

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

[Filed: August 18, 2021]

PROVIDENCE PRESERVATION SOCIETY, :
WEST BROADWAY NEIGHBORHOOD :
ASSOCIATION, CAROL ANDERSON, and :
RENEE MORRIS, :
Appellants, :

V. :

C.A. No. PC-2020-04495

MARC GREENFIELD, ANTHIA MANIOTES, :
BIANCA RODRIQUEZ, MARCUS MITCHELL: :
and SCOTT WOLF in their capacities as :
members of the Zoning Board of Review of the :
City of Providence, CHRISTINE WEST, :
HARRISON BILODEAU, MICHAEL :
GAZDACKO, MIGUEL QUEZADA; and :
NICOLE VERDI in their capacities as members :
of the PROVIDENCE CITY PLAN :
COMMISSION and OMNI GROUP, :
Appellees. :

DECISION

VOGEL, J. Providence Preservation Society (PPS), West Broadway Neighborhood Association (WBNA), Carol Anderson and Renee Morris (collectively, Plaintiffs) bring this appeal from a May 13, 2020 decision by the City of Providence Zoning Board of Review (Board). Ms. Anderson and Ms. Morris each allege to own property within 200 feet of a development proposed by Omni Group (Omni or Applicant). PPS and WBNA are neighborhood associations registered with the City of Providence. Before the Court, Plaintiffs challenge the Board’s decision which in essence permits Omni to go forward with its proposed development. The Superior Court exercises jurisdiction over

appeals from decisions of zoning boards of review pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, Plaintiffs' appeal is dismissed for lack of standing.

I

Facts & Travel

A

Omni's Applications to the CPC

Omni is the owner and proposed developer of real estate located between Westminster and Cranston Streets in Providence, Rhode Island. The real estate is listed in the land records as Assessor's Plat 29: Lots 511, 510 and 496; Lot 502; Lot 185 and Lot 501 (Board Hr'g Tr. at 27:7-13, Mar. 11, 2020; *see* CPC Area Plans.) Omni owns six of the seven lots within the parcel, and the area plans refer to these structures as a combined site plan.¹ (Board Hr'g Tr. at 26:21-24; *see* CPC Area Plans.) All of the parcels are located within a C-2 zoning district.²

Omni seeks to construct three (3) three-story residential buildings, each with sixteen (16) units on vacant land located at 946-1000 Westminster Street (the 946 Project). Omni further seeks to convert an existing two-story office building located at 870 Westminster Street (the 870 Project) into two residential units. On November 26, 2019, Omni filed an application with the Providence City Planning Commission (the CPC) for a minor land development project. (MI Application, 19-076)³. In the MI Application, Omni sought preliminary plan approval for a minor land development project (the 946 Project) on the property located at 946 and 1000 Westminster Street

¹ According to the CPC and the Board, the parcel of land also includes a lot owned by 93 Cranston Street, LLC and occupied by Urban Greens Supermarket. (City's Mem. n.1; *see* CPC Hr'g Audio Recording at 25:15-25:35, Dec. 17, 2019; *see also* Radius Plan.)

² C-2 is a general commercial zoning district that permits mixed use (residential and nonresidential). *See* Providence Zoning Ordinance § 1201, Table 12-1.

³ "MI" references applications for minor subdivision or minor land development. (*See* Application, Nov. 26, 2019 on the CPC application form.)

(Lots 496, 510, and 511). Omni applied for permission to: (1) redraw the lot lines of the three adjacent lots to form three lots of less than 10,000 square feet each; (2) construct one three-story multi-family dwelling unit on each of the three lots; (3) acquire a design waiver from the requirement of Providence Zoning Ordinance § 503.A.8,⁴ which prohibits residential or parking uses on the ground floor of buildings within twenty feet of a main street (in this case, Westminster Street) in a C-2 Zone; and (4) acquire an additional design waiver from Ordinance § 503.A.6 for the corner side yard setback for Lot 511. (Board Decision at 1-3, May 13, 2020; *see* Board Hr’g Tr. at 14:4-25, Mar. 11, 2020.)

Also, on November 26, 2019, Omni filed a second application with the CPC for Developmental Land Review (DPR Application, 2019-18.) (Board Decision at 1-3, May 13, 2020.) In the DPR Application, Omni sought a design waiver from Ordinance § 503.A.8 for a portion of the building located at 870 Westminster Street, Lot 185 (the 870 Project). *Id.* Both the MI and the DPR applications entailed exclusively residential construction and renovations. (Board Hr’g Tr. at 14:9-25, Mar. 11, 2020.)

It is undisputed that Omni has plans for further development of its land. The 946 Project and the 870 Project comprise the first phase of that development which in the future will include a two-story office building and a retail/residential building. (CPC Hr’g Audio Recording at 18:23-18:44, Dec. 17, 2019.) The “Area Plans” of the site show a proposal for an “office/2 story

⁴ Providence Zoning Ordinance § 503.A.8 states, in pertinent part:

“For a building that fronts on a Main Street in a C-1 or C-2 District, residential and parking uses are prohibited on the ground floor of the building within 20 feet of the Main Street. Lobbies and common spaces associated with residences are permitted within this area. This requirement shall be considered a design standard, and not a use regulation. . . .”

building” adjacent to Lot 185 and a proposed “retail/residential building” on Lot 501. *See* CPC Area Plans.

