

STATE OF RHODE ISLAND

NEWPORT, SC.

SUPERIOR COURT

(FILED: July 31, 2024)

SAKONNET PARTNERS, LLC,	:	
<i>Appellant,</i>	:	
	:	
v.	:	C.A. No. NC-2023-0337
	:	
LISE GESCHEIDT, JENNIFER	:	
HILTON CAVANAGH, DAVID	:	
COLLINS, JOHN R. JACKSON,	:	
and EDWIN K. SCHOBBER, JR.,	:	
in their capacity as Members of the	:	
TIVERTON ZONING BOARD OF	:	
REVIEW, sitting as the BOARD OF	:	
APPEALS,	:	
<i>Appellees.</i>	:	

DECISION

LANPHEAR, J. Before this Court is Appellant Sakonnet Partners, LLC’s (Sakonnet) appeal from the May 22, 2023 decision of Appellee Tiverton Zoning Board of Review, sitting as the Board of Appeals. The Zoning Board affirmed the Tiverton Planning Board’s decision to deny Sakonnet’s development plan review application to construct a crematorium. Jurisdiction is pursuant to G.L. 1956 § 45-23-71. For the following reasons, Sakonnet’s appeal is denied, and the Zoning Board’s decision is affirmed.

I
Facts and Travel

A
The Application

This appeal involves a development plan review application to construct a 2,960 square foot crematorium on Sakonnet's 21,496 square foot property located at 730 Main Road, Tiverton, Rhode Island. The Property is abutted to the east by residential homes, to the south by a used car dealership, and across Main Road by a mix of residential and commercial lots. Historically, the Property contained a small structure, which has since been demolished, and had multiple commercial uses. Currently, the Property contains an existing gravel road with a curb cut and a second curb cut on a separate access easement. Sweet's Mem., November 28, 2022, R. 987. The site has a significant grade change from Main Road of about 8 percent and the remainder of the site has a 2 percent grade change. The Property is in a General Commercial GC District¹ and the Neighborhood Business NB Overlay District.² At the time of the Application, a crematorium was a permitted use

¹ The General Commercial GC District "contains areas of the town which form the basic pattern of retail and service businesses serving the community, and the areas planned for expansion of such businesses. The GC District includes the major commercial area along Main Road in the northwest corner of Tiverton, and the smaller commercial area along Stafford Road, extending north from its intersection with Bulgarmarsh Road." (Tiverton Code of Ordinances (Tiverton Ordinances), App. A, Art. III, Sec. 1(f).)

² The Neighborhood Business Overlay District, which is part of the Tiverton Commercial Form-Based Code is defined as "[t]ransitional areas indicated by design as low density residential sections where homes have been converted to small-scale commercial and mixed uses."

https://www.tiverton.ri.gov/documents/planningboard/FormBasedCodes2013_v2.pdf.

by right in the GC and NB Districts.³ *See* Tiverton Ordinances, App. A, Art. IV, Sec. 9(d).

The Application, although modified throughout the Planning Board process, proposed a single structure which would contain a chapel as well as a garage which would contain the furnace. Sakonnet noted that the chapel space would not be used for funeral services but would instead act as a viewing area for no more than fifteen people. In the Application, Sakonnet noted that the north site access would be used to access the loading and delivery area while the south access would be used for parking lot access for patrons and staff. The Application proposed ten parking spaces. To “screen” the Property, the site plan indicated the installation of a mix of double evergreen tree buffers and fencing. The crematorium’s business hours would be from 9:00 a.m. to 5:00 p.m.

Before filing the development plan review application, Sakonnet initially filed a concept plan application on November 22, 2021. Thereafter, on September 14, 2022, Sakonnet filed its major subdivision or land development master plan application. After consideration, the Planning Board determined that the Application should proceed through development plan review which Sakonnet filed on November 7, 2022. Interim Town Planner, Ashley Sweet, certified the Application as complete on November 22, 2022 after review by the Town’s Ad Hoc Technical Review Committee on November 17, 2022.

