STATE OF RHODE ISLAND
ZONING BOARD OF REVIEW CITY OF PROVIDENCE

Jack Lindenfeld, *Appellant,* v. Fox Point Capital, LLC, and the City of Providence, *Appellees.*	Providence City Plan Commission Case No. 23-021 MA

APPELLEE'S RESPONSIVE MEMORANDUM OF LAW

The Appellee, Fox Point Capital, LLC ("Fox Point Capital"), is the owner of 269 Wickenden Street, also known as Providence Tax Assessor Plat 18 Lots 190 and 192. Fox Point Capital is also the applicant in file number 23-013 MA in which the Providence City Plan Commission issued a decision dated November 9, 2023 ("November 2023 Approval"). The decision approved the Master Plan regarding the subject properties. Appellant, Jack Lindenfeld, brought forth this appeal pursuant to R.I. Gen. Laws §45-23-66(a). For the reasons stated in the brief, the decision should be affirmed.

I. PROCEDURAL SUMMARY

The November 2023 Approval which is before this Zoning Board of Review ("ZBR") is a master plan approval pursuant to R.I. Gen. Laws § 45-23-40. The November 2023 Approval contains vested affirmative findings from a previous Master Plan

approval dated August 17, 2023, for the same site. That preceding approval is not a subject of this appeal, as the appeal period expired before the current appeal was filed.

II. FACTUAL BACKGROUND

A. August 2023 Approval Procedural History

1. On February 21, 2023, Fox Point Capital submitted an application for a major land development application. *See* Certified Record – Application form with checklist. The application sought the following:

    i. Master Plan approval. Master Plan submission of a Major Land Development to construct a five (5) story, mixed-use building with a cellar.
    ii. Administrative Subdivision. The project also entailed a proposed by-right administrative subdivision to reconfigure the lots and create a lot not for development which will be occupied by the generator.
    iii. Design Waiver, Window Sill Height. A design waiver for the window sill height, and
    iv. Height Adjustment. A dimensional height adjustment for a proposed height of five stories and approximately 65 feet.

2. On March 13, 2023, the administrative officer received the application and assigned it the case No. 23-021 MA. *See* Certified Record – Application form.[1]
3. On April 3, 2023, No. 23-021 MA received a certificate of completeness. *See* Certified Record – 23-012MA - 269 Wickenden (cert of completeness).
4. Between the certificate of completeness and the public informational meeting, members of the community voiced concerns about the building's design.

[1] There is a clerical error throughout the certified record addressing both the August 2023 Approval and November 2023 Approval as Case No. 23-012MA interchangeably with 23-021MA.

5. Based on the public response to the advertised application, but prior to the public informational meeting for Master Plan review, Fox Point Capital drafted an alternate exterior style concept.

6. On August 15, 2023, the Planning Board held a public informational meeting.

7. On August 17, 2023, the Planning Board issued a decision containing the following:

    i. Master Plan Approval. The August 2023 Approval also approved the master plan approval on the following conditions:

        1. The building's design shall follow the revised building design presented at the master plan hearing.

        2. The CPC deferred action on the design dimensional adjustment for height to the preliminary plan stage. The CPC required that granting of the waiver be subject to the applicant altering the façade to set the fifth story back at least 10' from the upper story, such that the building's design presents as a five story building at the corner of Brook and Wickenden Street.

        3. The landscaping plan shall be approved by the City Forester prior to preliminary plan submission.

        4. The drainage management plan shall be submitted prior to the preliminary plan stage.

        5. The preliminary plan shall include the location of bicycle parking.

        6. The applicant shall present a study on the impact of delivery vehicles and indicate how delivery vehicles will access the building.

        7. A signage plan shall be included with the preliminary plan submission.

    ii. Approval, Design Waiver, Window Sill Height. Approval of the requested design waiver from window sill height, finding that it was required due to the site's grade ("August 2023 Approval"). *See* Certified Record – 23-012 MA - 269 Wickenden (Master Plan Approval)- Recorded.

    iii. Height Adjustment, Eligibility Approved. The CPC did affirmatively find the application was eligible for the height adjustment. (*see* August Decision P.3, Paragraph 6).

    iv. Height Adjustment, Deferral of Approval of Design. The CPC deferred action on the *design* of height adjustment to preliminary plan with the requirement that the applicant alters the façade to set the fifth story building

at least 10' from the upper story, such that the building's design presents as a 5-story building.

8. On August 22, 2023, the August 2023 Approval was recorded, starting the clock for the 20-day appeal period.

9. As of September 12, 2023, the CPC received no appeals to the August 2023 Approval. *See* Certified Record.

10. As of September 12, 2023, the August 2023 Approval rights had vested. The August 2023 Approval is vested for two (2) years.

B. <u>August 2023 Approval – Vested and Un-appealed Findings of Fact</u>

11. Within the vested and un-appealed August 2023 Approval, the CPC made the following affirmative findings:

    i. <u>Consistent with Comprehensive Plan</u>**.** The project is Consistent with Providence Tomorrow: The Comprehensive Plan as (i) plan describes these areas as ones intended to foster pedestrian traffic, (ii) the plan conforms to this land use designation, (iii) the plan meets the objective BE-2 of the plan which encourages new development to complement traditional character, and (iv) the creation of housing will conform to objective H-2 of the plan.

    ii. The project <u>complies with the Zoning Ordinance</u> in the following ways:
        1. <u>Use:</u> the proposed retail and residential mixed use is permitted by right in C-2 zone.
        2. <u>Dimension and site design</u>: The use of a common architectural theme with pitched roofs with dormers, balconies, and incorporation of varied dimensional elements are in conformance with the design guidelines for multifamily development per Section 1202.K of the ordinance.
        3. <u>Build to Zone</u>: The building will be set to the front and side lot lines, exceeding the 60% and 40% build-to zone percentage requirements respectively.
        4. <u>Building materials</u>: permitted by right.
        5. <u>Parking</u>: No parking is required as the building will be located on a lot which does not exceed 10,000 SF.

6. Landscaping: The existing trees adjacent to the site satisfied the 1,500 SF canopy coverage requirement.
7. Environmental management: The development does not trigger conformance with the stormwater ordinance as the site is less than 20,000 SF and already developed.
8. Signage: The plans indicated the use of the wall, awning etc. for signs.
9. Design waiver: Due to the slope of the lot, the average grade is lower than the grade adjacent to the windowsills, and the plans showed that the sills are influenced by the slope, finding that the bottom of the window sills cannot be located within two feet of the adjacent grade due to the slope of the lot.
10. Dimensional adjustment: The CPC found that the applicant is eligible for the dimensional adjustment due to the provision of internal parking and mixed use development with over 50% assigned to residential use per section 1904.E.i of the ordinance, however action by the CPC was deferred to preliminary so that the CPC can see the fifth story present as a five story building from the corner of Brook and Wickenden.

iii. The project has no significant negative environmental impact because the applicant is expected to conform with applicable regulations.

iv. The project has no physical constraints that impact development of this property, making the lots buildable lots as the applicant will apply for an administrative subdivision.

v. The project has adequate street access as pedestrian and vehicular access will be provided from Wickenden and Brook.

C. November 2023 Approval

12. The applicant's design progressed in accordance with the CPC's and the public's concerns expressed during the August 15th Major Land Development Public Informational Meeting and in accordance with the August 2023 Approval.

13. On September 18, 2023, Fox Point Capital submitted a subsequent application for Master Plan Approval on the same lots. The application sought the following:

i. Master Plan approval. Master Plan submission of a Major Land Development to construct a five (5) story with a cellar mixed-use building.

ii. Administrative Subdivision. The project also entailed a proposed by-right administrative subdivision to reconfigure the lots and create a lot not for development which will be occupied by the generator.
iii. Design Waiver, Window Sill Height. A design waiver for the sill height, and
iv. Height Adjustment. A dimensional height adjustment for a proposed height of five stories and approximately 66.5 feet.
v. Design Waiver, First Floor Residential. A design waiver for locating residential use within 20' of Wickenden Street.
vi. Reduction of Rear Yard Setback. A dimensional adjustment for the proposed rear yard setback.

14. The only distinct relief requested was (1) the change in the height adjustment, (2) the new waiver of the first-floor residential requirement, and (3) the new dimensional adjustment for a reduction in the rear yard setback.

15. On October 13, 2023, the amended application filed in No. 23-012 MA received a certificate of completeness. *See* Certified Record – 23-021MA - 269 Wickenden (cert of completeness).

16. On October 9, 2023, notice was posted and sent in accordance with the Providence Development Review Regulations for a Public Informational Meeting.

17. On October 17, 2023, the Planning Board held a public informational meeting and voted to approve on the master plan application.

18. On November 9, 2023, the Planning Board issued a decision containing the following:

i. Master Plan Approval. The November 2023 Approval contained the following conditions:
    1. To provide clarity on the cellar level conforming to the definition of a cellar, the applicant shall provide more detail on its design at the preliminary plan state, including multiple section drawings and a plan for the cellar level showing all sloped and flat sections at the ceilings and floors of this level, the calculation of average grade,

and graphic representation of the full three-dimensional volume of the cellar level above and below average grade.
2. The applicant shall provide floor plans that include accurate calculation of the developed square footage of the building.
3. The landscaping plan shall be subject to the City Forrester's approval. The plan shall include a robust amount of plantings in the rear yard setback to buffer the building from the abutting use.
4. Drainage management and erosion control plans shall be submitted at the preliminary plan stage.
5. A signage plan shall be submitted with the preliminary plan.
6. The loading space shall remain in the preliminary plan.

ii. Approval, Design Waiver, Window Sill Height. ("November 2023 Approval").

iii. Approval, Height adjustment. The November 2023 decision granted the revised dimensional height adjustment for a total height of approximately 66'5" finding that the applicant had changed the building's design to address the CPC's concerns of the presence of the firth story from the ground level.

iv. Approval, First Floor Residential. The November 2023 decision approved the design waiver for locating residential use on the first floor within 20' of Wickenden Street, affirmatively finding that design would not affect the commercial nature of the street.

v. Denial, rear-yard setback reduction. The November 2023 decision denied the dimensional adjustment for the proposed rear yard setback finding that the applicant had not demonstrated that it was integral to the building's design.

19. The CPC made the following affirmative findings:

i. Consistent with the Comprehensive Plan. The project is Consistent with Providence Tomorrow: The Comprehensive Plan for the generally the same reasons as the August 2023 Approval.

ii. Compliant with the Zoning Ordinance. The project complies with the zoning ordinance for generally the same reasons of the August 2023 Approval in terms of landscaping, environmental impact, buildable lot, and street access as well as the project's build to zones, applicable parking minimum requirements, the inapplicability of the stormwater ordinance, and lot sizes.

iii. Height Adjustment. With regard to the progression in the building design, the CPC found that the design reduced the visibility of the fifth story from the intersection of Wickenden and Brook Street and "conformed to their

requirement that the presence of the fifth story be minimized from the street level" at that corner.

20. On November 14, 2023, the November 2023 Approval was recorded, starting the clock for the 20-day appeal period.

21. On December 1, 2023, the Appellant filed an appeal.

22. The only distinct relief that was appealed that had not already been completely vested by and through the August 2023 Decision and lack of appeal is for the Design of the Height Adjustment and the First-Floor residential.

III. SCOPE OF APPEAL

A. The Appeal seeks to overturn findings and approvals that are settled and therefore unappealable under res judicata.

The travel of the approvals sought at this location follows the iterative and progressing design principles intended by the Major Land Development process. The first publication of the proposed concept garnered responses, and before the first public informational meeting, an alternative exterior design concept was drafted. The first Master Plan Approval for the subject location directed the applicants to further pursue the alternate exterior design and gave explicit guidance on the preferred design of the top floor. The design waiver and the master plan were fully approved, and it was found to eligible for the height adjustment. Those approvals and findings were never appealed. Within said approval there are explicit findings to support the Master Plan approval, those findings were never appealed.

Now the Appellant seeks to re-litigate settled matters. The entire concept of progressing iterative design through public feedback as established by Major Land Development review is rendered meaningless if an appellant can overturn a settled issue in a subsequent proceeding. The purpose of iterative approvals and phases is to settle certain facts and then use that certainty to progress and refine the design and settle remaining open issues. If the entirety of an application must be reviewed de novo after each vote and decision, there is no value in having any vote or decision except for final approval. This is clearly not the case as such a regulatory environment would render development pragmatically impossible as the expense to completely design and engineer

a project without any certainty of settled entitlements would be too great a cost relative to the risk of uncertainty.

B. <u>A cornerstone of jurisprudence is avoiding the re-litigation of settled matters.</u>

As a first principal of the law, the Courts abhor re-litigation of settled issues because it undermines the conclusiveness of judicial process, it undermines judicial economy, and it creates uncertainty even after the conclusion of legal proceedings in a way that undercuts the foundational value of the determinations earned through legal proceedings. The legal theories and doctrines enforcing this principle abound. The most basic enactment of this principle is just the nature of binding precedent, persuasive precedent, and stare decisis more generally. Within the context of a specific subject, res judicata prevents the re-litigation of a claim once it has been settled in a previous action regarding the same subject. Within the context of a specific lawsuit, the legal doctrine of the law of the case prevents re-litigation of matters by a trial court once the issue is settled by an appellate body. Within the context of administrative denials, the doctrine of administrative finality prevents parties from multiple attempts for identical relief based on the same facts. The law universally seeks to avoid re-litigation of established findings and holdings whenever possible.

In this case, the Appellant has lost the ability to appeal the vested findings and approvals from the August 2023 Decision. Master Plan Approval of a mixed use structure with a waiver for window sill height is vested. Eligibility for the 5th story is still vested. All of the evidentiary findings therein are still vested. Nothing within that decision may

be overturned without violating the first principle of law that re-litigation of settled disputes undermines the legal process.

If the Appellant wished to appeal a determination as to the appropriateness of the use or the compatibility of the concept with the character of the neighborhood and the comprehensive plan, the appellant needed to do so before the expiration of the appeal period on those determinations, which occurred in September of 2023. In this case, the legal doctrine of res judicata controls.

C. The Appellant cannot relitigate any finding or approval that was contained in the August 2023 Approval.

The Doctrine of Res Judicata bars this appellate Board from relitigating issues previously decided by the Planning Board because the August 2023 Decision was not appealed. Richmond v. Wawaloam Reservation, Inc., 850 A.2d 924, 932 (2004). In Wawaloam, the town obtained a favorable decision from the town zoning board of review regarding zoning violations at recreational-vehicle (RV) campground owners' property. The owners failed to seek judicial review of the board's decision, and the Court held that res judicata barred the owners, in the town's subsequent action for injunctive relief against owners relating to the previously-adjudicated zoning violation from relitigating issues previously decided by the board. Id. at 932.

Here, the doctrine of res judicata controls in the same manner because there were two master plan approvals by the same commission: the August 2023 Approval and the

November 2023 Approval. The August 2023 Approval received no objections or appeals. The appeal period for such approval has expired, and the affirmative findings included therein are final. The November 2023 Approval is substantially similar to the August 2023 Approval. The August 2023 Approval did not include any denial. Nothing in the November 2023 Approval sought to reverse the prior Decision or any portion thereof. The November 2023 application amounts to a design progression based on the August 2023 Approval. The only matters up for debate and discussion during the November 2023 Approval were those that had not been settled in August.

Just as in Wawaloam, when Appellant failed to appeal the August 2023 Approval to the zoning board of review, that decision became final for the purpose of foreclosing re-litigation of claims and defenses that were raised or that could have been raised before the expiration of the appeal period in the proceeding.

The Commission in August 2023 found that the applicant was eligible for a 5th story and gave guidance to the applicant on what elements the Commission wanted addressed prior to approval of the design of the 5th story. This underlying application from the November 2023 Approval was substantially similar to the previous approval and merely built upon it based on the feedback received in the preceding public informational meeting. Eligibility for the height adjustment is not in dispute, merely the design of the top floor was at issue.

The November 2023 application and approval only contained two narrow requests that has not already been conclusively settled:

1. Dimensional Adjustment: Height: 1 story, Sixteen Feet Five Inches (16'5"), *as to its specific design*. The Applicants eligibility for the height adjustment has been conclusively determined.
2. Waiver: First floor residential use on a Main Street.

In accordance with the controlling principal of res judicata, the Applicant is requesting a preliminary motion and determination of the Zoning Board of Review to establish what portions of this appeal are barred from re-litigation, and what is the exact scope of the appeal.

NOW THEREFORE, the applicant specifically prays that this Board finds:

1) Master Plan Approval and the findings therein including all such findings necessary for said approval are barred from re-litigation under res judicata.
2) The height of the window sills is barred from re-litigation under res judicata.
3) Eligibility for the height adjustment is barred from re-litigation under res judicata.
4) As to the height of the building, the only subject of this appeal is the Planning Board's approval of the design—and not the existence—of the top floor.

IV. STANDARD OF REVIEW – ZONING BOARD REVIEW OF THE PLANNING COMMISSION DECISION

Under R. I. Gen. Laws § 45-23-70(a), appeal effective January 1, 2024, "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." The Superior Court further analyzed this section, and held that:

> under the Development Review Act of 1992 the zoning board of appeal no longer functions as a " 'super' planning board" entitled to entirely disregard the planning board's findings, as it once could. The Board may reverse a decision **only if** the planning board has made an error of law, if there was a procedural defect that resulted in prejudice to the appellant. Further, though the Board must not substitute its own judgment as to the findings made by the planning commission as to conflicting, competent evidence, where those findings nonetheless do not support the planning commission's decision or are in "clear error," the zoning board may properly reverse the commission's decision.

Sprague v. Zoning Board of Review of the Town of Charlestown, 2004 WL 2813763, at 7-8 (R.I. Super 2004) (internal citation omitted) (emphasis added). Prejudicial procedural error occurs when the procedure followed by the planning board at the public informational meeting is "characterized by such an abuse of discretion as to deny the plaintiff a fair opportunity to be heard." Building Systems, Inc. v. Town of Lincoln Zoning Bd. of Review, 2000 WL 1273997, at *6 (R.I.Super., 2000). The ZBR decision must be supported by legally competent evidence. Palazzo v. Colella, 2003 WL 21296431, at *3 (R.I.Super., 2003) (citing to Arnold v. R.I. Dept. of Labor and Training, No. 01-237 MP., slip op. (R.I. filed March 26, 2003) (defining legally competent evidence as "such relevant evidence that a reasonable mind might accept as adequate to

support a conclusion, and means an amount more than a scintilla but less than a preponderance")).