B

The CPC Proceedings

The CPC Department of Planning and Development’s (DPD) prepared a staff report on the MI application which described the “subject lot[s] [sic] [as] part of a complex that includes a former bank building on lot 185 and a proposed mixed use building intended to provide retail and other amenities on lot 501.” (DPD Staff Report, Agenda Item 9 at 3.) The DPD agreed with Omni that “mixed use development is difficult to provide on the subject lots.” *Id.* The staff report referenced Omni’s future plans to provide “mixed use amenities in proximity to the site.” *Id.* The DPD found that Omni complied with Section 806 of the Development Review Regulations (DRR) because its proposal under the MI Application (1) was consistent with the City of Providence’s Comprehensive Plan (Comprehensive Plan) which intends for neighborhood commercial/mixed use development; (2) complied with the Ordinance; (3) would not significantly impact the environment; (4) would not result in the creation of individual lots with physical constraints to development such that it would be impracticable to build on those lots; and (5) would provide adequate pedestrian access from Westminster Street. *Id.* Thus, the DPD recommended that the CPC approve the preliminary plan subject to Omni meeting certain conditions and the CPC granting certain waivers.⁵ *Id.*

⁵ The DPD conditioned its recommendation on the following: “(1) [that] CPC should grant the design waiver to allow residential development within 20 feet of Westminster Street; (2) [that] CPC should grant the design waiver from the corner side yard setback requirement; (3) [that] the administrative subdivision shall be approved prior to final plan submission; (4) [that] the applicant shall meet the canopy coverage requirement under the supervision of the City Forester; and (5) [that] final plan approval should be delegated to DPD staff.” (DPD Staff Report, Agenda Item 9 at 3.)

The DPD's staff report on the DPR Application describes the building at 870 Westminster as "part of a larger complex formerly used as a bank." (DPD Staff Report, Agenda Item 8 at 2.) The report noted that Omni presented a future plan for additional development on the site, a mixed-use building providing retail and other commercial amenities which would be constructed on Lot 501, which is in close proximity to the proposed development. *Id.* The DPD recommended that the CPC grant the design waiver on two grounds: (1) that the requirement to conform to Ordinance § 503.A.8 could result in economic hardship; and (2) that there would not be a negative effect on the neighborhood's character because commercial use would be provided on-site. *Id.*

On December 17, 2019, the CPC conducted a hearing on Omni's two applications at its regular meeting.⁶ Robert Azar, Deputy Director of the CPC introduced the proposals. (CPC Hr'g Audio Recording at 14:45, Dec. 17, 2019.) He spoke from time to time during the hearing.

Omni's president and chief executive officer, William DeStefano appeared on behalf of the Applicant. Mr. DeStefano addressed the applications purely as proposals for residential use. Of note, it was Azar, not Mr. DeStefano, who referenced Omni's future development plans. When asked by the Chair why Omni was seeking design waivers, Mr. DeStefano responded that he did not "see the need for additional retail on the first floor at this time." (*Id.* at 17:36.) He referenced nearby vacancies and noted that "brokers [Omni] we worked with we think that the Cranston Street side is going to be more conducive to retail." (*Id.* at 17:47-18:07.) Mr. Azar interjected that the proposed development reflects Omni's initial construction plans for the property and explained that Omni had future plans for construction of commercial space on Lot 501 and the conversion

⁶ Under DRR 504.5(C), governing major land development projects, the applicant must secure a stenographer for a public hearing and provide the CPC with a certified transcript within 21 calendar days thereafter. There is no similar requirement under Article 4, governing minor land development projects. In this case, the CPC hearing was recorded, but not transcribed.

of the building previously occupied as a bank to commercial use. (*Id.* at 18:06-18:47.)⁷ Mr. DeStefano clarified that Omni was not seeking permission for this proposal at this time for any projects other than the residential proposals set forth in the applications. (*Id.* at 18:06-18:47.)

Representatives from PPS, Rachel Robinson and from WBNA, Cynthia Langlykke, offered public comment on behalf of their respective organizations. (Compl. ¶¶ 1-2; Board Hr’g Tr. at 21:3-5, Mar. 11, 2020.)

At the conclusion of the testimony, the Chair articulated certain conditions upon which she recommended that the applications be approved, including that “the site be considered as a comprehensive whole including landscape and traffic circulation.” (*Id.* at 01:01:52-01:02:04.)⁸ Mr. DeStefano expressed concern that the CPC would be forcing him to develop the entire property. The Chair persisted: “I think we’re looking for some intentionality around how these parking lots relate to each other and not close off opportunities to link them or otherwise create a more cohesive design.” (*Id.* at 01:03:52-01:04:03.) She continued: “we’re interested in seeing a very intentional response. I think we need to see some ideas, and I think what we have seen is if we encourage people to look at ideas sometimes they emerge, and they actually make sense for all parties, and it may be to your benefit.” (*Id.* at 01:04:50-01:05:05.) Mr. DeStefano responded that Omni was “better off withdrawing” the applications rather than being compelled to provide a comprehensive plan for development of the entire property. (*Id.* at 01:05:26-50.) The Chair replied: “You can’t even do a sketch or a design study? You would rather withdraw, cancel the whole project than to do a sketch?” (*Id.* at 01:05:30-35.) Mr. DeStefano remained steadfast in his position

⁷ The “Area Plans” of the site show a proposal for an “office/2 story building” adjacent to Lot 185 and a proposed “retail/residential building” on Lot 501. *See* CPC Area Plans.

