STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: September 14, 2017)

ELISABETH BUX	:	
	:	
V.	:	**C.A. No. PM-2015-4901**
	:	
MICHAEL DIMEO; MARY DIMEO; CF INVESTMENTS, LLC; MTM DEVELOPMENT CORP.; and the ZONING BOARD of APPEALS of the TOWN of JOHNSTON	:	

DECISION

CARNES, J. Before the Court is an appeal from a decision of the Zoning Board of Review for the Town of Johnston (Town), sitting as the Johnston Board of Appeals (Board of Appeals). In its decision, the Board of Appeals upheld a decision of the Johnston Planning Board (Planning Board) to grant a Master Plan for a Major Land Development in Johnston (Master Plan Decision). Appellant Elisabeth Bux (Ms. Bux or Appellant) contends that the Master Plan Decision contains multiple legal errors and asks this Court to reverse the decision and deny the Master Plan approval. Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

I

Facts and Travel

Michael and Mary DiMeo own property located at 396 Greenville Avenue, Johnston, RI, and otherwise known as Lots 17, 20, and 186 on Tax Assessor's Map 47 in the Town's Land Evidence Records. (Corrected Planning Board Advisory Opinion to Town Council at 1, Jan. 28, 2014.) The property consists of 38.83 contiguous acres, and it is located in an R-20 zoned area. Id. The Applicants—CF Investments, LLC and MTM Development Corp.—are seeking major

land development approval "to demolish existing farm structures and develop a 7.1 acre portion of the 38.83 acre farm to construct a private age restricted (55+) community with an 870 foot private cul de sac and ten duplex style structures for 20 residential condo units[.]" Id. There will be "conservation easements on the remaining land to prohibit future residential development . . . ." Id. at 2. The proposed development requires a change in zoning from an R-20 to an R-10 zoned district. Id. at 1.

On January 7, 2014, the Planning Board conducted a public informational hearing on the proposed Master Plan for the property. Id. At the hearing, Applicants presented several expert witnesses in support of their plan; specifically, certified land use planner, Joseph Lombardo (Mr. Lombardo); professional engineer, Scott F. Moorehead (Mr. Moorehead); architect, Spencer McCombe (Mr. McCombe); and landscape architect, Hali Beckman (Ms. Beckman). In addition, various objectors testified in opposition to the proposal.[1]

Mr. Lombardo opined that the plan was consistent with the Town's Comprehensive Plan and Future Land Use Map because both of them contemplate "clustering residential developments and preserving open space," and that "[a]lmost three-quarters of that property will stay as open space, permanently, for the conservation easement." (Tr. 11, Jan. 7, 2014) (Tr. I)). He further testified that although the required zoning change would increase the density of the property from medium to medium-high, the fact that the development would consist of twenty units on almost forty acres of land means that the effective density would be almost two acres per unit, or one acre per unit if the wetlands portion of the property is subtracted out. Id. at 10. Mr. Lombardo then stated that the age restrictions for owners will achieve another goal of zoning; namely, diversity and balance of housing choices, and that it will open up the single-

[1] The Court observes that Appellant did not present any opposing evidence or testimony at the public informational hearing.

family housing stock as older members of the community sell their homes to move into the development. Id. at 12.

Mr. Lombardo later testified that the duplex buildings "are not much larger than a typical single-family home, so, you know, from that perspective, they'll fit in and look like a cluster development of larger single-family homes . . . ." Id. at 40. Consequently, he opined, the development should not degrade or devalue abutting properties. Id.

Mr. Moorehead testified about the proposed water and sewer lines. He stated that the water line and a gravel sewer would be placed within the proposed cul-de-sac roadway for the development. Id. at 16. In addition, the project anticipates the placement of "a gravity sewer out to Greenville Avenue through a paper street over which we have a right-of-way to Greenville Avenue." Id. Mr. Moorehead further stated that the sewers and roadway will be "privately owned, privately maintained [and that] [t]here will be no cost to the Town for maintenance, repairs, improvements, in perpetuity." Id. Mr. Moorehead then impressed upon the Planning Board that

> "the net flow from our proposed development would be at or below the existing condition, and knowing there are existing drainage problems, what we would endeavor to do is design the drainage to have a net reduction from our site so there would be no impact to any neighborhoods, either upstream or downstream from our development." Id. at 17-18.

He also noted that the plan requires permit approval from both the Department of Environmental Management and the Department of Transportation. Id. at 18.

Mr. Moorehead later testified that the Town's Technical Review Committee and Fire Department had indicated that "they were happy with the layout of the road, the turnaround, and the hydrant locations at that time, subject to [there] being adequate fire protection flow." Id. at 30. Town Building Official Bernard J. Nascenzi informed the Planning Board that before any

building permits can issue on the property, all water and sewer upgrades must be approved and completed. See id. at 35 ("I mean, if the system in place doesn't comply with the Rhode Island State Building Code, . . . it doesn't get built.").

