

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: May 29, 2013)

K.S.D. TRUST, GRANT DULGARIAN, :  
TRUSTEE :

V. :

C.A. No. PB-13-0920

MYRTH YORK, Chair, ARTHUR :  
STROTHER, DAN VARIN, MARC :  
GREENFIELD, ENRIQUE MARTINEZ, :  
In their official capacities as Members of :  
The Zoning Board of Review of the City of :  
Providence, Members of the PROVIDENCE :  
CITY PLAN COMMISSION, and :  
GILBANE DEVELOPMENT COMPANY :

**DECISION**

**SILVERSTEIN, J.** Before the Court is K.S.D. Trust’s (Appellant) appeal of a Decision of the City of Providence Zoning Board of Review sitting as the Board of Appeals (Board of Appeals), upholding the City of Providence City Plan Commission’s (CPC) approval of a Preliminary Plan application submitted by Gilbane Development Company (Applicant or Gilbane). Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

**I**

**Facts and Travel**

Gilbane seeks to develop a private student housing facility near Brown University (the Project). First, Gilbane must raze the buildings currently on the property. Next, Gilbane plans to build a four-story structure with ninety-five apartments, small ground-level retail, and underground parking. To do all of this, Gilbane must first navigate state and local zoning and land use laws. This requires the CPC’s approval of a “Master Plan,” followed by a later approval

of a “Preliminary Plan,” and finally an approval of the “Final Plan.” The Appellant owns an establishment across the street from the proposed Project site, and challenges the CPC’s approval of the Preliminary Plan here.

On April 27, 2012, the CPC granted Master Plan Approval for the Project. (Appellant’s Ex. 2, Notice of Master Plan Approval and Notice of Appeal for Major Land Development, Apr. 27, 2012.) In its notice of that approval, the CPC noted that, at the time, the future land use map in the City of Providence’s (the City<sup>1</sup>) Comprehensive Plan (the Comprehensive Plan) indicated two land use designations for the property to be developed: Neighborhood Commercial/Mixed Use and Medium Density Residential.<sup>2</sup> Id. at 2. The CPC recognized that “[w]hile the proposed development is consistent with the Neighborhood Commercial/Mixed Use designation; it is inconsistent with the Medium Density Residential designation.” Id. The CPC noted that Gilbane had petitioned the City Council to change the area to the Neighborhood Commercial/Mixed Use designation and that the Project would be consistent with the Comprehensive Plan if the City Council made such a change. Id. The CPC approved the Master Plan subject to five conditions, including a condition that “[t]he CPC will conduct a public hearing on the comprehensive plan change and make recommendations to the City Council on the proposed comprehensive plan and zoning changes. Should the plan and zoning changes fail to be approved as proposed, the plan shall be modified accordingly.”<sup>3</sup> Id. at 5. The Appellant unsuccessfully appealed that decision

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<sup>1</sup> In this Decision, the “City” refers to the City of Providence and all of its subdivisions.

<sup>2</sup> The land use designations and their corresponding descriptions as of April 27, 2012 are not part of the record in this case, nor has any party sought to submit them to this Court.

<sup>3</sup> It is unclear what final use of the word “plan” (“the plan should be modified accordingly”) refers to. It could mean the “Master Plan” that was before the CPC at the time, but “Master Plan” is capitalized on the approval on that page. It could mean the “comprehensive plan” as the first “plan” (“Should the plan . . .”) in that sentence presumably refers, but that would not make sense in the context of that sentence. Alternatively, it could just generally mean the plan for the

to the Board of Appeals. Importantly, the Appellant did not appeal that Board of Appeals Decision to the Superior Court.

On May 5, 2012, the City adopted Ordinance No. 292: “An Ordinance Amending *Providence Tomorrow: The Interim Comprehensive Plan* as the City’s Official Comprehensive Plan, As Amended” (“Ordinance No. 292”). (Gilbane Ex. B, Ch. 2012-24, No. 292.) The amendment to the Comprehensive Plan included “Table 11.1 Land Use Designations,” which contained the use designation “High Density Residential” with the corresponding description: “These areas are characterized by multi-family dwellings, with some one, two and three-family dwellings interspersed. Multi-family buildings typically range from three to six stories in height. In some areas, small scale commercial uses, such as neighborhood corner stores may be appropriate.” *Id.* at 108. The amendment also changed “Map 11.2 Future Land Use,” although the Court cannot tell exactly which designations apply to which streets given the size of the map.<sup>4</sup> *Id.* at 107.

