STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 13, 2018)

WALTER L. BRONHARD	:	
	:	
v.	:	**C.A. No. PC 2016-4074**
	:	
THE ZONING BOARD OF APPEALS OF THE CITY OF PROVIDENCE; R.E. JOHNSTON FAMILY, LLC; CHRISTINE WEST, in her capacity as Chair of the City Plan Commission for the City of Providence, RI ("CPC"); HEATHER TOW-YICK, in her capacity as Member of the CPC; MEREDYTH CHURCH, in her capacity as Member of the CPC; LOUIS TORRADO, in his capacity as Mayoral Designee of the CPC; JOSEPH ELLIOTT, in his capacity as Member of the CPC; MICHAEL GAZDACKO, in his capacity as Member of the CPC; HARRISON BILODEAU, in his capacity as Member of the CPC; JIM LOMBARDI, in his capacity as Treasurer of the City of Providence	:	

DECISION

VOGEL, J. Walter L. Bronhard (Bronhard or Appellant) brings this appeal from a decision of the Zoning Board of Appeals (Board of Appeals) of the City of Providence, sitting as the Planning Board of Appeal. In its decision, the Board of Appeals upheld a ruling of the City Plan Commission (CPC or Commission) granting Preliminary Plan Approval for Major Land Development Project to R.E. Johnston Family, LLC (Applicant). Bronhard asks the Court to reverse that decision and to find that the CPC acted without authority in granting the Applicant's request for Preliminary Plan Approval. This Court exercises jurisdiction over this matter

pursuant to G.L. 1956 § 45-23-71 and chapter 92 of title 42 of the R.I. General Laws, entitled the Equal Access to Justice for Small Businesses and Individuals.[1]

I

Facts and Travel

The Applicant owns property located at 249 Thayer Street in Providence (Property), otherwise known as Lot 49 of Assessor's Plat 13 (Corrective Warranty Deed). Bronhard owns a multi-family residential property located at 5 Euclid Avenue that directly abuts the Property.[2]

The Property is located in a C-2 zone "and consists of a one story building most recently used as a convenience store." (Notice of Master Plan Approval at 1.) A C-2 zone is a General Commercial District "intended for more intensive commercial uses and key commercial nodes, including larger retail establishments." (Providence Zoning Ordinance (Ordinance) § 500B.) The maximum height for buildings in a C-2 zone is fifty feet, and the buildings cannot contain more than four stories. (Ordinance § 502, Table 5-1: Commercial District Dimensional Standards.)

The Applicant filed with the CPC an Application for Major Land Development Project seeking "to demolish the [existing] building and construct a 61 foot tall, 5 story mixed use building with residential, institutional and commercial uses." (Notice of Master Plan Approval

[1] In his Complaint, Appellant sought reasonable litigation expenses pursuant to chapter 92 of title 42 of the R.I. General Laws. However, Appellant did not address the issue in his brief to the Court; consequently, the Court deems the issue waived. *See E. Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Barrington*, 901 A.2d 1136, 1152–53 (R.I. 2006) ('"Not only does the [raise-or-waive doctrine] serve judicial economy by encouraging resolution of issues at the trial level, it also promotes fairer and more efficient trial proceedings by providing opposing counsel with an opportunity to respond appropriately to claims raised."') (quoting *State v. Burke*, 522 A.2d 725, 731 (R.I. 1987)).

[2] As an abutting landowner, it is undisputed that Bronhard is an aggrieved party for purposes of filing this appeal. *See* § 45-24-31(4) (defining an aggrieved party as "(ii) Anyone requiring notice pursuant to this chapter."). Bronhard automatically was entitled to notice under § 45-24-53 because he owns an abutting property.

at 1.) Because C-2 zones limit buildings to four stories and fifty feet in height, the Applicant requested "a dimensional adjustment for one story and 11 feet." (CPC Minutes at 2, Feb. 23, 2016.) In return for the adjustment, the Applicant proposed "widen[ing] the sidewalk to provide additional public space for patrons and users of the street." (Notice of Master Plan Approval at 1.)

After a hearing on February 23, 2016, the CPC voted to approve the Master Plan Stage of the Application. *Id.* The CPC observed in its decision that Applicant was seeking "an adjustment from the height limit and proposed to provide public space as an amenity." *Id.* at 2. However, the CPC did not act on Applicant's request for a height adjustment at that point in time; instead, the Commission opted to address the height adjustment issue at the Preliminary Plan Stage when the Commission would have received additional information and be better able to assess the request. *Id.* The CPC ordered Applicant, among other things, (a) to submit a shadow study in order to show "the difference in shadows cast by a four story and five story structure" at set times during the day and during the winter and summer solstices; and (b) to "work with the Department of Public Works [DPW] to secure the portion of the street intended for public use." *Id.* at 4.

