

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

[FILED: July 14, 2015]

GRACECO, LLC, :  
Appellant, :

VS. :

C.A. No. KC-2015-0034

THE TOWN OF WEST GREENWICH :  
ZONING BOARD OF REVIEW :  
SITTING AS PLANNING BOARD :  
OF APPEAL; DANIELLE ANDREWS, :  
in her capacity as Treasurer for the :  
Town of West Greenwich; BRAD WARD, :  
THOMAS O’LAUGHLIN, TIMOTHY :  
REGAN, DAVID BERRY, MARK D. :  
BOYER, WILLIAM G. BRYAN, and :  
W. BRIAN WALLACE, in their capacities :  
as Members of the Town of West Greenwich :  
Planning Board; COMMERCE PARK :  
REALTY, LLC, by and through its :  
Receiver, MATTHEW J. MCGOWAN; :  
and GUGGENHEIM RETAIL REAL :  
ESTATE PARTNERS, INC., :  
Appellees. :

DECISION

RUBINE, J. Graceco, LLC (Graceco) appeals from a decision of the Town of West Greenwich Zoning Board of Review, sitting as the Planning Board of Appeal (Board of Appeal), which affirmed a decision of the West Greenwich Planning Board (Planning Board). The Board of Appeal found that the amendment to a preliminary subdivision plan was a “minor change,” which would not constitute a nuisance, and thereby affirmed the decision of the Planning Board approving such amendment. Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

## I

### Facts and Travel

The Centre of New England is a commercial and residential development which spans across Coventry, East Greenwich, and West Greenwich, Rhode Island. This appeal concerns the proposed development of a one-acre subdivision of Lot 4-3 of Assessor's Plat 1 to create an additional commercial lot located at 755 Centre of New England Boulevard, West Greenwich, Rhode Island (the Subdivision Property). The Subdivision Property is owned by Appellee Commerce Park Realty, LLC (Commerce Park). Appellee Guggenheim Retail Real Estate Partners, Inc. (Guggenheim) is the prospective owner and developer of a retail tire store to be built on a portion of the Subdivision Property, which will include an auto service and repair shop.<sup>1</sup> Graceco is the owner of the abutting lot, Lot 4-2 of Assessor's Plat 1, located at 775 Centre of New England Boulevard, West Greenwich, Rhode Island.

On February 14, 2011, the Planning Board granted preliminary plan approval for a proposed major subdivision and development of the Subdivision Property. The proposed development in the preliminary plan, earlier approved by the Planning Board, was to include an automobile repair facility and tire store. Specifically, the original subdivision approval incorporated a four-lane access road running alongside and servicing the Subdivision Property. A written decision was issued and recorded on March 4, 2011, which approved the original subdivision. No timely appeals were filed to contest the original preliminary plan approval.

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<sup>1</sup> This Court previously approved the Receiver's proposed sale of the Subdivision Property to Guggenheim for \$691,733.00. Although Guggenheim remains the prospective purchaser at this time, it was a co-applicant of the proposed amendment and was named as an Appellee in Graceco's complaint. See § 45-23-71 ("When the complaint is filed by someone other than the original applicant or appellant, the original applicant or appellant and the members of the planning board shall be made parties to the proceedings.").

On February 20, 2013, Matthew McGowan was appointed by the Superior Court as receiver of Commerce Park and related entities. On September 19, 2014, Commerce Park and Guggenheim jointly filed an application for an amendment to the preliminary plan. The proposed amendment provided for Commerce Park, through its Receiver, and Guggenheim to “phase” the development of the access road as referred to in the original subdivision. Rather than immediately creating a four-lane access road, according to the original subdivision approval, the proposed amendment contemplates that the developer would construct two lanes immediately and the remaining two lanes would be constructed when future development behind or to the south of the Subdivision Property required such an expansion of that access roadway. The rationale for this phased construction was that a four-lane roadway was not currently necessary to adequately serve the development, and deferring construction of the remaining two lanes until such additional roadway was required to serve future development conserved the resources of the receivership estate. In support of their application for modification, Commerce Park and Guggenheim produced a narrative report prepared by an engineer. In part, that narrative stated:

“This Narrative Report is prepared in support of a modified Preliminary Plan Application submission for the subject property. The project received Preliminary Plan approval from the Town of West Greenwich on March 4, 2011. Since that time the owner of the property has filed for Receivership and the project stalled. At this time, the project has been revived with some modifications. The most notable modification is that the proposed access roadway, known as Universal Boulevard Extension, has been reduced from a 60’ roadway with a center median to a 30’ access drive with a striped median. This new configuration will still provide for safe, signalized vehicular and pedestrian access to the development. A full list of plan modifications follows.”