On August 6, 2012, the City enacted two additional Ordinances, one amending the Comprehensive Plan, the other amending the City’s Zoning Ordinance. First, the City passed Ordinance No. 506: “An Ordinance Amending *Providence Tomorrow: The Comprehensive Plan* as the City’s Official Comprehensive Plan, by changing the Future Land Use Map for the Area Bounded by Cushing, Brook, Angell, and Thayer Streets” (“Ordinance No. 506”). (City Ex. A, Ch. 2012-46, No. 506, § 1.) Ordinance No. 506 amended the designation “High Density

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development going forward. Regardless, the interpretation of the Master Plan Approval is not before this Court; the Appellant did not appeal the Board of Appeals’ decision to the Superior Court and that Board of Appeals’ Decision is not in the record of this case.

<sup>4</sup> Ordinance No. 292 is contained within Gilbane’s Exhibit B, and refers to an attached document identified as *Providence Tomorrow: The Interim Comprehensive Plan*. (Gilbane Ex. B, Ch. 2012-24, No. 292, § 1.) Exhibit B includes Table 11.1 and Map 11.2, but “Interim” is not in the title and the cover page of the plan states, “Adopted ??, ??, 2012.”

Residential” to include that bounded area. *Id.* § 1. The City’s Comprehensive Plan—Adopted May 5, 2012, Amended through August 6, 2012—including, “Table 11.1 Land Use Designations,” which contained the use designation “High Density Residential” with the corresponding description: “These areas are characterized by multi-family dwellings, with some one, two and three-family dwellings interspersed. Multi-family buildings typically range from three to six stories in height. In some areas, small scale commercial uses, such as neighborhood corner stores may be appropriate.” (City Ex. F, *Providence Tomorrow: The Comprehensive Plan*, Adopted May 5, 2012, Amended through August 6, 2012, at 112.)

Second, the City adopted Ordinance No. 507, which amended the City’s Code of Ordinances “to create a new zoning district that would support high density residential and limited commercial development and to modify the zoning map for a nine lot area bounded by Meeting, Brook, Euclid, and Thayer Streets.” (City Ex. B, Ch. 2012-47, No. 507.) This added the new residential zoning district “R-M High Density,” which is “intended for the highest density residential mixed use combined with commercial and retail uses, with dwelling units located on lots with a minimum land area of 5,000 sq. ft. and a minimum land area of 300 sq. ft. per dwelling unit.” *Id.* § 1.

On September 20, 2012, the City Council passed a nonbinding Resolution “urging the CPC to . . . consider requiring [Gilbane] to resubmit the Master Plan phase . . . .” (Appellant Ex. 5, Resolution of the City Council No. 544, Sept. 20, 2012.) The Master Plan was never resubmitted.

Gilbane filed an application for Preliminary Plan Approval on November 20, 2012. On December 19, 2012, the CPC approved the Preliminary Plan, finding that: (1) the proposed development is consistent with the Comprehensive Plan, noting that the “existing density of the

residences and the fact that some are commercial uses”; (2) the proposed development complies with the Zoning Ordinance; (3) there will be no significant environmental impacts, noting that Gilbane provided a stormwater plan that found runoff rates would remain constant, a traffic study that found minimal traffic impact, and a survey that found no change to the character of the neighborhood; (4) there are no physical constraints; (5) there is adequate vehicular and pedestrian access. (Gilbane Ex. C, CPC Agenda Item 1, 257 Thayer Street, Dec. 18, 2012.)

On February 6, 2013, the Board of Appeals held a hearing and found unanimously that: (1) the CPC did not commit “prejudicial procedural error”; (2) the CPC did not commit “clear error”; and (3) the CPC’s findings were supported by substantial evidence. The Appellant filed this appeal in Superior Court on February 25, 2013, but did not join Gilbane. A number of motions were filed regarding the procedural problem; the Court granted the Appellant’s Motion to Amend and Gilbane’s Motion to Intervene, denied Gilbane’s Motion to Dismiss, and ordered expedited briefing of the appeal. On May 21, 2013, the Court held a hearing on the merits of the appeal.

## II

### Standard of Review

This Court’s review of a decision of a board of appeal is governed by § 45-23-71 (the Statute). The Statute provides:

(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 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;

(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 abuse of discretion or clearly unwarranted exercise of discretion. G.L. 1956 § 45-23-71.

