

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: September 23, 2024)

RICHARD SCHIEFERDECKER, :
JUDITH AMARAL, :
LORIANNE MEDEIROS, :
REV. JOSEPH A. ESCOBAR, :
CECILIA CABRAL, :
OM DEVKOTA, and :
NANCI SARGANIS :
Appellants, :

v. :

C.A. No. PC-2024-01374

CITY OF PROVIDENCE ZONING :
BOARD OF REVIEW, sitting as :
BOARD OF APPEAL, Marc Greenfield, :
Anthia Maniotes, Bianca Rodriguez, :
Ryan Holt, Ryan Brendan, in their :
capacities as members of the :
Zoning Board of Appeals, and :
CITY OF PROVIDENCE CITY :
PLAN COMMISSION, :
Michael Gazdacko, Nicole Verdi, :
Noel Sanchez, Charlotte Lipschitz, :
In their capacity as members of the :
City Plan Commission, and :
FOX POINT CAPITAL, LLC, and :
JACK LINDENFELD :
Appellees. :

DECISION

LANPHEAR, J. Before this Court is the appeal of Richard Schieferdecker, Judith Amaral, Lorianne Medeiros, Rev. Joseph A. Escobar, Cecilia Cabral, Om Devkota, and Nanci Sarganis’s appeal from a decision of the City of Providence Zoning Board of Review, sitting as the Board of Appeals (Zoning Board). The City of Providence City Plan Commission approved an application

by Fox Point Capital, LLC for Master Plan approval, and the Zoning Board upheld the decision of the Commission. Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

I

Facts and Travel

This appeal concerns two lots owned by Fox Point: 269 Wickenden Street, Providence, Rhode Island (Tax Assessor's Plat 18 Lots 190 and 192) (the Property). The Property is located in a C-2 District where mixed-use development consisting of residential and commercial use is permitted by right.

A

Providence City Planning Commission Decision

On February 21, 2023, Fox Point submitted an application for master plan approval to the Commission to demolish an existing two-story structure on the Property and construct a new mixed-use building consisting of five stories and a cellar. Following a public hearing on August 15, 2023, the Commission approved Fox Point's master plan in a written decision but imposed several conditions that must be met. The Commission's approval of this master plan was not appealed.

On September 18, 2023, Fox Point submitted a second application to the Commission for master plan approval on the same property to again demolish the existing two-story structure on the Property and construct a new mixed-use building consisting of five stories and a cellar. However, the second application differed in relation to Fox Point's requested design waivers and dimensional adjustments. Notably, Fox Point sought a height increase from sixty-five feet to sixty-six feet five inches, an increase from sixty-two to seventy-five residential units, and a decrease in internal parking spaces from twenty to twelve. Following a public hearing on October 17, 2023,

the Commission issued a written decision on November 9, 2023 approving in part Fox Point's master plan, but imposing several conditions that must be met. (R. CR694-98 (Nov. 9, 2023 Commission Decision).)

B

Providence Zoning Board of Review Acting as the Board of Appeals

On December 1, 2023, Jack Lindenfeld filed a notice of appeal to the Zoning Board contesting the Commission's decision. The basis of Mr. Lindenfeld's appeal is to preserve Wickenden Street as a "successful, multi-block, historic neighborhood of small businesses, offices, and residences[.]" (Hr'g Tr. 7:6-8, Jan. 24, 2024.) Following a public hearing, the Zoning Board issued its written decision on February 23, 2024, upholding the Commission's determination.

Of relevance here, the Zoning Board noted that the weight of the evidence supported the Commission's finding that the master plan was consistent with Providence's Comprehensive Plan because it fostered pedestrian-oriented needs like retail and housing in buildings oriented toward the street, encouraged the creation of new housing, and complemented traditional character. The Commission determined that the denial of the rear yard setback required redesign for preliminary plan approval. The Zoning Board agreed with the Commission that Mr. Lindenfeld's reliance on the College Hill, Wayland, and Fox Point Neighborhood Plan was misplaced because it was not incorporated into the Comprehensive Plan and need not be consistent with it.