In sum, the following principals control the zoning board's review of this appeal:

1. Deferral to the Planning Board's Judgment. The Zoning Board of Review cannot substitute its judgment for that of the Planning Board's decision.
2. Procedural Errors are forgiven so long as they are not Prejudicial. Even if the zoning board finds a procedural error, the Zoning Board cannot reverse the decision unless the procedural error is characterized by such an abuse of discretion as to deny the plaintiff a fair opportunity to be heard.
3. Appellant must submit legally competent evidence into the record. Legally competent evidence requires a finding of more than a scintilla of evidence has been established on the record and that evidence is adequate to support a conclusion. The Appellant cannot show lack of support by the weight of the evidence without a scintilla of evidence in support of that conclusion.
4. Clear error. A clear error of law amounts to stark and obvious violation of controlling law.

V. LEGAL ARGUMENT

The specific claims of the Appellant's legal argument are difficult to discern. The Appeal mentions the necessary elements for a successful appeal within its introduction, but then fails to identify how any of the statements and claims in the remainder of the appeal are connected to the necessary elements for a successful appeal. The body of the

appeal reads like an attempt to throw spaghetti at the wall to see if anything sticks just long enough that it imposes a delay or cost in the permitting process that will kill the project, but the goal is to oppose the project not on the merits or within the confines of the review, but through attrition via delay.

The appeal fails to address the fact that the Planning Board's judgment must be deferred to by this Board and that the Zoning Board cannot review the Board's findings of fact without legally competent evidence on the record suggesting that the Planning Board made a clear error. More to the point, the appeal does not cite any legally competent evidence at all. Neither does the appeal make any argument identifying a procedural error, never mind an argument as to how a procedural error prejudiced the appellant. The appeal does cite to a series of laws and does make a series of legal conclusions as to those laws, but the Applicant has been unable to discern a cogent argument expressly identifying how the proceeding amounted to a "clear error" of law. On the contrary, many of the inadmissible legal conclusions within the appeal are themselves a "clear error" of law. A scattered list of key words and citations of laws does not amount to a proof in support of any form of remand or reversal.

In sum, there are no grounds within the appeal to support a reversal or remand of any kind.

A. <u>The Appellant received a full and fair opportunity to be heard.</u>

The appellant was provided with notice in the normal course.[2] The appellant was represented by counsel via a legal memorandum that was submitted prior to the public informational meeting[3] as well as during the public informational meeting.[4] The subject of the application was known in full to the Appellant as evidenced by his legal counsel's responsive memoranda prior to the hearing. The objections of the Appellant were received and considered by the Planning Board, as evidence by the fact that both the written and verbal objections are contained within the certified record.

No procedural errors occurred at any point in the process. Moreover, even if a procedural error had occurred, the Appellant's full participation in the entire process, both before and during the public informational meetings, is dispositive proof that the Appellant was not prejudiced. To the extent that Appellant has made any argument that the Appellant was prejudiced by procedural error,[5] it has failed to cite any evidence to that effect.

B. <u>There is no legally competence evidence on the record in support of any of the Appellant's arguments. On the contrary, there is an insurmountable amount of evidence on the record that supports the Planning Board's judgment, the decision, and all of the findings therein.</u>

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[2] *See* Certified record mailed, return of certified mail.
[3] *See* Certified record, Public Comment, Correspondence from Tim More.
[4] *See* Certified record, Transcript, Comment of Tim More, P. 55-57.
[5] The Appellant does make a statement in the form of a non-admissible conclusion of law in their Memorandum on Page 1, Paragraph 2, but then does not mention clearly identify any procedural error or express any prejudice within the remainder of its argument.

The Zoning Board of Review must defer to the judgment of the Planning Board, and may only reverse a finding of the Planning Board if there is "conflicting, competent evidence" establishing that the Planning Board made a "clear error." Sprague v. Charlestown, at 7. None of the findings within the Department of Planning and Development's reports conflict in any way with the findings of the Planning Board. The expert witness fully supported all of the findings within the October 2023 staff report. The completely vested and un-appealed findings contained within the August Decision fully support all the Planning Board's findings within the Decision subject to this appeal.

The simplest way to establish if there is any legally competent evidence on the record to support the Appellant's position is to review the evidence cited by the Appellant within its appeal, and to analyze whether the cited evidence provides more than a scintilla of proof in support of the Appellant's argument. However, in this case, there is not a single citation or reference to a single piece of evidence. Controlling precedent requires that this Board find more than a scintilla of evidence to support any conclusion that there is a "clear error." (Palazzo v. Colella, at *3). To the extent that Appellant has made any argument that the Planning Commissioners made a "clear error"[6] it has failed to cite any evidence to that effect. Whereas the evidence on the record in support of the approval of the November Decision includes:

> 1. Certified Record – Contents for plan reviewed on 8.15.23, Plans and staff reports, 23-012MA - 269 Wickenden Street (master plan report)

[6] Here again, the Appellant does make a statement in the form of a non-admissible conclusion of law in their Memorandum on Page 1, Paragraph 2, but then does not identifiably describe any "clear error" anywhere within the argument.

2. Certified Record – Contents for plan reviewed on 8.15.23, Meeting submissions, 23-021MA - Michael Cassidy memo
3. Certified Record – Contents for plan reviewed on 8.15.23, Transcript, 23-012MA - 269 Wickenden Street (transcript) 8.15.23 hearing at 35-38.
3. CPC findings during and through August Public Informational Meeting
    a. DECISION: Certified Record – Contents for plan reviewed on 8.15.23, Application materials and approvals, 23-021MA - 269 Wickenden (Master Plan Approval) – Recorded at 4.
    b. TRANSCRIPT: Certified Record – Contents for plan reviewed on 8.15.23, Transcript, 23-012MA - 269 Wickenden Street (transcript) 8.15.23 hearing
4. Certified Record – Contents for plan reviewed on 8.15.23, Application materials and approvals, 23-021MA - 269 Wickenden (Master Plan Approval) - Recorded
5. Certified Record – Contents for plan reviewed on 10.17.23, Plans and staff reports, 23-012MA - 269 Wickenden Street (master plan staff report) - October 2023
6. Certified Record – Contents for plan reviewed on 10.17.23, Meeting submissions, 23-021MA - 269 Wickenden transcript (October 2023 hearing)
7. CPC findings during and through October Public Informational Meeting
    a. DECISION: Certified Record – Contents for plan reviewed on 10.17.23, Plans and staff reports, 23-012MA - 269 Wickenden Street (master plan staff report) - October 2023 at 4-5.
    b. TRANSCRIPT: Certified Record – Contents for plan reviewed on 10.17.23, Meeting submissions, 23-021MA - 269 Wickenden transcript (October 2023 hearing)
8. Certified Record – Contents for plan reviewed on 10.17.23, Application materials and approvals, 23-012MA - 269 Wickenden (Master Plan Approval) - Recorded

In accordance herewith, the applicant submits as if fully set forth herein this section Certified Record – Contents for plan reviewed on 8.15.23, Meeting submissions, 23-021MA - Conley memo and, Certified Record – Contents for plan reviewed on 10.17.23, Meeting submissions, 23-021MA - Conley memo submitted at meeting.

As to the facts set forth in the appeal:

- The applicant claims that the southerly buildings would be adversely impacted by the building, but does not explain how.

- The applicant claims that the building is four times the mass of neighboring buildings, but does not provide any evidence to support that assertion nor does the applicant accurately identify the scope of the buildings in the neighborhood.
- The applicant discusses a distinct commercial zone from the zone of the site, and then correctly identifies that the application is eligible for a twenty-four (24') foot height adjustment.
    - Of note, the application is for less than 17', and the Applicant concurs with the Appellant that the proposal sought 7' less in height than it could have.
- The applicant correctly identifies that if the facts of the application were different, more parking would be required.
- The applicant claims that floorplans are required for the submission without citing any provision in support of that claim. The applicant incorrectly claims that the application does not have sufficient information to calculate square footage.
- The applicant appears to conflate standards for loading and parking standards into a super-standard that is not actually a design requirement.
- The applicant appears to make an argument that historic design is a standard that must be met, but fails to cite to any law in support of the claim.
- A lot restricted as a lot not for development is permissible by right through the administrative subdivision process.
- The certified record speaks for itself, there is evidence, including expert testimony, in the form of the August DPD recommendation, August expert testimony,

findings of fact within the Decision as well as the November DPD recommendation. There is no evidence on the record in opposition to any of said evidence which universally supports the Planning Board November Decision.

- The Applicants incorrectly conflates portions of the Comprehensive Plan that provide guidance as a portion of the Comprehensive Plan that is binding. Only the criteria of the Future Land Use map are binding.

C. Error of Law.

i. Requirements for Master Plan Approval

The appellants largest argument on error of law is relative to the standards for Master Plan Approval. Master plan is "[a]n overall plan for a proposed project site outlining ***general, rather than detailed***, development intentions. It describes the basic parameters of a major development proposal, rather than giving full engineering details. Required in major land development or major subdivision review." R.I. Gen. Laws § 45-23-32(23). (emphasis added).

As noted throughout, the record is detailed with three separate expert opinions as to each of the applicable elements.[7] Applicants memoranda submitted to both hearing procedures also goes through great lengths to address each of the standards the Appellant claims were not addressed. But most critically, the Applicant lost its opportunity to appeal these standards because they were vested, they were not appealed, and they are

[7] The August staff report, the August expert report, the November staff report.

settled determinations of law because the principal of res judicata applies to all findings contained within the August 2023 Decision.

ii. ***Height Adjustment.*** Again the applicant cites to both of its Memoranda submitted into the record in each of the public informational meetings as if duly set forth herein, in particular Appendix A, which specifically details the supporting law for the height adjustment. Moreover, R.I. Gen. Laws §45-24-47(b), effective until January 1, 2024, states in pertinent part: "… In reviewing, hearing, and deciding upon a land development project, the city or town planning board or commission may be empowered to allow zoning incentives within the project; provided, that standards for the adjustments are described in the zoning ordinance…" Providence Zoning Code §1904 E.1(a-i) exactly conforms to R.I. Gen. Laws §45-24-47(b). Therefore, the heigh adjustment is permissible by law, and for all the reasons set forth herein the August Decision adjustment eligibility is un-appealable and the November Decision's approval of the adjustment design is supported by the evidence on the record.

iii. ***Design Waivers*****.**

Here again, the applicant cites to both of its Memoranda submitted into the record in each of the public informational meetings as if duly set forth herein, in particular Appendix B, which specifically details the supporting law for the waiver. Design Waivers are authorized by DRR 807.2, there is nothing in the general laws that prohibits the creation of a waiver process within local regulations. This specific waiver is also a matter of semantics as the apparent intent of the regulation is to ensure that commercial uses exist along the entirety of the pedestrian level, and this application conforms to that intent

as the cellar and not the first floor is the pedestrian level for a portion of the building as the grade of the street is fairly steep.

iv. ***Fiscal Impact Study***

The Appellant cites to the R.I. Gen. Laws § 45-23-60(1)(3) as grounds for the requirement for a state law mandated fiscal impact study. There is no law that meets that citation, to the extent that is a reference to the R.I. Gen. Laws § 45-23-60 more generally, there is no requirement for a fiscal impact study therein, nor was the applicant able to identify any requirement for a fiscal impact study in any area of applicable code or law. There is a provision that allows for the City Plan Commission to request impact statements, but there was no such request in this matter and therefore no such requirement.

v. Loading Space

The Applicant explicitly incorporates by reference the analysis and Argument set forth in the Memorandum submitted during the October hearing, specifically P. 6, entitled, "Objection Applies Incorrect Standards for Master Plan & Applies Said Incorrect Standards Incorrectly" as that portion of the certified record details the actual applicable standards. The loading space complies with all dimensional and design requirements. Regardless, of note, the Master Plan Stage is not meant to include final engineering. The details of items like drive aisles etc. become increasingly refined through the engineering process and preliminary plan stage approvals. The applicant has not sought any relief related to parking or loading and thus is still fully bound by all applicable standards. In other words, even if the details of the loading and parking areas

are found incomplete by this Board, this is not a subject for remand as a pre-requisite for Master Plan Approval, but may be a subject of a future preliminary plan application if and only if the design at preliminary plan requires relief.

D. Conclusion.

For the forgoing reasons, the Appellee respectfully requests the Zoning Board of Review to deny the Appellant's appeal.

Petitioner, by and through their attorney:

/s/ Dylan Conley

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850 A.2d 924
Supreme Court of Rhode Island.

TOWN OF **RICHMOND**
v.
WAWALOAM RESERVATION, INC., et al.

Nos. 2003–69–Appeal, 2003–107–Appeal
|
May 10, 2004.

Synopsis

Background: Town obtained favorable decisions from the town zoning board of review, the town building code board of appeal, and the State Building Code Standards Committee sitting as the Board of Standards and Appeals, concerning the existence of zoning and building code violations at recreational-vehicle (RV) campground owners' property, in common areas and in individually leased campsites. Owners did not seek judicial review. Thereafter, town sought injunctive relief against owners, relating to the previously-adjudicated zoning and building code violations. The Superior Court, Washington County, Ronald R. Gagnon, J., granted permanent injunctive relief. Owners appealed.

Holdings: The Supreme Court, Robert G. Flanders, Jr., J., held that:

[1] owners failed to preserve appellate review of witness' qualifications;

[2] res judicata barred relitigation of zoning violations; and

[3] res judicata barred relitigation of building code violations.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (21)

[1] **Zoning and Planning** Preservation before board or officer of grounds of review

Campground owners, merely by raising, during witness voir dire of town's alternate building official, the propriety of the official's appointment to that position, and merely by asking the official, during cross-examination, whether town's regular zoning enforcement officer was "ill or incapacitated in any way," did not preserve for appellate review a claim that the official was not qualified to testify about owners' zoning and building code violations, in town's action for injunctive relief regarding owners' zoning and building code violations, because official's appointment to his position violated the State Building Code. Gen.Laws 1956, § 23–27.3–107.2.

[2] **Appeal and Error** Sufficiency of Presentation of Questions

The appellate court will not entertain on appeal an issue that the aggrieved party did not specifically raise before the trial court.

4 Cases that cite this headnote

[3] **Appeal and Error** Sufficiency of Presentation of Questions

The aggrieved party must raise an issue in reasonably clear and distinct form before the trial justice, in order to preserve appellate review of the issue.

4 Cases that cite this headnote

[4] **Zoning and Planning** Admissibility

Even if appointment of witness, as town's alternate building official, violated State Building Code, the witness was competent to testify about his first-hand observations of campground owners' property, in town's action for injunctive relief regarding owners' zoning

and building code violations. Gen.Laws 1956, § 23–27.3–107.2; Rules of Evid., Rule 601.

[5] **Appeal and Error** Injunctive Relief

The appellate court will reverse a permanent injunction only if the hearing justice misapplied the law, misconceived or overlooked material evidence, or was clearly wrong.

[6] **Zoning and Planning** Injunctive and Other Equitable or Affirmative Relief

Injunctive relief can be an appropriate remedy for violations of zoning ordinances.

[7] **Zoning and Planning** Conclusiveness and collateral attack

After town obtained favorable decision from town zoning board of review regarding zoning violations at recreational-vehicle (RV) campground owners' property, relating to impermissible expansion of legal nonconforming use, and after owners failed to seek judicial review of board's decision, res judicata barred owners, in town's subsequent action for injunctive relief against owners relating to the previously-adjudicated zoning violations, from relitigating issues, or reasserting defenses, previously decided by the board; board, as administrative agency, had been acting in quasi-judicial capacity. Gen.Laws 1956, § 45–24–69.

4 Cases that cite this headnote

[8] **Appeal and Error** Verdict, Findings, Sufficiency of Evidence, and Judgment

The appellate court can affirm a judgment for reasons other than those relied upon by the trial court.

[9] **Res Judicata** Public policy considerations; public interest

The policy underlying the res judicata doctrine is to economize the court system's time and lessen its financial burden; the doctrine ensures that judicial resources are not wasted on multiple and possibly inconsistent resolutions of the same lawsuit.

[10] **Res Judicata** Res Judicata

Res Judicata Issues or Questions in General

Res judicata operates as an absolute bar to a cause of action when there exists: (1) identity of parties; (2) identity of issues; and (3) finality of judgment.

5 Cases that cite this headnote

[11] **Res Judicata** Claims or causes of action

Res Judicata Defenses

Res Judicata Claims or causes of action in general

When invoked, res judicata, also known as claim or defense preclusion, renders a previous judgment conclusive with respect to any claims or defenses that a party raised or could have raised in the previous proceeding.

3 Cases that cite this headnote

[12] **Res Judicata** Defenses

A plaintiff bringing successive actions against the same defendant can invoke res judicata to preclude the defendant from asserting defenses that were raised or that could have been raised in the first proceeding.

1 Case that cites this headnote

[13] **Administrative Law and Procedure** Quasi-judicial

An administrative tribunal acts in a quasi-judicial capacity when it affords the parties substantially the same rights as those available in a court of law, such as the opportunity to present evidence, to assert legal claims and defenses, and to appeal from an adverse decision.

4 Cases that cite this headnote

[14] **Zoning and Planning** Increase in amount or intensity of use

Evidence that, when town issued license to campground owners to operate with maximum of 300 campsites at campgrounds which were legal nonconforming use, owners had filed plan with town showing their intent to create 600–site campground, was irrelevant when determining scope of legal nonconforming use, for purposes of determining whether construction of road, as infrastructure supporting expanded campgrounds, constituted impermissible expansion of legal nonconforming use.

[15] **Zoning and Planning** Contemplated or intended use

To determine the extent of a legal nonconforming use, the court looks only to the uses actually existing at the time the property became nonconforming, not to any plans or intended uses for the property.

[16] **Zoning and Planning** Enlargement or Extension of Use

Generally, the right to continue a legal nonconforming use does not include the right to expand or intensify that use, even if the landowners had plans to do so when the use became nonconforming.

1 Case that cites this headnote

[17] **Zoning and Planning** Nonconforming Uses

The court strictly construes the scope of legal nonconforming uses, because the court views them as detrimental to a zoning scheme, and because the overriding public policy of zoning is aimed at their reasonable restriction and eventual elimination.

2 Cases that cite this headnote

[18] **Zoning and Planning** Nonconforming use

A general "natural business growth" exception to the requirement of obtaining a special-use permit for a proposed expansion of a legal nonconforming use is not recognized.

1 Case that cites this headnote

[19] **Zoning and Planning** Continuance or change of use in general

A change of use eliminates the exemption of a legal nonconforming use from recently enacted zoning ordinances.

[20] **Zoning and Planning** Conclusiveness and collateral attack

After town obtained favorable decisions from town building code board of appeal and from State Building Code Standards Committee sitting as Board of Standards and Appeals, regarding building code violations at individually leased campsites at recreational-vehicle (RV) campground owners' property, and after owners failed to seek judicial review of those decisions, res judicata barred owners, in town's subsequent action for injunctive relief against owners relating to the previously-adjudicated building code violations, from asserting or reasserting defenses the owners raised or could have raised before the town board and State Committee, though the complaint in the action for injunctive relief listed additional violations that had not been at issue in earlier proceedings; additional violations arose from seasonal and transient nature of owners' business, because new campers occupied campsites and built new structures of same type that State Committee had ruled were illegal. Gen.Laws 1956, § 23–27.3–127.1.4(f, g).

