

Decision 2.) The Property, with 719 feet of frontage on Ten Rod Road, is designated as Tax Assessor's Plat 36, Block 2, Lot 2. (Compl. ¶ 1; (Zoning Certificate).) The Project was reviewed as a major land development governed by the Town of Exeter Land Development and Subdivision Regulations. (ZBR Decision 2.) The application was certified complete by the Town Planner on November 19, 2018. *Id.*

The Planning Board held public hearings for the Applicant's master plan application on January 22, 2019; February 22, 2019; and March 26, 2019. (Compl. ¶ 6.) The Planning Board also conducted site visits to the Property on February 16, 2019 and March 23, 2019. *Id.* The deadline of the decision for the Master Plan Application was extended by mutual agreement to March 28, 2019 and the Planning Board ultimately denied the application. (Planning Board Decision) (ZBR Decision 2.) The Appellant appealed the Planning Board's Decision to the Zoning Board of Review sitting as a Board of Appeals. (*see* ZBR Decision). The Appellant now appeals the Zoning Board Decision affirming the denial to this Court. (Compl. ¶ 3.)

A

Proceedings before the Planning Board

1

January 22, 2019 Planning Board Hearing

The Applicant presented his master plan application for a major land development at the Planning Board's public hearing on January 22, 2019. (Second Suppl. Certification, June 7, 2021 (Second Suppl. Certified R.) January 22, 2019 Meeting Tr. (Jan. Tr.) 77:24-78:5.) At the hearing, the Applicant provided the Planning Board with a general overview of the project. (Jan. Tr. 80:25-86:7.) William Dowdell, the project engineer, reviewed the plans and submissions that included a five-foot perimeter fence to surround the Project. (Jan. Tr. 80:17-18.) Access to the Project was

proposed through Estate Drive by way of a paved road to the end of the cul-de-sac that extends to the Applicant's property line. (Jan. Tr. 87:10-15.) In order to obtain the access, the Applicant cut down trees clearing the path to access Estate Drive and laid down gravel without Town permission (Jan. Tr. 89:13-90:16.) The Applicant maintained that he was entitled to utilize this point for access. *Id.*

During the January 22, 2019 hearing, the Applicant was questioned about his entitlement to access through Estate Drive. (Jan. Tr. 90:25-91:19.) Unable to provide support for his position, the Planning Board requested the Applicant obtain documents from the town council or the public works director confirming his right of access. *Id.* The Applicant agreed to rectify the issue of access with the town council and public works director. (Jan. Tr. 91:20-21.) Mr. Dowdell concurred that the issue of access had to be "straightened out" and agreed to follow the appropriate process to obtain access from Estate Drive. (Jan. Tr. 92:14-24.)

The Planning Board also discussed their concerns regarding the environmental impact of the Project. (Jan. Tr. 95:23-96:4.) Mr. Dowdell explained that a species of dragonfly had been identified within the area surrounding the Project and indicated that he would address any potential endangerment issues. (Jan. Tr. 96:21-97:2.) The Planning Board requested an environmental assessment and stated their concern regarding the Project's potential effects on wildlife habitats. (Jan. Tr. 96:20; 97:11-12.) The Planning Board also addressed the issue of the buffer zone surrounding the Project and protecting neighbors' site lines. (Jan. Tr. 100:24-101:7.) The Town Planner indicated that the Planning Board sought a better delineation of the buffer zone and that effective buffering was a "major concern" for the Planning Board. (Jan. Tr. 101:9-16.)

The Planning Board allowed public comment, at which time the neighbors and abutters raised issues such as the Project's potential to contribute to the flooding of DuTemple Brook, as

well as the resulting hard-surface runoff. (Jan. Tr. 105:1-18.) Additionally, the issue of the Applicant's clearing of Estate Drive was discussed as well as screening. (Jan. Tr. 107:1-108:10.) Public comments closed and the public meeting was continued until February 26, 2019 where he would address the Board's concerns. (Jan Tr. 115:9-10.)

2

February 26, 2019 Planning Board Hearing

The Planning Board next met on Tuesday, February 26, 2019 to continue their review of the Applicant's master plan application. At the February hearing, the Applicant reviewed the revisions and information that he submitted to the Board on the previous Friday, February 22, 2019. (Second Suppl. Certified. R. February 26, 2019 Meeting Tr. (Feb. Tr.) 13:13-17.) The Applicant submitted new plans which increased the buffer zone to 86 feet of the property line. (Feb. Tr. 14:19-23.) The Applicant proposed a secondary commercial use within the buffer zone consisting of the sale of evergreen trees individually tagged by consumers, cut, and sold during the holiday season. (Feb. Tr. 18:6-17, 19:5-22.) The trees would then be replaced with smaller trees in the springtime. (Feb. Tr. 19:21-20:24.)

The Planning Board expressed concern regarding the intermittent nature of a commercial buffer explaining that the function of a buffer is "to provide an opaque screen to adjacent properties so [neighbors are] not looking at a 10-megawatt solar facility." (Feb. Tr. 20:20-21:4, 24:15-17.) This is antithetical to the function and a sustained buffer zone was preferred. (Feb. Tr. 25:20-26:14; 27:10-18.) In addition, there was the potential for consumers to trespass on neighbors' property when tagging and cutting the trees. (Feb. Tr. 22:20-23.)

