STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(Filed: August 7, 2013)

STEVEN PAPA and ALDO LEONE	**:**	
	:	
v.	**:**	
	:	**C.A. No. WC-2011-0619**
TOWN OF NEW SHOREHAM, NEW	**:**	
SHOREHAM HISTORIC DISTRICT	**:**	
COMMISSION, NEW SHOREHAM	**:**	
ZONING BOARD OF REVIEW	**:**	

DECISION

K. RODGERS, J. This matter is presently before this Court on an appeal by Appellants Steven Papa and Aldo Leone (Appellants) from a decision of the Town of New Shoreham's Zoning Board of Review (the Zoning Board). That decision—dated September 7, 2011 and recorded on September 8, 2011—denied Appellants' appeal of a decision issued by the New Shoreham Historic District Commission (the HDC) on July 15, 2011. On appeal to the Zoning Board and to this Court, Appellants argue that the HDC's failure to act on their Certificate of Appropriateness application within forty-five days from the time of filing dictates that their application is deemed to be approved.

This Court has jurisdiction over this matter pursuant to G.L. 1956 §§ 45-24-69 and 45-24.1-7.1. For the reasons that follow, this Court affirms the decision of the Zoning Board.

I

Facts and Travel

Appellants own Aldo's Restaurant in the Town of New Shoreham (the Town), located at Lot 89 of Assessor's Plat 6 in the Town's historic district. Appellants sought to build a sun

shade system consisting of two pergolas and a fixed awning over the restaurant's outdoor seating area, as well as to enclose an existing porch with doors, windows, and/or replaceable screens to be used in nicer weather. Appellants' architect, Herman Hassinger (Hassinger), executed and submitted a Certificate of Appropriateness[1] application dated August 19, 2010. A Certificate of Appropriateness is required from the HDC before a property owner may commence any construction, alteration, repair, removal, or demolition affecting the exterior of a structure within the historic district. See generally § 45-24.1-4 (identifying the materials that must be submitted to the HDC as well as the considerations weighed by the HDC in reviewing plans, and requiring that all decisions of the HDC be in writing with an explanation of the result reached).

The next scheduled HDC meeting after Appellants' application was filed was held on September 20, 2010. At that meeting, the HDC referred the application to the Planning Board for a determination as to whether Planning Board approval would also be needed.[2] There is a handwritten statement at the bottom[3] of the Certificate of Appropriateness application itself, which states "Deferred until Advisory Planning." On October 25, 2010, Hassinger filed a Request for Classification Determination with the Planning Board, indicating therein that "[t]he

[1] Certificate of Appropriateness is defined in § 45-24.1-1.1(3) as follows:

> "Certificate of appropriateness" means a certificate issued by a historic district commission established under this chapter indicating approval of plans for alteration, construction, repair, removal, or demolition of a structure or appurtenances of a structure within a historic district. Appropriate for the purposes of passing upon an application for a certificate of appropriateness means not incongruous with those aspects of the structure, appurtenances, or the district which the commission has determined to be historically or architecturally significant.

[2] The minutes of the September 20, 2010 HDC meeting were not submitted to the Zoning Board in its review of the HDC decision, and likewise were not included by the Zoning Board in its certified record to this Court.

[3] This handwritten statement appears on the application below not only the block of signatures and dates but also a line for "Action taken by Board" and that line's corresponding dates.

HDC Chairman requests a determination if these proposals are a minor or major change to the Special Use Permit of this property?"

In either November or December of 2010, the Planning Board returned the application to the HDC.[4] The HDC thereafter considered the application at its meeting on December 20, 2010. At that meeting, the HDC voted four-to-two to deny the request to construct the sun shade system, but unanimously approved the request to enclose the existing porch. On January 26, 2011, the HDC filed its written decision consistent with its December 20, 2010 vote and attached thereto the minutes of the December 20, 2010 meeting.