The Zoning Board found that the Commission did not err in granting a dimensional adjustment for building height to add a fifth story and a reduction in parking spaces because the Commission had discretion under Providence Zoning Ordinance §1904(E).¹ It agreed that Fox

¹ Section 1904(E)(1) provides: "1. The City Plan Commission has the authority to make adjustments to certain dimensional and design standards through land development project review when one or more of the following occur:

Point should provide clarity that the cellar level conforms to the Ordinance’s definition at the preliminary plan stage. The Zoning Board found that it had the authority to grant design waivers, and the Commission did not have to require Fox Point to submit a fiscal impact study. Finally, the Zoning Board found that the Commission’s decision allowing Fox Point to subdivide the Property into two lots—one of 10,000 square feet and the other of 108 square feet—without requiring parking is permissible, provided the smaller lot is designated as open space under § 1410(B)(7).

On March 12, 2024, Appellants filed their Complaint in the Superior Court appealing the Zoning Board’s decision.

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;

“a. Where open space is permanently set aside for public or common use. b. Where the physical characteristics, location, or size of the site require an adjustment. c. Where the location, size, and type of use require an adjustment. d. Where the required build-to percentage requires an adjustment. e. Where design standards require an adjustment. f. Where housing for low- and moderate-income families is provided. g. Where other amenities not required are provided, as stipulated in this Ordinance. h. Where structured parking is provided. i. Where vertical mixed-use development is provided, of which at least 50% is devoted to residential use.”

“(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)² 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

² 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, § 45-23-70 is applicable.

board’s decision rests upon competent evidence or is affected by an error of law.” *Id.* (internal citations omitted).

III

Analysis

A

Providence Comprehensive Plan

The Rhode Island Zoning Enabling Act “requires that zoning ordinances be developed and maintained in accordance with a comprehensive plan prepared pursuant to the Rhode Island Comprehensive Planning and Land Use Regulation Act (CPLURA).” *Peter Scotti & Associates, Inc. v. Yurdin*, 276 A.3d 915, 925 (R.I. 2022) (quoting *P.J.C. Realty, Inc. v. Barry*, 811 A.2d 1202, 1204 (R.I. 2002)); *see also* G.L. 1956 § 45-24-30(a). A comprehensive plan “is a statement (in text, maps, illustrations, or other media of communication) that is designed to provide a basis for rational decision making regarding the long term physical development of the municipality.” *Yurdin*, 276 A.3d at 925 (quoting *P.J.C. Realty, Inc.*, 811 A.2d at 1204) (internal quotation omitted). “A comprehensive plan is not an ‘innocuous general-policy statement,’ but rather such a plan ‘establishes a binding framework or blueprint that dictates town and city promulgation of conforming zoning and planning ordinances.’” *Yurdin*, 276 A.3d at 925 (quoting *Town of East Greenwich v. Narragansett Electric Co.*, 651 A.2d 725, 727 (R.I. 1994)).

1

Height Dimension Adjustment

For a C-2 District, the Providence Code of Ordinances Article 5, § 502 - Table 5-1 sets the maximum building height at “50’, not to exceed 4 stories” and a minimum rear yard setback of twenty feet. Providence Code Article 5, § 503(A)(8) directly references Wickenden Street,

indicating “residential and parking uses are prohibited on the ground floor of the building within 20 feet [of the street].” Article 5, § 503(A)(3)(c) provides, “[f]or windows on the ground floor of a building, the bottom of the window frame shall be located no higher than two feet above the adjacent grade.”

The Zoning Board upheld the Commission’s decision to approve Fox Point’s dimensional adjustments, allowing sixty-six feet of ground-floor residential use within twenty feet of Wickenden Street, permitting ground-floor windowsills to exceed two feet above the adjacent grade, authorizing a total height increase to sixty-six feet five inches along with an additional story for the proposed structure, and rejecting the proposed rear yard setback of ten feet.

Appellants claim the relief from height and for an additional story was granted in error under the Providence Code, insisting the Commission incorrectly assessed the master plans as containing a cellar rather than a basement. The definitions of a “cellar” and “basement” can be found in Article 2, § 201 of the Providence Code, which provides:

“Cellar: That portion of a building included between the upper surface of its floor and the upper surface of the floor next above, having less than one-half its height above the average elevation of the finished lot grade adjoining the building.”

“Basement: That portion of a building included between the upper surface of its floor and the upper surface of the floor next above, having one-half or more of its height above the average elevation of the finished lot grade adjoining the building.”