Additionally, the Board returned to the issue of the Applicant's proposed access along Estate Drive. (Feb. Tr. 28:1-4.) Mr. Dowdell and the Applicant restated their position that the

Applicant had legal access via Estate Drive. (Feb. Tr. 28:5-11, 29:2-3.) The Planning Board referred to the town's public works director's opinion that the Applicant lacked legal access through Estate Drive due to its status as a paper street. (Feb. Tr. 29:7-15.) The Planning Board once again instructed the Applicant to go to the town council to resolve the issue of access through Estate Drive. (Feb. Tr. 30:21-31:14.) The Planning Board confirmed that the Applicant had sufficient time to work with the town council before the deadline to consider the master plan application expired on March 28, 2019. (Feb. Tr. 33:1-18.)

The Planning Board discussed its concerns regarding site grading. (Feb. Tr. 34:5-7.) The issue arose after a recent site visit, during which the Applicant presented a model solar panel. (Feb. Tr. 35:20-36:1.) The solar panel had been placed in a 20-foot hole within the ground. (Feb. Tr. 36:19-24.) The Planning Board questioned whether the site would be graded such that all of the panels would be placed at a similar level. (Feb. Tr. 36:5-8.) The Applicant responded that grading and elevation plans were appropriate for the preliminary plan stage, rather than the master plan stage, and that he did not intend to provide the Planning Board with such plans. (Feb. Tr. 36:9-12.) The Board explained that approximate grading information was necessary because the elevation of the solar panels would affect the buffer zone and site lines of neighbors and abutters. (Feb. Tr. 36:19-37:9, 38:21-23, 40:4-41:12.) The Applicant assured the Board that he would have his engineer provide the necessary information. (Feb. Tr. 38:24-25.)

The parties scheduled another site walk and the Board opened the hearing up to public comment. (Feb. Tr. 49:14-22; 50:21-25.) A neighbor who lived on Estate Drive expressed her issue with the use of the road to access the Project due to the resulting commercial traffic and the residential nature of the neighborhood. (Feb. Tr. 51:5-22.) Another resident of Estate Drive communicated similar feelings and concerns about the duration of the Project and the intermittent

status of the proposed buffer zone. (Feb. Tr. 52:3-53:3.) The Planning Board continued the matter to March 26, 2019. (Feb. Tr. 61:2-25.)

3

March 26, 2019 Planning Board Hearing

The location of the March 26, 2019 hearing for master plan approval was moved to accommodate crowd capacity. (Second Suppl. Certified R. March 26, 2019 Meeting Tr. (Mar. Tr.) 2:19-24, 9:18-20.) The Applicant did not enter the hearing despite several requests for his presence as well as the departure of multiple attendants to make space for the Applicant. (Mar. Tr. 11:20-21:8.)¹ The Applicant's legal counsel was present for the duration of the meeting. Certified R. at 42-46 (Planning Board Decision, April 11, 2019 (Planning Board Decision) 3.)

The Planning Board once again discussed the ongoing and unresolved issue of access to the Project from Estate Drive, representing that the Applicant had declined to go through the appropriate process with the town council despite his previous assurance that he would do so. (Mar. Tr. 34:7-35:5.) The Town Planner indicated that the Applicant submitted two alternative forms of access to the Project, through Route 102 and Hallville Road. (Mar. Tr. 35:6-8.) The Town Planner discussed the related issues and identified multiple unresolved problems with both options. (Mar. Tr. 35:8-19.) The Town Planner also presented the outstanding issues surrounding the buffer zone. (Mar. Tr. 37:19-20.) The Town Planner indicated that the Applicant had submitted five buffer zone proposals the day prior to the hearing, ranging from leaving the zone natural and unaltered with sparse vegetation to the previously discussed commercial Christmas tree farm.

¹ The Planning Board decision describes a concerted effort by Appellant to oversubscribe the March 26, 2019 meeting with the intent of forcing the Planning Board to cancel the hearing. (Planning Board Decision 2-3.) The cancellation of the hearing would then force the Planning Board to automatically approve Appellant's application. *See* § 45-23-40(e).

(Mar. Tr. 37:20-38:8.) The Town Planner restated the concern with an intermittent commercial buffer zone. (Mar. Tr. 38:25-39:7.) Finally, the Town Planner described the issue surrounding the lack of information regarding site grading and the effects on drainage and flooding as well as the neighbors' view of the Project. (Mar. Tr. 39:15-40:14.)

Mr. Dowdell, the project engineer, responded to several of these concerns. (Mar. Tr. 41:9-10.) He reiterated the Applicant's position of legal access from Estate Drive. (Mar. Tr. 42:18-19.) Mr. Dowdell maintained that the resolution of the issue of access was not required by the town council. (Mar. Tr. 50:4-12.)

