

**SAVE SAND POND and CHRISTOPHER E.
GUNCHEON Appellants,
v.
CITY OF WARWICK ZONING BOARD OF
REVIEW, by and through
its members in their official capacities,
EVERETT O'DONNELL,
GEORGE SHUSTER, BEVERLY
STRUDAHL, PAUL DEPETRILLO,
and SALVATORE DELUISE, CENICOR,
LLC; and, PRW HOLDINGS, LLC.
Appellees.**

C.A. No. KC-2019-0997

**STATE OF RHODE ISLAND KENT, SC.
SUPERIOR COURT**

March 25, 2021

DECISION

LANPHEAR, J. Before this Court is the Appellants', Save Sand Pond and Christopher E. Guncheon (Save Sand Pond), appeal of the City of Warwick Zoning Board of Review's (Zoning Board) decision of August 14, 2019, which granted the Appellees', Cenikor, LLC and PRW Holdings, LLC. (Applicants) petition for a special use permit and dimensional variance. The Applicants object to this appeal and contend that the Zoning Board decision should be affirmed. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, this appeal is granted and remanded to the Zoning Board.

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**I
Facts and Travel**

The Applicants are seeking to redevelop the parcel located at 1160 Post Road in Warwick, Rhode Island. (Appellants' Br., Ex. A.) The parcel contains an existing building with mixed commercial use, including a pizza restaurant, hair salon, nail salon, daycare, and laundromat. *Id.* Ex. D, at 1. The parcel is zoned for General Business, and the parcel also shares a parking lot and

driveways with the commercial building to the northeast. Warwick Planning Board Decision at 1 (Compl. Exhibit A) (Planning Board Decision). Sand Pond, a 12-acre kettle pond, is located to the southwest of the proposed development; with residential properties located to the northeast and southeast. *Id.* The specific characteristics of the land surrounding the proposed development is "predominantly and quantifiably residential in nature with neighborhood supportive general business commercial uses along the Post Road corridor." (Appellants' Br., Ex. E, Hr'g Tr. Vol. I, 17:19-22, Apr. 29, 2019 (Tr. Vol. I).)

The proposed development will consist of the construction of a three-story addition to the existing building to be used as a self-storage facility as well as reconfiguration of the parking area to accommodate the addition. Planning Board Decision at 1. The parcel is approximately four acres; the total building footprint is proposed to be 46,038 square feet, consisting of 33,388 square feet of storage use, and 12,650 square feet of retail use; the storage use is the proposed construction, and the retail use is the existing use. *Id.* The front portion of the existing building will remain and be renovated for the retail use and the rear portion of the building is to be demolished to provide for the three-story self-storage facility. *Id.* The proposal requires Zoning Board approval of a special use permit pursuant to Use Code 807 and Section 304.5, for more than one nonresidential use or building on a lot, and dimensional relief pursuant to Section 701.7, for less than the required

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parking spaces. *Id.* Pursuant to Table 1 "Use Regulations" of the City of Warwick Zoning Ordinance (Warwick Zoning Ordinance), a "[m]inistorage and miniwarehouse facility" is allowed only by special use permit and must be approved by the zoning board of review. (Warwick Zoning Ordinance, Table 1). In other words, the zoning of the parcel does not permit the storage facility without the granting of a special use permit. *Id.* Therefore, due to the requirements of the Warwick Zoning Ordinance,

the Applicants sought both a special use permit and a dimensional variance. Compl. ¶ 10.

General business districts are defined as "[p]roperties mapped in accordance with subsection 303 of [the Warwick Zoning Ordinance] and generally used for a wide diversity of commercial establishments including retail, service, office, and automotive related uses." Warwick Zoning Ordinance § 301.8. The issuance of a special use permit is guided by Warwick Zoning Ordinance Section 906.3(C). Warwick Zoning Ordinance § 906.3(C). A special use permit allowing more than one nonresidential use is outlined in Section 304.5 of the Warwick Zoning Ordinance. Warwick Zoning Ordinance § 304.5. The required parking spaces are governed by Warwick Zoning Ordinance Section 701.7, and a request for dimensional relief reducing the number of parking spaces can be found in Warwick Zoning Ordinance Section 906.3. Warwick Zoning Ordinance §§ 701.7 & 906.3.

The Warwick Planning Board (Planning Board) **rejected the Applicants' application** for Master Plan Approval on September 13, 2017 after reviewing the Master Plan. Planning Board Decision at 2. Specifically, the Planning Board found that the proposal was inconsistent with Article 1 "Purposes and General Statements" of the City's Development Review Regulations and was also inconsistent with Warwick Zoning Ordinance Section 103.10, which intends to "[p]romote a high level of quality in design in the development of private and public facilities."

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Id. In addition to these findings of inconsistency, the Planning Board members stated various concerns: that the proposal was out of scale with the other structures on Post Road and is inconsistent with the abutting neighborhood; that the proximity to Sand Pond and the impact the development will make on the ecosystem; that there are more suitable places for the storage use; that the **proposal is inconsistent with the Comprehensive Plan**, detrimental to the natural resources of Sand Pond, detrimental to a private

enterprise, detrimental to a joint community partnership, and the proposal is out of scale, out of character, and out of place. *Id.* For all of these reasons, the Planning Board rejected the proposed Master Plan unanimously. *Id.*

The Applicants appealed the Planning Board's decision to the Zoning Board sitting as the Warwick Planning Board of Appeals. (Appellants' Br., Ex. C, Minutes for May 8, 2018 Hearing of Zoning Board.) On May 8, 2018, the Zoning Board, sitting as the Warwick Planning Board of Appeals, voted to approve the appeal and remanded the decision back to the Planning Board for the Planning Board to approve the Master Plan. *Id.* There is no appeal of the ultimate approval of the Master Plan pending before this Court.