Moreover, in his brief to this Court, the Receiver of Commerce Park explained,

“Conservation and preservation of the resources of the receivership estate is important, and the Receiver, in proposing the slight

modification of a phasing-in of the access roadway, was sensibly balancing the interests of numerous and substantial unpaid creditors in the [Commerce Park Realty] receivership case with the need to address the Town's concerns and other concerns (and the financial outlay required to address them) associated with a major mixed-use land development project having significant cash flow needs and pressing infrastructure demands. Following [a Receivership] evidentiary hearing, Judge Silverstein indicated that not only did he believe that it was logical and sensible to phase-in the road construction, but offered that, if he were the receiver, he would have proposed to proceed exactly as the Receiver intended."

Subsequently, the Town of West Greenwich Planner, Jennifer Paquet (Town Planner), placed the amendment application on the agenda for the Planning Board's meeting on October 20, 2014. The Town Planner's memorandum to the Planning Board on this matter, stated in part:

"The original plan involved building the entire intersection along with the construction of the auto shop, consisting of a four lane boulevard to access the land in Lot 4-1, which at this time is all undeveloped. The change is proposing to build only half the boulevard at this time for access to and from the auto repair and tire shop. The rest of the boulevard can be constructed when the other side of the road is developed. At this time the only change is with phasing of the construction of this four lane road, and since the two lane road provides adequate access and the proposed temporary striping works for the intersection, I recommend approval of this minor amendment."

As a result of the Town Planner's finding that the proposed amendment was minor, no notice was provided to abutting and interested property owners, and no public hearing was scheduled. The matter was put on the Consent Agenda for October 20, 2014. At the Planning Board meeting held on October 20, 2014, Graceco, through counsel, appeared in order to place its objections to the amendment of the preliminary plan as well as to the preliminary plan in

general<sup>2</sup> on the record. In front of the Planning Board, Graceco contended that the amendment should have been characterized as a major amendment requiring a public hearing, rather than a minor amendment, which does not require notice and a public hearing. Graceco argued the Land Development and Subdivision Regulations classifies a major change as one which negatively impacts adjacent properties and/or properties in the vicinity of the development property. Graceco argued, without any supporting evidence, that because the amendment would permit phased construction of the access road, the ongoing nuisance of construction would adversely impact Graceco and other neighboring property owners. Thus, Graceco concluded, the amendment should have been classified as a major change and Graceco should have been provided with notice of a public hearing regarding the amendment. Graceco then requested that the amendment be denied, or alternatively, the decision on the amendment be held until the appropriate public notice was distributed to all interested parties.

Chairman Brad Ward then asked the West Greenwich Town Solicitor, Michael Ursillo (Solicitor Ursillo), if he agreed with the Town Planner's analysis that the amendment was a minor change. Solicitor Ursillo did agree with the Town Planner's classification. Attorney Matthew McGowan, receiver for the Commerce Park, then noted that he did not receive Graceco's objection prior to the meeting and that a Superior Court Judge had already approved the proposed modification. During the Meeting, Chairman David Berry asked which entity would develop the rest of the four-lane road pursuant to the phasing plan. Town Planner Paquet stated that there had not been any additional buildings proposed in Lot 4-3, so there will be ongoing construction. Solicitor Ursillo then noted that any applications for further development

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<sup>2</sup> Any objections to the original preliminary plan were not timely made and are not the subject of this appeal.

would come before the Planning Board and that the Planning Board would then have the opportunity to determine how to complete the phasing.

Notwithstanding Graceco's objections, the Planning Board voted unanimously (4-0) to approve the proposed minor amendment to the previously approved preliminary plan. On October 22, 2014, the Town Planner issued a decision letter, written on behalf of the Planning Board. The letter was also recorded on October 22, 2014. The decision states:

“This amendment is based on the following findings of fact:

1. The proposed change does not result in the creation of additional lots for development.
2. The proposed change does not result in any change that would be contrary to any applicable provision of the Zoning Ordinance.
3. The proposed change will not have significant negative impacts on abutting property.
4. The proposed change has adequately addressed traffic flow.
5. The proposed change is consistent with the intent of the original approval.”