⁸ Neither the Chair nor any other Commissioner described what such condition specifically encompassed.

and appeared to understand the condition as requiring Omni to address its future plans when the Applicant was prepared only to focus on the residential projects before the CPC. The Chair questioned why Mr. DeStefano “would throw the baby out with the bathwater over such a minor thing.” (*Id.* at 01:06:31-34.) She said that the Commission merely was asking Omni to “study approaches ... to spend a little bit of thought, think about how these projects mix together.” (*Id.* at 01:06:35-50.) At the urging of Omni’s attorney, the CPC took a brief recess, and when they returned, DeStefano apparently had reconsidered and did not withdraw Omni’s applications. The CPC voted to approve them with the aforementioned condition included therein. (*Id.* at 00:30.)

C

The CPC Decisions

On January 7, 2020, the CPC issued its written decisions granting Omni’s applications.

Decision granting preliminary approval for MI Application 19-076 (MI Decision)

The CPC gave preliminary approval for the MI application subject to certain conditions. (1) the grant of the requested design waivers; (2) an application by Omni for an administrative subdivision of the lots; (3) “[t]he site shall be considered comprehensively with more information provided on landscaping and traffic circulation for the entire site”;⁹ (4) Omni must meet with the community about the proposed development; (5) the landscaping plan be approved by the City Forester; and (6) Omni enhance the design of the building entrances. (MI Decision at 3, 4.)

In approving the application and imposing these conditions, the CPC made the following findings: (1) the proposed project would provide housing opportunities which was consistent with the Comprehensive Plan; (2) the proposal complied with the zoning ordinance permitting multifamily development by right; and (3) the development “largely conformed to the dimensional

⁹ The CPC did not elaborate on the specifics required for Omni to meet this condition.

and design requirements of the C-2 zone.” *Id.* at 1-2. However, the CPC required Omni to revise the proposed design of the buildings “to feature more prominent, detailed entrances.” *Id.* at 2.

In granting Omni’s request for design waivers to permit residential housing within 20 feet of a main street, the CPC stated: “The CPC granted the waiver finding that mixed use development is difficult to provide on the subject lots *and that the applicant will be providing mixed use amenities within the complex.*” *Id.* at 2 (emphasis added).

The CPC noted that parking would not be required for the project once the lots are subdivided due to the individual lot sizes, but that parking will be provided on Lot 502, which is adjacent to the proposed development. The CPC required that “the applicant consider the entirety of the site for landscaping and traffic circulation and present this to the CPC at the final plan stage.” *Id.* The CPC also required Omni to submit the final landscaping plan for the City Forester’s approval. *Id.*

The CPC found that the projects would not result in negative environmental impact. *Id.* at 3. The lots were buildable and provided adequate vehicular and pedestrian access from Westminster Street. *Id.*

Decision granting design waiver at 870 Westminster Street

The CPC granted a design waiver to Omni. The waiver relieved Omni of the prohibition under 503.A.8 of locating residential units within 20 feet of a main street, Westminster Street. In its decision, the CPC stated:

“According to the applicant’s research, retail would not be viable at this location. *The applicant intends to construct a mixed use building providing retail and other commercial amenities to the south of the building fronting on Cranston Street. The former bank building located on the same lot will be redeveloped to provide commercial space as well.*” (DPR Decision at 1) (emphasis added).

The CPC found that denying the requested waiver “could” result in economic hardship and that granting it would not have a negative effect on the neighborhood. *Id.*

D

Board Proceedings

On January 27, 2020, Plaintiffs, Renee Morris, PPS and WBNA filed a joint Notice of Appeal with the Board combining their appeals from both of the CPC Decisions.¹⁰ *See* Notice of Appeal, Jan. 27, 2020; §§ 45-23-66, 67. Renee Morris, who had not testified before the CPC, has owned real estate located at 1029 Westminster Street, located within two hundred (200) feet of the subject property at all times material hereto.¹¹ Plaintiffs challenged the Decisions on various grounds and claimed standing as aggrieved parties who did not receive notice of the applications. *See* Appeal Mem., Jan. 27, 2020.

Plaintiffs contended that the procedure and form of the applications erroneously characterized the plans as minor land development rather than major land development projects. Omni responded to the appeal by denying the allegations contained therein and asserting that the Plaintiffs lacked standing to appeal from the CRP’s decisions because they are not “aggrieved parties” under Rhode Island law.

On March 11, 2020, the Board held a duly noticed hearing on Plaintiffs’ appeal. Plaintiffs moved to amend their appeal to add ten abutting property owners as parties to the appeal. (Board Hr’g Tr. at 5:11-15, Mar. 11, 2020.) Among the abutting property owners seeking to join in the appeal was Plaintiff Carol Anderson, who claims to have owned property at 1047 Westminster

¹⁰ Although the Board found the Notice of Appeal deficient because Plaintiffs should have filed two Notices of Appeal, it nevertheless chose to reach the merits of the appeal and to vote on each decision separately. (Board Resolution at 6, May 13, 2020.)

¹¹ To have standing as a party who requires notice, the party must own property within 200 feet of the property subject to the application. *See* § 45-23-42(c)(1); DRR § 805(C)(1).

Street since before September 1, 2019. (Comp. ¶ 4.) The Board denied the motion as untimely. *Id.* at 6:15-17.