Promptly after receiving the Application, Ms. Sweet issued a memorandum dated November 28, 2022. Ms. Sweet noted in her memorandum additional documentation Sakonnet would need to provide in order for the Planning Board to make a determination

³ Crematoriums have since been added to the Town’s list of explicitly prohibited uses.

on the Application, including a Rhode Island Pollutant Discharge Element System (RIPDES) permit through the Rhode Island Department of Environmental Management (RIDEM) for stormwater, formal written confirmation from the Fire Marshal that his concerns with access to the Property had been addressed, and clarification that there is adequate buffering or fencing of the eastern property boundary.

B

The Planning Board Decision

The Planning Board held hearings on December 6, 2022, February 7, 2023, March 7, 2023, April 4, 2023, and May 2, 2023. At the first Planning Board meeting, on December 6, 2022, the Planning Board voted to conduct a formal advertised and public hearing on the Application. The Planning Board thereafter held four public hearings on the Application. Prior to these hearings, the Planning Board received and considered documentation from Ms. Sweet; Tiverton Consulting Engineer, Nathan Michael; the Zoning Official, John Hoyle, Jr.; and concerned citizens, including Tiverton Residents Against Crematorium (TRAC) represented by counsel. Additionally, the Planning Board considered new documentation provided by Sakonnet addressing concerns with the Application. During the hearings, the Planning Board received testimony in support of the Application from Neal Hingorany and Joseph Malo of Narragansett Engineering; Jonathan Ferreira, Sakonnet's owner; counsel for Sakonnet; and a landscape architect from Gardner Gerrish Landscape Architects LLC. The Planning Board also heard testimony from Ms. Sweet as well as multiple concerned citizens, which included counsel for TRAC, doctors, professors, abutters, and other community members.

Mr. Michael also provided a memorandum reviewing the current Application in which he found that an updated Onsite Wastewater Treatment System (OWTS) may be required and that Sakonnet had not yet provided a full list of approved Low Impact Development (LID) methods. The Planning Board received e-mails from the public that detailed concerns regarding how the crematorium's emissions would impact the health of the community and the environment, as well as concerns regarding chapel related traffic.

At the February 7, 2023 hearing, Mr. Ferreira addressed the submitted memorandum and comments, noting that Sakonnet would need a RIDEM Air Quality Permit and that the chapel will only be used for small, private gatherings.⁴ Mr. Hingorany responded to Ms. Sweet and Mr. Michael's memoranda, stating that although Sakonnet had an approved OWTS for the prior building plan, it had to submit a revision based on the updated renderings of the building. Members of the public made comments at the hearing opposing the project, specifically due to the residential location, and the possibility of health and safety concerns. One community member specifically asked about the height of the smokestack to which Mr. Hingorany responded that Sakonnet had provided manufacturer photos of the proposed stack which would be three feet above the roof peak and would be "to code." It was noted that the smokestack was not included on the submitted renderings of the building. Prior to the conclusion of the hearing, Ms. Sweet reiterated that although issues were presented to Sakonnet in her memorandum, such issues were addressed in documentation presented to the Planning Board just prior to the hearing. Based on the information presented at the public hearing, the board

⁴ Although there are no transcripts from any of the five hearings, the Meeting Minutes are provided as part of the record, and recordings of each meeting are available online at https://www.youtube.com/playlist?list=PLIxCnTj69y6V2EXoHlIE79oDqs_N06JiO.

members requested updated documentation of Sakonnet's RIDEM permit applications, revised materials regarding the height of the smokestack, and current landscaping renderings. The Planning Board voted to continue the hearing and extend the time clock.