Mr. McCombe testified that each unit will have two bedrooms, two bathrooms, an open kitchen, dining and living area, and a two-car garage. Id. at 19. Each unit also will contain "a small porch welcoming you as you drive along the street." Id. at 20. He further testified that the duplexes will have two gables facing the street with "a bit of a steeper roof" to "help sort of soften the look of it and give it that New England look." Id. Mr. McCombe concluded by stating that

> "the design is based on white cedar shingles that will be probably, with some bleaching oil, to give them a little bit of definition and design, the white trim, and simple detailing with some overhangs to give them a nice New England look." Id. at 21.

Ms. Beckman next testified on behalf of the Applicants. Ms. Beckman stated that the proposal will exceed the regulatory requirement of fifteen percent vegetated surface and open space, as well as the requirement for planting trees along the street. Id. at 23. She also stated that in addition to the existing vegetation, the plan calls for densely planting approximately ninety-one, eight-to-ten-foot trees of several different varieties, as well as for stockade fences along the south, southeast, and northern property lines. Id.

At the conclusion of the expert testimony, several abutters testified. Abutter Phil Lemoi expressed his concern about ongoing problems with the natural gas lines in the area and whether the development would exacerbate these problems if it hooked into the same gas lines. Id. at 44-45. Mr. Moorehead testified that while gas would be preferable, it would depend upon the capability of National Grid's system. Id. at 45. The Building Official agreed, stating that if

upgrades of the electrical or gas systems are necessary, then National Grid would pass the charge onto the developers as part of the tie-in fee. Id. at 47.

Other concerns that the abutters raised at the public informational hearing included the length of time it would take for construction to be completed and the safety of surrounding properties should blasting be necessary; whether the proposed open space might be developed in the future; what would happen if the homeowners' association goes under; and whether the proposed zoning change from R-20 to R-10 would affect the entire neighborhood.

Town Planner and Administrative Officer Pamela M. Sherrill AICP (Town Planner), who previously had submitted a report to the Planning Board, stated that before any construction could take place, both the stormwater management portion of the project and the road first must be put in place. Id. at 49. She also stated that the Planning Board would review the conservation easements and condominium association documents at the preliminary stage of the process, and that the Town has "the power to put a lien on the property . . . [as a] way that the Town can get assurance that it will be maintained." Id. at 55 and 61. Counsel for the Applicants noted that one of the project's stipulations is that all of the landscaping must be in place before construction may begin, id. at 78; that the construction phase of such projects typically takes twelve to eighteen months, id. at 48; and that the proposed zoning change "is very site specific . . . it doesn't effect [sic] anything else and it does not set precedent." Id. at 61. With respect to blasting, Mr. Moorehead testified that questions about that issue were premature, as they first would have to test the groundwater and soil; however, he would able to properly address the issue at the preliminary stage of the application. Id. at 78-79.

Objector Jeanne Lynch read a letter into the record from the Director of the Woonasquatucket Watershed Council. Id. at 86-87. Said letter expressed concern about the

project's "strong potential to effect [sic] stormwater runoffs into tributaries of Asapumset Brook, a feeder stream to the Woonasquatucket River." Id. at 86. The letter suggested that stormwater be treated on-site; that "low-impact development techniques be employed in accordance with the State stormwater manual"[;] that any landscaping should use "minimal fertilization"[;] that water conservation techniques, such as soil-moisture-controlled automatic sprinkler systems, be employed instead of standard timers; and that the landscaping be organic. Id. at 87. Counsel for Applicants said that the application addresses all of the aforementioned concerns. Id. at 89.

Ms. Lynch also testified on behalf of the Rhode Island Association of Conservation Districts. She stated that "protecting farmland is very important to me[,]" id. at 88, and she expressed concern that future residents might complain about farm odors from existing farm operations in the area after they move into the development. Id. at 90-92. She also expressed concern about what the development might do to the livelihood of local organic farmers. Id. at 92.

At the conclusion of the public informational hearing, the Planning Board voted to accept the Town Planner's December 31, 2013 Memorandum (Planner's Memorandum). Id. at 93. After the Planning Board accepted the Planner's Memorandum, one of its members made

> "a motion to approve the Master Plan on the DiMeo Farm, based upon the submitted application, testimony presented to the Board, plan and staff report, and the memorandum from various departments, all of the general purpose[s] of Section 1 of the Town of Johnston, Land Development and Subdivision Review Regulation have been addressed. Positive findings were found for all the standard[s] of Section 5-2, Required Finding.
> "It's also apparent that the proposed Master Plan is consistent with the Town of Johnston Comprehensive Plan, subject to page 5 of the Planner memo dated December 31st, 2013." Id. at 94.

Thereafter, the Planning Board voted unanimously in favor of the motion. Id at 94-95. The Planning Board then unanimously voted to recommend that the Town Council adopt the proposed zoning change for the property. Id. at 96.

On January 14, 2014, the Planning Board issued its Master Plan Decision, as well as an Advisory Opinion to the Johnston Town Council. On January 28, 2014, the Planning Board issued a Corrected Advisory Opinion to the Johnston Town Council. The minutes from the public informational hearing and the Town Planner's Memorandum were attached to each of these documents.