A

First Zoning Board Hearing (April 29, 2019)

On June 22, 2018, the Applicants submitted their application to the Zoning Board for the required special use permit and dimensional variance. (Appellees' Ex. A). The Applicants submitted a memorandum to the Zoning Board in support of their application on April 26, 2019. (Appellees' Supplemental Binder, Exhibit C1.) The application was heard and discussed before the Zoning Board on April 29, 2019, June 18, 2019, and July 24, 2019. (Hr'g Transcripts, Exs. E, F, G.)

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On April 29, 2019, the Zoning Board hearing began with the Planning Board reading into the record its analysis and recommendation to reject approval citing the nature of the proposed project being out of character with the surrounding area. (Tr. Vol. I 6-43.) Specifically, Daniel Geagan of the Planning Board stated:

"it is the opinion of the Department that, in context of the consideration of the requested special use permit with dimensional variance, the size,

scale and building massing is inconsistent with the surrounding area.

"...

"[a] building six times greater than the largest existing structure and 23 times greater than the average structure within this section of roadway unequivocally alters the general character of the surrounding area.

"...

"the Planning Department's opinion is that the proposed building form is far greater in all metrics than any other commercial structure within the context of the surrounding area, is out of scale for the surrounding area and will adversely impact and alter the general character of the corridor.

"...

"[t]he Department finds that the special use does not meet all of the criteria set forth in the subsection of this Ordinance authorizing such special use due to the Applicant's proposed size, scale and intensity of development; and therefore, the proposed excessive development intensification of the site is the cause of the Applicant's request to also seek a 50 percent parking variance, the maximum request allowable by Ordinance. The Department is of the opinion that this request for variance is not the least relief necessary as the Applicant could reduce the size of the project to meet or better meet the standards set forth within the Ordinance.

"...

"[a]s to the dimensional variance...the requested hardship, a dimensional variance for parking relief is not due to the unique characteristics of the subject land or proposed structure. The subject site

has existed for many years as a mixed-use commercial building with parking.

"...

"[t]he Department is of the opinion that the evidence clearly shows that the Applicant's desire to realize financial gain is the motivating factor.

"...

"[t]he Planning Department also finds relative to the requested dimensional variance that there is no undo hardship that will be suffered by the owner of the subject property if the dimensional variance is not granted, and that it shall not amount to more than a mere inconvenience, which shall mean that there's no other reasonable alternative to enjoy a legally permitted beneficial use of one's property.

"...

"the Department finds that the proposed project is too intense of a use for the site and the surrounding area. That [] approving this incompatible predominantly

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industrial use will definitively alter the general character of the surrounding residential and supportive residential commercial area and **will impair both the intent and purpose of the Comprehensive Plan** of the City of Warwick and the Warwick Zoning Ordinance; and therefore, the Department finds the proposed project to be unable to meet the required standards for both a dimensional variance and a special use permit both individually and combined as fully stated and described within this document; and therefore, the Department recommends that the Zoning Board

adopt this analysis with its findings and recommendations and that the Board deny the request for variance and special use." *Id.* at 20, 21, 23, 30-32, 36, 42-43.

The Applicants objected to the Planning Board's recommendation, gave an opening statement and then presented seven experts. *Id.* at 43-65. The first expert was Audie Osgood, a professional engineer with DiPrete Engineering. *Id.* at 65-90. Mr. Osgood testified about the Class I boundary survey of the property including the neighboring buildings and uses as well as the current and planned filtration on the property. *Id.* at 69-74. Mr. Osgood also testified that as the property exists now it is deficient pursuant to Rhode Island Department of Environment Management (DEM), and the proposed redesign of the property would be subject to updated regulations and rules from DEM, and therefore, the property redesign must update the drainage on the property. *Id.* at 75-76. He also testified regarding the change in impervious area and how the proposal would reduce the impervious area from 82 percent to 63 percent and how the reduced parking spaces would benefit the drainage and filtration of the water. *Id.* at 83-84. He concluded his testimony by stating that, as the site is now, the environment is at risk because if there was a spill in the area there is no treatment to keep the spilled material out of the pond. *Id.* at 85-86.

The next expert was Edward Pimentel, who specializes in land use regulations. *Id.* at 90-108. Mr. Pimentel submitted a report on the consistency of the Comprehensive Plan. *Id.* at 92. He further testified that the standard for granting a special use permit is that it will not alter the general character, not that the use has to reflect the surrounding character. *Id.* at 96. He indicated that the project will not impact the character of the general neighborhood and instead will improve

the property and area in both environmental and engineering perspectives. *Id.* at 99. Finally, he testified that in his opinion the proposal request is consistent with the zoning ordinances and is consistent with the surrounding area. *Id.* at 103, 106.

Next, Wade Palazini, a senior consultant with Jensen Hughes and expert fire safety consultant, testified regarding the project's compliance with the Rhode Island Fire Safety Code. *Id.* at 109-118. He testified that the recommendations incorporated into the project and the building, as proposed, is compliant with the Rhode Island Fire Safety Code. *Id.* at 114.

Peter M. Scotti, an expert real estate appraiser, testified in relation to property values with regard to the property and what impact the proposed use would have to property values in the surrounding area. *Id.* at 118-132. Mr. Scotti testified that his role was to survey the area and make a determination as to what effect the project would have on surrounding properties. *Id.* at 120. He testified that he found no evidence to suggest that a ministorage facility set back the way the one proposed would be will have any impact on the residential properties in the rear. *Id.* at 123. He further stated that the value of the property would be significantly better than the current value after the redevelopment. *Id.* at 124-25. He indicated that there is no evidence that having a refurbished plaza is going to lead to a negative value of residential properties in the area and that the site, as it is now, does not benefit the surrounding properties. *Id.* at 125-26.

Next, Paul Bannon, an expert traffic consultant from RAB Professional Engineers, Inc., testified regarding his conclusions and findings for the traffic layout. *Id.* at 132-146. His testimony about the traffic impact from the proposal concluded that "[t]he proposed use will generate much less traffic than could be generated with the square footage resulting in less vehicles on the driveway and less turning conflicts in a safer condition for this commercial plaza." *Id.* at 137. He also testified that this application

would not proceed to preliminary plan phase unless it is approved

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by the Rhode Island Department of Transportation (DOT). *Id.* at 139. He testified about how the amount of parking required by the City of Warwick is excessive and that the site does not need the amount of parking as it is required to have. *Id.* at 142-44.