Consistent with the applicable standard of review, the Board considered the issues before it based upon the findings and record of the CPC. *See* § 45-23-70(a) and § 1918 of the City of Providence Zoning Ordinance. Accordingly, no witnesses appeared before the Board, and the hearing was limited to the CPC record and argument of counsel for the Plaintiffs, Omni and the CPC.

Through counsel, Plaintiffs challenged the CPC's decision approving a proposal for minor land development. They argued that Omni had an overall plan to have additional mixed-use buildings on the property, and the plan required the scrutiny that accompanied major land development projects. Plaintiffs asserted that Omni relied on its overall plan to support its request for the design waivers while applying only for approval for residential structures to avoid the major land development review. *Id.* at 59:2-14.

Omni, through its attorney, disputed that contention and noted that if there is further development on the property that triggers notice, all interested parties would receive that notice (consistent with the procedures governing applications for major land development). *Id.* at 51:23-52:1. Omni argued that the CPC's reference to future mixed-use development was similar to dicta in a court decision and did not impact the decisions it issued on January 7, 2020. *Id.* at 61:11-24. Counsel suggested that “[p]rojects are presented in phases to the commission and to other planning boards throughout the state all the time. It’s the landowner prerogative.” *Id.* at 63:6-9.

Counsel for the CPC stated:

“the applicant did not want to develop lot 501. They wanted to do [it] in the future. So, when is that? Is that tomorrow, is that five years from now. We don’t know. But he’s not ready to have that part of his property reviewed. So that part of it isn’t part of the complex in

his mind. The fact that the Plan Commission feels it's a part of, you know, they want everything to look or be in the same character, that's what they want to look at. It was commenting and what they want to do forward looking." *Id.* at 53:24-54:10.

After all parties concluded their presentations, Board member Scott Wolf moved for a determination that the CPC erred in considering 19-076MI as an application for minor land development. (*Id.* at 88:3-12.) No member seconded his motion. (*Id.* at 88:13-14.) Board member Anthia Maniotes moved to dismiss the appeal and to uphold the decision of the CPC on 19-076MI. (*Id.* at 88:18-21.) That motion was seconded by Board member Marcus Mitchell and passed 4-1. (*Id.* at 88:24-89:4.)

The Board then considered the appeal of the CPC decision to grant a design waiver at 870 Westminster Street. Board member Maniotes moved to dismiss the appeal and uphold that decision as "DPR development plan review as a minor land development." (*Id.* at 90:1-4.) Board member Bianca Rodriguez seconded the motion and it passed 4-1. (*Id.* at 90:9-13.)

Finally, Board member Maniotes moved to "[u]phold the CPC's decision to consider the applications separately and not consider them as a major land development project." (*Id.* at 91:15-18.) Board member Mitchell seconded the motion, and it passed 4-1. (*Id.* at 91:21-25.)

E

Decision of the Board

On May 13, 2020, the Board issued its decision entitled "Resolution No 2020-02A." The Board made preliminary findings. The Board referenced its denial of the motion to amend, noting the failure of the moving parties to file their motion in writing in advance of the Board hearing. The Board held that their request to join the appeal was time barred because the appeal period had passed. (Board's Decision at 4.)

The Board further determined that PPS and WBNA lacked standing to appeal the CPC decisions because they did not own property within 200 feet of the proposed project. *Id.* at 5. Additionally, the Board noted that although Renee Morris owned property within that radius, she did not claim or present evidence that her property would suffer injury by the Decisions of the CPC. *Id.* This distinction is important, because absent an allegation of injury, her claim of standing must fail unless she can prevail on the argument that the applications should have been filed and processed as proposals for major land development. *See* §§ 45-23-38, 39. *Id.*

Next, the Board determined that the notice of appeal was deficient because Appellants failed to file separate appeals from the two decisions issued by the CPC on January 7, 2020. However, the Board concluded that “in order to reach the merits of the appeal, the Board will consider the Appellant’s arguments, but it will vote on each Decision separately.” (*Id.* at 6.)

The Board decided that the application 19-076MI properly was filed as seeking approval for minor land development because: (a) seeking design waivers “did not remove the proposal from the definition of a minor land development project;” *Id.* (b) Omni sought approval for residential projects only; (c) DPR properly considered Omni’s request for waiver of the prohibition against ground floor residential units; (d) Omni permissibly applied for preliminary approval of the residential projects and was not required to wait until ready to apply for approval for future commercial projects; (e) the CPC’s references to Omni’s future uses of its property does not convert its application to one for major land development; and (f) the CPC made all required positive findings on all elements of the applicable Section 806 and thus lacked authority to re-assign the application to one for major land development. *Id.* at 6, 7.

The Board suggested that Appellants supported their appeal with insufficient “bald allegations,” and that they did not adequately counter the CPC’s conclusion that denying the

requested waivers “would not only result in an economic hardship, but also that ground floor residential uses are consistent with the neighborhood.” *Id.* at 7.

On June 11, 2020, Plaintiffs¹² took a timely appeal to this Court from the decision of the Board upholding the CPC decisions granting Omni’s two applications, 19-076MI and Application for Development Review Plan. (Compl. ¶ 7.) Plaintiffs claim that the Board erroneously (1) dismissed PPS and WBNA for lack of standing and (2) erroneously denied their appeal from the CPC decisions. *Id.* ¶ 8.