Hassinger, on behalf of Appellants, filed a timely appeal of this decision with the Zoning Board on February 14, 2011, pursuant to § 45-24.1-7.1. The basis of that appeal was that the HDC did not provide any factual basis or guideline citations which supported its decision to deny the Certificate of Appropriateness for the sun shade system. In that appeal, Appellants did not contend that the HDC failed to act within forty-five days, as required by § 45-24.1-7, or that such a failure to act should be deemed to constitute approval of their entire application, including the sun shade system.

On April 6, 2011, the Zoning Board voted to remand the case to the HDC for a written decision to be issued in accordance with § 45-24.1-4(e). The Zoning Board's vote was memorialized in a written decision dated April 25, 2011 and recorded on April 26, 2011. That decision provided that the Zoning Board would retain jurisdiction over the appeal so that a new appeal need not be filed. See Zoning Bd. Decision to Remand at 1. Rather, the record

[4] The exact date is unclear because no Planning Board proceedings were made part of the record before either the HDC or the Zoning Board and, therefore, no such records have been certified to this Court on appeal from the Zoning Board.

transmitted from the HDC to the Zoning Board would be supplemented by the HDC with its decision and any new information which may be added to the record. See id.

On remand from the Zoning Board, the HDC again voted at its June 28, 2011 meeting to deny a Certificate of Appropriateness with regard to the sun shade system and to approve the Certificate of Appropriateness with regard to the porch enclosure. The HDC's written decision is dated July 15, 2011. Appellants then filed another appeal with the Zoning Board on July 20, 2011, although such an appeal was unnecessary because the Zoning Board's original decision noted that it would retain jurisdiction. In this second appeal, Appellants raised the forty-five day requirement found in § 45-24.1-7 for the first time. Specifically, Appellants made two arguments under this statute: (1) that the HDC failed to act on their application within forty-five days of the filing of their application on August 19, 2010; and (2) that the HDC similarly failed to act within forty-five days of the Zoning Board's decision remanding the matter to the HDC. According to Appellants, either of these violations should have been deemed to constitute approval of their application by default, pursuant to § 45-24.1-7.

A hearing was held before the Zoning Board on July 27, 2011 on this second appeal. At its August 31, 2011 meeting, the Zoning Board voted to deny the appeal and uphold the decision of the HDC. This vote was memorialized in a written decision, including sixteen enumerated findings of fact, that was dated September 7, 2011 and recorded on September 8, 2011. In that decision, the Zoning Board noted that Appellants provided no documentation concerning relevant dates and the Zoning Board was left to piece together the pertinent information. See Zoning Bd. Decision at 2. The Zoning Board's findings of fact also included a discussion regarding the lack of objection on the part of Hassinger to the HDC's actions in transferring the application to the Planning Board, as well as Hassinger's subsequent filing which sought

Planning Board review. Id. Appellants now seek reversal of that Zoning Board decision by this Court.[5]

II

Standard of Review

When considering an appeal to this Court from a Zoning Board decision sitting in review of the HDC, this Court's review is to be conducted in the same manner as provided for in § 45-24-69(a). See § 45-24.1-7.1. That section provides as follows:

> The 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 reverse or modify a decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
> (1) In violation of constitutional, statutory, or ordinance provisions;
> (2) In excess of the authority granted to the zoning board of review 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.

§ 45-24-69(d).

This Court "must examine the entire record to determine whether 'substantial' evidence exists to support the [zoning] board's findings." Salve Regina Coll. v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). The term "substantial evidence" is

[5] The Zoning Board's decision dated September 7, 2011, from which the instant appeal was taken, did not appear in the certified copy of the record that was filed with this Court on December 19, 2011. Counsel for both Appellants and the Town have since executed a stipulation making that decision a part of the certified record on appeal by agreement.

defined as "'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 Bd. of Review of N. 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)).

Additionally, all decisions and records of a zoning board must comply with the requirements of § 45-24-61. See § 45-24-68. Sec. 45-24-61 states that a zoning board "shall include in its decisions all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or his or her failure to vote."