In its Master Plan Decision, the Planning Board found that "[t]he proposed development is consistent with the comprehensive plan as detailed in [the] Planner's report of December 31, 2013, presented in Exhibit B." (Master Plan Decision at 4.) The Planning Board approved the Master Plan "as applied for, substantially in accordance with all of the plans, specifications, and other documentation submitted . . . subject to the proposed master plan conditions on page 5 of the planner's December 31, 2013 memo." Id.

Ms. Bux timely appealed the Master Plan Decision to the Board of Appeals, and on March 27, 2014, the Board of Appeals conducted a hearing on the appeal. After hearing the oral arguments of the parties, the Board of Appeals unanimously voted to uphold the Master Plan Decision and to deny the appeal. On June 16, 2014, Ms. Bux filed an appeal of that decision to the Superior Court.

This Court, however, was unable to review the decision of the Board of Appeals because the certified record was not complete. See Bux v. Dimeo, C.A. No. PC-14-3015, filed June 22, 2015. Consequently, the Court vacated the decision and remanded the matter to the Board of Appeals for it to obtain and review the permanent record from the Planning Board, and to then

issue a decision based upon said review. Id.[2] On September 24, 2015, the Board of Appeals conducted a hearing to certify the record in accordance with this Court's instructions. See Tr. Sept. 24, 2015 (Tr. II).[3]

At the hearing, Ms. Bux sought to introduce certain evidence that was not available at the time of the public informational hearing. (Tr. II at 5.) The Board of Appeals denied the request, but allowed Ms. Bux to make an offer of proof. Id. at 15. After some discussion, the Board of Appeals unanimously voted to uphold the Master Plan Decision. Ms. Bux timely appealed the decision from the Board of Appeals to this Court.

Additional facts will be supplied 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:

> "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

[2] A different justice of the Superior Court issued the remand.

[3] The Court observes that the Board of Appeals contained the same members as it had during its previous review of the matter on March 27, 2014.

> "(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. 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 E. 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 well established 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.

III

Analysis

Ms. Bux raises several issues on appeal. First, she contends the Board of Appeals failed to review the permanent record of the Planning Board before voting to uphold the Planning Board's Master Plan Decision. She next maintains that the Planning Board failed to make independent findings of fact as required by statute. Ms. Bux then avers that the Applicants failed to address the potential impact of the proposed sewer line on neighboring organic farms in their Master Plan. She also asserts that the Master Plan Decision erroneously presupposes that the Applicants have a right to a sewer easement over a paper street that had been dedicated only for highway purposes. Next, Ms. Bux alleges that the Master Plan Decision contained an improper condition; namely, a requirement that the legal department/town engineer provide an opinion as to the validity of the paper street. Finally, Ms. Bux claims that the Board of Appeals should have considered the new evidence she tried to present at the remand hearing.

A

Review of the Planning Board Record

Ms. Bux maintains that the Board of Appeals failed to review the certified record of the Planning Board before voting to uphold the Planning Board's Master Plan Decision. Specifically, she contends that there is no evidence in the record to show that members of the Board of Appeals actually reviewed and considered the certified record to determine whether there was sufficient evidence in that record to support the Planning Board's decision.

Section § 45-23-70 provides in pertinent part:

> "(a) As established by this chapter, in instances of a board of appeal's review of a planning board or administrative officer's decision on matters subject to this chapter, 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.
>
> . . . .
>
> "(d) The board of appeal shall keep complete records of all proceedings including a record of all votes taken, and shall put all decisions on appeals in writing. The board of appeal shall include in the written record the reasons for each decision." Sec. 45-23-70.

On September 24, 2015, the Board of Appeals conducted a hearing after the Court remanded the matter. Prior to the hearing, the Board of Appeals obtained the certified record from the Planning Board. See Tr. II at 5.

During the hearing, the following colloquy took place:

> "[Assistant Town Solicitor] MR. BALLIRANO: So, the Board has reviewed the extensive record of all the Planning Board submissions, and now it's the appropriate time to either - -
> "MR. NASCENZI: Decide.
> "MR. BALLIRANO: - - affirm the Planning Board's Master decision, that they didn't make any errors in their process, or I guess if they thought errors were made, they could remand it back to the Planning Board for submissions.
> "MR. FREZZA: Do I have a motion?
> "MR. PILOZZI: I'm going to make a motion to uphold the Town of Johnston's Planning Board decision for the beginning part of the plan. I read the remand until 4:40 a.m. I find no procedural errors.
> . . .
> "MR. PILOZZI: I found that they covered quite a bit with this application. They had their Technical Review Committee meetings. Mr. Nascenzi, and all the other experts in Town. I think they did a marvelous job with this." Id. at 18-19 (emphasis added).

Mr. Pilozzi later stated that his "motion to uphold would be my findings of fact that the use of the Planner, extensively, is in compliance with [§] 45-23-60. I don't find anything in there that I didn't like as far as procedural error. I found--I thought they were very thorough." Id. at 23-24.

