

STATE OF RHODE ISLAND

NEWPORT, SC.

SUPERIOR COURT

(FILED: May 22, 2025)

TIMOTHY WEST and MAUREEN WEST :
Appellants, :

v. :

SAMUEL GOLDBLATT, BART GRIMES, :
RUSSELL JOHNSON, DAVID RILEY, :
WICK RUDD, SUSAN T. PERKINS, and :
NICOLE SHEVORY, in their capacities as :
Members of the CITY OF NEWPORT :
ZONING BOARD OF REVIEW :
Appellees. :

C.A. No. NC-2024-0026

DECISION

LANPHEAR, J. Before this Court is Timothy West and Maureen West’s appeal of the City of Newport Zoning Board of Review’s (the Board) decision denying their appeal of the Newport Historic District Historic Commission’s (the Historic Commission) denial of their Application for Certificate of Appropriateness (the Application). Jurisdiction is pursuant to G.L. 1956 §§ 45-24-69 and 45-24.1-7.1. For the reasons set forth herein, the appeal is denied.

I

Facts and Travel

The Wests bring this action challenging the Board’s decision to deny their appeal of their Application to the Historic Commission. The Wests own property located at 45 Everett Street in Newport, Rhode Island.

The Wests filed an Application with the Historic Commission requesting permission to “[r]emove the dormer[]” and “[r]eplace the existing slate [roof] with Owens Corning Architectural Shingles” on their property. (Application at 4.) On January 21, 2020, the

Application came before the Historic Commission for hearing. At the hearing, Mr. West testified that “the roof is in trouble” and that to “put it back in the ideal state, the slate would have to come off . . .” (Historic Commission Hr’g Tr. 12:3-12, Jan. 21, 2020.) Mr. West also testified that he “want[s] to take these dormers out” to “take the weight off the roof . . .” *Id.* at 13:9-22. As for the slate, Historic Commission members agreed they would need documentation from an expert “[such as] an engineer . . . [and] a slate roof specialist[.]” *Id.* at 17:9-10; 19:1-3. As for the dormers, the Vice Chair stated, and the other Historic Commission members agreed, “we don’t have any information as to when those dormers were added . . . [and] I don’t know that removing the dormers is really going to solve [the Wests’] problem.” *Id.* at 19:10-23. The Vice Chair further explained that it could not support “removing a slate roof and replacing it with asphalt on a Dudley Newton contributing building in the Kay-Katherine neighborhood[.]” *Id.* at 19:24-20:2. The Historic Commission Chairperson, Karl Bjork, stated “we wouldn’t be able to make a good decision tonight without some additional information[.]” and asked the Wests if they would be “willing to continue the Application to a further month[.]” *Id.* at 25:22-24; 26:1-2.

“THE CHAIRPERSON: So if you are agreeable, what I would do is make a motion to continue the Application [to the February meeting].

“[MR. WEST]: Okay. I have had one slate person come in and give me a write-up. So you want another one?” *Id.* at 26:18-23.

Before the February meeting, the Wests asked that the Application be continued once again. The next meeting was scheduled for March 17, 2020. Before that meeting, the City of Newport cancelled public meetings because of the COVID-19 pandemic. On March 22, 2020, Governor Gina Raimondo issued Executive Order #20-09 in response to the COVID-19 pandemic, which restricted public and private gatherings. *See* Executive Order #20-09. Accordingly, the Historic Commission postponed its meeting until May 19, 2020. On May 19,

