

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: September 11, 2013)

STONEHENGE PARTNERS, LLC :
Plaintiff/Appellant, :
v. :
GILBANE DEVELOPMENT :
COMPANY, THE MEMBERS OF :
THE PROVIDENCE CITY PLAN :
COMMISSION, and THE MEMBERS :
OF THE PROVIDENCE ZONING :
BOARD :
Defendants/Appellees. :

C.A. No. PB 13-2970

DECISION

SILVERSTEIN, J. Before the Court is the appeal of Stonehenge Partners, LLC (Appellant) from a Decision of the Providence Zoning Board of Appeal (Board of Appeal), upholding the City of Providence City Plan Commission’s (CPC) granting of Final Plan Approval to Gilbane Development Company (Gilbane/Applicant).1 Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

I

Facts and Travel

Gilbane seeks to develop a private student housing facility (the Project) near Brown University. Gilbane plans to demolish the buildings currently on the property and to then build a four-story structure with ninety-five apartments, small ground-level retail, and underground parking. To accomplish this, Gilbane sought and gained approval from

1 CPC and Gilbane will be referred to collectively as “Appellees.”

the CPC.² Appellant owns property abutting the proposed Project site, and challenges the CPC's granting of Final Plan Approval.

On December 19, 2012, the CPC granted Preliminary Plan Approval for the Project. (Appellant's Ex. D, Notice of Preliminary Plan Approval and Notice of Appeal for Major Land Development Project 12-011 MA at 257 Thayer Street, Dec. 19, 2012, at 1.) The CPC conditioned Preliminary Plan Approval upon the fulfillment of several conditions, including Condition 6, requiring that "applicant shall investigate the impact of the development on subsurface drainage on the site and to surrounding properties and present a report to the CPC for final plan review." *Id.* at 5. Condition 6 was imposed at the request of a CPC member regarding the subsurface drainage issues. (Appellant's Ex. B, Providence Planning Commission Tr. at 87-88, Dec. 18, 2012.) There was no express requirement that the report be written.³

On February 26, 2013, the CPC voted to grant Final Plan Approval to Gilbane. (Appellant's Ex. E, CPC Minutes of Feb. 26, 2013, at 1-2.) At the meeting, Gilbane offered the testimony of both its project architect, Don Powers, and drainage expert, David Taglianetti. Mr. Taglianetti testified that existing drainage flows across the Project site and away from Appellant's property and that "the drainage system would be developed based on existing flows and topography at the engineering stage." *Id.* at 2. Additionally, both Mr. Taglianetti and Mr. Powers testified that any subsurface drainage

² This Court previously decided an unrelated appeal associated with the Project. *See K.S.D. Trust v. Myrth York, et al.*, No. PB-13-0920, 2013 WL 2403618 (R.I. Super. May 29, 2013).

³ Incidentally, three reports were requested. The first two requests were for written reports from two groups for matters unrelated to Condition 6. The request for a report that was the basis for imposing Condition 6 merely asked for "some type of analysis or report," not specifying that it needed to be written. (Appellant's Ex. B, Providence Planning Commission Tr. at 87-88, Dec. 18, 2012.)

issues would become apparent and handled at the design stage. Id. at 1-2. The CPC found, over objection by Appellant’s attorney, that the “information presented by the applicant was satisfactory” Id. at 2.

On March 1, 2013, the CPC issued its findings in its Notice of Final Plan Approval, later filed on March 4, 2013. With regard to Condition 6, the CPC found that the Applicant submitted storm water plans approved by the City Engineer. The findings also detailed Applicant’s statements that subsurface drainage issues could only be determined as the “project progress[ed] into the Final Design Phase.” (Appellant’s Ex. A, Notice of Final Plan Approval and Notice of Appeal for Major Land Development Project 12-011 MA at 257 Thayer Street, Mar. 1, 2013, at 3.) Accordingly, any problems would be addressed with a design solution later developed. Id. The CPC, based on these findings, once again stated that they “found applicant’s investigation to be satisfactory.” Id.

