STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: March 21, 2014)

LOVE'S TRAVEL STOPS AND COUNTRY STORES, INC., MADELINE A. GINGERELLA, in her capacity as Trustee of the George A. Gingerella Living Trust, DAVID A. GINGERELLA, ANGELO GINGERELLA, ROSEMARIE GINGERELLA, ANGELO COMFORTI, LUCILLE SPOSATO, DONNA LaPLANTE, WILLIAM GINGERELLA, LOUIS W. GINGERELLA, JR., DOUGLAS J. GINGERELLA, LOIS DELANEY, CAROL A. BROUGH, TONI R. SKOCIC, and MELANIE GINGERELLA	:	
v.	:	**C.A. No. WC 09-844**
ALFRED DiORIO, HOWARD WALKER, RAYMOND COX, HAZEL DOUTHITT, and JOSEPH ESCHER, in their capacities as members of the Town of Hopkinton Planning Board, and PHILIP SCALISE, DANIEL HARRINGTON, JONATHAN URE, RONNIE SPOSATO, HARRY BJORKLAND, and C. WRIGLEY BYNUM, in their capacities as members of the Town of Hopkinton Zoning Board of Review, sitting as the Platting Board of Appeals	:	

DECISION

THUNBERG, J., Before this Court is an appeal from a decision of the Zoning Board of Review for the Town of Hopkinton (Town), sitting as the Platting Board of Appeals (Platting Board), filed by Love's Travel Stops and Country Stores, Inc. (Love's or Applicant)[1] and owners of the property at issue (the Gingerella Family, collectively, Appellants).[2] In its decision, the Platting Board upheld the Hopkinton Planning Board's (Planning Board) decision to deny a Master Plan Application that had been filed by Love's. The Appellants contend that the Planning Board's decision contains multiple legal errors and seeks this Court to reverse that decision and approve the Master Plan Application. Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

[1] Love's is an Oklahoma-based, family-owned business that operates travel stops at more than 290 locations in over thirty-nine states nationwide. See http://www.loves.com/AboutUs.aspx. According to its website,

> "Love's operates two main types of facilities. Love's Country Stores are fueling stations with an attached convenience store. The larger Love's Travel Stops are located on interstate highways and offer additional amenities such as food from national restaurant chains like Subway, Arby's, and Carl's Jr., as well as trucking supplies, showers, and RV dump stations." Id.

[2] On or around 1949, the disputed property in this case was purchased by several members of the Gingerella family. Today, approximately twenty family members have an interest in the property. (Tr. at 77-78, May 6, 2009.)

I

Facts and Travel

The property at issue in this case consists of an unimproved 18.4 acre parcel, otherwise known as Lot No. 59 on Tax Assessor's Plat 7 in the Hopkinton Land Evidence Records (the Property). (Tr. at 3, Apr. 1, 2009 (Tr. I)). Located in a manufacturing zone since the inception of the Town's Zoning Ordinance (the Ordinance) in 1971, the Property is bounded by Route 3, Interstate Route 95, a state-owned Park-and-Ride, and another unimproved parcel. (Tr. I at 5; Tr. at 57, May 6, 2009 (Tr. II)). It is undisputed that the property across the street was zoned as residential until 2006, at which point it was rezoned as manufacturing. (Tr. II at 57, 103).

Love's has proposed developing the Property as a travel stop for passenger vehicles and tractor-trailer trucks. Specifically, the proposal involves installation of a twenty-four hour facility with a single, 10,800 square-foot building containing a fifty-six seat, drive-thru Arby's fast-food restaurant, a gift shop, restrooms, and a fuel-filling station. (Tr. I at 7). The fuel-filling station would accommodate automobile traffic in the front of the building and diesel trucks in the back of the building. (Tr. I at 7-8). To accommodate these uses, the site would contain eighty-nine automobile parking spaces as well as fifty-six tractor-trailer truck stalls, each measuring nine by eighteen feet. (Tr. I at 10). The truck stalls would provide

temporary overnight parking for truckers, most of whom would leave their truck engines running for heating or cooling purposes. (Tr. I at 63-64).

On January 1, 2008, the Town's zoning official issued three zoning certificates for the Property. The certificates designated the Property as being within a manufacturing zone, and each required the applicant to obtain special use permits. Accordingly, on October 2, 2008, Love's filed an application for three special use permits; namely, Use Category 554 (gasoline service stations); Use Category 581 (eating places) and Use Category 5995 (gift, novelty and souvenir shop, convenience store as accessory to gasoline service station).

On November 10, 2008, Love's submitted a Master Plan Application for a major land development project; however, on December 19, 2008, the Town Planner, James Lamphere (Mr. Lamphere), returned the Master Plan Application as incomplete. Love's updated its Master Plan Application and, on March 4, 2009, Mr. Lamphere certified the Master Plan Application as complete. The Planning Board conducted public informational meetings on the Master Plan Application on April 1, May 6, and July 1, 2009.

At the meetings, Love's presented testimony from the following individuals: Christopher Duhamel, professional engineer; Rick Shuffield, Director of Real Estate and Development at Love's; Thomas Daley, environmental consultant; Mark Speer, professional engineer; John Carter, registered landscape architect;

Judith Zimmerman-Reich, professional traffic operations engineer; David A. Gingerella, part-owner of the Property; Daniel J. Urso, licensed certified public accountant; and Michael Lenihan, certified real estate appraiser. Speaking in opposition to the application were Dan Prentiss, on behalf of the Wood-Pawcatuck Watershed Association and the Hopkinton Historical Association; and Daniel W. Varin, planning consultant. In addition to testimonial evidence, numerous documentary exhibits were introduced at the meetings.

At the conclusion of the July 1, 2009 meeting, Planning Board member Howard Walker read a lengthy motion into the record, the adoption of which would constitute the Planning Board's decision. The Planning Board unanimously approved the motion and denied Love's application for a master permit. The Platting Board subsequently upheld the decision, and this timely appeal ensued.[3]

Additional facts will be supplied as needed in the analysis portion of this Decision.

II

Standard of Review

The Superior Court's review of a board of appeal decision is governed by § 45–23–71, which provides that:

[3] The Court takes judicial notice that, in addition to the instant appeal, several Gingerella family members filed a four-count declaratory judgment action against the Town and the Planning Board on October 29, 2009.

> "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." Sec. 45–23–71(c).

It is well established that "the Superior Court does not engage in a *de novo* review of board decisions pursuant to this section." Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998) (citing E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 284-85, 373 A.2d 496, 501 (1977)). Rather, it "reviews the decisions of a plan commission or board of review under the 'traditional judicial review' standard applicable to administrative agency actions." Id. Thus, unless the decision "is affected by an error of law[,]" West v. McDonald, 18 A.3d 526, 531 (R.I. 2011), the Court's examination "is limited to a search of the record to determine if there is

any competent evidence upon which the agency's decision rests.[4] If there is such evidence, the decision will stand." Restivo, 707 A.2d at 665.

In conducting its examination, the Court is mindful that it must "give[] deference to the findings of fact of the local planning board." West, 18 A.3d at 531 (citing Munroe v. Town of East Greenwich, 733 A.2d 703, 705 (R.I. 1999); Kirby v. Planning Bd. of Review of Middletown, 634 A.2d 285, 290 (R.I. 1993)). The Court "lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level[.]" Restivo, 707 A.2d at 666 (quoting Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986)). However, it is axiomatic that "[a] planning board's determinations of law, like those of a zoning board or administrative agency, are not binding on the reviewing court; they may be reviewed to determine what the law is and its applicability to the facts." West, 18 A.3d at 532; see Pawtucket Transfer Operations, 944 A.2d at 859 (citing Gott v. Norberg, 417 A.2d 1352, 1361 (R.I.1980)).