[21] **Appeal and Error** Ratification, estoppel, waiver, and res judicata

The appellate court may raise the doctrine of res judicata sua sponte to affirm a trial court's judgment.

1 Case that cites this headnote

Attorneys and Law Firms

***926** Karen A. Ellsworth, Esq., for Plaintiff.

Elizabeth McDonough Noonan, Esq., Providence, for Defendant.

Present: WILLIAMS, C.J., FLANDERS, GOLDBERG, FLAHERTY, and SUTTELL, JJ.

OPINION

FLANDERS, Justice.

The rural Town of **Richmond** (town) and a capacious campground for recreational vehicles furnish the factual backdrop for this dispute over alleged zoning and building-code violations. At all times material to these consolidated cases, the defendants, **Wawaloam Reservation**, Inc., James Smith, and Maureen Smith (hereinafter collectively referred to as defendants), owned and operated the **Wawaloam** Campground (campground or property) in the town. They appeal from Superior Court judgments granting injunctive relief to the town with respect to sundry zoning and building-code violations at the campground. For many years, the defendants and the town have squabbled over the defendants' alleged expansion and alteration of the campground, which exists as a ***927** nonconforming use under the town's zoning ordinance. After the town obtained favorable decisions from the local zoning board of review and from the state building-code board concerning the existence of these violations—from which decisions the defendants failed to appeal or to seek available judicial review—it successfully sued the defendants in the Superior Court to enforce them. As a result, the court entered judgments requiring the defendants to comply with the applicable building-code and zoning-ordinance provisions and to abate the violations.

Appealing from the Superior Court judgment that enjoined them to correct the previously adjudicated violations of the zoning ordinance, defendants argue that the trial justice misapplied the law by finding that they needed to obtain special-use permits to build a new road, to add an addition to one of the campground buildings, and to proceed with other alterations of their legal nonconforming use of the campground. The defendants also appeal from the judgment requiring them to abate the previously adjudicated building-code violations at the campground. In doing so, they argue that the trial justice improperly found that defendants exercised sufficient control over the individual campsites in question to compel the removal of sheds, decks, and various other structures that lacked a building permit or that were otherwise at variance with the building code.

We reject these arguments. The doctrine of res judicata bars defendants from relitigating any claims and defenses relating to the existence of the violations in question that they raised or that they could have raised either in the previous administrative proceedings concerning these matters or in any appeal from or review of the adverse administrative decisions that those proceedings produced. With respect to the new road and to any other issues not governed by the previous administrative decisions, the trial justice, we conclude, did not err in finding that these alterations to the campground lacked the requisite permits and authorizations, and therefore were unlawful. Consequently, we affirm the Superior Court's issuance of injunctive relief in both cases.

Facts and Travel

Since 1969, defendants have owned this 100–acre–plus property and operated it as a recreational-vehicle campground. Located between Gardner Road and Hillsdale Road in the northeast corner of the town, the campground includes 300 individual campsites that campers using recreational vehicles lease from defendants on a seasonal and transient basis.

1. Facts Pertinent to the Zoning Violations

The campground was originally situated in an R–80 zoning district that permitted overnight and family camping. In 1990, however, the town rezoned the property to an R–2 district and amended its zoning ordinance to prohibit overnight and family camping in all town zoning districts. At that time, the campground became a legal nonconforming use. In 1991, the town again revised its zoning ordinance to allow camping in an R–2 district, but only by special exception. Under the current zoning ordinance, the property is located in an R–2 zone, where the town permits "Outdoor Private Land Recreation * * * Camps & Campgrounds" by special-use permit. **Richmond** Municipal Code, Title 18 Zoning § 18.16.010 at 146. The town issued a license to

the campground for the 1991–1992 season on a month-to-month basis. The town issued defendants a license to operate a campground with a maximum of 300 campsites for the year ending May 31, 1993.

***928** On April 2, 1991, the town granted defendants a building permit to construct a forty-foot by eighty-foot recreation building on the campground. The defendants used this building, known as the Pavilion, to serve food to campers who were staying on the property in their recreational vehicles. The defendants, however, did not seek or obtain a special-use permit before constructing this building. In 1994, defendants applied for a building permit to construct an addition to the Pavilion. The town denied this application. Nevertheless, between 1994 and 1995, defendants built a sixteen-foot by twenty-one-foot addition to the Pavilion to add restrooms, so that the building would comply with Department of Health regulations. In January 1996, the deputy zoning enforcement officer for the town issued a zoning-violation notice, ordering defendants to remove the addition to the Pavilion or to obtain a special-use permit for the alteration of a nonconforming development. The officer issued the citation under § 18.48.030(A) of the Town of **Richmond's** Zoning Ordinance, which provides that a "[n]onconforming use of a building, structure or land may be enlarged, expanded, or intensified with the grant of a special use permit by the zoning board of review."

The defendants appealed this violation notice to the **Richmond** Zoning Board of Review (zoning board). In August 1998, the zoning board denied this appeal. Although the zoning board gave defendants leave to apply for a special-use permit, defendants failed to submit such an application. Furthermore, defendants decided not to appeal the zoning board of review's decision to the Superior Court, as they were entitled to do under G.L.1956 § 45–24–69.

Thereafter, in April 1999, the town sued defendants in Superior Court (WC 99–180), seeking a permanent injunction that would require defendants to correct or abate the addition by obtaining appropriate relief from the board or by removing the addition from the Pavilion. The town argued that, as the zoning board previously had concluded, the addition constituted an illegal alteration of the defendants' nonconforming campground use.

In June 2001, the town's deputy zoning enforcement officer, Russell W. Brown, inspected the property. During this inspection, he observed that the addition to the Pavilion remained intact and that defendants had begun building a new road on a lot adjacent to the campground. Based on these observations, the town filed another action (WC 01–313) against defendants, seeking injunctive relief to prevent defendants from constructing and completing the road. The town argued that, like the addition to the Pavilion, the new road illegally altered and expanded the nonconforming campground use.

The Superior Court consolidated these actions. In 2002, the trial justice issued a bench decision, ruling that both the restroom addition to the Pavilion and the new road serving the campground illegally expanded defendants' nonconforming use. Because defendants did not obtain special-use permits before constructing these alterations, the trial justice granted the town's request for permanent injunctive relief and ordered defendants to obtain the permits or to remove the offending structures. This appeal ensued.

2. Facts Pertinent to the Building–Code Violations

In November 1995, the town's alternate building official, John Pagliaro, cited defendants for building-code violations involving various decks, sheds, and other such structures that campers built on their individual campsites. The town sent notice of these violations to defendants, but it ***929** did not send any notice to the individual campers themselves. The defendants appealed this notice to the town's building code board of appeal, which upheld most of the violations. The defendants then appealed this decision to the Rhode Island Building Code Standards Committee, sitting as the Board of Standards and Appeals (state building-code board). In this appeal, the defendants also requested variances from the code sections cited. In 1996, the state building-code board upheld most of these violations and denied most of defendants' variance requests. Although defendants did not appeal this decision to the District Court, as they were entitled to do under G.L.1956 § 23–27.3–127.1.4(f), (g), they also failed to abate or to correct all the building-code violations at the campsites.

In 1997, the town, in its second amended complaint, [1] sought a permanent injunction that would require defendants to correct or abate the building-code violations and to terminate the unlawful use of the campsite structures in question. Some of the violations cited in the town's second amended complaint were not among those that the state-building-code board had considered in its 1996 decision. Before trial, in 2000, the town's new alternate building official, Russell Brown, once again inspected the campground and determined

that most of the structures on the individual campsites—ones that the town had cited as violations in 1995 and that the state building-code board had found to be such in 1996—remained in violation in 2000. These violations included decks and sheds that individual campsite occupants had constructed without first submitting plans or obtaining building permits to do so. In addition, some of these structures failed to use pressure-treated wood, to have footings at least one foot below grade, or to comply with applicable load-bearing requirements.

By the time the Superior Court reached this case for trial in 2001, the parties had dismissed many of the allegations by stipulation. The trial focused on the building-code violations found in a pool-house building that defendants owned and on the various structures at individual campsites. The trial justice, in a written decision, found that the pool house violated § 809.2 (currently § 1010.2) of the Rhode Island State Building Code because the deck lacked the proper number of exits. In addition, he found that various structures at certain individual campsites violated the state building code. He decided that defendants were responsible for these violations because they exercised control over the individual sites, prescribing, *inter alia,* the requisite sizes for platforms and approving sheds and the materials for their construction. He concluded that defendants "have complete control of the area and are well positioned to have campers comply with the [b]uilding [c]ode."[2] Consequently, ***930** the trial justice ordered the defendants to ensure that the individual campsites complied with the building code by August 30, 2003. This appeal ensued. At a pretrial conference, we entered an order consolidating the zoning and building-code appeals.

I

The Superior Court Properly Admitted the Trial Testimony of Russell Brown, the Town's Deputy Zoning Enforcement Officer and Alternate Building Official

[1] The defendants first contend that the Superior Court justice presiding over both cases erred in permitting Russell Brown (Brown), the town's Deputy Zoning Enforcement Officer and Alternate Building Official, to testify about defendants' zoning and building-code violations. The defendants insist that Brown was not qualified to testify because his appointment violated § 23–27.3–107.2 of the state building code, which permitted the local authority to appoint an alternate building official to act on behalf of the local building official "during any period of disability caused by, but not limited to, illness, absence, or conflict of interest."

In 2000, the town appointed Brown to serve as Deputy Zoning Enforcement Officer and Alternate Building Official. The defendants now allege that this appointment was improper under § 23–27.3–107.2 because the town's local building official was not under any disability at that time. Given this allegedly improper appointment, defendants maintain on appeal that the hearing justice erred in admitting Brown's testimony concerning defendants' zoning and building-code violations.

[2] **[3]** We rebuff this argument for several reasons. Initially, we conclude that defendants failed to properly raise the propriety of Brown's appointment at trial as an alleged reason to preclude him from testifying. It is axiomatic that we will not entertain on appeal an issue that the aggrieved party did not specifically raise before the trial court. *E.g., Harvey Realty v. Killingly Manor Condominium Association,* 787 A.2d 465, 467 (R.I.2001). "When an issue is not explicitly raised in the trial court with sufficient clarity so that the trial justice may appropriately respond to the claims of a party, we shall not consider the alleged error on appeal." *Scully v. Matarese,* 422 A.2d 740, 741 (R.I.1980). In addition, the party must raise the issue "in reasonably clear and distinct form before the trial justice." *Town of Smithfield v. Fanning,* 602 A.2d 939, 942 (R.I.1992). Here, defendants assert that they raised the issue of Brown's appointment during their *voir dire* of this witness. They also maintain that they asked him during cross-examination whether the town's regular zoning enforcement officer was "ill or incapacitated in any way." But it does not appear from the record that they specifically objected on this ground when Brown took the stand to testify, nor did they argue that Brown's improper appointment precluded him from testifying at trial. At no time did they move to strike his testimony or to bar him from testifying because of the allegedly improper manner or method of his appointment to office. ***931** Merely by asking questions during the trial that were relevant to this issue while they were examining Brown, defendants, we hold, failed to afford the trial justice an opportunity to rule on whether the manner and method of Brown's appointment disqualified him from testifying at trial. Hence, they cannot raise this issue now for the first time on this appeal.

Moreover, had defendants properly raised this issue below, the town represents that it would have introduced evidence

showing that the local building official was in fact under a disability when it appointed Brown to his office. In its brief, the town posits that it originally created the positions of Deputy Zoning Enforcement Officer and Alternate Building Official because the local building official had a conflict of interest with two of the defendants in this action.

Given defendants' failure to preserve this issue for appeal, we will not decide whether Brown's appointment violated the provisions of § 23–27.3–107.2. Avoiding such first-impression evidentiary disputes, which lack the vetting they should receive during a trial, is precisely one of the reasons why we will not permit parties to raise issues such as this for the first time on appeal. Because defendants did not object at trial to Brown's testimony or move to strike it because of his alleged unauthorized appointment, the town never had the opportunity to present evidence to counter this assertion. Therefore, we will not now entertain this argument for the first time on appeal.

[4] In any event, even assuming, *arguendo,* that the town impermissibly appointed Brown to the position of Alternate Building Official, we would still decide that the Superior Court properly allowed Brown to testify. Under the Rhode Island Rules of Evidence, trial justices have broad discretion to admit the testimony of witnesses. *See* R.I. R. Evid. 601. Nothing in Brown's testimony suggested that he was incompetent to testify about his first-hand observations of defendants' property. And defendants do not cite any statute, rule, or other authority that would limit such testimony to duly appointed zoning and building officials. Therefore, for these reasons, we hold that the Superior Court did not commit reversible error when it admitted Brown's testimony in both the zoning and building enforcement cases.

II

Defendants' Zoning Violations

The defendants next argue that the hearing justice improperly issued a permanent injunction requiring defendants to comply with the town zoning ordinance. In doing so, the trial justice found that defendants impermissibly expanded their legal nonconforming campground use without obtaining special-use permits.

[5] **[6]** We will reverse a permanent injunction only if the hearing justice misapplied the law, misconceived or overlooked material evidence, or was clearly wrong. *Renaissance Development Corp. v. Universal Properties Group, Inc.,* 821 A.2d 233, 236 (R.I.2003). Injunctive relief can be an appropriate remedy for violations of zoning ordinances. *See* *City of Woonsocket v. Forte Brothers, Inc.,* 642 A.2d 1158, 1159 (R.I.1994) (per curiam).

We discern no error in the trial justice's grant of injunctive relief. In this case, defendants' campground became a legal nonconforming use on September 4, 1990, when the town amended its ordinance to outlaw overnight and family camping in the town. Municipal zoning ordinances apply to recreational vehicle campgrounds. *See* G.L.1956 § 32–7–3(3), (5)(iv); § 32–7–5(a), (c), (d). The Zoning Enabling Act ***932** defines nonconformance as: "A building, structure, or parcel of land, or use thereof, lawfully existing at the time of the adoption or amendment of a zoning ordinance and not in conformity with the provisions of that ordinance or amendment." Section 45–24–31(49). Section 18.48.030(A) of the town zoning ordinance further provides, in pertinent part, that a "[n]onconforming use of a building, structure or land may be enlarged, expanded, or intensified with the grant of a special use permit by the zoning board of review." *See also* § 45–24–40(a)(i) (vesting municipalities with authority to require a special-use permit for enlargement of nonconforming use).

Here, it is undisputed that defendants altered the campground without first obtaining a special-use permit from the zoning board of review. Moreover, for the additional reasons stated below, we hold that the hearing justice properly determined that defendants illegally altered and expanded their nonconforming use and that he properly issued injunctive relief to remedy this illegal alteration of the campground.

1. The Doctrine of Res Judicata Barred Defendants from Relitigating Issues or Reasserting Defenses Previously Decided by the Zoning Board of Review

[7] On appeal, defendants argue that the hearing justice erred in finding that both the Pavilion addition and the road were enlargements of defendants' nonconforming use. But before addressing the merits of these contentions, we hold that res judicata precludes defendants from relitigating the propriety of the Pavilion addition. When defendants failed to appeal to the Superior Court from the decision of the zoning board of review (finding that the Pavilion addition violated the zoning ordinance), that decision became final for the purpose

of foreclosing relitigation of claims and defenses that were raised or that could have been raised in that proceeding.

[8] Because we can affirm a judgment for reasons other than those relied upon by the trial court, we invoke the doctrine of res judicata in this case to preclude repetitive litigation of claims and defenses previously decided in a final adjudicative proceeding. *See* *Merrilees v. Treasurer, State of Vermont,* 159 Vt. 623, 618 A.2d 1314, 1315 (1992) ("Allowing an appellate court to raise res judicata is consistent with policies of avoiding unnecessary judicial waste * * * and fostering reliance on judicial decisions by precluding relitigation * * *.").

[9] **[10]** **[11]** **[12]** "The policy underlying res judicata is to economize the court system's time and lessen its financial burden. 'This doctrine ensures that judicial resources are not wasted on multiple and possibly inconsistent resolutions of the same lawsuit.' " *ElGabri v. Lekas,* 681 A.2d 271, 275 (R.I.1996). "[R]es judicata operates as an absolute bar to a cause of action [when] there exists '(1) identity of parties, (2) identity of issues and (3) finality of judgment.' " *Rhode Island Student Loan Authority v. NELS, Inc.,* 600 A.2d 717, 720 (R.I.1991). When invoked, res judicata, also known as claim or defense preclusion, renders a previous judgment conclusive with respect to any claims or defenses that a party raised or could have raised in the previous proceeding. *See id.* Furthermore, a plaintiff bringing successive actions against the same defendant can invoke res judicata to preclude the defendant from asserting defenses that were raised or that could have been raised in the first proceeding. 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure:* Civil 2d § 4414 at 344–51 (2002).

***933** Here, the zoning board of review found that defendants' addition to the Pavilion building impermissibly expanded defendants' nonconforming campground use. When the defendants failed to appeal that decision to the Superior Court, it became final. Res judicata, therefore, bars defendants from reasserting this defense on appeal from the Superior Court judgment that required defendants to remove the Pavilion addition or to seek a special-use permit. Both the town and defendants were parties to the previous administrative proceeding, and defendants actually defended the propriety of the Pavilion addition before the zoning board of review. In addition, the zoning board of review's decision was tantamount to a final judgment for defense-preclusion purposes because the defendants did not appeal it. *See* *Department of Corrections v. Tucker,* 657 A.2d 546, 550 (R.I.1995) ("Since the decision of the board was not appealed, it became a final decision and was binding on both [parties]."); *Town of Lincoln v. Cournoyer,* 118 R.I. 644, 649, 375 A.2d 410, 413 (1977) (holding that unappealed decree constituted a final judgment for res judicata purposes). Finally, because the identical issue—namely, the propriety of the Pavilion addition under applicable zoning laws—was addressed in both proceedings, res judicata bars defendants from reasserting defenses that they raised or that they could have raised before the zoning board of review. "[D]irect enforcement of a judgment cannot be resisted merely by raising defenses that might have been raised before the judgment was entered." 18 Wright, § 4414 at 344. *See also* *Campbell v. Superior Court in and for the County of Maricopa,* 18 Ariz.App. 287, 501 P.2d 463, 465–67 (1972) (holding that res judicata precluded delinquent taxpayer from relitigating validity of assessment in suit brought by state to enforce collection of tax following prior administrative decision upholding assessment).

