CITY OF PROVIDENCE
ZONING BOARD OF REVIEW

IN RE: APPEAL OF UNIFIED DEVELOPMENT REVIEW PROJECT DECISION
153 CARPENTER STREET
CPC No. 2020-040 UDR
Appellant: 2Ringold Real Estate, LLC

MEMORANDUM IN SUPPORT OF DENYING AND DISMISSING APPELLANT'S APPEAL OF CITY PLAN COMMISSION'S APPROVAL OF UNIFIED DEVELOPMENT REVIEW PROJECT APPROVAL

Now comes the Providence City Plan Commission ("CPC") and hereby submits this memorandum in support of its approval of a unified development review project ("UDR") relating to 153 Carpenter Street. The CPC requests that the Honorable Zoning Board deny and dismiss the appeal of 2Ringold Real Estate, LLC (the "Appellant").

Introduction

This appeal relates to a unified development review project application submitted by owners and applicants, Kathryn McClure and Seth Clark, requesting that the CPC grant a minor subdivision of one lot described as Assessor's Plat 28, Lot 957 into two lots, dimensional relief relative to the subdivision, and a special use permit that would allow a principal parking use on the smaller of the subdivided lots (the "Application"). The subject lot is located in the R-3 zoning district. Specifically, the proposal was to divide the subject lot into one 3,979 s.f. lot for an existing single family home, and one 1,337 for an existing parking lot; the required area in the R-3 zoning district is 5,000 s.f. The proposal also required relief from required rear yard setback, from 10 feet to 5 feet, side yard setback, from 6 feet to 3

feet, as well as maximum impervious surface, landscaping, canopy coverage, and maximum driveway width.

An application for UDR requires advertising in a newspaper, as well as notice of the hearing mailed to neighbors within 200 feet of the property by certified record. The record includes copies of a mailing list, mailing labels, return receipts, unclaimed mail, as well as a certification of notice produced by the applicant.

The application was heard by the CPC on December 15, 2020. The CPC considered the presentation by the applicant's representatives, plans, as well as a detailed recommendation issued by the Department of Planning and Development. There was no public comment.

All of the various zoning relief, as well as the minor subdivision was approved by the CPC "based on the findings of facts and conditions included in the staff report." See Transcript, pp. 18-22.

Standard of Review

In instances of a board of appeal's review of a planning board or administrative officer's decision on matters subject to this chapter, the board of appeal shall not substitute its own judgment for that of the planning board or the administrative officer but must consider the issue upon the findings and record of the planning board or administrative officer. The board of appeal shall not reverse a decision of the planning board or administrative officer except on a finding of prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record. § 45-23-70(a); Appeals – Standards of review.

When considering appeals of a zoning board of appeals, the Court is not

permitted to conduct a de novo review of a decision. Munroe v. Town of East Greenwich, 733 A.2d 703, 705 (R.I. 1999). This Court must not "consider the credibility of witnesses, weigh the evidence, or make its own findings of fact." *Id.* Instead, this Court must limit its review to "a search of the record to ascertain whether the board's decision rests upon 'competent' evidence or is affected by an error of law." *Id.* (quoting Kirby v. Planning Board of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993)). Additionally, § 45-23-71(c) requires the Court to conduct its review of the proceedings before a municipality's planning board or planning commission-not the board of appeals-in determining whether the decision of the planning board is supported by competent or substantial evidence.

Competent evidence is functionally equivalent to the term "substantial evidence." Town of Burrillville v. R.I. State Labor Rels. Bd., 921 A.2d 113, 118 (R.I. 2007). Substantial evidence is relevant evidence that a reasonable person would accept as adequate to support the board's conclusion and amounts to "more than a scintilla but less than a preponderance." Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)). In short, a reviewing court may not substitute its judgment for that of the board of appeals if it "can conscientiously find that the board's decision was supported by substantial evidence in the whole record." Mill Realty Assocs. 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)). While the appellate court must defer to an administrative agency's determination of the facts,

its resolution of a question of law is reviewed de novo. Johnston Ambulatory Surgical Associates. v. Nolan, 755 A.2d 799, 805 (R.I. 2000).

Argument

The Appellant challenges the Decision on three general bases: (1) lack of subject matter jurisdiction relating to notice and authority of the CPC to consider certain special use permits; (2) lack of "adequate reasoning" to support its decision to approve variances; and (3) lack of evidence to support required findings to approve the minor subdivision. For the following reasons, the CPC's Decision must be upheld and this appeal dismissed.

1. The Commission had requisite subject matter jurisdiction to hear this appeal.

   (a) There is no evidence of insufficient notice and, in any event, the appellant does not have standing to object.

