STATE OF RHODE ISLAND
ZONING BOARD OF REVIEW

CITY OF PROVIDENCE

RICHARD SHIEFERDECKER, JUDITH AMARAL, LORIANNE MEDEIROS, JOSEPH ESCOBAR, CECILLIA CABRAL, OM DEVKOTA, and NANCI SARGIS,
Appellants,

v.

PROVIDENCE DEPARTMENT OF INSPECTIONS AND STANDARDS ZONING OFFICIAL, FOX POINT CAPITAL LLC, and FOX POINT CAPITAL II LLC
Appellees.

Providence Department of Inspection and Standards Administrative Modification Appeal

Appellees, Fox Point Capital LLC and Fox Point Capital II LLC, Responsive Memorandum of Law

I. PROCEDURAL SUMMARY OF THE ADMINISTRATIVE MODIFICATION

The Appellees, Fox Point Capital, LLC and Fox Point Capital II, LLC ("Fox Point Capital"), are the owners of 269 Wickenden Street, also known as Providence Tax Assessor Plat 18 Lots 190 and 192. The Director of the Providence Department of Inspections and Standards, or their designee is the zoning enforcement officer who reviewed and approved the subject administrative modification (hereinafter referred to as the "108sqft Administrative Modification"), pursuant to The City of Providence Zoning Ordinance ("Ordinance") §1709. On or about February 5, 2025, Fox Point Capital filed the 108sqft Administrative Modification seeking "relief from the area requirement to qualify for the parking exemption…" see 108sqft Administrative Modification Approval. The 108sqft Administrative Modification was approved and recorded on February 11, 2025. Richard Shieferdecker et al ("Appellants"), brought forth this appeal on February 28, 2025, pursuant to R.I. Gen. Laws §45-24-64 and Ordinance §1903(F).

II. CONTEXTUAL BACKGROUND

1. Administrative Modification Law

The State of Rhode Island recently adopted a new law requiring that all municipalities enforce a new "administrative modification" process. 2023 R.I. SB 1032 §1, enacted June 24, 2023. Administrative Modifications can fairly be understood as *de minimis* dimensional variances. In effect, the State requires that dimensional relief less than 5% be reviewed administratively, without requiring any notice. Dimensional relief from 5%-15% requires notice only to direct abutters, and if there is no objection the relief is granted without a hearing. The state allows for modifications up to 25% without a public hearing. In sum, the State has expressly found that dimensional relief up to 25% is so minor that it does not require a public hearing and dimensional relief up to 5% is so *de minimis* that it does not even require any form of notice at all. Of note, the subject modification is a 1% deviation from the dimensional standard.

2. Approval History

The subject property is in the midst of the approval process. The subject property are two separate lots that are a combined 10,108sqft. The Property has received two (2) master plan approvals expressly including a 108sqft lot not for development for the express purpose of construction of a building on a 10,000sqft lot which does not require any parking. If all of this seems familiar to the Board, the same Appellants to this matter previously appealed and challenged the second Master Plan approval, arguing in part that the City Planning Commission erred by not requiring parking, but both this Zoning Board of Review and the Superior Court upheld that approval. More recently, the Property received Preliminary Plan Approval whereby the 10,108sqft of total land area was authorized to construct a building without requiring any parking. In sum, the

development proposal of 10,108sqft of total land area has been approved and those approvals have been upheld, each with express consideration of the 10,000sqft parking exemption, a total of five (5) separate times by three (3) separate bodies and all five times all three bodies have found that the proposal is appropriate.

Appellants seem to wish to relitigate this argument in the hopes of obtaining a different result from before – but they cannot succeed here either. The Administrative Modification achieves the same outcome of the preceding four approvals with a lot not for development, but it does so without the practical inconvenience of creating a new and separate deed restricted lot. The definition of insanity is doing the same thing again and again while hoping for a different result. Fox Point Capital is requesting that this Honorable Board refuse to reward insanity and instead remain consistent with all of the preceding determinations and uphold the 108sqft Administrative Modification so that the project may move forward without the need for the practical inconvenience of creating a lot not for development.