Appellant timely filed its appeal of the CPC decision to the Board of Appeal. A hearing on the matter was held on May 22, 2013. On May 31, 2013, the Board of Appeal adopted Resolution 9749, denying Appellant’s appeal and upholding the decision of the CPC. (Appellant’s Ex. F, Resolution of the Zoning Board of Appeal No. 9749, May 31, 2013.) The Board of Appeal found that Condition 6 contained no requirement that the report be written, and that the testimony satisfied the condition that a report be presented. The Board of Appeal found “that there was no prejudicial procedural error, clear error, or lack of support for the decision by the weight of the evidence in the record.” Id. at 4. The Appellant filed the instant appeal on June 20, 2013.

II

Standard of Review

The zoning board, sitting as the board of appeal, reviews decisions of a planning board pursuant to § 45-23-70. Specifically, subsection (a) provides that a board of appeal may reverse the planning board if it finds there was “prejudicial procedural error, clear error, or a lack of support by the weight of the evidence in the record.” This Court’s review of a decision of a board of appeal is governed by § 45-23-71 (the Statute). Subsection (c) of the Statute provides:

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.

Sec. 45-23-71(c). Judicial review of planning board decisions is not de novo. Munroe v. Town of East Greenwich, 733 A.2d 703, 705 (R.I. 1999) (citing Kirby v. Planning Bd. of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993)). 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.” Kirby v. Planning Bd. of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993).

III

Analysis

A

Satisfaction of Condition 6

Appellant argues that Final Plan Approval was in error because there was no evidence that Condition 6 of CPC's Preliminary Plan Approval was complied with. Specifically, Appellant contends that Condition 6's requirement that a report be presented by Gilbane for Final Plan Approval required the submission of a written report. Appellant further argues that a review of the transcript of the hearing makes it clear that the report was to be written because the planning board member who requested the report regarding the subsurface drainage impacts had previously requested written reports from two other groups. Finally, Appellant argues that oral testimony given by Gilbane's witnesses, coupled with the storm water drainage report, could not constitute a report that satisfied Condition 6.

Appellees argue that Condition 6 was satisfied by the oral testimony of Mr. Taglianetti and Mr. Powers. Specifically, they argue that the testimony constituted a report regarding the subsurface issues. Appellees contend that nothing contained within Condition 6 necessitated the filing of a written report, and accordingly, the oral testimony satisfied the condition.

The Board of Appeal found there was no prejudicial procedural error, clear error, or lack of support for the decision by the weight of the evidence in the record in CPC's finding that the report need not be written. When provisions are either unclear or ambiguous, a board's interpretation will be entitled to weight and deference, so long as it

is not clearly erroneous or unauthorized. Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859-60 (R.I. 2008). The use of the term, “report,” by the CPC is subject to multiple interpretations. See BLACK’S LAW DICTIONARY 1414-15 (9th ed. 2009) (defining “report” as “[a] formal oral or written presentation of facts or a recommendation for action”); see also Janklow v. Minn. Bd. of Exam’rs for Nursing Home Adm’rs, 536 N.W.2d 20, 23 (Minn. Ct. App. 1995) (looking to dictionary definition of “report” when the statute failed to provide a definition, and defining in part, as presenting a regular account of or relating or telling about). This is particularly the case when the CPC specifically requested “written reports” from two other groups but only requested “some type of analysis or report” regarding the subsurface drainage from Appellees. (Appellant’s Ex. B, Providence Planning Commission Tr. at 87-88, Dec. 18, 2012.) The CPC found that the oral testimony given by Mr. Taglianetti and Mr. Powers satisfied the condition that a report be presented regarding the subsurface drainage issues. The Board of Appeal found the CPC decision was not affected by error of law because the acceptance of oral testimony as a report is simply not a clearly erroneous or unauthorized interpretation of the term “report.” See Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 345 (R.I. 2004) (holding that agency’s interpretation of undefined ambiguous term is entitled to weight and deference, even when other reasonable constructions exist, as long as it is not clearly erroneous or unauthorized).