On May 17, 2016, the CPC conducted a hearing on the Preliminary Plan Stage of the Application. (Tr. dated May 17, 2016 (Tr. I)). The Applicant presented two expert witnesses at the hearing to testify on behalf of the Application: Licensed Professional Landscape Architect Ricardo Dumont and Professional Engineer Brian King. *Id.* at 8 and 31.

Mr. Dumont testified that he had conducted a shadow study of the Property based upon a revised plan to construct a building with four floors and a mezzanine, rather than five full-sized floors. *Id.* at 10. This revised plan reduced the height of the building to fifty-seven feet in the

front of the building, and to a stepped down height of forty-seven feet in the back. *Id.* at 12-13. Under the plan, the first floor of the Property would contain retail space, the second and third floors would have office space, and the fourth and fifth floors would house three, two-story duplexes. *Id.* at 14. The stepped-down area on the roof would include a roof garden and a greenhouse garden for use by the occupants of the residential units. *Id.* at 12.

Mr. Dumont then addressed the proposed public amenity that Applicant was offering to the city in exchange for the height adjustment. He testified that in return for the height adjustment, the Applicant had offered to construct an eleven-foot long, pervious-pavement "bump-out" of the sidewalk.[3] This bump-out would occur beyond the curb line into an area currently utilized for on-street public parking and would not involve any land owned by Applicant. The bump-out area would contain two trees, a bench, and no tables. *Id.* at 16-17.

With respect to the shadow study, Mr. Dumont testified he measured the shadow lengths that a fifty-foot high building would make at various times of the day and year.[4] *Id.* at 18-20. He then compared those measurements with the shadow lengths that the proposed fifty-seven foot high building would make during those same periods. *Id.* Mr. Dumont concluded that the difference between the two sets of measurements is "three to four feet of increased shadow length in all times of the year." *Id.* at 36-37.

Mr. King testified next. He stated that the drainage report indicates that the development, including the bumped-out sidewalk area, "is within the construction limits." *Id.* at 32. He also

[3] The proposal involves widening a portion of the sidewalk into an area now used for on-street parking. The parties refer to this expansion of the sidewalk as a "bump-out." For the sake of convenience, the Court also will use the term "bump-out" when referring to the proposed expansion.

[4] As previously stated, the Applicant is permitted to erect a fifty-foot building, as of right, under the Ordinance. *See* Ordinance § 502, Table 5-1: Commercial District Dimensional Standards (declaring maximum height for C-2 zones is fifty feet).

stated that the pervious pavers in the bump-out area "will help reduce the stormwater runoff." *Id.* He then testified that "[w]e have worked with the Public Works Department for this [bump-out] area[,] [and] [w]e have prepared an operation and maintenance booklet that will be followed by the owner of this lot to inspect and maintain this public use area, to clean it as needed." *Id.* Mr. King indicated that "[w]e have received permits from Narragansett Bay Commission for the sewer system and also for drainage." *Id.* Mr. King further stated that in addition to putting in two new trees in the bump-out area, they are prepared to meet the "Tree Ordinance" requirements either by providing or paying for three additional trees. *Id.* at 33.

Two objectors then testified. John Gallagher stated that he believed that the modern design of the building does not fit in with the historical quality of the surrounding area. *Id.* at 39-40 (stating that it "looks like it's going to be a big glass ice cube, really"). Grant Dulgarian next testified on behalf of a trust that owns property across the street. Mr. Dulgarian stated that there was "no justification" for allowing an additional story beyond the four-story limit. *Id.* at 41. He then observed that there is a shortage of parking on Thayer Street, and that the proposed sidewalk bump-out would take away an existing public amenity; namely, on-street parking. *Id.* at 41 and 44. Mr. Dulgarian then posited that the shadow study was inaccurate because "[i]f this building were only four stories instead of five, it wouldn't be a 50-foot building. So the difference [between the shadow measurements] would be greater." *Id.* at 44.

Thereafter, counsel for the Applicant responded to a letter that the College Hill Neighborhood Association (CHNA) had sent to CPC in support of the plan, and which also contained five requests. *Id.* at 46-48; *see also* Letter from CHNA, dated May 14, 2016. Counsel stated that the Applicant was willing to fulfill four of the requests, but characterized as

inappropriate a request "that the retail space be designed for shops rather than restaurants." (Tr. I at 46.)

Mr. Robert Azar then presented the findings of fact contained in the CPC Staff Report. *Id.* at 49. Observing that the Preliminary Plan had proposed a building which would be over the height limit, Mr. Azar succinctly stated:

> "In order for them to justify this additional height, they're proposing the provision of a public amenity, which is this bumped-out sidewalk within the public right-of-way. We are in favor of granting that dimensional adjustment subject to the applicant working with the City engineer to frame an agreement that would allow the applicant to develop and maintain that public space in the interest of the public." *Id.* at 50-51.

