



# I

## Facts and Travel

This appeal concerns three lots owned by Kirkbrae: 644 George Washington Highway, 646 George Washington Highway, and 648 George Washington Highway (hereinafter Property). The Property is zoned as BL-0.5, Business Limited.

The proposed project for the Property comprises the “combination of three (3) wooded lots into one commercial lot containing one convenience store, five gas dispensers, one quick serve restaurant with a drive-thru and associated parking and stormwater management systems.” Kirkbrae’s Mem. Ex. M, at 5<sup>1</sup>. Kirkbrae, along with Cumberland Farms, submitted to the Planning Board the Master Plan application, Certificate of Completeness, Notification/Contact List, abutters’ list, and radius maps. Although the drive-thru is permitted, the Project requires a special use permit for the gas station and increased signage.

On June 15, 2021, the Technical Review Committee for Lincoln reviewed the Master Plan and Certificate of Completeness and moved the Project forward for a public informational meeting. The committee requested extensive traffic analysis at the preliminary plan stage and expressed concerns about traffic lines for the proposed restaurant.<sup>2</sup> On July 23, 2021, Kirkbrae provided a supplemental traffic analysis from McMahon Associates.

On July 20, 2021, the Planning Board held a public hearing and heard abutters’ testimony. At the same meeting, Phil Henry, the project engineer, testified and Francisco Lovera—the traffic engineer from McMahon Associates who provided the traffic study—also testified. They each

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<sup>1</sup> When citing to the Record throughout this Decision, this Court will reference the consecutive pagination as received by the Zoning Board of Review.

<sup>2</sup> As background, there were three stages of review for land development and subdivisions: (1) “master plan”; (2) “preliminary plan”; and (3) “final plan.” *See* § 45-23-39(a).

responded to questions from the Planning Board. Subsequently, the Committee recommended the Master Plan for approval.

## A

### **Lincoln Planning Board Decision**

On August 31, 2021, the Planning Board held a meeting, discussed the Project, and voted 4-1 to deny the Master Plan. The Planning Board issued the denial for Kirkbrae and Cumberland Farms Major Land Development Master Plan. (Complaint, Exhibit A.)

The Planning Board first addressed the five prongs set forth in § 45-23-60(a). For the first prong, the Planning Board found that the Project was not consistent with Lincoln's Comprehensive Plan because "the proposed [P]roject does not promote and protect the existing natural and built environment and the mitigation of all significant negative impacts of the proposed development on the existing environment." (Kirkbrae's Mem. Ex. Y, at 1.) In addition, the Planning Board found that the Project "does not promote design of land development that is well integrated with the surrounding neighborhoods with regard to natural and built features, and which concentrate development in areas which can allow the best support for the appropriate uses by reason of natural characteristics and existing infrastructure." *Id.* at 1-2. Finally, "while the proposed uses are allowed, the [P]roject does not fit within this specific area along George Washington Highway. This specific area is made up of office buildings that typically close down during the evening hours. The proposed [P]roject will add two retail uses into an otherwise office use area." *Id.* at 2.

The second prong examined whether the proposed development complied with the standards and provisions of the Lincoln Zoning Ordinance. The Planning Board determined that the Project did not do so as it would require a special use permit for the gas station and additional signs.

The third prong examined whether there will be “significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions of approval.” *Id.* The Planning Board found that the applicant addressed the concerns raised by the abutters about environmental impacts at Master Plan review stage; however, the issues will have to be addressed in greater detail at the next stage.<sup>3</sup> The Planning Board did not address that fourth prong because it only applied to subdivisions.

The Planning Board’s finding for the fifth prong examined if there is physical access to a public street. The Planning Board’s finding stated that “the applicant did not satisfactorily address[] the issue of automobile lights shining across the street into the abutters’ yards.” *Id.* The finding for the fifth prong also says that this Project “may create unforeseen traffic and public safety concerns in the area[,] and the applicant did not satisfactorily address the issues brought out by the board.” However, the Planning Board acknowledged that there was permanent access to a public street for the proposed Project.