The Planning Board discussed the findings required in G.L. § 45-23-60 and LDSR § 3.5. (Mar. Tr. 61:4-68:13.) In their decision, the Planning Board made various findings of fact and unanimously voted to deny Appellant's Application. (Mar. Tr. 70:13-14.) The Planning Board noted that, despite the Applicant's decision to untimely file plethora documents and his failure to resolve outstanding issues, he declined to extend the time clock for the Board to consider the master plan application. (Mar. Tr. 63:1-20.)² A written decision was then issued on April 11, 2019. (Planning Board Decision.) The written decision incorporated the Town Planner's memorandum and the Board's required findings as discussed at the March 26, 2019 meeting. *Id.* The written decision included twenty findings of fact. *Id.*

In addition, the Planning Board's written decision included the conclusions required by the criteria set forth in G.L. § 45-23-60 and LDSR § 3.5. The Planning Board was unable to make the

² While an applicant is never obligated to extend the time clock for the Planning Board's consideration, this Court is troubled by this Applicant's refusal set against the backdrop of repeated requests by the Board to address the outstanding issues of access, buffering, and grading. Section 45-23-40(f).

affirmative findings necessary to approve Appellant's Application. (Mar. Tr. 61:4-70:14.)

Specifically, the Planning Board made negative findings as to the following standards:

- i. The proposed development is consistent with the town's comprehensive plan and/or has to the board's satisfaction addressed issues where there may be inconsistencies;
- ii. There will be no significant negative environmental impacts from the proposed development as shown on the preliminary plan as determined by the planning board, with all required conditions for approval;
- iii. All proposed land developments land development projects and all subdivision lots shall have adequate, permanent and safe physical vehicular access to a public street. Lot frontage on a public street without physical access shall not be considered compliance with this requirement;
- iv. Each subdivision shall provide for safe circulation of pedestrian and vehicular traffic for adequate surface water run-off, for suitable building sites, and for preservation of natural, historical, or cultural features that contribute to the attractiveness of the community; and
- v. The design and location of streets, building lots, utilities, drainage improvements and other improvements in each subdivision shall minimize flooding, soil erosion, and shall embody to the degree feasible a design that minimizes future maintenance. (Planning Board Decision 3-4.)

Following the Planning Board's denial of the master plan application, Appellant submitted a timely notice of appeal to the Zoning Board. (ZBR Decision 4.)

B

The Appellant appealed the decision to the Zoning Board of Review sitting as a Board of Appeals

On May 1, 2019, Applicant appealed the Master Plan Decision to the Zoning Board. *See* Pl.'s Ex. S (Appeal Application). In that appeal, Appellant argued that the planning board's decision contained prejudicial procedural error, clear error, and lack the support of the weight of the evidence in the record. *Id.* at 4. On May 23 and June 20, 2019, the ZBR considered the Appellant's appeal. (Compl. ¶ 10; *see* Second Suppl. Certified R. May 23, 2019 Meeting Tr. (May

Tr.); June 20, 2019 Meeting Tr. (June Tr.) At the May 23, 2019 hearing, the Appellant and his attorney presented a number of documents, including emails between the Appellant and town officials, to the ZBR. (May Tr. 5:6-24.) The Appellant argued that these documents were omitted from the appellate record. (May Tr. 5:16-24.) As a result, the ZBR continued the hearing until June 20, 2019 to afford the Board Members an opportunity to review the submitted documents in detail. (May Tr. 47:14-48:4.)

At the June 20, 2019 meeting, the ZBR heard arguments from the Appellant's attorney and the Assistant Solicitor. (June Tr. 30:12-45:16.) The parties continued to dispute whether the Planning Board considered emails between the Appellant and town officials, including Ashley Sweet, the Town Planner, in rendering its decision, and whether those emails should be included in the appellate record. (June Tr. 38:17-39:22, 46:12-47:15.) The parties also disputed the merits of the Planning Board's decision. (*See generally* June Tr.) Specifically, the Assistant Solicitor maintained that the Appellant's failure to provide information to the Planning Board regarding vehicular access to the Project was fatal to the project. (June Tr. 40:9-42:21.) The Appellant argued that the Planning Board applied an inappropriately high level of scrutiny in considering the Appellant's master plan application. (June Tr. 32:14-37:15.) The Zoning Board considered the record of the Planning Board, discussed, and ultimately affirmed each of the Planning Board's negative findings. (June Tr. 65:1-71:2.)

In doing so, many ZBR Members commented on the lack of information provided to the Planning Board by the Appellant regarding buffer options and vehicular access to the Project. (June Tr. 57:8-60:16, 60:18-61:5.) ZBR Member Tim Robertson commented that the Planning Board behaved diligently in attempting to obtain the necessary information and rendered a timely and appropriate decision. (June Tr. 61:8-62:7.) ZBR Member Susan Franco-Towell commented

that the Planning Board applied the correct standard in considering the Appellant's application. (June Tr. 62:9-24.) At the conclusion of the June 20, 2019 ZBR hearing, the ZBR voted unanimously to affirm the Planning Board's decision to deny Appellant's master plan application. (June Tr. 73:10-74:13.)

In a written decision dated July 1, 2019, the ZBR denied Appellant's appeal after reviewing the Planning Board's conclusions and findings of fact. (ZBR Decision) The attorney for the Planning Board, Peter Ruggiero, Esq., noted that the Planning Board is justified in denying a master plan application when it is unable to make a positive finding as to just one of the several criteria in § 45-23-60 ("Required findings") and LDSR § 3.5 ("Required findings for all approvals"). (ZBR Decision 6.) The ZBR concluded that the Planning Board had insufficient evidence to make the affirmative findings necessary to approve the Appellant's Application. *Id.* The ZBR found no error by the Planning Board and sufficient evidence in the record to support the Planning Board's conclusions. *See id.* at 7. The ZBR Decision was recorded in the Exeter Land Evidence Records on July 1, 2019. *See id.* at 8; Compl. ¶ 12.

