

CITY OF PROVIDENCE
ZONING BOARD OF REVIEW SITTING AS THE BOARD OF APPEALS

2Ringold Real Estate, LLC	:	
	:	
APPELLANT	:	
	:	
VS.	:	RE: 153 Carpenter St.
	:	
CITY OF PROVIDENCE PLANNING	:	
COMMISSION, Katherine McClure, and	:	
Seth Clark	:	
	:	
	:	
APPELLEES	:	

APPELLANT’S MEMORANDUM OF LAW IN SUPPORT TO APPEAL

This is an appeal of the December 16, 2020 decision of the City Plan Commission (“Commission”) to grant relief from the Zoning Ordinance under the Uniform Development Review and approval of the Preliminary Plan for minor subdivision of the lot located at 153 Carpenter Street (AP 28 Lot 957).

The Commission Lacked Subject Matter Jurisdiction

At the outset, the Commission lacked subject matter jurisdiction to hear the application. Applications filed under Unified Development Review seeking a variance must provide notice to “to each owner within the notice area,¹ by certified mail, return receipt requested, of the time and place of the hearing not less than ten (10) days prior to the date of the hearing.”² “[A]dequate and sufficient notice is a requirement of due process in zoning matters and action taken by a board that has not

¹ The “notice area” is defined as “all owners of real property whose property is located within two hundred (200) feet of the perimeter of the subject property.” Development Review Regulations Section 805.

² R.I. GEN. LAWS §§ 45-23-42, 45-23-50.1.

satisfied the notice requirements is a nullity.”³ “It is well-settled that a zoning board’s ‘strict compliance’ with statutory notice provisions is a prerequisite to the board’s exercise of jurisdiction.”⁴

Here, however, the Applicant failed to provide notice to several property owners⁵ in the notice area. Accordingly, the application for relief from the Zoning Ordinance must be reversed as the Commission’s lack of subject matter jurisdiction represents prejudicial procedural error.⁶ Having failed to provide statutorily adequate notice, the Commission was without subject matter jurisdiction to hear the matter.

Furthermore, the legislation enabling UDR requires the zoning ordinance “specify which types of zoning approval the [Commission] shall be empowered to grant for which types of projects.”⁷ The Zoning Ordinance does not provide the Commission with the authority to approve special use permits for principal use parking lots for the subdivision of lots in R3 zones.

Without a specific grant of authority in the Zoning Ordinance, the Commission lacked subject matter jurisdiction to hear the Applicant’s requests for dimensional relief. Accordingly, the Decision must be reversed and the Application must be denied.

The Commission’s Decision Lacked Adequate Reasoning to Support its Decision

The requirement of “municipal boards to provide reasons [has] to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration, helping parties plan their cases for rehearings and judicial review, and keeping agencies within their jurisdiction.”⁸ “When reviewing a decision of a quasi-judicial municipal board, “the issue

³ Ryan v. Zoning Bd. of Review, 656 A.2d 612, 615-16 (R.I. 1995).

⁴ Nelson v. Zoning Bd. Of Review, 2008 R.I. Super. Lexis 58 (Ca No NC-2007-0364) April 28, 2008, *quoting Ryan*, 656 A.2d at 615.

⁵ For example, see Warranty Deed conveying the interest in 157, 160, and 164 Carpenter Street to Fabiana Ang of East Brunswick New Jersey recorded September 11, 2020 in Book 12833 at Page 244 in the Land Evidence Records of the City of Providence.

⁶ See Nelson, 2008 R.I. Super. Lexis 58 (Ca No NC-2007-0364) April 28, 2008.

⁷ 45-24-46.4

⁸ Irish Partnership v. Rommel, 518 A.2d 356, 358 (R.I. 1986) (internal citations omitted).

is not one of form, but the content of the decision; and what [the Court] must decide is whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principals. Those findings must, of course, be factual rather than conclusion, and the application of the legal principals must be something more than the recital of litany. **These are minimal requirements.** Unless they are satisfied, a judicial review of a board's work is impossible.”⁹

First, the Applicant failed to show, and the Decision failed to articulate, how the prior use of the property as a parking lot, and the subsequent abandonment of that use by constructing a single family dwelling, presented a cognizable hardship. Not only was the, now, nonconforming use abandoned but the record fails to demonstrate how a hardship was created.