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[4] In reviewing a planning board's decision,

> "the board of appeal shall not substitute its own judgment for that of the planning board or the administrative officer but must consider the issue upon the findings and record of the planning board or administrative officer. The board of appeal 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." Sec. 45-23-70(a).

III

Analysis

The Appellants contend that the Platting Board erroneously affirmed the Planning Board's decision for a number of reasons. They assert that the Planning Board erroneously concluded that the Master Plan Application was not consistent with the Comprehensive Plan, and that recent amendments to the Comprehensive Planning and Land Use Act control the outcome of this appeal. They additionally contend that the Planning Board erroneously subjected its Master Plan Application to a higher standard of proof; namely, that standard of proof which is applicable to preliminary and final plan approval. The Appellants next maintain that the Planning Board usurped the role of the Zoning Board when it concluded that the Planning Board could not approve the master plan unless the project met the requirements for a special use permit. Lastly, Appellants aver that the Planning Board mistakenly concluded that the installation of a non-public, non-transient well automatically would place the property into a primary aquifer protection zone in which gas stations and underground storage tanks (USTs) are prohibited.

A

Conforming the Ordinance to the Comprehensive Plan

In its decision, the Planning Board determined that, in the event of an inconsistency between the Town's Comprehensive Plan and the Ordinance, the

Comprehensive Plan controls the outcome of the application. During the relevant period, the Comprehensive Plan designated the Property as mixed-use village, while the Ordinance and zoning map designated it for manufacturing use. The Planning Board recognized that, although these designations potentially could be considered inconsistent, it ultimately concluded that they could be harmonized in such a way that the Master Plan Application and the Comprehensive Plan were consistent. The Platting Board upheld this interpretation by the Planning Board.

Chapter 22.2 of title 45, entitled the "Rhode Island Comprehensive Planning and Land Use Act" (CPLURA), mandates each municipality in the state adopt a comprehensive plan in order to direct "rational decision making regarding the long term physical development of the municipality." Sec. 45-22.2-5. Chapter 24 of title 45 mandates that zoning ordinances be consistent with associated comprehensive plans and "provide that in the instance of uncertainty in the construction or application of any section of the ordinance, the ordinance shall be construed in a manner that will further the implementation of, and not be contrary to, the goals and policies and applicable elements of the comprehensive plan." Sec. 45–24–34(a). In addition, § 45–24–34(b) requires that "[t]he city or town shall bring the zoning ordinance or amendment into conformance with its comprehensive plan as approved by the chief of the division of planning of the department of administration or the superior court in accordance with its

implementation schedule as set forth in said plan." Sec. 45–24–34(b). However, "the provisions requiring that zoning ordinances conform to comprehensive plans within eighteen months are directory rather than mandatory." West, 18 A.3d at 535. Consequently, "a municipality's failure to amend a zoning code within eighteen months does not eviscerate the goals, requirements, and mandates of a municipality's comprehensive plan." Id.

It is undisputed in this case that the Town did not amend its Ordinance to be in conformance with its Comprehensive Plan. Notwithstanding this failure, the Planning Board concluded that any inconsistency between the Comprehensive Plan's mixed-use village classification and the Ordinance's manufacturing-use district could be harmonized in such a way as to be consistent. Thus, a threshold issue for the Court to address is whether the two provisions may be reconciled as consistent.

With respect to issues of statutory interpretation, the Court engages in a de novo review. See West, 18 A.3d at 532. Our Supreme Court has declared that "[a] planning board's determinations of law, like those of a zoning board or administrative agency, are not binding on the reviewing court; they may be reviewed to determine what the law is and its applicability to the facts." Id. See also McAninch v. State of Rhode Island Dept. of Labor and Training 64 A.3d 84, 86 (R.I. 2013) ("Although this Court affords the factual findings of an

administrative agency great deference, questions of law—including statutory interpretation—are reviewed *de novo*.") (quoting Heritage Healthcare Services, Inc. v. Marques, 14 A.3d 932, 936 (R.I. 2011)). It is axiomatic

> "that the rules of statutory construction apply in the same manner to the construction of an ordinance. When a legislative enactment consists of clear and unambiguous language, this Court will interpret it literally, giving the words contained therein their plain and ordinary meaning. Additionally, when the provisions of a statute are unclear or subject to more than one reasonable interpretation, the construction given by the agency, or board, charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized. This is true even when other reasonable constructions of the statute are possible." West, 18 A.3d at 532 (internal citations, quotations, and footnote omitted).

Notwithstanding the foregoing, however, it must be remembered that "'[t]he plain meaning approach . . . is not the equivalent of myopic literalism, and it is entirely proper for [the Court] to look to the sense and meaning fairly deducible from the context.'" Peloquin v. Haven Health Ctr. of Greenville, LLC, 61 A.3d 419, 425 (R.I. 2013) (quoting Mendes v. Factor, 41 A.3d 994, 1002 (R.I. 2012)). Thus, the Court "must consider the entire statute as a whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections." Id. This also means that the Court will not interpret a statute to achieve a meaningless or absurd result. See Ryan v. City of Providence, 11 A.3d 68, 71 (R.I. 2011) (stating that "in interpreting a

statute or ordinance, we first accept the principle that statutes should not be construed to achieve meaningless or absurd results") (internal quotations omitted). Ultimately, the Court's '"goal is to give effect to the purpose of the act as intended by the Legislature."' McAninch, 64 A.3d at 86 (quoting Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 344 (R.I. 2004)).

In its decision, the Planning Board observed that the goals of the Comprehensive Plan include preservation of the rural character of the town and the integrity of its landscape. (Tr. at 141, July 1, 2009 (Tr. III)). It further observed that the Comprehensive Plan designates the Property for mixed-use village, and that such a

> "designation envisions a mixture of commercial, residential, office and resident -- commercial, residential, office uses in a small-scale village-like setting. Buildings would be small and serve local needs, not serve as a regional hub.
>
> "The buildings, their uses and their layout, would be consistent with the rural character of the town. The proposed truck stop is utterly inconsistent with the mixed use village concept. There is nothing small scale or village like in the business the Applicant proposes." Id. at 141-42.

In reaching this conclusion, the Planning Board stated: "Quite simply, we must read the comprehensive plan and the zoning code together to prevent manufacturing uses on this site but only if they're scale-setting and their

appearance [is] consistent with the mixed use village concept, which the Applicant's project, rest assuredly, is not." Id. at 143.

At the subsequent Platting Board hearing, the Chairman of the Planning Board, Alfred DiOrio (Chairman DiOrio), noted that the Planning Board's decision "reconciled the master plan compared to the zoning code . . . [and observed] that the Planning Board must read the comprehensive plan and zoning code together to permit manufacturing uses on the site but only if they're scale-setting and their appearance is consistent with the mixed use village concept, which the Appellant's project was not." (Tr. of Platting Board of Review at 10-11, Nov. 19, 2009) (Platting Board Tr., Nov. 19, 2009).

The Platting Board then affirmed the Planning Board's decision, concluding

> "that the project proposed by Love's Travel Stops & Country Stores, Inc. is not consistent with the Comprehensive Plan and that we find that there was no error of law since 1) the current status of the law states that the comprehensive plan provides the binding framework for use of property in the Town and to the extent that it is inconsistent or conflicts with the zoning ordinances, the comprehensive plan governs and 2) the Planning Board found that the Hopkinton Comprehensive Plan and the Hopkinton Zoning Ordinances were consistent as they apply to this project, however, Love's Travel Stops & Country Stores, Inc.'s proposed project, because of its scale and appearance—not because of the proposed use, did not conform with the Planning Board's interpretation of a mixed use village." (Decision of the Platting Board of Review at 2).