Christopher S. Mazzier, the architect on the project, testified next about the proposed elevation and the materials to be used. *Id.* at 146-156. Mr. Mazzier presented two concepts: the first was a more traditional-type concept and the second was a more contemporary concept. *Id.* at 150. He also testified that these plans were still open to further review from the Planning Board after the preliminary plan stage. *Id.* at 153.

The last expert to testify was Richard J. Mandile, an expert environmental consultant from Sage Environmental, who testified regarding the environmental report prepared by Sage Environmental and about aspects of the project that were critical from an environmental view. *Id.* at 156-166. Mr. Mandile prepared an environmental impact study for this project and, in doing so, performed two evaluations of the property. *Id.* at 158-59. The first was a Phase 1 environmental site assessment that attempts to answer the question whether there has been a release of oil or hazardous material on the property which showed there was no evidence of a release of oil or hazardous materials to the property. *Id.* at 159. The second area was to review and comment on the proposed stormwater management systems that would be designed and proposed to DEM. *Id.* at 161. He then testified about DEM's role in the future of the project. *Id.* at 162-66.

At the conclusion of the Applicants' expert testimony, Save Sand Pond reserved, and members of the public testified as to various concerns regarding the scale, scope, and

environmental concerns of the project. *Id.* at 167-170. The public also testified about concerns

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regarding property values decreasing because of the proposed project and about the possibility of the increase in traffic the project will cause. *Id.* at 171, 179.

B

Second Zoning Board Hearing (June 18, 2019)

On June 18, 2019 the Zoning Board reconvened, and the Applicants submitted further testimony. (Hr'g Tr. Vol. II, 199-253, June 18, 2019 (Tr. Vol. II).) Richard Mandile, from Sage Environmental, testified again to discuss the report prepared by Sweet Water. *Id.* at 199-215. He testified that the redevelopment of the property will result in immediate improvement of water quality because DEM will require a pull back from the wetland encroachment and storm water treatment. *Id.* at 202-03. He also repeated that water quality in Sand Pond will benefit from the reduction in parking spaces. *Id.* at 203. He discredited any concerns about the proposal being hazardous because of the language of the tenant's agreement when renting a storage area and because of the design of the storage units. *Id.* at 203-04.

Audie Osgood, a professional engineer in the State of Rhode Island employed with DiPrete Engineering in Cranston, also testified again to go through the storm water design. *Id.* at 216-32, 240-44. He testified about the overall storm water issue on the property and how that will impact Sand Pond. *Id.* at 217-18. The remainder of Mr. Osgood's testimony was answering questions presented by Save Sand Pond's counsel regarding the boundary surveys completed and about the storm water systems. *Id.* at 229-32.

John Carter, the Applicants' landscape architect, testified to describe the plantings and the layout with respect to landscape. *Id.* at 232-40. Mr. Carter specifically addressed two

concerns that were raised in the first hearing; the first was the view from the abutters on the north side of the property, and the second was the concerns of the people on the south side of Sand Pond looking

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across. *Id.* at 234. He then testified about some changes that were made including moving plantings to the top of the retaining wall and increasing the size of those plantings and planting some evergreen trees to supplement the view from across Sand Pond. *Id.* at 234-35, 237.

Edward Pimental testified again as well. *Id.* at 288-311. He testified that the proposal requires a special use permit, and that the proposal was not seeking any variances other than the parking. *Id.* at 290-91. He also testified regarding the positive impact that the redevelopment will have on the property and about why the variance should be granted. *Id.* at 291-96.

Save Sand Pond then provided an opening statement and presented expert testimony highlighting the issues with the proposal. *Id.* at 245-340. Peter Friedrichs, an experienced city planner for the City of Newport, testified that "this large scale industrial use due to its size and due to the unique nature of the open space zoning that it abuts will alter the general character of the surrounding area, specifically Sand Pond." *Id.* at 260. Further, he indicated that aspects of the Comprehensive Plan were not met by the project. *Id.* at 261.

Alisa Richardson, an expert on the project's environmental impacts, testified that a project of this nature would introduce risks to the unique ecosystem of Sand Pond. *Id.* at 317-340. Specifically, she testified that the concern is regarding phosphorus getting into Sand Pond which can come into the pond through storm water run-off or dumping of leaves or grass clippings. *Id.* at 325-26. She further testified that if the project went forward as proposed, new threats would be introduced to Sand Pond such as spills, garbage, leaking, and dumpsters. *Id.* at 327.

Finally, she provided testimony about storm water treatment systems in relation to the proposal and whether that would prevent chemicals from entering the pond. *Id.* at 335-36.

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C

Third Zoning Board Hearing (July 24, 2019) & Zoning Board Decision

On July 24, 2019, the Zoning Board heard testimony from more experts from both sides. (Hr'g Tr. Vol. III 390-482, July 24, 2019 (Tr. Vol. III).) Alisa Richardson continued her testimony from the second hearing. *Id.* at 390-449. She testified more about the history of pollution of Sand Pond and whether it is now currently still impacted by pollution. *Id.* at 390-94. She was then questioned extensively about her possible conflict as an employee of the DOT as well as offering her opinion on this project and the report she wrote regarding the proposal. *Id.* at 394-449.

The Applicants then called Attorney Sanford Resnick to testify regarding the title report and covenant and restrictions. *Id.* at 449-463. He explained that he was asked to answer whether there were any restrictive covenants on the property and that to answer that question he examined the titles to the property starting around 1960. *Id.* at 452. He also concluded that there were no restrictions or covenants that affect the development as proposed. *Id.* at 455. Next, David Russo from DiPrete Engineering testified about the Class I survey and how the survey for this proposal meets all the State's standards that are required. *Id.* at 466-67. Finally, Wade Palazini testified that the project has involved the installation of a sprinkler system and the likelihood of an uncontrolled fire in the proposed building is not likely. *Id.* at 472-82. Further, he testified that the Warwick Fire Department was a professional organization that had the ability to deal with a fire in a building of this kind, even with its long hallways and lack of windows. *Id.* at 475.