III

Analysis

Appellants maintain in their argument to this Court that the Zoning Board's decision should be reversed because the HDC did not act on their application within the forty-five day period provided for in § 45-24.1-7. The Town has responded that the Zoning Board's decision should be upheld as being supported by substantial evidence in the record, and that Appellants are equitably estopped from making their argument that the HDC failed to act under § 45-24.1-7 based on Appellants' acquiescence to the HDC's transfer of their application to the Planning Board.

A

Interpreting § 45-24.1-7

Although this Court may not "substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact," this matter presents the Court with an issue of statutory interpretation—namely, whether and when the HDC satisfied its duty "to act" placed upon it by § 45-24.1-7. See §45-24-69(d). As such, this Court must conduct its

review of § 45-24.1-7 de novo because it is well established that the interpretation of a statute is a question of law. See Palazzolo v. State ex rel. Tavares, 746 A.2d 707, 711 (R.I. 2000).

"In matters of statutory interpretation our ultimate goal is to give effect to the purpose of the act as intended by the Legislature." Webster v. Perrotta, 774 A.2d 68, 75 (R.I. 2001) (citation omitted). In attempting to accomplish this goal, it is the "plain statutory language [that] is the best indicator of legislative intent." State v. Santos, 870 A.2d 1029, 1032 (R.I. 2005). Indeed, "[i]t is well settled that when the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." Ryan v. City of Providence, 11 A.3d 68, 70-71 (R.I. 2011) (quotation omitted)). Only if the language of a statute is found to be ambiguous does the Court "engage in a more elaborate statutory construction process" guided by the canons of statutory interpretation. Chambers v. Ormiston, 935 A.2d 956, 960 (R.I. 2007) (citation omitted). A statute is ambiguous "when the language of [the] statute is not susceptible to literal interpretation." New England Dev., LLC v. Berg, 913 A.2d 363, 369 (R.I. 2007) (citing Ret. Bd. of Employees' Ret. Sys. of R.I. v. DiPrete, 845 A.2d 270, 279 (R.I. 2006)); see also LaPlante v. Honda N. Am., Inc., 697 A.2d 625, 628 (R.I. 1997) (finding a statute ambiguous where "it is subject to two completely different, although initially plausible interpretations") (quotation omitted). The "ultimate interpretation of an ambiguous statute . . . is grounded in policy considerations and [this Court] will not apply a statute in a manner that will defeat its underlying purpose." Arnold v. R.I. Dept. of Labor and Training Bd. of Review, 822 A.2d 164, 169 (R.I. 2003) (citing Pier House Inn, Inc. v. 421 Corp., 812 A.2d 799, 804 (R.I. 2002)).

The statute at issue in this case states:

> The 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. No work shall begin until the certificate has been filed, but, in the case of rejection the certificate is binding upon the building official or other duly delegated authority and no permit shall be issued in such a case. The failure of the 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 commission, is deemed to constitute approval. In the event, however, that the historic district 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 commission has a period of up to ninety (90) days within which to act upon the application.

§ 45-24.1-7 (emphasis added). This Court must consider first when the forty-five day period is triggered, and next whether the HDC satisfied its duty under the statute within that period.

1

What Triggers the Forty-Five Day Period?

Appellants argue that the HDC failed to comply with § 45-24.1-7 by failing to act within forty-five days of either the date their application was filed—August 19, 2010—or the date of the Zoning Board's decision, which remanded the matter to the HDC—April 25, 2011. The statute itself states that "[t]he failure of the 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 commission, is deemed to constitute approval." § 45-24.1-7 (emphasis added). On this point, this Court need not "engage in a more elaborate statutory construction process" guided by the canons of statutory interpretation. Chambers, 935 A.2d at 960 (citation omitted). Rather, the plain language of the statute is clear: the forty-five day period in which the HDC must act is only triggered by the filing of an application with the HDC.