Prior to the March 7, 2023 hearing, Ms. Sweet provided an updated memorandum dated March 2, 2023. In her updated memorandum, Ms. Sweet noted that Sakonnet did provide additional materials, but that the Planning Board needed to seek further information. Specifically, she reiterated unmet requirements from the last memorandum and noted that based on the Zoning Board's questions, the Planning Board should inquire into the primary use of the chapel as it relates to parking. She added that Sakonnet should also provide documentation related to its Air Quality Permit. Also submitted were the Zoning Official's memorandum dated March 6, 2023 as well as Mr. Michael's memorandum dated March 7, 2023, both of which provided an assessment of the Application. The Zoning Official's memorandum stated that "the proposed ten (10) parking spaces meets the requirements of the Zoning Ordinance[.]" while stating that the Planning Board should condition its approval on a capacity limitation of "fifteen (15) mourners" and that the chapel not be used for funeral services. R. 1049-50. In Mr. Michael's memorandum, he specifically notes that the "Applicant still needs to document that the full list of approved LID methods and/or procedures were explored" *Id.* at 1054. Opposed members of the public presented a signed petition and further materials regarding the health and safety of neighboring residences.

At the outset of the hearing, Chairman Hardy announced that Sakonnet requested a continuance to provide the Planning Board with permits which had not yet been granted. Mr. Malo responded to Ms. Sweet's memorandum and explained that the new

documents included an e-mail from the Fire Marshal, but that they would follow up with a formal letter. As to LID and stormwater comments, Mr. Malo testified that they would provide a list of the standards and an analysis in a formal response “shortly” and added that, as to the septic system permit, they are currently in the comment phase with RIDEM. *See* March 7, 2023 Hearing Recording. The landscape architect testified regarding the updated landscape plan which included a double evergreen buffer on the east side of the Property and a fence on the north side.

Members of the public asked about the height of the smokestack, inquired into the permitting process for the Property, noted the health and safety concerns from emissions, questioned whether there was enough parking for the chapel, and asserted that because a crematorium is an incinerator, and incinerators are not permitted in the NB District, the crematorium itself is not permitted. In addressing these concerns, Sakonnet’s counsel noted that an Air Quality Permit and OWTS were still needed. The town solicitor disputed the public’s comments regarding the use of the Property, stating that a crematorium is permitted by right, regardless of whether it is considered an incinerator. Because Sakonnet was willing to submit more materials to comply with Ms. Sweet’s comments and assist the Planning Board in making its determination, the Planning Board voted to continue the hearing again.

The third public hearing was held on April 4, 2023. The Planning Board received a memorandum from TRAC’s counsel requesting that the Planning Board review the Application under the more heightened major land development review rather than development plan review. The memorandum noted that members of the public raised various health and safety concerns and Sakonnet had provided conflicting information

regarding the proposed use. Sakonnet's counsel submitted his response, arguing that major land development review is not appropriate in this circumstance. Ms. Sweet provided her March 30, 2023 memorandum which raised concerns and questions with the Application, specifically that there remained a number of permits and applications that may have been applied for or completed but that were not provided to the Planning Board.⁵ These include the Air Quality Permit, the OWTS, the Phase I Environmental Survey Assessment (ESA), and the LID.

At the hearing, members of the public questioned why there was still no dimensional information for the smokestack and added that the Application had many discrepancies and lacked important information. The Planning Board inquired into why the permitting process was taking so long and were concerned with the fact that Sakonnet had not yet provided the permitting information. The Planning Board also addressed TRAC's counsel's memorandum and specifically his argument that under development plan review, the Planning Board does not have as much discretion to consider environmental issues or the Town's comprehensive plan. The town solicitor was adamant that the Planning Board could consider these concerns in its holistic review of the Application under development plan review while Sakonnet's counsel argued that it would be prejudicial to Sakonnet to change the review process at this late stage. Again, the Planning Board voted to continue the public hearing and extend the time clock.

