determination would have been within their authority. *Bellevue-Ochre Point Neighborhood Association v. Preservation Society of Newport County*, 151 A.3d 1223, 1230 (R.I. 2017), stands for the proposition that the zoning board may review the present status of a property. There, the zoning board was permitted to provide information concerning the present status of the Breakers' existing use—that is, whether "the Breakers is a lawful nonconforming use." *Id.* at 1226. *See also Tompkins v. Zoning Board of Review of Town of Little Compton*, No. C.A. 2001-204, 2003 WL 22790829, at *4 (R.I. Super. Oct. 29, 2003) (emphasizing that the local zoning board has authority to "determine whether the subject '*complies* with or *is* legally nonconforming'"; in other words, it may review the "present status" of the property) (emphasis in original).

substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are . . . (2) [i]n excess of the authority granted to the zoning board of review by statute or ordinance[.]" Sec. 45-24-69(d). This Court concludes that the Zoning Board exceeded its authority when it confirmed the extent and scope of the nonconforming use on Lot 4, thereby prejudicing Appellants' substantial rights. Accordingly, the Decision is reversed as to Lot 4.

2

Lots 3 and 4-1

Appellants contest the Zoning Board's conclusion that they did not present sufficient evidence that "there has been, whether by actual use or intent of a prior landowner, sand and gravelling [*sic*] use, or intent, on Lot 3 or Lot 4-1." *See* Decision 7. Appellants assert that extractive industry must be permitted on Lots 3 and 4-1 because the lots have been used for such activities since prior to the 1974 Ordinance. *See* Hr'g Tr. 73:21-22, Sept. 1, 2021. Appellants further assert that Lot 4-1 should retain the same nonconforming use as Lot 4 since Lot 4-1 was subdivided from Lot 4.[11] *See id.* at 67:11-17.

Zoning boards have "no right to" "confirm the legality of a pre-existing use[.]" *RICO*, 787 A.2d at 1144; *see also Duffy v. Milder*, 896 A.2d 27, 36 (R.I. 2006) (citing *Olean*, 101 R.I. at 52, 220 A.2d at 178) ("[Zoning boards] . . . do not have the authority to confirm the legality of a preexisting use."). Here, the Zoning Board ruled on the legality of Lot 3 and Lot 4-1's pre-existing use. Specifically, the Zoning Board affirmed the Building Official's determinations that there was no evidence of extraction taking place on Lots 3 and 4-1 prior to the 1974 Ordinance. (Det. Letter 2.) For example, the Zoning Board explained that "[t]he burden of proving a pre-

[11] For the reasons set forth below, the Court need not address this issue.

existing legal nonconforming use and the intent of the landowner at the time of the enactment of the [1974 Ordinance] is upon [Appellants], and it must show that the use lawfully was established before the zoning restrictions were placed upon the land." (Decision 4.) After Appellants presented photographs and maps without the aid of an expert witness to interpret them, the Zoning Board stated that "[t]he only intent that the [Zoning] Board can speculate from these deeds is that the owner at the time of the transfers intended to divide the property into the subject lots. *Id*. at 6. The Zoning Board concluded that "[it] does not find sufficient evidence to conclude that there has been, whether by actual use or intent of a prior landowner, sand and gravelling [*sic*] use, or intent, on Lot 3 or Lot 4-1. *Id*. at 7. Clearly, the Building Official determined that Lots 3 and 4-1 do not have a legal pre-existing use for extractive industry. *Id*. The inquiry interpreted more than the applicable ordinance and involved inquiry into intent of the landowner for proposed uses of the Property. As such, the Zoning Board exceeded its authority when it confirmed the legality of Lot 3 and Lot 4-1's pre-existing uses.

This Court "may reverse or modify the [Zoning Board's] decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are . . . (2) [i]n excess of the authority granted to the zoning board of review by statute or ordinance[.]" Sec. 45-24-69(d). This Court concludes that the Zoning Board exceeded its authority when it confirmed the legality of the pre-existing uses of Lots 3 and 4-1. Accordingly, the Decision is reversed as to Lots 3 and 4-1.[12]

[12] Appellants assert that the Zoning Board erroneously relied on the aerial photographs of the Property from 1939 through 2021. (Appeal 16.) Appellants explain that each aerial photograph contains a disclaimer that reads:

> "THIS MAP IS FOR PLANNING PURPOSES ONLY. IT IS NOT VALID FOR LEGAL DESCRIPTION OR CONVEYANCE[.] While the Town makes every attempt to ensure the accuracy and completeness of the data, the Town of Charlestown provides this

Because this Court determined that the Zoning Board exceeded its jurisdiction, this Court need not address Appellants' remaining argument regarding the doctrine of diminishing assets or its request to present additional evidence. *See* Appeal 13-16; *see generally* Mot. for Leave.

IV

Conclusion

After review of the entire record, this Court finds that the Zoning Board exceeded its authority and prejudiced substantial rights of Appellants in both (1) making a scope and extent determination of Lot 4's nonconforming use and (2) making a finding on the legality of the pre-existing use of Lots 3 and 4-1. Accordingly, the Zoning Board's Decision regarding Lots 4, 3, and 4-1 is reversed. Counsel shall submit an appropriate order.

> data as is, with all faults. The Town of Charlestown makes no claims, no representations and no warranties, regarding the reliability, completeness or the accuracy of the GIS data and GIS data products furnished by the Town. In no event shall the Town be liable for any indirect or consequential damages incurred from the use or inability to use the data." *Id*; *see also* Submittals #6 & #7: RIGIS Imagery.

Appellants' assertions regarding the aerial photographs pertain to the Zoning Board's analysis of Lots 3 and 4-1. *See* Appeal 16. For the foregoing reasons, the Zoning Board exceeded its authority when it upheld the Building Official's determination of Lots 3 and 4-1. Accordingly, the Court need not address this issue.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Charlestown Farms, LLC, et al. v. Town of Charlestown Zoning Board of Review, et al.**
CASE NO:	**WC-2021-0434**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**December 21, 2023**
JUSTICE/MAGISTRATE:	**Taft-Carter, J.**
ATTORNEYS:	
For Plaintiff:	**M. Hamza Chaudary, Esq.** **Jeffrey K. Techentin, Esq.**
For Defendant:	**Wyatt A. Brochu, Esq.**