

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

Filed December 28, 2004

SUPERIOR COURT

JOHN DUBIS, SUSAN DUBIS, BARBERA :
PERRETTA, RICHARD PERETTA :
KIMBERLY BARLOW, JEFFREY :
JOHNSON, MICHELLE WILCOX, KEVIN :
WILCOX, ROBERT CARLSON, JAMES :
NAUGHTON, KATHLEEN NAUGHTON :
DONALD PARE, PATRICIA PARE :
MAURICE LACROIX, and LORRAINE :
LACROIX :

Appellants :

vs :

K.C. 2004-0380

ROBERT CROWE, DENISE DEGRAIDE :
VIRGINIA SOUCY, JOHN D'ONOFRIO :
RUSSELL LACALLAIDE, FRED PERRY, :
and ANTHONY PETRARCA in their :
capacity as members of the Planning :
Commission Board of Appeal for the Town :
of Coventry, RONALD PELLETIER, :
THOMAS DALEY, CYNTHIA FAGAN :
GEORGE CALDOW, RUSSELL :
CROSSMAN, JASON OSENKOWSKI :
JAMES KUIPERS, DIANNE PAUL, and :
PAUL DAGGETT, in their capacities as :
members of the Planning Commission of the :
Town of Coventry, COMMERCE PARK :
REALTY, LLC., COMMERCE PARK :
PROPERTIES, LLC., COMMERCE PARK :
COMMONS, LLC., COMMERCE PARK :
ASSOCIATES 8, LLC., COMMERCE :
PARK ASSOCIATES 9, LLC., COMMERCE :
PARK ASSOCIATES 4 :

Appellees :

DECISION

THOMPSON, J. This matter comes before the Court on the appeal of John Dubis, Susan Dubis, Barbara Peretta, Richard Perretta, Kimberly Barlow, Jeffrey Johnson, Michelle Wilcox, Kevin Wilcox, Robert Carlson, James Naughton Kathleen Naughton, Donarld Pare, Patricia Pare, Maurice LaCroix, and Lorraine LaCroix (“Appellants”) from a decision of the Coventry Zoning Board, sitting as the Coventry Subdivision Board of Appeals (“Board of Appeals”). The Board of Appeals denied the appeal and affirmed the decision of the Coventry Planning Commission, (“Commission”) which approved a conceptual master plan for the construction of a project known as the Centre of New England (“CONE”). This Court has appellate jurisdiction over this matter pursuant to G.L. (1956) § 45-23-71.

Facts and Travel

On July 1, 2003, Commerce Park Realty, LLC (“Applicant”) submitted a conceptual master plan for the CONE project and a corresponding request for a certificate of completeness of said plan. The certification of the application as complete is subject to the Applicant’s furnishing of the supporting materials required by the Conceptual Master Plan Submission Checklist (“Checklist”) found in Article XV of the Town of Coventry Subdivision and Land Development Regulations. Despite the conspicuous absence of various required supporting materials, the Director of Planning, Robert Crowe, certified the application as complete on July 23, 2003.

On September 17, 2003, the Commission held a public hearing to address the matter in compliance with § 45-23-40(d)(1). At this hearing, various board members and members of the community raised concerns regarding the sufficiency of the submission. First, the Town Engineer, Sheila Patnode, complained that the submission did not constitute a master plan, but

merely depicted the present condition of the site. She stated that the plan lacked information related to the potential impact of increased traffic, sewers, water, and drainage.¹ Next, various Commission members questioned the lack of an open space plan, the absence of a more detailed description of the potential residential uses of the property, and the dearth of analysis addressing the potential environmental impact of the project. At the conclusion of the hearing, the Commission Chairman, Joseph Voccio, informed the Applicant that the Commission would not place the matter back on the agenda until the Applicant addressed the various deficiencies of the submission. Voccio advised the Applicant to work with the Director of Planning and the Town Engineer to develop a “more definitive description” of the master plan.

On September 30, 2003, the Director of Planning sent the Applicant a letter requesting additional information. The letter requested the following supporting materials not included with the conceptual master plan submission: an open space plan, approximate building and landscape buffers, confirmation from the Kent County Water Authority that service could be provided, evidence of compliance with the RIPDES permit, traffic studies and projections, an estimate of the population of residential uses, a fiscal impact analysis, a lighting plan, a proposed phasing plan for the entire park, proposed connections to surrounding streets, applicable studies on age-restricted residential communities, a proposed sanitary sewer use plan, a revised drainage plan, and a proposed neighborhood impact analysis. Nevertheless, the letter did not condition approval of the conceptual master plan on the Applicant’s resolution of each area of concern.

Although the Applicant failed to address the request for more information, the Commission placed the matter on its agenda for November 12, 2003. On the night before this hearing, the Applicant submitted only one supplemental item, a new site plan which represented

¹ It should be noted that Patnode prefaced her comments by stating that normally she would address these concerns at a later date, but public concern over the project prompted her to raise her concerns sooner rather than later.

a radical departure from the previous plan. The new plan detailed 3454 residences, three hotels, 1.1 million square feet of commercial and retail space. Although the new plan did not fully address the concerns raised at the previous hearing, the Commission voted 7 to 1 in favor of the application. The Commission conditioned its approval on several stipulations which effectively modified the requirements listed in the Checklist.