The final hearing was held on May 2, 2023. Prior to this hearing, Ms. Sweet submitted a memorandum which included a draft decision denying the Application. She noted that multiple items were still considered unresolved in the record: an approved

⁵ The certified record does not contain Ms. Sweet's memorandum dated March 30, 2023.

Physical Alteration Permit from RIDOT; a copy of the submitted air quality permit to RIDEM; the ESA; a calculation of the smokestack height; an explanation on why the LID measures were not implemented for stormwater; and written confirmation from the Fire Marshal that the site access was adequate. Just prior to the hearing, Sakonnet submitted the ESA and LID analysis. At the hearing, the Planning Board questioned why these materials were submitted late, and Sakonnet's counsel responded that they had just received Ms. Sweet's memorandum. He noted that because the use is permitted by right, Sakonnet is not required to submit additional evidence to the Planning Board negating adverse impact, as the review is strictly for site and design plans. In questioning Sakonnet, Chairman Hardy stated, "some of the materials we have been requesting, not weeks, but months" and that he "didn't see anything in Ms. Sweet's memorandum that [he] hasn't seen before." May 2, 2023 Hearing Recording. Ms. Sweet also noted that the formal letter from the Fire Marshal and the LID analysis have both been requested for some time and that the ESA is a checklist item. The Planning Board thereafter voted not to accept the new materials.

During the hearing, Mr. Hingorany discussed that the ESA took additional time because they completed a more thorough analysis of the Property. He testified regarding the height of the smokestack, specifically stating that the to-scale architectural plan and engineering plans indicated that the top of the smokestack would be thirty-six inches above the peak of the roof, which is at elevation 254.25, thus the "peak of the chimney is at 257.25." May 2, 2023 Hearing Recording. Mr. Malo noted that there is a backlog at RIDOT regarding the Physical Alteration Permit, and that he addressed the LID request from Mr. Michael in an earlier memorandum, which must have gotten lost.

At this hearing, the Planning Board voted to deny the Application “based on Interim Town Planner Sweet’s memorandum dated April 21, 2023.” Planning Board Meeting Minutes, R. 1771. Specifically, Ms. Sweet based her recommendation on the ongoing deficiencies with the Application that have yet to be addressed as well as her concern for the health and safety of residents in the area. She based her health and safety concerns on her review of Tiverton Ordinances Article 1, Section 2; Article XX, development plan review, Section 6; Article X, Subdivision Regulation, Section 23-53; and the Comprehensive Plan due to topographic issues with the Property, specifically elevations and winds, and the lack of scientific evidence on the long-term effects of exposure in light of the fact that Sakonnet did not provide the Planning Board with a definitive smokestack height. Planning Board member Hilton stated that she was also concerned that all of the homes to the east of the Property were at a higher elevation than the development and thus was concerned with the exposure to those residents. Thereafter, the Planning Board filed its written decision denying the Application. R. 1264-1291 (Planning Board Decision).

In the written decision, the Planning Board determined that the following items were unresolved at the time of the decision: an approved Physical Alteration Permit from RIDOT; a copy of the submitted air quality permit to RIDEM; a Phase I ESA as required by the land development and subdivision regulation checklist;⁶ clarification of the height of the smokestack; an explanation of why LID measures were not being implemented for stormwater; and written confirmation from the Fire Marshal that his concerns have been

⁶ The November 2022 Application states that the Phase I ESA is “in progress, will be supplied at or prior to meeting.” R. 265. The Planning Board mentioned the Environmental Review Statement (ERS) which was also not submitted.

addressed. The Planning Board also reiterated the health and safety concerns mentioned in Ms. Sweet's memorandum and the fact that the Planning Board found the attempts at buffering were inadequate.

