



In June 2008, Casmat submitted a Master Plan application to the Smithfield Planning Department to develop “Walcott Village,” a project which contemplated a 124,320 square foot three-phase commercial complex.<sup>1</sup> Phase I consisted of a three-story mixed use building with a 12,800 square foot footprint. Phase II would add a 108,520 square foot one-story building. Phase III included 3,000 square feet for a retail structure. The development also reflected parking for about 694 vehicles and associated access roadways, sidewalks, and storm water facilities. The project required a significant relaxation of zoning restrictions, including numerous variances. Because the project’s commercial use exceeded 40,000 square feet of gross floor area, a special use permit was also required pursuant to §§ 4.3 and 4.4 of the Smithfield Zoning Code.

Casmat’s proposed primary access to the site, and the only access from Route 44, was through a driveway on the southwestern portion of the parcel, which was to be constructed over an existing cart path located to the west of a Wendy’s Restaurant on Route 44 and would intersect with Route 44. A traffic signal was to be added where the proposed access driveway met Route 44, which would require a physical alteration permit from the Rhode Island Department of Transportation (“RIDOT”).

The project also included a secondary connection to the Crossing at Smithfield through a driveway at the northeast section of the Property. That access, however, terminated at the property line of the Apple Valley Mall and was not accessible from Route 44. Casmat represented that it enjoyed an easement over the property allowing access from Route 44 to the Apple Valley Mall. Although Casmat considered including that truncated connection between

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<sup>1</sup> Casmat’s proposed project is a major land development project pursuant to the Town of Smithfield Subdivision Regulations and is subject to Section III, Article E(2) of the Subdivision Regulations and § 45-23-39.

the Apple Valley Mall and the project, a dispute arose between the mall and Casmat over whether Casmat had such an easement. That dispute led to litigation. Casmat maintained that if it was successful in the litigation, it could redesign the project plans to incorporate the use of the easement through Apple Valley Mall as an alternative access to the current proposed access west of Wendy's. The record discloses no resolution of the disputed easement.

The Planning Board held numerous hearings to review Casmat's proposed project. Casmat presented expert witnesses and submitted various documentation during these hearings in support of the project. These witnesses included Joseph Lombardo, Casmat's Certified Project Land Planner, who suggested that the project was consistent with the recommended strategies for land use and economic development, as well as the general goals of the Smithfield Zoning Ordinance and the Comprehensive Community Plan of Smithfield. Lombardo, however, did not address in material fashion serious traffic congestion issues on Route 44 or a need for a connector road to Apple Valley Mall.

John Shevlin, Casmat's traffic engineer, acknowledged that history reflected a significant number of accidents on Route 44 in the proximity of the project. Notably, the section of Route 44 near the proposed project was already identified as one of the worst accident-prone areas in Rhode Island. Shevlin also conceded that high accident rates are typical in high-volume traffic areas with a large number of signalized intersections. He was also mindful that the project would create additional intersections, would result in yet another traffic signal, would generate more traffic which would increase travel time in the area, and that the additional access driveway and intersection near Wendy's would, when taken together, further exacerbate the current traffic congestion.

In view of the significant traffic problem, the Planning Board engaged James Cronan, Director of Traffic Engineering of Crossman Engineering, Inc., to conduct another analysis. Cronan concurred with Shevlin's prediction of traffic increase, but he went further. For the entire arterial, Cronan also reported that travel time would markedly increase during afternoon peak hours on weekdays and on Saturdays. Cronan believed that an alternative access had to be pursued, noting that a new traffic signal, in fact, would increase travel times. Indeed, he expressed concern that RIDOT might not even approve of Casmat's proposed signaled intersection, since a new traffic signal would result in a total of four signals within 1,650 feet. Cronan suggested that a connection road to the Apple Valley Mall would be more useful than the proposed access driveway by Wendy's. Importantly, if the plan were to proceed with the fourth signalized intersection, Crossman recommended that Casmat should first seek RIDOT's approval before presenting the plan to the Planning Board from preliminary approval. Casmat never did so.