Our Supreme Court has declared that "[a]lthough each has its own purpose, a municipality's comprehensive plan and its zoning ordinance are intended to work in concert with one another." West, 18 A.3d at 535-36. However, a comprehensive plan, rather than being a "general-policy statement[,] . . . establishes a binding framework or blueprint that dictates town and city promulgation of conforming zoning and planning ordinances." Id. at 539. Accordingly,

> "[a] central goal of comprehensive planning, as articulated by the General Assembly, is to encourage cities and towns to plan for orderly growth and development and the appropriate use of land, as well as for the protection and management of land and natural resources. See § 45–22.2–3. In contrast, municipal zoning regulations are necessary 'to establish and enforce standards and procedures for the proper management and protection of land, air, and water as natural resources, and to employ contemporary concepts, methods, and criteria in regulating the type, intensity, and arrangement of land uses * * *.'" West, 18 A.3d at 536 (quoting § 45–24–29(b)(3)).

The Comprehensive Plan at issue identifies the mixed-use village classification as "areas for commercial, office, retail and mixed-use residential structures situated within a small-scale village context. Large-scale office development such as office parks are permitted but will be subject to detailed site plan review and performance standards." Comprehensive Plan of the Town of

Hopkinton, adopted January 2004, at VII-25. No further description or definition of this classification is provided by the Comprehensive Plan.

Section 5 of the Ordinance, entitled "District Use Regulations," states that the "District Use Table establishes in each district those uses permitted and those uses permitted by special-use permit." It further provides that "[a]ll uses not so permitted in a district are prohibited therein." Id. The district use table itemizes the Town's districts as residential, neighborhood business, commercial, and manufacturing. No reference to a mixed-use village district can be found anywhere in the Ordinance.

Within the district use table, all residential uses are prohibited in manufacturing zones with the exception of hotels and motels, which require a special use permit. Also prohibited in manufacturing zones are private schools; all indoor and outdoor government public recreation uses; outdoor water-based private recreation; and, apart from stadia and amusement theme parks, all outdoor private land recreation. General hospitals require a special use permit in a manufacturing zone but, otherwise, all hospitals, sanitaria, convalescent and rest homes are prohibited as well.

Conversely, many uses that are permitted by way of right or by a special use permit in manufacturing zones are expressly prohibited in all other use zones. These include: mining; special trade contractors; junkyards; textile mill products;

apparel and other finished products from fabric; furniture and furnishing manufacturing; and paperboard and paperboard manufacturing. With respect to commercial activities, all retail trade is permitted in manufacturing zones only by way of a special use permit, and the only personal, business or professional service not requiring a special use permit is a travel agency or bureau.

As noted above, the mixed-use village concept contemplates "commercial, office, retail and mixed-use residential structures"; however, it is clear from the Ordinance that, apart from hotels and motels, all residential development is absolutely prohibited in manufacturing zones. Indoor and outdoor government recreation facilities are also prohibited absolutely, even though such facilities are permissible by right in all other districts. Conversely, many uses that the Ordinance expressly prohibits in all of the other zones are permissible by right in manufacturing zones, such as mining and junkyards.

It is difficult, if not impossible, to conceive of any way that these inconsistencies could be reconciled such that the Comprehensive Plan and the Ordinance would "work in concert with one another[,]" as intended by the Legislature. West, 18 A.3d at 535-36. The Planning Board found "[t]he proposed truck stop is utterly inconsistent with the mixed use village concept." (Tr. III at 42). However, every conceivable residential proposal on the Property, with the exception of a hotel or a motel, would be inconsistent with the Ordinance's

requirements for manufacturing use districts. Furthermore, although the Planning Board stressed that the mixed-use village classification envisions development that is "small scale or village-like[,]" nothing in the Ordinance would preclude the Gingerella family from developing the Property for use as a junkyard, a textile mill, a sawmill, or a stadium—to name a few of the uses that are permissible by right and would not require approval. In light of the marked inconsistencies between the manufacturing uses permitted in the Ordinance and the mixed-use village concept contained in the Comprehensive Plan, the Court concludes that the Platting Board committed clear error when it upheld the Planning Board's erroneous conclusion that the mixed-use village classification could be harmonized with the Ordinance's manufacturing use districts. See e.g., Gillis v. City of Springfield, 611 P.2d 355, 359 (Or. Ct. App. 1980) (declaring a rezoning that permits only limited institutional residential uses incompatible with comprehensive plan that designates the zone as medium density residential and that "the type of use called for in the comprehensive plan may [not] be ignored").

Having determined that the two provisions are irreconcilably inconsistent, the Court next must determine whether the Platting Board erred in upholding the Planning Board's determination that the Comprehensive Plan trumps any inconsistency that may exist between the Comprehensive Plan and the Ordinance. The Appellants contend that the General Assembly's recent amendment to § 45-

22.2-13 of the CPLURA controls the outcome of this question.[5] They specifically maintain that the amendment operates retrospectively, such that the Ordinance's designation of the Property as a manufacturing zone trumps application of the Comprehensive Plan's mixed-use village designation. In contrast, the Platting Board contends that the Planning Board properly concluded that, in the event of an inconsistency, the mixed-use village classification takes precedent over a manufacturing use district.

When the Planning Board considered the instant Master Plan Application, the relevant section provided: "for communities with municipally adopted comprehensive plans which have not received state approval pursuant to this chapter, these municipalities shall conform their land use decisions to the locally adopted comprehensive plan until the time state approval is granted." Sec 45-22.2-13(d). Since the filing of this appeal, however, the General Assembly amended this provision, which now reads:

> "Each municipality shall amend its zoning ordinance and map to conform to the comprehensive plan in accordance with the implementation program as required by subdivision 45-22.2-6(b)(11) and paragraph 45-22.2-6(b)(12)(iv). The zoning ordinance and map in effect at the time of plan adoption shall remain in force until amended. In instances where the zoning ordinance is in conflict with an adopted comprehensive plan, the zoning ordinance in effect at the time of the comprehensive plan adoption shall direct municipal land use decisions until

[5] The relevant amendment may be found at P.L. 2011, ch. 215, § 1, et seq.

> such time as the zoning ordinance is amended to achieve consistency with the comprehensive plan and its implementation schedule. In instances of uncertainty in the internal construction or application of any section of the zoning ordinance or map, the ordinance or map shall be construed in a manner that will further the implementation of, and not be contrary to, the goals and policies and applicable content of the adopted comprehensive plan." Sec. 45-22.2-13(c).

According to Appellants, this amendment controls; thus, the Ordinance's designation of the Property as being in a manufacturing zone trumps the mixed-use village category set forth in the Comprehensive Plan.

It is axiomatic that the "'Court presumes that statutes and their amendments operate prospectively' absent 'clear, strong language or a necessary implication that the General Assembly intended to give the statute retroactive effect.'" R.I. Mobile Sportfishermen, Inc. v. Nope's Island Conservation, 59 A.3d 112, 118 (R.I. 2013) (quoting Direct Action for Rights & Equality v. Gannon, 819 A.2d 651, 658 (R.I. 2003)); see also Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 4 (R.I. 2005) ("We only give statutes retroactive effect when the Legislature clearly expresses such an application.").

There is no indication that the General Assembly intended § 45-22.2-13 to apply retrospectively; indeed, the clear language of the amendment provided that the "Act shall take effect upon passage." P.L. 2011, ch. 215, § 5. Consequently,

the statute must be applied prospectively, and Appellants' claim of retrospective applicability must fail.

As noted above, a comprehensive plan "establishes a binding framework or blueprint that dictates town and city promulgation of conforming zoning and planning ordinances[;]" however, it does not follow that a comprehensive plan necessarily should trump an ordinance in the event of a conflict. West, 18 A.3d at 539. This is because each is "intended to work in concert with" the other. Id. at 536.