The Applicants then closed by requesting a positive affirmative vote on their application. *Id.* at 485-89. Save Sand Pond then requested that the Zoning Board deny the application in its closing. *Id.* at 489-96. Public comment was again allowed before the Zoning Board voted. *Id.* at 496-511. To summarize the public's comments, there were concerns raised again about the

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environmental impacts of the redevelopment of the property, about the impact on the abutter's enjoyment of their property if the redevelopment is allowed to move forward, and other general concerns about the impact of the redevelopment on the neighborhood. *Id.* at 496-511. Following the conclusion of the public comments, Mr. George Schuster, a member of the Zoning Board, made a statement regarding the application. *Id.* at 512-24. He rejected the assertion that the issuance of a special use permit was a matter of right. *Id.* at 513. He also rejected the proposition that a special use permit could be granted without a determination that there was consistency with the Comprehensive Plan, and instead restated that the use must not alter the general character of the surrounding area. *Id.* at 513-14. Importantly, he stated that he was "not convinced [that] this proposal will not alter the general character of the surrounding area, because it will, in at least certain respects, intensify the existing commercial use of a property that is in a precarious balance with the residences and a kettle pond." *Id.* at 520. Mr. Schuster stated that he was not fully persuaded by the testimony presented by the Applicants, but he felt that the application should be granted along with seven conditions. *Id.* at 521. He then listed out his proposed seven conditions. *Id.* at 521-24. The Zoning Board then voted to grant the petition. *Id.* at 525.

The Zoning Board's written decision was issued on August 14, 2019 and memorialized the vote made at the Zoning Board hearing. *See* Zoning Board Decision. The Zoning Board agreed with the Applicants' experts that the project would not alter the general characteristics of the

surrounding area and was consistent with the City of Warwick Comprehensive Plan. *Id.* at 3. Therefore, the Zoning Board voted unanimously to grant the application for a special use permit and dimensional variance. *Id.*

The Zoning Board's decision also included several conditions to the granting of the application. *Id.* at 5-6. The conditions were as follows:

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- "1. That the petitioner's landscape plan be amended, such that:
"a) The area from 6 feet away from the building edge and continuing to the existing vegetation along the pond edge be planted with indigenous, non-invasive plants, and not turf grass.
"b) That such area include large evergreen bushes and trees along the entire pond-facing façade of the building, with the goal of screening as much of that façade as practicable, with such plantings to be selected in coordination with and approved by the City's Registered Landscape Architect prior to the issuance of any building permit.
- "2. That the petitioner shall not use or apply, or permit others to use or apply fertilizers, pesticides, or other landscape-related chemicals of any type on the property.
- "3. That the petitioner shall be responsible for the cleanup of all existing litter and other debris along the edge of the pond prior to the issuance of any building permit, and that the petitioner also clean up, on a regular basis, all debris that may in the future be deposited or end up on the pond edge or any other portion of the property.
- "4. That the petitioner make a contribution to the URI Watershed Watch, in an amount sufficient, to

fund water-quality testing in Sand Pond for ten years commencing when demolition on the project begins, with such amount to be approved by the City's Registered Landscape Architect and funded by the petitioner prior to the issuance of any building permit.

"5. That the petitioner further reduce the parking plan for the project by 20 spaces on the northeast perimeter of the project, and that the petitioner submit a landscape plan for the area of those parking spaces, which plan will include additional trees and shrubs, with such plan to be approved by the City's Registered Landscape Architect prior to the issuance of any building permit.

"6. That the petitioner include additional stormwater controls utilizing low-impact design (LID) standards, in addition to and not in replacement of any other applicable requirements of the Rhode Island Department of Environmental Management, and in a manner that would mitigate to the best extent practicable any contaminant spill from entering Sand Pond, with such systems to be approved by the City's Registered Landscape Architect prior to the issuance of any building permit.

"7. That the building contain an automatic sprinkler system designed and installed to comply with National Fire Protection Association (NFPA) Standard 13, to be confirmed by the City Building Department prior to the issuance of any building permit." *Id.* at 5-6.

Save Sand Pond filed a timely appeal to the Kent County Superior Court on September 5, 2019 requesting this Court to reverse the Zoning Board's decision granting the application for a special use permit and dimensional variance as to

the proposed plan for constructing a three-story storage structure on the property.

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II Standard of Review

The standard by which a Superior Court is to review a decision of a zoning board is clearly set out within the Rhode Island General Laws. The Superior Court has jurisdiction to hear appeals from zoning boards of review pursuant to § 45-24-69. When reviewing a local zoning board's decision, § 45-24-69(d) mandates the following:

"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).

Our Supreme Court requires this Court to "review[] the decisions of a ... board of review under the 'traditional judicial review' standard applicable to administrative agency actions." *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I. 1998)

(quoting *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977)). Judicial review of an administrative agency is essentially an appellate proceeding. *Notre Dame Cemetery v. R.I. State Labor Relations Board*, 118 R.I. 336, 338, 373 A.2d 1194, 1196 (1977). Accordingly, the trial justice "lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute his or her findings of fact for those made at the administrative level." *Lett v. Caromile*, 510 A.2d 958, 960 (R.I. 1986) (citing *E. Grossman & Sons*, 118 R.I. at 285-86, 373 A.2d at 501). However, the applicant always

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bears the burden to demonstrate why the requested relief should be granted. See *DiIorio v. Zoning Board of Review of City of East Providence*, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969) (requiring "an applicant seeking relief before a zoning board of review to prove the existence of the conditions precedent to a grant of relief").