On July 19, 2019, Appellant filed a Complaint, pursuant to § 45-23-71, asking this Court to reverse the decision of the ZBR and remand his application to the Planning Board for reconsideration. Compl. 3. The ZBR filed its Answer on August 2, 2019 and a Motion to Dismiss for lack of prosecution on June 18, 2020. *See Docket.* The Appellant objected on August 21, 2020. *See id.* The ZBR then moved to accelerate the administrative appeal on August 25, 2020. *See id.* The Court denied the ZBR's Motion to Accelerate on October 5, 2020. *See id.*

Following a hearing on September 1, 2020, the Court entered an Order for appellate briefing by both parties. *See Order, Sept. 22, 2020 (Taft-Carter, J.).* Appellant filed his Memorandum of Law in Support of the Appeal on November 24, 2020. *See Docket.* The ZBR

filed its Brief in Response on December 22, 2020. *Id.* At a hearing on January 19, 2021, Appellant sought leave from this Court to supplement the administrative record, which was granted in an Order entered on January 29, 2021. *See* Order, Jan. 29, 2021 (Taft-Carter, J.). Thereafter, Appellant filed a Supplemental Memorandum on January 18, 2021. *See* Docket. Following another hearing on May 26, 2021, the Court entered an Order instructing the parties to “confer and provide the Court with a complete copy of the administrative record, including all hearing transcripts.” (Order, June 9, 2021 (Taft-Carter, J.).)

II

Standard of Review

Pursuant to § 45-23-66, “an aggrieved party” may take “an appeal from any decision of the planning board, or administrative officer charged in the regulations with enforcement of any provisions . . . to the board of appeal” of the appropriate city or town. Section 45-23-66. In reviewing the challenged decision, a zoning board sitting as a board of appeal

“shall not substitute its own judgment for that of the planning board or the administrative officer but must consider the issue upon the findings and record of the planning board or administrative officer. The board of appeal shall not reverse a decision of the planning board or administrative officer except on a finding of prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record.

...

“The board of appeal shall keep complete records of all proceedings including a record of all votes taken, and shall put all decisions on appeals in writing. The board of appeal shall include in the written record the reasons for each decision.” Section 45-23-70.

Under § 45-23-71, an “aggrieved party may appeal a decision of the board of appeal” to the Superior Court. Section 45-23-71(a). Sitting without a jury, the reviewing Court “shall consider the record of the hearing before the planning board” and “may allow any party to the

appeal to present evidence in open court” only after a determination that such “additional evidence is necessary for the proper disposition of the matter[.]” Section 45-23-71(b). On appeal, 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 [or] 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.” Section 45-23-71(c).

Section 45-23-71 thus “utiliz[es] the traditional judicial review standard that is applied in administrative-agency actions.” *Munroe v. Town of East Greenwich*, 733 A.2d 703, 705 (R.I. 1999). The Court must “give[] deference to the findings of fact of the local planning board[.]” and the Court’s “review ‘is confined to a search of the record to ascertain whether the board’s decision rests upon ‘competent evidence’ or is affected by an error of law.’” *West v. McDonald*, 18 A.3d 526, 531 (R.I. 2011) (quoting *Kirby v. Planning Board of Review of Town of Middletown*, 634 A.2d 285, 290 (R.I. 1993)). “A planning board’s determinations of law, like those of a zoning board or administrative agency, are not binding on the reviewing court; they may be reviewed to determine what the law is and its applicability to the facts.” *Id.* at 532 (citing *Pawtucket Transfer Operations, LLC v. City of Pawtucket*, 944 A.2d 855, 859 (R.I. 2008)).

III

Analysis

A

Statutory Framework

The general provisions governing major land developments and major subdivision review stages are set forth in § 45-23-39. An applicant is required to proceed through three (3) stages of review to obtain approval: master plan approval, preliminary plan approval, and then final plan approval. Section 45-23-39(b). The planning board, in considering an application, is required to make specific positive findings at each of these three stages. *See* § 45-23-60(a). Section 45-23-60(a) requires that the approving authority make positive findings to the effect that:

1. The proposed development is consistent with the town's comprehensive plan and/or has to the board's satisfaction 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 standard would be impracticable. . . . 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 land development projects and all subdivision lots shall have adequate, permanent and safe physical vehicular access to a public street. Lot frontage on a public street without physical access shall not be considered compliance with this requirement.

If the Planning Board fails to make a positive find for *any* of these standards, "the planning board shall have grounds for denial of the project design." *See* LDSR § 3.5 (emphasis added.) At the master plan review stage, an applicant must provide the planning board with information on

the “natural and built features of the surrounding neighborhood,” including environmental and topographical characteristics of the site, *see* § 45-23-40(1)(2), and seek comments from local, state, and federal agencies. Section 45-23-40(a)(3)(i)-(iv).

The planning board must also consider a municipality’s zoning ordinances. Section 45-23-60(a)(2). The Town of Exeter’s Land Development and Subdivision Regulations requires the planning board to make several additional findings of fact, prior to approving subdivisions and developments. LDSR § 3.5. The two additional findings relevant to the Board’s Decision included:

“6) Each subdivision shall provide for safe circulation of pedestrian and vehicular traffic for adequate surface water run-off, for suitable building sites, and for preservation of natural, historical, or cultural features that contribute to the attractiveness of the community; and
“7) The design and location of streets, building lots, utilities, drainage improvements and other improvements in each subdivision shall minimize flooding, soil erosion, and shall embody to the degree feasible a design that minimizes future maintenance.” LDSR § 3.5.