C

The Zoning Board of Appeals Decision

Sakonnet appealed the Planning Board's denial to the Zoning Board, which heard the appeal on September 6, 2023. Sakonnet argued that the Planning Board exceeded its authority by denying the Application based primarily on health and safety concerns under its analysis of the Comprehensive Plan when in fact, the use is permitted by right. At the hearing, the Zoning Board questioned Sakonnet's counsel regarding its failure to provide permit applications for both air quality and stormwater even though the Planning Board requested such documentation on multiple occasions. Counsel suggested that it did provide the stormwater application on the night of the hearing, which the Planning Board chose not to consider, and did not submit the air quality permit as it was under RIDEM's jurisdiction, not the Planning Board's jurisdiction. When questioned about the smokestack height, counsel responded that it was provided on the plan. Counsel then suggested that all issues raised regarding the health and safety of the residents is outside the scope of development plan review, which is primarily focused on design standards. TRAC's counsel and the town solicitor reiterated that just because the use is permitted by the zoning ordinance does not mean it receives an automatic "rubber stamp." Instead, they argued that it is based on the use in the zoning district, and the specific property must be considered. They added that here, based on all of the criteria and on Sakonnet's

failure to provide the Planning Board with the documentation it requested, the Planning Board rightfully denied the Application.

The Zoning Board affirmed the Planning Board's decision and denied the appeal on September 25, 2023. *See* R. 1850-1865 (Zoning Board Decision). In its decision, the Zoning Board stated that "the referenced subdivision regulations [Article X] provide the Planning Board with the necessary latitude to consider health and safety effects, the [Planning] Board did not exceed its authority," and that based on the language of Article X, Section 32-53(II)(d), "reference to the comprehensive plan within its decision is not clear error as a matter of law." It added that Sakonnet failed to provide the height of the proposed smokestack, never produced an approved air quality permit, failed to explain its LID measures, and never submitted a RIDOT physical alteration permit. The Zoning Board noted that major land development review would not be proper as the development is not considered a land development project.

D

Superior Court Arguments and Hearing

On September 29, 2023, Sakonnet filed the instant appeal of the Zoning Board's decision to this Court. On appeal, Sakonnet advances similar arguments. These points include: that the Planning Board erroneously considered health and safety concerns under the Article X land development and subdivision standards; that the Planning Board erroneously considered the requirements of the comprehensive plan; that a crematorium is a use permitted by right; and that the denial of the Application was contrary to the plain language of the zoning code. TRAC and the Zoning Board contend the comprehensive plan and the Article X land development and subdivision standards were properly

considered, and even if this Court finds Sakonnet's arguments persuasive, the Planning Board's denial of the Application based on Sakonnet's failure to provide the Planning Board with materials it requested was appropriate.

The Court held oral argument. At the hearing, the Court questioned Sakonnet's counsel concerning the Planning Board's ability to request additional materials, as well as its ability to stop accepting such materials after reasonable time has passed. Counsel responded that the Application was certified complete even though some checklist items, like the physical alteration permit, were not yet provided. After oral argument, the parties filed supplemental briefs addressing questions raised by the Court.

II

Standard of Review

When reviewing a decision of a zoning board of review sitting as a board of appeal,

“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.” Section 45-23-71(d).

The Court must “conduct its review of the proceedings before a municipality’s planning board or planning commission-not the board of appeals-in determining whether the decision of the planning board is supported by competent or substantial evidence.” *Beaven v. North Kingstown Planning Commission*, No. WC-2004-0545, 2008 WL 4376195, at *7 (R.I. Super. Sept. 17, 2008). “‘Substantial evidence . . . means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount 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) (quoting *Caswell v. George Sherman Sand & Gravel Co., Inc.*, 424 A.2d 646, 647 (R.I. 1981)).

The Superior Court “‘does not consider the credibility of witnesses, weigh the evidence, or make its own findings of fact[.]’” *Cocci v. Town of South Kingstown*, No. WC-2010-0604, 2017 WL 244852, at *4 (R.I. Super. Jan. 13, 2017) (quoting *Munroe v. Town of East Greenwich*, 733 A.2d 703, 705 (R.I. 1999)). “[A]s this Court’s review of the board of appeals’ decision is highly circumscribed,” it “may not substitute its judgment for that of the board of appeals if it ‘can conscientiously find that the board’s decision was supported by substantial evidence in the whole record.’” *Beaven*, 2008 WL 4376195, at *7 (quoting *Mill Realty Associates v. Crowe*, 841 A.2d 668, 672 (R.I. 2004)).