As such, the Zoning Board's decision remanding the matter to the HDC did not trigger a new forty-five day period in which the HDC was required to act. Indeed, the remand did not

constitute the filing of a new application; rather, the remand simply provided that "[t]he [HDC] shall articulate and explain the reasons and basis of its decision including the basis for its conclusion that the proposed activity would be incongruous with those aspects of the structure, appurtenances or the district which the [HDC] has determined to be historically or architecturally significant." Zoning Bd. Decision to Remand at 1. For this reason, the only relevant time period triggered by § 45-24.1-7 in this case is the forty-five day period from the date of Appellants' August 19, 2010 Certificate of Appropriateness application.

2

Did the HDC Satisfy its Duty to Act?

Having determined when the forty-five day period is triggered, this Court must decide whether the HDC satisfied its duty to act under the statute within that period. As a preliminary matter, this Court finds that the relevant language of this statute in this regard "is not susceptible to literal interpretation." Berg, 913 A.2d at 369 (citing DiPrete, 845 A.2d at 279). As such, this Court must "engage in a more elaborate statutory construction process" guided by the canons of statutory interpretation. Chambers, 935 A.2d at 960 (citation omitted).

While engaging in statutory interpretation, it is important to note that not all statutes are created equal. Indeed, "[s]tatutes, or particular provisions of statutes, may be mandatory or prohibitory, or they may be directory, permissive, or discretionary. One provision of a statute may be mandatory and another directory." 73 Am. Jur. 2d Statutes § 11 at 237 (2001). In the instant matter, this Court is only concerned with the distinction between mandatory and directory statutory provisions. That difference may be succinctly summed up as follows:

> The "directory" or "mandatory" designation of a statute does not refer to whether a particular statutory requirement is "permissive" or "obligatory," but instead simply denotes whether the failure to comply with a particular procedural step will or will

> not have the effect of invalidating the governmental action to which the procedural requirement relates. If the prescribed duty is essential to the main objective of the statute, the statute ordinarily is "mandatory," and a violation will invalidate subsequent proceedings under it. However, if the duty is not essential to accomplishing the principal purpose of the statute but is designed to ensure order and promptness in the proceeding, the statute ordinarily is "directory," and a violation will not invalidate subsequent proceedings unless prejudice is shown. The determination of whether statutory language is mandatory or directory is one of legislative intent.

Id. at 237-38.

This distinction has long been recognized in Rhode Island. See Lockwood v. Mechanics' Nat'l Bank, 9 R.I. 308, 339 (1869) (finding that while the National Currency Act required an oath to be administered to newly appointed or elected directors, "[t]here is no penalty or forfeiture prescribed for its omission, and the act is not mandatory"); Bosworth v. Smith, 9 R.I. 67, 72 (1868) (finding the statutory language "as soon as may be after his appointment" to be "directory, and that a disregard of them," therefore, does not render subsequent actions invalid). Indeed, our Supreme Court has stated that the "intention of the Legislature controls our consideration of the mandatory or directory character of statutory provisions." Roadway Exp., Inc. v. R.I. Comm'n for Human Rights, 416 A.2d 673, 674 (R.I. 1980).

In this case, the Court must examine the interplay between separate sentences of § 45-24.1-7. The first sentence of that provision states that "[t]he 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." § 45-24.1-7 (emphasis added). The second sentence of the statute is of no importance to this matter; however, the third sentence states that "[t]he failure of the 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 commission, is deemed to constitute approval." Id.

The Rhode Island Supreme Court engaged in a similar two-section analysis in New England Dev., LLC v. Berg, 913 A.2d 363 (R.I. 2007). In that case, our Supreme Court considered whether the provisions of the Rhode Island Land Development and Subdivision Review Enabling Act of 1992, codified at §§ 45-23-25 et seq., required local planning boards to file written decisions within 120 days of receiving a particular application or, in the event that no such written decision was filed, if the application was deemed to be granted by default. See Berg, 913 A.2d at 363. While the statutory framework of § 45-23-40 is not identical to the framework provided in § 45-24.1-7,[6] the holding in Berg is helpful to this Court's current analysis in deciding whether the statutory language is mandatory or merely directory.