Here, the Planning Board was unable to make the required positive finding on five of the standards regarding Appellant’s Application. (ZBR Decision). Specifically, the Planning Board made negative findings as to the following standards:

1. The proposed development is consistent with the town’s comprehensive plan and/or has to the board’s satisfaction addressed issues where there may be inconsistencies;
2. There will be no significant negative environmental impacts from the proposed development as shown on the preliminary plan as determined by the planning board, with all required conditions for approval;
3. All proposed land developments land development projects and all subdivision lots shall have adequate, permanent and safe physical vehicular access to a public street. Lot frontage on a public street without physical access shall not be considered compliance with this requirement;
4. Each subdivision shall provide for safe circulation of pedestrian and vehicular traffic for adequate surface water run-off, for suitable building sites, and for preservation of natural, historical, or cultural features that contribute to the attractiveness of the community; and

5. The design and location of streets, building lots, utilities, drainage improvements and other improvements in each subdivision shall minimize flooding, soil erosion, and shall embody to the degree feasible a design that minimizes future maintenance. (Planning Board Decision 3-4.)

The ZBR found that the Planning Board's negative findings were supported by legally competent evidence, pursuant to G.L. § 45-23-60(b). (ZBR Decision 3.) The ZBR further found there was no prejudicial procedural error or clear error. (ZBR Decision 7.) Thus, the ZBR affirmed the Planning Board's denial of Appellant's Application based on these five negative findings. *Id.*

1

The Town of Exeter's Comprehensive Plan

First, Appellant argues that the Town's Zoning Ordinance expressly permits solar development in RU-4 districts, rendering the Project compatible with the Town's Comprehensive Plan because the Property is zoned RU-4. (Appellant's Mem. 24-29.) Conversely, the ZBR denies that the Project inherently complies with the Town's Comprehensive Plan solely because the Project will comprise an approved use. *Id.* at 22-27. The ZBR argues that the Planning Board correctly looked to facets of the Comprehensive Plan such as the emphasis of the Town's rural character as support for determining noncompliance and made a negative finding regarding § 45-23-60(a)(1). *Id.* at 24-26. The Project must be consistent with the Town of Exeter's Comprehensive Plan and conform to the standards and provisions of the Zoning Ordinance. Section 45-23-60(a)(1)(2).

Clearly, a permitted use in a particular district implicitly demonstrates a legislative conclusion that the use is harmonious with other uses in the district. *Perron v. Zoning Board of Review of Town of Burrillville*, 117 R.I. 571, 574, 369 A.2d 638, 641 (1977). However, a proposed development does not automatically comport with a municipality's comprehensive plan solely

because the development consists of an allowed use. *Town of Exeter by and through Marusak v. State*, 226 A.3d 696, 702 (R.I. 2020). Zoning requirements and comprehensive planning are two distinct mechanisms that “are meant to address substantively different issues and may contain different, yet non-conflicting, requirements.” *West*, 18 A.3d at 541.

In this case, Appellant’s Project is located in an RU-4 zone, which is defined as a “rural district.” The Town’s zoning ordinances provide that:

“The purpose of [the RU-4] zone is to protect land now used for forestry, farming and related activities and the natural habitat and wildlife and to preserve the area’s rural character. This [RU-4] zone provides land suitable for low density residential development and reserves land for future farming, forestry, conservation practices and recreational uses.” *Town of Exeter Ordinances App. A Zoning § 2.1.3.*

The Town’s Comprehensive Plan includes goals such as the stewardship and maintenance of the Town’s rural character as well as managing development in a manner that does not affect or detract from the Town’s general rural character. (ZBR’s Br. Ex. 5 (Town of Exeter’s Comprehensive Plan).) The Comprehensive Plan defines stewardship as “providing management for the continued enjoyment and appreciation of the town’s resources for today’s residents and future generations.” *Id.* at ¶ 2.1. Further, the Comprehensive Plan emphasizes the importance of the Town’s “visual identity” managing growth to prevent adverse effects on the visual character of the Town. *Id.* ¶ 2.3. The Comprehensive Plan seeks to accommodate growth while using the Town’s “rural character to the [T]own’s advantage” and “preserving much of the town’s character.” *Id.* ¶¶ 2.2, 2.3. The goals and policies provides that the Town of Exeter shall “remain essentially a low-density community” and “shall try to manage current and future growth and development in a manner that does not adversely affect or detract from Exeter’s unique natural, environmental and

economical resources . . .” *Id.* ¶ 4.1.1. Issues pertaining to land use and natural and cultural resources are also described in the Comprehensive Plan. *Id.* ¶ 5.2.1-5.2.2(a).

The Planning Board sought to preserve and maintain the Town’s “rural character” by protecting the neighbors’ view of the Project. (June Tr. 67:8-19.) The Planning Board based its decision on Appellant’s lack of clarity and direction in his presentation of the Project’s grading, buffer options, and the resulting site lines to neighbors and abutters. (Mar. Tr. 63:13-15.) Specifically, at the February 26, 2019 meeting, the Planning Board explained that preliminary or general grading information was necessary to establish the height of the solar panels, which would then affect the sufficiency of the screening provided by the buffer zone. (Feb. Tr. 34:5-15.) Appellant failed to provide the Planning Board with such general grading information. (Mar. Tr. 63:21-64:4.)

