STATE OF RHODE ISLAND

NEWPORT, SC. **SUPERIOR COURT**

[Filed: June 8, 2022]

NORTHBOROUGH REALTY HOLDINGS, LLC	:	
Petitioner,	:	
	:	
v.	:	**C.A. No. NC-2021-0201**
	:	
TIVERTON ZONING BOARD OF REVIEW SITTING AS THE BOARD OF APPEALS; LISE J. GESCHEIDT; GEORGE S. ALZAIBAK; JOHN R. JACKSON; WENDY TAYLOR HUMPHREY; and JOEL BISHOP, in their official capacities only as Members of the Tiverton Zoning Board of Review Sitting as the Board of Appeals	:	
***Respondents*.**	:	

DECISION

LICHT, J. Northborough Realty Holdings, LLC (Northborough) appeals a decision from the Town of Tiverton Zoning Board of Review sitting as the Planning Board of Appeals (Board of Appeals), which affirmed a decision of the Tiverton Planning Board (Planning Board). The Board of Appeals found that Northborough's proposed changes to the storm water management plan for its proposed land development project of a 52 unit condominium complex (the Project) constituted a major change to a prior approved plan that necessitates notice and a full public hearing. Jurisdiction is pursuant to G.L. 1956 § 45-23-71.

I

Facts and Travel

In June 2008, Petitioner Northborough secured Final Plan Approval for the Project. (*See* Administrative Record (AR) at 00017-00019). The Project site (the Property) was approved as a

two-lot site, consisting of the Commercial Lot and the Residential Lot,[1] located at 994-1000 Main Road, commonly referred to as Rhode Island Route 138, in Tiverton, Rhode Island. The Planning Board granted Final Plan Approval in September 2007 which doubles as the vesting of Northborough's rights to the Project. (*See* AR at 00018, Tiverton Zoning Ordinance at Art. XVIII, § 4(b)).

Final Plan Approval was for a project that situated the condominium units on the Residential Lot, with project infrastructure—inclusive of an underground detention basin for the stormwater management system—to be located on the Commercial Lot. At that time, Northborough did not record the Final Plan Approval. However, in response to the economic fallout in the real estate development industry due to the Great Recession, the General Assembly enacted G.L. 1956 § 42-17.1-2.5. This statute tolled the expiration period relative to the approval of the Project. At the time of tolling, the planned stormwater management system had not yet been approved by the Rhode Island Department of Environmental Management (DEM). Modifications to the stormwater management system, however, were expressly contemplated by the Planning Board in its granting of Final Plan Approval.[2]

Northborough formally resumed its efforts to develop the Project in mid-2020. As its first act, Northborough sought approval from DEM for its stormwater management system. However, during the tolling period, DEM had changed its regulations. The original system—an underground detention basin—was no longer proper. DEM required and approved an above-ground detention basin. Northborough then sought approval from the Planning Board's administrative

[1] Assessor's Plat 119, Lots 121 and 122, respectively.

[2] *See* AR at 00018 ("No certificate of occupancy shall be issued for any condominium unit . . . until the . . . Town of Tiverton [building official] has received a report . . . on behalf of the applicant certifying . . . [t]hat ***all storm water drainage facilities*** required by the plan for the entire site of [the Project] have been installed in accordance with the plans ***or any approved modifications thereto***.") (emphasis added).

representative, Officer Jennifer Siciliano (the Administrative Officer), of their DEM-approved above-ground detention basin as a "minor change" to Final Plan Approval. (*See* AR 00765-00769).[3]

On June 19, 2020, just three days after DEM granted Northborough a construction permit based on the schematics for its now above ground detention basin, the Administrative Officer denied Northborough's requested change to Final Plan Approval. Explaining her position, the Administrative Officer wrote that Northborough was now required to obtain (i) a Special Use Permit from the Zoning Board concomitant with an (ii) Administrative Subdivision to merge the Commercial and Residential Lots. (*See* AR at 00045-00046). For their part, Northborough argued that the Administrative Officer's decision was flawed because it ignored that (1) Northborough had already acquired a valid special use permit from the Zoning Board in September 2007 (*See* AR at 00017-00019)[4], and (2) the plans approved by DEM did *not* show a one parcel project. (*See* AR at 00006).[5] Indeed, DEM's eventual approval/grant of the RIPDES Permit explicitly refers to the Project as a two-lot project: "Assessor's Plat 119, ***Lots 121 and 122***." (*Id.* at 00023-00025) (emphasis added). At the time, Northborough also argued that any DEM-required change must be

[3] This followed an attempt by Northborough's engineers to redesign the detention basin such that it would remain underground but at three (3) times the size of the original basin. *See* Pet'r's Mem. at 7. Despite this redesign receiving initial approval from the Town, Northborough was again stymied by DEM, who by then required further enlargement of the detention basin in exchange for a RIPDES Permit. *See* AR at 00766-00768. At this point, Northborough's only feasible option was to pursue an *above ground* detention basin to be located on the Commercial Lot. *Id.* DEM granted Northborough Construction General Permit Number RI-101946 based on the schematic design of the new above ground detention basin on June 16, 2020. *Id.* at 00023-00025.