He later recommended that "[t]he CPC should grant the height adjustment for seven feet and one-story, finding that the applicant will provide public space as an amenity." *Id.* at 51.

A member of the CPC then made a motion to incorporate Mr. Azar's findings of fact, as well as the list of conditions contained in the Staff Report. *Id.* at 56. Thereafter, the CPC unanimously voted to approve the Preliminary Plan. *Id.*

On May 25, 2016, CPC issued a written decision. (Notice of Prelim. Plan Approval, dated May 25, 2016.) In its decision, CPC observed that "[t]he applicant requested a dimensional adjustment from the 50 foot, four story height limit in this zone. The applicant is also proposing to widen the sidewalk to provide additional public space for patrons and users of the street." *Id.* at 1. The CPC found that "[c]reation of a public seating area would conform to the [Comprehensive] [P]lan's objective of creating more usable public space." *Id.* at 2. Referring to the shadow study, CPC then "found that the proposed height was not expected to have a negative effect on surrounding character." *Id.* The decision further stated that the CPC had

> "voted to grant the adjustment finding that the applicant would be developing and maintaining public space as an amenity. The CPC required that the applicant work with the City Engineer to secure the space intended for public use and frame an agreement outlining a maintenance schedule for the space." *Id.*

Bronhard and Mr. Dulgarian timely filed separate appeals. (Notices of Appeal, filed on June 13, 2016 and June 14, 2016, respectively.) On July 13, 2016, the Board of Appeals conducted a duly noticed hearing on the appeal. (Notice of Public Hearing, dated June 28, 2016, and Tr. dated July 13, 2016 (Tr. II)).

At the hearing, counsel for Bronhard contended that the CPC failed to consider whether the proposal is in harmony with neighboring uses and whether it promotes the objectives and purposes of the Comprehensive Plan, as required by the relevant statute. (Tr. II at 244-45.) He further posited that the Applicant first should have sought a dimensional variance from the Zoning Board. *Id.* at 249. Counsel for Bronhard also objected to the proposed bump-out, stating that it simply was substituting one public amenity with another public amenity. *Id.* at 257. He contended that by swapping one amenity (parking) for another amenity (the bench), the Applicant would not be providing an *additional* amenity as required by the Ordinance. *Id.* at 259. At one point, counsel for Bronhard attempted to introduce pending legislation as evidence of legislative intent; however, the Board of Appeals did not accept it in as an exhibit because the Governor had not signed the legislation. *Id.* at 251 and 253-55.

Mr. Dulgarian next addressed the Board of Appeals.[5] He reiterated the previous argument; namely, that the Ordinance does not permit the elimination of one public amenity in order to replace it with another public amenity. *Id.* at 263. Mr. Dulgarian also challenged the

[5] Although Mr. Dulgarian did not submit a memorandum of law in support of his appeal—a strict requirement of the pertinent Rules and Regulations—the Board of Appeals nevertheless permitted Mr. Dulgarian to speak at the hearing "out of courtesy[.]" (Tr. II at 262.)

shadow study, asserting that the study should have compared the proposed fifty-seven foot, five-story building with a four-story building consisting of forty-six feet. *Id.* at 268-69.

Counsel for the Applicant countered that the CPC possesses the authority to grant a zoning incentive. *Id.* at 274. He additionally asserted that this is not a case of amenity swapping because on-street public parking does not constitute an amenity. *Id.* at 281-82. He also pointed out that the Ordinance permits use of the public right-of-way as an amenity when it allows owners to plant "street trees" in the public right-of-way for purposes of meeting the Ordinance's canopy coverage requirement. *Id.* at 283-84. Lastly, he disputed Mr. Dulgarian's suggestion that the Applicant would construct a forty-six foot high building if restricted to four stories. *Id.* at 286. Instead, counsel for the Applicant stated that if the CPC were to deny a fifth story, the Applicant would construct a four-story, fifty-foot high building that "would just have taller ceilings in the different floors." *Id.*

At the conclusion of the hearing, the Board of Appeals deliberated on the matter. *Id.* at 300-18. Thereafter, the Board of Appeals first voted in favor of a motion that the weight of the evidence supported the CPC's finding that the seven-foot height adjustment was appropriate, and that there was an insignificant difference between the shadow cast by a fifty-seven foot building as opposed to a fifty-foot building. *Id.* at 310. The Board of Appeals next voted in favor of a motion that § 45-24-47 gave authority to the CPC to grant a height incentive. *Id.* at 313-14. Finally, the Board of Appeals voted in favor of a motion that the CPC "did not make a clear error in providing for a height adjustment linked to the provision of a public amenity." *Id.* at 316-17. On August 16, 2016, the Board of Appeals memorialized its determinations by issuing a written decision upholding the CPC's grant of Preliminary Plan Approval. (Resolution No. 2016-26,

dated August 16, 2016.) Bronhard timely appealed the decision to this Court on August 29, 2016. (Compl.)