Section 45-22.2-13(d) provided, in pertinent part, that in situations where "communities with municipally adopted comprehensive plans which have not received state approval pursuant to this chapter, these municipalities shall conform their land use decisions to the locally adopted comprehensive plan until the time state approval is granted." Sec. 45-22.2-13(d). The American Heritage Dictionary defines the term "conform" as following: "To be or act in accord with a set of standards, expectations or specifications . . . . To be similar in form or pattern." The American Heritage Dictionary of the English Language 386 (5th ed. 2011). By requiring land use decisions to "conform with" a local comprehensive plan, the Legislature essentially was mandating that municipal land use decisions be made "in concert with" the associated comprehensive plan. Sec. 45-22.2-13(d); West, 18 A.3d at 539. Nowhere in this language is there a suggestion that a comprehensive

plan should trump an ordinance; indeed, any such interpretation would lead to the absurd result of allowing an amendment to a comprehensive plan to eviscerate or usurp a valid existing ordinance—an outcome the Legislature surely did not intend.

As a result, the Court concludes that, where possible, § 45-22.2-13(d) requires land-use decision makers to conform or harmonize an ordinance with the relevant comprehensive plan. Although the Planning Board recognized this directive and attempted to so harmonize, it was not possible due to the fact that the Ordinance and Comprehensive Plan are so inconsistent. Furthermore, while the Planning Board did not rule that the mixed-use village concept trumped the manufacturing use district, had it done so, it would have committed error because it would have impermissibly overridden the necessary enforcement standards and procedures set forth in the Ordinance. See West, 18 A.3d at 536; § 45–24–29(b)(3). Consequently, the Court concludes that, in the instant matter, the Planning Board should have determined that the Master Plan Application must be reviewed under the Ordinance's standards for a manufacturing use district and not under the Comprehensive Plan's mixed-use village concept. Thus, the Platting Board's failure to reverse this conclusion was error.

B

Applicability of § 45-23-60

The Appellants assert that the Planning Board erroneously subjected its Master Plan Application to a higher standard than that required for master plan approval. Specifically, they contend that the Planning Board required it to meet the standards necessary for preliminary plan approval rather than that required for approval of a master plan application.

It is undisputed that the instant matter involves a major land development proposal and, as such, requires major plan review. See § 45-23-39(a). Such a review comprises "three stages of review, master plan, preliminary plan and final plan, following the pre-application meeting(s) specified in § 45-23-35." Sec. 45-23-39(c).

A master plan is defined as "[a]n overall plan for a proposed project site outlining general, rather than detailed, development intentions. It describes the basic parameters of a major development proposal, rather than giving full engineering details." Sec. 45-23-32(23). A preliminary plan is "[t]he required stage of land development and subdivision review which requires detailed engineered drawings and all required state and federal permits." Sec. 45-23-32(35). A final plan consists of "[t]he final stage of land development and subdivision review." Sec. 45-23-32(13).

With respect to master plan submissions:

> "(1) The applicant shall first submit to the administrative officer the items required by the local regulations for master plans.
> "(2) Requirements 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.
> "(3) Initial comments will be solicited from (i) local agencies including, but not limited to, the planning department, the department of public works, fire and police departments, the conservation and recreation commissions; (ii) adjacent communities; (iii) state agencies, as appropriate, including the departments of environmental management and transportation, and the coastal resources management council; and (iv) federal agencies, as appropriate. The administrative officer shall coordinate review and comments by local officials, adjacent communities, and state and federal agencies." Sec. 45-23-40(a).

Thereafter, a planning board must "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." Sec. 45-23-40(e) (emphasis added).

Section 45-23-63 "is a procedural statute entitled, 'Procedure—Meetings—Votes—Decisions and records.'" New England Development, LLC v. Berg, 913 A.2d 363, 371 (R.I. 2007); § 45-23-63. It provides the procedural framework for

conducting planning board proceedings and votes, as well as instructions to planning boards about the maintenance of its records. See § 45-23-63.[6]

[6] Section 45-23-63 provides:

> "(a) All records of the planning board proceedings and decisions shall be written and kept permanently available for public review. Completed applications for proposed land development and subdivisions projects under review by the planning board shall be available for public review.
>
> "(b) Participation in a planning board meeting or other proceedings by any party is not a cause for civil action or liability except for acts not in good faith, intentional misconduct, knowing violation of law, transactions where there is an improper personal benefit, or malicious, wanton, or willful misconduct.
>
> "(c) All final written comments to the planning board from the administrative officer, municipal departments, the technical review committee, state and federal agencies, and local commissions are part of the permanent record of the development application.
>
> "(d) Votes. All votes of the planning board shall be made part of the permanent record and show the members present and their votes. A decision by the planning board to approve any land development or subdivision application requires a vote for approval by a majority of the current planning board membership.
>
> "(e) All written decisions of the planning board shall be recorded in the land evidence records within thirty-five (35) days after the planning board vote. A copy of the recorded decision shall be mailed within one business day of recording, by any method that provides confirmation of receipt, to the applicant and to any objector who has filed a written request for notice with the administrative officer."

When considering a master plan application, planning boards are required to conduct public informational meetings. See § 45-23-40(c)(1) ("A public informational meeting will be held prior to the planning board decision on the master plan, unless the master plan and preliminary plan approvals are being combined, in which case the public informational meeting is optional, based upon planning board determination."). A public informational meeting is defined as, "A meeting of the planning board or governing body preceded by a notice, open to the public and at which the public is heard." Sec. 45-23-32(37)

The notice required for a planning board's public informational meeting "must be given at least seven (7) days prior to the date of the meeting in a newspaper of general circulation within the municipality. Postcard notice must be mailed to the applicant and to all property owners within the notice area, as specified by local regulations." Sec. 45-23-40(c)(2). At said meeting, the applicant "present[s] the proposed development project." Sec. 45-23-40(c)(3). In addition, "[t]he planning board must allow oral and written comments from the general public. All public comments are to be made part of the public record of the project application." Id.

Planning board proceedings for preliminary plan submissions for major land developments and major subdivisions have more rigorous requirements than those

for a master plan. Accordingly, applications and supporting materials for preliminary plans must

> "include, but are not limited to: engineering plans depicting the existing site conditions, engineering plans depicting the proposed development project, a perimeter survey, all permits required by state or federal agencies prior to commencement of construction, including permits related to freshwater wetlands, the coastal zone, floodplains, preliminary suitability for individual septic disposal systems, public water systems, and connections to state roads." Sec. 45-23-41(2).

In acting upon a preliminary plan submission, a planning board not only must adhere to the mandates contained in § 45-23-63, but also must follow the requirements of § 45-23-60. See § 45-23-41(f) ("A complete application for a major subdivision or development plan shall be approved, approved with conditions or denied, in accordance with the requirements of §§ 45-23-60 and 45-23-63 . . . .") (emphasis added).

Section 45-23-60, sets forth the required findings that a planning board must make in its decision on a preliminary plan application.[7] Specifically, it provides:

> "(a) All local regulations shall require that for all administrative, minor, and major development applications the approving authorities responsible for land development and subdivision review and approval

[7] Planning boards must also make findings under § 45-23-60 when deciding applications for minor land developments and minor subdivisions. Sec. 45-23-38. Furthermore, "[a] planning board may re-assign a proposed minor project to major review only when the planning board is unable to make the positive findings required in § 45-23-60." Sec. 45-23-38(e).