The sixth, seventh, and eighth prongs applied were created locally by the town. (Lincoln Land Development and Subdivision Regulations 5, 19-20.) The sixth prong only applies to subdivisions which is not applicable to this proposed project. The Planning Board finding for the seventh prong concerns the circulation of pedestrian and vehicular traffic, safe building sites, and preserve features that are beautiful to the neighborhood:

“the proposed [P]roject will not provide for safe circulation of pedestrian and vehicular traffic. The [B]oard finds that the [P]roject will not contribute to the attractiveness of the community. The Board finds that the [P]roject does not fit within this specific area along George Washington Highway. This specific area is made up of office buildings that typically close down during the evening

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<sup>3</sup> The Planning Board did not use this as a factor to deny the Master Plan which was a reasonable finding by the Planning Board.

hours. The proposed [P]roject will add two retail uses into an otherwise office use area.” *Id.* at 3.

Finally, the eighth prong is not applicable to land development projects. *Id.* On September 30, 2021, Kirkbrae timely appealed the Planning Board’s decision to the Zoning Board.

## **B**

### **Lincoln Zoning Board of Review Acting as the Board of Appeals**

On October 28, 2021, the Zoning Board, sitting as a board of appeals, heard the appeal pursuant to § 45-23-70.<sup>4</sup> Counsel for Kirkbrae summarized the procedural history, and the Zoning Board members questioned her about the traffic study and how it coincided with COVID. Counsel noted that *Toohey v. Kilday*, 415 A.2d 732, 737 (R.I. 1980), amongst others, conclude that “lay judgments of neighboring property owners on the issue of the effect of the proposed use on neighborhood property values and traffic conditions have no probative force [with] respect [to] an application.” *Id.* at 12:1-6. She stated that, while a traffic study is not required at the Master Plan stage, Kirkbrae submitted the traffic study because they had already completed it. Kirkbrae’s counsel then noted that she focused on the traffic study on appeal because the Planning Board identified traffic as one of the grounds for denial.

Kirkbrae suggested the other predominant ground for denial—that the Project does not fit in the area—“is not consistent with either the zoning ordinance or the comprehensive plan.” *Id.* at 17:17-18:16. Counsel acknowledged the issue of headlights shining into neighboring homes. In summation, Kirkbrae contended that there was a lack of evidence in the record, and the Zoning

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<sup>4</sup> Section 45-23-70 was repealed by P.L. 2023, ch. 308, § 3 and P.L. 2023, ch. 309, § 3, effective January 1, 2024. However, the appropriate standard for an appeal is “the law in effect at the time when the applicant . . . submitted its application for a permit to the zoning board[,]” absent a “clear expression of retroactive application.” *East Bay Community Development Corporation v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1144 (R.I. 2006). Hence, the repealed § 45-23-70 is applicable.

Board was in clear error upholding the Planning Board's decision. Specifically, the Zoning Board erred in affirming the Planning Board's decision because the Planning Board cast aside the traffic data and expert testimony provided by Kirkbrae.

In response, Albert Ranaldi, Jr., Lincoln Town Planner, summarized the testimony provided at prior hearings including the emphasis on traffic. *Id.* at 40:18-41:17. In response to questioning, Mr. Ranaldi testified that the Committee recommended the plan for approval from a technical vantage point because the Project, they found, was consistent with the Comprehensive Plan. Lincoln's Land Development and Subdivision Regulations Section 1, General Purpose three, is to "[p]romote the protection of the existing natural and built environment and the mitigation of all significant negative impacts of any proposed development on the existing environment." (Subdivision Regulations, 1, 3.) Lincoln's Land Development and Subdivision Regulations Section one, General Purpose four is to "[p]romote design of land development and subdivisions that are well-integrated with the surrounding neighborhoods with regard to natural and built features, and which concentrate development in areas which can allow the best support for the appropriate uses by reason of natural characteristics and existing infrastructure." *Id.*

The Zoning Board of Review decision, acting as the board of appeals, states

"The testimony of Lincoln residents demonstrated that General Purpose standards 3 and 4 have not been met and provides sufficient evidence to support the Planning Board's decision to deny the master plan application. The proposed use of a service station/restaurant would not protect the existing natural and built environment and would not mitigate all significant negative impacts of any proposed development on the existing environment. Further, the proposed use is not well-integrated with the surrounding neighborhoods with regard to natural and built features. One side of the road has office uses; the other side is residential. The proposed uses for the site are not well-integrated into the neighborhood, and are more appropriate much farther away, on the other side of Route 146 on George Washington Highway. This includes the residences

across George Washington Highway that will be subject to headlight sweeps from vehicles [exiting] the site.” *Id.*

The Zoning Board voted 4-1 to affirm the decision of the Planning Board to deny the application.