“Pursuant to § 45-23-71 judicial review of board decisions is not de novo.” Munroe v. Town of East Greenwich, 733 A.2d 703, 705 (R.I. 1999). The Superior Court’s review “‘is confined to a search of the record to ascertain whether the board’s decision rests upon ‘competent evidence’ or is affected by an error of law.’” West v. McDonald, 18 A.3d 526, 531 (R.I. 2011) (quoting Kirby v. Planning Board of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993)).

### III

#### Analysis

The Appellant argues that the CPC “exceeded its statutory and regulatory authority and acted with prejudicial procedural error, clear error, lack of support by the weight of the evidence in the record in granting approval of the subject Preliminary Plan Application.” (Appellant’s Mem. Supp. Vacating the Decision of the Zoning Board of Review 2.) Later, the Appellant frames the “Questions Raised” as “1. Whether the Applicant should have been required to resubmit to the Master Plan phase of review in light of the unmet conditions in approved Master Plan and whether the Preliminary Plan approval was premature and erroneous and violated the

due process rights of objectors?” and “2. Whether the CPC approval of the Preliminary Plan was in clear error of law or fact?” Id. at 6.

## A

### **Issues with the Master Plan**

The Appellant’s obfuscatory presentation of the travel melds the PCP’s separate approvals of the Master Plan and the Preliminary Plan and their separate challenges. While the PCP’s Master Plan Approval contains conditional language, that action was unsuccessfully challenged before the Board of Appeals and was not appealed to the Superior Court. This Court has been asked to review the Board of Appeals’ decision upholding the PCP’s action approving the Preliminary Plan. In its findings of fact and conclusion of law in this case, the Board of Appeals stated:

“This Board has already decided with respect to the same parties that ‘statutory and regulatory standards allow applicants to address certain issues with the comprehensive plan[s] after master plan approval where there are inconsistencies with the Comprehensive Plan.’ Resolution 9695 dated August 6, 2012. The CPC did not act *ultra vires* in conditioning its approval. The matter is *res judicata*.” Zoning Board of Review Resolution No. 9733, Feb. 15, 2013, at 5.

The Appellant does not challenge the res judicata conclusion. More importantly, the Court would not be able to consider that issue because the Board of Appeals decision (Resolution No. 9695) on the Master Plan Approval is not part of the record in this case, nor has any party attempted to admit that decision into evidence. Most importantly, the Board of Appeals’ decision on the Master Plan Approval was not appealed to the Superior Court. Therefore, it is not properly before this Court for review as the Court is confined to this record and this decision

below. Cf. West v. McDonald, 18 A.3d at 531 (noting that court is confined to a search of the record).

Nevertheless, even if the Court considered the Appellant's argument, based on this record, the issue is only a matter of semantics. The condition in the Master Plan Approval states, "Should the plan and zoning changes fail to be approved as proposed, the plan shall be modified accordingly."<sup>5</sup> (Appellant's Ex. 2, Notice of Master Plan Approval and Notice of Appeal for Major Land Development, Apr. 27, 2012, at 6.) While the City did not amend the relevant area in the Comprehensive Plan to "Neighborhood Commercial/Mixed Use," it created a new land use designation: "High Density Residential." As discussed below, the amendments to the City's Comprehensive Plan and Zoning Ordinances now permit a mixed residential and commercial use: the type of uses that Gilbane has sought for the project all along.

## **B**

### **The CPC's Approval of the Preliminary Plan**

After noting that Ordinance No. 507 (the zoning ordinance) references mixed commercial and residential uses, the Appellant argues that Ordinance No. 506 (the ordinance amending the Comprehensive Plan) "does not contain any such mixed use reference, nor does it refer to any land use other than 'high density residential.'" (Appellant's Mem. Supp. Vacating the Decision of the Zoning Board of Review 7.) This is incorrect; the Appellant ignores the description of "High Density Residential," contained in "Table 11.1 Land Use Designations," of the Comprehensive Plan, stating that: "These areas are characterized by multi-family dwellings, with some one, two and three-family dwellings interspersed. Multi-family buildings typically

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<sup>5</sup> See supra note 3 for a discussion of the ambiguous use of "the plan."