The Final Plan Approval was subject to a two-tier review process, whereby the CPC first heard and decided the application presented by Appellees. After the CPC filed and posted its decision with the city clerk, Appellant could then file an appeal with the Board of Appeal. This two-tier review process has been likened to a funnel, whereby the

CPC, at the first level of review, is at the “mouth of the funnel” and analyzes all of the evidence, opinions, and issues. Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 207-08 (R.I. 1993). The Board of Appeal, as the second level of review, is stationed at the “discharge end of the funnel” and therefore does not receive all the information firsthand, as the CPC did. Id. Accordingly, our Supreme Court has held that the “further away from the mouth of the funnel that an administrative official is . . . the more deference should be owed to the fact finder.” Id. at 208.

The CPC had before it the testimony of Gilbane’s drainage expert, Mr. Taglianetti, who, among others, “stated that subsurface drainage impacts could only be determined as the project progresses into the Final Design Phase.” (Appellant’s Ex. A, Notice of Final Plan Approval and Notice of Appeal for Major Land Development Project 12-011 MA at 257 Thayer Street, Mar. 1, 2013, at 3.) The CPC found this testimony, coupled with the storm water plan that was presented at the preliminary plan stage to be “satisfactory,” so as to fulfill the requirements of Condition 6. Id. See also Labor Ready Ne., Inc., 849 A.2d at 345 (citing In re Lallo, 768 A.2d 921, 926 (R.I. 2001)). This Court finds that the Board of Appeal’s denial of the appeal of the CPC’s Final Plan Approval was not prejudicial procedural error, clear error, or lacking evidentiary support.

B

Independent Statutory Compliance

While the Court finds that Condition 6 was complied with, it agrees with Appellees that CPC had independent statutory authority to grant Final Plan Approval even in the absence of compliance with that condition. The CPC was therefore able to

move forward with the application as submitted. Condition 6 was imposed at the preliminary board hearing on December 18, 2012. (Appellant's Ex. B, Providence Planning Commission Tr. at 87-88, Dec. 18, 2012.) Assuming Condition 6 required the submission of a written report, the lack of a written report with the final plan application meant that the application "[did] not meet the requirements set . . . by the planning board at preliminary approval[.]" Sec. 45-23-43(c). However, § 45-23-43(c) expressly allows the planning board to consider the application "as submitted" and either approve or deny it. See generally Carvalho v. Town of Lincoln, 2013 WL 372644, n.34 (R.I. Super. 2013) (Savage, J.) (noting ability of planning board to consider applications for final approval that do not include materials requested at planning approval stage). Therefore, because Condition 6 was imposed by the planning board at preliminary approval, Appellees' lack of a written report (if required by Condition 6) did not prevent the CPC from granting Final Plan Approval. Thus, the Board of Appeal's finding that the CPC's approval of Appellees' application without a written report was not in excess of its statutory authority.

IV

Conclusion

After review of the entire record, the Court finds that the Board of Appeal's decision upholding the CPC's grant of Final Plan Approval is not clearly erroneous, affected by error of law, or affected by procedural error. Final Plan Approval was granted after compliance with Condition 6 set forth in the Preliminary Plan Approval, or in the alternative, was granted despite the lack of a written report. Accordingly, Appellant's appeal is denied, and the Board of Appeal's decision upholding the CPC's

grant of Final Plan Approval is affirmed. Substantial rights of the parties have not been prejudiced by the decisions of either the CPC or the Board of Appeal. Counsel for Gilbane may present an order consistent herewith.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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COURT: Providence Superior Court

DATE DECISION FILED: September 11, 2013

JUSTICE/MAGISTRATE: Silverstein, J.

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