II

Standard of Review

Section 45-23-71(b) grants the Superior Court jurisdiction to review a zoning board of appeals' decision to uphold a city or town planning commission's decision. The standard by which the Superior Court reviews zoning board of appeals' decisions is governed by § 45-23-71(c), which provides in pertinent part:

> "The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact. The court may affirm the decision of the board of appeal or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions or decisions which are:
> "(1) In violation of constitutional, statutory, ordinance or planning board regulations provisions;
> "(2) In excess of the authority granted to the planning board by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 45-23-71(c).

Section 45-23-71(c) "authorizes the Superior Court to review such decisions utilizing the traditional judicial review standard that is applied in administrative-agency actions." *Munroe v. Town of E. Greenwich*, 733 A.2d 703, 705 (R.I. 1999). In reviewing questions of fact, the reviewing justice is "confined to a search of the record to ascertain whether the board's decision rests upon 'competent evidence' or is affected by an error of law." *Kirby v. Planning Bd. of Review of Middletown*, 634 A.2d 285, 290 (R.I. 1993). '"[R]easonably competent evidence"' is defined as '"any evidence that is not incompetent by reason of being devoid of probative force as

to the pertinent issues."' *Restivo v. Lynch*, 707 A.2d 663, 668 (R.I. 1998) (quoting *Zimarino v. Zoning Bd. of Review of Providence*, 95 R.I. 383, 386, 187 A.2d 259, 261 (1963)).

However, '"[q]uestions of law determined by the administrative agency are not binding upon [the Court] and may be freely reviewed to determine the relevant law and its applicability to the facts presented in the record."' *Iselin v. Ret. Bd. of Emps.' Ret. Sys. of R.I.*, 943 A.2d 1045, 1048–49 (R.I. 2008) (quoting *State Dep't. of Envtl. Mgmt v. State Labor Relations Bd.*, 799 A.2d 274, 277 (R.I. 2002)). Thus, "[a]lthough this Court affords the factual findings of an administrative agency great deference, questions of law—including statutory interpretation—are reviewed *de novo." Iselin*, 943 A.2d at 1049 (citing *In re Advisory Op. to the Governor*, 732 A.2d 55, 60 (R.I. 1999)).

III

Analysis

Bronhard asserts that the Board of Appeals failed to consider whether the Zoning Enabling Act and the Ordinance gave CPC the authority to grant a height adjustment in return for converting an existing public space from one use to another. In essence, it contends that the Board of Appeals blindly deferred to the CPC's legal judgment and erroneously relied upon a flawed statutory analogy about tree coverage in public rights-of-way. In addition, Bronhard maintains that the Board of Appeals erroneously failed to consider pending legislation that was relevant to the question of whether CPC had legal authority to grant the adjustment. Bronhard also avers that CPC had improperly engaged in amenity swapping and that its decision was contrary to the Comprehensive plan.

The Court observes that the issue before the Court is limited to whether the CPC had the authority to grant a height adjustment in return for converting an existing public space from one

use to another. The subject Application was brought under the so-called "incentive zoning" section of the General Laws. *See* § 45-24-47. The Application was considered under the standards applicable to that statute. The Court rejects Bronhard's reference to then pending legislation as irrelevant to the instant appeal. The Court notes that the bill to which he refers has since been enacted into law broadening the authority of the CPC to enable it to consider applications for dimensional variances. *See* § 45-22-7(c). However, the Applicant did not seek a dimensional variance, and the Application was not decided under the standards applicable to an application for a variance. *See* § 45-24-41.

A

Statutory Interpretation of the CPC's Authority

It is well settled that "the rules of statutory construction apply equally to the construction of an ordinance." *Mongony v. Bevilacqua,* 432 A.2d 661, 663 (R.I. 1981). This Court "review[s] questions of statutory interpretation *de novo.*" *Tanner v. Town Council of E. Greenwich*, 880 A.2d 784, 791 (R.I. 2005). In conducting its *de novo* review, the Court is mindful that "a zoning board's determinations of law, like those of an 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." *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (quoting *Gott v. Norberg*, 417 A.2d 1352, 1361 (R.I. 1980) (internal quotations omitted)).

