

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: June 22, 2015)

ELISABETH BUX

V.

MICHAEL DIMEO; MARY DIMEO;
CF INVESTMENTS, LLC; MTM
DEVELOPMENT CORP.; and the
ZONING BOARD of REVIEW of
the TOWN of JOHNSTON

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C.A. No. PC 14-3015

DECISION

NUGENT, J. Before the Court is an appeal from a decision of the Zoning Board of Review of the Town of Johnston (Town), sitting as the Johnston Board of Appeals (Board of Appeals). In its decision, the Board of Appeals upheld a decision of the Johnston Planning Board (Planning Board) to grant a Master Plan for a Major Land Development in Johnston (Master Plan Decision). Appellant Elisabeth Bux (Ms. Bux or Appellant) contends that the Master Plan Decision contains multiple legal errors and asks this Court to reverse that decision and to deny the Master Plan approval. Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

I

Facts and Travel

The property at issue in this case is located at 396 Greenville Avenue, Johnston, RI, and is otherwise known as Lots 186, 20, and 17 on Tax Assessor’s Map 47 in the Johnston Land Evidence Records. (Master Plan Decision at 1.) The property consists of 38.83 contiguous acres, and it is located in an R-20 zoned area. Id. The Applicants, CF Investments, LLC and MTM Development Corp., are seeking major land development approval “to demolish existing farm

structures and develop a 7.1 acre portion of the 38.83 acre farm to construct a private age restricted (55+) community with an 870 foot private cul de sac and ten duplex style structures for 20 residential condo units.” Id. In addition, “the Applicant[s] intend[] to protect the remainder of Lot 20 from future development through open space and drainage conservation easements and deeding of Lot 17 to the Town of Johnston.” Id. The proposed development requires a change in zoning from an R-20 to an R-10 Zone District. Id.

On January 7, 2014, the Planning Board conducted a hearing on the proposed Master Plan for the property. Id. According to the Decision, “[a]n orderly, thorough and expeditious review has been conducted with Technical Staff Review on December 16, 2013 and the Planning Board meeting on January 7, 2014. Pre-application meetings with Planning staff were held August 21, 2013 and in 2010 [sic].” Various documents were submitted in support of the Master Plan, including “architectural and landscape plans,” and the “Planner’s report of December 31, 2013.” Id. at 3 and 4.

On January 14, 2014, the Planning Board issued its written Master Plan Decision reflecting its unanimous approval of the Master Plan. Specifically, the Planning Board approved the “Master Plan for a Major Land Development, as applied for, substantially in accordance with all of the plans, specifications, and other documentation submitted.” Id. at 4. Thus, the approval was “based on the submitted application, testimony presented to the Board, planning staff reports, and memorandums [sic] from applicable Town Departments, subject to the proposed Master Plan conditions on page 5 of the planner’s December 31, 2013 memo.” Id. The Master Plan Decision was recorded at Book 2344, Pages 128-131 in the Town’s Land Evidence Records. See Master Plan Decision.

On February 5, 2014, Ms. Bux appealed the Master Plan Decision to the Board of Appeals, and on March 27, 2014, the Board of Appeals conducted a hearing on the appeal. See Appeal of the Master Plan Decision of the Town of Johnston Planning Board; Notice of Public Hearing. After hearing the oral arguments of the parties, the Board of Appeals unanimously voted to uphold the Master Plan Decision and to deny the appeal. See Board of Appeals Decision at 3. On May 28, 2014, the Board of Appeals recorded a written decision in the Town's Land Evidence Records.

On June 16, 2014, Ms. Bux filed the instant appeal. On July 8, 2014, the Board of Appeals filed the Certified Record to the Court, and on April 21, 2015, it filed the transcript from the hearing before the Board of Appeals. The Certified Record consists solely of copies of (a) the written decision of the Board of Appeals, recorded May 28, 2014; (b) the radius map; (c) the list of abutters; (d) the Appeal from the Planning Board; (e) the Master Plan Decision; (f) the Notice of Public Hearing; and (g) the field card.

II

Standard of Review

The Superior Court's review of a board of appeal decision is governed by § 45-23-71, which provides that:

“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).

It is well established that “the Superior Court does not engage in a de novo review of board decisions pursuant to this section.” Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998) (citing E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 284-85, 373 A.2d 496, 501 (1977)). Rather, it “reviews the decisions of a plan commission or board of review under the ‘traditional judicial review’ standard applicable to administrative agency actions.” Id. Thus, unless the decision “is affected by an error of law[.]” West v. McDonald, 18 A.3d 526, 531 (R.I. 2011), the Court’s examination “is limited to a search of the record to determine if there is any competent evidence upon which the agency’s decision rests.¹ If there is such evidence, the decision will stand.” Restivo, 707 A.2d at 665 (emphasis in original).