Along with the findings of fact, the Town Planner explicitly stated:

“Please note that this approval pertains to the ability to phase the construction of the approved four lane road to construct two lanes, as modified temporarily, together with the construction of the proposed auto repair and tire business. It is expected that the rest of the road will be constructed upon future development of the parcel, which requires Planning Board review.”

On November 10, 2014, Graceco filed an appeal of the Planning Board's decision to the Board of Appeal. The appeal reiterated Graceco's argument that the amendment should have been classified as a major change rather than a minor change. Graceco also asserted that the amendment violates the Performance Standards for the Exit 7 Special Management District,<sup>3</sup> as the prolonged construction would create a nuisance. Finally, Graceco argued that the Planning

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<sup>3</sup> The subject property is entirely located in the Exit 7 Special Management District.

Board's issuance of the original March 2011 preliminary plan should be overturned, as proper notice was not provided to all abutters.

Pursuant to § 45-23-69, on December 16, 2014, the Board of Appeal held a public hearing on Graceco's appeal. At the hearing, counsel for Graceco argued that the amendment was a major change:

"The Town Planner had sent out a memo stating that there was a Minor amendment, and the Planning Board approved the amendment as a minor amendment, not requiring abutter notice. We believe it was a Major Amendment, and therefore believe that direct notice to abutters was required. The amendment was a four-lane intersection, but now it is going to be phased to two lanes and have another two lanes put in at another time. Phasing will prolong construction which will impact Graceco as a nuisance. We would like this to be remanded back to the Planning Board so the abutters can be heard. This is also a violation of the Exit 7 Performance Standards."

Town Solicitor Ursillo retorted:

"Now, a major change of a Preliminary Plan in my mind would be taking a two way boulevard and turning it into a four way boulevard. That would be the type of change that would go to the heart of the conditions of approval first time around when it was approved in 2011. The strange thing is that the four lanes are still out there it's just that the construction of those four lanes is going to be phased. This is something the Planning Board does on a regular basis. You have a map which clearly shows the intersection, the map is stamped received September 29, 2014. What it shows is that when you come in from the boulevard you can go left or right. The only change is instead of going directly straight across there's going to be an adjustment so you go a little to the left because there's going to be two lanes instead of four. . . . It is simply a phasing plan . . . . It [is] clearly a minor change. It's certainly not contrary to the plan that was already approved. The only change approved was the phasing, which is quite common under our ordinance and is generally granted whenever anyone asks for it."

Solicitor Ursillo also concluded that the amendment did not constitute a violation of the Performance Standards of the Exit 7 Special Management District because the mere phasing of a

construction project does not constitute a nuisance. Counsel for the Receiver was also present. Similar to Solicitor Ursillo, counsel for the Receiver stated that the amendment constituted a phasing of construction which was neither a major change nor a nuisance. Counsel explained:

“What’s happening here is that you have a property owner that’s in [a] dire financial situation and it’s in a court receivership. The receiver is trying to marshal assets of the receivership of the developer for the benefit of creditors of the developer and in doing that we are trying to sell property for development. Because there is a limitation of resources, the two lanes is all that’s needed to service this development at the present time.”

Counsel for Graceco then argued that based on the representations before the Board of Appeal, it appears that the developers do not intend to build the additional two lanes and therefore, this is not a phasing but an elimination of two lanes. Therefore, Graceco implied, the amendment was a major change. Counsel for Graceco went on to argue how the amendment violated the performance standards of the Exit 7 Special Management District:

“The unnecessary prolonged construction is considered a nuisance. Although phasing of the entire district is the intent of the regulation it has nothing to do with the phasing of an individual parcel. The parcel itself is what my client abuts, regardless of where the road will be built. The prolonged construction is what is going to cause a nuisance. I have nothing further to add other than a request a remand to the Planning Board to find out if this is a major amendment to the Preliminary Plan.”

During the hearing, the Board of Appeal noted that the road in question neither directly abuts nor services Graceco’s property.