Additionally, a “story” is defined as:

“A story is that portion of a building between the upper surface of any floor and the upper surface of the floor next above, including any portion of a building used for human occupancy between the topmost floor and the roof. *A basement is counted as a story, but a cellar is not.*” (The Providence Code, Article 2, § 202(B)(3) (emphasis added).)

Appellants suggest the exclusion of the cellar’s height calculation was flawed because it relied on incorrect measurements. Appellants claim the lowest level of the proposed structure is a basement and thus another story, making it in violation of the Ordinance. Further, Appellants contend that the Zoning Board did not have adequate evidence to approve the master plan, as indicated by the Commission’s request for additional clarification on whether the lowest level should be classified as a basement or a cellar.

The varying heights result from the building’s location on a slope on Wickenden Street. *See* R. CR001-11 (Building Proposal Design). The current provisions in the Providence Code and the Comprehensive Plan do not explicitly address how these variations in height affect whether portions of the structure are classified as a cellar or a basement. The definition’s use of the phrase “that portion” suggests that certain parts of the building could be classified differently—some as a cellar and others as a basement, depending where it is situated in relation to the adjacent grade.

The approved master plan is still in its conceptual stage. The Commission was correct in expressing its heightened concern for the height issue. It conditioned its approval upon Fox Point providing further clarification on this issue at the preliminary plan stage, which will likely include a height survey and possible design adjustments during the preliminary planning phase.

2

Neighborhood CWF Plan and the Comprehensive Plan

Appellants allege the Zoning Board erred in finding the Commission was not required to follow the CWF Neighborhood Plan³ because it was not part of the Comprehensive Plan. The

³ The CWF plan or the neighborhood plan is the College Hill, Wayland, and Fox Point Neighborhood Plan, October 2001.

Zoning Board’s decision contradicts the Comprehensive Plan. Appellants reference § 11, Land Use, Objectives LU1 and LU2 of the Comprehensive Plan, which states:

“LU1(A) Use the neighborhood plans to review the following: 1. Development patterns and attributes that contribute to the character of Providence’s stable neighborhoods . . .

“LU2(A) Use the neighborhood plans to review the following: 1. Design vision for Growth Districts, Growth Corridors and Transitional Areas identified on Map 11.1 ‘Areas of Stability and Change’ that identifies the preferred pattern and character of development including mass, scale, building height, design, use, and density, and considers topography, streets, sidewalks and open spaces.” (*See Providence Tomorrow Comprehensive Plan 108, 110.*)

Appellants argue that the term “use” implies a clear directive to align master plans with the CWF and assert that the Zoning Board’s decision to not enforce this alignment was a clear error.

In *Yurdin*, our Supreme Court examined the legality and appropriateness of a proposed amendment to the Providence Code that would permit a new high-rise residential building in a mixed-use district, assessing whether this change was consistent with the Comprehensive Plan and zoning regulations without regard to neighborhood plans. The Court acknowledged the language set forth in Objectives LU1 and LU2 and that the Comprehensive Plan “does on numerous occasions discuss the importance of neighborhood plans.” *Yurdin*, 276 A.3d at 930. Nevertheless, the Supreme Court concluded:

“While the Comprehensive Plan certainly references neighborhood plans and their role in future development in Providence, [the] plaintiffs have not pointed us to any language which specifically incorporates the Knowledge District Plan into the Comprehensive Plan. None of the just-discussed language remotely evidences an express intention to incorporate the Knowledge District Plan into the Comprehensive Plan . . . What is more, the Comprehensive Plan itself states, in the Foreword, that in updating the Comprehensive Plan, the Department of Planning and Development already ‘incorporate[d] the important ideas and concepts which arose from the neighborhood planning process’” *Id.* at 930-31 (internal quotation omitted).

Here, similarly, in relation to the CWF plan, the Zoning Board found:

“Appellant’s reliance on the CWF Plan is misplaced because it is not part of the Comprehensive Plan. Although a series of neighborhood plans were created to inform the 2014 Comprehensive Plan, they were not fully incorporated or officially adopted by the City Council. . .” (See Compl. Ex. 1 Feb. 23, 2024 Zoning Board Decision 8.)

Applying the rationale in *Yurdin*, the Zoning Board’s determination that the Commission’s findings did not need to be consistent with the CWF neighborhood plan was not clearly erroneous.