In its October 23, 2015 written decision, the Board of Appeals did not make any new findings of fact; instead, it "incorporate[d] its May 28, 2014 decision into [its] remand decision and expand[ed] its review in accordance with the remand instructions after review of the amended record provided by the Planning Board." Board of Appeals Decision at 2, Oct. 23, 2015. In doing so, the Board of Appeals quoted the Planning Board Member's January 7, 2014 motion to approve the Master Plan. See id.; see also Board of Appeals Decision at 2-3, May 28, 2014; Tr. I at 94.

Although only one member of the Board of Appeals explicitly stated that he had reviewed the certified record, there is nothing in the record to suggest that the other members did not do so as well. Indeed, when the Assistant Town Solicitor stated that "the Board has reviewed the extensive record of all the Planning Board submissions," no-one—not even counsel for Ms. Bux—contradicted this statement. Tr. II at 18; see also § 45-23-70(a) (requiring boards of appeal to "consider the issue upon the findings and record of the planning board or administrative officer").

The Court accepts the Assistant Town Solicitor's representation that the Board of Appeals in fact reviewed the extensive record and rejects Ms. Bux's contention to the contrary. Accordingly, the Court concludes that the Board of Appeals' review of the certified record is not in violation of statutory provisions or made upon unlawful procedure.

B

The Planning Board's Decision

Ms. Bux contends that the Planning Board failed to make independent findings of fact when it approved the Master Plan. The Applicants dispute this contention, stating that the

Master Plan Decision itself, as well as the attached Planner's Memorandum, satisfies the statutory requirements.

Section 45-23-30 provides:

> "Land development and subdivision review ordinances, regulations and rules shall be developed and maintained in accordance with this chapter and with a comprehensive plan which complies with chapter 22.2 of this title and a zoning ordinance which complies with § 45-24-27 et seq. Local regulations shall address the following purposes:
>
> "(1) Providing for the orderly, thorough and expeditious review and approval of land developments and subdivisions;
>
> "(2) Promoting high quality and appropriate design and construction of land developments and subdivisions;
>
> "(3) Promoting the protection of the existing natural and built environment and the mitigation of all significant negative impacts of any proposed development on the existing environment;
>
> "(4) Promoting design of land developments and subdivisions which are well-integrated with the surrounding neighborhoods with regard to natural and built features, and which concentrate development in areas which can best support intensive use by reason of natural characteristics and existing infrastructure;
>
> "(5) Encouraging local design and improvement standards to reflect the intent of the community comprehensive plans with regard to the physical character of the various neighborhoods and districts of the municipality;
>
> "(6) Promoting thorough technical review of all proposed land developments and subdivisions by appropriate local officials;
>
> "(7) Encouraging local requirements for dedications of public land, impact mitigation, and payment-in-lieu thereof, to be based on clear documentation of needs and to be fairly applied and administered; and
>
> "(8) Encouraging the establishment and consistent application of procedures for local record-keeping on all matters of land development and subdivision review, approval and construction." Sec. 45-23-30.

Section 45-23-60, entitled "Procedure--Required Findings[,]" 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 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;
> > "(4) The subdivision, as proposed, will not result in the creation of individual lots with any physical constraints to development that building on those lots according to pertinent regulations and building standards would be impracticable. (See definition of Buildable lot). Lots with physical constraints to development may be created only if identified as permanent open space or permanently reserved for a public purpose on the approved, recorded plans; and
> > "(5) All proposed land developments and all subdivision lots have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered in compliance with this requirement.
>
> "(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 (emphasis added).

During the public informational hearing, the Planning Board specifically voted to accept the Town Planner's Memorandum, which already was part of the record. See Tr. I at 93. In doing so, the Planning Board accepted the findings contained in that Memorandum, wherein the Town Planner found that the requested zone map change was consistent with the six stated goals of the Comprehensive Plan. See Town Planner's Mem. at 3. Specifically, she found that:

> "Consistency with the Comprehensive Plan: The requested zone map change from R-20 to R-10 is consistent with the Future Land Use Map, Figure 10-1A (see attached GIS map with FLUM overlay) based on the following:

- Map identifies the subject lots as Low Density 35,000 to 80,000 sq ft or over per dwelling unit - public water or sewer (see attached) with Targeted Open Space (TOS).
- 38 acre site (or 52.69 as indicated in the assessor's field cards) has been proposed for 20 dwelling units or over 82,000 sf ft per unit. Proposed development will be served with public water and sewer. As indicated in the Suitable Land Analysis on Sheet 1 of 2, 21.5 +/- acres are suitable (not wetlands or buffers), yielding an overall density of over 46,000 sf/unit. With conservation easements on the remaining land to prohibit future residential development, the overall density is consistent with the comprehensive plan.
- Preservation of open space through implementation of conservation easements on a portion of the subject property is consistent with the future land use map TOS designation.
- Although a portion of the symbol for Affordable Housing Overlay (crosshatched) extends onto the subject lots in the Future Land Use Map, the Affordable Housing Plan (Appendix A of the Comprehensive Plan) identifies Cherry Hill Road - PD zoned area known as DePetrillo property (more specifically identified as AP 47/Lot 10) and surrounding vicinity as suitable for 100 units including 25 affordable. The subject lots are NOT part of the Affordable Housing Overlay.