III

Analysis

Development plan review is detailed in Article XX of the Tiverton Code of Ordinances.⁷

“Development plan review, a process by which the town planning board and its technical review committee reviews the development, site and architectural plans of certain industrial, commercial or multi-unit residential projects is enacted pursuant to the provision of RIGL 45-24-49. It is designed to achieve the purposes set forth in article I, section 2, provide for a cooperative and collaborative design process between the developer/applicant and the town” Tiverton Ordinance Article XX, Sec. 1.

Development plan review includes both site plan review as well as design review, which are based on standards that accompany an upper threshold and lower threshold.

See id. §§ 3(a), 3(b). Pursuant to the General Provisions,

“[w]here the project involves an application for a use permitted by right as provided in article IV of this ordinance and exceeds the threshold as described under section 3(a)(2) and section 3(b)(2, 3 and 4) the technical review committee shall be advisory to the planning board. The planning board shall, in turn, be advisory to the permitting authority, i.e. the building official/zoning officer. A rejection of the application by the permitting authority shall be considered an appealable decision pursuant to article XV of this ordinance.” *Id.* § 2(b).

Section 5 provides guidelines for the contents of the Application while Section 6 sets forth the standards governing the Planning Board’s review of an application. When conducting the site plan review, which is “[a] review of project site plans that have an impact on the public realm and affect public safety, health and welfare, e.g. storm water drainage, soil erosion and sediment control, parking, traffic circulation and pedestrian

⁷ As the Application and Planning Board votes were on or before May 2, 2023, the 2023 state statutes and Tiverton ordinances are applied herein.

convenience and safety[.]" the Planning Board is also required to "apply the improvement standards contained in article X of the land development and subdivision regulations, and specifically those contained in section 23-61, control of stormwater runoff, and section 23-66, soil erosion and sediment control, where applicable" among other factors. *Id.* §§ 2(e)(1), 6(a). The design plan review includes "[a] review of the design elements of a project, e.g. architecture, signage, landscaping and lighting for appropriate scale and aesthetic suitability" among other consideration addressed in Section 6(b). *Id.* § 2(e)(2).

A

The Planning Board Process

First, the Court addresses the Planning Board's decision to refuse materials submitted by Sakonnet mere hours before the May 2, 2023 hearing, and the Zoning Board's affirmation of the Planning Board's action. The statutory scheme establishes an orderly and thorough procedure for local planning boards and commissions. First, the municipal planner, performing an administrative role, reviews the application materials, comparing them to a checklist of what is likely needed for such an application. Section 45-23-36. Obviously, there are application forms, proposed plans, schematics, other regulatory approvals, radius maps, prepared notices, and application fees. When these documents are certified complete, applicants may receive vested rights, governing how quickly the planning board must act. Section 45-23-38(f). To comply, the commission issues notices promptly and sets a hearing date.

While this may be the established criteria, it is not always strictly followed. Not all necessary documents are available or known at the time of the application. Some

planners may certify the application as complete, while others attempting to assist the applicant certify the checklist as complete based on an assurance that documents will be delivered as received. When the municipal planner certifies an application is complete, under the expectations or assurances that the applicant will ‘catch up’ and supplement, the board need not wait without limit. The planner is not the board itself and the board may determine, during the application process or as a result of the public hearing, that more is needed. Clearly, it is the applicant’s burden to submit a completed application upfront—not to place the administrative officers in awkward positions when the information is not complete and not to take offense to the local boards when they reasonably request complete information. It is the local board which is the finder of fact and initial decisionmaker—it is critical that it be equipped for its task. A planning board is authorized to request further reasonable information:

“Notwithstanding other provisions of this section, the planning board may subsequently require correction of any information found to be in error and submission of additional information specified in the regulations but not required by the administrative officer prior to certification, as is necessary to make an informed decision.” Section 45-23-36(d).