III. STANDARD OF REVIEW

Pursuant to Ordinance §1903(F) and R.I. Gen. Laws §§45-24-63, 64, any aggrieved party may appeal the decision of a zoning enforcement officer to the Zoning Board of Review. **"[T]he board of appeal shall not substitute its own judgment for that of the administrative officer** but must consider the issue upon the findings and record of the administrative officer." R.I. Gen. Laws §45-23-67(d)(1) (emphasis added). The Zoning Board of Review shall only reverse the administrative officer's decision upon findings of, "[P]rejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record." Id. The Zoning Board of Review may, after a review of the record and conducting of a hearing, reverse or affirm, wholly or in part, and modify an order, requirement, decision, or determination. See City of Providence Zoning Board of Review Policies and Procedures, §9.

IV. ARGUMENT

A. Appellants are not an aggrieved party and therefore lack standing to file this appeal.

Under state law and local ordinance, not just anyone can file an appeal. See Ordinance §201; R.I. Gen. Laws §45-24-31(5). In order to file an appeal, a party must be an "aggrieved party." This appeal should be denied on the basis that none of the appellants are an aggrieved party and therefore they cannot appeal the subject modification. No argument has been made and no evidence has been provided to establish Appellants' status as an aggrieved party – only legal conclusory statements have been made on this point. The Appellants seem to presume they are entitled to an appeal, but the law does not make that presumption and this Board cannot assume. It is the Appellants burden to prove that they are an aggrieved party. See Blackstone Valley Chamber of Commerce v. Public Utility Commission, 452 A.2d 931, 934 (R.I. 1982) ("One who seeks review has the burden of setting the judicial machinery in motion by establishing that he is aggrieved and has a right to redress[.]") Accordingly, Appellants have failed to meet their burden of proof establishing themselves as an aggrieved party by providing no evidence of such.

State law and the zoning ordinance's definition of an aggrieved party mirror each other. An aggrieved party as either someone who is entitled to notice under RIGL §45-24, or someone, "who can demonstrate that ***their property*** will be injured by a decision of any officer or agency responsible for administering this Zoning Ordinance." Ordinance §201 (emphasis added); R.I. Gen. Laws §45-24-31(5). "[G]eneralized grievances affecting the community at large, such as parking and traffic difficulties, do not support a finding that the party was aggrieved." Clark v. Zoning Bd. Of Review, C.A. No. PC-2022-06617 LEXIS 20, *13 (R.I. Super. Feb. 26, 2024).

i. Appellants were not entitled to notice of Fox Point Capital's proper less than 5% administrative modification, denying Appellants of aggrieved party status in this manner.

Notice was not required for the less than 5% administrative modification, therefore Appellants do not qualify as an aggrieved party in this manner. Ordinance §1903(C)(3). Modification requests of five percent (5%) or less are exempt from the public notice requirements of §1801. Id. The subject modification requested, "relief from the area requirement to qualify for the parking exemption available pursuant to Zoning Ordinance Section 1410.B.7…" See Administrative Modification Application; see also Administrative Modification Decision. Modifications pertaining to parking are explicitly permitted:

> The Director of the Department of Inspection and Standards is authorized to grant a 15% modification to any dimensional standard of this Ordinance and to the required vehicle or bicycle parking spaces.

Ordinance §1903(B). Said Zoning Ordinance §1410(B)(7) creates a parking exemption for commercial lots up to 10,000sqft. The subject properties are laid out as a 10,000sqft lot and a 108sqft lot. An administrative modification increasing the lot size of the parking exemption by 1% to 10,108sqft makes the 108sqft Administrative Modification application expressly exempt from providing notice. Ordinance §1903(C)(3).

Thus, Appellants were not entitled to receive notice of the application and therefore cannot presume that they have aggrieved party status. Absent being entitled to notice, Appellants' only means to acquiring standing as an aggrieved party is if they can show an injury to their property. In order for this appeal to be valid, it is the Applicant's burden to prove that their specific property is specifically harmed by a 1% increase in the parking exemption size.

ii. Appellants have not alleged a valid injury, much less proved one, and failing their burden appellants are not an aggrieved party and therefore this appeal must be dismissed.