II

Standard of Review

The Board possesses jurisdiction to review an appeal from decision of the CPC pursuant to § 45-23-70(a) and § 1918 of the City of Providence Zoning Ordinance. That review is limited, and “the board of appeal shall not substitute its own judgment for that of the planning board ... but must consider the issue upon the findings and record of the planning board ... The board of appeal shall not reverse a decision of the planning board ... except on a finding of prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record.” Section 45-23-70(a).

The Superior Court reviews the decisions of a planning commission or board of review under the traditional judicial review standard applicable to administrative agency actions. *E. Grossman & Sons, Inc. v. Rocha*, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977). The Superior Court does not conduct a *de novo* review of such decisions. *Id.* Here, the Superior Court exercises jurisdiction over this appeal from a decision of the Zoning Board of Review whose own standard of review was limited by statute.

¹² Carol Anderson, who did not appear before the Board, appears as a co-plaintiff in this case.

Pursuant to § 45-24-69, the Superior Court exercises jurisdiction over decisions of the Zoning Board of Review and “shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.” Section 45-24-69(d). “The court may affirm the decision ... or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced” by “findings, inferences, conclusions, or decisions” that are:

- “(1) In violation of constitutional, statutory, or ordinance provisions;
- “(2) In excess of the authority granted to the zoning board of review 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.” *Id.*

The Superior Court must “examine the whole record to determine whether the findings of the zoning board were supported by substantial evidence.” *Lloyd v. Zoning Board of Review for City of Newport*, 62 A.3d 1078, 1083 (R.I. 2013) (internal quotation omitted). Substantial evidence is “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.” *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008) (quoting *Apostolou v. Genovesi*, 120 R.I. 501, 508, 388 A.2d 821, 825 (1978)). If the Court “can conscientiously find that the board’s decision was supported by substantial evidence in the whole record,” the decision must be upheld. *Apostolou*, 120 R.I. at 509, 388 A.2d at 825.

“When interpreting an ordinance, [the Rhode Island Supreme Court] employ[s] the same rules of construction that [it] appl[ies] when interpreting statutes.” *Ruggiero v. City of Providence*, 893 A.2d 235, 237 (R.I. 2006). Furthermore, the Rhode Island Supreme Court has ruled that “[it]

review[s] issues of statutory interpretation *de novo*. When the language of a statute is clear and unambiguous, th[e] Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Zanni v. Town of Johnston*, 224 A.3d 461, 464 (R.I. 2020) (internal citations omitted). However, “when the provisions . . . are unclear or subject to more than one reasonable interpretation, the construction given by the [Board], charged with its enforcement is entitled to weight and deference, as long as that construction is not clearly erroneous or unauthorized . . . even when other reasonable constructions of the statute are possible.” *West v. McDonald*, 18 A.3d 526, 532 (R.I. 2011) (internal citations omitted). Finally, “a zoning ordinance is in derogation of the common-law right of a property owner to use her land as she wishes, and any doubt as to the legislative intent behind the ordinance must be resolved to her benefit.” *City of Providence v. O’Neill*, 445 A.2d 290, 293 (R.I. 1982).

III

Analysis

On appeal, Plaintiffs challenge the Board’s determination that the proposed projects constitute “minor” as opposed to “major” land development. They further argue that the Zoning Enabling Act does not permit the CPC to grant a design waiver relieving Omni of compliance with the 20-foot rule. The Board, the CPC and their respective members along with Omni (collectively, Defendants) dispute Plaintiffs’ contentions and further challenge Plaintiffs’ standing to bring this appeal.¹³ Defendants argue that even abutting landowners are not entitled to notice for the CPC review of minor land development projects. Plaintiffs further allege that Ms. Anderson does not

¹³ Of note, the Board denied Plaintiffs’ motion to add Ms. Anderson and other abutting landowners as appellants. Ms. Anderson has not challenged that ruling on appeal to this Court but merely joins the appeal without having appeared at the administrative level or filing a motion before this Court to be added as a party.

have any ownership interest in the property she relies upon to give her standing.¹⁴ As to PPS and WBNA, Defendants assert that they would not qualify as “aggrieved parties” even if notice was required for the project because neither non-profit corporation owns real estate that abuts the property sought to be developed.

Although the parties have raised multiple issues, this Court decides this appeal by resolving a single issue, to wit, whether the Board erred in finding that Plaintiffs lacked standing to challenge the CPC decisions. This finding requires the Court to determine whether the Board erred in upholding the CPC’s Decision that Omni’s application 19-076MI properly was filed as seeking approval for minor land development.

At issue is whether Plaintiffs are “aggrieved” parties under the Rhode Island Zoning Enabling Act of 1991, §§ 45-24-27, *et seq.* Only an aggrieved party has standing to appeal from a decision of the planning board to the board of appeal. *See* § 45-23-66. *See also* DRR §§ 811.2, 3. Under § 45-24-31(4), an “aggrieved party” is:

- “(i) Any person, or persons, or entity, or entities, who or that can demonstrate that his, her, or its property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town; or
- “(ii) Anyone requiring notice pursuant to this chapter.”

Section 45-24-31(4)(i) does not apply here. Neither Ms. Morris nor Ms. Anderson allege injury. PPS and WBNA do not claim to own property. For this reason, whether a party is aggrieved in this instance turns on whether notice is required under the Act. Section 45-24-31(4)(ii).