2020, the Historic Commission held a virtual meeting in which its members decided to “continue all the applications . . . to the next hearing, whether that be in-person or virtual.” (Historic Commission Hr’g Tr. 8:13-16, May 19, 2020.) The Historic Commission continued their June 18, 2020 hearing to July 21, 2020. On July 21, 2020 the Historic Commission held a virtual meeting regarding the Application. There, Mr. West testified “[s]ince the January meeting, in preparation for this meeting, [he] . . . [e]ngaged a structural engineer, and obtained a roof condition report, as requested by the [Historic Commission].” (Historic Commission Hr’g Tr. 6:9-7:1, July 21, 2020.) Mr. West suggested that “the failure of the Historic Commission to act within 45 days from the date of the Application . . . , unless [an] extension is agreed upon mutually by the Applicant and the Historic Commission, . . . constitute[s] approval.” *Id.* at 7:14-18. In response, the Assistant City Solicitor suggested the Historic Commission “give[] the Application the same scrutiny it otherwise would, and make a decision on the merits, and Mr. West can preserve his right to object or take action based on this portion of the Ordinance.” *Id.* at 8:22-9:1. The Historic Commission then voted unanimously to deny the Application, stating that “th[e] Application does not qualify for [the requested] changes.” *Id.* at 38:11-39:7; 29:7-9.

The Wests, represented by counsel, appealed the Historic Commission’s decision to the Board, which heard the matter on February 13, 2023. *See* Board Decision at 2. On January 5, 2024, the Board issued its decision denying the Wests’ appeal of their Application to the Historic Commission, concluding “the [Historic Commission] had not committed an error or a prejudicial procedural error and that [it] had acted on the application within 45 days but that the requirement to “act” did not require that [it] grant or deny the application within 45 days.” *Id.* at 3. The Board also found “there was no evidence that the [Historic Commission] had been dilatory or acted other than in the public interests and that the Appellants had accepted the benefits of multiple

continuances and further delays were as a result of the COVID-19 pandemic.” *Id.* In making its decision, the Board declared it “considered the record, the Appellants’ brief and the Assistant City Solicitor’s Memo to the Board regarding the 45 day issue[.]” *Id.*

On January 25, 2024, the Wests filed the instant appeal pursuant to § 45-24-69, asking this Court to reverse the Board’s decision and grant reasonable litigation expenses, including attorneys’ fees. *See* Compl. ¶ 26. Now before the Court is their appeal.

II

Standard of Review

Section 45-24-69 governs this Court’s review of a decision of a zoning board of review, sitting as a board of appeals, to review the decision of the Historic Commission. Subsection (d) provides

“[t]he court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review 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) [i]n violation of constitutional, statutory, or ordinance provisions;

“(2) [i]n excess of the authority granted to the zoning board of review by statute or ordinance;

“(3) [m]ade upon unlawful procedure;

“(4) [a]ffected by other error of law;

“(5) [c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or

“(6) [a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” Section 45-24-69(d).

This Court “reviews the decisions of a . . . board of review under the ‘traditional judicial review’ standard applicable to administrative agency actions.” *Restivo v. Lynch*, 707 A.2d 663, 665 (R.I.

1998) (internal quotation omitted). The Court “gives deference to the findings of a local zoning board of review” because it ““is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.”” *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (quoting *Monforte v. Zoning Board of Review of City of East Providence*, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962)).

Furthermore,

“[a]ny person, or persons jointly or severally, aggrieved by a decision of the historic district Historic Commission has the right of appeal, concerning the decision, to the zoning board, and a further right of appeal from the zoning board to the superior court, in the same manner provided in § 45-24-69 and from the superior court to the supreme court by writ of certiorari.” Section 45-24.1-7.1.

“When hearing appeals from Historic Commission decisions, the zoning board of review shall not substitute its own judgment for that of the Historic Commission, but must consider the issue upon the findings and record of the Historic Commission.” Section 45-24.1-9. This Court should provide the same deference to the Historic Commission on findings of fact and credibility of witnesses.

III

Analysis

Section 45-24.1-7 states in pertinent part that

“[t]he Historic Commission shall file with the building official or other duly delegated authority its certificate of appropriateness or rejection of all plans submitted to it for review . . . The failure of the Historic Commission to act within forty-five (45) days from the date of an application filed with it, unless an extension is agreed upon mutually by the applicant and the Historic Commission, is deemed to constitute approval. In the event, however, that the historic district Historic Commission makes a finding of fact that

the circumstances of a particular application require further time for additional study and information than can be obtained within the period of forty-five (45) days, then the Historic Commission has a period of up to ninety (90) days within which to act upon the application.” Section 45-24.1-7.