In reviewing a zoning decision, the Court "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." *Salve Regina College v. Zoning Board of Review of City of Newport*, 594 A.2d 878, 880 (R.I. 1991) (quoting *DeStefano v. Zoning Board of Review of City of Warwick*, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). "Substantial evidence . . . means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." *Lischio v. Zoning 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)). If the Court "can conscientiously find that the board's decision was supported by substantial evidence in the whole record," it must uphold that decision. *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)).

III Analysis

On appeal, Save Sand Pond raises the following issues: (1) the Zoning Board overstepped their statutory authority by authorizing a variance on the parking needed, exceeding the allowance in the Warwick Zoning Ordinance; (2) the Zoning Board failed to address a special use permit for a nonresidential multiple use on one lot; (3) the Zoning Board failed to include factual findings

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under which the Zoning Board came to their decision; and (4) the Zoning Board decision was made contrary to uncontradicted expert testimony and against the weight of the record.

The Applicants counter that the Zoning Board's decision should be affirmed because the Zoning Board's decision granting a special use permit and dimensional variance comported with the Warwick Zoning Ordinance and Rhode Island General Laws. The Applicants contend the decision is not affected by error of law and is supported by substantial evidence in the record; further, the decision does not violate constitutional or statutory law, nor is the finding made upon unlawful procedure. Finally, the Applicants suggest that the decision is clearly supported by reliable and probative evidence and not characterized by an abuse of discretion.

Overall, Save Sand Pond contends that the decision must be reversed and remanded with a direction that the proposal should be denied, and the Applicants request that this Court affirm the decision. For the reasons stated below, this Court accepts this appeal and remands it back to the Zoning Board for further review.

A Zoning Board Acted in Excess of the Authority Granted by Statute or Ordinance

*i. Dimensional Relief Reducing Parking Spaces
Below the 50 Percent Cap*

Applicants requested a dimensional variance in their application to the Zoning Board, seeking a reduction in the number of parking spaces from 267 to 136. Appellants' Br. at 8. The Zoning Board in its decision reduced the parking spaces by an additional twenty spaces as a condition to granting the application and required Applicants to submit a landscape plan for the area of those twenty parking spaces. Zoning Board Decision at 5. This further reduced the number of spaces to 116, which is less than 50 percent of the required 267 spaces per Warwick Zoning Ordinance Section 701.7.

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Save Sand Pond suggests that this reduction in the Zoning Board decision is in excess of the authority of the Zoning Board and also a direct violation of the Warwick Zoning Ordinance. Appellants' Br. at 8. The Applicants argue that Save Sand Pond's review of the Warwick Zoning Ordinance is misplaced because the standard is that the "**requested relief** shall not exceed a 50 percent deviation..." and the Applicants did not request relief beyond 50 percent. Appellees' Br. at 27.

The Applicants suggest that the application sought relief in conformance with the Warwick Zoning Ordinance and any action to the contrary of the Zoning Board is not grounds for reversing the Zoning Board's decision. *Id.* This contention is inconsistent with the record because on the record Applicants mentioned to the Zoning Board multiple times that although they were requesting a dimensional variance to reduce the spaces to 136 from 267, they claimed the property did not need 136 spaces, and welcomed the further reduction of the number of parking spaces. Applicants stated, "[t]his is parking we don't need. This is parking we don't want. We would reduce it another 50 spaces and put more green space in there. This is what the Warwick code is requiring us to do. If we could ask for less parking, we would." Tr. Vol. I 46:23-47:4.

The number of required parking spaces is determined based on the square-footage of the

establishment(s) on the property. *See* Warwick Zoning Ordinance § 701.7. Pursuant to § 45-24-42(c):

"[t]he ordinance additionally may provide that an applicant may apply for, and be issued, a dimensional variance in conjunction with a special-use permit. If the special use could not exist without the dimensional variance, the zoning board of review, or, where unified development review is enabled pursuant to § 45-24-46.4(b), the planning board or commission shall consider the special-use permit and the dimensional variance together to determine if granting the special use is appropriate based on both the special use criteria and the dimensional variance evidentiary standards." Section 45-24-42(c).

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According to the statute, a dimensional variance may be granted along with a special use permit, if granting the special use permit is appropriate based on the special use criteria and the dimensional variance standard. *Id.* Therefore, to determine if granting the special use permit here was appropriate, this Court must look at the Warwick Zoning Ordinance that grants the Zoning Board this authority.

Pursuant to Warwick Zoning Ordinance Section 906.3(C):

"In granting a special use permit, the board shall require that evidence to [of] the satisfaction of the following standards be entered into the record of the proceedings: "(1) That the special use is specifically authorized by this ordinance, and setting forth the exact subsection of this ordinance containing the jurisdictional authorization; "(2) That the special use meets all

the criteria set forth in the subsection of this ordinance authorizing such special use, except that the board may issue a special use in conjunction with a dimensional variance provided that the dimensional variance may be issued only for the following dimensional requirements, **no other dimensional relief can be sought except for that specifically listed herein, and the requested relief shall not exceed a 50 percent deviation from each required dimensional standard**, provided however, that the 50 percent limitation shall not apply to nonresidentially zoned properties which:

- "i. Do not abut or share a common boundary with open space and residentially zoned property; or
- "ii. Directly abut the Amtrak Northeast Rail Corridor (NEC), irrespective of the zoning classification of the rail corridor;
- "(a) Section 300, Table 2A and Table 2B Dimensional Regulations, minimum front yard, minimum side yard, minimum rear yard, minimum landscape open space.
- "(b) Sections 505 and 505.1, landscaping and screening.
- "(c) Section 505.6, parking lot buffers.
- "(d) Section 701.7, off-street parking.
- "(e) Section 702.2, number of required loading spaces.
- "(f) Section 806, permitted signs by district.
- "(3) That the granting of the special use permit will not alter the general character of the surrounding area or impair the intent or purpose of this ordinance or the comprehensive plan of the city." Warwick Zoning

Ordinance, § 906.3(C) (emphasis added).