The Board of Appeal voted unanimously (5-0) to uphold the Planning Board’s decision. The Board of Appeal’s written decision was issued and recorded on December 24, 2014. The Board of Appeal found that the record did not contain any evidence that would indicate that the phasing of the roadway would constitute a nuisance. Additionally, the Board of Appeal agreed that the amendment constituted a “minor change” rather than a “major change.” Finally, the

Board of Appeal rejected Graceco's argument that the amendment should be nullified based on alleged notice defects.

In reasoning that the change to the preliminary plan was merely a minor change, the Board cited to the West Greenwich Subdivision Regulations:

“Subdivision Regulations Article VI, B.2 entitled ‘Minor Changes’ states that ‘For the purpose of these regulations the term ‘minor changes’ shall mean any change which, in the opinion of the Administrative, is consistent with the intent of the original approval. ‘Major changes’ (Section B.2) shall mean changes which, in the opinion of Administrative Officer, are clearly contrary to the intent to the original approval.’”

The Board of Appeal then went on to find that as “[t]he Applicant is still bound to create such four lanes in any event at the appropriate time. . . .The Amendment is a minor change and not a major change to the Preliminary Plan.”

The Board of Appeal also found Graceco's arguments regarding nuisance to be unpersuasive, and concluded:

“There is no evidence on this record that the phasing of a roadway is a nuisance. By making two lanes instead of four lanes, there would be less of a nuisance at the present time.”

...

“With regard to the entire Exit 7 project, the phasing is a necessary and anticipated aspect of all the construction on the site which has been ongoing as different parcels become purchased and developed. That does not constitute any type of nuisance.”

Finally, the Board of Appeal found that even if it were to consider the amendment to have been a major change, Graceco waived the requisite notice pertaining to a major change of a preliminary plan,<sup>4</sup> concluding,

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<sup>4</sup> Graceco had also argued that the original preliminary plan was not properly noticed to Graceco's predecessor. In response, the Board of Appeal found that “the approval of the Preliminary Plan was more than three years ago and the time to appeal any issue relating to the

“Graceco, LLC participated in and made statements at the Planning Board hearing on October 22, 2014<sup>5</sup> and therefore waived any defect in notice to their party. Graceco has no standing to assert the rights of any other party to lack of notice based on the present record.”

## II

### Standard of Review

An aggrieved party may appeal a decision of a Planning Board of Appeal to the Superior Court pursuant to § 45-23-71. In pertinent part, § 45-23-71 states:

“(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.”

“Pursuant to § 45-23-71 judicial review of board decisions is not *de novo*.” Munroe v. Town of E. 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 does not consider the credibility of witnesses, weigh the evidence, or make its own findings of fact.” Id. Rather, “[i]ts

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original approval of the Preliminary Plan is by law barred as untimely.” The issue of notice to the original preliminary plan is not argued in the instant appeal, and this Court will, therefore, not address it.

<sup>5</sup> The date seems to have been a misstatement by the Board of Appeal. Although the Planning Board Decision was issued on October 22, 2014, the meeting was held on October 20, 2014.

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, 634 A.2d at 290).

Furthermore, although our courts will interpret clear and unambiguous language of a legislative enactment literally, “when the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency, or board, charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized. . . . This is true even when other reasonable constructions of the statute are possible.” West, 18 A.3d at 532 (internal citations and quotations omitted). “When interpreting an ordinance, we employ the same rules of construction that we apply when interpreting statutes.” Ruggiero v. City of Providence, 893 A.2d 235, 237 (R.I. 2006).

### **III**

#### **Analysis**

Pursuant to § 45-23-71, Graceco timely filed the instant appeal. Graceco alleges that the Board of Appeal committed reversible error in issuing its decision upholding the prior decision of the Planning Board to classify the preliminary plan amendment as a minor change. Graceco also argues that the amendment violates the Performance Standard for the Exit 7 Special Management District. The Appellees have each objected to Graceco’s appeal, arguing that the amendment to the preliminary plan was correctly categorized as a minor change and that the amendment did not constitute a nuisance. This Court will address each argument in turn.

#### **A**

##### **Major versus Minor Change**

Graceco argues that the Town Planner and Planning Board acted in an arbitrary and capricious manner by classifying the proposed amendment as a minor change, rather than a

major change. The Appellees respond that the proposed amendment was correctly categorized pursuant to the Town of West Greenwich Land Development and Subdivision Regulations.