[13] In addition, we hold that, in circumstances such as these, res judicata may attach to decisions of zoning boards of review. Previously, this Court has given preclusive effect to administrative agency decisions, as long as the tribunal acted in a quasi-judicial capacity. *See, e.g.,* *Tucker,* 657 A.2d at 549–50 (granting res judicata effect to decisions of Personnel Appeal Board citing Restatement (Second) *Judgments* ch. 6, § 83 at 266 (1982)). [3] An administrative tribunal acts in a quasi-judicial capacity when it affords the parties substantially the same rights as those available in a court of law, such as the opportunity to present evidence, to assert legal claims and defenses, and to appeal from an adverse decision. *See* *id.* at 549. ***934** Here, the zoning board allowed the parties to present evidence and testimony in support of their legal arguments. Moreover, although the defendants had an opportunity to appeal the zoning board of review's adverse decision to the Superior Court under § 45–24–69, the defendants failed to prosecute such an appeal. Because the proceeding before the zoning board of review involved an administrative agency acting in a quasi-judicial capacity, we hold that res judicata precludes defendants from relitigating issues or reasserting defenses that were or could have been argued before and decided by that board. The propriety of the Pavilion addition was one such issue. Hence, defendants are precluded from relitigating the merits of that zoning violation in this case.

2. The Defendants Impermissibly Enlarged Their Nonconforming Use by Constructing a Road

[14] The defendants argue that their construction of a road to facilitate traffic flow in and around the campground did not amount to an enlargement of a nonconforming use. Instead, they suggest, the road was merely incidental to defendants' lawfully managing and maintaining their campground. Also, according to defendants, the hearing justice overlooked material evidence demonstrating that they had the right to expand their nonconforming use to 600 campsites without obtaining special-use permits. At trial, one of the defendants testified that in 1969—the year the town first issued a license to defendants to operate a campground—defendants filed a plan with the town showing a 600–site campground.[4] She further testified that the town approved this plan. Because this plan put the town on notice in 1969 of defendants' intent to create a 600–site campground, defendants argue, they may now increase the number of campsites to 600—and construct all the infrastructure needed to serve such a campground, including the road in question—without obtaining a special-use permit.

[15] We reject this argument. Even if the hearing justice had overlooked material evidence—and we have no basis to conclude that he did—defendants' 1969 expansion plans were irrelevant to the issue of whether they needed to obtain a special-use permit to enlarge their nonconforming use. No competent evidence showed that the town approved the alleged plan to expand the campground to 600 campsites. To determine the extent of a nonconforming use, we only look to the uses actually existing at the time the property became nonconforming, not to any plans or intended uses for the property. 7 Patrick J. Rohan, *Zoning and Land Use Controls* § 41.03[3][c] at 41–92 (2002).

[16] **[17]** The defendants' campground became a legal nonconforming use in 1990. Generally, "the right to continue a nonconforming use does not * * * include the right to expand or intensify that use," *Town of West Greenwich v. A. Cardi Realty Associates,* 786 A.2d 354, 362 (R.I.2001)—even if the owners had plans to do so. A use of property does not obtain the protection afforded by its status as a legal nonconforming use unless the use actually existed at the time the ordinance prohibiting it took effect. *See id.* at 361–62. We strictly construe the scope of nonconforming uses because we view them " 'as detrimental to a zoning scheme, and the overriding public policy of zoning * * * is aimed at their reasonable restriction and ***935** eventual elimination.' " *RICO Corp.,* 787 A.2d at 1144–45.

The defendants' legal nonconforming use, therefore, only protects those campground uses actually existing on their property in 1990.[5] Even assuming that defendants originally intended in good faith to increase the number of campsites to 600 and that they had filed plans with the town that so indicated, this intent has no bearing on whether defendants needed to obtain a special-use permit to actually construct and use such additional sites. *See Misner v. Presdorf,* 421 N.E.2d 684, 685–86 (Ind.Ct.App.1981) (limiting nonconforming use of campsite to those uses actually existing when town rezoned campsite property, not uses campsite owners intended). Moreover, defendants could not expand the number of campsites—and also construct the necessary infrastructure—even if they had produced evidence showing that the town council approved a 600–site campground in 1969. *See Llewellyn's Mobile Home Court, Inc. v. Springfield Township Zoning Hearing Board,* 86 Pa.Cmwlth. 567, 485 A.2d 883, 885 (1984) (determining scope of nonconforming use by the number of mobile homes existing, not the number shown on the plans). Therefore, even if the hearing justice overlooked material evidence of defendants' intent, he did not err because this intent was irrelevant to the scope of defendants' nonconforming use.

[18] Citing a Superior Court decision,[6] defendants next assert that they did not need a special-use permit to construct a road because this alteration of the campground was merely "the result of natural business growth." But we have never recognized a general "natural business growth" exception to the requirement of obtaining a special-use permit for a proposed expansion of a nonconforming use. In *A. Cardi Realty Associates,* 786 A.2d at 362, we held that, under the doctrine of diminishing assets, a court considering the expansion of a nonconforming use must look to the intent of the landowner, not the extent of excavation, at the time the zoning ordinance prohibiting the use took effect. In this case, however, defendants' nonconforming use and their proposed expansion involved campsites, not excavating natural resources. Accordingly, our reasoning in *A. Cardi Realty Associates* is totally inapposite. Moreover, there is no general "natural business growth" exception to the rule that nonconforming uses are to be strictly limited to those existing when the uses become nonconforming.

[19] Equally unpersuasive is defendants' attempt to distinguish between merely changing and expanding a nonconforming use. " 'A change of use eliminates the exemption of a nonconforming use from recently enacted zoning ordinances.' " *Harmel Corp. v. Zoning Board of Review of Tiverton,* 603 A.2d 303, 306 (R.I.1992); *see* *Santoro v. Zoning Board of Review of Warren,* 93 R.I. 68, 71–72, 171 A.2d 75, 77–78 (1961). The town, however, never has alleged that the defendants changed their nonconforming use and thereby eliminated its exemption as a nonconforming campground use. Instead, the town argues ***936** only that defendants needed to obtain a special-use permit before altering or enlarging their legal nonconforming use. We agree.

For these reasons, we hold that the trial justice properly issued an injunction in the zoning-enforcement case requiring defendants either to obtain special-use permits to enlarge their nonconforming campground use or to remove the new road and the Pavilion addition to the campground.

III

Building–Code Violations

[20] The defendants also challenge the injunction ordering them to abate various building-code violations at the campground. The defendants contend that they do not control the individual campsites in a manner sufficient to effectuate the terms of the injunction and that the trial justice erred in relying on vague and ambiguous portions of the state building code. [7] Once again, however, we have no need to reach the merits of defendants' arguments because res judicata bars their attempted relitigation here.

[21] As discussed above, we may raise the doctrine res judicata *sua sponte* to affirm a trial court's judgment. *See* *Merrilees,* 618 A.2d at 1315. In this case, we hold that res judicata precludes defendants from relitigating defenses that were raised or that could have been raised in the previous code-violation proceeding before the state building-code board. Here, the identity of the parties was the same in both proceedings. Also, the state building-code board's decision upholding the alleged building-code violations became the equivalent of a final judgment when defendants did not appeal it under § 23–27.3–127.1.4(f), (g). *See* *Tucker,* 657 A.2d at 550.

We also hold that because the issues in both proceedings were identical, res judicata bars defendants from reasserting defenses that they raised or that they could have raised before the state building-code board. Even though the second amended complaint listed some additional violations at individual campsites that were not at issue in the first proceeding, both proceedings involved identical issues—namely, whether structures built by campers on individual campsites violated the building code. These additional violations arose from the seasonal and transient nature of defendants' business; that is, new campers occupied the campsites and built new structures of the same type that the state building-code board had ruled were illegal in the previous proceeding. Despite these new offending structures, defendants had the opportunity to argue that these kinds of structures on individual campsites and erected by campers did not violate the building code. Therefore, defendants are foreclosed from reasserting that defense in this proceeding.

For the foregoing reasons, we hold that res judicata bars the defendants from raising any argument or defense suggesting the defendants' lack of responsibility for removing these structures from individual campsites. The parties already litigated this issue before the state building-code board during the previous proceeding. Although the record before us does not show whether, in the previous proceeding, the defendants' actually argued all the building-code issues and defenses asserted in their brief, such as the alleged vagueness and ambiguity of the state building code, ***937** res judicata bars the relitigation of defenses that were raised or that could have been raised in that previous proceeding. Accordingly, we hold that the defendants cannot reassert these defenses on this appeal because they could have and should have been raised in the proceedings before the state building-code board or in a timely appeal from the board's decision that upheld the violations.

Conclusion

Filing a notice of appeal or seeking discretionary review from the appropriate court is the proper way to obtain relief from an adverse decision before an administrative agency, board, or body. Here, the defendants neglected to appeal or to seek judicial review of various adverse administrative decisions by the zoning board of review and by the state building-code board concerning the existence of zoning and building-code violations at the campground. By allowing these decisions

to become final, the defendants subjected themselves to the doctrine of res judicata, barring them from relitigating those violations here. Moreover, with respect to the new road and to other attempts to alter or expand the campground, the trial justice did not err in finding that the defendants violated the applicable zoning and building-code provisions. Therefore, for the foregoing reasons, we affirm the Superior Court judgment granting injunctive relief in both cases in favor of the town.

All Citations

850 A.2d 924

Footnotes

1 The town initially filed a complaint against defendants in 1993, alleging failure to obtain a travel-trailer license and alleging the existence of a nuisance. The town then amended this complaint to include claims pertaining to site improvements and to the keeping of animals. The town dropped all these claims in the second amended complaint.

2 In reaching this conclusion, the trial justice relied on evidence showing that defendants were proactive in overseeing campsite alterations and the types of structures that campers wanted to build on their sites. He pointed to the following excerpt from defendants' Rules and Regulations:

> "Alterations, such as platform, sheds, etc., must be approved by the office before being erected. Platforms must be no wider [than] 8 feet and no longer than the length of your trailer. They must be built in 4X8 foot sections, bolted underneath, to provide easy maneuverability in the event one must be relocated. The platforms should be made from pressure treated or other approved wood and should remain close to the ground. PLEASE ask questions before beginning to build something that could end up costing a lot of money if done incorrectly. We can answer your questions. Don't hesitate! Also, don't forget that cement platforms are always an option. Seasonals are allowed one shed per site. The shed must be no larger than 8X10 feet."

Based on this evidence, the trial justice found that defendants exercised sufficient control over the individual campsites to cause the campers to comply with the building code. We concur and affirm this finding.

3 Just as we have applied the doctrine of administrative finality to the decisions of zoning boards of review, *see, e.g.,* *RICO Corp. v. Town of Exeter,* 787 A.2d 1136, 1143 n. 7 (R.I.2001) (collecting cases), the final results of proceedings before such boards are also subject to the effect of other preclusive doctrines, such as res judicata. In 1964, this Court cautioned that applying res judicata to decisions of zoning boards of review might "deny[ ] a landowner once refused relief the right to a reconsideration of an application based upon intervening circumstances resulting in a deprivation of all beneficial use of his property." *Marks v. Zoning Board of Review of Providence,* 98 R.I. 405, 406, 203 A.2d 761, 763 (1964). Although we acknowledge this risk, we caution that a zoning decision should be given preclusive effect in later proceedings only if the issues in both proceedings were identical. See *Lavoie v. Victor Electric,* 732 A.2d 52, 54 (R.I.1999) (per curiam) (refusing to apply res judicata when petitioner asserted that injury underlying initial petition for review was different from injury underlying subsequent petition for review). If an intervening change in circumstances is so

significant as to deprive a landowner of all beneficial use of his or her property, the issues in the proceedings will not be identical for res judicata purposes. But here, no such intervening changes have occurred.

4 The defendants did not introduce this plan into evidence because they did not retain a copy of it and the copy they filed with the town disappeared from the town records before 1998.

5 In 1990, the town licensed defendants to operate 250 campsites. Under the town's ordinance, defendants needed to obtain a special-use permit to increase the number of campsites. But in 1992 the town erroneously issued a license for 300 sites. The town concedes that this was an error, but it has not taken any steps to reduce the number of sites below 300. Therefore, we deem 300 campsites to be the number of campsites that are permitted at the campground by their status as a legal nonconforming use.

6 *Town of West Greenwich v. A. Cardi Realty Associates,* No. KC 90–776, 1999 WL 615741 (R.I.Super.Ct. Aug. 6, 1999).

7 The defendants do not challenge the trial justice's finding that the pool house violated § 809.2 (currently § 1010.2) of the Rhode Island State Building Code because it lacked the requisite number of exits.

2004 WL 2813763
Only the Westlaw citation is currently available.

Superior Court of Rhode Island.

Patricia SPRAGUE,
v.
ZONING BOARD OF REVIEW OF THE TOWN OF CHARLESTOWN, Michael Rzewuski, in his capacity as Chairman of the Zoning Board of Review Of the Town of Charlestown, and William Counter, Milton Krantz, Ronald Crosson, and Raymond Dreczko, in Their capacities as Members of the Zoning Board Of Review of the Town of Charlestown, and Beechwood Enterprises, Inc.
CAROLINA COMPACT, LLC
v.
ZONING BOARD OF REVIEW OF THE TOWN OF CHARLESTOWN, Michael Rzewuski, in his capacity as Chairman of the Zoning Board of Review Of the Town of Charlestown, and William Counter, Milton Krantz, Ronald Crosson, and Raymond Dreczko, in Their capacities as Members of the Zoning Board Of Review of the Town of Charlestown, and Beechwood Enterprises, Inc.

No. 2002-0254, 2002-0255.
|
Sept. 21, 2004.

CONSOLIDATED DECISIONS

LANPHEAR, J.

***1** The above captioned matters are companion cases before the Court on appeal from a single decision of the Zoning Board of Review for the Town of Charlestown. ("Zoning Board" or "Board"). Both cases have to do with the Board's reversal and remand, with instructions to approve, of a Charlestown Planning Commission ("Planning Commission" or "Commission") decision denying the Master Plan of a residential subdivision and major land development project proposed by defendant Beechwood Enterprises, Inc. ("Beechwood"). It is uncontested that Appellants Patricia Sprague ("Sprague") and Carolina Compact, LLC, ("Carolina Compact" or "Carolina") as abutting landowners, are parties aggrieved by the Board's decision. [1] Because both appeals contest the propriety of this single decision based solely upon statutory and ordinance provisions, this Court, in furtherance of judicial economy and to promote clarity, consolidated these cases upon motion by Order of November 18, 2002. This Order is a part of the record in both files.

BACKGROUND

At the outset, this Court is compelled to observe the poor state of the record filed with this court. Section 45-23-67 of the Rhode Island Land Development and Subdivision Review Enabling Act of 1992, G.L.1956 § 45-23-25, *et seq,* ("Development Review Act") requires the planning board to transmit to the board of appeals "all papers, documents and plans, or a certified copy thereof, constituting the record of the action which is being appealed." Similarly, upon a subsequent appeal to this court, § 45-23-71 requires the board of appeals to file "the original documents acted upon by it and constituting the record of the case appealed from, or certified copies ..., together with any other facts that may be pertinent, with the clerk of the court...." These records must be complete. In order for this court to assess the completeness of the record, it is elementary that any exhibits presented before the planning board or zoning board of review be marked and identified. Here, the record transmitted to the court, though containing a "Table of Contents," was disorganized and, in fact, the order of documents did *not* correspond to the order indicated in that "Table of Contents." Further, while two documents purport to be exhibits 4 and 5, as submitted to the planning board, no other documents are numbered as exhibits-leaving it to this Court to sift through and decipher the records and the role each played in the prior proceedings, as evidenced by the Planning Commission *Minutes.* This Court observes that the failure to employ proper record keeping procedures may rise to such a level as to impair judicial review and, further, to evidence procedural deficiencies prejudicing one or more parties. When these concerns materialize the decision appealed from is subject to reversal or, at the very least, a remand for further proceedings is required. Nonetheless, the Court finds the record adequate to address the appeal. [2]

***2** In May 1999 Beechwood Enterprises filed a pre-application for conceptual review by the Planning Commission pursuant to G.L. § 45-23-35. [3] Beechwood

proposed construction of a 25 lot residential subdivision for land located off of Route 112 in Charlestown, Rhode Island, designated as Assessor's Plat 28, Lot 82-1. Due to several, successive development moratoria enacted by the Planning Commission, concept plan review was not conducted until July 24, 2000. [4]

After meetings on July 24, August 16, and December 20, 2000, the Commission indicated its approval of a "cluster plan" development of 24 lots with a 100 foot perimeter buffer. (*Record,* Item 17, "Document T: Conceptual Approval" (Dec., 26, 2000)). [5] The Commission required that the Applicant submit "in writing the fire district recommendations on second or emergency access," as well as all submissions required by the "Master plan checklist" provision of the Ordinance. *See Ordinance* § 188-32.C. Further, the Board notified Beechwood that it would have to address certain concerns of the State Conservation Commission and provide an environmental impact analysis addressing all of the items included in the *Ordinance,* "unless obviously not applicable." [6]

A subsequent meeting was held before the Commission on June 20, 2001, at which Beechwood requested that the subsequent subdivision review stages, i.e., Master and Preliminary Plan Review, combined pursuant to *Ordinance* § 188-32.A. and G.L. § 45-23-39(c). (*Minutes,* Charlestown Planning Commission, "Carolina Farms-Major Subdivision" (Jun 20, 2001)). [hereinafter *Minutes*]. The Commission granted Beechwood's request. However, the Commission and Beechwood agreed that the application was incomplete. [7] Therefore, Beechwood and the Commission agreed that the remainder of the 60-day time period for certification of completeness, *see* G.L. §§ 45-23-40(b) and 41(b), would be tolled until Beechwood submitted all of the items required by the Planner in a list to be provided by him.

The Charlestown Town Planner, James Lamphere ("Planner"), certified Beechwood's application for combined Master and Preliminary Plan Review as complete on September 14, 2001. (*Record,* Item 17, "Certificate for Completion," (Sep. 14, 2001)). Included in the application were, *inter alia:* a site analysis describing the sites environmental features (*Record,* Item 17, Doc. J); an environmental analysis discussing the predicted impacts of the project, including its impact on public services and traffic (*Record,* Item 17, Doc. U); a soil erosion and sediment control plan (*Record,* Item 17, Doc. R); and a comprehensive packet of stormwater drainage calculations (*Record,* Item 17, Doc. Q).

Also included in the application packet was a letter from the Rhode Island Historical Preservation & Heritage Commission. The letter is self-identified as an "advisory opinion ... regarding the archaeological sensitivity of the project area." (*Record,* Item 17, Doc. P, *Letter from Edward Sanderson, Executive Director, Deputy State historic Preservation Officer to Evelyn Smith, Beechwood Enterprises, Inc.* (Feb. 20, 2001)). The letter indicated that the site "may contain significant archaeological remains" dating from the post-1709 use of the site as part of a Narragansett Indian Reservation. *Id.* The Commission advised that "a Phase I(c) archaeological survey be conducted to determine the presence of such sites...." *Id.* Beechwood had provided no archaeological survey when the Planner certified the application complete for purposes of the combined Master/ Preliminary Plan Review (or anytime thereafter).