Based on the emphasized portion of the above-cited section of the Warwick Zoning Ordinance, the Zoning Board exceeded its authority by reducing the parking spaces by more than 50 percent of the required number of parking spaces. This deviation from the requirement exceeds

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the Zoning Board's authority regardless of the Applicants' claim that they did not request the reduction. The Zoning Board still must follow the Warwick Zoning Ordinance when granting an application before the Zoning Board.

Applicants further contend that the Zoning Board's action here is allowed pursuant to § 45-24-43, which states:

"[i]n granting a variance or in making any determination upon which it is required to pass after a public hearing under a zoning ordinance, the zoning board of review or other zoning enforcement agency may apply the special conditions that may, in the opinion of the board or agency, be required to promote the intent and purposes of the comprehensive plan and the zoning ordinance of the city or town." Section 45-24-43.

However, the Applicants mistakenly argue that this statute allows the Zoning Board to act outside the authority granted by the Warwick Zoning Ordinance. Although this statute allows the Zoning Board to place conditions on their decisions in granting an application, the Zoning Board is still bound by the Warwick Zoning Ordinance. Here, the conditions the Zoning Board imposed exceeded their authority under the Warwick Zoning Ordinance.

Therefore, this Court is convinced that the Zoning Board acted in excess of its authority granted by the Warwick Zoning Ordinance, specifically Section 906.3(C)(2), by implementing the condition that the parking spaces be reduced by more than 50 percent.

ii. Special Use Permit for Mixed Use

As previously discussed, the parcel at issue is zoned General Business. General Business districts are defined as "[p]roperties mapped in accordance with [Warwick Zoning Ordinance] subsection 303 . . . and generally used for a wide diversity of commercial establishments including retail, service, office, and automotive related uses." Warwick Zoning Ordinance § 301.8. The proposed redevelopment sought by the Applicants is classified as Use Code 807 for ministorage and miniwarehouse facility. Warwick Zoning Ordinance Table 1. Table 1 of the Warwick Zoning

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Ordinance indicates that uses are either (1) permitted by right within the district, (2) prohibited within the district, (3) allowed by special use permit only if approved by the zoning board of review in accordance with subsection 906 of this ordinance, or (4) deemed to be an amendment of the zoning ordinance and is allowed only if approved by the city council following the same procedure in subsection 1007. *Id.* The third category means that once the special use permit is approved by the zoning board of review, the use is then allowed and permitted in the district. *Id.* Use Code 807 falls under this third designation. *Id.* Therefore, Use Code 807 is a permitted use in a General Business district once the special use permit has been granted by the zoning board of review. *Id.*

Section 304.5 of the Warwick Zoning Ordinance states: "[m]ore than one nonresidential structure may be allowed on a single lot within appropriately zoned nonresidential districts if devoted to the same actual use. Upon application to the zoning board of review, a special use permit may be granted in

accordance with subsection 906 of this ordinance, where more than one actual use on a lot may be requested, *provided however that such uses shall be only those that are permitted within the district in question.*" Warwick Zoning Ordinance § 304.5 (emphasis added).

The Rhode Island Supreme Court has held that the purpose of the special use permit is to establish within the ordinance conditionally permitted uses. *Nani v. Zoning Board of Review of Town of Smithfield*, 104 R.I. 150, 155, 242 A.2d 403, 406 (1968). Additionally, "such a use is one which the local legislature has conditionally permitted and has thereby, at least implicitly, found to be harmonious with those uses which are permitted in the district." *Id.* "[W]hen the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1226 (R.I. 1996). "But when the statute is ambiguous, we must apply the rules of statutory construction and examine the statute in its entirety to determine the intent

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and purpose of the Legislature." *Gem Plumbing & Heating Co, Inc. v. Rossi*, 867 A.2d 796, 811 (R.I. 2005).

The Applicants suggest that in order to maintain the other commercial tenants in the plaza, a special use permit is necessary. Appellees' Br. at 18. Specifically, Applicants suggest that the reason a special use permit was sought was to remain in compliance with Section 304.5 of the Warwick Zoning Ordinance. *Id.* Save Sand Pond, on the other hand, alleges that the application must be rejected because the proposal fails to satisfy Warwick Zoning Ordinance Section 304.5, as the proposed addition of a self-storage building is a non-permitted use in a General Business zone, and, therefore, the grant of the special use permit for the self-storage building exceeds the Zoning Board's power (because it directly contradicts the Warwick Zoning Ordinance).

Appellants' Br. at 10. Save Sand Pond states that the clear language of Warwick Zoning Ordinance Section 304.5 does not allow for multiple nonresidential uses on a lot when one of those uses is available only by special use permit. *Id.* at 11.

Here, the Zoning Board's decision sets forth substantial analyses as to why the application was granted pursuant to Section 906 of the Warwick Zoning Ordinance. Zoning Board Decision at 3-4. The decision acknowledges that "[t]he special use permit is authorized by Table 1 Use Regulations #807 of the Warwick Zoning Ordinance, upon approval of the Zoning Board of Review." *Id.* at 3. The Zoning Board is authorized to grant a special use permit, as requested here. Furthermore, Use Code 807 is an allowed and permitted use in a General Business district once a special use permit has been approved. Warwick Zoning Ordinance, Table 1. The front portion of the parcel contains an existing building with mixed commercial use including a pizza restaurant, hair salon, nail salon, daycare, and laundromat. Zoning Board Decision at 1. A special use permit is required to add a self-storage unit on the property because the use is not permitted by right, but

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is allowed by special use permit. For these reasons, the granting of the special use permit does not violate the provisions of the Warwick Zoning Ordinance, because self-storage is a second nonresidential use, the use is permitted within the district following the granting of a special use permit and therefore the granting of the special use permit does not violate Section 304.5. Warwick Zoning Ordinance § 304.5.

Therefore, pursuant to a plain reading of Warwick Zoning Ordinance Section 304.5, this Court finds that the Zoning Board acted within the authority granted to it by the Warwick Zoning Ordinance in granting the special use permit.