¹⁴ Defendants argue that the abutting property referenced by Carol Anderson is solely owned by Elmer Anderson. Of note, Ms. Anderson replied to this allegation by providing a copy of the city’s own tax record listing her as a joint owner with her husband. *See Appellants’ Reply Br.*, Apr. 17, 2021. Defendants do not dispute the authenticity of this document.

Under DRR §§ 400, *et seq.*, notice is not required for a minor land development project, but it is required for major land development projects. *See* § 45-23-42(a); DRR § 503. The notice requirement for major land development projects applies to all abutters within 200 feet of a subject property. *See* § 45-23-42(c)(1); DRR §§ 503, 504, 805(C)(1).

Section 45-23-42 provides in pertinent part:

“(a) A public hearing is required for a major land development project or a major subdivision or where a street extension or creation requires a public hearing for a minor land development project or minor subdivision.

...

“(c) Notice area. (1) At a minimum, all abutting property owners to the proposed development’s property boundary shall receive notice.” Section 45-23-42.

See also DRR §§ 503, 504 and 805(C)(1):

“**Section 503 – Master Plan:** Any . . . proposed major subdivision or major land development project shall first submit a Master Plan. Applicants shall adhere to the following:

...

“503.5 – Review Procedure

...

“(B) Informational Meeting: For a major land development project, a public informational meeting shall be held prior to the Commission’s decision on the master plan.

...

“504.5 – Public Hearing and Notice Requirements: A public hearing shall be required prior to the Commission’s decision on a preliminary plan for a major subdivision or land development project or a minor subdivision or land development project where a street is proposed to be extended or created and/or where a variance or special use permit or a modification to relief granted at the master

plan stage is being requested pursuant to Unified Development Review.¹⁵

...

“Section 805 - Notice Requirements For Public Informational Meeting and Public Hearing

...

“(C) Notice Area: Notice shall be sent by standard mail for public informational meetings or certified mail, return receipt requested for public hearings, by the applicant to:

1. All owners of real property whose property is located within two hundred (200) feet of the perimeter of the subject property.” DRR §§ 503, 504 and 805(C)(1).

Minor vs. Major Land Development

Sections 45-23-32(21) and (24) provide definitions of the terms “major land development” and “minor land development” as follows:

“(21) Major land development plan. Any land development plan not classified as a minor land development plan

...

“(24) Minor land development plan. A development plan for a residential project as defined in local regulations ... All nonresidential land development projects are considered major land development plans.” Section 45-23-32.

The Board ruled that Omni’s application properly was filed, considered and granted as a plan for a residential project, a minor land development plan. Plaintiffs assert that the applications should have been filed as proposals for major land development. Plaintiffs contend that the

¹⁵ Omni’s applications do not propose a street extension or creation, nor is the Applicant seeking Unified Development Review.

applications for residential development reflected only one phase of a multi-phase developmental plan which also includes proposals for nonresidential land development.

Plaintiffs argue that the proposed development is a major land development, rather than a minor land development. (Pls.' Appeal Br. 2.) If the Court agrees with Plaintiffs' argument, then the decision of the Board must be reversed because the applications were filed and considered under the requirements applicable to minor land development projects. *See* DRR §§ 400 *et seq.*, § 503. If the Court rejects that argument, then the Court must dismiss the appeal and uphold the Board's decision because none of the Plaintiffs have standing to challenge the grant of an application for preliminary approval of minor land development. This Court cannot consider the merits of Plaintiffs' arguments if it lacks jurisdiction over the parties due to lack of standing. *See Mark Realty Inc. v. City of Pawtucket*, 658 A.2d 912 (Mem.) (R.I. 1995). In either case, this Court need not reach any other issue raised by the parties in support of their respective positions because the ruling on whether the Board erred in determining that Omni's application properly was filed and processed as one for minor land development will determine the outcome of the case.

Plaintiffs argue that the site should be deemed a phased development plan project because Omni's proposed developments involve contiguous or related parcels of land, and the development should have proceeded by phases. (Pls.' Br. 7-9.) Plaintiffs claim that if Omni's proposed development was classified as phased, then it would be a major land development because Omni's other proposed plans within the site include nonresidential uses, which would fall outside of the minor land development plan definition. *Id.* Plaintiffs contend that, because Omni sought a waiver or modification, the project would not fall under the definition of minor land development, and the proposed development would be a major land development project instead. *Id.* at 2. Therefore, Plaintiffs argue that a more detailed review and a public hearing was required. *Id.* at 5.

Defendants argue that Omni’s two proposed projects (MI Application and DPR Application), along with the remaining land within the site are discrete properties, and Plaintiffs may not force Defendants to treat these parcels as one development project. (Omni’s Mem. 8.) Furthermore, Defendants argue that the mere discussion and review of abutting properties—whether owned by an applicant or another party—does not automatically render such offsite property part of an application. *Id.* at 10. Defendants claim that, although the CPC reviewed Omni’s other proposals, this was in the context of assuring conformity with the surrounding neighborhood. *Id.* Lastly, Defendants contend that the CPC lacked the authority to reassign the proposed minor land development project to major land development review because its preliminary plan approval made positive findings of all the elements required under the pertinent statute. (City’s Mem. 17.)