Michael Phillips, the Smithfield Town Planner, submitted a memorandum that considered the traffic analysis in light of the project's compliance with the Smithfield Comprehensive Community Plan. He expressed concern that the project was, in his view, inconsistent with the Smithfield Comprehensive Community Plan. Because of traffic congestion on Route 44, Phillips also foresaw the need for a connector road between the Apple Valley Mall and the Crossings at Smithfield.

Quite apart from the significant traffic congestion problems, environmental issues were also raised and examined. Joseph McCue, Project Manager of Natural Resource Services, Inc., a Project Biologist, indicated that the Rhode Island Department of Environmental Management would require Casmat to file an Application to Alter Freshwater Wetlands because of the

extensive wetland modifications and changes that would occur. The record in this case does not show that any such application was filed by Casmat. Further, McCue identified a depression on the parcel classified as wetland area, which Casmat had omitted from the plans submitted to the Planning Board. The Planning Board requested that Casmat revise the plan to identify this depression as a wetland area to delineate the buffer required by § 5.3.4 of the Smithfield Zoning Ordinance, and to list the variance sought from this buffer regulation. Casmat failed to comply with that request by the January 29, 2009 hearing.

On April 30, 2009, the Planning Board voted to deny the project. The decision was recorded on June 3, 2009. The Planning Board found, *inter alia*, that Casmat's Master Plan was not consistent with the Comprehensive Community Plan and expressed its uncertainty of Casmat's ability ultimately to construct an adequate connector road. In reaching this decision, the Board considered and discussed all of the underlying evidence and presentations.

The Zoning Board reviewed Casmat's appeal on August 26, 2009 and denied it on September 25, 2009, after concurring with the Planning Board's findings. The Zoning Board also determined that Casmat's proposal was not consistent with the Smithfield Comprehensive Community Plan. Casmat asks this Court to reverse that decision. The Court declines to do so.

#### **Manner of Review**

Under the Developmental Review Act, administrative review of a planning board's decision is limited. A board of appeal is not simply permitted to swap its own determination for that of the planning board. Reversal cannot be had unless the appellate board finds prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record. Sec. 45-23-70. Limited review of the board's decision is available in the Superior Court pursuant to § 45-23-71. This Court's review of the decision below is constrained by § 45-23-71(c), which does not authorize it to substitute its own judgment for that of the board. 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 which 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.” Sec. 45-23-71(c).

Accordingly, when reviewing the board’s decision, the Superior Court sits as an appellate court with a limited scope of review. Munroe v. Town of E. Greenwich, 733 A.2d 703, 705 (R.I. 1999) (citing Kirby v. Planning Bd. of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993)). The court reviews a decision of the board of appeal using “the ‘traditional judicial review’ standard that is applied in administrative-agency actions.” Id. The court does not evaluate the weight of the evidence, nor does it assess the credibility of witnesses or arbitrarily displace factual findings for those made at the administrative level. Id. Instead, the court’s review is “confined to a search of the record to ascertain whether the board’s decision rests upon ‘competent evidence’ or is affected by an error of law.” Id.; accord Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992).<sup>2</sup> If there is sufficient

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<sup>2</sup> The Rhode Island Supreme Court analogized the two-step administrative appeals process to a funnel. Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 207-08 (R.I. 1993). At the first level, the Planning Board, similar to a hearing officer in a non-land use forum, sits “as if at the mouth of the funnel” and analyzes all of the evidence, opinions, and issues. At the second level of review, the Board of Appeal, stationed at the “discharge end” of the funnel, does not receive the information considered by the Planning Board firsthand. The “further away from the mouth of the funnel that an administrative official is . . . the more deference should be owed to the fact finder.” So too, a planning board, sitting at the “mouth of the funnel” is owed greater deference with respect to its findings of fact.