The Appellee's changes to land development or subdivision plans, made subsequent to the preliminary plan approval, are governed by § 45-23-65.<sup>6</sup> Section 45-23-65 requires that major changes to development plans follow the same review and public hearing process required for the approval of a preliminary plan. Minor changes, on the other hand, may be approved without public hearing. See § 45-23-65. Therefore, the classification of such a change has a significant effect on the procedures required for approval. The Rhode Island General Laws give local planning boards the discretion to define what would constitute a minor change or a major change to a land development or subdivision plan. See id. Thus, this Court will look to the local regulations to determine if the Board of Appeal's decision is affected by error of law.

When courts construe ordinances, the “ultimate goal is to give effect to the purpose of the act as intended by the Legislature.” Ryan v. City of Providence, 11 A.3d 68, 70-71 (R.I. 2011) (quoting Webster v. Perrotta, 774 A.2d 68, 75 (R.I. 2001)). This Court must examine “the

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<sup>6</sup> The statute reads in pertinent part:

“(b) Minor changes, as defined in the local regulations, to a land development or subdivision plan may be approved administratively, by the administrative officer, whereupon a permit may be issued. The changes may be authorized without additional public hearings, at the discretion of the administrative officer. All changes shall be made part of the permanent record of the project application. This provision does not prohibit the administrative officer from requesting a recommendation from either the technical review committee or the planning board. Denial of the proposed change(s) shall be referred to the planning board for review as a major change.

“(c) Major changes, as defined in the local regulations, to a land development or subdivision plan may be approved, only by the planning board and must follow the same review and public hearing process required for approval of preliminary plans as described in § 45-23-41.” Sec. 45-23-65

language, nature, and object of the statute.” Berthiaume v. Sch. Comm. of Woonsocket, 121 R.I. 243, 247, 397 A.2d 889, 892 (1979). “It is well settled that when the language of a statute is clear and unambiguous, [courts] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996). “This is particularly true where the Legislature has not defined or qualified the words used within the statute.” Ryan, 11 A.3d at 71 (quoting Markham v. Allstate Ins. Co., 116 R.I. 152, 156, 352 A.2d 651, 654 (1976)). Nevertheless, when a court construes the meaning of statutory language, it is entirely proper for the court to look to “the sense and meaning fairly deducible from the context.” Id. (interior citations and quotation marks omitted). As our Supreme Court has previously held, it would be “foolish and myopic literalism to focus narrowly on” one statutory section without regard for the broader context. Id. (quoting In re Brown, 903 A.2d 147, 150 (R.I. 2006)).

Graceco states that when classifying the amendment as a minor change, the Town Planner relied exclusively upon Section VI(B)(3) of the Town of West Greenwich Land Development and Subdivision Regulations. Graceco contends that the Town Planner failed to address Section VI(B)(2) of the same regulations, which provides guidance as to what constitutes a “minor change.” Graceco avers Section VI(B)(2) supports its proposition that the amendment was a minor change. Section VI(B)(2) of the Town of West Greenwich Land Development and Subdivision Regulations defines a minor change as:

“For the purpose of these Regulations, the term “**minor changes**” shall mean any change which, in the opinion of the Administrative Officer, is consistent with the intent of the original approval. Such minor changes shall include, but are not necessarily limited to the following:

- a. Amendments to utility plans which are acceptable to the Director of Public Works or Highway Supervisor or to the appropriate utility company;
- b. Lot line revisions which can be reviewed and approved as an administrative subdivision according to the provisions of Article V., Section C.2.
- c. Amendments to grading plans or drainage plans which [sic] acceptable to the Director of Public Works or Highway Supervisor and which do not require approval of any state or federal reviewing authorities;
- d. Amendments to construction plans which are required because of unforeseen physical conditions on the parcel being subdivided;
- e. Modifications to any construction plans for off-site improvements which are acceptable to the Director of Public Works or Highway Supervisor; or,
- f. Modifications which are required by outside permitting agencies such as, but not limited to the Department of Environmental Management, and the Department of Transportation.” (Emphasis added.)