Notably, § 45-23-32 defines “major land development” in terms of its definition of “minor land development.” The statute provides that “minor land development” includes only applications that seek preliminary approval for land development solely for residential use. If the application includes, even in part, nonresidential development, it is excluded from the definition of “minor land development” and falls within the definition of “major land development.”

The Court finds that the statutory definitions of these terms are clear and unambiguous. “[W]hen the language of a statute is clear and unambiguous, [the Court] must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.” *Johnston v. Poulin*, 844 A.2d 707, 711 (R.I. 2004); *State v. Oliveira*, 882 A.2d 1097, 1110 (R.I. 2005). “Moreover, when [the Court] examine[s] an unambiguous statute, ‘there is no room for statutory construction and [the Court] must apply the statute as written.’” *Id.* (quoting *State v. DiCicco*, 707 A.2d 251, 253 (R.I. 1998)).

Clearly, Omni applied only for preliminary approval of a residential land development project. It is undisputed that the Applicant has future plans to develop other structures for mixed use. The record is devoid of any evidence as to when in the future Omni plans to pursue the additional development of its property. At the CPC hearing, Mr. DeStefano was adamant that Omni had no immediate plans for commercial development, and that the company was not in a position to commit to any plan or timeframe for future mixed-use projects. (CPC Hr'g Audio Recording at 01:05:26-50, Dec. 17, 2019.) However, the CPC insisted that he address Omni's long-range plans to a minor and somewhat vague extent as a condition it set for granting the MI application. The CPC conditioned the approval of the MI application on a requirement that "[t]he site shall be considered comprehensively with more information provided on landscaping and traffic circulation for the entire site." MI Decision at 3.

The Court finds that this vague condition does not defeat Omni's right to seek preliminary approval for the only projects it currently intends to pursue. Nothing in the statutory definition of "minor land development" precludes landowners from piecemeal development of their property. In fact, when Omni returns to the CPC with additional applications for preliminary approval for mixed use projects, those applications will be for "major land development" and the notice requirements set forth in DRR § 503 will apply to the applications and the proposals.

However, contrary to the contention of Omni's counsel that references by the CPC to Omni's future development plans were tantamount to dicta in a court decision, the CPC appears, at least in part, to have relied on those future mixed use plans in granting the applications.

In the MI decision, the CPC stated that it granted the waiver permitting residential housing within 20 feet of a main street based upon two findings: (1) that mixed use development is difficult to provide on the subject lots and (2) "*that the applicant will be providing mixed use amenities*

within the complex.” MI Decision at 2 (emphasis added). In granting the DPR application, the CPC stated:

“According to the applicant’s research, retail would not be viable at this location. *The applicant intends to construct a mixed use building providing retail and other commercial amenities to the south of the building fronting on Cranston Street. The former bank building located on the same lot will be redeveloped to provide commercial space as well.*” (DPR Decision at 1) (emphasis added).

In voting to approve the applications, the Commissioner also relied on other factors, such as the commercial use and activity on Westminster and Cranston Streets as well as the commercial use at the supermarket in close proximity to the subject property. (CPC Hr’g Audio Recording at 17:35-19:10, Dec. 17, 2019.) The CPC further found that the waiver should be granted “due to the unique characteristics of the lot.” (MI Decision at 2, Jan. 7, 2020.)

Of note, when he testified before the CPC, Mr. DeStefano did not invite the CPC to base its ruling on Omni’s future development plans. He testified that he was seeking design waivers because he didn’t “see the need for additional retail on the first floor at this time.” ((CPC Hr’g Audio Recording at 17:36, Dec. 17, 2019.) He referenced vacancy in the area noted that “brokers [Omni] we worked with we think that the Cranston Street side is going to be more conducive to retail” (*Id.* at 17:47-18:07.) It was the CPC staff member who characterized the proposed residential projects as the initial phase of a larger plan that would include mixed-use development. (*Id.* at 18:06-18:47.) Mr. DeStefano immediately tried to bring the discussion back to the residential proposals and reiterated that Omni was seeking only permission for the residential projects. (*Id.* at 18:06-18:47.)

The general purposes of zoning ordinances include promotion of the implementation and consistency with the Comprehensive Plan. *See* § 45-24-30(a) (“Zoning regulations shall be developed and maintained in accordance with a comprehensive plan prepared, adopted, and as may

be amended, in accordance with chapter 22.2 of this title and shall be designed to address the following purposes.”) The Board concluded that, in making its determinations, “CPC is required to consider the City’s Comprehensive Plan, including the neighborhood as a whole and other uses in the area.” (Board Decision at 7, May 13, 2020.) However, Mr. DeStefano reiterated that Omni did not have a full proposed plan for the other properties on the site and that it was only offering preliminary ideas to aid the CPC in envisioning the context of the proposals. (CPC Hr’g Audio Recording at 17:35-19:10, Dec. 17, 2019.)

Plaintiffs have failed to provide any legal authority to support their contention that Omni’s current applications and those it may be filing at some undetermined point in the future could not be filed piecemeal or that the CPC’s conditions and findings somehow convert the applications for residential projects from minor to major land development. Even if the CPC erroneously based its approvals, in whole or in part, on the finding that the Applicant has future plans for mixed use development, such error would not create standing for the Plaintiffs to challenge that finding.

The statutory scheme provides only one circumstance which would enable the CPC to reassign a proposed minor project to major review: “The planning board may re-assign a proposed minor project to major review only when the planning board is unable to make the positive findings required in § 45-23-60.” Section 45-23-38(e).