"The requested zone map change (with grant of a conservation and/or drainage easement on the remaining land not proposed for development) is consistent with the six stated goals of the Comprehensive Planning Act, especially the following:

> "#1. To promote orderly growth and development that recognizes the natural characteristics of the land, its suitability for use and the availability of existing and proposed public and/or private services and facilities. The proposed zone change will increase density on the portion of the subject lots that is best served by access to Greenville Avenue and utilities, while preserving wetlands and uplands from future development.
>
> "#2. To promote a balance of housing choices for all income levels and age groups which recognizes the affordability of housing as the responsibility of each municipality and the state. Providing housing for ages 55+ helps diversify the housing stock of the town and provides housing options for those looking to downsize from singe [sic] family detached housing. Lot 186 is currently

> developed as a two-family structure that is not consistent with current R-20 zoning. Subject lots are NOT located within the Future Land Use Map Affordable Housing Overlay.
> "#3. To promote the protection of the natural, historic and cultural resources of each municipality and the state. Conservation and/or drainage easements will protect natural resources on the site.
> "#4. To promote the preservation of the open space and recreational resources of each municipality and the state. Conservation and/or drainage easements will preserve open space and recreational resources on the site, consistent with Targeted Open Space designation on the future land use map." Id. at 3-4 (emphasis in original).

The Town Planner also stated that "[a] zoning map change for development of 20 duplex units will promote public health and safety if drainage and conservation easements are granted to protect the remainder of Lot 20 from development." Id. at 4. She noted that the proposal will "protect[] ponds, rivers and wetlands through a conservation easement[,]" and that it recognizes "the need to shape and balance urban development (with accessibility to Greenville Avenue) with protection of rural qualities of meadows, woodland, and wetlands in more remote areas of the subject lots." Id.

In recommending approval of the Master Plan, the Town Planner proposed the implementation of certain conditions. Id. at 5. Specifically, she proposed that the Master Plan be subject to:

> "Lot merger of AP 47/Lots 20 and 186.
>
> "Legal Department / Town Engineer review and concurrence that the paper street designated on Sheet 1 of 2 is privately owned and that sewer/emergency access easements are not required through AP 47/Lots 43, 44, 45, and 46.
>
> "Granting a conservation and drainage easement (grantee to be determined at the Preliminary Plan stage) for portion of Lot 20 not included within the 7.1-acre development area. Conservation easements must be drafted to enable agricultural production, forest,

> silviculture, timber resources, and open space, as applicable. A management plan for areas subject to easements shall be reviewed and approved by the Planning Board at the Preliminary Plan stage.
>
> "A 25-foot buffer strip shall be provided to the rear of AP 48/Lots 340, 341, 342, 344, and 34 in accordance with §340-27.2B.(8) where a more-intensive land use (duplexes) abut less-intensive (single family) uses." Id.

After accepting the Town Planner's Report, a Planning Board member made a motion to approve the Master Plan

> "based upon the submitted application, testimony presented to the Board, plan and staff report, and the memorandum from various departments, all of the general purpose[s] of Section 1 of the Town of Johnston, Land Development and Subdivision Review Regulation have been addressed. Positive findings were found for all the standard[s] of Section 5-2, Required Finding.
> "It's also apparent that the proposed Master Plan is consistent with the Town of Johnston Comprehensive Plan, subject to page 5 of the Planner memo dated December 31st, 2013." (Tr. 1 at 94.)

Ms. Bux contends that this motion was insufficient because the Planning Board failed to address the requirements of § 45-23-30 and failed to independently make the necessary statutory findings pursuant to § 45-23-60 during the hearing. However, the Town Planner's Memorandum, which the Planning Board had just accepted and later attached to its written decision, addressed each of the required findings. See Master Plan Decision, Ex. B. Furthermore, in its own written decision, the Planning Board made detailed, comprehensive findings:

> "Whereas, in accordance with the Johnston Land Development and Subdivision Review Regulations Section V, Article C.2 Required Findings, approving authorities responsible for major land development review and approval shall address each of the general purposes stated in Article I:
> "1. Construction of the proposed 55+ adult living community with protection of open space through conservation easements . . . will promote public health, safety, and general welfare by providing much needed and demanded retirement style living and dedication

of land to the town and open space / drainage conservation easements . . . Consideration of allowable agricultural use and relocation of greenhouses and other farm structures should be considered during review and approval of proposed conservation easements during the Preliminary Plan stage to allow this use and preserve farming jobs.