Section VI(B)(3) of the Town of West Greenwich Land Development and Subdivision

Regulations defines a major change as:

“For the purpose of these Regulations, **the term “major changes” shall mean changes which, in the opinion of the Administrative Officer, are clearly contrary to the intent of the original approval.** Such major changes shall include, but are not necessarily limited to the following:

- a. Changes which would have the effect of creating additional lots or dwelling units for development;
- b. Changes which would be contrary to any applicable provision of the Zoning Ordinance or which require a variance or special use permit from the Zoning Board of Review; or,
- c. Changes which may have significant negative impacts on abutting property or property in the vicinity of the proposed subdivision or land development project.” (Emphasis added.)

It is the opinion of this Court that the phasing of the construction of an access road is not explicitly listed as a major or minor change. As the plain language of the statute does not direct the Planning Board on the appropriate classification of phased construction, such classification requires a look at the broader context and purpose of the statute. See Ryan, 11 A.3d at 71.

It was the task of the Planning Board to review the Town Planner's determination that the amendment was a minor change, consistent with the preliminary plan. In making the recommendation that the Planning Board classify the proposed amendment as a minor change, the Town Planner stated:

“The original plan involved building the entire intersection along with the construction of the auto shop, consisting of a four lane boulevard to access the land in Lot 4-1, which at this time is all undeveloped. The change is proposing to build only half the boulevard at this time for access to and from the auto repair and tire shop. The rest of the boulevard can be constructed when the other side of the road is developed. At this time the only change is with *phasing* of the construction of this four lane road, and since the two lane road provides adequate access and the proposed temporary striping works for the intersection, I recommend approval of this minor amendment.” (Emphasis in original).

Furthermore, while the record does not explicitly indicate why the Planning Board accepted the Town Planner's recommendation and classified the amendment as a minor change, the record does indicate that the Planning Board found the amendment to be consistent with the intent of the preliminary plan. For example, the decision letter of the Planning Board, which approved the amendment stated:

“This amendment is based on the following findings of fact:

1. The proposed change does not result in the creation of additional lots for development.
2. The proposed change does not result in any change that would be contrary to any applicable provision of the Zoning Ordinance.
3. The proposed change will not have significant negative impacts on abutting property.

4. The proposed change has adequately addressed traffic flow.
5. **The proposed change is consistent with the intent of the original approval.** (Emphasis added.)

Along with the findings of fact, the letter explicitly stated:

“Please note that this approval pertains to the ability to phase the construction of the approved four lane road to construct two lanes, as modified temporarily, together with the construction of the proposed auto repair and tire business. It is expected that the rest of the road will be constructed upon future development of the parcel, which requires Planning Board review.”

Graceco argues that because there is no timetable which defines when and how the future phases would be completed, the phasing is a “false guise,” “tantamount to eliminating the four (4) lane road requirement from the preliminary plan in its entirety.” It contends that any future development of the remaining land will not be pursuant to a second phase of the preliminary plan at issue here, but rather will be under a different development plan, which, Graceco alleges, will not be subject to the requirement to build the four-lane road.

Even if this Court were to accept Graceco’s assertions that a new development plan is now required to complete the road project, the record does not demonstrate that this new development is against the intent of the preliminary plan. After reviewing the record, it appears the purpose of the requisite four-lane intersection was to alleviate traffic caused by the development. However, at this time, the only new development is the auto repair shop and the rest of the plat remains undeveloped. Moreover, The Narrative Report prepared by Millstone Engineering, P.C. states:

“The most notable modification is that the proposed access roadway, known as Universal Boulevard Extension, has been reduced from a 60’ roadway with a center median to a 30’ access drive with a striped median. This new configuration will still provide for safe, signalized vehicular and pedestrian access to the development. The roadway may revert to the original

configuration in the future and the storm water calculations included in this statement include this future possibility.”

In this case, the Town Planner evidentially found this Narrative Report to be credible evidence and stated that “[t]he change is proposing to build only half the boulevard at this time for access to and from the auto repair and tire shop . . . at this time the only change is with *phasing* of the construction of this four lane road, [and] the two lane road provides adequate access and the proposed temporary striping works for the intersection.”

Furthermore, the Planning Board found “the proposed change has adequately addressed traffic flow.” This Court will not disturb the finding of fact of the Planning Board that the proposed amendment is consistent with the intent identified in the preliminary plan to alleviate traffic. See Munroe, 733 A.2d at 705 (stating, “the Superior Court does not consider the credibility of witnesses, weigh the evidence, or make its own findings of fact.”). As the Planning Board found that the amendment properly addresses traffic flow, which finding is supported by evidence in the record, this Court will not disturb the Planning Board’s finding that the amendment is consistent with the intent of the preliminary plan.