Second, the hardship presented by the existence of a single-family dwelling existing on the same lot as a parking lot, if a hardship at all, is nothing more than an inconvenience created by the Applicant's predecessor in interest. Consequently, the hardship only arises in the context that the Applicant is dividing the lots with the demonstrated intent to deed the interest in the parking area to a separate parcel in order to convey the newly created parcel, by deed, for consideration.

The Decision of the Commission represents clear error as it fails to make the required findings of facts to substantiate the action taken. Additionally, the Commission failed to consider or reconcile evidence presented on the record by the Applicant that establishes the Applicant's intention to realize greater financial gain, lack hardship, and prior action. Accordingly, the Commission's Decision should be reversed.

⁹ Id.

**The Commissions Decision is the Product of Clear Error as the Development was not
Entitled to Subdivision**

In order for the Commission to approve the preliminary plan for a subdivision it must also make required findings of facts to support the action taken.

The Commission must find that the proposed development is consistent with the comprehensive community plan and/or has satisfactorily addressed the issues where there may be inconsistencies. Indeed, Providence Tomorrow: The Comprehensive Plan not only identifies parking lots as excellent areas of development but “[e]ncourage[s] the . . . elimination of surface parking lots and discourage[s] parking lots as they are a detriment to the city’s economic future and its built environment.”¹⁰

With the discouragement of surface parking lots, and objectives to increasing housing stock, in mind, the Commission failed to consider how the lots could be subdivided in another manner to meet the Comprehensive Plan’s objectives—namely providing a larger housing stock and supply rather than additional surface parking lots. Accordingly, the Commission failed to make sufficient findings of fact to find that the proposed development is consistent with the comprehensive plan and must be reversed.

The Commission must also find that the proposed development is in compliance with the standards and provisions of the Zoning Ordinance. It is the requirement that the Commission find that the proposed **development** complies with the Zoning Ordinance.

Indeed, the Decision provides dimensional relief—which we argue was improperly granted—however, the subdivision, as proposed, creates a nonconforming lot as the existing structure will encroach on the side-yard setback by three feet. No dimensional relief was requested to cure this nonconformity and the Decision must be reversed.

¹⁰ Objective M6 (G).

The Commission must also find that “the subdivision, as proposed, will not result in the creation of individual lots with any physical constraints to development that building on those lots according to pertinent regulations and building standards would be impracticable.” The Application proposes the creation of a lot 31’ x 43’ measuring 1,333 sf—3,6667 sf and almost three times short of the minimum lot size of a subdivided lot in an R3 zone.

Clearly, the Zoning Ordinance contemplates the use of lots in an R3 zone to consist of dense residential development and the creation of this lot is nothing more than a newly created lot with no development protentional whatsoever—let alone the development for residential uses. Accordingly, the Application proposes the creation of a lot that is impractical for the development of any “building.” Indeed, proposals providing open space or reserved for public use are exempt from this requirement, however, the Application and Decision restrict the use of the newly created parking area for an individual property owner.

The Decision failed to make a finding of fact that the proposed individual lots would not have constraints making **building** impractical. The Board’s finding is based on clear error as, in its own words, it acknowledges that one of the individual lots will amount to nothing more the creation of a parking area dedicated to a parcel down the street and a lot with a single family dwelling encroaching on a side-yard setback.

Providence City Ordinances do not provide for the imposition of any fees by the Board. Therefore, the Board’s practice of assessing a filing fee is not authorized under the ordinance. To this end, not only does the City Ordinances not provide the Board to collect fees—but state statutes provide explicitly, as it pertains to the public hearing to be held by the boards of appeal, that “the cost of any notice required for the hearing shall be borne by the **applicant**.”¹¹

¹¹ R.I. GEN. LAWS §43-23-69. (Emphasis added).

Not only was the Board without authority to assess a processing fee. Moreover, the Board violated state law by assessing the “Advertising Fee” to the Appellant and not the Applicant.

Accordingly, the Appellant respectfully requests that the Board be ordered to return the fees paid by the Appellant.

Conclusion

The lack of subject matter jurisdiction and the Applicant’s failure to propose a development with lots capable for development are fatal to the Application because they render the Decision to be based on prejudicial procedural error requiring the Decision to be reversed and the Application **DENIED**. Moreover, the Decision’s findings that the Applicant demonstrated a unique hardship that is not caused by prior action or an intent to realize greater financial gain is not supported by the weight of the evidence and requires remand.

Respectfully submitted,

Appellant,

2Ringold Real Estate, LLC

By its attorney,

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