The Appellant makes a bald accusation that notice was not provided "to several property owners" in the notice area, and then references one owner in a footnote. However, the Applicant provided an Affidavit certifying that notice was sent to all property owners "based on current real estate tax assessment records of the City," which is the typical standard for notice in zoning matters. See R.I.G.L. § 45-24-53. In any event, there is no evidence that any particular property owner did not have actual or constructive notice of the hearing.

Even if a then-current property owner was not notified, this Appellant does not have standing to complain. "Only someone who should have received notice but did not in fact receive valid notice is entitled to challenge [such a] procedural defect." *Chase, Roland A.*, Rhode Island Zoning Handbook, 3d Ed., 2016, § 140, citing

Cugini v. Chiaradio, 96 R.I. 189 A.2d 798 (1963); Ryan v. Zoning Bd. of Review of New Shoreham, 656 A.2d 612 (R.I. 1995). Therefore, the Decision of the CPC cannot be nullified on the ground that proper notice was not given to one entitled to such notice, unless that person complains. Id., citing Ryan.

(b) The Zoning Ordinance empowers the CPC to grant special use permits under Unified Development Project review.

The Zoning Ordinance clearly and succinctly authorizes the CPC to review and approve "variances and special use permits" in the context of land development project applications. See Zoning Ordinance, Sect. 1904. R.I.G.L. § 45-24-46.4 does require that the zoning ordinance must specify (1) which type of approval, i.e., both variances and special use permits are specified, and (2) which types of projects, i.e., land development projects is specified. Therefore, this argument must fail.

2. The CPC considered substantial evidence on the record in granting the variances requested.

The Decision issued included detailed findings addressing the statutory criteria. The hardship is addressed in two paragraphs, where the CPC finds that the legal use of the property has been a parking lot since 1957, and that such use "could affect the use and enjoyment of the dwelling." Additionally, the CPC found that "[t]he need for relief is related to the size and dimensions of the lots, as well as the use of the property, which collectively contribute to the applicant's hardship." See Decision, Findings of Fact – Dimensional Variance, Sect. 1.

Contrary to Appellant's bald assertions, the CPC addressed "prior action," and specifically found that the hardship was not a result of the Applicant's prior action; instead, it resulted from "the use of the site as a parking lot [and it's] dimensions."

Furthermore, because the parking lot "will not be intensified beyond what it can accommodate," the CPC found the "relief does not appear to be for financial gain." Curiously, the Appellant concedes that the inconsistent uses on the lot are "nothing more than an inconvenience created by the Applicant's predecessor in interest." So, the condition *was not the result of any prior action of the applicant* and, without the relief, the hardship suffered *will amount to more than a mere inconvenience.*

The CPC made detailed, well-reasoned findings that support its Decision and, therefore, the Zoning Board should not disturb the relief granted.

3. The CPC made the required findings based on the evidence presented that the minor subdivision was entitled to subdivision.

The Zoning Board must confine its review to the record. In making its Decision, the CPC relied on its staff 's recommendation when considering the findings required by the Development Review Regulations and State Law. There was no testimony or evidence challenging the testimony presented by Department of Planning and Development staff. DPD staff referenced both the Comprehensive Plan and Zoning Ordinance, which the CPC adopted in its findings. See Findings – Minor Subdivision, Sects. 1, 2.

Furthermore, the Appellant seems to miss the point when it discusses the Comprehensive Plan. The minor subdivision is intended to separate two incompatible uses, and provide much-needed dedicated parking to a nearby residence. The parking lot is an existing condition and was never "going away." It is an impossibility to "provide a larger housing stock supply" within this Application as Appellant argues. Therefore, any reference to "elimination of surface parking lots" and "objectives to increase housing stock" is irrelevant to this Application.

Importantly, an easement for the benefit of a neighboring property (131 Carpenter Street) is required to be recorded against the newly divided parking lot, which will prevent said lot from being separately transferred for (unlikely) housing development. There will be no change to existing conditions, as found by the CPC in its Decision, and landscaping improvements will be made under the direction of the City Forester. See Findings of Fact – Dimensional Variance, Sect. 3.

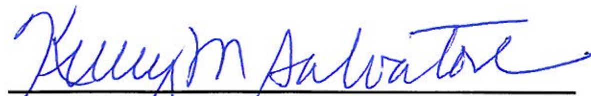
The Appellant presents no legitimate basis to disturb the Decision of the City Plan Commission.

Conclusion

For the reasons set forth herein, the Appellant has failed to make the arguments supporting reversal of the City Plan Commission's Decision in this matter. The City Plan Commission respectfully requests the Honorable Zoning Board to deny and dismiss Appellants' appeal.

CITY PLAN COMMISSION

By its attorney,



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March 3, 2021

Certificate of Service

I hereby certify that I delivered by electronic mail a copy of this Memorandum to the following individuals on March 3, 2021:

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