"2. The proposed 55+ adult living community with protection of open space is consistent with the range and intensities of use that are appropriate to the character of the Town . . . [and] shall be an excellent compliment [sic] to the single family structures . . . already in the surrounding area and positively promote a mix of lifestyles and housing for all stages of life. Duplex design that looks like a large single family dwelling on lots that are generally compatible in area to adjacent neighborhoods is also appropriate to the character of the town.

"3. The proposed compact development and preservation of open space through conservation easements provides for the orderly growth and development of Johnston which recognizes the following:

> "(1) Compliance with use, density and setback requirements for R-10 zone with the requested zone change from R-20 to R-10
>
> "(2) Consistency with the comprehensive plan as demonstrated through testimony and Exhibit B
>
> "(3) Natural characteristics of the land with development limited to upland areas accessible to Greenville Avenue
>
> "(4) Protection of ponds, rivers and wetlands through DEM permitting and a conservation easement . . .
>
> "(5) Recognizes the unique or valuable natural resources and features including protection of one of two existing agricultural fields through conservation easements.
>
> "(6) Reduces the demand on municipal services with road, stormwater facilities, and utilities to be privately constructed and maintained . . .
>
> "(7) Recognizes the availability of public water and sewer on Greenville Avenue . . .
>
> "(8) The need to shape and balance urban development . . . with protection of rural qualities of meadows, woodland, and wetlands in more remote areas of the subject lots.

"4. An orderly, thorough and expeditious review has been conducted with Technical Staff Review on December 16, 2013 and the Planning Board meeting on January 7, 2014. Pre-application meetings with Planning staff were held August 21, 2013 and in 2010.

"5. Submission of architectural and landscape plans demonstrate that the proposed will promote a high level of quality in design . . .

> Retention of existing trees at the Greenville Avenue entrance, buffer plantings and street trees meet town requirements, will help preserve the view from Greenville Avenue, and help screen view of the development from adjacent houses.
> "6. The application will promote the protection of the existing natural and built environment through adequate landscape buffering to adjacent residential land use and stormwater management, in accordance with RIDEM and town regulations . . . The rate and quantity of stormwater drainage from the lots cannot change and will require both State and Town approvals. . . . Town will place a lien on property owners if they default on stormwater system maintenance . . .
> "7. Concentration of development in proximity to Greenville Avenue in the portion of the subject lots which can best support intensive use by reason of natural characteristic and infrastructure will replicate the visual pattern of development in adjacent neighborhoods. Sewer and emergency access would be via a privately owned paper road . . . Right of abutters to access the private paper street would not change.
> "8. The proposed development is consistent with the comprehensive plan as detailed in Planner's report of December 31, 2013, presented in Exhibit B.
> "9. The proposed development reflects and promotes design and improvement standards which reflect the intent of the Town of Johnston's various infrastructure, engineering, and technical standards and policies. The proposed private maintenance of stormwater infrastructure is specifically consistent with 2013 amendments to Section III F of the Johnston Land Development and Subdivision Review Regulations.
> "11. [sic] The intent of the applicant to deed AP 47/Lot 17 to the Town of Johnston (3.69± acres) represents a commitment to dedicate land to the public . . . ." (Master Plan Decision at 2-4.)

In approving the Master Plan, the Planning Board found "the proposed major land development to be consistent with the purposes of the Development Review Act of 1992 and has made findings as to the five point test set forth in R.I.G.L. 45-23-60." Id. at 4. It thus unanimously approved the Master Plan "as applied for, substantially in accordance with all of the plans, specifications, and other documentation submitted." Id.

After thoroughly reviewing the record, the Court is satisfied that the Planning Board made the necessary findings under § 45-23-60 when it accepted the findings contained in the

Town Planner's Memorandum, referenced the Memorandum in its motion to approve the Master Plan, and issued its comprehensive decision which incorporated the Town Planner's Memorandum. See Pierce v. Providence Ret. Bd., 15 A.3d 957, 960 (R.I. 2011) (impliedly accepting as proper "[a] written decision adopting the subcommittee's findings and recommendation was completed by the board on March 25, 2009"). The Court also is satisfied that the findings were supported by legally competent evidence. See id. (stating findings of fact must be "supported by legally competent evidence" on the record . . . .).

Although Ms. Bux contends that the Planning Board was required to make its own "independent" findings during the hearing, § 45-23-60 does not contain any such requirement. See § 45-23-60.[4] Consequently, the Court concludes that the Planning Board's decision was not in violation of statutory or planning board provisions.

C

The Paper Street and Sewer Easement

Ms. Bux maintains that the Planning Board's Master Plan Decision is defective because it improperly designated to the legal department/town engineer the Planning Board's duty to determine whether the paper street was privately owned and would not require sewer and emergency access easements. She contends such information was readily available to the Planning Board and that it should have made findings on the issue prior to approving the Master Plan. In addition, she contends that the paper road was established only for highway purposes and that, as a result, an easement for a sewer would be required.

When engaging in statutory interpretation, the Court's "'ultimate goal is to give effect to the purpose of the act * * *.'" O'Connell v. Walmsley, 156 A.3d 422, 426 (R.I. 2017) (quoting

[4] Section 45-23-60 is recited in its entirety in Part B of this Decision, supra.