## II

### Standard of Review

Section 45-23-71(a) grants the Superior Court jurisdiction to review decisions from a zoning board of review, sitting as a board of appeals. Review is governed by § 45-23-71(d):

“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 that 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.”

The Court must “examine the entire record to determine whether ‘substantial’ evidence exists to support the board’s findings.” *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004) (internal citations omitted). Substantial evidence is “more than a scintilla but less than a preponderance.” *Id.*

Section 45-23-70(a) provides that “[t]he board of appeal [the Zoning Board] 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.” Section 45-23-70(a). In reviewing an appeal from a decision of a board of appeal, “[t]he Superior Court gives deference to the findings of fact of the local planning board.” *West v. McDonald*, 18 A.3d 526, 531 (R.I. 2011). “[T]he Superior Court does not consider the credibility of witnesses, weigh the evidence, or make its own findings of fact.” *Munroe v. Town of East Greenwich*, 733 A.2d 703, 705 (R.I. 1999). “[I]ts 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.” *Id.* (internal citations omitted).

### **III**

#### **Analysis**

##### **A**

#### **Applicability of Lincoln’s Prongs**

Kirkbrae argues that the seventh prong is inapplicable because the standard is not present in § 45-23-60. (Kirkbrae’s Mem. at 23-24.) Kirkbrae contends that that the seventh prong does not apply to land development projects. Alternatively, Kirkbrae contends that, if the seventh prong does apply, the record lacks substantial evidence to show the Project does not fit in the area and “will not provide for safe circulation of pedestrian and vehicular traffic.” Kirkbrae’s Mem. at 24-38. Lincoln did not directly address this matter. *See* Lincoln’s Mem.

Kirkbrae cites multiple cases to support its argument that the Planning Board may not apply the seventh prong. (Kirkbrae’s Mem. at 23-24) (citing *Munroe*, 733 A.2d at 709-710); *Hartunian v. Matteson*, 109 R.I. 509, 515-16, 288 A.2d 485, 489 (1972); *Lincourt v. Zoning Board of Review*



of *City of Warwick*, 98 R.I. 305, 201 A.2d 482 (1964)). This argument is ineffective for a host of reasons.

Section 45-23-60 outlines five required findings for major land developments, and Lincoln created three additional findings. Section 45-23-60 does not expressly limit the five findings created via statute. In addition, each of the cases that Kirkbrae cites in its brief are distinguishable. In *Munroe*, the Town of East Greenwich adopted ordinances that conflicted with the Rhode Island Development and Subdivision Review Enabling Act, (Development Act §§ 45-23-25 through 45-23-74; there, the Rhode Island Supreme Court held that the Development Act overrides *inconsistent* ordinances adopted by a town. *Munroe*, 733 A.2d at 707. Lincoln did not adopt ordinances that are inconsistent with state statute; Lincoln created additional required findings for the Planning Board to make. In *Hartunian*, the Rhode Island Supreme Court held that the town ordinance defining “a reasonable time” to bring a statutory appeal was void. *Hartunian*, 109 R.I. at 515-16, 288 A.2d at 489. Here, Lincoln did not define a term outlined in the Development Act, instead it created additional standards. *Lincourt* is irrelevant to the case at hand because it addressed a dimensional variance and the jurisdiction of the board of review. *Lincourt*, 98 R.I. at 309, 201 A.2d at 485.

While Kirkbrae focuses on the seventh prong, this Court need not rely exclusively on the final three (local) prongs of the required findings by the Planning Board given their creation by Lincoln. As analyzed *infra*, there is substantial evidence to support the Planning Board’s findings for the first five prongs, which contain the bulk of the Planning Board’s findings.