In challenging the Board’s decision, the Wests argue that the Board erred in denying their appeal because the Historic Commission failed to act on the Application within forty-five days, “unless an extension [wa]s agreed upon mutually by the applicant and the Historic Commission,” as required by § 45-24.1-7. (Wests’ Mem. in Supp. of Appeal at 9.) In particular, the Wests allege that, by cancelling its March and April meetings due to the COVID-19 pandemic, and by “unilaterally” continuing the Application in May and June without receiving the Wests’ consent, the Historic Commission violated § 45-24.1-7. *Id.*

The travel reveals a different picture, the Wests’ Application was filed in December 2019 and first came before the Historic Commission on January 21, 2020. In January, even though it would go beyond the forty-five-day limit, Mr. West agreed to continue the hearing to the February 2020 meeting to supply more information. (Historic Commission Hr’g Tr. 25:22-24; 26:1-2; 26:18-21, Jan. 21, 2020.) Before the next meeting in February 2020, the Wests requested to continue the hearing again to the following month, March 2020. Even though the Historic Commission’s decision occurred beyond forty-five days since the date that the Application was filed, the Wests mutually accepted the benefit of the continuances, which waived the forty-five-day deadline required by § 45-24.1-7.

The Wests posit one ground for appeal – that because the Historic Commission did not vote timely, the Application must be deemed granted. The Historic Commission met and heard the Application in January 2020 after a request by the Wests. While the parties intended to proceed with the hearing in February 2020, the Wests contacted the Historic Commission

beforehand asking for a further continuance.

The Wests have a statutory right to have their application heard and considered timely. Concerned that the Application was incomplete, the Historic Commission encouraged a continuance and the Wests consented. There was no set time limit or agreed postponement date. The Historic Commission's attempts to schedule for March 2020 were thwarted by the COVID-19 pandemic.

The statutory right, once waived, is not applicable and cannot be revived by the waiving party. "[A] right once waived is gone forever and cannot be reclaimed." *MacKnight & Hoffman, Inc. v. Programs for Achievement in Reading, Inc.*, 96 R.I. 345, 346, 191 A.2d 354, 355 (1963). The time limit is not a statutory spigot which is turned on and off only by the applicant to the inconvenience of the local board, the public attempting to participate at the public hearing, and the abutters who may be seeking to schedule their own witnesses. The right to a decision by the Historic Commission in forty-five days was waived by the Wests.¹

Secondly, the record reveals that March 2020 – when the Wests suggest the Historic Commission should have held its hearing – was a most challenging time for public agencies. Because of the COVID-19 pandemic, the March and April 2020 Historic Commission meetings were cancelled. The Governor of Rhode Island declared a State of Emergency on March 9, 2020 preventing public meetings. R.I. Governor Executive Orders 20-02, 20-09, and 20-18. At that time, G.L. 1956 § 42-46-3 required that local boards meet publicly, yet her Excellency the Governor ordered them not to. Eventually, public agencies were allowed to meet by video conferencing and learned how to create and operate the video conferencing.

¹ "[A] waiver is a waiver for all time." *Orr v. Superior Court*, 52 R.I. 335, 161 A. 139, 140 (1932) (internal citation omitted). *See also Walton v. Eaton Corp.*, 563 F.2d 66, 71 (3rd Cir. 1977).

The Court does not find that the statutory right to a hearing and decision within forty-five days of the Application was infringed here. Accordingly, the actions of the Historic Commission are not deemed to constitute approval.²

IV

Conclusion

For the foregoing reasons, the Wests' appeal is denied. The Board's decision affirming the Historic Commission's denial of the Application is affirmed.

² Because this Court finds in the Board's favor, it need not consider its equitable estoppel argument.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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DATE DECISION FILED: **May 22, 2025**

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

ATTORNEYS:

For Plaintiff: **Michael Monti, Esq.**
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