Raiche v. Scott, 101 A.3d 1244, 1248 (R.I. 2014)). Accordingly '"[w]hen the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings."' Id. (quoting Raiche, 101 A.3d at 1248). Nevertheless, "the plain meaning approach must not be confused with myopic literalism; even when confronted with a clear and unambiguous statutory provision, it is entirely proper for [the Court] to look to the sense and meaning fairly deducible from the context." Id. (internal quotations omitted). Thus, the Court is required to '"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. (quoting Raiche, 101 A.3d at 1248).

However "[a]lthough [the Court] must give words their plain and ordinary meanings, in so doing [it] must not construe a 'statute [* * *] in a way that would result in absurdities or would defeat the underlying purpose of the enactment.'" Id. (quoting Commercial Union Ins. Co. v. Pelchat, 727 A.2d 676, 681 (R.I. 1999)). If interpretation of a statute "leads to an outcome that is contrary to the policy that underlies the act and achieves an absurd result, this Court simply declines to engage in mere semantics"[;] rather, the Court's "function is to 'look beyond mere semantics and give effect to the purpose of the act.'" McCain v. Town of N. Providence ex rel. Lombardi, 41 A.3d 239, 247 (R.I. 2012) (quoting Commercial Union Ins. Co., 727 A.2d at 681).

Section 45-23-40 sets forth the general provisions governing master plans. It provides in pertinent part:

> "The planning board shall, within ninety (90) days of certification of completeness, or within a further amount of time that may be consented to by the applicant through the submission of a written waiver, approve of the master plan as submitted, approve with changes and/or conditions, or deny the application, according to

> the requirements of §§ 45-23-60 and 45-23-63." Sec. 45-23-40(e) (emphasis added).

This provision clearly permits a planning board to impose conditions when approving a master plan; however, Ms. Bux contends that one of the conditions imposed in the instant matter was improper. That condition stated: "Legal Department / Town Engineer review and concurrence that the paper street designated on Sheet 1 of 2 is privately owned and that sewer/emergency access easements are not required through AP 47/Lots 43, 44, 45, and 46." (Planner's Mem. at 5.)

Section 45-23-41(a), governs the submission requirements for Preliminary Plan approval. It provides in pertinent part:

> "(3) At the preliminary plan review phase, the administrative officer shall solicit final, written comments and/or approvals of the department of public works, the city or town engineer, the city or town solicitor, other local government departments, commissions, or authorities as appropriate.
> "(4) Prior to approval of the preliminary plan, copies of all legal documents describing the property, proposed easements, and rights-of-way." Sec. 45-23-41(a) (emphases added).

The plain and ordinary language of this provision requires the administrative officer to solicit information from the town solicitor and town engineer, and also requires submission of "all legal documents describing the property, proposed easements, and rights-of-way." Id. Thus, assuming arguendo that the disputed condition in the Master Plan approval was improper, the error, if any, was harmless because § 45-23-41(a) requires submission of the same information from the town solicitor/town engineer at the preliminary plan approval stage. Indeed, were the Court to rule that the condition was improper—thus necessitating reversal of the Planning Board's decision—such interpretation would lead to an absurd result because the very same issue must be addressed at the preliminary plan stage under the statute. See § 45-23-41(a)(4)

(requiring at preliminary plan stage, "copies of all legal documents describing the property, proposed easements, and rights-of-way").

Considering that the legal issues surrounding the paper street and sewer easement necessarily will be addressed at the preliminary plan stage, the Court concludes that any other arguments that Ms. Bux raised regarding the paper road and sewer easement are premature and would not cause her substantial prejudice.

D

Potential Neighborhood Impact

Ms. Bux asserts that the Master Plan submissions failed to address the potential impact of the proposed sewer line on neighboring organic farms in violation of § 45-23-40(2). Specifically, she contends that the submissions did not consider whether the construction of a sewer line under the paper road would damage or disrupt the neighboring agricultural land or whether a potential break in the sewer line would threaten the safety of the food produced on that land.

As previously stated, "[r]equirements for the master plan and supporting material for this phase of review include . . . potential neighborhood impacts." Sec. 45-23-40(2). Although the Master Plan submissions did not address the specific potential neighborhood impacts raised by Ms. Bux, they did address some potential impacts on the nearby agricultural activities.

The Master Plan Decision stated that "[c]onsideration of allowable agricultural use and relocation of greenhouses and other farm structures should be considered during review and approval of proposed conservation easements during the Preliminary Plan stage to allow this use and preserve farming jobs." (Master Plan Decision at 2.) It also stated that the proposal

"[r]ecognizes the unique or valuable natural resources and features including protection of one of two existing agricultural fields through conservation easements." Id. at 3.