It is axiomatic that "when a statute contains clear and unambiguous language, this Court interprets the statute literally and gives the words their plain and ordinary meanings." *Casale v. City of Cranston*, 40 A.3d 765, 768 (R.I. 2012). Thus, where the language of a statute "is clear on its face, then the plain meaning of the statute must be given effect and this Court should not

look elsewhere to discern the legislative intent." *Chambers v. Ormiston*, 935 A.2d 956, 970 (R.I. 2007). Accordingly, "[w]hen presented with a clear and unambiguous enactment, there is no room for statutory construction, and the statute will be literally applied, attributing the plain and ordinary meaning to its words." *Ret. Bd. of Emps.' Ret. Sys. of State v. DiPrete*, 845 A.2d 270, 279 (R.I. 2004).

Nevertheless, "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." *Pawtucket Transfer Operations*, 944 A.2d at 859–60 (citing *Flather v. Norberg*, 119 R.I. 276, 283 n.3, 377 A.2d 225, 229 n.3 (1977)). In addition, "[o]ur process of statutory construction further involves a 'practice of construing and applying apparently inconsistent statutory provisions in such a manner so as to avoid the inconsistency.'" *Kells v. Town of Lincoln*, 874 A.2d 204, 212 (R.I. 2005) (quoting *Montaquila v. St. Cyr*, 433 A.2d 206, 214 (R.I. 1981)).

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." *O'Connell v. Walmsley*, 156 A.3d 422, 428 (R.I. 2017) (quoting *Commercial Union Ins. Co. v. Pelchat*, 727 A.2d 676, 681 (R.I. 1999) (internal quotations omitted)). Accordingly "[i]f a mechanical application of a statutory definition produces an absurd result or defeats legislative intent, this [C]ourt will look beyond mere semantics and give effect to the purpose of the act." *Id.*

This case involves a process known as "incentive zoning." Incentive zoning is defined as "[t]he process whereby the local authority may grant additional development capacity in

exchange for the developer's provision of a public benefit or amenity as specified in local ordinances." Sec. 45-24-31(36). The statute that governs incentive zoning provides in pertinent part:

> "(b) In reviewing, hearing, and deciding upon a land development project, the city or town planning board or commission may be empowered to allow zoning incentives within the project; provided, that standards for the adjustments are described in the zoning ordinance, and may be empowered to apply any special conditions and stipulations to the approval that may, in the opinion of the planning board or commission, be required to maintain harmony with neighboring uses and promote the objectives and purposes of the comprehensive plan and zoning ordinance.
> "(c) In regulating land development projects, an ordinance adopted pursuant to this chapter may include, but is not limited to, regulations governing the following:
> . . . .
> "(4) Maximum density per lot and maximum density for the entire development, with provisions for adjustment of applicable lot density and dimensional standards where open space is to be permanently set aside for public or common use, . . . or where other amenities not ordinarily required are provided, as stipulated in the zoning ordinance. Provision may be made for adjustment of applicable lot density and dimensional standards for payment or donation of other land or facilities in lieu of an on-site provision of an amenity that would, if provided on-site, enable an adjustment[.]" Sec. 45-24-47.

Section 1904 of the Ordinance contains a provision entitled "Adjustments of Dimensional Regulations" that provides in pertinent part:

> "The city plan commission has the authority to make adjustments to certain dimensional and design standards through land development project review when one or more of the following occur:
> "a. Where open space is permanently set aside for public or common use.
> "b. Where the physical characteristics, location, or size of the site require an adjustment.
> "c. Where the location, size, and type of use require an adjustment.

> "d. Where the required build-to percentage requires an adjustment.
> "e. Where design standards require an adjustment.
> "f. Where housing for low- and moderate-income families is provided.
> "g. Where other amenities not required are provided, as stipulated in this ordinance.
> "h. Where structured parking is provided.
> "i. Where vertical mixed-use development is provided, of which at least 50 percent is devoted to residential use." Sec. 1904 E.1. of the Ordinance.

With respect to height adjustments of buildings in non-residential zones, the Ordinance permits adjustments of up to twenty-four feet or up to two stories. Sec. 1904 E.2. ("The City Plan Commission modifications are limited to [these] thresholds[.]")

In its Preliminary Plan, the Applicant sought a seven-foot adjustment from the height limit so that it could add an extra story to the four-story limit. Based upon the foregoing provisions, such an adjustment would be permissible, provided that Applicant satisfy one or more of the requirements contained in § 1904 E.1. of the Ordinance.

In its decision, "[t]he CPC voted to grant the adjustment [based upon a] finding that the applicant would be developing and maintaining public space as an amenity." (Notice of Prelim. Plan Approval at 2.) Thus, it appears that the CPC relied upon § 1904 E.1.g. as the basis for granting approval of the adjustment. *See* § 1904 E.1.g. (granting authority to the CPC to permit an adjustment "[w]here other amenities not required are provided, as stipulated in this Ordinance").[6] The CPC conditioned its approval of the adjustment by requiring "that the applicant work with the City Engineer to secure the space intended for public use and frame an agreement outlining a maintenance schedule for the space." (Notice of Prelim. Plan Approval at 2.)