The Town Planner addressed these issues relating to the Comprehensive Plan in the memoranda (Def.’s Ex. 4.) The Planning Board requested additional information from the Appellant with respect to road access, grading, tree clearing, and buffing. *See generally Id.* It was explained to the Appellant that the Project’s visibility to neighbors depended upon the site grading, which would vary depending on the buffer design selected. (Feb. Tr. 40:4-41:2.) Despite assurances that he would provide such information, Appellant failed to provide the Planning Board with the requested information. (Feb. Tr. 38:24-25.)

The Planning Board concluded that the Applicant failed to produce substantial evidence demonstrating that the Project failed to comply with the Town’s Comprehensive Plan. (Feb Tr. 40:10-14; ZBR’s Br., Ex. 4 (Town Planner Memorandum) 8.³) Clearly, the Planning Board was

³ The Planning Board incorporated the written memorandum of Ashley Sweet, Town Planner, analyzing the Application into its April 11, 2019 Decision. (Planning Board Decision 3; ZBR Mem., Ex. 4.)

not equipped to make a decision about the effects of the Project's appearance without sufficient information regarding the appearance. (Appellant's Mem., Ex. K.) Further, the limited information provided to the Planning Board was submitted the day prior to the March 26, 2019 approval meeting, giving the Planning Board insufficient time to review the buffer proposals. (Mar. Tr. 63:13-15.) The absence of the selection of a specific buffer option and accompanying grading information serves as substantial evidence that supports the Planning Board's negative finding regarding the Project's capacity to detract from the rural character of the Town and resulting compliance with the Town's Comprehensive Plan. *See* §§ 45-23-40(e), 45-23-60(a)(1).

2

Environmental Impact

Appellant next argues that he submitted competent and credible evidence that the Project would not cause significant negative environmental impact, pursuant to § 45-23-60(a)(3). (Appellant's Mem. 30-34.) Appellant maintains that the Planning Board failed to request an environmental and community impact study as required by municipal regulation, Town of Exeter Ordinances, Appendix B: Land Development and Subdivision Regulations (LDSR) § 3.4(1). *Id.* at 30-31. The ZBR denies that Appellant provided the Planning Board with sufficient evidence to demonstrate that the Project would not cause significant environmental impact. (ZBR's Br. 27.)

The record clearly reflects that Planning Board Member Palmer requested an environmental and community impact study from Appellant at the January 22, 2019 meeting, pursuant to municipal regulation. *See* Jan. Tr. 96:20; LDSR § 3.4(1)(b). Board Member Palmer made the request during a series of questions regarding the Project's capacity to affect endangered species identified on the Property, such as dragonflies. *Id.* at 95:23-96:20. Further, the record contains ample testimony from the Town Planner and abutters that the Project would negatively

impact the local environment, including negative impacts on a stream located on the Property. (ZBR Br., Ex. 4; Jan. Tr. 105:1-18.) The Planning Board noted that the Project would cause extensive loss of forest and natural habitat for wildlife. (Mar. Tr. 62:12-21.) The Town Planner described, and the Planning Board agreed, that two of the three access options presented by Appellant would result in significant environmental impacts due to the property's wetland status and necessary stream crossings. (ZBR's Br. Ex. 4, at 9; Mar. Tr. 62:12-23.) Multiple abutters testified of "major concern[s]" with respect to the impact on the local habitat for wildlife and the potential for flooding. (Jan. Tr. 105:1-18, 110:18-111:22.)

Despite these concerns being expressed on multiple occasions, the Appellant failed to demonstrate that there would be no significant negative environment impacts. While the Appellant refers to a 2009 wetlands delineation of the Property prepared by a biologist in support of his proposition that the Project would not cause significant environmental impact, the report merely identifies the sections of the Property which are classified as wetlands. (Master Plan Application) The report fails to indicate any environmental impact of the Project. *Id.* Further, the application itself describes this report as "expired" and needing "to be updated." *Id.* at 26. In addition to the wetlands delineation, Appellant also indicated the soil types within the Property, stated that the Project is not located within a flood zone, and identified no standing structures within the Project boundaries as evidence supporting a lack of environmental impact. *Id.* Further, Appellant stated in his application that access to the Project from Estate Drive would cross the potential habitat of an endangered species, the Ringed Boghaunter DragonFly, and offered no explanation as to what steps would be taken to mitigate the potentially adverse effects of such a disruption. *Id.* Ultimately, Appellant failed to address the concerns of the Planning Board in relation to the Project's environmental impacts. *Id.*

The Court cannot find that the Planning Board erred by finding that Appellant failed to produce substantial evidence, to address the environmental impact of the solar project. Sections 45-23-40(e), 45-23-60(a)(3).

3

Vehicular Access

Appellant contends that he provided the Board with three sufficient routes of vehicular access to the Project: Estate Drive; Route 102; and Hallville Road, satisfying G.L. § 45-23-60(a)(5). (Appellant’s Mem. 34-36.) The ZBR noted a prior decision by this Court for support that Appellant does not have legal access via the Estate Drive cul-de-sac.⁴ (Appellant’s Suppl. Mem. (Jan. 18, 2021) 1-2.) Further, the ZBR argues that the two remaining access options, Route 102 and Hallville Road, involve unaddressed environmental issues. (ZBR’s Br. 21-22.) Therefore, the ZBR argues that Appellant has failed to demonstrate legal access connecting the Project to a public street, as required by G.L. § 45-23-60(a)(5).