competent evidence in the record, the court is obliged to uphold the agency's decision. Johnston Ambulatory Surgical Associates, Ltd. v. Nolan, 755 A.2d 799, 805 (R.I. 2000) (citing Barrington School, 608 A.2d at 1138).<sup>3</sup> Reversal is warranted only where the conclusions and factual determinations are "totally devoid of competent evidentiary support in the record" or from the reasonable inferences that might be drawn from such evidence. Bunch v. Board of Review, Rhode Island Dept. of Employment and Training, 690 A.2d 335, 337 (R.I. 1997) (quoting Guarino v. Dept. of Social Welfare, 122 R.I. 583, 588-89, 410 A.2d 425, 428 (R.I. 1980)).

### **Failure to Exhaust Remedies and Complete Prerequisites**

There exists, at the outset, a failure by Casmat to have exhausted and/or completed certain prerequisites which, by itself, invites denial of its instant appeal. The proposed plan failed to demonstrate that RIDOT would approve of the new traffic signal and intersection. The plan also failed to include the requisite DEM permission to cure the existing wetlands problem.

Further, Casmat's unresolved litigation relating to the easement was an appropriately troubling issue for the Zoning Board. See Ocean Road Partners v. State, 670 A.2d 246, 250 (R.I. 1996) (applicant bears the burden of demonstrating, to a reasonable probability, that a claimed use is allowable). The Zoning Board was in no position to assume that Casmat would prevail in that litigation.

Thus, the Casmat application was fatally flawed, and its ultimate disapproval was, in effect, foreordained. See Richardson v. Rhode Island Dep't of Educ., 947 A.2d 253, 259 (R.I. 2008) (The general rule is that an individual aggrieved by an agency's action "must first exhaust administrative remedies before bringing a claim in court.").

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<sup>3</sup> Competent evidence is any evidence except that which has "no probative force as to the pertinent issue." Melucci v. Zoning Bd. of Review of Pawtucket, 101 R.I. 649, 653, 226 A.2d 416, 419 (R.I. 1967).

### **Sufficient Evidence to Deny the Application**

Quite apart from those deficiencies, this Court is nevertheless satisfied that neither the Planning Board nor the Zoning Board acted impermissibly in denying Casmat's proposal. Casmat recites a litany of purported reasons to vacate the Zoning Board's decision, none of which is meritorious. Distilled to its essence, Casmat complains that there was insufficient evidence in the record to sustain the Board's decision. It also contends that denial of its application somehow amounted to an unlawful confiscation of its property. The Court disagrees.

This Court need not expand the pages of this decision unnecessarily. Suffice to say that the record includes a plethora of evidence and factual findings that belie Casmat's entreaties. Its suggestion, for example, that the Board ignored expert testimony that may have supported the project is simply, in effect, Casmat's lamentation that the Board did not accept some favorable expert testimony as conclusive. One of the principle concerns, as noted earlier, was the increased traffic congestion that the project would invite in an area that was already ranked as one of the worst accident spots in the state. Nothing Casmat presented dispelled that concern. This Court is not obliged, and, indeed, not empowered, to alter that determination. A planning board may reject the testimony of an expert if adequate contrary evidence exists in the record. "[T]here is no talismanic significance to expert testimony." See Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998). "It may be accepted or rejected by the trier of fact." Id. So too, Zoning and Planning Boards are entitled to, and should, scrutinize expert testimony. In such situations, judicial review is generally limited. Mendonsa v. Corey, 495 A.2d 257, 263 (R.I. 1985).

There is ample evidence in the record (e.g., Cronan's traffic analysis) that the project would result in obvious and unwanted increased traffic delays during peak hours. This finding, unrebutted in the record, obviously troubled the Board, and this Court is not empowered to ignore such a significant finding. That the Board members may have used their personal



knowledge of the traffic congestion issue is entirely permissible. See Perron v. Zoning Board of Review of Burrillville, 117 R.I. 571, 576, 369 A.2d 638, 641 (1977) (evidence gleaned from the personal observations of zoning board members constitutes “legally competent evidence upon which a finding may rest”). The Zoning Board’s decision was based upon reliable, probative, and substantial record evidence.