Pursuant to § 45-23-69, the Appellants filed a timely appeal of the decision with the Board of Appeals on December 16, 2003. The Appellants argued that the Commission disregarded its own regulations, because it failed to compel the Applicant to submit the complete list of supporting materials required by the Checklist. The Appellants suggested that, because the project would likely add stability to the tax base, the Commission granted approval to avoid jeopardizing the project's progression. In accordance with § 42-23-69, the Board of Appeals held a public hearing on the matter on March 30, 2004. On April 14, 2004, the Board of Appeals entered its written decision affirming the Commission's approval of the conceptual master plan submission for the CONE project. Pursuant to § 45-23-70, the Appellants timely filed the instant appeal in Superior Court on May 4, 2004.

Standard of Review

Section 45-23-71 confers jurisdiction on the Superior Court to review the decisions of the board of appeals. Section 45-23-71(c) states in relevant part:

“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 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.”

The Superior Court does not review board decisions de novo. Kirby v. Planning Board of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993). Rather, § 45-23-71 directs the Superior Court to review such decisions under the ‘traditional judicial review’ standard applied in administrative-agency actions. Id. Judicial review is limited to a search of the record to determine if there is any competent evidence upon which the agency's decision rests. If there is such evidence, the decision will stand.” Restivo v. Lynch, 707 A.2d 663, 666 (R.I. 1998) (quoting E. Grossman and Sons v. Rocha, 118 R.I. 276, 285-86, 373 A.2d 496, 501 (R.I. 1977)). “Therefore, the Superior Court does not consider the credibility of witnesses, weigh the evidence, or make its own findings of fact.” Id. Rather, “its 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.” Munroe v. Town of E. Greenwich, 733 A.2d 703, 705 (R.I. 1999) (citing Kirby, 634 A.2d at 290).

The Appellants argue that the Applicant’s submission lacked several significant requirements. As such, they contend that the Commission’s approval of the Master Plan violated statutory and regulation provisions, and represented an arbitrary, capricious decision that was an abuse of the Board’s discretion.

The Appellees advance a three-part response. First, the Appellees argue that the Applicant satisfied all of the obligations and requirements mandated by the Rhode Island General Laws and the Town of Coventry Subdivision Regulations for a conceptual master plan review approval. Second, the Appellees assert that the Board of Appeals did not err in affirming

the approval of the master plan. Finally, the Appellees claim that the Appellants' contentions are moot, because the Applicant has addressed all twenty concerns.

Board of Appeals Decision

In affirming the Commission's approval of the conceptual master plan submission, the Board of Appeals issued a somewhat contradictory decision. Although it agreed with the Appellants' argument that the regulations required more information, the Board reasoned, "[a]lthough there could have been more information forthcoming from the [Applicant], the Planning Commission failed to require it at the Conceptual Master Plan stage of approval, and pursuant to their grant of authority in Article 8 of the Subdivision and Land Development Regulations of the Town of Coventry, they elected to approve it as submitted." Based upon this reasoning, the Board of Appeals summarily held that the weight of the evidence in the record supported the Commission's decision but made no reference to any such evidence in the record.

Notwithstanding its agreement with the Appellants' argument, the Board of Appeals stated that it did not find either clear or prejudicial error. Consequently, it opted not to substitute its judgment for that of the Planning Commission. Nevertheless, the Board of Appeals required the Applicant to provide the outstanding materials requested in the September 30th letter as a condition precedent to advancing to the next stage of review, Preliminary Plan Approval.

Submission Requirements for a Master Plan

The submission requirements for a conceptual master plan are controlled by the Rhode Island General Laws and the Town of Coventry Subdivision and Land Development Regulations. Section 45-23-40 (a)(2) of the General Laws states in relevant part: "[r]equirements for the master plan and supporting material for this phase of review include, but are not limited to information on the natural and built features of the surrounding neighborhood,

existing natural and man-made conditions of the development site, including topographic features, the freshwater wetland and coastal zone boundaries, the floodplains, as well as the proposed design concept, proposed public improvements and dedications, tentative construction phasing, and potential neighborhood impacts.” Similarly, Article V, Section 4 of the Subdivision Regulations states in relevant part: “[a]ny applicant requesting approval of a proposed major subdivision or major land development, as defined in these Regulations, shall first submit to the Administrative Officer the plans and supporting materials provided in the conceptual master plan Checklist for Major Land Development and Major Subdivision as provided in Article XV.”

For purposes of this appeal, the Appellants focus on the following omissions from the Applicant’s conceptual master plan submission: (1) an open space plan; (2) an identification of the areas of land to be set aside for recreation and/or schools; (3) an identification of the areas of land which are not appropriate for development; (4) an estimate of the number of school-aged children; (5) a fiscal impact analysis; (6) a proposed phasing or site analysis; (7) written confirmation from the Kent County Water Authority regarding the availability of water service; and (8) a landscape plan. The Court will briefly address the status of these alleged deficiencies.²

Of these eight alleged deficiencies, the record indicates that the Applicant has only definitively addressed one. The Appellees submitted a fiscal impact analysis report dated February 6, 2004 prepared by Professor Marshall M.A. Feldman, PhD of the University of Rhode Island.