Here, the planner requested additional information, in writing, within days of the Application.

Applicants are normally willing to comply and be cooperative, of course. The board is normally willing to extend the hearings and their vote, with the consent of the applicant. Nevertheless, the board should not be required to hold multiple public hearings or defer its final decision because the applicant did not submit a complete package upfront. While the applicant is required to produce a complete application sufficient for

the board to render a decision, if it does not do so, the board certainly is not required to continue community hearings and its decisions while waiting for the applicant to catch up. While the board may be mandated to vote within a time limit, when the applicant waives the right to a prompt decision, the board need not extend its vote time and time again. Local quasi-judicial authorities are entitled to control their own procedures if they do so reasonably. Boards are quasi-judicial entities, and while the statutes may obligate them to reach decisions promptly, the boards should not be required to defer consideration forever at the whim of the applicant. The statutory scheme clearly intends a completed application upfront, a prompt hearing, and a decision within a set time limit.

To reach a prompt decision, it is logical to conclude that the applicant will continue to cooperate reasonably with the board and staff. Here, there were five separate hearings over six months. Early on, the public became concerned with any environmental effects and the appearance of the property, and the Planning Board focused on health and safety. Although owners, engineers, and architects were present, simple questions concerning smokestack heights, the septic disposal system, and emissions were left unanswered.⁸

Over the course of the five hearings, the Application became controversial and of heightened public interest. The Planning Board graciously gave extensions to Sakonnet and held additional public hearings, always with significant public participation. On

⁸ For example, the Planning Board had asked for the height of the smokestack at almost every hearing, as the Property was on a hillside. Finally at the Zoning Board appeal, Sakonnet's counsel indicated that the height was "designated on the plan." R. 1880. Other information was received just hours before the May 2, 2023 hearing (the fifth public hearing) and rejected by the Board because it was not submitted until just before the meeting. However, even then the Planning Board gave counsel an opportunity to explain the new material.

multiple dates (including at the first public hearing) the Planning Board asked for further documentation, including the RIDOT physical alteration permit, formal Fire Marshal approval concerning the proposed access, the design of the fence and buffering, RIDEM input concerning the air quality permit which was requested after two experts and multiple abutters testified regarding their concerns, and answers regarding the LID, and several of them were required to be submitted with the checklist weeks before. Each of these requests was reasonable. They were not all received. Specifically, as a result of public participation, the Planning Board became concerned about the height of the smokestack. The Planning Board found that such height was never definitively provided to the Planning Board even after multiple requests. *See* Planning Board Decision. Based on the factors articulated in Article XX, it was more than reasonable that the Planning Board, after being made aware of the possible effects the smokestack may have, to request this height, even after the Application had been deemed “complete.” Moreover, it is reasonable for the Planning Board to expect an answer regarding the height of such smokestack at the next meeting.

When the Planning Board vote for yet another two-month extension failed, and a one-month extension vote passed by a mere one vote margin, it was patently obvious that Sakonnet had a hard deadline before a vote on the Application—the hearings would not continue indefinitely. Again, the Planning Board is entitled to control its own procedures if it does so reasonably.

As this Court has indicated before, municipal planning board members are usually unpaid, dedicated to public service, and meet year-round to listen to members of the community and decide important, often complex issues. Planning Board members

commonly work at full-time jobs and then attend these meetings, often extending their work late into the evening. As it is unfair to expect a judge to read an extensive memorandum delivered moments before a hearing, it is unfair for Sakonnet to deliver a requested, critical report shortly before its scheduled vote. It is unfair to expect the Planning Board (or the public participating at the hearing) to be satisfied by a summary of the report when they have requested the whole.