Throughout the application process, the issue of vehicular access to the project was significant and in the forefront. Board Members continuously and consistently noted that the issue was “problematic” and a “huge outstanding issue.” (Jan. Tr. 89:25-90:2; Feb. Tr. 28:1-4; Mar. Tr. 34:5-16.) In fact, following a circuitous exchange with the Planning Board, the Appellant ultimately proposed vehicular access via three options: (1) Estate Drive, (2) Route 102, and (3)

⁴ This Court previously adjudicated the narrow issue of the status of Estate Drive and determined that the portion of Estate Drive that abuts Appellant’s property is a “‘paper street’ dedicated to the Town for future development and not a public road that has been accepted by the Town.” *Asa S. Davis v. Town of Exeter*, WC-2019-0228, (R.I. Super. Jan. 13, 2021) (Taft-Carter, J.). However, in keeping with the scope of review, this Court will consider solely the evidence before the Planning Board and ZBR to determine if reliable evidence supports the Planning Board’s decision and the ZBR’s affirmance. Section 45-23-71(c). Therefore, the conclusion of this Court regarding the status of Estate Drive, which postdated the proceedings below, is not part of the record and will not be considered by this Court.

Hallville Road. (Mar. Tr. 35:1-19.) At the time of the master plan application, the parties disputed the status of the road abutting the Project, Estate Drive. (Jan. Tr. 88:10-93:23.)

With respect to Estate Dive access, the Planning Board concluded that the portion of Estate Drive abutting the Property is a “paper street” or “stub road,”⁵ while Appellant asserted Estate Drive to be a Town road, and, therefore, a proper route of access to the Project. *Id.* The Planning Board relied on a letter from the Town Public Works Director in determining that Appellant lacked legal access and permission to use Estate Drive. (Mar. Tr. 65:24-66:1; Certified R. 66.) To rebut the Public Works Director’s statement, Appellant and Mr. Dowdell merely repeatedly stated their own belief that Appellant had legal access and offered no supporting documentation other than Mr. Dowdell’s lawyer agreeing with Appellant’s contention. (Feb. Tr. 28:5-8; Mar. Tr. 42:18-19.) The record is riddled with repeated instructions to the Applicant, directing him to comply with town ordinances and acquire a permit to connect the cul-de-sac to the Property. (Jan. Tr. 91:15-21; Feb. Tr. 31:12-18.) It is clear that Appellant never complied with the Planning Board’s request or offered anything other than a legal opinion to contest the Town Public Works Director’s decision regarding Estate Drive. (Jan. Tr. 91:15-21; Mar. Tr. 32:25-33:5.)

The Planning Board also questioned the Applicant regarding the two remaining options for access, Route 102 and Hallville Road. (Mar. Tr. 64:23-65:7.) Both the Route 102 and Hallville Road access options involved a stream crossing and potential detrimental effects to the Property’s wetlands. *Id.* Concerns associated with both methods of access were never addressed by Appellant. *Id.* The Hallville Road option was predicated on the validity of an easement through neighboring

⁵ A “paper street” or “stub road” is a “portion of a street reserved to provide access to future development, which may provide for utility connections.” Section 45-23-32(49). It is “a street which appears on a recorded plat but which in actuality has never been open, prepared for use, or used as a street.” *Robidoux v. Pelletier*, 120 R.I. 425, 438, 391 A.2d 1150, 1157 n.2 (1978).

property. (Appellant's Mem. Ex. R.) The Planning Board received information regarding the purported easement the day prior to the March 26 meeting, leaving insufficient time⁶ for the Board to review the relevant documents and determine whether an easement would allow access. (Mar. Tr. 35:6-14.) The Appellant failed to provide sufficient information that either Estate Drive, Route 102, or Hallville Road can serve as legal and appropriate routes of access to the Project. (Mar. Tr. 32:25-33:5, 64:23-65:7.) Therefore, the Board did not err when it concluded that the Applicant failed to demonstrate that he had access to the Project through a public street. *See* § 45-23-60(a)(5).

4

Buffering - Attractiveness of Community

Next, Appellant maintains that competent evidence on the record supports his submission of five different buffer options, each sufficiently designed to shield the Project from neighbors' site lines. (Appellant's Mem. 36-37.) Appellant argues that these buffer options sufficiently ensure that the attractiveness of the community is maintained, as required by LDSR § 3.5(6). *Id.* The ZBR takes issue with the number of buffer options presented to the Planning Board. *Id.* at 28-29. The ZBR argues that the Planning Board could not have made a positive finding regarding the maintenance of community attractiveness, pursuant to LDSR § 3.5(6), given the wide variety of buffer options presented. *See id.* at 12, 28-29 (adopting the Town Planner's reasoning regarding the application deficiencies). Finally, the ZBR argues that the Planning Board properly required approximate grading information, pursuant to LDSR § 3.5(7), given the Property's potential to flood and the impact of grading on neighbors' site lines. *Id.* at 29 (referencing Town Planner's concerns regarding the Property's grading).