## B

### **Is There Substantial Evidence to Support the Planning Board's Findings Regarding Headlights?**

Kirkbrae avers that it sufficiently addressed the issue of headlights shining into abutters' properties by proposing the construction of a vegetative buffer. In opposition, Lincoln argues that this issue was not sufficiently explicated because a vegetative buffer would not entirely solve the issue. Additionally, Lincoln contends that headlights impacting surrounding land is not consistent with the Comprehensive Plan.

At the July 28, 2021 Planning Board meeting, David Marquard, an abutter, testified that the headlights would hit his house and felt unhappy with that prospect. At the August 31, 2021 Planning Board meeting, Chairman Bostic repeated his concerns about headlights beams projecting across the street. In response, Phil Henry, a civil design engineer for the Kirkbrae, testified that "They will work with DOT to provide shrubbery... There is no opportunity for [a] buffer . . . They will voluntarily work with residents . . ." (Kirkbrae's Mem. Ex. X, at 3.) This speculative solution, after various meetings of the Technical Review Committee and the Planning Board which discussed this issue, did not appease the Planning Board which rejected the proposal moments later.

Various neighbors had discussed the concern of the headlights. While both sides presented evidence regarding the issue of headlights shining onto abutters' properties, it is not the role of this Court on appeal to weigh the evidence. *See Apostolou v. Genovesi*, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978). Rather, it is this Court's role to conclude whether substantial evidence existed for the Zoning Board to uphold the Planning Board's finding. *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013). Lay witnesses were certainly familiar with the properties involved and no specifics were provided on the shrubbery which, presumably, had

not been discussed with DOT yet. *Restivo v. Lynch*, 707 A.2d 663 (R.I. 1998). The Planning Board was duty-bound to determine whether the applicant had submitted substantial evidence, the credibility of the witnesses and the weight of the evidence before it. Therefore, this Court finds that there is substantial evidence to support the Planning Board’s conclusion that the undefined vegetative buffer was not sufficient to remedy the issue of headlights shining onto abutters’ land.

## C

### **Whether the Project was Consistent with the Comprehensive Plan**

Kirkbrae avers the record—including but not limited to the Planning Board meeting minutes—show that the Master Plan is consistent with the Comprehensive Plan, making the Zoning Board’s decision to uphold the Planning Board’s findings, *inter alia*, clear error. Alternatively, Kirkbrae argues that the Comprehensive Plan was not updated as mandated, pursuant to § 45-22.2-12, making the Comprehensive Plan an inadequate basis for denial of a land use decision. Lincoln suggests there is competent evidence in the record to support the Zoning Board’s upholding of the Planning Board’s finding that the Comprehensive Plan is inconsistent with the Project.

Section 45-22.2-12(b), effective March 1, 2024, states that:

“[a] municipality shall fully update and re-adopt its entire comprehensive plan . . . at least once every ten (10) years from the date of municipal adoption. . . . If a municipality fails to fully update and re-adopt its comprehensive plan within twelve (12) years from the date of the previous plan’s adoption, such municipality shall not be able to utilize the comprehensive plan as a basis for denial of a municipal land use decision.”

The prior version of § 45-22.2-12(b)—effective until March of 2024—only included the first requirement that a municipality update its comprehensive plan every ten years; it did not bar a municipality from utilizing the plan as a basis for denial of a land use decision. This appeal was

filed on January 24, 2022, before the new statute was enacted. The law in effect at the instigation of litigation is applicable, *see East Bay Community Development Corporation*, 901 A.2d at 1144; therefore, the prior version of § 45-22.2-12(b)—without the prohibition from using the Comprehensive Plan as a means for denial if a town failed to update its Comprehensive Plan—is inapplicable for this suit. Lincoln’s Comprehensive Plan was last updated in 2003. Accordingly, Kirkbrae’s argument is unavailing, and the Planning Board had the authority to conclude that the Comprehensive Plan is inconsistent with the Project.

The Court now turns to Kirkbrae’s argument that the Project is permissible under the zoning ordinance; therefore, it should also be permissible pursuant to the Comprehensive Plan. In opposition, Lincoln argues that the Planning Board’s decision appropriately elucidates how the Project conflicted with the Comprehensive Plan. While the uses contained in the proposed Project are permitted pursuant to Lincoln’s Zoning Table of Uses, it does not automatically follow that the uses are congruous with the Comprehensive Plan. They are separate regulations with distinguishable requirements.