> shall address each of the general purposes stated in § 45-23-30 and make positive findings on the following standard provisions, as part of the proposed project's record prior to approval:
>
> > "(1) The proposed development is consistent with the comprehensive community plan and/or has satisfactorily addressed the issues where there may be inconsistencies;
> >
> > "(2) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance;
> >
> > "(3) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval;
> >
> > . . .
>
> "(b) Except for administrative subdivisions, findings of fact must be supported by legally competent evidence on the record which discloses the nature and character of the observations upon which the fact finders acted." Sec. 45-23-60.

The higher standard required for preliminary plan approval is buttressed by stringent hearing and notice requirements. Thus, "[p]rior to a planning board decision on the preliminary plan, a public hearing, which adheres to the requirements for notice described in § 45-23-42, must be held." Sec. 45-23-41(d) (emphasis added). Section 45-23-42 provides in pertinent part:

> "Public notice of the hearing shall be given at least fourteen (14) days prior to the date of the hearing in a newspaper of general circulation within the municipality following the municipality's usual and customary practices for this kind of advertising. Notice shall be sent to the applicant and to each owner within the notice area, by certified mail, return receipt requested, of the time and place of the hearing not less than ten (10) days prior to

> the date of the hearing. Notice shall also be sent to any individual or entity holding a recorded conservation or preservation restriction on the property that is the subject of the application. The notice shall also include the street address of the subject property, or if no street address is available, the distance from the nearest existing intersection in tenths (1/10's) of a mile. Local regulations may require a supplemental notice that an application for development approval is under consideration be posted at the location in question. The posting is for informational purposes only and does not constitute required notice of a public hearing." Sec. 45-23-42(b).

Furthermore, depending on the location of the property and the scope of the proposal, additional notice requirements may apply. See § 45-23-42(c).

Unlike § 45-23-41(f) (requirements for acting upon preliminary plan applications), the plain and ordinary language contained in § 45-23-40(e) (requirements for acting upon master plan applications) does not require a planning board to make positive findings based upon § 45-23-60. Even if the language of § 45-23-41(f) were ambiguous, which it is not, the entire statutory scheme supports the conclusion that planning boards are not required to make findings pursuant to § 45-23-60 with respect to master plan submissions for major developments.

The materials required for master plan submissions merely consist of "information on the natural and built features of the surrounding neighborhood . . ., as well as the proposed design concept, proposed public improvements and dedications . . . and potential neighborhood impacts." Sec. 45-23-40(2) (emphases added). In contrast, preliminary plan submissions require an applicant to submit

materials that are much more detailed in scope, including "engineering plans depicting the existing site conditions [and] . . . the proposed development project, a perimeter survey, all permits required by state or federal agencies . . . , and connections to state roads." Sec. 45-23-41(2) (emphases added). In addition, the notice requirements for a master plan public informational meeting consist of postcard mailings to relevant property owners and seven days public notice, while notice for a preliminary plan public hearing requires fourteen days public notice and certified mailing to relevant property owners, as well as notice to owners of certain recorded property interests. Compare § 45-23-40(d)(2) with § 45-23-42(b). The lesser informational requirements for master plan submissions, coupled with the abridged notice requirements for the associated public informational meeting, reinforces the Court's conclusion that § 45-23-60 does not apply to master plan applications.

C

The Planning Board's Decision

The Appellants assert that by improperly subjecting its application to the requirements of § 45-23-60, the Planning Board committed reversible error when it found there to be legally insufficient evidence to support approval of the plan. They also contend that the Planning Board usurped the role of the Zoning Board when it concluded that the plan would not meet the requirements for a special use

permit and aquifer protection permit. Before addressing these issues, the Court first will address the sufficiency of the evidence and the circumstances surrounding the issuance of the Planning Board's decision.

It is undisputed that the deadline for issuing a decision on the Master Plan Application was on or around July 2, 2009. As stated above, the Planning Board conducted three meetings on the application, specifically, on April 1, May 6, and July 1, 2009.

Professional Engineer Duhamel was the first to testify on behalf of Love's. At the conclusion of his direct testimony, counsel for Love's, Attorney Vincent J. Naccarato (Attorney Naccarato) invited the board members to question Mr. Duhamel. See Tr. I at 16 ("If any of the board members have any questions, he'll be glad to answer them."). Chairman DiOrio responded: "Actually, consistent with our policy, we'd like to have you continue with your presentation and we'll handle all the questions at once." Id.

At the end of the evening, Chairman DiOrio observed that Love's had presented four expert witnesses and he asked: "Can you give me a feel for the rest of your presentation, just looking to budgeting some time . . . [?]" Id. at 42. Attorney Naccarato informed the Planning Board that he intended to call three or four more witnesses in favor of the Master Plan Application. Chairman DiOrio

estimated that Love's would need "about the same amount of time next round - ." Id. He then stated:

> "So for those in the audience who are following this, looks like there's going to be at least another evening where the Applicant is going to do a presentation, and then we are going to follow our policy, Planning Board, all the other - all other local agencies will do questions, comments, public, and then the Applicant will have an opportunity to respond. Is that clear for everybody?" Id.

The following colloquy then took place:

> "MR DiORIO: Let's talk about a continuation date and time, then.
> (PAUSE)
> "MR DiORIO: So if we were to offer up the next regular meeting, work for you?
> "MR. NACCARATO: It works, sir, or anything you have in the interim too.
> "MR DiORIO: Isn't that special, yes. How about the next meeting, that would be May 6. The next regular meeting, May 6, 7:00, location to be determined. How's that?
> "MR. NACCARATO: That's fine." Id.

One month later, on May 6, 2009, the meeting reconvened at 7:00 p.m. At that meeting, Attorney Naccarato conducted direct examination of several witnesses. He then advised the Planning Board that he believed he had "concluded all of [his] witnesses." (Tr. II at 57). Attorney Naccarato informed the Planning Board that, pursuant to its request at the beginning of the meeting, he would furnish a transcript of the proceedings "as soon as it is available." Id. at 58. Board member Walker asked Attorney Naccarato: "Would it be possible to have

them available for the next month's meeting so we can review them beforehand?" Id. Thereafter, Chairman DiOrio informed Attorney Naccarato that his "timing is fantastic, 9:30. So I think the continuation is in order." Id. At that point, Board member Walker moved that the meeting be continued "to our next regular meeting, June 3, 2009 at 7 P.M. here at the Town Hall." Id. No cross examination of Applicant's witnesses took place at the May 6, 2009 meeting.

The record reveals that the June 3, 2009 meeting had to be postponed due to the fact that the Town Hall did not have the capacity to accommodate the considerable number of people who wished to attend. The Planning Board reconvened on July 1, 2009. At that meeting, Town Solicitor Scott Levesque (Attorney Levesque) detailed events that had occurred since the previously postponed meeting:

> "Now, after the board entertained a motion to adjourn given capacity issues, I spoke to Mr. Naccarato about the fact that we did, in fact, have a deadline that was approaching, in fact, is tomorrow, for making our decision. And at that point I asked Mr. Naccarato to talk to his client about extending the time in which this board had to make its decision. Mr. Naccarato did agree to do so.
>
> "We spoke next about the issue on June 12. And at that point I learned for the first time that the Applicant was not going to give an extension for us to decide this matter as a board. During the context of that conversation, I indicated to Mr. Naccarato that the record was not complete and that the board would like the opportunity to complete the record. I asked Mr. [Naccarato] to go back to his client and again asked for

> whatever brief extension he could obtain so that the board could do whatever meetings it could, including special meetings, to get the record complete.
>
> "I next heard from Mr. Naccarato on June 25. At that point I learned that no further extension was going to be given; and that was our final answer, as it were." Tr. III at 20-21.