The attached Town Planner's Memorandum stated that the "[p]roposed development as age-restricted housing with private road, utilities and stormwater management as well as conservation easements will provide for the protection of public investment in transportation, water, stormwater management systems, sewage treatment and disposal, solid waste treatment and disposal . . . ." (Planner's Report at 5) (emphases added). She also stated that the "[p]roposed development will promote safety from fire, flood, and other natural or man-made disasters." Id. (emphasis added).

At the public informational hearing, Mr. Moorehead testified that the sewers and roadway will be "privately owned, privately maintained [and that] [t]here will be no cost to the Town for maintenance, repairs, improvements, in perpetuity." Tr. I at 16. He also testified that

> "the net flow from our proposed development would be at or below the existing condition, and knowing there are existing drainage problems, what we would endeavor to do is design the drainage to have a net reduction from our site so there would be no impact to any neighborhoods, either upstream or downstream from our development." Id. at 17-18.

Mr. Moorehead noted that the plan requires permit approval from both the Department of Environmental Management and the Department of Transportation. Id. at 18.

The Building Official told the Planning Board that all water and sewer upgrades must be approved and completed before the Town will issue building permits. See id. at 35 ("I mean, if the system in place doesn't comply with the Rhode Island State Building Code, . . . it doesn't get built."). The Town Planner stated that "[w]hat the Town has been doing is enabling liens on the property so that if the Town had to come in and maintain anything in the future, if it goes defunct . . . ." Id. at 60.

In light of the foregoing, it is clear that the Master Plan submissions considered the potential neighborhood impact of the sewer line. Furthermore, considering that the submissions observed that the sewer line upgrade must be approved by various state departments before building permits may issue, coupled with the fact that the Town is going to obtain liens on the property to ensure that it is properly maintained, obviates any necessity for the submissions to specifically address the unlikely possibility that the approved sewer lines might possibly break in the distant future and cause speculative harm to the neighboring farmland, as suggested by Ms. Bux.

Although Ms. Bux also contends that the submissions should consider the potential disruption and/or damage that construction of the sewer line might impose on neighboring agricultural activities—assuming that the paper road and sewer easement issues are resolved in favor of the Applicants—such potential neighborhood impacts would be temporary. For example, they only would potentially impact neighboring agricultural activities during the actual construction of the sewer line and would not be a reason to deny the application. Consequently, the Court concludes that the Board of Appeals' finding that the Master Plan submissions adequately addressed the potential neighborhood impact of the proposed development was not clearly erroneous and was not affected by error of law.

E

The Remand Hearing

In her final appellate contention, Ms. Bux asserts that the Board of Appeals should have considered evidence at the remand hearing of two allegedly relevant developments that had occurred subsequent to the Planning Board's decision. This evidence concerns the purchase of abutting lots by an individual who opposes the creation of a sewer easement and a unanimous

vote by the Rhode Island Agricultural Lands Preservation Commission (RIALPC) to accept an application from Michael and Mary DiMeo to sell the development rights for the property.

According to Ms. Bux, a sewer easement cannot be created without consent from her and the new property owner. However, this presupposes that a sewer easement does not already exist on the property. Considering that this legal issue will be addressed by the Town Solicitor in the preliminary plan stage, the Board of Appeals did not err in failing to admit evidence of the purchase of abutting land by an individual who allegedly would not consent to a sewer easement.

Likewise, evidence that RIALPC voted to accept the DiMeos' application to sell the development rights for the property also is irrelevant because there is no evidence that the purchase actually has occurred. Indeed, pursuant to R.I. R. Evid. 201, the Court takes judicial notice of the fact that CF Investments, LLC has filed suit against the DiMeos for breach of contract, breach of fiduciary duty, misrepresentation, and injunctive relief. See CF Investments, LLC v. DiMeo, C.A. No. KC-2015-0593; see also Hamilton v. Ballard, 161 A.3d 470, 475 n.10 (R.I. 2017) ("A court may take judicial notice, whether requested or not. * * * A judicially noticed fact must be one not subject to reasonable dispute * * * [and] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." (quoting R.I. R. Evid. 201)). Thus, it is not inconceivable that the sale of the property's development rights will not be executed. Accordingly, the Court concludes that the Board of Appeals' decision not to admit evidence of RIALPC's vote to accept the application to sell the property's development rights was not made upon unlawful procedure.

IV

Conclusion

After a thorough review of the record, the Court finds the Board of Appeals' decision was supported by the reliable, probative, and substantial evidence, was not arbitrary and capricious, and was not in violation of statutory, ordinance, and planning board provisions. The Board of Appeals' decision also was not affected by error of law, was not characterized by an abuse of discretion, or made upon unlawful procedure. As a result, substantial rights of the Appellant have not been prejudiced. Accordingly, this Court affirms the Board of Appeals' decision to uphold the Planning Board.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Elisabeth Bux v. Michael DiMeo, et al.**
CASE NO:	**PM-2015-4901**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**September 14, 2017**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**Andrew M. Cagen, Esq.**
For Defendant:	**Armando E. Batastini, Esq.; Richard G. Riendeau, Esq.; Joseph R. Ballirano, Esq.**