⁶ As discussed above, the Planning Board was unable to continue the hearing to review the late-filed materials because only Appellant had the authority to extend the time clock for the Board's consideration of his application. Section 45-23-40(f). Appellant declined to extend the time clock.

The Planning Board observed that the issue of buffering was an outstanding issue. (Mar. Tr. 38:25-39:7.) As discussed previously, the Applicant failed to present evidence of a concrete buffering plan. (Appellant's Mem., Ex. K.) In addition, the record is void of a site grading plan. (Mar. Tr. 39:15-20.) During both site visits to the Property, Planning Board Members and abutters questioned Appellant on the sightlines from neighboring properties to the site of the proposed Project. (On-Site Visit Minutes.) Appellant never directly answered these questions, indicating that the sightlines would vary based on the site's grading, which had yet to be determined. *Id.*

At the February 22, 2019 meeting, the Board made it clear that "one of the main concerns of the Planning Board" was how to "adequately protect the neighbors" from viewing the Project and provide serviceable screening. (Feb. Tr. 40:23-41:1.) Despite several explicit indications to Appellant that a commercial and intermittent buffer zone was inappropriate and unserviceable, the Applicant expressed his "continue[d] . . . prefer[ence]" for installing a Christmas tree farm as the buffer. (Appellant's Mem. Ex. R.) Appellant attempted to mitigate the Planning Board's concerns by updating the Christmas tree farm proposal to include rotating rows of trees, harvested at different times of the year to maximize screening. (Appellant's Mem. Ex. M (March 11, 2019 correspondence between Appellant and Town Planner).) However, the Planning Board strongly disputed the suitability of any "intermittent" or "revolving" buffer and reiterated the importance of a "sustained," "maintained," and "consistent" buffer. (Feb. Tr. 21:1-4, 26:2-4, 27:11-13.)

Appellant also provided four additional buffer renderings to the Town Planner the day before the March 26, 2019 approval meeting. (ZBR Decision.) The Town Planner noted the fact that the renderings were inconsistent with prior representations by Appellant. (Def.'s Ex. 4 (Town Planner's Mem.)) For example, Appellant had previously communicated that he intended to plant nine rows of trees within the buffer zone, but the rendering only showed four rows of trees. *Id.*

Further, the Town Planner was concerned that the renderings were drawn up by Appellant himself rather than a professional engineer or landscape architect. *Id.*

Ultimately, Appellant's repeated insistence on utilizing the buffer zone as a commercial enterprise which would create inconsistent screening and the insufficiency of his alternate proposals supports the Planning Board's inability to find that the Project would contribute to the preservation of the Town's attractiveness. (Appellant's Mem., Ex. R.) Here, the Court finds that the Planning Board did not err in concluding that the Applicant failed to produce specific plans for a feasible buffer zone, including grading information for the various buffer options and the site of the solar panels. Section 45-23-40(e); LDSR § 3.5(6).

5

Flooding and Erosion

Lastly, Appellant argues that the Planning Board required excessive and unnecessary information at the master plan stage regarding flooding and erosion. (Appellant's Mem. 37-39.) Specifically, Appellant maintains that he is not required to provide detailed information regarding utility connections and grading at this initial stage to satisfy LDSR § 3.5(7). *Id.* Appellant argues that such detailed planning is required at the preliminary plan review rather than the master plan review. *Id.* The ZBR contends that the Planning Board never requested detailed planning from Appellant, only general grading information. (ZBR Br. 35-36.)

The Planning Board clearly lacked the information necessary to determine that the Project would minimize flooding and soil erosion. The record reflects that the Planning Board and commenting abutters repeatedly discussed their "major concern[s]" with Appellant regarding drainage and flooding and requested general grading information responsive to those concerns. (On-site Visit Minutes; Jan Tr. 105:1-18, 111:4-9; Mar. Tr. 40:5-14.) The Planning Board

explained that, without general information, the Planning Board was “unable to really understand how the site will drain” because “[d]rainage is very much reliant on” grading. (Mar. Tr. 40:5-8.) Appellant failed to address the Planning Board’s concerns and submitted no information regarding drainage or grading. (*See generally* Mar. Tr.) Appellant argues that he was not required to submit engineering plans at the master plan review stage, but the record does not reflect that the Planning Board ever requested such detailed planning. (Mar. Tr. 40:5-14.) Instead, the Planning Board had legitimate concerns and requested general and preliminary information to address those concerns. *Id.* The Appellant declined to provide such information. *Id.* Accordingly, applying the appropriate deferential standard of review, the Court cannot find that the Planning Board erred when it concluded that there was a lack of grading and drainage information provided by Appellant and the site design’s potential to minimize future flooding, erosion, and drainage. *See* LDSR § 3.5(7).

V

Conclusion

For the reasons stated above, the Court finds that substantial evidence supports the ZBR’s decision to affirm the Planning Board. Accordingly, Appellant’s appeal is denied, and the Decision of the Zoning Board of Review, sitting as a Board of Appeal, is affirmed. Counsel shall submit an appropriate judgment for entry.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Asa A. Davis III v. Town of Exeter Zoning Board of Review, sitting as a Board of Appeal

CASE NO: WC-2019-0383

COURT: Washington County Superior Court

DATE DECISION FILED: September 28, 2022

JUSTICE/MAGISTRATE: Taft-Carter, J.

ATTORNEYS:

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