

PROVIDENCE ZONING BOARD OF REVIEW

Re Appeal from the Decision of the City Plan Commission Dated November 9, 2023, granting Master Plan Approval, design waivers and dimensional adjustments for Land Development Project 23-012 MA at 269 Wickenden Street ("Site").

APPELLANTS MEMORANDUM OF LAW

The Appellant seeks a reversal of the above decision of the City Plan Commission dated November 9, 2023 ("Decision") that granted Master Plan approval, design waivers and dimensional adjustments to Appellee's proposed residential/commercial building at 269 Wickenden Street at the southeast corner of Wickenden and Brook Streets because of prejudicial procedural error, clear error, and lack of support by the weight of the evidence in the record, as set forth below.

APPELLANT:

The Appellant owns real estate within two hundred feet of the proposed development site and thus is deemed to be an aggrieved party.

FACTS:

The Appellee Fox Point Capital LLC ("Applicant") filed an application with the Providence City Plan Commission ("CPC") for Master Plan approval, two dimensional adjustments, and design waivers for a proposed allegedly five (5) story 66.5 foot high mixed residential/commercial building ("Building") on two Assessor's lots ("Site") that comprise 10,108 square feet at the southeast corner Angell and Brook Streets. The Building would be six stories and 70 feet in height when measured from Brook Street. The footprint of the Building would be approximately 10,000 square feet. The Building is located in a C-2 Zone that stretches along Wickenden Street. As noted below, the College Hill, Wayland, Fox Point Neighborhood Comprehensive Plan recommends the rezoning of Wickenden Street to C-1 and limiting the height of new buildings to three stories because of the existing scale and density of the buildings along Wickenden Street east of Benefit Street.

The site plan submitted with the original application shows the height of the nearby buildings as being much lower than the 66.5 feet of the Building, e.g., 273 Wickenden 29.5 feet, 275 Wickenden 30 feet, 83 Brook Street 35 feet and 12 Armstrong 35 feet. The mass of the Building is more than four times the mass of any of these neighboring buildings and much greater the other buildings along the length of the historic portion of Wickenden Street that is east of Benefit Street.

The properties that bound the southerly side of the Site are zoned residential and would be adversely impacted by the height, scale and mass of the Building.

The Zoning Ordinance ("Ordinance") limits the height of buildings in a C-2 Zone to fifty (50) feet not to exceed four stories. If the property were in a C-1 zone the Ordinance would

allow only a height of 45 feet not to exceed four stories. Sec 1904 of the Ordinance gives the City Plan Commission the authority to grant adjustments to allow additional height of twenty-four (24) feet not to exceed six stories.

The Building would contain 75 residential units and approximately 3500 square feet of commercial space in the basement and first floor. There would be twelve (12) parking spaces and one loading space in the basement. The Zoning Ordinance generally would require 82 parking spaces if the project were not a land development project.

The plans submitted with the application are materially incomplete in that there are no floor plans for the upper floors and they do not show the dimensions needed to calculate the square footage of the proposed lower level and first floor residential and commercial spaces.

The loading space shown on the Applicant's plans is twenty (20) feet long, whereas the Ordinance requires twenty-two (22) feet. The loading space would be in the garage and thus it would not be accessible unless the garage door is opened. Thus, UPS and similar delivery trucks would generally not be able to use the loading space. The location of the loading space and the width of the vehicular passageway next to the loading space would not allow most trucks that park in the loading space to turn around, thereby requiring such trucks to back out of the garage in contravention of Sec 1404 c of the Ordinance that requires that parking should be designed so that a "driver [exiting a garage] should proceed forward into traffic."

This project would require the demolition of two 2-3 story buildings on the Site in the College Hill National Historic Landmark District that are compatible with the historic buildings along Wickenden Street in terms of scale, height, mass and design. (Landmark Districts are a small subset of National Historic Register Districts.)

The Site (per the Appellee's survey) is 10,108 square feet but the Appellee is proposing to create two parcels of 10,000 and 108 square feet so that the project would not be subject to minimum parking requirements under the Zoning Ordinance. A lot of 108 square feet and with no frontage on a road cannot be legally created.

No expert testimony was presented as to the what impact there would be on the neighborhood, including in particular the small businesses along Wickenden Street, from adding uses that would normally require seventy (70) spaces more than what is being provided and a loading space that is not readily accessible. There was also no expert testimony on the impact of such a large building on the much shorter and smaller nearby buildings and the residentially zoned properties at the back of the project.

The Site is subject to both the City of Providence Comprehensive Plan (2014) ("City Plan") and the College Hill, Wayland and Fox Point Neighborhood Plan (2009) ("CWF Plan"). All decisions of the Providence City Plan Commission are required by State and City laws to include a finding that a proposed project would be in conformity with both the City Plan and the CWF Plan.