The language of the first provision at issue requires the HDC to file its Certificate of Appropriateness or rejection of plans submitted to them. See § 45-24.1-7. Indeed, the language of that provision uses the word "shall." See id. "'Shall' is considered presumptively mandatory unless there is something in the context or character of the legislation which requires it to be looked at differently." 3 Norman J. Singer, Sutherland Statutory Construction § 57:2 at 8-9 (2008). Our Supreme Court has recognized this rule of construction by distinguishing the word

[6] The relevant portion of § 45-23-40 states:

> (e) **Decision.** The planning board shall, within one hundred and twenty (120) days of certification of completeness, or within a further amount of time that may be consented to by the applicant, approve of the master plan as submitted, approve with changes and/or conditions, or deny the application, according to the requirements of § 45-23-63.
>
> (f) **Failure to act.** Failure of the planning board to act within the prescribed period constitutes approval of the master plan, and a certificate of the administrative officer as to the failure of the planning board to act within the required time and the resulting approval will be issued on request of the applicant.

"shall" from the word "may." See Downey v. Carcieri, 996 A.2d 1144, 1151 (R.I. 2010) (noting that "[i]t is an axiomatic principle of statutory construction that the use of the term 'may' denotes a permissive, rather than an imperative, condition"); see also Quality Court Condo. Ass'n v. Quality Hill Dev. Corp., 641 A.2d 746, 751 (R.I. 1994) ("[T]he use of the word 'may' rather than the word 'shall' indicates a discretionary rather than a mandatory provision."). Thus, for this reason, this Court finds that the filing requirement found in this statute is mandatory.

As for the sentence containing the forty-five day timeframe by which the HDC must act on an application, our Supreme Court has held that statutory provisions requiring public officers to take actions within specific time periods are directory. See Washington Highway Dev., Inc. v. Bendick, 576 A.2d 115, 117 (R.I. 1990) (holding that a statutory provision requiring a decision on a wetland application be rendered within six weeks is directory); Beauchesne v. David London & Co., 118 R.I. 651, 661, 375 A.2d 920, 925 (R.I. 1977) (holding that statutory provisions governing workers' compensation were designed to expedite justice, and that a failure to comply therewith would not void any action taken); Providence Teachers Union, Local 958 v. McGovern, 113 R.I. 169, 177, 319 A.2d 358, 363-64 (R.I. 1974) (holding that the statutory time provision for arbitrators to call hearings was designed to "secure order, system and dispatch," and was not mandatory). Indeed, these types of time limitations placed on the actions of public officers often become mandatory only when accompanied by negative words. See McGovern, 113 R.I. at 177-78, 319 A.2d at 364 ("Provisions so designed to secure order, system and dispatch are generally held directory unless accompanied by negative words.").

However, when faced with the task of interpreting a statute much like the one at issue in this case, our Supreme Court held that the language of § 45-23-40(f) was mandatory insofar as it required "the planning board to act within the prescribed period." See Berg, 913 A.2d at 373;

§ 45-23-40(f) (emphasis added). But turning to whether such "act" required the filing of a written decision under § 45-23-40(e), the Court determined that that requirement was merely directory: "§ 45–23–40(e) does include a requirement that the planning board file a written decision within 120 days, and the absence of a sanction in that section renders this requirement directory as opposed to mandatory." Id. (emphasis added). The relevant language of § 45-24.1-7 is fundamentally different from § 45-23-40 inasmuch as the provision containing the forty-five day time period and the corresponding sanction are found within the same statutory provision. See § 45-24.1-7. Following the reasoning set forth in Berg, then, this Court finds that the forty-five day timeframe contained in § 45-24.1-7 is mandatory rather than directory, and that failure to act within that timeframe must result in an application being deemed approved.