[6] The Court observes that neither the Ordinance nor the Zoning Enabling Act defines the term "amenity."

However, although § 1904 E.1.g. gives the CPC authority to grant a request for an adjustment in return for "other amenities not required[,]" the Zoning Enabling Act and the Ordinance are silent with respect to the CPC's authority, if any, to alter municipal roadways or sidewalks.[7] Indeed, it appears that the authority to alter roadways and sidewalks lies exclusively with the City Council. *See* G.L. 1956 § 24-3-1 ("Town councils may mark out, relay, widen, straighten, or change the location of the whole of or any part of any municipal road, whether laid out by the state or otherwise . . . ."); Sec. 24-3-23 ("Town councils may order highways or parts of highways to be graded within their respective towns, and whenever a grade for any highway shall be established the grade shall not be changed without the consent of the town council of the town in which it is located, nor without notice to the proprietors of lands abutting on the highway . . . ."); Sec. 24-7-2 ("Whenever the town council shall determine by its vote that a sidewalk shall be made and laid in and upon any street or highway in the town, they may order the sidewalk to be made and laid upon like notice to the abutting landowner, as is provided in § 24-3-23.")

Sections 24-3-23 and 24-7-2 require town councils to give notice to abutting landowners before they can alter roadways and sidewalks. However, while the abutting landowners in this case may have had notice of the Preliminary Plan Approval for Major Land Development Project pursuant to § 45-23-42,[8] they did not receive notice from the City Council pursuant to either

[7] The term roadway is defined as "that portion of a highway improved, designed, or ordinarily used for vehicular travel, excluding the sidewalk, berm, or shoulder even when used by persons riding bicycles." G.L. 1956 § 31-1-23(h). The term sidewalk is defined as "that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians." Sec. 31-1-23(i).

[8] Although § 45-23-42(a) requires a CPC public hearing for "a street extension or creation . . . for a minor land development project or minor subdivision[,]" the proposed bump-out in this case does not constitute "a street extension or creation." and the Application at issue is for a major land development. Sec. 45-23-42(a).

§ 24-3-23 or § 24-7-2. Indeed, the City Council had no involvement in the process whatsoever, in violation of § 24-3-23 and/or § 24-7-2.

In addition, it appears that the language of the Ordinance itself does not authorize the proposed bump-out of the sidewalk. It is undisputed that the proposed bump-out would occur within a public right-of-way. *See* CPC Agenda Item 1, dated May 17, 2016, at 1 ("The applicant is proposing to extend the sidewalk to provide a permanent public amenity within the public right of way.") Section 201 of the Ordinance defines a right of way as "[a] strip of land taken or dedicated for use as a public way. In addition to the roadway, it typically incorporates the curbs, lawn strips, sidewalks, lighting, utilities, and drainage facilities." (Sec. 201 of the Ordinance.) The Ordinance clearly provides that "[t]his ordinance does not apply to land, uses, and structures located within the public right-of-way, with the exception of certain permitted encroachments into the right-of-way per section 302." (Sec. 102 A. of the Ordinance.)

Section 302, entitled "EXEMPTIONS FOR PUBLIC RIGHTS-OF-WAY AND PUBLIC UTILITIES[,]" provides in pertinent part:

> "A. The provisions of this ordinance do not apply to land located within public rights-of-way, except for encroachments into the public right-of-way authorized under this ordinance.
> . . . .
> "D. Any structure, fixture, excavation, obstruction, or encroachment erected or maintained over, onto, or under any public right-of-way requires a right-of-way encroachment permit in accordance with section 1914." (Sec. 302 of the Ordinance.)

Section 1914 sets forth the procedures for obtaining a public right-of way permit. *See* Sec. 1914 of the Ordinance. It additionally provides:

> "E. Encroachment Permissions. Two types of encroachment into the right-of-way are permitted by this ordinance: encroachment not for habitation and encroachment for habitation. The regulations for such encroachments are found in section 1303.

> "F. Additional Encroachments. *All encroachments not described in section 1303 require an easement to be granted at the sole discretion of the city council*." *Id.* (emphasis added).