Under § 45-23-60, the planning board must be able to find that:

“(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.” Section 45-23-60.

In this case, the CPC made the requisite positive findings and incorporated them into its decision. MI Decision at 1-3; CPC Hr’g Audio Recording at 51:40-54:43, Dec. 17, 2019; Board Decision at 7, May 13, 2020. Thus, the CPC had no statutory authority to reassign the applications from minor to major land development.

Plaintiffs also assert that the definition of a minor land development plan precludes Omni from applying for preliminary approval for minor land development while seeking design waivers. In defining a minor land development plan, the legislature included only those applications for residential development that do “not require waivers or modifications as specified in *this act*.” Section 45-23-32(24) (emphasis added). Of note, Article 10 of the DRR defines a minor land development plan as one which “does not require waivers or modifications as specified in *these regulations*.” (Emphasis added.) Here, Omni did not seek design waivers from a statutory requirement or from the DRR, but from the provisions of municipal ordinances. *See Ordinances § 503.A.8 and § 503.A.6*. Plaintiffs’ argument that the applications for waivers precludes Omni from filing for minor land development fails. (*See Board Decision at 6, May 13, 2020.*)

Plaintiffs' argument that Omni's proposed development should be classified as a phased development also fails. Section 45-23-48(a) states that "[a] municipality *may* provide for the preliminary and final review stages, and for the construction of major land developments and subdivisions, to be divided into reasonable phases." Section 45-23-48(a) (emphasis added). This statute gives the municipality the discretion to divide projects into phases. It does not mandate such division. Additionally, its provisions are inapplicable to this case. Omni is not seeking approval for a multi-phase major land development and has applied only for preliminary approval for residential minor land development. Omni did not submit a master plan providing a description and a timetable for multiple development phases. *See* 5 Rathkopf's *The Law of Zoning and Planning* § 88:5 (4th ed.).

Although Omni presented a "combined site plan," this merely was an illustration of what Omni expected to propose at some undesignated point in the future. It was not presented as part of a master plan to be considered along with the applications for residential projects. *See* CPC Area Plans; CPC Hr'g Audio Recording at 17:35-19:10, Dec. 17, 2019.

The Decision of the Board upholding the CPC finding that application 19-076MI properly was filed as seeking approval for minor land development is supported by evidence in the record and the applicable law. This Court upholds that decision.

As a request for preliminary approval of minor land development, no notice to abutting landowners was required. Similarly, no notice was required to be given to PPS or WBNA. Because no notice was required and because no Plaintiff alleges injury to property, none of the Plaintiffs are aggrieved parties and none have standing to pursue this appeal.

The Court need not delve into the question whether Ms. Anderson also lacks standing due to her failure to seek permission to join in the appeal and failure to challenge the Board's denial

of her effort to be added as an appellant before the Board.¹⁶ Similarly, the Court does not examine the status of PPS and WBNA to appeal decisions of the Board granting preliminary approval of major land development projects. Finally, Plaintiffs' lack of standing precludes this Court from reaching the issue of whether the Board erred in upholding the CPC's grant of design waivers. "Standing is an access barrier that calls for the assessment of one's credentials to bring suit ... [S]tanding involves a threshold inquiry into the parties' status before reaching the merits of their claims." *Blackstone Valley Chamber of Commerce v. Public Utilities Commission*, 452 A.2d 931, 932-33 (R.I. 1982) Having determined that the Plaintiffs lack standing, the Court does not reach the merits of any remaining claims.

¹⁶ The Court notes that Ms. Anderson joined the appeal without filing a motion with the Court under Superior Court Rules of Civil Procedure 15 to do so. *See Carbone v. Planning Board of Appeal of Town of South Kingstown*, 702 A.2d 386, 388-89 (R.I. 1997) Additionally, on appeal, she does not challenge the Board's ruling rejecting her efforts (and those of other abutters) to join the appeal at the administrative level. It is arguable that absent proof of an expanded record, the Board's decision denying the motion to amend as untimely may constitute the "law of the case" and preclude her from joining this appeal. As the Court has stated, "[t]he law of the case doctrine . . . is a flexible rule that may be disregarded when a subsequent ruling can be based on an expanded record." *Berman v. Sitrin*, 101 A.3d 1251, 1262 (R.I. 2014); *Lynch v. Spirit Rent-A-Car, Inc.*, 965 A.2d 417, 424 (R.I. 2009) (quoting *Chavers v. Fleet Bank (RI), N.A.*, 844 A.2d 666, 677 (R.I. 2004)).

IV

Conclusion

After reviewing the entire record, this Court determines that the Board's Decision upholding the CPC's grant of preliminary approval for a minor land development project included sufficient findings of facts and reasons for the action taken and was not impermissibly conclusory.

Plaintiffs lack standing to challenge the grant of preliminary approval for a minor land development project.

For the reasons stated herein, the Court does not reach the remaining issues raised by Plaintiffs in their appeal.

Plaintiffs' Appeal is dismissed. The Board's Decision is upheld.

Counsel shall submit an appropriate order for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Providence Preservation Society, et al. v. Zoning Board of Review of the City of Providence, et al.

CASE NO: C.A. No. PC-2020-04495

COURT: Providence County Superior Court

DATE DECISION FILED: August 18, 2021

JUSTICE/MAGISTRATE: Vogel, J.

ATTORNEYS:

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