range from three to six stories in height. In some areas, small scale commercial uses, such as neighborhood corner stores may be appropriate.” (City Ex. F, *Providence Tomorrow: The Comprehensive Plan*, Adopted May 5, 2012, Amended through August 6, 2012, at 112 (emphasis added).) Here, there is evidence that there will be a “small amount of retail” on the ground floor. See Zoning Board of Review Resolution No. 9733, Feb. 15, 2013, at 1; Gilbane Ex. C, CPC Agenda Item 1, 257 Thayer Street, Dec. 18, 2012, at 2. Therefore, the Board of Appeals did not commit clear error when it found that the CPC did not commit clear error by finding that the Preliminary Plan was consistent with the City’s Comprehensive Plan. See § 45-23-71(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 Appellant compounds this incorrect reading of the amendment to the Comprehensive Plan by arguing that Ordinance No. 506 imposes a restraint on further expansion of commercial uses by pointing to the language in § 2 of Ordinance No. 506’s amendment to the Comprehensive Plan, which states “This amendment shall not be construed as a general change in residential density, endorsement of demolition of historic structures, or expansion of commercial uses in other parts of College Hill. On the contrary, this amendment is a reaffirmation of the College Hill Neighborhood Plan that was adopted along with the overall Comprehensive Plan.” (City Ex. A, Ch. 2012-46, No. 506, § 2.) This argument ignores § 1 of the ordinance, which delineates that the “High Density Residential” designation “encompasses the area Bounded by Cushing, Brook, Angell, and Thayer Streets.” Therefore, when § 2 uses “in other parts of College Hill,” it means the area of College Hill not bounded by Cushing, Brook, Angell, and Thayer Streets, i.e., the area outside the Project site.

Appellant also contends that the Preliminary Plan was not consistent with the City's Zoning Ordinance. This is also incorrect. Ordinance No. 507 amended the City's Zoning Ordinance "to create a new zoning district that would support high density residential and limited commercial development and to modify the zoning map for a nine lot area bounded by Meeting, Brook, Euclid, and Thayer Streets." (City Ex. B, Ch. 2012-47, No. 507.) By those terms, Ordinance No. 507 supports the small scale "small amount of retail" referenced above. See id. Furthermore, "R-M High Density"—the new residential zoning district created for the Project site area—is "intended for the highest density residential mixed use combined with commercial and retail uses, with dwelling units located on lots with a minimum land area of 5,000 sq. ft. and a minimum land area of 300 sq. ft. per dwelling unit." *Id.* § 1 (emphasis added). Therefore, the Board of Appeals did not commit clear error when it found that the CPC did not commit clear error by finding that the Preliminary Plan was consistent with the City's Zoning Ordinance. See § 45-23-71(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.").

Accordingly, there is evidence that the Preliminary Plan is consistent with both the Comprehensive Plan and the City's Zoning Ordinance. Thus, the Board of Appeals' denial of the appeal of the CPC's Preliminary Plan Approval was not clear error.

## C

### Height Adjustment

At the hearing on the merits of the appeal, the authority of the CPC to raise the height restriction was brought up. Such an adjustment is permissible. Section 45-24-47(c) provides:

"an ordinance adopted pursuant to this chapter may include, but is not limited to, regulations governing . . . [m]aximum density per lot and maximum density for the entire development, with

provisions for adjustment of applicable lot density and dimensional standards . . . where the physical characteristics, location, or size of the site require an adjustment, and/or where the location, size, and type of housing, commercial, industrial, or other use require an adjustment . . . .” Sec. 45-24-47(c).

The City of Providence Zoning Ordinance § 421.1(c) cites the language of § 45-24-47(c) and permits the CPC to make adjustments of “12’ or 1 story” in building height for a residential zone. Given that the height adjustment here was less than twelve feet, the adjustment was permissible under § 45-24-47(c) and the City’s Zoning Ordinance.

#### **IV**

#### **Conclusion**

The Court finds that the Board of Appeals’ decision upholding the CPC’s Preliminary Plan Approval is not clearly erroneous, infected by procedural error, or affected by any other error or deficiency of evidence. The Preliminary Plan is consistent with both the City’s Comprehensive Plan and the City’s Zoning Ordinance. Issues relating to the conditional nature of the Master Plan Approval are not properly before this Court in its review of the Preliminary Plan, and even if they were, the Court would not rule differently based on the record before it. The prevailing party may present an order consistent herewith.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

**TITLE OF CASE:** K.S.D. Trust, Grant Dulgarian, Trustee v. Myrth York, Chair, Arthur Strother, Dan Varin, Marc Greenfield, Enrique Martinez, In their official capacities as Members of the Zoning Board of Review of the City of Providence, Members of the Providence City Plan Commission, and Gilbane Development Company

**CASE NO:** PB-13-0920

**COURT:** Providence Superior Court

**DATE DECISION FILED:** May 29, 2013

**JUSTICE/MAGISTRATE:** Silverstein, J.

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