3

Consistent with Providence Comprehensive Plan

Because of the concerns raised by members of the Zoning Board at the October 17, 2023 public hearing, Appellants argue the Zoning Board’s decision did not comply with the Comprehensive Plan and that its approval was erroneous in view of the record. At the public hearing, members of the Zoning Board voiced concerns regarding the project. *See* Hr’g Tr., 45:1-5, Jan. 24, 2024 (Chairman Greenfield stated: “I would have liked to see more evidence. . . some discussion on whether or not the [Commission’s] approval was consistent with the comprehensive plan.”) .⁴ However, the decision of the Zoning Board provided in relevant part:

“The Board finds that the weight of the evidence supports the CPC’s finding that the Project is consistent with the Comprehensive Plan and/or satisfactorily addressed the issues where there may be inconsistencies, *see* R.I. Gen. Laws § 45-23-60(a), because:

“a. The CPC found that the Project is located in an area designated by the Comprehensive Plan’s future land use map for neighborhood mixed use development. The Comprehensive Plan describes these areas as intended to foster pedestrian-oriented needs like retail and housing in buildings oriented toward the street. The Project

⁴ Regardless of what the individual Zoning Board members may prefer, each of them (and this Court) are considering the appeal based on the Planning Commission’s findings of fact and weighing of evidence.

conforms to this land use designation. *See Comprehensive Plan* (adopted November 24, 2014), Section 11.2, Maps 11.2 and 11.3, Tables 11.1 and 11.2, at 110-21.” (*See Compl.*, Ex 1 Feb. 23, 2024 Zoning Board Decision 7.)

The Zoning Board did not merely insert conclusory, boilerplate language unsupported by any factual findings. Rather, the Zoning Board considered the prerequisite factual determinations by the Commission and applied the proper legal principles as stated above. *Irish Partnership v. Rommel*, 518 A.2d 356, 359 (R.I. 1986). The Zoning Board’s decision affirming the Commission’s approval of the master plan is consistent with the Comprehensive Plan and not arbitrary and capricious.

B

Parking

Fox Point’s approved master plan mandates the subdivision of Lot 192, which spans 10,108 square feet, into two parcels: one of 10,000 square feet for mixed-use development and the other of 108 square feet designated as open space. (*See Compl.*, Ex 1 Feb. 23, 2024 Zoning Board Decision 11.) According to the Providence Code, Chapter 27, Article 14, Table 14-1, which addresses multi-family dwellings, Fox Point would need to provide one parking space for each dwelling unit, or seventy-five parking spaces for the seventy-five residential units. Creating a subdivision dramatically reduces the number of parking spaces provided. The Zoning Board deemed the subdivision permissible, referencing Providence Code § 1410(B)(7) exempting lots of 10,000 square feet or less from parking requirements in the R-4, C-1, and C-2 districts. Appellants contend that the Zoning Board’s approval for the subdivision was arbitrary and capricious, alleging it was a maneuver to evade parking requirements and in violation of § 45-23-60(a)(2).

Neither § 45-23-60(a)(4) nor the Providence Code imposes dimensional restrictions on subdivisions in a C-2 district. Moreover, a subdivision application is not required at the master

plan stage and is not presently before the Court. Concerns regarding the use of the 108 square foot lot for a generator, and not open space, were addressed in the January 24, 2024 hearing before the Zoning Board. (*See* Compl., Ex. 1 Feb. 23, 2024 Zoning Board Decision 11.)

Discussion of the potential subdivision was appropriate but far from final. Given the project's scale and its location on Wickenden Street, the Zoning Board's decision to accept a potential subdivision under Providence Code § 1410(B)(7), while legally permissible, is troubling. Despite the lack of specific dimensional restrictions or subdivision application requirements at the master plan stage, Fox Point's apparent maneuver to bypass parking standards seems to undermine the intent of the zoning regulations. Subdividing the lot dedicated to this project apparently minimizes parking requirements and appears to be unjust. As the matter is before the Court now only on master plan review, and not for consideration of a subdivision application, the Court need not reach this question further and defers those issues for further consideration by the Providence authorities.

IV

Conclusion

The appeal is **DENIED**, and the Zoning Board's decision affirming the Planning Board's approval of the master plan is affirmed.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Schieferdecker v. City of Providence Zoning Board of Review, et al.

CASE NO: PC-2024-01374

COURT: Providence County Superior Court

DATE DECISION FILED: September 23, 2024

JUSTICE/MAGISTRATE: Lanphear, J.

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