Section 1303 B.1. describes the types of "not for habitation" encroachments that are permitted under the Ordinance. Specifically, it provides:

> "a. An encroachment not for habitation is *any construction that projects from a building* over, onto, or under a public right-of-way that is not designed for and cannot accommodate human or other habitation including, but not limited to, awnings, canopies, marquees, signs, architectural embellishments, foundations, wheelchair ramps, stairs, and the like, whether supported by the ground or not.
> "b. An encroachment not for habitation that encroaches over, onto, or under a public right-of-way is limited as follows:
> > "i. Awnings, canopies, marquees, and signs with less than 15 feet vertical clearance above the sidewalk may extend into or occupy up to two-thirds of the width of the sidewalk measured from the lot line. Awnings, canopies, marquees, and signs with 15 feet or more vertical clearance above the sidewalk may extend into or occupy up to 100 percent of the width of the sidewalk.
> > "ii. All other encroachments may extend up to four feet into the right-of-way, *but in no case may extend farther than the curb line*." (Sec. 1303 B.1. of the Ordinance.) (emphases added).

It appears that the proposed bump-out does not fit within the definition of an encroachment because it does not constitute a "construction that projects from a building . . . ." (Sec. 1303 B.1.a. of the Ordinance.) Even assuming, *arguendo*, that the current sidewalk could be construed as a projection from a building for purposes of the Ordinance, the proposed bump-out nevertheless would violate a number of Ordinance provisions. *See* § 45-23-71(c)(1) (permitting reversal of a decision if it is "[i]n violation of constitutional, statutory, ordinance or planning board regulations provisions").

By its very nature, the bump-out extends beyond the present curb line in violation of § 1303 B.1.b.ii.[9] Even if an argument could be made that a bump-out does not consist of an extension beyond the curb line because it simply moves the curb line out further, the amenity itself would be separated from the building by a public right-of-way, and thus would not satisfy the projection requirement of § 1303 B.1.a. As a result, the Applicant would have to obtain an easement from the City Council pursuant to § 1914 F. *See* § 1914 F. ("All encroachments not described in section 1303 require an easement to be granted at the sole discretion of the city council."). The record is clear that the Applicant has not sought any such easement; consequently, assuming that the bump-out could be construed as an encroachment, it would be in violation of § 1914 of the Ordinance.

In view of the foregoing, the Court finds that the CPC did not have statutory authority to grant permission to alter or amend the sidewalk and/or roadway. The Court further finds that the CPC did not have authority under the Ordinance to permit an extension of the curb line. Consequently, the Court concludes that the Board of Appeals erred in upholding the CPC's decision.

[9] During the hearing on May 17, 2016, members of the CPC observed that the Ordinance permits an owner to plant trees within public rights-of-way when the owner is unable to meet tree canopy requirements on site. One member stated: "This [Application] is an analogous situation to that. The benefit cannot be accommodated on site, so we allow work to happen in the public right-of-way." (Tr. I at 27.) The Board of Appeals later approved of the analogy. *See* Tr. II at 303 (stating "we had it earlier where the City Forester . . . we had a property that didn't have any land for trees and they were going to put trees somewhere else within a radius and that satisfied us"). However, this analogy is misplaced because, even though the Ordinance may permit an owner to plant trees on a sidewalk right-of-way, it would be absurd to suggest that it permits the planting of trees beyond the curb line. *See Mancini v. City of Providence*, 155 A.3d 159, 163 (R.I. 2017) (stating "under no circumstances will [the Court] construe a statute to reach an absurd result").

B

Public Amenity

Bronhard asserts that the Board of Appeals erred in deferring to the CPC's interpretation of the definition of "public amenity." He also asserts that the parking spaces that currently occupy the space themselves are public amenities, and that the incentive zoning scheme does not permit amenity swapping. In response, Applicant asserts that the Board of Appeals did not err in deferring to the Planning Commission's interpretation of the definition of public amenity because the Board of Appeals is prohibited from substituting its own judgment for that of the Planning Commission.

It is well settled that the Court "give[s] weight and deference to a zoning board's interpretation and application of the zoning ordinance, provided its construction is not clearly erroneous or unauthorized." *Cohen v. Duncan*, 970 A.2d 550, 562 (R.I. 2009). Thus, "'[i]f a statute's requirements are unclear or subject to more than one reasonable interpretation, the construction given by the agency charged with its enforcement is entitled to weight and deference as long as that construction is not clearly erroneous or unauthorized.'" *Mancini v. City of Providence*, 155 A.3d 159, 167–68 (R.I. 2017) (quoting *Duffy v. Powell*, 18 A.3d 487, 490 (R.I. 2011)). Nevertheless, "an agency's interpretation is 'not controlling' and, further, that 'regardless of * * * deference due, th[e] Court always has the final say in construing a statute.'" *Mancini*, 155 A.3d at 168 (quoting *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 506 (R.I. 2011)). Indeed, our Supreme Court has made clear that it has "never suggested that we owe any administrative agency's interpretation blind obeisance; rather, the true measure of a court's willingness to defer to an agency's interpretation of a statute depends, in the last analysis, on the persuasiveness of the interpretation, given all the attendant circumstances." *Mancini*, 155

A.3d at 168 (internal quotations omitted); *see also Unistrut Corp. v. State of R.I. Dep't of Labor and Training*, 922 A.2d 93, 101 (R.I. 2007) ("This is not a case in which we are faced with a statute susceptible of multiple reasonable meanings, and therefore are required to give deference to the agency interpretation.").