Moreover, Graceco further argues that the lack of timetable equates to the elimination of the requirement of a four-lane intersection. The Board of Appeal found that “[t]he Applicant is still bound to create such four lanes in any event at the appropriate time.” When accepting the amendment, the Planning Board clearly stated that the road would be completed when more buildings were put up in the parcel: “It is expected that the rest of the road will be constructed upon future development of the parcel, which requires Planning Board review.” Thus, the Board of Appeal found that the two-lane road is temporary. The developer will be required to complete the intersection upon further development. The Board of Appeal also found that the original preliminary plan mentioned that the road would be “phased in.” Beginning the phasing of the

four-lane intersection with the construction of a temporary two lanes is consistent with the original preliminary plan, which referenced phasing from the start. The Board of Appeal's classification of the amendment as a minor change is not in violation of the Town of West Greenwich Land Development and Subdivision Regulations or clearly erroneous. Accordingly, the Court affirms the decision of the Planning Board and the Board of Appeal, finding that the proposed amendment should be characterized as a minor amendment.

## **B**

### **Waiver of Notice**

Graceco further argues that as a result of the Planning Board's alleged misclassification of the amendment as a minor change, Graceco and other abutters were wrongfully denied notice and a public hearing.<sup>7</sup> The Appellees argue that even if this Court were to have found that the amendment was a major change—which it has not—Graceco was present at the Planning Board meeting on the proposed amendment and objected to that amendment. In the instant case, although Graceco was not provided with notice of the Planning Board meeting, it appeared at the Planning Board meeting and argued essentially the same arguments it presents before this Court on appeal.

Graceco waived any notice arguments by presenting an objection before the Planning Board at the hearing regarding the proposed amendment. Our Supreme Court “has repeatedly held . . . that appearance before the zoning board is proof that the unnotified party had the opportunity to present facts that would assist the zoning board in the performance of its duties,

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<sup>7</sup> In this case, it is undisputed that Graceco did not receive notice of the Planning Board meeting regarding the amendment to the preliminary plan. However, it is also undisputed that Graceco did receive notice of the Board of Appeal hearing reviewing the Planning Board meeting. The lack of notice before the Planning Board meeting to amend the original preliminary plan is the only issue before this Court in the instant appeal.

and therefore, such a party waives the right to object to any alleged deficiency of notice.” Ryan v. Zoning Bd. of Review of Town of New Shoreham, 656 A.2d 612, 616 (R.I. 1995); see also Graziano v. R.I. State Lottery Comm’n, 810 A.2d 215, 221 (R.I. 2002) (“this Court has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting”). Because Graceco appeared and objected to the proposed amendment on the basis that the proposed amendment should be considered a major change and that the amendment constituted a nuisance in violation of the performance standards, Graceco waived its argument on notice.

Furthermore, this Court finds that Graceco lacks standing to raise notice defects on the part of other abutters. In Baker v. Carr, 369 U.S. 186, 204 (1962), the United States Supreme Court held that to have standing an individual must have “such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” McKenna v. Williams, 874 A.2d 217, 226 (R.I. 2005) (quoting Flast v. Cohen, 392 U.S. 83, 99-100, (1968)) (holding, “when standing is at issue, the focal point shifts to the claimant, not the claim, and a court must determine if the plaintiff ‘whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable’ or, indeed, whether or not it should be litigated”). Graceco is not the proper party to request the adjudication of its neighbors’ notice to a Planning Board meeting. Compare E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 280, 373 A.2d 496, 498 (1977) (holding that a property abutter has standing to challenge a planning board’s approval of a subdivision where the property abutter demonstrated a substantial threat to the future use of their own land). Thus, the decision of the Board of Appeal was not in violation of procedural due process.

## C

### **Alleged Violation of the Performance Standards**

Graceco also argues that the amendment violated the specific Performance Standards for developments and subdivisions in the West Greenwich Exit 7 Special Management District as the prolonged construction constitutes a nuisance. The Appellees respond that the proposed amendment did not violate the specific Performance Standards as the construction activity was not careless.