***3** An initial, non-public meeting was held regarding the application on September 19, 2001. At that time, the Planner indicated concerns regarding the size and location of a proposed emergency access easement, which Beechwood proposed in lieu of a second principal means of ingress and egress. Also at that time, the Commission agreed that the Applicant could pay a fee rather than dedicating land for recreational use by future subdivision residents. [8] However, the Commission did not waive the requirement of a 100 foot, open space perimeter buffer; as to this the Commission suggested that an easement-in addition to the proposed emergency access road-be created through Lots 18 and 19 to provide residents with an access to the open space, in addition to that provided by the emergency access easement.

Finally, and importantly, the Commission "discussed whether or not it is fair to require this applicant to have underground utilities, when other recent subdividers have not been required to have underground utilities, and came to the conclusion that they will not be required to have underground utilities at this point." (*Minutes,* p. 4 (Sep. 19, 2001)). [9]

At a hearing on October 17, 2001, Applicant presented evidence in favor of its application. Issues discussed at the hearing included environmental issues, such as whether a vernal pool existed on the property [10] and proposed re-vegetation of the property after construction; abutters' concerns that underground utilities should be required; and

the conformity of the subdivision with the Town's subdivision and zoning area requirements.

Most pertinent to this appeal, Applicant presented the testimony of Christopher Mason, an expert in planning and wetlands who had prepared Applicant's "Environmental Analysis." Among other things, Mr. Mason testified to the project's proposed "Amber Way" access to Route 112. Mr. Mason testified that applicant's design was consistent with the Comprehensive Plan and good planning practices. He testified that, given prevailing traffic conditions, the sight distance for vehicles traveling on Route 112 and approaching Amber Way was suitable. He testified that "[p]eople tend to travel faster than the posted speed limit, but ... there is a good site [sic] distance from either direction." (*Minutes,* p. 4 (Oct. 17, 2001)). He further testified that the additional traffic from the subdivision would not affect the flow of traffic on Route 112. (Applicant also presented a letter from the Town's fire chief finding a single principal access with an emergency access road to be adequate. (*Minutes,* p. 4 (Oct. 17, 2001) [11]).

Mr. Mason was cross-examined on October 29, 2001, by Attorney Paul Singer, representing The Carolina Compact. Mr. Singer cross-examined Mr. Mason on most aspects of the "Environmental Analysis." As to traffic conditions, Mr. Singer questioned whether Mr. Mason was aware of the Town's rush hours, periods when traffic flow would be particularly heavy. Mr. Singer questioned whether Mr. Mason's prediction of 192 trips per day entering and leaving the subdivision "would not improve that rush hour." Mr. Mason replied that it would not "improve" it. (*Minutes,* p. 7-8 (Oct. 29, 2001)).

***4** Mr. Singer also used the opportunity to highlight the proposed subdivision's cost to the Town, questioning Mr. Mason as to the content of the "Cost/Benefit Analysis" section of his "Environmental Analysis." (*See Record,* Item 17, Doc. U). [12] Thus, Singer pointed out that Mr. Mason predicted that the annual school expenditures by the Town would total $152,418, and non-school expenditures would total $52,640; whereas tax revenues from the subdivision would amount only to $87,448. Singer observed that over a fifty year period the cost to the Town would exceed $5 million. (*Minutes* p. 8 (Oct. 29, 2001)).

At the next hearing, on November 29, 2001, Mr. Singer presented the testimony of Town Police Chief Thomas Sharkey. The Chief testified that when traveling southbound on Route 112 the sight distance to the proposed Amber Way was less than 300 feet. (*Minutes,* p. 1 (Nov. 29, 2001)). His conclusion was based on the presence of a "crown in the road," which he alleged obfuscated the sight distance. *Id.* at 1-2. Chief Sharkey testified that recent Department of Transportation surveys showed that, despite a posted speed limit of 35 mph, 85% of vehicles on Rt. 112 traveled between 42 and 47 mph, and the other 15% travel in excess of that. *Id.* The Chief testified that, based upon his familiarity with traffic and highway safety, for a vehicle moving "at 300 feet traveling at 40mph there would not be enough time to stop." *Id.* at 2. However, Applicant presented the testimony of Mr. Donald Jackson, who designed the Amber Way entrance. Mr. Jackson testified that the plan was designed for a 40 m.p.h. sight distance, "braking on wet pavement," and that there was adequate sight distance for this speed. *Id.* Chief Sharkey himself had previously inspected the entrance/exit site and found that it was adequate for the neighborhood and, as he reported in a letter to the Planner, had no objections to its location." (*See Record,* Item 17, Doc K-4, *Letter from Tom Sharkey to James Lamphere,* received Sept. 14, 2001)). When questioned by Applicant, the Chief responded that his new testimony was based upon the fact that actual speeds on Route 112 were higher than posted speed. (*See Minutes* at 2 (Nov. 29, 2001)).

Bruce Goodsell, the Assistant Town Solicitor, advised the Commission that it was inappropriate to consider vehicles that violated the law by traveling in excess of the posted speed. *Id.* at 3.

Also at the November 29, 2001 hearing, a representative of the Narragansett Indian Historic Preservation Office expressed concern over the need for an archaeological survey, as recommended by the state Historic Preservation Commission. After some discussion, one of the Commissioners motioned to follow the HPC's recommendation and to require a survey. *Id.* at 3. Another of the Commissioners expressed her confusion that she thought the Commission had already required a survey, as part of the "Environmental Analysis," when it granted Concept approval on December 20, 2000. After some discussion the motion was withdrawn on the understanding that the Commission could approve the plan subject to a subsequent archaeological survey. (*See Minutes* at 4 (Nov. 29, 2001)).

***5** At the November 29 hearing the issue also came up that Applicant's pending Physical Alteration Permit ("PAP")-for construction of the Amber Way entrance and subdivision streets-was submitted to the R.I. Department of

Transportation ("DOT") with erroneous information. This was confirmed at the next hearing on December 12, 2001. Applicant's initial PAP application showed a posted speed of 30 m.p.h. on Route 112, but the actual posted speed was 35 mph. Applicant stated that a corrected PAP application was already submitted to the DOT. (*Minutes,* p. 1 (Dec. 12, 2001)).

Other issues discussed at the December 12, 2001 hearing included lot design, land slope contours, [13] the possibility of an archaeological survey as a condition of approval, Applicant's soil erosion control plan, and, again, whether underground utilities would be appropriate.

The next meeting was held on January 3, 2002. At that meeting, the Commissioners discussed that Applicant would be using portions of the subdivision's perimeter buffer for stump dumps, a drainage easement, and as part of the emergency access easement. The Commissioners expressed concern that these structures would defeat the purpose of the buffer as an audio-visual screen.

The Planning Board Decision

On January 10, 2002 the Planning Commission moved to approve the project application with various conditions of approval proposed by the applicant. These included that the Applicant provide permanent bounder markers along the boundary of the parcel, that the Amber Way entrance be landscaped in accordance with subdivision regulations, that proposed curb cuts be shown on the final plan, and that the Applicant be required to plant trees should the Commission deem natural vegetation to be insufficient. The list also required the applicant to secure a Physical Alteration Permit from the R.I. DOT, and conduct a Phase I(c) archaeological survey. The Town Planner recommended that the combined plan be approved with these "conditions of approval." Thereafter, the Commission voted to include a condition of underground utilities, an issue which was raised during the hearings by concerned abutters, but which, again, the Commission had stated would not be required." (*Minutes,* p. 4 (Sep. 19, 2001).

The vote to approve failed 3-2, even with the condition of underground utilities. *See* G.L. § 45-23-63(d). [14] The Commission's decision was embodied in a letter of January 16, 2002, addressed to Ms. Evelyn Smith of Beechwood Enterprises, Inc., and written by the Planning Commission Clerk. (Appellee Beechwood Enterprises, Inc.'s, Memorandum of Law, W.C. Nos. 02-0254, 02-0255 Exhibit 1 (Apr. 2, 2003)). The letter is not a part of the certified record and does not include findings of fact. Rather, the only basis set forth for the decision was the concerns expressed by Commissioner Platner during the January 10, 2002 meeting. It is noteworthy that the letter is a mere recital of the minutes of the meeting.

***6** Commissioner Platner premised her vote of denial on the absence of a physical alteration permit for the State Department of Transportation, and the lack of Phase I(c) archaeological survey. She also cited the Town Police Chief's concern that the location of the proposed Amber Way was a public safety issue, and an abutter's concern that the location of the emergency access road was "very close to the abutter." However, Platner concluded that "she does not think the plan would be denied if it were complete."

The bases of the remaining two Commissioner members, recounted in the *Minutes* of January 10, 2002, were much more vague. Commissioner Arnold denied because, he concluded, the

> traffic issue is unsafe, the buffer as a stump dump is improper, the question of who will maintain Lunar Way, [15] the [Narragansett Indian] Tribe should also have the opportunity to survey the entire parcel before any disturbance, and the uncertainty of the school system in the next few years. (*Minutes,* p. 7 (Jan. 10, 2002).

Commissioner Mello voted to deny because there were "too many unanswered questions, too many conditions of approval." He referred specifically to missing the Physical Alteration Permit and the lack of an archaeological survey. *Id.* Further, he felt that "the proposed subdivision does not adhere to good planning practices and that it violates the Comprehensive Plan and Subdivision Regulations, and must err on the side on [sic] conservation." *Id.* However, neither Mr. Arnold nor Mr. Mello offered any factual findings in support of their conclusions.

The Board of Appeals Decision

Beechwood timely appealed the decision to the Charlestown Zoning Board, sitting as the platting board of appeals. Beechwood claimed prejudice on resulting from the improper inclusion of a condition requiring underground utilities. [16] Beechwood also claimed that the Planning Commissioner's bases for denial were in clear error of law, lacked support by the weight of the evidence of the record, and resulted in prejudicial procedural error to Beechwood.

After hearings on March 12, 2002 and April 9, 2002, the Board met for decision on April 15, 2002. The Board's decision is memorialized in a letter of April 19, 2002, addressed to Mr. and Mrs. Smith of Beechwood Enterprises, Inc., and written by the Zoning Board of Review & Appeals' Clerk. (*See Record,* Item # 21).

The Board addressed the various reasons provided for the Commissioners' decision, unanimously voted to overturn, and remanded the application to the Planning Commission "for approval with all conditions agreed upon, with the exception of underground utilities." *Id.* at 5.

Now before the Court is the appeal of Patricia Sprague and Carolina Compact, Inc. Appellants allege that Applicant's failure to provide an archaeological survey or proper Physical Alteration Permit were valid grounds for denial. Further, Appellants contend that the zoning board of appeals substituted its opinion for that of the Planning Board, because the latter had sufficient evidence to find that the proposed Amber intersection created a safety hazard, to find that the subdivision would have an adverse impact upon the Town's school system, and to find that the perimeter buffer would not function as a true visual buffer. Alternatively, Appellants contend, the Board abused its discretion by remanding for final decision rather than for further consideration.

STANDARD OF REVIEW

***7** The standard of review for this Court's reviews of zoning board decisions, where that board is acting as the appellate authority on planning board decisions, is articulated in R.I. Gen. Laws 1956 § 45-23-71(c), which states:

> (c) The court shall not substitute its judgment for that of the planning 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, ordinance or planning board regulations provisions [sic];
>
> (2) In excess of the authority granted to the planning board of review by statute or ordinance;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of [sic] 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.

Thus, this Court does not conduct a de novo review, but "is limited to a search of the record to determine if there is any competent evidence upon which the agency's decision rests...." *Restivo v. Lynch,* 707 A.2d 663, 665 (R.I.1998) (quoting *E. Grossman & Sons, Inc. v. Rocha,* 118 R.I. 276, 285-86, 373 A.2d 496, 501 (1977)).

Rhode Island General Laws 1956 § 45-23-70 provides that standard of review that the zoning board ("zoning board" or "Board"), when sitting as the board of review for planning commission decisions [17] ("planning commission" or "planning"), must adhere to. Section 45-23-70(a) provides, in part, that:

> 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.

Thus, under the Development Review Act of 1992 the zoning board of appeal no longer functions as a " 'super'

planning board" entitled to entirely disregard the planning board's findings, as it once could. *See* *E. Grossman,* 118 R.I. at 282, 373 A.2d at 500. [18] The Board may reverse a decision only if the planning board has made an error of law, if there was a procedural defect that resulted in prejudice to the appellant. Further, though the Board must not substitute its own judgment as to the findings made by the planning commission as to conflicting, competent evidence, [19] where those findings nonetheless do not support the planning commission's *decision* or are in "clear error," the zoning board may properly reverse the commission's decision.

***8** In instances, where the Commission's findings do not support the decision or are in clear error, Section 45-23-70(c) directs that:

> [i]n the instance where the board of appeal overturns a decision of the planning board or administrative officer, the proposed project application is remanded to the planning board or administrative officer, at the stage of processing from which the appeal was taken, for further proceedings before the planning board or administrative officer and/or for the final disposition, which shall be consistent with the board of appeal's decision.

Further, G.L. § 45-23-60(a) requires that the approving authority make positive findings to the effect that:

> (1) The proposed development is consistent with the comprehensive community plan and/or has satisfactorily addressed the issues where there may be inconsistencies;
>
> (2) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance;
>
> (3) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval;
>
> (4) 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.... Lots with physical constraints to development may be created only if identified as permanent open space or permanently reserved for a public purpose on the approved, recorded plans; and
>
> (5) All proposed land developments and subdivision lots have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered in compliance with this requirement.

Where the planning commission denies an application without making express findings of fact in its written decision, on a particular issue, the Board may remand for "final disposition" where that issue was not a basis of the Commission's denial. *See Craig v. J.F. Smith Builders, Inc.,* 2002 R.I. Super Lexis 178 (Gagnon, J.). [20]

ANALYSIS

I. *Archaeological Survey*

Among the Commissioners' bases for denial was the absence of an archaeological survey. The zoning board of appeals concluded that to deny subdivision approval because of this was prejudicial procedure error. Appellants disagree. For the following reasons, this Court finds that the zoning board of appeals decision was supported by the substantial, reliable, and probative evidence of the record, was neither arbitrary nor capricious, and was in accord with existing law.

The *Ordinance* mandates that the Commission require an "applicant to submit an environmental analysis of the proposed development" if one of several conditions are found to be met. § 188-19(A). One of these is that the Commission "finds a reasonable cause that the proposed development will have a negative impact on the natural or man-made environment on the property or upon nearby properties...." § 188-19.A.(11). The Commission generally must inform an applicant that an analysis will be required at the conceptual stage, though "[the] Commission reserves the right to require an environmental analysis at later stages if it finds environmental resources that may be threatened by the proposed development." § 188-19.(11).

***9** Here, the Board required, as part of its conceptual approval on December 20, 2000, that the applicant submit an environmental impact analysis addressing all of the items included in the Ordinance. One of the items is the potential impact of the site upon "historic/archaeologic sites." § 199-19.B.(2)(c). However, the *Minutes* indicate that the applicant was not required to address items that were "obviously not applicable." Importantly, the analysis was required at the December 20, 2000 hearings, two months before the state Historic Preservation Commission recommended an archaeological survey.

Even after receiving the HPC letter, the Planner certified the application as complete, on September 19, 2001, though no archaeological survey was submitted. Moreover, the *Minutes* reveal that the Commission expressed a noncommittal attitude toward the pre-requirement of a survey throughout the hearings. On November 29, 2001, one of the Commissioners requested that a survey be required; however, the motion was withdrawn on the understanding that a survey could be made a condition of any approval given. And, as late as December 12, 2001, the Commission's Chair stated the Commission intended to require the survey as a "condition of approval." *Minutes* (Dec. 12, 2001). Thus, despite the Commission's requirement of a full environmental analysis, this Court cannot conclude that this Applicant was derelict in not providing an archaeological survey as part of the environmental analysis where the record shows that the Commission did not initially contemplate an archaeological survey and the Planner certified the application as complete without further notification of the delinquency.

Importantly, while a Planner's certification does not generally preclude the Commission from requiring additional information "specified in the regulations but not required by the administrative officer," G.L. § 45-23-36(c), here the Commission prejudiced the applicant by combining both master and preliminary review without first assuring that all necessary materials were submitted. The planning commission may combine review stages only after *"the planning board* determines that all necessary requirements have been met by applicant." G.L. § 45-23-39(c). (Emphasis added). [21]

On June 20, 2001, the Commission signified that master/preliminary plan review could be combined subject to applicant's supplying the additional information specified in a list to be prepared by the Planner. When the Commission later discovered that it improperly determined that all necessary requirements were met-or, here, improperly vested the Planner with that determination-the proper result was to issue a conditional approval or to extend the time for action upon conferral with the applicant, as authorized by G.L. § 45-23-41(f). *See also* G.L. § 45-23-36(d). This would ameliorate the prejudice caused to applicant by the Commission's premature consolidation of master and preliminary review. Instead, three of the Commission members voted to deny the application because no archaeological survey was submitted and the 120 day period to act on the combined plan was running out.

***10** This Court finds that, under the facts of this case, the record substantiates the zoning board's determination that the planning Commission committed prejudicial procedural error when it denied the approval of Applicant's *combined* Master/Preliminary plan because of the absence of an archaeological survey.

II. *Physical Alteration Permit*

Two of the three Commissioners who voted to deny cited the absence of a final Physical Alteration Permit as a basis for their decision. Beechwood argues that the zoning board of appeals properly determined that this was an invalid basis because the Planning Board had the authority and duty to extend the 120 day decision period to afford Beechwood to secure the application or, alternatively, to approve the proposed subdivision with a condition of PAP approval. Appellants argue that a PAP is a prerequisite to approval and that the Commission has discretion, but not the obligation, to extend the time for approval if the applicant agrees.

R.I.G.L. § 45-23-41(f) provides that the Commission shall, approve with conditions, or deny an application for preliminary review within 120 days from the date it is certified as complete, "or within such further amount of time that may be consented to by the developer." § 45-23-41(a)(2) states that, for preliminary review, an applicant shall submit "all permits required by state or federal agencies prior to commencement of construction, including permits related to ... connections to state roads." Further, *Ordinance* § 188-33(B)(7)(e)(9) specifically requires a physical alteration permit for preliminary review. Here, Beechwood submitted an application without the necessary DOT approval. Despite this, the Planner certified the application as complete for combined Master/Preliminary Plan Review, thereby beginning the 120 day period.