Section 45-24-47 provides in pertinent part:

> "(c) In regulating land development projects, an ordinance adopted pursuant to this chapter may include, but is not limited to, regulations governing the following:
> . . . .
> "(4) Maximum density per lot and maximum density for the entire development, with provisions for adjustment of applicable lot density and dimensional standards where open space is to be permanently set aside for public or common use, . . . *or where other amenities not ordinarily required are provided, as stipulated in the zoning ordinance.* Provision may be made for adjustment of applicable lot density and dimensional standards for *payment or donation of other land or facilities in lieu of an on-site provision of an amenity that would, if provided on-site, enable an adjustment*[.]" Sec. 45-24-47(c)(4) (emphases added).

The clear and unambiguous language of this provision contemplates a *payment or the donation of land or facilities*, regardless of whether the land or facilities are located on-site or off-site.[10] However, in this case, the Applicant has not offered to make any payment or offered to donate any land or facilities whatsoever; rather, it seeks to use public land for its project. While the statute does not expressly prohibit private entities using public land to satisfy the public amenity requirement in § 45-24-47(c)(4), such language is not necessary because the statute provides for *payments or donations of land or facilities* by the landowner. Clearly, a landowner cannot donate land or facilities—such as a public right-of-way—that he or she does

[10] The fact that § 45-24-47(c)(4) contemplates a payment or the donation of land or facilities in return for density and dimensional adjustments lends support to the Court's earlier conclusion regarding the CPC's lack of authority to allow a landowner to use a public right-of-way for purposes of providing an amenity.

not own. *See Mancini,* 155 A.3d at 163 (stating "under no circumstances will [the Court] construe a statute to reach an absurd result").

Notwithstanding the foregoing, the Court also observes that § 45-24-47(c)(4) clearly and unambiguously requires ordinances to stipulate "other amenities not ordinarily required . . . ." Sec. 45-24-47(c)(4). However, the Ordinance does not so stipulate; rather, it simply tracks the language contained in the statute. *See* § 1904 E.1.g. of the Ordinance ("Where other amenities not required are provided, as stipulated in this ordinance.") Indeed, the Ordinance does not even define the term amenity. *See, e.g.,* McKinney's Town Law § 261-b(1)(b) (McKinney 2010) ('"Community benefits or amenities' shall mean open space, housing for persons of low or moderate income, parks, elder care, day care or other specific physical, social or cultural amenities, or cash in lieu thereof, of benefit to the residents of the community authorized by the town board.").

Although the Court should give deference to the CPC's interpretation of the term "where other amenities not ordinarily required are provided," it need not blindly defer to the CPC's interpretation where the Ordinance failed to provide any stipulations with respect to that term, as required by § 45-24-47. Thus, considering that the purported amenity in this case will not be in return for a payment, donated land, or facilities, the Court finds that the Board of Appeals erred in giving deference to the CPC's interpretation of the term public amenity.[11]

[11] The Court need not delve into Bronhard's other appellate contentions regarding the alleged inconsistency with the Comprehensive Plan and that the proposal seeks impermissible amenity swapping. Even if the CPC's decision was consistent with the Comprehensive Plan, the fact remains that it did not have the authority to bump-out the sidewalk in the first instance. Accordingly, the Court need not reach the decision's alleged inconsistency with the Comprehensive Plan. For the same reason—lack of authority—the Court need not address Bronhard's contention that the proposed bump-out constitutes impermissible amenity swapping.

IV

Conclusion

After a thorough review of the entire record, this Court finds that the decision of the Board of Appeals is clearly erroneous, is made upon improper procedure, is in violation of ordinance provisions and planning board regulations, is in excess of the Board of Appeals' authority, is arbitrary and capricious and characterized by abuse of discretion, and is affected by clear error of law. Substantial rights of the Appellant have been prejudiced. As such, the decision of the Board of Appeals, upholding the decision of the CPC, granting Preliminary Plan Approval to the Applicant is hereby vacated. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Walter L. Bronhard v. The Zoning Board of Appeals of the City of Providence, et al.**
CASE NO:	**PC 2016-4074**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**February 13, 2018**
JUSTICE/MAGISTRATE:	**Vogel, J.**
ATTORNEYS:	
For Plaintiff:	**Nicholas L. Nybo, Esq.** **William M. Dolan, Esq.**
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