Casmat also complains that both the Zoning and Planning Boards erroneously, and without sufficient basis, concluded that the project was inconsistent with the Smithfield Comprehensive Community Plan. Casmat further suggests that too much reliance was placed upon Phillips’ memorandum to reach that result. The record reflects that the Zoning Board made several factual findings in concluding that the Planning Board’s decision was supported by the weight of the evidence in the record. Phillips’ impressions were only part of the equation. There is ample record evidence by Cronan as well as Phillips to support a finding that Casmat’s Master Plan was inconsistent with and contrary to the goals of the Smithfield Comprehensive Community Plan. The Zoning Board’s decision was not without adequate basis.

Casmat additionally argues that traffic congestion and inconsistency with the Smithfield Comprehensive Community Plan are impermissible reasons to withhold approval. Where, as here, a potential hazard at the location of a proposed use accompanies an increase in traffic at the site, the Rhode Island Supreme Court has held that it may properly be considered as a valid zoning criterion by the board in making its decision. Toohey v. Kilday, 415 A.2d 732, 737 (R.I. 1980).

The Smithfield Comprehensive Community Plan has a goal of minimizing congestion, improving safety, and offering alternative methods for inter-town travel. The Circulation Element of the Smithfield Comprehensive Community Plan reflects the need for a connector

road between Apple Valley Mall and the Crossings at Smithfield because it would likely relieve traffic congestion as well as encourage greater development in the area. The Comprehensive Community Plan also noted that RIDOT was reworking the traffic flow on Route 44 and that the “increase in commercial traffic, due in part to recent major commercial developments in the area, [has] caused both congestion and safety concerns.” Overall, the Smithfield Comprehensive Community Plan expresses a goal to increase roadway capacity and reduce congestion and average travel times. “[A] comprehensive plan is not simply the innocuous general policy statement,” but rather “establishes a binding framework or blueprint that dictates town and city promulgation of conforming planning ordinances.” Town of East Greenwich v. Narragansett Electric Company, 651 A.2d 725, 727 (R.I. 1994). The Zoning Board’s inclusion of traffic congestion issues and reference to the Comprehensive Community Plan in order to reach its decision was not at all error. Indeed, to have ignored such significant and competent evidence would do scant justice to the responsibilities that town administrators are bound to exercise.

Casmat also entreats this Court to find that the Board’s decision amounts to an improper taking of property without compensation. An unconstitutional taking occurs when all beneficial use of property is deprived by government restrictions. See Annicelli v. Town of South Kingstown, 463 A.2d 133 (R.I. 1983); E&J Inc. v. Redevelopment Agency of Woonsocket, 405 A.2d 1187 (R.I. 1979). Zoning directives, however, do not constitute a taking of private property merely because the property may not be put to its most profitable use. Annicelli v. South Kingstown, 463 A.2d 133, 139 (R.I. 1983) (zoning ordinance that “deprives an owner of all beneficial use of his property is confiscatory and requires compensation”); Golden Gate Corp. v. Town of Narragansett 116 R.I. 552, 359 A.2d 321 (1976). Casmat has not in any way shown

that the decisions below resulted in either a physical invasion of its property or that it has been deprived of all economically beneficial or productive use of its property.

### **Conclusion**

Upon review of the entire record, this Court finds that Casmat's application was fatally flawed ab initio for lack of exhaustion of administrative remedies and for failure to have resolved litigation that was inherently significant to its plan. Further, even when considered on its merits, Casmat's appeal cannot succeed because the decision below was supported by reliable, probative, and substantial record evidence and was not made in excess of either the Zoning or Planning Board's authority, nor were they affected by error of law. Substantial rights of Casmat have not been impermissibly prejudiced.

Casmat's appeal is denied, and its demand for expenses is also denied. Judgment shall enter for the defendants.