In the instant case, the incorrect, initial PAP application was flawed because of Beechwood's error. Despite the absence of a required PAP, the Planner certified the application as complete. Nevertheless, the Commission is authorized to require "correction of any information found to be in error and submission of additional information specified in the regulations ..., as is necessary to make an informed decision." G.L. § 45-23-36(c). When the Commission does so, it may postpone review with the consent of the applicant. G.L. § 45-23-36(d). In such cases, the period for review is stayed and resumes where the Planner or the planning board determines that the required information is complete. *Id.*

Here, the *Minutes* clearly show that Beechwood requested and consented to an extension of time in order for Beechwood to reconsider its denial and so that Beechwood could "come back to answer any additional concerns [the Commissioners] have." (*Minutes* p.7-8 (Jan. 10, 2002). The purpose of our statutes mandating planning commission action on subdivision proposals within a specified time "is to remedy indecision, protracted deliberations, and deliberate or negligent inaction on the part of the approving authorities." 5 Rathkopf, *The Law of Zoning and Planning,* § 91:7 (2002). Thus, the 120 day provision is for the protection of applicants for subdivision relief. Because the time limitations imposed upon Commission action are intended for the benefit of the applicant, Beechwood ought to have been granted an extension of time when it was discovered that an unintentional error had been made and that further submissions were required. G.L. § 45-23-36. However, the Planning Commission refused to grant additional time. The zoning board of appeals properly concluded that this was prejudicial procedural error.

***11** This Court finds that the Zoning Board of Appeals conclusion is supported by the substantial, reliable, and probative evidence of the record, is neither arbitrary nor capricious, and was not affected by error of law. G.L. § 45-23-71.

III) *Impact Upon The Public School System*

Only Commissioner Arnold cited "the uncertainty of the school system in the next few years" as a basis for denial. The Commissioner, however, provided no explanation of or findings to support this statement. Further, the only evidence on the record relating to school systems is found in Mr. Mason's "Environmental Analysis." (*Record,* Item 17, Doc. U, §§ 2.5, 2.5.1). Mr. Mason concluded, that, using estimated populations provided by the R.I. Department of Administration's Statewide Planning Program, the proposed subdivision would be expected to house 19 school children. Mr. Mason concluded that while the local schools were "close to capacity," Charlestown had already enacted ordinances designed to increase the schools' capacities. Thus, Mr. Mason, concluded, "[w]ith the implementation of [these] capacity improvements by Chariho (or the Town of Charlestown), additional school-aged children from the proposed development should not pose a significant burden to the school system." *Id.*

Some courts have held that a Planning Commission may deny subdivision approval where existing public improvements are so inadequate as to not be reasonably able to absorb the predicted growth-as where a school system is at or above capacity-and where the tax benefits to be received by the subdivision are insufficient to remedy the deficiency. *See* 2 Rathkopf, *The Law of Zoning and Planning,* § 15:30 (2002). However, a municipality should not prevent the entrance of newcomers solely to avoid future burdens, economic or otherwise, upon the administration of public services and facilities. *Cf.* *Town of Glocester v. Olivo's Mobile Home Court, Inc.,* 111 R.I. 120, 300 A.2d 465 (1973) (zoning ordinance with this purpose is invalid). Because the only evidence submitted as to the subdivision's impact on the school system was provided by Mr. Mason and concluded that the Town's school capacity could satisfactorily absorb the increase caused by Beechwood's proposed subdivision, the Commissioner's basis was in clear error. And, though the Commissioner may have based his conclusion, that the school system was so precariously situated that Mr. Mason's conclusion was unreliable, on his own knowledge or observations, he failed to disclose any facts, upon which he might have relied, on the record. Therefore, such facts, if any, cannot sustain the decision. *See* *Toohey v. Kilday,* 415 A.2d 732, 737-38 (R.I.1980).

Thus, this Court finds that the zoning board properly determined, based upon the substantial, reliable and probative evidence of the record, that this was an improper ground for denial, based upon clear error, and resulting in prejudice to Beechwood.

IV. *Impact Upon Traffic*

***12** Again, only Commissioner Arnold cited the proposed subdivision's impact upon traffic on Route 112 as a basis

for denying Beechwood's application, stating that the "traffic issue is unsafe...." (*Minutes* (Jan. 10, 2002)). [22]

Although there was evidence indicating that the entrance to Amber Way could be dangerous, the evidence was not of a nature to support the Commissioner's conclusion. The Town Police Chief testified only that there was inadequate sight distance to provide drivers with a safe stopping distance *if* those drivers were exceeding the posted speed limit, in violation of the law. (*Minutes,* (Nov. 29, 2001)). Applicant presented the testimony of Mr. Donald Jackson, who designed the Amber Way entrance. Mr. Jackson testified that the plan was designed for a 40 m.p.h. sight distance, "braking on wet pavement," and that there was adequate sight distance for this speed. *Id.* Chief Sharkey had inspected the entrance/exit site, found that it was adequate for the neighborhood and, as he reported in a letter to the Planner, had no objections to its location." (*See Record,* Item 17, Doc K-4, *Letter from Tom Sharkey to James Lamphere,* received Sept. 14, 2001)). When questioned by Applicant, the Chief responded that his changed opinion was due to his receipt of information that actual speeds on Route 112 were higher than posted speed. (*See Minutes* at 2 (Nov. 29, 2001)) . [23]

The zoning board of appeals addressed the traffic issue. The board determined that it was unfair to restrict Applicant's right to subdivide because of travelers' violations of speed restrictions. Appellants argue that a town may consider prevailing traffic conditions, regardless of their legal status. Appellants argue that, otherwise, the Town would be saddled with the cost of enforcing the speeding restrictions, though they might otherwise not. Further, Applicants contend that the speeding is not a traffic hazard in and of itself, but that approval of the subdivision will be the cause of a hazard. Therefore, they contend, the negative impact is caused by the subdivision, and not by the pre-existing traffic.

Appellants' arguments are incorrect. A planning commission may consider existing traffic conditions and may properly restrict development where the development will cause an increase in traffic congestion. *See* 83 Am.Jur.2d *Zoning and Planning* § 58 (2002); 5 Rathkopf, *The Law of Zoning and Planning,* § 90:11 (2002). Furthermore, a commission may require adherence to prescribed sight distances for proposed intersections. 2 Rathkopf, *The Law of Zoning and Planning,* § 15:30, n. 1 (2002). "For such evidence to be effective upon the ultimate determination, however, it should relate, not to the existence of congestion at the location of the proposed use, but to whether the traffic generated by its establishment at that site will intensify the congestion or *create* a hazard." *Bonitati Bros. v. Zoning Bd. of Review,* 104 R.I. 170, 242 A.2d 692 (1968) (citing *Thomson Methodist Church v. Zoning Board of Review,* 99 R.I. 675, 210 A.2d 138 (1965); *Center Realty Corp. v. Zoning Board of Review,* 96 R.I. 482, 194 A.2d 671 (1963)). (Emphasis added). Here, the alleged safety hazard, i.e., inadequate sight distance, does not inhere in the placement of the Amber Way intersection. Rather, it is only when, subsequently, travelers approach the intersection at an illegal speed that safety becomes an issue.

***13** To allow an unidentified, third party's prospective violation of the law to work a restriction upon an otherwise conforming subdivision would open the door to flagrant abuses and egregious injustices. It is conceivable, for example, that a hostile abutter, anticipating an unwanted subdivision, could undertake an illegal action on his or her own property that, in conjunction with the proposed use, would create a hazard to the community. Were Appellants' arguments correct, a municipality would be free to ignore the violation in favor of restricting lawful development. This is clearly an impermissible result.

Thus, this Court finds that the zoning board of appeals decision was not affected by error of law, or clearly erroneous in view of the substantial and reliable evidence of the record.

V. *Perimeter Buffer*

Commissioner Arnold also cited the use of a stump dump in the open space, perimeter buffer as grounds for denial. It was his conclusion that such use "is improper." [24]

The Charlestown Zoning Ordinance requires a vegetated perimeter buffer for all residential cluster subdivision. *Zoning Ordinance* § 218-60.F. A buffer is simply "land that is maintained in either a natural or landscaped start, and is used to screen and/or mitigate the visual impacts of development on surrounding areas, properties or rights-of-way." *Id.* § 218-5.B. (defining, *inter alia,* "Buffer"). A buffer must be "at least one hundred feet wide around the entire perimeter of all lots to provide a visual and audio screen between adjacent land uses." *Id.* While generally no structures may be built in the buffer, the Commission may permit stormwater control and drainage structures in the buffer zone. *Id.* § 218-60.F. Finally, the 100 foot requirement can be reduced if (1) adjacent land already serves as open space and the Applicant demonstrates that "it is likely to remain so," (2)

the Commission finds that there is an existing substantial, permanent natural barrier that will serve as a buffer, or, (3) interior lands are so environmentally sensitive as to advise perimeter development. *Id.*

The Commissioner made no findings and provided no legal basis for his conclusion that use of a perimeter buffer as a stump dump is "improper." Presumably, he was relying on *Zoning Ordinance* § 218-60.H.(2), which states that,

> [l]and that has been environmentally damaged shall not be accepted for a cluster subdivision until such land is restored to a condition that the Commission determines to be satisfactory to effect the purposes of this section.

The Zoning Board members failed to address this ground for denial, perhaps because only one Commissioner asserted the presence of the stump dump. Nevertheless, this Court is compelled to observe that the *Minutes* indicate that these "dumps" will be buried and subsequently re-landscaped. (*See Minutes* (Jan 3, 2002)). Commissioner Arnold made no findings to the contrary, but merely concluded that use of a portion of the buffer as a stump dump is improper.

***14** Upon remand, should the Commission wish to revisit this issue and rely upon this as a basis of denial, it must make findings of fact, based upon evidence in the record, to the effect these stump dumps will not be landscaped and, for that reason, do not conform to the *Zoning Ordinance'* s requirement of a visual screen. However, if the dumps are intended to be buried and maintained in a vegetative state, the *Zoning Ordinance* provides minimal discretion to the Commission. Only if the stump dump is so visually obtrusive as to constitute a permanent and recognizable disfigurement upon the landscape should the Commission deem it unsatisfactory, pursuant to *Zoning Ordinance* § 218-60.H.(2).

As to the drainage easements located within the buffer, these are permissible pursuant § 218-60.F. However, the Commission may similarly determine that any structures included as part of these easements vitiate the intended purposes of the perimeter buffer.

Conclusion

For the foregoing reasons, this Court concludes that the decision of the zoning board of appeals was not affected by error of law, was not made upon unlawful procedure, and was supported by the reliable, probative, substantial evidence of the record. However, the Board failed to address the Commissioners' concern with Beechwood's proposed use of the perimeter buffer. Because the Planning Commission failed to provide any findings of fact in support of its conclusion that use of the perimeter buffer for stump dumps is improper, the zoning board is without means to assess the basis for denial. *See Veronneau v. Cumberland Planning Bd. of Appeals,* 2003 R.I.Super. Lexis 132 (Darigan, J., 2003). Thus, upon review of the record, the Court remands this matter to the Board of Appeals for a written decision within 120 days that reviews the written decision of the Planning Commission, after remand to the Planning Commission for findings of fact *as to the buffer issue,* or for reconsideration of the issue and approval in accordance with the terms of decision of the Zoning Board of Appeals.

All Citations

Not Reported in A.2d, 2004 WL 2813763

Footnotes

1 This Court, where appropriate, will refer to both parties merely as Appellant or Appellants.

2 One of Appellant Carolina Compact's contentions on appeal is that the zoning board of appeals was required to obtain transcripts of the Planning Commission proceedings. These transcripts were made by Beechwood for its own use and at its own expense. *See* Tr. at 15 (Mar. 12, 2002) (Consolidated Appeal, *Beechwood*

Enterprises, Inc v. Town Planner of the Town of Charlestown, Beechwood Enterprises, Inc v. Planning Commission of the Town of Charlestown). It is Carolina Compact's position that the transcripts are the actual record, and that, therefore, the zoning board was required to review these, pursuant to G.L. § 45-23-70.

> Appellant's argument is incorrect. Here, the Minutes prepared by the Planning Commission were the official record. While this Court is of the opinion that independently prepared transcripts may be offered to the board of appeals-despite the general prohibition against introduction of new evidence at that stage-there is no evidence in the board of appeals' transcript that any of the appellants offered the Commission transcript as an exhibit. *See Griggs v. Estate of Griggs,* 2004 R.I. LEXIS 74, 14-15 (Vogel, J.2004) (“A [ ] judge must be clear when privately commissioned transcripts are to be made a part of the record. The best way to ensure that the transcripts are officially included is for the [ ] judge to mark the transcripts as an exhibit”).
>
> Given the Appellant's understandable confusion as to whether an independent transcript might be inadmissible, and given the history of this case, upon remand the zoning board of appeals or planning commission should consider *all* transcripts then offered as exhibits.

3 Concept review is an informal process whereby an applicant may seek advice as to applicable laws and ordinances and as to the required steps for approval of a proposed development project. G.L. § 45-23-35(a). Concept review also provides the planning board with an opportunity for input into the “formative stages of major subdivision and land development concept design.” G.L. § 45-23-35(b). However, concept review and other pre-application “discussions are not considered approval of a project or its elements.” G.L. § 45-23-35(d). Charlestown's own “Subdivision and Land Development” ordinance, § 188-26.A.(2), requires “the submission of several conceptual layouts” so that the Planning Commission can provide “its initial opinion” as to which one is best suited for the site, taking into account various topographical site conditions, environmental impact, street layout, and problems associated with previous, similar uses. *See* CODE OF THE TOWN OF CHARLESTOWN, RHODE ISLAND, Ch. 188, “Subdivision and Land Development” (2000). [*“Ordinance”*]. Thereafter, the *Ordinance* requires a public informational meeting for, *inter alia,* all major land development projects. *Id.* at § 188-26.A .(3)(a). *See also* G.L. § 45-23-39(b). The Ordinance specifies additional submission requirements for this meeting. *See id.* at § 188-26.B.

4 Beechwood refers to these moratoria as “having thwarted the Applicant's efforts to be heard,” (*Beechwood Memo.* at 3, “Fact & Travel of the ‘Carolina Farms' Application,” para. 5 (Apr. 2, 2003)), *“notwithstanding* the fact that the *application had been filed prior* to the implementation of the emergency moratorium .” (*Id.* para. 3). However, despite this protest, there is no suggestion in the record or the memoranda that Beechwood attempted to avail itself of its right, pursuant to G.L. § 45-23-35(e), to file an application for master or preliminary review after 60 days from its pre-application submission.

5 For purposes of this opinion, Items are as numbered in the Table of Contents to the record presented to this Court. Most documents included in Item # 17, “Charlestown Subdivision/Land Development Application Packet,” are identified by letter, presumably, the documents were lettered by Beechwood prior to submitting its application. The letters can be found in the top left-hand comer of the documents. For documents so lettered, for all citations subsequent to the first, this Decision will use only the Item number and document letter. For those documents not numbered, the Court will use the Item number and the identifying title.

6 One of the items listed in the *Ordinance* is the potential impact of the project upon “historic/archaeologic sites.” § 199-19 .B.(2)(c).

7 A planning commission or board may combine review stages only after “the planning board determines that all necessary requirements have been met by applicant.” G.L. 45-23-39(c); *Ordinance,* § 188-32.A.

8 Either a dedication of such land *or* payment of a fee, or both, is required by *Ordinance* §§ 188-23.A., 188-23.F.

9 Given the importance placed on the issue of underground utilities by the parties on appeal, it is important to note that the Commission's decision on October 17 was *correct.* The Development Review Act, § 45-23-45, states that

> "(a) Public design and improvement standards for development projects *shall be specified, through reasonable, objective standards and criteria, in the design and improvement standards section of the local regulations.* Appropriate public improvement standards shall be specified for each area or district of the municipality. Standards may include, but are not limited to, specifications for rights-of-way, streets, sidewalks, lighting, landscaping, public access, *utilities,* drainage systems, fire protection, and soil erosion control.
>
> (b) All public improvements required in a land development project or subdivision by a municipality shall reflect the physical character and design for that district which is specified by the municipality's adopted comprehensive plan. Public improvement requirements and standards need not be the same in all areas or districts of a municipality. The technical details of the improvement standards may be contained in an appendix to the local regulations but shall be considered part of the regulations." (Emphases added).

However, Charlestown's *Ordinance* does not specify any criteria for determining when electric, telephone, or other communications utilities must be underground. Rather, it vests complete discretion in the Planning Commission, stating only that "[u]nderground utilities are preferred, encouraged and may be required by the Planning Commission." *Ordinance* § 188-48.D.

10 It was confirmed at the October 29, 2001 meeting that the subject pool was located on an adjacent parcel, and not applicant's property.

11 The evidence as to the one access was addressed to the Planning Commission's discretionary authority to require two principal means of access for subdivisions of more than 15 lots. *See Ordinance* § 188-45.B.(6).

12 *Ordinance* § 188-19.B.(5) provides that an environmental analysis address impacts made upon "public services," and § 188-19 .D. provides that the environmental analysis include an analysis of the benefits and costs incurred by the municipality from a proposed development.

13 Despite some of the commissioners' concerns, on December 12, 2001, that Beechwood's site plans did not adequately identiy certain land constraints, including slopes and contours, none of the commissioners cited this as a reason for denying subdivision approval. *See infra.* Perhaps this was because Beechwood provided additional maps at the next meeting, on January 3, 2002. Therefore, the zoning board properly did not consider these potential issues during its review.

14 Notably, one of the issues that Beechwood raised on appeal before the zoning board was the administrative officer's failure to issue a default approval and to certify that the planning board had failed to act upon the application within 120 days, as it was required to do pursuant to G.L. § 45-23-41(f). Upon the planning board's failure to act within this time, the officer is obliged, by G.L. § 45-23-41(g), to issue a default approval "on request of the applicant." It was Beechwood's contention that the planning board did not expressly deny the application but, instead, *failed to approve* the application; Beechwood argued that a separate vote *to deny* the application was required. Because Beechwood has not briefed the issue on appeal to this Court, this Court does not decide the issue. Nevertheless, it is observed that the minutes of the vote indicate that the Board members and parties understood the vote to constitute a denial of the application. *See, e.g., Record* Exhibit 12, *Planning Commission Minutes,* p. 6 (Jan. 10, 2002) (Bd. member Platner observing that time for action has run out, but that the application is incomplete); *id.* at 7-8 (Attorney Hogan, for applicant, requesting

that the Commission reconsider its denial-to deny without prejudice-and motion to that end being denied). In fact, in its memorandum to the board of review, Carolina stated that "[w]hile *Appellant recognizes that the intent of the Commission may have in fact been to deny,* the Commission's actions did not accomplish this result." *Record,* Exhibit 1, Beechwood Enterprises, Inc., Appeal to Zoning Bd. of Review, File No. 798 (1/31/02), "Statement of Appeal" at 2. (Emphasis added).

Further, because G.L. § 45-23-63(d) requires a majority vote to *approve* a subdivision, the absence of a majority is a *de facto* denial.