As Appellants were not entitled to notice, to alternatively qualify as an aggrieved party, Appellants must allege "that the challenged action has caused him injury in fact, economic or otherwise." Rhode Island Ophthalmological Society v. Cannon, 317 A.2d 124, 128 (R.I. 1974); citing Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 152 (1970). The alleged injury must be a, "legally cognizable and protected interest that is 'concrete and particularized and actual or imminent, not 'conjectural' or 'hypothetical.'" McKenna v. Williams, 874 A.2d 217, 226 (R.I. 2005) (quoting Pontbriand v. Sundlun, 699 A.2d 856, 862 (R.I. 1997)). Critically, R.I Case Law has expressly held that:

> [G]eneralized grievances affecting the community at large, **such as parking and traffic difficulties**, do not support a finding that the party was aggrieved.

See Clark, C.A. No. PC-2022-06617 LEXIS 20, at *13. **Emphasis added**.

This needs to be made abundantly clear. It is the appellant's burden to show that their property is harmed, see Blackstone Valley, 452 A.2d at 934, and general community parking and traffic difficulties *do not qualify as proof of harm*. The harm cannot be conjectural or hypothetical. There must be proof of the harm. In other words, if Appellants do not prove that their personal property is injured by some negative impact *other than* generalized community parking and traffic impacts, then their appeal fails as a matter of law.

In Clark, a City of Providence matter heard by this very board, the applicant proposed a minor land development project to build new multifamily apartment buildings, in a C-2 zone. Id. At *1. Parking was proposed to be internal to the building requiring the applicants to apply for a dimensional height adjustment for its proposed building. Id. at *2. No notice was required for the hearing before the City Planning Commission, per the relevant ordinance, the preliminary plan was approved, and the appellants appealed. Id. at *3. In Clark, appellants unsuccessfully argued

that notice should have been provided. Id. Appellants also argued that they were injured as the proposed buildings would impact traffic and parking in the neighborhood. Id. at *4. Both the Zoning Board of Review and Superior Court held that the requested adjustment was proper, no notice was required, and no proper injury was alleged as, "generalized grievances affecting the community at large, such as parking and traffic difficulties, do not support a finding that the party was aggrieved." Id. at *13.[1]

The record in this case is plain: Appellants have not established any injury in fact. Appellants have simply made a legal conclusory statement that they have standing but have failed to put forward any arguments or evidence to support this statement. Appellants have failed to meet their burden of proof establishing an injury. See Blackstone Valley, 452 A.2d at 934.

The only semblance of a claimed injury would be, "75 additional cars looking for parking on surrounding neighborhood streets. This will significantly reduce the number of available on-street parking in the neighboring area." Mem. In Support of Appellants, 7 (Mar. 18, 2025). As this Board may recall with the Clark matter, on November 21, 2022 it rejected the same generalized grievance that Appellants can only possibly claim. C.A. No. PC-2022-06617 LEXIS 20, at *4, *13. This Board, and the Superior Court, have consistently ruled that generalized grievances of traffic and parking issues in the community did not qualify an appellant as an aggrieved party due to the lack of injury in fact, thereby lacking standing to challenge a decision. Id. The alleged injury is not even about Appellant's private property. '75 additional cars looking for parking' is an allegation that Appellants are harmed because they believe it may be less convenient for them to use public property to park their vehicles. This is not a specific injury to their specific property.

[1] See also Watson v. Fox, 44 A.3d 130, 136 (R.I. 2012) (Taxpayer seeking declaratory relief seeking a ruling that the process the General Assembly used to allocate state money for legislative grants did have any injury in fact besides generalized claims alleging purely public harms).

For the same reason no one can file a lawsuit to object to a new driver's license being issued to a Providence resident because that is one more person looking for parking, people looking for public parking cannot be used to bring a private zoning appeal.

Again, no proof or argument has been presented stating any of the Appellants' injury in fact. Even setting aside Appellants' failure to meet their burden of proof, Appellants claim for an alleged injury would only be the general community impact on parking. This is not a proper injury in fact. See Clark at *13. An aggrieved party must show that ***their*** private property will be injured as a result of the actions the zoning enforcement officer. See Zoning Ordinance §201 (emphasis added); R.I. Gen. Laws §45-24-31(5)(i). However, appellants have failed to explicitly or implicitly allege an injury to their property in any manner. It cannot be shown that the modification request to confirm the exemption of the off-street parking requirements will injure ***their*** private properties. Having not proven that they have sustained an injury to their properties, Appellants have not shown that they are an aggrieved party. Having not satisfied either prong, Appellants have no standing to file this appeal and said appeal should be dismissed.