Lot 4-3 is situated on Centre of New England Boulevard, which is a street that falls within the boundaries of the West Greenwich Exit 7 Special Management District. The Town of West Greenwich set forth specific Performance Standards for developments and subdivisions proposed in the Exit 7 Special Management District. Graceco argues that the prolonged construction proposed in the amendment constitutes a nuisance and points to Section 16 in support of its argument that the amendment would constitute a violation. Specifically, Graceco argues that the amendment violates Section 16 because “[t]he proposed construction phasing will perpetuate an unnecessary and unpermitted nuisance to abutting property owners by prolonging the construction and the effects therefrom, including the emission of dust, detectable ground vibrations, and excessive noise that the abutting neighbors will endure.”

Section 16 of the Exit 7 Special Management District Performance Standards states that “[n]o nuisance shall be permitted to exist or operate upon any lot so as to be offensive or detrimental to any adjacent lot or property or to its occupants.” The Standards include a non-exclusive list of what may constitute a nuisance. Amongst this list, the Standards include:

“Any use, including careless construction activity, that emits dust, sweepings, dirt, or cinders into the atmosphere, or discharges liquid, solid wastes, or other matter into any street, property or wetland which may adversely affect the health, safety comfort of,

or intended use of their property by persons within or adjacent to the SMD.”

...

“Excessive noise. No outside speaker or public address system shall be permitted without the express written consent of the Planning Board. At no point outside of any lot line shall the sound pressure level of any machine, device, or any combination of same, from any individual plant or operation, exceed the decibel levels set forth in Article III.” Section 16 of the Exit 7 Special Management District Performance Standards.

This Court notes Graceco briefly stated, without elaboration, that dust, vibrations or excessive noise would constitute a nuisance at the Planning Board meeting and at the hearing before the Board of Appeal. Graceco vaguely argued that the continuing construction would adversely affect it and its neighbors. Graceco failed to present any evidence in support of its arguments. See Budlong v. Zoning Bd. of Review of City of Cranston, 93 R.I. 199, 205, 172 A.2d 590, 593 (1961) (holding that the burden of showing abuse of discretion on behalf of a zoning board is on those who seek to reverse a decision of a zoning board). Even accepting that the construction might adversely affect neighbors to some extent, there was no evidence that the effects would be so excessive that they would rise to the level of a nuisance as defined by the Performance Standards.

Moreover, the Standards explicitly state that the emission of dust caused by “careless construction” may be a nuisance. Graceco failed to demonstrate how the phasing of construction constituted “careless construction” in violation of the Performance Standards. The Standards do not provide that construction activity, in itself, could constitute a nuisance. When this Court looks at the purpose of the Standards, it is clear that construction activity per se and the reasonable and temporary consequences of a construction project would not lead to a nuisance

under the Standards. See Ryan, 11 A.3d at 70-71. The purpose of the Performance Standards is explicitly stated in the Standards. Section 1 reads:

“The purpose of the Exit 7 Special Management District (“SMD”) is to establish design, density and dimensional criteria for a large-scaled mixed-use development in the area located at Exit 7 along Interstate Route 95. **It is the intent of this ordinance to allow for a multi-year phased development** that promoted high quality design, provides for multi-family residential development . . . provides employment opportunities and expands the Town’s commercial tax base.” (Emphasis added.)

After reviewing the Performance Standards as a whole, it is evident that phased construction is consistent with the Standards. For example, Section 18 of the Performance Standards includes a “Timing of Development,” which states that “[d]evelopment within the SMD shall be constructed in phases.” The section goes on to depict a development phasing schedule. This section clearly indicates that the Exit 7 Special Management District was meant to be developed in stages. As there is no evidence of record that the amendment would result in anything other than regular construction activity, this Court finds that the Board of Appeal committed no clear error in its determination that the construction activity associated with phased development is not a nuisance in violation of the Exit 7 Special Management District Performance Standards.

#### IV

#### Conclusion

After review of the record, this Court finds that the decision of the Board of Appeal did not result in clear error of law. Substantial rights of the Appellant have not been prejudiced. Judgment affirming the Board of Appeal and approving the proposed amendment shall enter. Counsel shall submit the appropriate Order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Graceco, LLC v. The Town of West Greenwich Zoning Board of Review Sitting as Planning Board of Appeal, et al.

**CASE NO:** KC 2015-0034

**COURT:** Kent County Superior Court

**DATE DECISION FILED:** July 14, 2015

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

**ATTORNEYS:**

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