15 Item # 17 of the *Record* also contains a group of site plans and maps the cover of which reads "Preliminary Plan for Carolina Farm A Major Subdivision in Charlestown, R.I." [hereinafter *Plans Packet*]. The "Site Plan," (*Record,* Item # 17), indicates that Applicant proposed two primary streets, "Amber Way" and "Lunar Way". These would both be cul-de-sacs which share a common point. Amber Way begins at Route 112 (or, Carolina Back Road), runs somewhat circuitously at a northeasterly direction for a short distance, and then turns easterly. Lunar Way runs south/southwesterly. The Lots on the Plan are situated on the north side of Amber Way, the eastern side of Lunar Way, and in the area between the vertex of the two streets. The perimeter of the entire subdivision is reserved as open space. For convenience, a copy of the "Site Plan" is attached to this Decision.

Commissioner Arnold was concerned with whether the Town would be liable for maintaining the subdivision's proposed "Lunar Way." However, this was an improper basis for denial. General Laws, § 45-23-46(e) requires that subdivision regulations establish separate procedures for municipal acceptance of public streets. Where these procedures are employed, acceptance by the municipality functions as an acceptance "for maintenance and/or part of the municipal system." G.L. § 45-23-46(h).

16 Beechwood properly contended that it could not be required to include underground utilities. *See supra.,* n. 9. Thus, Beechwood argued, the inclusion of this improper condition could have influenced the Commissioners' votes. However, the record demonstrates that the condition would have worked in Beechwood's favor, if at all. Thus, the Board erroneously determined that this was a valid ground for reversal. Nevertheless, the Board was correct insofar as it concluded that the Commission could not require underground utilities. *Id.*

17 A written decision by the planning commission is required by § 45-23-63(a). *See also Veronneau v. Cumberland Planning Bd. of Appeals,* 2003 R.I.Super. Lexis 132 (Darigan, J.). Further, G.L. § 45-23-53(d) requires a majority vote of the planning commission for an application to be approved and, where approval is given, § 45-23-60 sets out a list of provisions that the planning board must address by making findings of fact in its written decision. Though the Development Review Act contains no provisions expressly stating that a denial must also include specific findings, our Supreme Court has consistently required that a municipal agency, when acting in a quasi-judicial capacity, must in its decision set forth findings of fact and reasons for the action taken. *See, e.g., Ridgewood Homeowners Ass'n v. Mignacca,* 813 A.2d 965, 977 (R.I.2003); *Sciacca v. Caruso,* 769 A.2d 578, 585 (R.I.2001). *See also* 5 Rathkopf, *The Law of Zoning and Planning,* § 91:14 (2002).

18 Prior to 1992, the now repealed R.I.G.L.1956 § 45-23-18 authorized that planning board of appeals "may reverse or affirm, wholly or partly, or may modify the decision appealed from and make such order, requirement, decision, or determination as ought to be made, and to that end shall have all the powers of the plan commission from whom the appeal was taken." *Id.*

19 Our Supreme Court has defined the term "reasonably competent evidence" as "any evidence that is not incompetent by reason of being devoid of probative force as to the pertinent issues." *Zimarino v. Zoning Board of Review of Providence,* 95 R.I. 383, 386, 187 A.2d 259, 261 (1963).

20 It is the planning commission that is vested with regulatory responsibility regarding subdivision, pursuant to the Development Review Act, and which has the power to grant waivers and modifications relating to subdivision requirements. *See* G.L. § 45-23-62. However, the purpose of our statutes mandating planning commission action on subdivision proposals within a specified time, (*see, e.g.* §§ 45-23-40(e), 45-23-41(f)), "is to remedy indecision, protracted deliberations, and deliberate or negligent inaction on the part of the approving authorities." 5 Rathkopf, *the Law of Zoning and Planning,* § 91:7 (2002). The protections afforded by these statutes would be nil indeed if the zoning board were obligated to remand for additional findings each time a planning commission denies an application on a clearly erroneous basis while ignoring other issues, which may then be used by the commission as the basis for a further-perhaps erroneous-denial. The potential for abusive tactics intended to evade or impermissibly delay an applicant's right to approval of a fully conforming subdivision would be great.

21 This statute avoids unfair surprise to an applicant who waives the right to Master Plan review. It is at Master Plan review that an applicant must provide the Commission with information on the environmental and topographical characteristics of the site, *see* G.L. § 45-23-40(a)(2), and seek comments from local, state, and federal agencies, G.L. § 45-23-40(a)(3). If at this stage comments submitted by an agency, or other considerations, causes the Commission to require an environmental analysis or archaeological survey the applicant has an additional year in which to respond before it must submit a Preliminary plan. See § 45-23-40(g).

22 Notably, though Commissioner Platner noted "the Town Police Chief's concern that the location of the proposed Amber Way was a public safety issue," she also concluded that the application would probably be approved if it were complete. (*Minutes* (Jan. 10, 2002)). Thus, she did not base her denial upon the traffic issue.

23 Appellants also allege that, as reflected in the site plans, an abutting property owner has a tree in a position on her property such that the Amber Way entrance does not have a proper "sight triangle." The sight triangle section, *Zoning Ordinance* § 218-66 provides:

> "[o]n any corner lot and all street intersections, no structure, vegetation or item shall be erected or maintained between the height of three and ten feet above ground level within the triangle formed by two street lines and a third line joining points on the street lines twenty feet from the intersection of street lines."

The tree is depicted as being on Beechwood's "Entrance Plan for Amber Way," (*Record,* Item # 6) as being 24# wide. Carolina Compact alleges that the tree is only fifteen feet from the Amber Way intersection, running parallel to Route 112. (*Appellant's Memo. in Support of Appeal from Charlestown Zoning Bd. of Review* (Jan. 30, 2003)). As Beechwood observes in its memo, the entrance map shows that the proposed intersection of Amber Way and Route 112 lies beyond Beechwood's property line. (*See* Record, Item. # 6). However, by using the corner of Appellant's property line as the intersection when determining the sight triangle, Carolina Compact misconceives the evidence. (*See Appellant's Memo,* insert between pages 26 and 27 (depicting alleged sight triangle with red highlighting)). Rather, because the state highway line-over which the tree is depicted as straddling-is 20 feet beyond the proposed intersection, it is not within the sight triangle. The true intersection where the sight triangle would be appropriate is at the curb cut of Route 112.

Notably, though, even if the tree were within the sight triangle, however, the *Zoning Ordinance* provides that no item shall be "erected or *maintained."* (Emphasis added). Generally, only the owner of property in which a tree is found can be said to maintain it.

24 Notably, while Commission Platner also mentioned that the buffer was "not a true audio or visual buffer," she also added that she did not believe the plan would be denied if the application was complete.

End of Document

2000 WL 1273997
Only the Westlaw citation is currently available.

Superior Court of Rhode Island.

BUILDING SYSTEMS, INC., Plaintiff
v.
TOWN OF LINCOLN ZONING
BOARD OF REVIEW, et al., Defendants

No. C.A. PC 99-3437.
|
Aug. 8, 2000.

DECISION

ISRAEL, J.

***1** The plaintiff appeals from a decision of the Zoning Board of Review of the Town of Lincoln, sitting as the Town's Planning Board of Appeal ("the appeal board"). The appeal board on June 1, 1999 denied the plaintiff's appeal from a decision of the Town's Planning Board ("the planning board") rendered on January 27, 1999, which denied approval of a proposed subdivision plan submitted by the plaintiff. This Court's jurisdiction is established by *G.L.1956 (1999 Reenactment) § 45-23-71*.

The plaintiff contends, first, that the decision of the planning board exceeded its authority because it measured the minimum length of a proposed cul-de-sac street in the plaintiff's subdivision from the nearest intersection with an existing dual egress street, even though that intersection was beyond the boundaries of the proposed subdivision plat. The plaintiff points out that the pertinent subdivision regulation requires only that "[c]ul-de-sac streets shall not be more than six hundred (600) feet in length ...". The regulation does not specify the terminals between which the maximum distance is to be measured. The plaintiff argues that, so long as the street proposed in its subdivision plat is less than six hundred (600) feet in length within the subdivision, the regulation is literally satisfied, even if the street is tacked on to the end of another accepted cul-de-sac of any length.

The defendants respond that the planning board is permitted, even required to consider the interests of the entire town in promulgating and interpreting its land development regulations. The plaintiff's suggestion that the planning board's *jurisdiction* is limited to the proposed subdivision is frivolous. Obviously the planning board has town-wide jurisdiction. The plaintiff points to nothing in the enabling statute and the regulation which *forbids* the planning board from measuring the length of cul-de-sac streets from their nearest intersection with an established dual egress street within or beyond the proposed subdivision. An interesting jurisdictional question might be raised, if such an intersection were beyond the town or state line, but there is no suggestion that there is not an immediately accessible town street within six hundred feet of the plaintiff's land, or that the land is incapable of development with multiple routes of public access to a network of accepted town streets.

The defendants note that *§ 45-23-31* requires that its local subdivision regulations must "be construed in a manner that will further the implementation of, and not be contrary to, the goals and policies and applicable elements of the comprehensive plan." In the Town Comprehensive Plan, as adopted in 1992, and amended in 1995, the Town adopted among its goals and policies with respect to its major and minor circulation systems the following:

"3. Maintain road development policies that provide for neighborhood safety while also ensuring adequate emergency access to all neighborhoods and reasonable circulation options.

***2** 9. Refine subdivision street design and construction standards that enhance neighborhood character."

The planning board is clearly entitled to consider neighborhood requirements, as well as townwide standards, when it construes and applies its own regulations. The long-standing and reasonable construction an administrative agency applies to its own regulations is entitled to some respect by a reviewing court. *See Lerner v.. Gill,* 463 A.2d 1352, 1358 (R.I.1983) (Holding that courts may choose to defer to agency's "interpretive rules", but are not required to do so). *See also* *Cohen v. Brown University,* 101 F.3d 155, 173, cert. den. 520 U.S. 1186, 117 S.Ct. 1469, 137 L.Ed.2d 682, (1st Cir.1996). (Agency's construction of its own regulations entitled to substantial deference.)

A limitation on the overall length of dead-end cul-de-sac streets in residential neighborhoods is eminently reasonable, particularly where, as here, town planners seek to avoid the stacking of one cul-de-sac upon another by developers, who wish to avoid the limitation of the regulatory requirement. This Court finds that the requirement by the planning board that a cul-de-sac street be measured from its intersection with a dual egress town street, and not from its junction at a plat boundary with another cul-de-sac or dead-end street, is a reasonable construction of the regulation.

The decision of the planning board, as affirmed by the board of appeals, was well within the authority granted to it by the enabling statute and the regulations issued by the planning board pursuant to the statute.

The plaintiff, next, argues that the appeal board's decision ought to be reversed because there was no competent evidence in the record to support its decision. The plaintiff does not contend that, if the length of the proposed street is measured as required by the planning board's interpretation of the regulation, it does not exceed the six hundred foot limitation specified in the regulation. In fact, at the public hearing before the planning board on January 27, 1999 the plaintiff sought a waiver, which it called a variance, from the road length requirement but, as explained below, it provided no evidence in support of its request for that waiver.

In the record considered by the planning board and reviewed by the appeal board and certified to this Court is a plan entitled "Lincoln Terrace, Section 9, Lincoln, RI, Subdivision of Land for Building Systems, Inc., A.P. 14 Lot 90, Duxbury." That plan shows that the subdivision is proposed to be served by a single cul-de-sac street called "Cawley Dr[ive]." That proposed street is obviously an extension of Holiday Drive, apparently also a cul-de-sac street. The length of Cawley Drive is variously described in the record of this case as anywhere from approximately 450 to 580 feet. There is no evidence of the length of Holiday Drive before it intersects with another street which is not itself also a cul-de-sac or dead-end street.

***3** The appeal board argues that it and the planning board could base their respective decisions on their knowledge of the area, citing *Toohey v. Kilday,* 415 A.2d 732 (R.I.1980). The problem in this case is that neither board claimed to have based their "finding" that the cul-de-sac street, when measured from the nearest intersecting street was greater than 600 feet on their knowledge or observation of the area. *See* *Restivo v. Lynch,* 707 A.2d 663, 666-67 (R.I.1998). Nevertheless, the plaintiff would not have requested a waiver on January 27, 1999, unless it agreed that measured by board standards the proposed street exceeded 600 feet. The plaintiff never argued before the planning board or the appeal board that, measured as required by the regulation under the board's construction, the proposed street actually measured less than six hundred feet. The plaintiff has always taken the position that the *method* of measurement was improper and that it was unfair to impose that method on its proposal without adequate notice immediately before it was to come on for public comment.

Based on the entire record before the appeal board, as certified to this Court, there is substantial competent evidence that the proposed cul-de-sac street exceeds six hundred feet when measured from its intersection with the nearest town street which is not itself a dead-end. Such evidence includes the plaintiff's application for a variance or waiver of the street length requirement, and the drawings labeled as Exhibits A-1 and A-2 before the planning board. *See* *Apostolou v. Genovese,* 120 R.I. 501, 388 A.2d 821 (1978).

Finally, the plaintiff urges that the decision of the planning board was arbitrary and capricious because it had no notice of the board's construction of the regulation in sufficient time to address that requirement prior to a final hearing and decision by the board. Important to the plaintiff's claim is the fact that the board's standard for measurement of street length for cul-de-sac streets was not in writing, and obviously, not published. The only way for an applicant to learn how its proposed street would be measured was to ask the board.

The plaintiff's proposed subdivision was a major subdivision, as defined in *§ 45-23-32(22),* since more than five lots were proposed. Accordingly, *§ 45-23-35(a)* requires that at least one pre-application meeting be held, to "allow the applicant to meet with appropriate officials, boards and/or commissions, planning staff, and, where appropriate, state agencies *for advice as to the* required steps in the approval's process, *the pertinent and local plans, ordinances, regulations, rules and procedures and standards which may bear upon the proposed development project."* (Emphasis supplied). The record discloses that three pre-application meetings were held: May 10 and July 26, 1995 and January 24, 1996. At the January 24, 1996 meeting the planning board noted that the road design had been altered to meet regulations and to meet

an existing street. The length of the road was noted to be 580 feet. At no time during any of these pre-application meetings, did the planning board *advise* the applicant, as required by *§ 45-23-35(a),* that the length of its proposed street was to be measured from its intersection with an accepted street not itself a cul-de-sac. While the principal concern at the last pre-application meeting was with surface water drainage, at least one abutter did express some concern about street access, but only because of the threat of flooding, not because of any problem with its length.

***4** The next step in the statutory approval process according to *§ 45-23-39* for a major subdivision is the submission of a master plan, which may be combined with preliminary plan review as provided by *§ 45-23-39(c).* Apparently, the planning board decided to combine master plan and preliminary plan review in this case. The first such review in the record took place on May 27, 1998 on an application certified as complete on January 11, 1996. Clearly, the developer must have consented to the planning board's failure to act on the application within one hundred and twenty days as required by *§ 45-23-41(f).* At this hearing the proposed road is noted to be 500 feet in length with a cul-de-sac. There is no explanation for the disappearance of eighty feet, nor is any reference made to the points from which measurement is required to be made. The application was "tabled for further review," again with the implied consent of the developer. Once again, the record shows concern by the planning board with drainage and not ever with road length.

A modified plan was reviewed by the planning board at its next meeting on June 24, 1998. Once again virtually the sole reported concern was with surface water. The application was tabled, again with implied consent, "to review detention pond." From the record there was no reason for the plaintiff to modify its proposed road, nor did the planning board advise, suggest or recommend any such modification. When the master-preliminary plan next came up for further review on September 23, 1998, the planning board's notes have no reference to any concern about street length. Once again, the focus is exclusively on drainage concerns. Apparently, no consideration was accorded to *§ 45-23-41(f),* which would have affected this preliminary plan, unless it was understood that the plaintiff intended to modify the plan or present further evidence that the plan would meet the planning board's concerns. At the time, the record is clear that those concerns addressed drainage alone.

On October 28, 1998 the plaintiff presented a revised proposal. The plaintiff proposed to install an underground holding tank in place of previously proposed aboveground retention ponds. The proposal was "tabled, until the tank was presented to the Town (Department of Public Works and Engineering) for approval."

By December 16, 1998, after an intervening meeting on November 18, 1998, at which road length was not mentioned, the plaintiff had changed its mind and reverted to the proposed use of a detention pond to control surface water drainage. The note of the December review contains an ambiguous report: "Length of road is 500' to first intersection, which doesn't comply with the length of road regulations." Notwithstanding the internal inconsistency of this comment, the plaintiff has acknowledged that it was thereby put on notice that the planning board might raise the issue of non-compliance with the street length requirement. Further, lending to the ambiguity of the planning board's conduct on December 16, 1998 was its conclusion that: "Subdivision meets regulations and no variances are required." Presumably, the planning board was referring to the waivers provided for in *§ 45-23-62(b),* which are similar to variances formerly granted by zoning review boards. The planning board decided to move to a public informational meeting, optional under *§ 45-23-40(d)* for master plans combined with preliminary plans. There is no suggestion in the record that the planning board would treat the "informational meeting" as a final hearing on the plaintiff's application.

***5** The plaintiff argues that, if the planning board had any real problem with street length, it could have raised that problem before it sent the plaintiff's application to a public informational hearing. After all, the application had been reviewed at least since May 27, 1998, and the plaintiff had addressed every other concern expressed by the planning board. The plaintiff argues, as well, that it had no reason to expect that the planning board would deny its application without first affording it a reasonable opportunity to meet the planning board's concerns, or to be heard on its application for a waiver.

At the public informational hearing on January 27, 1999 on the plaintiff's master plan, the plaintiff at the outset of the hearing did request a waiver of the street length requirement of the pertinent regulation. The plaintiff has insisted that it first learned of the planning board's dispositive concern about its proposed street just before the commencement of the hearing. This Court concludes that it was not until the meeting

of the planning board on December 16, 1998 that the plaintiff finally learned that the planning board might eventually apply its unpublished and previously undisclosed construction of the street length regulation.

After nearly two hours of the public meeting (8:05 p.m. to 10:00 p.m.), most of which was taken up by concern over the drainage system, all of which were addressed if not resolved by the plaintiff's experts, the planning board never considered the plaintiff's request for a waiver, as required by *§ 45-23-62(d)*. Then, the record discloses a confusing procedure. A motion was made and seconded that the subdivision "be taken under advisement and (to) seek proposals for an engineer study of the entire drainage area."There is no recorded vote on this motion as required by *§ 45-23-63*. Then, abruptly, a motion was made and seconded, "to reject the subdivision because road length exceeds requirements, roadway incorrect with Board's practise of measuring at nearest intersecting street, inconsistent with the Comprehensive Plan." The motion to deny the application passed, again without a recorded vote, as required by law.

It is difficult to gainsay the plaintiff's claim of shocked surprise.

Considering the history of this application before the planning board since May 1995, where every effort had been made by the plaintiff to address each concern of the planning board, as it arose, the plaintiff could justifiably believe that, if the planning board was not satisfied with its application, it would not have sent the application to any form of public meeting without some opportunity for the plaintiff to respond to those concerns. The defendants say the plaintiff claims it was "whipsawed." It was not. It was blind-sided.