B

The Board's Decision Lacked Adequate Findings

Pursuant to § 45-24-61(a), a Zoning Board must issue a written decision that affirms or denies a request for zoning relief. That decision must include "all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote." Section 45-24-61(a). "When the board fails to state findings of fact, the court will not search the record for supporting evidence or decide for itself what is proper [under] the circumstances." *Bernuth v. Zoning Board of Review of Town of New Shoreham*, 770 A.2d 396, 401 (R.I. 2001) (quotation omitted).

In the decision, the Zoning Board listed several findings of fact and recited the standard for granting a special use permit and a dimensional variance according to the Warwick Zoning Ordinance. *See* Warwick Zoning Ordinance § 906.3(A)-(C). Significantly, the Zoning Board found that:

"5. The proposal is to redevelop the existing property by demolishing the rear portion of the existing structure and constructing a three-story addition to be used as a self-storage facility as further detailed in the plans approved by the Board.

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"6. The proposed use as a storage facility is allowed by way of a special use permit, authorized by Table 1 Use Regulations #807.

"...

"8. The requested dimensional variance is being sought for having less than required parking spaces. They are proposing 136 parking spaces (267 spaces required).

"9. The petitioner presented expert witnesses, duly accepted by the Board, who submitted reports in the field of engineering, fire, traffic,

zoning/planning, environmental, real estate, financial and landscaping. The conclusions of the findings for the project were that the proposal would result in an overall improvement of the existing conditions.

"...

"15. The water quality in Sand Pond will significantly benefit from the reduction in parking spaces, which will be replaced with permeable surfaces, such as landscaping, which will further buffer stormwater that may percolate through soil and ground water." Zoning Board Decision at 2-3.

Applying the standard for evaluating an application for a special use permit, the Zoning Board stated that: (1) the special use permit is authorized by Table 1 Use Regulations #807 of the Warwick Zoning Ordinance, (2) the special use meets all the criteria in said section, and (3) the proposed use will not alter the general characteristics of the surrounding area in a negative way nor impair the intent or purpose of said ordinance or the City's Comprehensive Plan. *Id.* at 3-4.

Further, applying the standard for evaluating an application for a dimensional variance, the Zoning Board stated that: (1) the hardship from which the petitioner seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area and not due to a physical or economic disability of the applicant, the proposed development would not have any detrimental effect on the surrounding property values, and the proposed redevelopment and renovations to the existing front portion of the structure will significantly enhance the appearance of the subject property; (2) the hardship is not the result of any prior action, and does not result primarily from the desire of the applicant to realize greater financial gain, but instead the petitioner is trying to realize all beneficial use of the subject property; (3) the granting of the requested dimensional

variance will not alter the general characteristics of

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the surrounding area or impair the intent or purpose of the Zoning Ordinance or the Comprehensive Plan of the City because by reducing the parking spaces and replacing the space with permeable surfaces, as well as installing a stormwater system, will help lessen the impact and help to improve the water quality of Sand Pond; (4) "[t]he relief requested for the required parking spaces is the least relief necessary" and "[t]he proposed storage units will meet all other dimensional requirements of the Zoning Ordinance"; and (5) "[l]iteral enforcement of the dimensional regulations in this case would constitute more than a mere inconvenience for the applicant" because "[a]ll dimensional requirements will be met with the exception of required parking spaces." Decision at 4.

Based on the Zoning Board's analysis, they voted unanimously to grant the application for a special use permit and a dimensional variance. *Id.* The Zoning Board granted the petition along with several stipulations and conditions. *Id.* at 5-6.

A zoning board is "required to make findings of fact and conclusions of law in support of its decisions in order that such decisions may be susceptible of judicial review." *Thorpe v. Zoning Board of Review of Town of North Kingstown*, 492 A.2d 1236, 1237 (R.I. 1985). The Rhode Island Supreme Court has stated, "the minimal requirements for a decision of a zoning board of review would be the making of findings of fact and the application of legal principles in such a manner that a judicial body might review a decision with a reasonable understanding of the manner in which evidentiary conflicts have been resolved and the provisions of the zoning ordinance applied." *Id.* "[A]n applicant seeking a dimensional variance has the burden before the zoning board of showing that a factual basis appears in the record to support the proposition that there is 'no other reasonable alternative' that would allow the applicant to enjoy a legally

permitted beneficial use of the property." *Bernuth*, 770 A.2d at 401. In *Bernuth*, the Court found that

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"[a]lthough the zoning board...made findings of fact regarding other statutory requirements for a dimensional variance...[t]here was no discussion in the written decision of what the board considered to be the hardship suffered by the applicants, nor was there any discussion of reasonable alternatives or a lack thereof necessitating relief." *Id.* at 402. Additionally, the Court held that "even if the applicants did present sufficient evidence to support a finding that no other reasonable alternative existed whereby a legally permitted beneficial use of the property was possible, the zoning board's decision was conclusional and failed to apply the proper legal principles, thereby making judicial review of the board's work impossible." *Id.* (citing *Irish Partnership v. Rommel*, 518 A.2d 356, 358 (R.I. 1986)).

Here, the Zoning Board's decision did make findings of fact, as detailed above, and the Zoning Board made conclusions of law by applying the standards for granting a special use permit and dimensional variance from the Warwick Zoning Ordinance. However, those findings of fact failed to address what hardship exists in relation to the proposal and also failed to address whether or not the Applicants had a reasonable alternative. Specifically, there was no discussion or consideration of a reduction of the square footage as an alternative option for the Applicants rather than granting the dimensional relief. Appellants' Br. at 12.

Based on its review of the Zoning Board's decision, this Court is not satisfied that the Zoning Board made adequate findings of fact related to the requested dimensional variance and special use permit. For this reason, this Court cannot affirm the Zoning Board's decision.