Attorney Levesque then asked Attorney Naccarato: "I take it, Mr. Naccarato, that the position of the Applicant is still the same, that there will be no further extension?" Id. at 21. A lengthy colloquy ensued which is worth reproducing here in full:

> "MR. NACCARATO: Am I a witness here?
> "MR. LEVESQUE: I don't need to swear you in, but if you'd like to answer.
> "MR. DiORIO: It's a simple question. We've got to get to it sooner or later.
> "MR. NACCARATO: You know, I think I'd like to see how far we get this evening and at what time, and then confer with my client and then we'll make a decision.
> "MR. LEVESQUE: Okay.
> "MR. DiORIO: I would only, and I don't think I need to tell you this, but clearly the board needs a little time to structure a response in the event that the Applicant decides not to grant the extension. So just, logistically, how do you see that playing out? Are you going to tell us at 9:30?
> "MR. NACCARATO: You know, you put us in a - - you make us look like bad guys.
> "MR. DiORIO: That's certainly not my intention.
> "MR. NACCARATO: And that's not the case. You know, we've been here. As [Attorney Levesque] has pointed out, this application was filed in November. My client has been here from Oklahoma five times. Through no fault of our own . . . , we haven't gone beyond any

given time at regular meetings. We want to be cooperative. However, . . . there's tit for tat also.

And if you're going - - I was going to ask for a ruling as to whether you're going to let us examine any witnesses that may come forward tonight. If that's the case, maybe we would extend it. If it's not the case, probably we would not.

"MR. DiORIO: Well, Mr. Naccarato - -

"MR. NACCARATO: That's our feeling, that's our feeling at this time.

"MR. DiORIO: I don't want to speak necessarily for the board, but I'll tell you my personal opinion is the folks, most of the folks in this room have been quite patient in hearing your application. We've given you, we've extended you every courtesy. I think it's time to hear from the people in this room.

"Now, if that's not going to allow you time to question and cross-examine, it's inevitable that we're going to run out of time this evening.

"MR. NACCARATO: You know, I suppose it depends on what is presented this evening.

"MR. DiORIO: I have a room full of people that I'm sure most of them are going to say something.

"MR. NACCARATO: Yeah.

"MR. DiORIO: So, again, logistically I just need to plan ahead because I need to shut people off so that the board can make a decision. I'm not springing anything on you, you know that we've got to do that.

"MR. NACCARATO: No, I know the procedure. Look, I've been here before, like all of us. I understand the procedure. However, you know, it works both ways. It works both ways as far as what you have to present and what we've done. Obviously, we've gone far, far beyond what is required at master plan.

"MR. DiORIO: That's appreciated but not the point.

"MR. NACCARATO: Not the point, but it - - also we were almost four months from the time of application until a certificate of approval. I mean, you know - -

"MR. DiORIO: That's interesting as well but not the point.

> "MR. NACCARATO: Again not the point. I agree with you. But at this particular point, our decision has been given, been given twice.
> "MR. DiORIO: Okay. So I have that as a formal acknowledgement that there will be no extension.
> "MR. NACCARATO: I would certainly like to extend the courtesy to you. However, I have to see what is presented before I can make an absolute final decision if you request a further extension. Yeah, and what would help if we get an opportunity to review the record of what's been put in, how many letters were put in, 14 letters. That never was sent to us. I don't have, you know - -
> "MR. DiORIO: I understand. All I know is - -
> "MR. NACCARATO: I'd gladly review them while the public comment is being made.
> "MR. DiORIO: Okay. Okay.
> . . .
> "MR. NACCARATO: Including ourselves.
> "MR. DiORIO: I'm just trying to be straight up with you that at 9:30 the bell is going to ring and somebody has got to make a decision. Okay?
> "MR. NACCARATO: Okay." Id. at 21-25.

After this lengthy exchange, Chairman DiOrio observed that "the next order of business would normally be for the Planning Board to question the Applicant and his experts. [He stated] [p]ersonally, I am willing to forego as a Planning Board member my questions and comments in an effort to get to the public, who I appreciate have been most patient in this regard." Id. at 26. Upon subsequent motion, the Planning Board unanimously voted to "stand down on its questions and comments and . . . move directly to public questions." Id. at 27.

Later, during the meeting, a member of the public asked the Planning Board: "what if you guys are confronted with the fact that we don't have enough time to get the full story? How must you decide[?]" Id. at 33. Chairman DiOrio responded:

> "At 9:30 the bell will ring and we will make a decision . . . . A decision needs to be made at 9:30, that's the black and white of it, unless the Applicant - -
> "VOICE: Unless he grants the exception.
> "MR. DiORIO: Reconsiders, sure." Id.

During the course of Attorney Naccarato's cross examination of a witness, Chairman DiOrio stated: "I am not going to suggest that you're done but I think we need to move on." Mr. Naccarato observed that counsel for the Gingerella family, Attorney Eric S. Brainsky, had not yet had an opportunity to cross-examine the witness, and offered to turn the witness over to him for his examination. See id. at 80-81. Chairman DiOrio then declared: "You have three minutes. How's that?" Id. at 81. Attorney Naccarato took issue with this comment, stating "Look, I - - look, I am very sorry. However, you have to understand that, everybody in this room has to understand, that we're dealing with a use of a particular land owner's property. And we have testimony here that we vehemently disagree with as to its interpretation." Id. Chairman DiOrio responded: "I understand. You have to trim your time back. . . . I will be watching the clock." Id.

Towards the end of the evening, Attorney Naccarato reiterated that an extension to the deadline would not be granted. Id. at 111. Chairman DiOrio reacted by stating

> "Okay. So I have, for the record, the Applicant has selected not to grant any extension. So that puts us in a position where I believe we're ready to make a decision; we must.
>
> "Let's take a break. So to afford the Planning Board a few minutes to glue something together. Why don't we take a ten- minute break. I have 9:36. Thank you.
>
> (BRIEF RECESS)
>
> "MR. DiORIO: With our pending deadline of tomorrow, I believe the board is in a position to make a decision.
>
> At this time I'd entertain a motion." Id.

At this point, Board member Walker delivered his motion into the record—the adoption of which constituted the Planning Board's decision in the matter. After the reading of the motion, but before a vote was taken, Attorney Naccarato made the following statement:

> "I just want the record to reflect that Mr. Walker's motion was read from an extensive typed document, from what I could see. This obviously, if this board votes in the affirmative, is a preordained decision on behalf of this board. Further, I'd like to point out Mr. Walker amended his motion at the direction of the Town Solicitor. I'd like to have the record reflect that." Id. at 146.

Attorney Naccarato's statement was duly noted; thereupon, the Planning Board voted unanimously in favor of the motion. The meeting was adjourned at 10:30 p.m.

In its decision, the Planning Board stated: "The vast majority of the time allocated to hear applications on April 1 was consumed by this Applicant, and the Applicant's presentation completely consumed the meeting time with no input from the Planning Board or the public." Id. at 116. It then observed that "[w]hile the Applicant's attorney raised the possibility of a special meeting [on April 1, 2009], he neither offered any argument to support the need for one nor impressed upon the Planning Board members that they should make special accommodations since no customary extensions of the deadline to decide the application would be forthcoming." Id. at 117. The Planning Board further observed that on May 6, 2009, "[t]he entire meeting was again consumed by this Applicant . . . ." Id. at 118.

After outlining the negotiations surrounding the Planning Board's request for a deadline extension, the Planning Board declared in its decision:

> "The Applicant now stands before this board demanding a decision on the project and refusing to give the board any more time to complete the record when this Applicant has been given full uninterrupted use of this board's time to present the project. As a result, roughly 90 days of the 120-day deadline was wholly consumed by this Applicant. Most of the remaining 30 days lapsed after the June meeting was not able to be held, due to no

> fault of either the Applicant or the board. This forces the board to decide this application upon a one-sided and incomplete record.
> . . .
> "The Applicant's refusal to extend the deadline for a decision has the effect of preventing members of the public from commenting . . . .
> . . .
> "Regrettably, the Applicant's decision leaves the board with no choice but to consider a complex application on very limited evidence, consisting mostly of unquestioned and unchallenged testimony of the Applicant's own witnesses." Id. at 121-22.