Appellants argue that the HDC failed to act within forty-five days of the filing of its application on August 19, 2010, by not acting until December 20, 2010 when it voted on Appellants' application. See Appellants' Mem. at 6.[7] The Berg Court was faced with a similar argument and considered whether a planning board's vote satisfied the mandatory requirement to act within the prescribed time:

> "Act," in its plain and ordinary meaning, means "to do something." That definition clearly encompasses a broader scope of behavior than merely filing a written decision. In fact, in this case, the planning board clearly did do "something." On November 21, 2005, the planning board voted to deny the master plan application.

Berg, 913 A.2d at 372 (citations omitted). The Court went on to hold

> that § 45–23–40(f) contains a mandatory requirement that the planning board act on the application within the statutory timetable, and that failure to abide by that requirement will result in the constructive approval of the master plan, and require the

[7] Appellants have not argued that a written decision was required to be filed within the forty-five days.

> administrative officer to issue the certificate of the planning board's failure to act. That requirement, however, does not encompass the requirement that a written decision be filed. In our opinion, the fact that the planning board voted to deny the application by the deadline satisfies the "action" requirement of § 45–23–40(f).

Id. at 372-73.

Appellants argue that the holding in Berg is distinguishable insofar as the "act" accepted by our Supreme Court in that case was a vote, which did not occur in the instant case until well after the forty-five day timeframe delineated by § 45-24.1-7. Appellants' proposed reading of Berg misses the mark. The Berg Court's reliance on the dictionary definition of the word "act" was substantially broader than Appellants' preferred application in the instant case. See id. at 372 (noting that the "definition clearly encompasses a broader scope of behavior than merely filing a written decision"). The mere fact that the "something" in Berg (the vote) differs from the "something" in this case (referring Appellants' application to the planning board) does not render the holding in Berg inapplicable in this matter.

The more appropriate interpretation of what is required to be done as set forth in § 45-24.1-7 is the one set forth by our Supreme Court in Berg: "'Act,' in its plain and ordinary meaning, means 'to do something.'" Berg, 913 A.2d at 372 (quoting Random House Unabridged Dictionary 19 (2d ed. 1993)). In this case, the HDC "acted" on Appellants' application on September 20, 2010 when it transmitted the application to the Planning Board for any necessary approvals or determinations. The Zoning Board's written decision specifically reflects this act:

> 3. Looking at Exhibit 1A, the HDC Chair, William J. Penn, signed the Application on September 20, 2010, apparently at its regular monthly meeting. At that time, the Commission apparently took action to require the Applicants to take the proposals to the Planning Board for a determination as to whether or not the Historic District Commission even had the authority to approve the requested changes in the property.

Zoning Bd. Decision at 2.

Accordingly, this Court finds that the Zoning Board's decision dated September 7, 2011 is supported by substantial evidence in the record, is not made upon unlawful procedure, is not affected by error of law, and is not clearly erroneous, arbitrary or capricious.

B

Equitable Estoppel

Even if this Court was persuaded by Appellants' arguments regarding the extent of the HDC's duty "to act" under § 45-24.1-7, the Town argues that Appellants should be equitably estopped from asserting that argument. "Equitable estoppel is a judicial remedy by which a party may be precluded by its own act or omission from asserting a right to which it otherwise would have been entitled, or pleading or proving an otherwise important fact." 28 Am. Jur. 2d Estoppel and Waiver § 28 at 453 (2000). Stated differently, "equitable estoppel is a means of preventing a party from asserting a legal claim or defense which is contrary or inconsistent with his prior action or conduct." Id. at 454. The Rhode Island Supreme Court has recognized this doctrine, stating that "[u]nder the doctrine of equitable estoppel, a party may be precluded from enforcing an otherwise legally enforceable right because of previous actions of that party." Ret. Bd. of Emps.' Ret. Sys. of State of R.I. v. DiPrete, 845 A.2d 270, 284 (R.I. 2004) (citing El Marocco Club, Inc. v. Richardson, 746 A.2d 1228, 1233 (R.I. 2000)). In laying out the requisite elements of equitable estoppel, our Supreme Court stated:

> The indispensable elements of equitable estoppel, or estoppel *in pais*, are:
>
> > "first, an affirmative representation or equivalent conduct on the part of the person against whom the estoppel is claimed which is directed to another for the purpose of inducing the other to act or fail to act

> in reliance thereon; and secondly, that such representation or conduct in fact did induce the other to act or fail to act to his injury."

Providence Teachers Union v. Providence Sch. Bd., 689 A.2d 388, 391-92 (R.I. 1997) (quoting Lichtenstein v. Parness, 81 R.I. 135, 138, 99 A.2d 3, 5 (1953)).

The Town argues that equitable estoppel should bar Appellants "from claiming either that the referral to the Planning Board was an unnecessary delaying tactic [or] that the [HDC] deprived them of a timely decision." Town's Mem. at 10. In support of this argument, the Town notes that not only did Appellants not object to the HDC's decision to transfer the matter to the Planning Board, but also that Hassinger filed a "Request for Classification Determination" to the Planning Board seeking resolution of the same issues that prompted the application's transfer to the Planning Board. See id. at 10-12. According to the Town, "the [HDC] may have considered [Appellants'] acquiescense [sic] in the referral to the Planning Board a tacit agreement to extend the time" provided for in § 45-24.1-7. Id. at 12. More importantly, the Zoning Board's decision points to the very action that the HDC was awaiting—a determination from the Planning Board that the HDC had the authority to approve the requested changes in the property—and that Appellants did not object to that. See Zoning Bd. Decision at 2.

This Court finds that substantial evidence in the record exists to support the Town's argument on appeal that Appellants are estopped from asserting the right to have their application deemed to be approved. For equitable estoppel to apply, Appellants must have made "an affirmative representation or equivalent conduct" directed at the Town "for the purpose of inducing the [Town] to act or fail to act in reliance thereon." Providence Teachers Union, 689 A.2d at 391 (quotation omitted). Appellants not only failed to object in any way to the HDC's referral to the Planning Board at the September 20, 2010 meeting, but also Hassinger's Request

for Classification Determination was submitted to the Planning Board thereafter. These actions constitute "equivalent conduct" directed at the Town for the purpose of delaying further action by the HDC until such time as the Planning Board made its determination on the matter. The HDC was induced by Appellants' conduct to consider the application "Deferred until Advisory Planning," a notation that is handwritten on the bottom of the application itself and thus is supported in the record.

For these reasons, this Court finds that Appellants are equitably estopped from arguing that the HDC violated the requirements of § 45-24.1-7 following the August 19, 2010 submission of their Certificate of Appropriateness application by failing to act within forty-five days.

IV

Conclusion

For the reasons stated herein, this Court finds that the HDC fully complied with the requirements of § 45-24.1-7. Furthermore, this Court also finds that Appellants are equitably estopped from even alleging a violation of § 45-24.1-7 based on their conduct prior to the instant appeal. The decision of the Zoning Board is supported by substantial evidence in the record, is not made upon unlawful procedure, is not affected by error of law, and is not clearly erroneous, arbitrary or capricious. Accordingly, the decision of the Zoning Board is affirmed.

Counsel for the Town shall submit an appropriate order for an entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	Steven Papa and Aldo Leone v. The Town of New Shoreham, New Shoreham Historic District Commission, and New Shoreham Zoning Board of Review
CASE NO:	WC-2011-0619
COURT:	Washington Superior Court
DATE DECISION FILED:	August 7, 2013
JUSTICE/MAGISTRATE:	K. Rodgers, J.
ATTORNEYS:	
For Plaintiff:	Angelo R. Simone, Esq.
For Defendant:	Donald J. Packer, Esq.