PROCEEDINGS BELOW

The CPC granted Master Plan approval, the requested height adjustment and design waivers for residential use within 20 feet of a main street and window sills more than two feet above the adjacent grade. The CPC denied the rear yard setback adjustment. As discussed below, (a) the CPC did not make the required findings that the Building and height adjustment would be in conformity with the Comprehensive Plan, which they are not, and (b) the design waivers are not authorized by the Zoning Ordinance and the Zoning Enabling Act.

1. Violation of, and Inadequate Findings Regarding Compliance with, the Comprehensive Plans.

The key statutory provisions that the Decision fails to comply with are the following:

§ 45-23-60. Procedure – Required findings.

(a) All local regulations shall require that for all administrative, minor, and major development applications the approving authorities responsible for land development and subdivision review and approval shall address each of the general purposes stated in § 45-23-30 and make positive findings on the following standard provisions, as part of the proposed project's record prior to approval:

- (1) The proposed development is consistent with the comprehensive community plan and/or has satisfactorily addressed the issues where there may be inconsistencies;

§ 45-23-30.

Land development and subdivision review ordinances, regulations and rules shall be developed and maintained in accordance with this chapter and with a comprehensive plan which complies with chapter 22.2 of this title and a zoning ordinance which complies with RIGL 45-24-27. Local regulations shall address the following purposes:

- (1) Providing for the orderly, thorough and expeditious review and approval of land developments and subdivisions;
- (2) Promoting high quality and appropriate design and construction of land developments and subdivisions;
- (3) Promoting the protection of the existing natural and built environment and the mitigation of all significant negative impacts of any proposed development on the existing environment;
- (4) Promoting design of land developments and subdivisions which are well-integrated with the surrounding neighborhoods with regard to natural and built

features, and which concentrate development in areas which can best support intensive use by reason of natural characteristics and existing infrastructure;

(5) Encouraging local design and improvement standards to reflect the intent of the community comprehensive plans with regard to the **physical character** of the various neighborhoods and districts of the municipality;

The Decision paid lip service to the requirement of RIGL 45-23-60 by finding that (a) the proposed development would be mixed use in a mixed-use neighborhood and thus “complement the traditional character” of Wickenden Street and thus satisfy Objective B-2 and (b) by creating housing “will conform to objective H-2 of the plan which encourages creation of new housing.”

However, the Decision fails to

- (a) address many of the Objectives of the Comprehensive Plan with which the project does not comply
- (b) find that the proposed development has “satisfactorily addressed the issues where there may be inconsistencies”, and
- (c) address the additional requirement of RIGL 45-23-60, to wit, that the CPC “shall address each of the general purposes stated in § 45-23-30”, namely that the proposed development will *inter alia*

“(3) Promote the protection of the existing natural and built environment and the mitigation of all significant negative impacts of any proposed development on the existing environment.

(4) Promote design of land developments and subdivisions which are **well-integrated with the surrounding neighborhoods** with regard to natural and built features, and which **concentrate development in areas which can best support intensive use by reason** of natural characteristics and **existing infrastructure**.

5) Encourage local design and improvement standards to **reflect the intent of the community comprehensive plans with regard to the physical character** of the various neighborhoods and districts of the municipality.”

In fact, the proposed development is inconsistent with the above general purposes and a number of the Objectives of the Comprehensive Plan, including:

OBJECTIVE BE2: Promote design innovation and architectural diversity while preserving Providence’s traditional character.

OBJECTIVE BE4:

B. Establish design and maintenance standards for major corridors that incorporate preservation, high-quality design and **neighborhood character**.

C. Encourage design that connects neighborhoods while recognizing individual neighborhoods’ unique character.

OBJECTIVE BE5: PRESERVATION PLANNING **Preserve the historic buildings, districts and areas** that contribute positively to Providence's urban fabric.

OBJECTIVE BE7: NEIGHBORHOOD CHARACTER AND DESIGN **Protect the existing character of the city's neighborhoods by supporting design excellence and historic preservation.**

B. Encourage developments to be **compatible with surrounding uses in scale, density and character**, while not stifling innovative design and architecture.

The Decision also makes almost no mention of these relevant provisions of the Comprehensive Plan.

The Decision also makes no mention of the CWF Plan which provides

Wickenden Street: Maintaining character and scale was also identified as a priority for Wickenden Street. Recommended ways of doing so include trying to maintain the current mix of uses and **limiting building height to three stories**. Down-zoning Wickenden Street from C2 to C1 is recommended.

The Decision and the record do not address

- a. the increased traffic on Wickenden Street the project will generate
- b. where small delivery trucks and large garbage trucks will park
- c. where the many more cars than can be parked on the Site will be parked in a neighborhood where parking is already overtaxed
- d. the demolition of the existing two buildings that are compatible in scale and design with the buildings on Wickenden Street that are within a National Historic Landmark District
- e. whether the height and mass of the building would negatively impact the value of the much shorter and smaller neighboring buildings on Wickenden and Brooks Streets and create additional shadows on the abutting and nearby buildings and sidewalk.