Then, stating that it is legally required to make positive findings, the Planning Board found: "Clearly the board cannot legally approve the project even at this conceptual master plan stage unless it finds from legally competent evidence in the record that the project would fulfill the . . . purposes and standards" of the Development Review Act. (Id. at 124). Accordingly, the Planning Board found that "the legally competent evidence on the record is insufficient to permit a finding that the project qualifies for the required special use permit." Id. at 128.

In Section 5 of the decision, entitled "Matters reserved for future consideration[,]" the Planning Board stated:

> "Unfortunately, the record now before the board does not permit us to address all of the issues that would normally consume a lot of our attention because the record is completely one-sided. We can address only those matters for which the Applicant has failed to produce legally competent evidence on questions as to which the Applicant has the burden of proof and where the

> Applicant has failed to present sufficient evidence to support a necessary finding in its favor." Id. at 143.

Chapter 23 of title 45, entitled the Rhode Island Land Development and Subdivision Review Enabling Act of 1992 or Development Review Act (the Act), "sets the parameters for localities' regulations governing administrative, minor, and major development applications." West, 18 A.3d at 536. Section 45-23-40(e) requires that a "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[,]" act upon a master plan application. Sec. 45-23-40(e). Thus, according to the plain language of this provision, a planning board has 120 days to act upon a master plan application. In determining whether this time provision is either mandatory or directory, the Court must look to factors such as "(1) the presence or absence of a sanction, (2) whether the provision is the essence of the statute, and (3) whether the provision is aimed at public officers." West, 18 A.3d at 534.

The first factor is satisfied because the sanction for failing to act upon a master plan application within 120 days constitutes automatic approval of the application by operation of law. See Sec. 45-23-40(f) ("Failure of the planning board to act within the prescribed period constitutes approval of the master plan . . . and the resulting approval will be issued on request of the applicant."); New England Development, LLC, 913 A.2d at 363; (holding § 45-23-40(f) as

"contain[ing] 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 administrative officer to issue the certificate of the planning board's failure to act"). Given the mandatory nature of the 120-day requirement, i.e., whether the provision is the essence of the statute, the Court concludes that the second factor is satisfied. As for the third factor, there is no question that the provision is directed to public officers; thus, that factor has also been satisfied. Consequently, the Court concludes that the 120-day requirement to act is mandatory in nature. Conversely, while an applicant may consent to an extension of the deadline, there is nothing in the statute to suggest that this consent must be given. Indeed, were an applicant required to consent to an extension, the mandatory element of the statute would be rendered a nullity.

In the present case, the mandatory nature of the statute's requirement was acknowledged by the Planning Board when it repeatedly observed that it was under a deadline to issue its decision and when it attempted to obtain Love's consent to an extension of said deadline in order to question Love's witnesses and hear from members of the public. Although the Board complained that the presentation of evidence was "one-sided," and that it did not have an opportunity to question

Love's witnesses, the record reveals that Love's did not contribute to these alleged deficiencies.

At the April 1, 2009 meeting, the Planning Board declined an offer to question one of Love's witnesses, citing its policy of waiting until the end of an applicant's case-in-chief before cross-examining witnesses. Thereafter, Attorney Naccarato informed the Planning Board that it intended to call three to four more witnesses whose testimony probably would consume most of the time allocated for the next meeting. When Attorney Naccarato indicated that Love's would be willing to reconvene before the next regular meeting, Chairman DiOrio responded: "Isn't that special, yes. How about the next meeting, that would be May 6. The next regular meeting, May 6, 7:00 . . . ." (Tr. I at 42.)

As anticipated, the direct testimony of Love's subsequent witnesses lasted until 9:30 p.m. at the May 6, 2009 meeting. At that point, not a single question of cross-examination had been asked of any of Love's expert witnesses. Rather than extend the meeting beyond its usual time, Chairman DiOrio adjourned the meeting after informing Attorney Naccarato that: "your timing is fantastic, 9:30. So I think the continuation is in order." (Tr. II at 58.) The next meeting was scheduled to occur at the next regular monthly meeting on June 3, 2009.

On June 3, 2009, the meeting was cancelled due to overcrowding problems at the Town Hall. Although none of Love's expert witnesses had been cross

examined, and not one remonstrant had been afforded an opportunity to testify, the Planning Board continued the matter to its next monthly meeting on July 1, 2009.

At the July 1, 2009 meeting, the Planning Board unsuccessfully attempted to obtain Love's consent to an extension of the deadline. It criticized Love's for its refusal to extend the deadline and faulted Love's for the one-sided nature of the evidence. Statutorily, Love's was under no obligation to grant any such extension. The Planning Board, on the other hand, knew it was under an obligation to issue its decision on or before the deadline, and that the failure to do so would have constituted approval of the Master Plan Application by operation of law. Cognizant of the deadline, the Planning Board approved a motion to forego questioning Love's expert witnesses in order to allow remonstrants to testify. Toward the end of the meeting, the Planning Board members unanimously voted to adopt a prepared motion as its decision and adjourned the meeting at 10:30 p.m. Id. at 147.[8]

In view of this procedural history, the Court concludes that although the Planning Board complained that the presentation of evidence was "one-sided," this is not attributable to the Applicant. The record reveals that while the Planning

[8] When it became clear that Love's would not grant a deadline extension, Dan Prentiss, a representative from the Wood-Pawcatuck Watershed Association and the Hopkinton Historical Association, made a motion to strike all of Love's testimonial evidence because its witnesses had not been cross-examined. (Tr. III at 110-111). The Planning Board did not rule on the motion.

Board was aware, by the end of the April 1, 2009 meeting, that Love's might require an additional session to present its expert witnesses, the Board neither extended that meeting nor scheduled an interim meeting.[9] The record reflects that the May 6, 2009 meeting was adjourned at its regular time of 9:30 p.m. When the June 3, 2009 meeting had to be cancelled due to overcrowding, the Planning Board was fully aware that there had been no opposing testimony or cross-examination of Applicant's witnesses; nonetheless, it scheduled its next meeting for its regularly scheduled meeting of July 1, 2009, one day before the statutory deadline. As a result, the Planning Board was obliged to issue an immediate decision or be sanctioned with an approval of the Master Plan Application by operation of law. The relevant question facing the Court is whether Love's presented sufficient information and satisfied the requirements of § 45-23-40(a).

In its decision, the Planning Board found the legally competent evidence to be insufficient for purposes of making findings on the special use permits and aquifer protection permit. It found that there was insufficient evidence "to permit a finding that the project qualifies for the required special use permit[,]" and that "the project [was] not compatible with protection of property values and

[9] An interim informational meeting merely would have required notice of "at least seven (7) days prior to the date of the meeting in a newspaper of general circulation within the municipality . . . [and] [p]ostcard notice . . . mailed to the applicant and to all property owners within the notice area, as specified by local regulations." Sec. 45-23-40(c)(2).

neighboring properties." (Tr. III at 128). It also found that "the project [was] not environmentally compatible with neighboring properties" because it potentially could "compromise [] the aquifer that is the sole source of drinking water for the southern part of Hopkinton." Id. at 131. The Planning Board further found that it was unable to "make the indispensable finding that the project would be environmentally compatible with neighboring properties" because Love's failed to provide adequate testimony or other evidence to alleviate the Board's concerns about air, light and noise pollution. Id. at 137. In addition, the Planning Board found:

> "Installation of the [non-transient non-community] well would cause the proposed site to fall within a wellhead protection area and cause the site to be reclassified as part of the so-called primary aquifer protection zone. As a result, USTs would be prohibited on this site according to . . . the zoning code." (Tr. III at 133-134).