B. There are no valid grounds with which this Board should overturn the approval of the submitted administrative modification request.

On the merits, great deference is to be given to the zoning enforcement officer's decision, barring evidence of "prejudicial procedural error, clear error, or a lack of support by the weight of the evidence in the record." §45-23-67(d)(1). Prejudicial procedural error occurs when the procedure followed by the zoning enforcement officer 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 zoning enforcement officer's 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). A clear error of law amounts to stark and obvious violation of controlling law.

1. The zoning enforcement officer made the correct findings on all of the required administrative modification factors

In terms of an administrative modification, the zoning enforcement officer shall base their decision on the following factors:

> a. The modification requested is reasonably necessary for the full enjoyment of the permitted use.
> b. If the modification is granted, neighboring property will neither be substantially injured nor its appropriate use substantially impaired.
> […][2]

Ordinance §1903(C)(2); RIGL §45-24-46(a). The Zoning enforcement officer came to an affirmative determination on all applicable factors. See Administrative Modification Approval.

[2] For the subject modification, RIGL §45-24-46(a and b) are applicable but (c-d) are not.

a. The 1% modification requested is reasonably necessary for the full enjoyment of the permitted use.

Lots of 10,000sqft or less in a C-2 zone are exempt from requiring parking. Ordinance § 1410(B)(7). The two lots combined will equal 10,108sqft. See Master Plan Approval, Nov. 9, 2023; see also Preliminary Plan Approval, Feb. 26, 2025. The proposed building will be placed on a 10,000sqft lot, and a second 108sqft lot not for development will also exist. This has been consistently stated throughout all reviews and approvals. Id.

The mixed-use building without parking on the 10,000sqft lot is by-right. The 108sqft lot meets all applicable dimensional requirements and is also by right. The denial of the modification requested will frustrate the permitted by right uses of 10,108sqft of property. These uses have been found to be permitted uses by all three jurisdictions presiding over each of the five preceding decisions and approvals. The modification is reasonably necessary to enjoy the permitted uses because it allows them to occur exactly as proposed without the awkward construct of 108sqft of deed restricted vacant land.

Another way of looking at the modification is that there is no real difference between a 10,000sqft lot and a 10,108sqft lot that causes a need for parking. There is nothing magical about the two-dimensional space occupied by a piece of property where 10,108sqft of space really needs to be parked, but 10,000sqft of space doesn't. There is no practical or substantive distinction between a 10,000sqft lot and a 10,108sqft lot generally, and there is literally no difference between 10,000sqft and 10,108sqft in terms of need for parking.

Accordingly, the modification requested is reasonably necessary for the full enjoyment of the permitted use. Ordinance §1903(C)(2); RIGL §45-24-46(a).

b. The granting of the modification does not harm the appellants.

For all of the reasons set forth regarding Appellants failure to meet the standards of an aggrieved party, and for all of the reasons and findings of fact set forth in the preceding approvals and decisions, it is abundantly clear that the granting of the modification does not cause any specific harm to appellant's private property.

2. The Zoning Enforcement Officer did not deviate from the procedure as prescribed by the ordinance and committed no procedural error in their review.

The zoning enforcement officer committed no prejudicial procedural error. As stated above, the administrative modification was properly applied for as a modification to area requirements to establish qualification of the parking requirement exemption, a permitted modification. (Ordinance §1903(B) ("The Director of the Department of Inspection and Standards is authorized to grant a 15% modification to any dimensional standard of this Ordinance and to the required vehicle or bicycle parking spaces"). The Zoning enforcement officer then reviewed the submitted application within ten days of receipt of the application. Having determined that the request was for a less than 5% modification, the zoning enforcement officer properly determined that notice was not required. The zoning enforcement officer issued their findings, as prescribed by their ordinance. The zoning enforcement officer did not abuse their discretion, rather they followed the explicit procedure to a tee. The zoning enforcement officer committed no prejudicial procedural error.

3. The zoning enforcement officer used only legally competent evidence to base their decision to review and approve the 108sqft Administrative Subdivision.