General Purpose Four of the subdivision regulations is intended to “[p]romote design of land development and subdivisions that are well-integrated with the surrounding neighborhoods with regard to natural and built features, and which concentrate development in areas which can allow the best support for the appropriate uses by reason of natural characteristics and existing infrastructure.” (Subdivision Regulations 1, 3). At the July 28, 2021 Planning Board meeting, Jim Frederickson, a neighborhood resident, testified that he “feels this will drastically change the area. He states that the area should be professional buildings, doctor’s offices and not a gas station and [] Arby’s.” (Kirkbrae’s Mem. Ex. T, at 2.) David Marquard, an abutter, similarly testified that the Project does not fit the area as it currently exists. *Id.* at 1-2. Janet Kerlin, a town resident, testified

that this Project will alter the character of the neighborhood. *See id.* at 2-3. At the same hearing, Mark,<sup>5</sup> an area resident, testified that the gas station would change the character of the neighborhood. *Id.* at 2. This evidence contained in the record satisfies the substantial evidence standard to show the Project does not fit in with the area. There was sufficient abutter testimony to support the Planning Board’s finding that the proposed Project is not in harmony with the existing neighborhood, which was sufficient to support the Planning Board’s finding that the Project does not comport with the Comprehensive Plan. Surely people who have lived in the neighborhood are sufficiently qualified to discuss the “potential neighborhood impacts” of the proposal.

Thus, there is substantial evidence in the record to support the Zoning Board upholding the Planning Board’s finding that the proposed Project is inconsistent with the Comprehensive Plan. The Zoning Board did not err as a matter of law in adopting the Planning Board’s finding that the Project is inconsistent with the Comprehensive Plan.

## **D**

### **Was the Language Used by the Planning Board Arbitrary?**

Kirkbrae contends that the Planning Board’s use of catch-all provisions was “arbitrary and unsupported by the evidence in the record.” (Kirkbrae’s Mem. at 42-44.) Namely, the Planning Board stated in its decision; “the proposed [P]roject does not promote and protect the existing natural and built environment and the mitigation of all significant negative impacts of the proposed development on the existing environment.” *Id.* at 44 (citing Kirkbrae’s Mem. Ex. Y, at 1). Accordingly, Kirkbrae argues that this use of general language pulled from Lincoln’s Land

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<sup>5</sup> Mark’s last name was not provided in the meeting minutes. *See* Kirkbrae’s Mem. Ex. T. No disrespect is intended by the use of his first name.

Development and Subdivision Regulations is not adequate grounds to deny a land development project and does not apply to proposed projects. Conversely, Lincoln argues that there is substantial evidence to support the Zoning Board's affirmance of the Planning Board's finding. *See* Lincoln's Mem. at 6.

The Zoning Board's approval of the Planning Board's findings, when it denied Kirkbrae's Master Plan, was not an error and only one portion of the Planning Board's significant findings. In addition, substantial evidence requires "more than a scintilla but less than a preponderance." *Lischio v. Zoning Board of Review of Town of North Kingstown*, 818 A.2d 685, 690 n.5 (R.I. 2003) (citation omitted). Plainly, as analyzed previously, there is substantial evidence to support the Planning Board's findings about the proposed Project's misfit with the area.

#### **IV**

#### **Conclusion**

Here, there is little doubt that the Planning Commission conducted a thorough review of the Proposal, rounding each of the marks for a complete, rational analysis of the individual issues. For the foregoing reasons, Kirkbrae's appeal is denied, and the Zoning Board's decision affirming the Planning Board's denial of the Master Plan is affirmed. Counsel shall submit an appropriate order for entry.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** Kirkbrae Development Corp. v. The Town of Lincoln Zoning Board of Review, et al.

**CASE NO:** PC-2022-00463

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** April 24, 2024

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

**ATTORNEYS:**

**For Plaintiff:** Joelle C. Rocha, Esq.

**For Defendants:** Anthony DeSisto, Esq.