Planning Boards take their mission seriously, and they should. Unlike ministerial approvals which the statutes allow to be performed by administrative officers, Planning and Zoning Boards are charged with finding facts, applying standards, and making substantive decisions. Health and safety are important considerations in formulating comprehensive plans, they are clearly important considerations in measuring compliance of a proposal to those comprehensive plans.

Accordingly, based on the substantial evidence in the record, and lack thereof, the Planning Board's decision to deny the Application based primarily on the fact that Sakonnet did not meet its burden in providing the Planning Board with the materials it requested to make its decision was not erroneous. Therefore, the Zoning Board's decision to uphold the Planning Board's denial based on these grounds was also proper.

B

Article X and the Comprehensive Plan

The parties primarily dispute whether the Planning Board abused its discretion by considering health and safety concerns within the scope of the Article XX development plan review process, specifically the comprehensive plan and the Article X standards. Regardless of the additional standards the Planning Board considered in its decision,

there is substantial evidence in the record that Sakonnet failed to provide the Planning Board with materials it requested, such as the exact height of the smokestack and applications for permits, as well as evidence that the buffering it proposed was adequate under the design standards.

Although the Court need not delve into this argument, it is important to note that the Planning Board may not act with blinders and is not required to approve an application solely because it is a use permitted under the zoning ordinances. *See Davis III v. Town of Exeter Zoning Board of Review*, No. WC-2019-0383, 2022 WL 5571855, *8 (R.I. Super. Sept. 28, 2022) (“Clearly, a permitted use in a particular district implicitly demonstrates a legislative conclusion that the use is harmonious with other uses in the district. However, a proposed development does not automatically comport with a municipality’s comprehensive plan solely because the development consists of an allowed use.”) (Internal citation omitted.) The Planning Board must consider health and safety and cannot ignore the overarching purpose of the zoning ordinances nor the Comprehensive Plan when determining a development plan review application.

Article X explicitly references Article XX, Section 6(a), which requires the Planning Board to view the health and safety components of the application.⁹ Section 6 of Article XX of the development plan review ordinances in effect in Tiverton at the time stated:

“a. For site plan review done under the provisions of this article, the planning board shall apply the improvement

⁹ To this point, the Court did inquire of the parties whether the design standards under Article XX were “specific and objective guidelines.” Because the Court finds that the Application was properly denied on grounds unrelated to the specifics of the guidelines themselves, the Court need not address this issue.

standards contained in article X ... specifically ... control of stormwater runoff . . .

“In addition, the board shall apply the following standards:

“*General site standards:* ...

“*Circulation, parking and traffic control standards:*

“(1) The layout and design of all means of vehicular and pedestrian circulation, ...

“*Landscaping standards;*

“(1) Buffering in the form of walls, fences, shrubs, trees or other appropriate screening . . .”

C

Equal Access to Justice Act

Finally, Sakonnet is not the prevailing party in this case and is therefore not entitled to attorney’s fees and litigation costs under the Equal Access to Justice Act. *See* G.L. 1956 § 42-92-3(a) (“Whenever the agency conducts an adjudicatory proceeding subject to this chapter, the adjudicative officer shall award to a prevailing party reasonable litigation expenses incurred by the party in connection with that proceeding.”).

IV

Conclusion

Accordingly, Sakonnet’s appeal is denied, and the decision of the Zoning Board (affirming the decision of the Planning Board) is affirmed.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Sakonnet Partners, LLC v. Tiverton Zoning Board of Review, et al.

CASE NO: NC-2023-0337

COURT: Newport County Superior Court

DATE DECISION FILED: July 31, 2024

JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:

For Plaintiff: Jeremiah C. Lynch, III, Esq.

For Defendant: Todd J. Romano, Esq.
Michael J. Marcello, Esq.

For Intervenor: Stephen J. Sypole, Esq.