The Zoning enforcement officer utilized legally competent evidence in their review of the administrative modification request. The zoning enforcement officer utilized the procedure and

standards laid out in the zoning ordinance and the application created for a modification request, that is in conformance with the zoning ordinance. It would be folly to argue that the standards and procedure laid out in the ordinance, or the application based upon the ordinance, are not legally competent evidence to be used by the zoning enforcement officer.

4. The zoning enforcement officer did not commit any error of law as Ordinance §1903(B) explicitly allows modifications pertaining to required vehicle parking.

The ordinance explicitly grants modifications to the dimensional standards to establish required parking. Ordinance §1903(B) ("The Director … is authorized to grant a 15% modification to any dimensional standard of this Ordinance and to the required vehicle or bicycle parking spaces.") There is no evidence that such a request is prohibited by the ordinance or state law. The state statute requires a minimum set of standards for modifications, but does not expressly limit what standards can be modified, except for the moving of lot lines. R.I. Gen. Laws §45-24-46. The subject modification request was legally permissible and therefore not a clear error of law.

An administrative modification's purpose is to, "provide relief from carrying out a requirement of this Ordinance that may cause a minor practical difficulty." Ordinance §1903(A). Of note, the granting of the administrative modification has no impact or change to the previous approvals. It merely allows for compliance with the zoning code without requiring the "minor practical difficulty" of creating a 108sqft lot not for development as already upheld by all of the previous approvals and decisions.

R.I. Gen. Laws §45-24-46 does not limit or exclude what a municipality may include as a category of items to apply for a modification. Providence's Zoning Ordinance allow modifications of dimensional requirements, expressly including parking. See Ordinance §1903(B).[3]

Appellants mischaracterized the requested modification in a few ways. First, at no point did Fox Point Capital attempt to use a modification to modify the current lot sizes. The requirement modified was the dimensional size of the exemption parking requirements, a permitted modification. See Ordinance §1903(B). Specifically, the City's Ordinance provides an exemption to the parking space requirement in a C-2 district with a lot size of 10,000sqft or less. Ordinance §1410(B)(7). Both the approved Master Plan and Preliminary Plan state that the proposed building will be placed on a 10,000sqft lot. See Approved Master Plan; see also Approved Preliminary Plan. The remaining 108sqft lot would need to become a deed restricted lot not for development. Thus, the modification of the parking area dimensional exemptions was requested, which is permissible, to allow this project to qualify for the approved parking requirement exemption without requiring the unpragmatic 108sqft lot not for development.

Second, Appellant also grossly mischaracterizes the modification amount requested. 108/10,108 is less than 1%, not 100%. A less than 1% modification does not require notice. Ordinance §1903(C)(3). The modification changes the area used to determine whether the subject lot qualifies for the parking exemption. The 108sqft, whether it is its own lot or just a portion of the building lot will not be developed and thus should not be considered in the City's parking requirement calculation. The end result is a red herring as the City only modified the lot area used to establish the dimensional standard for parking.

[3] For comparable laws as further proof hereof, see also City of Cranston Code of Ordinances §17.20.130(A) (modifications are allowed for "dimensional or quantitative requirements of parking, signs, landscaping, and other similar requirements of this section…"), City of Pawtucket Code of Ordinances §410-97.1 (dimensional modifications are allowed pertaining to any zoning dimensional requirement).

In sum, an administrative modification can be granted pertaining to any dimensional standards of the Zoning Ordinance, specifically as it pertains to parking spaces. Ordinance §1903(B). Therefore, there is no clear error of law and this appeal must be denied.

V. CONCLUSION

Fox Point Capital respectfully requests that this appeal is summarily denied and dismissed. First the Appellant requests that this Board expressly dismiss the appeal on the grounds that the Appellants are not an aggrieved party and lack standing to appeal this matter just as this Board and the Superior Court held in Clark. (C.A. No. PC-2022-06617 LEXIS 20, at *4, *13)

Additionally, for clarity of the record, the Appellant also requests that this board expressly deny this appeal on the merits as there is no evidence to show that this Board should overrule the Zoning enforcement officer's deference or that any error of law or procedural error occurred.

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By its Attorney,

/s/ Dylan B. Conley

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