According to *§ 45-23-71(c),* this Court "may affirm the decision of the board of appeal 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: * * * (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." It is a well-established rule of statutory construction that this subpart must mean something different from, or in addition to the other subparts. In this case this Court has found that the planning board had plenary discretion to deny the plaintiff's application based on the competent evidence before it. Nevertheless, that discretion may not be abused or clearly exercised in an unwarranted manner.

***6** Since the plaintiff cannot claim that it has been deprived of its property without due process of law, because it has not so been forbidden to develop its land as to deny it all beneficial use of its premises, it cannot claim that the defendants have violated its constitutional rights. Nonetheless, even though constitutional standards of procedural due process may not be required, a sound exercise of quasi-judicial discretion should require that an applicant be afforded at least the same opportunity to be heard at a meaningful time and in a meaningful manner as constitutional due process would require. *See* *Millett v. Hoisting Engineers Licensing Division of the Department of Labor,* 119 R.I. 285, 296, 377 A.2d 229, 236 (1977).

The issue in this case is whether the plaintiff had a fair opportunity to be heard before its application was finally denied on a ground not reasonably raised during the preceding administrative review process.

Our Supreme Court has said:
"However, discretion is not exercised by merely granting or denying a party's request. The term 'discretion' imports action taken in the light of reason as applied to all the facts and with a view to the rights of all the parties to the action *while having regard for what is right and equitable under the circumstances and the law." Hartman v. Carter,* 121 R.I. 1, 4-5, 393 A.2d 1102, 1105 (1978).

The only discernible reason for the planning board to have reviewed the plaintiff's application with the plaintiff and its experts at planning board meetings during 1998 was to permit the plaintiff to address the planning board's concerns. Applying the provisions of the enabling act literally, the planning board could just as well have denied the application in June 1998 out of hand without bothering with the public informational meeting of *§ 45-23-40(d)* or the public hearing required by *§ 45-23-41(d)*. The public informational meeting of January 27, 1999 was just that, a mere *meeting,* not a public hearing such as required for a major subdivision by *§ 45-23-39(b)*.

Denying the plaintiff's application out of hand at the end of a two hour public informational meeting on new grounds without a fair opportunity for the plaintiff to address those grounds shows utterly no "regard for what is right and

equitable under the circumstances and the law." Equity and right demand that the planning board accord to this plaintiff a fair opportunity to be heard on the question of its compliance with the street length requirement and also on its request for a waiver, if it is unable to comply with the literal requirements of the regulation, as construed by the board.

The Court concludes that the procedure followed by the planning board at the public informational meeting of January 27, 1999 was characterized by such an abuse of discretion as to deny the plaintiff a fair opportunity to be heard.

The appeal board felt that, because it could not substitute its own judgment for that of the planning board, it could not reverse the decision of the planning board, even for a serious procedural irregularity. They were mistaken. According to *§ 45-23-70(a),* "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." (Emphasis supplied). The existence of grossly prejudicial procedural error is clear in this case.

***7** For all the foregoing reasons the decisions of the board of appeal and the planning board will be vacated and set aside. This case will be remanded to the planning board for its further review at the preliminary plan stage, pursuant to *§§ 45-23-39(b)* and *45-23-41.* The planning board may apply its standard of measuring cul-de-sac street length from the nearest intersection with an approved street with two means of egress, within or beyond the subdivision. The planning board will consider and hear the plaintiff on the plaintiff's application for a waiver or modification. After a full and fair hearing before the planning board all the avenues of administrative and judicial appeal from adverse decisions will, of course, be open again to the parties. *See* *Lemoine v. Department of Mental Health, Retardation and Hospitals,* 113 R.I. 285, 290-92, 320 A.2d 611, 615 (1974).

The plaintiff will submit a form of judgment for entry on notice to the defendants.

All Citations

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Superior Court of Rhode Island.

Angelo PALAZZO, et al.
v.
Raymond F. COLELLA, et al.

No. Civ.A. PC 01-1043.
|
May 28, 2003.

DECISION

RAGOSTA, J.

***1** Before this Court is an appeal from a decision of the Cranston Zoning Board of Review (the "Zoning Board"), sitting in its appellate capacity as the Cranston Platting Board of Review pursuant to G.L.1956 §§ 45-23-32(3); 45-23-66 to 45-23-70; and the Cranston City Charter § 13.06. The Zoning Board affirmed the Cranston Planning Commission's (the "Planning Commission") preliminary subdivision approval for property in the City of Cranston. Jurisdiction is pursuant to G.L.1956 § 45-23-71.

FACTS/TRAVEL

Although the initial facts of this case are as found in *DiZoglio v. Colella,* C.A. 98-5132, June 1, 2000, Vogel, J., this Court will briefly recount the pertinent events leading up to the present appeal. Mr. Raymond Colella ("Colella") was the owner of a parcel of land in the City of Cranston known as Assessor's Plat 21, Lot No. 29 and Assessor's Plat 22, Lot Nos. 220, 228, 229, 230, 231, 233, 234, and also known as the Glenham Park Subdivision ("Glenham Park" or the "Property"). Beginning in 1996, Colella sought approval from the Planning Commission to subdivide it into smaller residential lots, while almost from the outset, Mr. Angelo Palazzo, as well as several other abutting landowners (individually known as "Palazzo" and collectively known as "appellants"), have opposed the project.

In November 1997, Colella applied to the Planning Commission for preliminary subdivision plat approval, and on January 6, 1998, the Planning Commission held the first of several public hearings on that matter. [1] Throughout the course of these hearings, Colella presented the Commission with data from DiPrete Engineering Company ("DiPrete"), which apparently indicated that the proposed development would not adversely affect the surrounding area. On April 13, 1998, the Planning Commission held the last of its public hearings with respect to Glenham Park and apparently considered the findings of DiPrete's report along with a report compiled by Vanassee, Hangen, Bruslin Inc., ("VHB") at Palazzo's request. Additionally, the Planning Commission had before it a letter addressed to it from Cranston Chief Engineer Nicholas Capezza ("Capezza"), recommending approval of the preliminary subdivision approval. Finally, the Planning Commission heard testimony from counsel representing Colella, promoting the project, as well as testimony from counsel representing Palazzo, objecting to the project. After hearing all the testimony, the Planning Commission unanimously voted to approve the preliminary subdivision approval for Glenham Park.

On May 1, 1998, Palazzo, pursuant to G.L.1956 §§ 45-23-32(3), 45-23-66 to 45-23-70, and the Cranston City Charter § 13.06, appealed the Planning Commission's decision to the Zoning Board. On July 2, 1998, the Zoning Board held a public hearing, which was continued until September 9, 1998. On September 21, 1998, the Zoning Board voted unanimously to affirm the decision of the Planning Commission.

***2** On October 13, 1998, Palazzo, pursuant to G.L.1956 § 45-23-71, timely appealed the Zoning Board's decision to the Superior Court. On June 1, 2000, the Court, in *DiZoglio v. Colella,* C.A. 98-5132, June 1, 2000, Vogel, J., remanded the case to the Zoning Board for further proceedings, finding that it failed to set out supporting grounds for its decision on the record. The Court instructed the Zoning Board to conduct a more thorough review of the record evidence before it and also to examine whether a proper voting quorum of Planning Commission members existed as of the April 13, 1998 hearing and if adequate notice of the appeal to the Zoning Board had been provided to all interested parties.

On August 9, 2000, the Zoning Board held a public hearing to reconsider the issues presented before it on remand, and this hearing was subsequently continued to September 13, 2000. When the Zoning Board met on September 13, 2000,

its members voted, once again, to continue the hearing until January 10, 2001 so that a recently added Zoning Board member, Mr. Frank Corrao ("Corrao"), could review the record evidence up to that point before voting on the matter. [2]

On February 22, 2001, the Zoning Board filed its final written decision affirming the Planning Commission's April 13, 1998 decision. On March 2, 2001, the appellants timely appealed the Zoning Board's January 10, 2001 decision to this Court pursuant to G.L.1956 § 45-23-71.

STANDARD OF REVIEW

General Laws 1956, § 45-23-71 reads in pertinent part that

> "(a) An aggrieved party may appeal a decision of the board of appeal, to the superior court for the county in which the municipality is situated ...
>
> (b) The review shall be conducted by the superior court without a jury. The court shall consider the record of the hearing before the planning board and, if it appear (*sic*) to the court that additional evidence is necessary for the proper disposition of the matter, it may allow any party to the appeal to present evidence in open court, which evidence, along with the report, shall constitute the record upon which the determination of the court shall be made.
>
> (c) The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of appeal or may 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 or planning board regulations provisions;
>
> (2) In excess of the authority granted to the planning board 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 an abuse of discretion or clearly unwarranted exercise of discretion." G.L.1956 § 45-23-71.

***3** It is well-recognized in Rhode Island that municipalities may confer upon a local zoning board appellate review authority over a decision of a local planning board. *See* *Munroe v. Town of East Greenwich,* 733 A.2d 703 (R.I.1999). Essentially, the reviewing court gives deference to the decision of the zoning board, the members of which are presumed to have special knowledge of the rules related to the administration of zoning ordinances, and the decision of which must be supported by legally competent evidence. *Monforte v. Zoning Bd. of Review of East Providence,* 93 R.I. 447, 449, 176 A.2d 726, 728 (1962); *see, Arnold v. R.I. Dept. of Labor and Training,* No. 01-237 MP., slip op. (R.I. filed March 26, 2003) (defining legally competent evidence as "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance"). Thus, a court should exercise restraint in substituting its judgment for that of the zoning board and is compelled to uphold the board's decision if the Court "conscientiously finds" that the decision is supported by substantial evidence contained in the record. *Mendonsa v. Corey,* 495 A.2d 257 (R.I.1985) (quoting *Apostolou v. Genovesi,* 120 R.I. 501, 507, 388 A.2d 821, 825 (1978)). It is only if the record is "completely bereft of competent evidentiary support" that a board of appeal's decision may be reversed. *Sartor v. Coastal Resources Management Council of Rhode Island,* 434 A.2d 266, 272 (R.I.1981).

NOTICE OF HEARING

The appellants maintain that the Zoning Board did not provide interested parties with adequate notice of the September 9, 1998 hearing. General Laws 1956, § 45-23-69, provides that "[t]he board of appeal shall hold a public hearing on the appeal within forty-five (45) days of the receipt of the appeal, give public notice of the hearing, as well as due notice to the parties of interest." G.L.1956 § 45-23-69. It is well-accepted that "[i]n zoning matters, just as in other legal proceedings, notice is a jurisdictional prerequisite. It is purposed upon affording those having an interest an opportunity to present facts which might shed light on the

issue before the board....” *Carroll v. Zoning Bd. of Review,* 104 R.I. 676, 248 A.2d 321, 323 (1968). To be sufficient, “the notice sent ‘must be reasonably calculated, in light of all the circumstances, to apprise the interested parties of the pendency of the action....” ’ *Zeilstra v. Zoning Bd. of Review,* 417 A.2d 303, 307 (R.I.1980). One way that this may be accomplished is by publication in a local newspaper of general circulation. *Tuite v. Zoning Bd. of Review,* 95 R.I. 12, 182 A.2d 311 (1962); *see also Tantimonaco v. Zoning Bd. of Review,* 100 R.I. 615, 218 A.2d 480 (1966). It has also been said that the presence at a zoning board hearing of the party challenging the sufficiency of the notice given indicates that the zoning board provided adequate notice of the proceedings. *Zeilstra,* 417 A.2d at 307.

***4** In this case, the Zoning Board has certified substantial evidence that it did comply with the jurisdictionally mandated notice requirements of G.L.1956 § 45-23-69. Specifically, the Zoning Board has provided this Court with substantial evidence in the form of a list and map indicating that notice was sent via regular mail to abutting landowners within four-hundred (400) feet of Glenham Park. The record also reflects that counsel for the appellants attended the September 9, 1998 Zoning Board hearing. The Zoning Board's finding that it provided adequate notice to all interested parties of the pendency of the September 9, 1998 hearing is supported by the reliable, probative and substantial evidence of the whole record.

THE ADEQUACY OF THE CERTIFIED RECORD

The appellants argue, *inter alia,* that there were numerous procedural defects at the Zoning Board's hearings of August 9, 2000, September 13, 2000, and January 10, 2001, which prejudiced their (the appellants') rights. Principally, the appellants argue, the Zoning Board did not adequately review the record of the Planning Commission pursuant to its statutory mandate for procedural or conclusory defects, and therefore, the Zoning Board's decision to uphold the Planning Commission was arbitrary or capricious or characterized by an abuse of discretion.

General Laws 1956, § 45-23-66 states in relevant portion that

> “(a) Local regulations adopted pursuant to this chapter shall provide that an appeal from any decision of the planning board ... may be taken to the board of appeal by an aggrieved party.
>
> (b) Local regulations adopted pursuant to this chapter shall provide that an appeal from a decision of the board of appeal may be taken by an aggrieved party to the superior court for the county in which the municipality is situated.” G.L.1956 § 45-23-66.

General Laws 1956, § 45-23-32(3) defines the “board of appeal,” in relevant part, as “[t]he local review authority for appeals of actions of the ... planning board on matters of land development or subdivision, which shall be the local zoning board of review constituted as the board of appeal.” G.L.1956 § 45-23-32(3). Similarly, the Cranston City Charter, § 13.06, states in relevant portion that “[a]ppeals may be taken from the decision of the city plan commission to the zoning board of review hereby designated as the platting board of review. The zoning board of review shall have power to sustain, overrule or modify the decision of the city plan commission appealed from....” *Cranston City Charter,* § 13.06; *see generally Munroe,* 733 A.2d at 703.

When hearing appeals from the planning board, G.L.1956 § 45-23-70 provides in pertinent part that

> “(a) ... the board of appeal shall not substitute its own judgment for that of the planning board ... but must consider the issue upon the findings and record of the planning board.... The board of appeal shall not reverse a decision of the planning board ... except on a finding of prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record.
>
> ***5** (b) The concurring vote of three (3) of the five (5) members of the board of appeal sitting at a hearing, is necessary to reverse any decision of the planning board....
>
> * * *
>
> (d) The board of appeal shall keep complete records of all proceedings including a record of all votes taken, and shall put all decisions on appeals in writing. The board of appeal shall include in the written record the reasons for each decision.” G.L.1956 § 45-23-70.

With respect to the findings required of planning boards, G.L.1956 § 45-23-60 provides in relevant portion that

"[a]ll local regulations 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;

(2) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance;

(3) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval;

(4) 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....

(5) All proposed land developments and all subdivision lots have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered in compliance with this requirement." G.L.1956 § 45-23-60. (Emphasis added.)

In its decision of February 22, 2001, the Zoning Board found that "the [Planning] Commission's ruling did not violate the applicable statute and ordinances and ... their decision was not erroneous in view of the substantial and probative facts in the record before it...." *Zoning Board Decision* at 3. In arriving at its conclusion, the Zoning Board stated that "the [Zoning] Board looked at the record to determine whether the [Planning] Commission made the required findings set forth in R.I.G.L § 45-23-60...." *Id* at 2. Nevertheless, the record is bereft of any evidence that the Planning Commission specifically considered the factors enunciated in G.L.1956 § 45-23-60 when it approved the preliminary subdivision plan for Glenham Park. Specifically, the certified record reveals only that the Planning Commission heard testimony from several interested parties, both for and against the proposal, and that the Planning Commission had before it both the DiPrete and VHB reports as well as a letter from Capezza recommending subdivision approval. *See Planning Commission Minutes, April 13, 1998* at 3-6. The record does not, however, indicate what positive findings the Planning Commission made or whether the evidence presented satisfied the requirements of G.L.1956 § 45-23-60. Essentially, the Planning Commission issued a boilerplate decision indicating that its members unanimously approved the preliminary subdivision application for Glenham Park subject to several limiting conditions. *Notice of Decision* at 1-2; *see vonBernuth v. Zoning Bd. of Review,* 770 A.2d 396 (R.I.2001) (a zoning board's application of legal principles must amount to something more than the recital of a mere litany). This Court can only speculate as to how the Zoning Board found, *inter alia,* that the Planning Commission "did not violate the applicable statute and ordinances," and that it (the Planning Commission) properly discharged its statutory duties.

***6** The record is also bereft of any evidence that the Zoning Board held a public hearing, pursuant to the requirements of G.L.1956 § 45-23-69, on January 10, 2001 with respect to the instant matter on remand from this Court. Since the Zoning Board has not certified to this Court the record of the allegedly held January 10, 2001 hearing, there is no substantial evidence of record demonstrating that Zoning Board member Corrao ever reviewed the record of the proceedings prior to January 10, 2001. *Irish Partnership v. Rommel,* 518 A.2d 356 (R.I.1986) (zoning board members must make adequate findings of fact on the record otherwise, proper judicial review is impossible); *see also von Bernuth v. Zoning Bd. of Review,* 770 A.2d 396 (R.I.2001). Additionally, because the record of the alleged January 10, 2001 hearing is absent from the certified record, there is no substantial evidence of record indicating how the remaining Zoning Board members voted and whether any evidentiary conflicts were resolved. *Id.* (holding that a "court will not search the record for supporting evidence or decide for itself what is proper in the circumstances"); *see also von Bernuth,* 770 A.2d at 401.

Since the Zoning Board's decision was in violation of ordinance and statutory provisions regarding the Planning Commission's findings, this Court need not reach the appellants' other arguments or whether the Planning Commission had a proper quorum.

CONCLUSION

As there is no substantial evidence of record to indicate that the Planning Commission made the requisite findings on the record, after remand, consistent with the requirements of G.L.1956 § 45-23-60, or whether the Zoning Board held the required January 10, 2001 hearing before recording its February 22, 2001 decision, the Zoning Board's decision upholding the Planning Commission's preliminary subdivision approval for Glenham Park was clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record. *See von Bernuth,* 770 A.2d at 402 ("court will not search the record for supporting evidence or decide for itself what is proper in the circumstances" (quoting *Irish Partnership,* 518 A.2d at 359)). Substantial rights of the appellants have been prejudiced by the Zoning Board's decision. This Court hereby remands to the Zoning Board its February 22, 2001 decision with instructions to further remand the matter to the Planning Commission to make findings of fact on the record regarding the propriety of preliminary subdivision approval for Glenham Park. This Court shall retain jurisdiction.

Counsel shall prepare the appropriate order for entry.

All Citations

Not Reported in A.2d, 2003 WL 21296431

Footnotes

1 The Planning Commission repeatedly postponed the hearings to allow Palazzo sufficient time to present data which would purportedly demonstrate the harmful effects to his property from water runoff should the Glenham Park subdivision application be approved.

2 The record of the allegedly held January 10, 2001 hearing, however, was not certified to this Court. *See* discussion *infra* pp. 9-10.