The Decision did not address the negative environmental impact from the loss of substantial pervious surfaces on the Site due to the huge footprint of the Building vs the small footprint of the two existing buildings and their driveways.

2. CPC Did Not Make Required Findings That Support the Granting of the Height Adjustment. The CPC improperly granted a height adjustment to allow an additional floor and additional height of sixteen and a half (16.5) feet. The CPC found that the adjustments could be granted because:

The CPC found that the applicant had changed the building's design to address the CPC's concerns of the presence of the fifth story from the ground level.

The CPC failed to make any findings in granting the height adjustment other than the Applicant “is eligible for the adjustments.” Thus, the CPC failed to make the finding required by Sec 1904 of the Zoning Ordinance that granting the adjustment would comply with the Comprehensive Plan. In fact, the proposed adjustment would not be consistent with the Comprehensive Plan.

As noted above, numerous “Objectives” of the Comprehensive Plan (BE2A, BE4C, BE5A and BE7 B) and the CWF Plan require that new buildings be compatible in “scale, density and character “ with nearby buildings, such as those referenced on page 1 above.

The five story 66’ 6” of height, especially for a building of such mass, will significantly exceed the height and mass of the three-story buildings on the opposite side of Wickenden Street, and the two to three story buildings to the east, west and south of the proposed Building.

3. Design Waivers are Invalid. The Decision purports to grant two design waivers pursuant to Sec. 1904 E. 3 of the Zoning Ordinance with respect to (a) sixty-six (66) feet of residential space being within twenty (20) feet of a main street and (b) windowsills more than two (2) feet above the adjacent grade. However, Sec 1904 does not authorize the granting of “design waivers” and the Zoning Enabling Act does not authorize the CPC to grant “modifications”.

Providence Zoning Ordinance does not provide for the granting of Design Waivers.

The design waivers were purportedly granted pursuant to Sec 1904 B of the Zoning Ordinance. However, this provision only purports to allow modifications (not waivers):

B. Authority The City Plan Commission may approve a land development project. The City Plan Commission may also approve modifications to select dimensional standards as described in item E.

E.3. The City Plan Commission may modify design regulations of the C-1, C-2, C-3, M-MU, and W-2 Districts, and the TOD Overlay District.

Sec 1906 C. 1 b of the Zoning Ordinance gives the CPC the only the right to “review waivers from design regulations.”

The Zoning Enabling Act does not provide for the granting of Design Waivers.

The Zoning Enabling Act does not authorize a zoning ordinance to give a planning commission the power to grant waivers or modifications from the requirements of the Zoning Ordinance.

RIGL 45-24-49. Special provisions – Development plan review

(c) Nothing in this subsection shall be construed to permit waivers of any regulations unless approved by the permitting authority pursuant to the local ordinance **and this act.**

The statutory powers granted to the CPC are as follows:

- (a) RIGL 45-24-47 authorizes a planning commission to grant “incentives” in connection with land development projects.
- (b) RIGL 45-24-46.4 authorizes a planning commission to grant variances and special use permits as part of a unified development review process for a land development project.

The Zoning Enabling Act does not authorize the CPC to grant Modifications

RIGL 45-24-64 of the Zoning Enabling Act allows a zoning ordinance to provide for modifications but only from “literal dimensional regulations”. The power to grant such dimensional modifications is reserved in RIGL 45-24-31 (51) to the zoning enforcement officer.

(51) *Modification.* Permission granted and administered by the **zoning enforcement officer** (*emphasis added*) of the city or town, and pursuant to the provisions of this chapter to grant a dimensional variance other than lot area requirements from the zoning ordinance

Thus, the provision of Sec 1904 B of the Zoning Ordinance that purports to authorize the CPC to “approve modifications to select dimensional standards as described in item E:” is invalid because that power could only be granted to the zoning enforcement officer.

RIGL 45-23-62 of the Development Review Act authorizes planning commissions to grant “modifications” and “waivers” but only with respect to subdivision and development review regulations.

4. Fiscal Impact Study Not Provided. The fiscal impact study required by Sec. 605.2 of the Development Review Regulations and RIGL 45-23-60(1) (3), was not provided.

5. Loading Space does not satisfy Ordinance Requirements. As noted on page 2 above, the loading space does not meet the dimensional and exit requirements of Sections 1406 and 1404 C of the Ordinance.

CONCLUSION

The Zoning Board should reverse the CPC’s Decision to grant Master Plan Approval, the adjustments, and the design waivers for the many reasons stated above, including the many aspects of the proposed Building that violate the two Comprehensive Plans’ objectives of preserving historic neighborhoods and the height, mass and scale of neighborhoods.