C

The Zoning Board's Decision Was Not Supported by Substantial Evidence

Save Sand Pond alleges that the Zoning Board decision contradicted the evidence because there was "important, relevant and uncontradicted evidence" regarding the environmental impacts

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of the project. Appellants' Br. at 16. Further, Save Sand Pond alleges that the decision was "directly contradictory" because one member of the Zoning Board stated he was "not convinced that this proposal will not alter the general character of the surrounding area[,]" and the Zoning Board still granted the application. *Id.*

In its review of a zoning board decision, the Court "must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings." *Salve Regina College*, 594 A.2d at 880 (quotation omitted). When a decision is "[c]learly erroneous in view of the reliable, probative, and substantial evidence [contained in] the whole record[,]" the decision of the Zoning Board will be vacated. *Bernuth*, 770 A.2d at 399. "Substantial evidence [is] such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance." *Lischio*, 818 A.2d at 690 n.5 (quoting *Caswell*, 424 A.2d at 647).

First, the Court will address Save Sand Pond's two specific concerns, and then the Court will address the remaining findings of the Zoning Board and whether those findings are supported by substantial evidence.

As to Save Sand Pond's concerns regarding the environmental impacts of the proposal on Sand Pond, the Zoning Board specifically included various conditions in its decision to address these concerns, such as the condition that fertilizers, pesticides, or other landscape-related chemicals not be used on the property and that the Applicants are responsible for the cleanup of

litter and debris along the edge of the pond. Zoning Board Decision at 5. These conditions, in combination with the record and the Zoning Board decision, demonstrate to this Court that the Zoning Board showed ample regard for the environmental concerns raised by Save Sand Pond.

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Additionally, it is the Court's position that Save Sand Pond's suggestion that a member of the Zoning Board was not convinced about the proposal altering the general character of the surrounding area is misplaced. The member stated that he was "not convinced this proposal will not alter the general character of the surrounding area..." Tr. Vol. III 520:2-4. The statement was taken out of context by Save Sand Pond. The member stated that although he was not convinced that the proposal would not alter the general character of the surrounding area because it would intensify the existing commercial use of a property that exists in a "precarious balance with the residences and a kettle pond," he felt that the Warwick Zoning Ordinance allows the Zoning Board to grant the application while imposing reasonable conditions that would "promote the intent and purpose of Warwick's Comprehensive Plan and Zoning Ordinance." *Id.* at 520:7-8, 17-18 The Zoning Board member clearly was articulating his concern with granting the application without any conditions, but those concerns were resolved by the Zoning Board imposing several conditions in granting the application.

Reviewing the full record in this case, the Court is not satisfied that there is substantial evidence to support all of the Zoning Board's findings. The Zoning Board's decision states that "[t]he proposed use will not alter the general characteristics of the surrounding area in a negative way nor impair the intent or purpose of said ordinance or the City's Comprehensive Plan." Zoning Board Decision at 4. However, at the hearings before the Zoning Board, there was conflicting testimony presented surrounding this very issue. Edward Pimentel testified that the

proposal will not alter the surrounding area and will actually help to improve the area. Tr. Vol. I at 96-99. In the alternative, Peter Friedrichs testified that the proposal will alter the surrounding area and that, in his opinion, the proposal failed to satisfy elements of the Comprehensive Plan. Tr. Vol. III at 260-61. Therefore, the Court finds that there are inconsistencies in the record as to the Zoning

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Board's finding that the proposed use would not alter the general characteristics of the surrounding area in a negative way.

Further, the Court is not satisfied that the record contains substantial evidence that establishes the hardship from which Applicants seek relief (regarding the dimensional variance) and additionally whether the relief requested is the least relief necessary. The Zoning Board decision states that the relief requested is the least relief necessary and that the hardship is due to the unique characteristics of the land and not due to the general characteristics of the surrounding area or a physical or economic disability of the applicant. Zoning Board Decision at 4. However, the record lacks any evidence regarding the specific hardship the Applicants are alleging they need relief from, and the record lacks any discussion as to whether the relief requested is the least relief necessary.

Therefore, for these reasons, this Court finds that the Zoning Board's decision is not supported by substantial evidence.

IV Conclusion

With this, the Court is faced with whether to remand the matter. To do so, the Court will take the various issues in turn:

Although the Zoning Board's decision resulted in an insufficient number of parking spaces to comply with the ordinances, that decision was not in the Applicants' proposal, but

was a modification created by the Zoning Board itself. It is appropriate to remand the matter on this issue, so the Zoning Board, with the parties' assistance, may revise its decision appropriately.

As to whether the application will result in more than one nonresidential use in a General Business zone, the Court is satisfied that the Warwick Zoning Ordinance allows more than one

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nonresidential use when the use is permitted in the district. Furthermore, the Court is satisfied that the requested use is permitted in the General Business district by special use permit and therefore the second nonresidential use is not prohibited, and the Zoning Board acted within the Warwick Zoning Ordinance.

In regard to whether the Zoning Board has made sufficient fact finding to justify dimensional relief, detailing the impact on the neighborhood and the like, the Court is satisfied that a remand would be appropriate. A review of the transcript reveals the entire Zoning Board's focus on the many witnesses who appeared during the three nights of hearings. Each of the parties presented numerous witnesses who testified on the key issues. The discussion among the members establishes their attentiveness.¹ Here, however, the findings need to be detailed and explicit. The Court is satisfied that the Zoning Board could make such findings on remand, perhaps without the need of an additional hearing.

Therefore, this Court holds that the Zoning Board acted within its authority in granting the special use permit but exceeded its authority in making its ruling on parking, the Zoning Board's decision failed to provide sufficient findings of fact as required, and the decision of the Zoning Board was not supported by substantial evidence on the record. Save Sand Pond's appeal is hereby granted. The decision of the Zoning Board is remanded back to the Zoning Board.

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Footnotes:

¹ The Court notes that Mr. Shuster's conclusions illustrate the Zoning Board's focus on the presentation of the evidence in the case, and the Zoning Board's desire to fulfill its role. It was refreshing to see a Zoning Board attempt to create a thoughtful and detailed proposal, founded on the evidence but independent of that outlined by the parties, in an attempt to preserve the goals of the neighborhood, the developers, and protect the integrity of the surrounding environment.