As a result of these findings, the Planning Board concluded that

> "the legally competent evidence on the record is insufficient to support several findings required by the Enabling Act.
> "No. 1. That the proposed development is not in compliance with the standards and provisions of the town zoning ordinance. As set forth in detail in A 1 through 4 above, the proposed development does not meet the requirements for a special use permit without which it cannot proceed. Therefore, it is not in compliance with the standards and provisions of the zoning ordinance and so cannot, consistent with the Enabling Act, be approved.
> "Section 2. The proposed development would likely have a significant negative environmental impact. As set

> forth in detail above, the project would likely . . . impair neighboring property owners' use and enjoyment of their properties. Therefore, the project does not meet this essential requirement for approval under the Enabling Act.
> "Section 3. The proposed project is not consistent with the town's comprehensive plan and cannot be made so. As the Planner has stated in his report, several elements of the town's comprehensive plan include, among their goals, the preservation of the rural character of the town and the integrity of its landscape.
> "For the reasons stated in detail in Section A1 through 4 above, this project is completely inconsistent with those goals." Id. at 140-141.

The foregoing findings and conclusions of the Board presume that Love's was required to provide legally competent evidence to satisfy the mandates of § 45-23-60 at the master plan stage of its proposal. This was error.

As stated above, Love's was required to provide information about the proposed project in accordance with § 45-23-40(a). Once Love's submitted the requisite information and its application was certified as complete, the Planning Board had 120 days to provide a public informational meeting and render its decision to "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." Sec. 45-23-40(e) (emphasis added).[10] Thus, hypothetically, if Love's development plan had included single-family residences, the Planning Board properly could

[10] The Appellants have not alleged that the Planning Board failed to follow the requirements of § 45-23-63.

have denied the Master Plan Application because such a use is prohibited in manufacturing use districts and, therefore, could never qualify for a special use permit under the Ordinance. However, the Planning Board did not have the authority to deny the Master Plan Application based upon findings made pursuant to § 45-23-60.

Even if the Planning Board did have the authority to make findings under § 45-23-60 at the master plan stage of the development, its findings with respect to the special use permits and aquifer protection plan permit remain erroneous. Although the Platting Board contends that the Planning Board's decision consisted of "only passing on whether the applicant ha[d] sufficient evidence to gain approval for a special use permit, variance, or aquifer protection permit, [and was] not determining whether the permit should be granted[,]" (Appellees' Brief at 22), in essence, the effect of the Planning Board's determinations amounted to a denial of said permits.

Section 10 (3) of the Ordinance provides:

> "The zoning board, at its next meeting after receipt of a complete application for a special use permit may request that the planning board and/or town planner report its findings and recommendations, including a statement on the general consistency of the application, with the goals and purposes of the comprehensive plan of the town, writing to it within thirty (30) days of receipt from it." (Emphasis added.)

The Ordinance further provides: "[d]evelopment plan review may be conducted by the planning board at the request of the zoning board or town council for applications for uses requiring a special use permit, a variance, a zoning ordinance amendment, and/or a zoning map change. The review, conducted by the planning board, shall be advisory to the permitting authority." Section 15 (B) of the Ordinance (emphases added).

Chapter 131 of the Ordinance, entitled the "Groundwater & Wellhead Protection Ordinance," constitutes an amendment to the Ordinance. It sets forth a District Use Table delineating the uses which require an aquifer protection permit and provides that "[i]t shall be the responsibility of the zoning enforcement officer to determine which use classification a proposed use is governed by." Sec. 5 of the Ordinance (as amended). In the event that an aquifer protection permit is required:

> "[t]he zoning board, at its next meeting after receipt of a complete application for an Aquifer Permit Protection Permit may request that the planning board and/or town planner and the conservation commission report their findings and recommendations, including a statement on the general consistency of the application with the goals and purposes of the comprehensive plan of the town, writing to the zoning board within thirty (30) days of the zoning board request." Sec. 5(a)(3)(B) the Ordinance (as amended) (emphases added).

Whether or not the Zoning Board makes such a request, it must "hold a [duly] noticed public hearing on any application for an Aquifer Protection Permit . . ." Sec. 5(a)(3)(C) the Ordinance (as amended). Should the Zoning Board grant

such application, it must do so only after it is "satisfied by legally competent evidence . . . ." Sec. 5(a)(3)(C) the Ordinance (as amended).

It is clear that the Planning Board's role with respect to the issuance of a special use permit or aquifer protection permit is to give a recommendation and/or advice only upon request of the Zoning Board. Here, there is no evidence that any such requests were made of the Zoning Board and, even if there were, by denying the Master Plan Application on the basis that Love's had provided insufficient evidence "to permit a finding that the project qualifies for the required special use permit[,]" (Tr. III at 128), the Planning Board usurped the role of the Zoning Board, which is "charged with . . . deciding applications for variances and special exceptions." Town of Coventry Zoning Bd. of Review v. Omni Dev. Corp., 814 A.2d 889, 896 (R.I. 2003). A similar conclusion can be made with respect to the Planning Board's conclusion that "USTs would be prohibited on this site according to . . . the zoning code." (Tr. III at 134). Furthermore, even assuming that the Planning Board's findings with respect to the special use permit and aquifer protection permit could be construed merely as recommendations to the Zoning Board, the Planning Board's denial of the Master Plan Application, on the basis of insufficient evidence for the permits, essentially eviscerated the need for the permits in the first instance, rendering futile Love's further pursuit of said permit applications.

In view of the foregoing, the Court concludes that the Planning Board erroneously applied the requirements of § 45-23-60 to the instant application. It further erred in denying the Master Plan Application based upon its conclusion that Love's did not present sufficient evidence to obtain special use permits and an aquifer protection plan permit. A review of the record reveals that Love's presented sufficient information necessary to satisfy the requirements of § 45-23-40(a), as evidenced by the certification of completeness. The fact that the informational meetings may have been "one-sided" cannot, and should not, be imputed to Love's which was under no obligation to consent to an extension so that opposing information could be elicited. See § 45-23-40(e) (requiring the Planning Board to act upon a master plan application within "120 days of certification of completeness, or within a further amount of time that may be consented to by the applicant."). As a result of the Planning Board's errors, the Court concludes that the Platting Board erroneously upheld the Planning Board's decision. Instead, it should have reversed the Planning Board's decision, approved the Master Plan Application, and remanded the matter to the Planning Board so that the Master Plan Application could proceed to the preliminary plan stage of the process.

IV

Conclusion

After a review of the entire record, this Court finds that the Platting Board's decision was unsupported by the reliable, probative, and substantial evidence, was arbitrary and capricious, and was in violation of statutory, ordinance, and planning board provisions. The Platting Board's decision was also affected by error of law and was characterized by an abuse of discretion. Specifically, the Platting Board's decision erroneously upheld an erroneous application of the Comprehensive Plan and an erroneous application of § 45-23-40. Substantial rights of the Appellants have been prejudiced as a result. Accordingly, this Court reverses the Platting Board's decision to uphold the Planning Board and remands the matter to the Platting Board for further proceedings consistent with this Decision.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Love's Travel Stops and Country Stores, Inc. v. Alfred DiOrio, et al.**
CASE NO:	**WC 09-844**
COURT:	**Washington County Superior Court**
DATE DECISION FILED:	**March 21, 2014**
JUSTICE/MAGISTRATE:	**Thunberg, J.**
ATTORNEYS:	
For Plaintiff:	**Kelly M. Fracassa, Esq.** **John O. Mancini, Esq.**
For Defendant:	**Todd J. Romano, Esq.**