In conducting its examination, the Court is mindful that it must “give[] deference to the findings of fact of the local planning board.” West, 18 A.3d at 531 (citing Munroe v. Town of E. Greenwich, 733 A.2d 703, 705 (R.I. 1999); Kirby v. Planning Bd. of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993)). The Court “lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level[.]” Restivo, 707 A.2d at 666 (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)).

¹ In reviewing a planning board’s decision,
“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.” Sec. 45-23-70.

However, it is axiomatic that “[a] planning board’s determinations of law, like those of a zoning board or administrative agency, are not binding on the reviewing court; they may be reviewed to determine what the law is and its applicability to the facts.” West, 18 A.3d at 532; see Pawtucket Transfer Operations, 944 A.2d at 859 (citing Gott v. Norberg, 417 A.2d 1352, 1361 (R.I. 1980)).

III

Analysis

The Appellant has raised multiple issues on appeal. Specifically, she asserts that (1) the Planning Board failed to make positive findings in the Master Plan Decision, as required by § 45-23-60;² (2) the Master Plan should have been denied because it did not address the potential impact of the proposed sewer line on neighborhood agricultural activities, in accordance with § 45-23-40(2); (3) Applicants erroneously assumed a crucial component of the application; namely, that Applicants have a right to a sewer easement; and (4) the Planning Board erroneously conditioned its approval of the Master Plan upon the receipt of a future favorable opinion from the legal counsel/town engineer. Notwithstanding these appellate issues, the Court is unable to address the merits, if any, of the allegations because the Certified Record in this case is incomplete.

In Rhode Island, “[i]t is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” Tanner v. Town Council of E. Greenwich, 880 A.2d 784, 796 (R.I. 2005) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223,

² It is not clear that the Planning Board actually was required to make positive findings in accordance with § 45-23-60. Section 45-23-40(e), which governs master plans, requires a planning board to “approve of the master plan as submitted, approve with changes and/or conditions, or deny the application, according to the requirements of § 45-23-63.” However, that provision is silent with respect to whether master plan decisions should conform to the requirements of § 45-23-60. See § 45-23-40.

1226 (R.I. 1996)). When examining a statute that is unambiguous, “there is no room for statutory construction and [the Court] must apply the statute as written.” Tanner, 880 A.2d at 796 (quoting State v. DiCicco, 707 A.2d 251, 253 (R.I. 1998)).

The instant matter involves a major land development proposal, and that requires major plan review under chapter 23 of title 45. See § 45-23-39(a) (“Major plan review is required of all applications for land development and subdivision approval subject to this chapter, unless classified as an administrative subdivision or as a minor land development or a minor subdivision.”). Major plan review consists of “three stages of review, master plan, preliminary plan and final plan, following the pre-application meeting(s) specified in § 45-23-35.” Sec. 45-23-39(b).

A master plan is defined as “[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.” Sec. 45-23-32(23).

With respect to the required submissions for a master plan:

“(1) The applicant shall first submit to the administrative officer the items required by the local regulations for master plans.

“(2) Requirements for the master plan and supporting material for this phase of review include, but are not limited to: information on the natural and built features of the surrounding neighborhood, existing natural and man-made conditions of the development site, including topographic features, the freshwater wetland and coastal zone boundaries, the floodplains, as well as the proposed design concept, proposed public improvements and dedications, tentative construction phasing, and potential neighborhood impacts.

“(3) Initial comments will be solicited from (i) local agencies including, but not limited to, the planning department, the department of public works, fire and police departments, the conservation and recreation commissions; (ii) adjacent communities; (iii) state agencies, as appropriate, including the departments of environmental management and transportation, and the coastal resources management council; and (iv) federal agencies, as appropriate. The administrative officer shall

coordinate review and comments by local officials, adjacent communities, and state and federal agencies.” Sec. 45-23-40(a) (emphases added).³

Thereafter, a planning board must “approve of the master plan as submitted, approve with changes and/or conditions, or deny the application, according to the requirements of § 45-23-63.” Sec. 45-23-40(e).

Section 45-23-63 provides in pertinent part:

“(a) All records of the planning board proceedings and decisions shall be written and kept permanently available for public review. Completed applications for proposed land development and subdivisions projects under review by the planning board shall be available for public review.

“ . . .

“(c) All final written comments to the planning board from the administrative officer, municipal departments, the technical review committee, state and federal agencies, and local commissions are part of the permanent record of the development application.

“ . . .

³ On its official website, the Town describes the process for major subdivision/land development applications as follows:

“[1] Pre-application meeting; [2] Combined Concept/Master Plan application, staff reviews, and Planning Board public informational meeting; [3] Preliminary Plan application (upon detailed design and receipt of all state permits), staff reviews, and Planning Board hearing; [4] See notice of decision for Minor Subdivision/Land Development process, above.”