With respect to the Applicant’s failure to submit an open space plan, Article IV of the Subdivision Regulations reveals that this requirement is only applicable to residential cluster developments and residential compounds. The Appellees claim that CONE has been zoned as a

² Throughout the record, there are various allusions to traffic studies and state mandated permits. However, these items are not mandatory until the preliminary stage per § 45-23-41.

Business Park, and, as such, an open space plan is not required. Although this could be a persuasive argument, neither party has directed the Court to evidence in the record that would substantiate the assertion that the entire site is zoned as Business Park. Moreover, considering the fact that the record contains evidence that the plan may include over three thousand residences, the Court is not satisfied that an open space plan is not required.

As to the remaining alleged deficiencies, the record of the minutes from the November 12, 2003 meeting and the written decision of the Commission entered December 1, 2003 indicate that the Commissions and Appellees entered into the following stipulations:

1. The adjoining stub streets which surround and adjoin the parcels in the Business Park Zone should not be designed to provide access to the Business Park. No cut through or extensions of any stub roads will be allowed.
2. Buffer Zones: The plan is designed with a 25-foot Buffer Zone. The Planning Commission stipulates that Buffer Zones shall be a minimum of 50 to 75 feet. Buffer Zone is required adjacent to residential uses. The final dimension of a Buffer Zone will be reviewed and approved with each individual application for a development proposal.
3. Any development proposals for residential use will have eighty percent of units dedicated to residents 55 years old or older, and twenty percent for residents under 55 years of age.
4. Open space areas and wetland areas should be preserved and calculated for review.
5. The Conceptual Master Plan is not approved with the number of residential units as shown on the referenced plan. The number of residential units for a proposed residential use will be reviewed with each individual application for a development proposal.
6. No requested waivers are approved as part of this Conceptual master Plan Decision. Waiver requests will be reviewed with each individual application for a development proposal.

Waivers and Modifications

A modification is defined as “1. A change to something; an alteration; 2. A qualification or limitation of something.” Black’s Law Dictionary 1025 (8th ed. 1999). Despite the Board’s nomenclature, the stipulations entered into during the November 12 meeting are, in fact,

modifications of the submission requirements articulated in § 45-23-40 and Article V. In part, the stipulations modify the subdivision regulations to allow the Commission to review individual phases of the CONE project on a piecemeal basis.

Article VIII of the Subdivision Regulations gives the Commission broad authority to tailor the requirements for the conceptual master plan to fit individual projects; however, the regulations establish a specific procedure for exercising that discretion. Article VIII, Section (B)(1)(a)-(b) clarifies the board's authority to waive or modify requirements for a conceptual master plan for a major subdivision of land. It states in relevant part:

“The Planning Commission shall have the authority to waive or modify one or more of the requirements for subdivision or land development approval contained in these regulations if the Planning Commission finds that:

- a. the waiver or modification is reasonable and within the general purposes and intents of these regulations; and,
- b. literal enforcement of the regulation is impracticable and will exact undue hardship because of peculiar conditions pertaining to the land in question; or waiver or modification of the regulation is in the best interest of good planning practice or design as evidenced by consistency with the Comprehensive Community Plan and the Zoning Ordinance.”

Once the Board has determined whether a modification or waiver is warranted, subsection (D)(1)(b) requires that “[t]he Planning Commission’s decision shall be in writing, and shall contain findings of fact addressing the conditions contained in Section VIII.B.1.”

Given the size of the proposed CONE project, the Court does not question the Commission’s decision to modify the typical requirements for the conceptual master plan submission. The Commission’s piecemeal approach may very well be the most practicable method to advance the project and protect the interests of the community. However, to effectuate this approach, the Commission must comply with the Subdivision Regulations and set forth the reasons for these modifications in writing. Neither brief annotations in the minutes of

the November 12, 2003 meeting nor the pithy written decision issued by the Commission are sufficient to satisfy this requirement.

Conclusion

Upon review of the entire record, the Court finds that the decision of the Board of Appeals in the instant matter is clearly erroneous in light of the substantial, reliable, and probative evidence. Although the Board of Appeals recognized the Commission's failure to compel the Applicants to provide the necessary supporting material, it nonetheless affirmed the decision. The fact that the Board of Appeals conditioned its approval on the Applicant addressing the remaining deficiencies in order to move beyond the Conceptual Master Plan Stage of Review suggests that it should never have affirmed the decision in the first place.

Furthermore, the Board of Appeals cited Article VIII for the Commission's authority to modify one or more of the approval requirements; however, it overlooked the provision of Article VIII that requires the Commission to set forth the rationale behind modifications in writing. Given that the Commission failed to comply with that provision, the Court finds that the decision of the Commission violated Article VIII of the Subdivision Regulations. For the same reasons, the Court finds that the decision was based upon unlawful procedure. Therefore, the Court remands this matter to the Board of Appeals for a written decision and proceedings consistent with this opinion. Counsel shall submit the appropriate order for entry.