<http://www.townofjohnstonri.com/planningandeconomicdevelopment.htm>.

The list of materials that must be checked off as complete, incomplete, or n/a for purposes of master plan review include: the application form; plan #1 and its the initial staff review; plan #2 and staff review; the radius map; the list of abutters; tax certificates; legal instruments; fee application; a certificate of completeness: and plan #3, after the plan is certified as complete. See

<http://www.townofjohnstonri.com/linked/3%20%5Bapplication%5D%20%20all%20projects%20%5B7-10%5D.pdf>.

“(e) All written decisions of the planning board shall be recorded in the land evidence records within thirty-five (35) days after the planning board vote. A copy of the recorded decision shall be mailed within one business day of recording, by any method that provides confirmation of receipt, to the applicant and to any objector who has filed a written request for notice with the administrative officer.” Sec. 45-23-63 (emphases added).

The clear and unambiguous language of the aforementioned provisions requires applicants to submit a master plan and supporting materials, and for the relevant planning board to maintain those documents as part of the development’s detailed permanent record.

After a planning board has filed a decision, aggrieved parties may file an appeal to the board of appeal within twenty days. See § 45-23-67(a). Thereafter, the board of appeal, “shall require the planning board or administrative officer to immediately transmit to the board of appeal, all papers, documents and plans, or a certified copy thereof, constituting the record of the action which is being appealed.” Sec. 45-23-67(c) (emphasis added).

In reviewing a planning board’s decision, “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” Sec. 45-23-70(a) (emphasis added). Accordingly, “[t]he 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.” Id. In the course of conducting its review, “[t]he 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.” Sec. 45-23-70(d) (emphasis added).

After an appeal board’s decision has been recorded, an aggrieved party may appeal the decision to the superior court. Sec. 45-23-71(a). At that point, “[t]he board of appeal shall file

the original documents acted upon by it and constituting the record of the case appealed from, or certified copies of the original documents, together with any other facts that may be pertinent, with the clerk of the court within thirty (30) days after being served with a copy of the complaint.” Id. (emphasis added). In reviewing the decision, this Court is required to “consider the record of the hearing before the planning board and, if it appear 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.” Sec. 45-23-71(b) (emphasis added).

The language of the foregoing provisions clearly requires planning boards to keep and then submit the permanent record of a development application to the board of appeals for its review. The board of appeals is then not only required to review that record, but also to keep a record of its own proceedings as part of the permanent record. Should an aggrieved party then appeal the decision to this Court, the board of appeals must certify the entire record in its possession to this Court for its review. Without such a record, it is impossible for this Court to determine the basis for a planning board’s findings of fact or conclusions of law. See Ctr. for Behavioral Health, Rhode Island, Inc. v. Barros, 710 A.2d 680, 684 (R.I. 1998) (limiting Superior Court “to an examination of the certified record to determine whether the agency’s decision is supported by substantial evidence”).

In the instant matter, the Master Plan Decision specifically references the Application, the proposed Master Plan, architectural plans, landscape plans, planning staff reports, memoranda from Town departments, and a December 31, 2013 Planner’s Report. See Master Plan Decision at 3-4 (“Motion to approve this Master Plan for a Major Land Development was made . . . based

on the submitted application, testimony presented to the Board, planning staff reports, and memorandums [sic] from applicable Town Departments, subject to the proposed master plan conditions on page 5 of the planner's December 31, 2013 memo.”).

However, not a single one of the aforementioned documents is contained in the Certified Record. Thus, despite the Board of Appeals determination—“In reviewing the record as a whole and the totality of the facts contained therein, the Board of Appeals affirms the Master Plan decision of the Planning Board and finds they did not commit prejudicial error in their Master Plan decision[,]” (Board of Appeals Decision at 3)—given the paucity of said Record, it is not clear how the Board of Appeals was in a position to conduct such a review. Likewise, it is impossible for this Court to review the Board of Appeal's Decision, pursuant to § 45-23-71, without the necessary documents from the Planning Board.

IV

Conclusion

Considering the foregoing, this Court finds that the decision of the Board of Appeals is in violation of statutory or planning board provisions, was made upon unlawful procedure, and was affected by error of law. Furthermore, substantial rights of Appellant have been prejudiced. Accordingly, the decision of the Board of Appeals is vacated, and the papers are remanded to the Board of Appeals so that it can order the Planning Board to submit the permanent record in accordance with § 45-23-67(c). Thereafter, the Board of Appeals is ordered to review said permanent record and to issue a decision based upon that review.

Counsel shall submit the appropriate judgment for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Bux v. Dimeo, et al.**

CASE NO: **PC 14-3015**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **June 22, 2015**

JUSTICE/MAGISTRATE:

ATTORNEYS:

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