[4] (Indicating granting of "Conditional Approval" of "Preliminary Plan" following review and public hearing before the Zoning Board on September 4, 2007).

[5] Northborough concludes that the Administrative Officer took this position regarding the necessity of merging lots 121 and 122 because "the plans submitted by Northborough's engineer to DEM showed the Land Development Project as located on a single lot." Pet'r's Mem. at 8, *see also* AR at 00046.

viewed as "minor" in light of the legal authority granted to DEM by the General Assembly and, further, that Tiverton failed to promulgate regulations defining what, exactly, differentiated a "minor change" from a "major change."

Despite Northborough's September 10, 2020 letter outlining these arguments,[6] the Administrative Officer ultimately issued a decision denying Northborough's request. (*See* AR at 00047-00048). In turn, Northborough initiated an appeal of the Administrative Officer's decision to the Board of Appeals pursuant to § 45-23-66(a) as well as Tiverton Land Development and Subdivision Regulations § 23-78. Following a November 18, 2020 hearing, the Board of Appeals *denied* Northborough's appeal on or about January 5, 2021 (the Original Decision). The Board of Appeals determined that while an administrative officer *has the discretionary authority* to approve a "minor change" (pursuant to the plain language of Article IX, Sec. 23-50(b)), an administrative officer also "***retains the discretionary right to refer even minor changes to the Planning Board for their review and input***." (AR at 00265) (emphasis added). Additionally, the Board of Appeals conceded that while "the Planning Board['s] [current] regulations do not presently define the term 'minor change,'" even if the "major/minor" distinction were defined, "it is not mandatory that the Administrative Office[r] automatically approve the[] [minor change] as a matter of right." *(Id.*).

In response to the Original Decision, Northborough requested a hearing before the full Planning Board to request its stormwater management system change be labeled a "minor" one.

[6] According to the letter, Northborough acknowledged that "the . . . final approved plans called for stormwater management facilities to be placed underground on an adjoining commercially zoned lot . . . which is owned by Northborough and is to be accessed by way of an easement. However, due to regulation changes, []DEM is now requiring that the stormwater management facilities consist of an above-ground detention based on the Commercial Lot." AR at 00003. Defendants highlight that attached to this same letter was the "Stormwater Management Plan for Bayview Town Houses" (dated June 2020), which, "[s]ignificantly . . . shows an open stormwater retention pond that ***occupies almost 100% of the surface area*** of . . . [the] [C]ommercial [L]ot." Resp'ts' Opp'n Mem. at 3 (emphasis added); *see also* AR at 00027-00044.

The hearing on that issue took place on March 2, 2021 (*see* AR at 00764; *see also* AR at 00556, 00562-00565, 00763-00778), with the Planning Board rendering a unanimous written decision (the Planning Board Decision) on March 30, 2021. The Planning Board Decision denied Northborough's application for approval, finding that the "proposed re-submitted []DEM approved storm water management plan constitutes a major change requiring a fully noticed hearing of the [Tiverton Planning Board] before the final plan decision and plan can be submitted and recorded." (AR at 00590).

Ultimately, the Planning Board based their "Major Change" determination on the following findings of fact: (1) the new plan for the stormwater management system would take up between 60-to-100% of the Commercial Lot;[7] (2) a merger of the Commercial Lot with the Residential Lot would thus be necessitated;[8] (3) Northborough would be unable to meet zoning setback requirements on the Commercial Lot if the two lots are not merged;[9] and (4), pursuant to a comprehensive plan (allegedly not in force at the time Final Approval was granted), a requirement

[7] "First, a simple comparison of the 2008 storm water drainage plan, Map C2, to the proposed storm water plan, Sheet 10, of June 2020, shows a significant encroachment on the developer's self-created commercial lot (Lot 122) . . . Mr. Greene, the applicant's engineer testified that its revised 2018 storm water retention plan submitted to RIDEM, occupied 60% of the lot and that final approved plan [*sic*] by []DEM occupied up 100% [*sic*] of the lot." The Planning Board Decision, AR at 00590-591.

[8] "As noted by the AO/Planner in her testimony, the newly submitted plan requires the merger of lots 121 and 122, originally approved as two separate lots in the 2008 approved plan. While there was conflicting testimony as to whether Northborough's []DEM subdivision showed one or two lots, it is undisputed and uncontested that the two lots will now have to be effectively merged thus removing a lot line and more importantly the extinguishment of a potentially developable commercial lot. . . . The new storm water plan extinguishes any such viability for the future as the lot will be effectively depressed and underwater with significant rainfall or other storm event." *Id.* at 00591.

[9] Based purely on the finding that the Commercial Lot will not be usable for any commercial purpose: "In her letter to counsel for Northborough dated September 28, 2020 from Ms. Siciliano, these changes 'might have an effect on the [Tiverton Planning Board's] ability to determine that the development is consistent with town comprehensive plan and in compliance with the standards of the town zoning ordinance." *Id.*

that the Commercial Lot be maintained for a future "Pedestrian Friendly" commercial use.[10] Northborough timely appealed the Planning Board Decision to the Board of Appeals requesting that it be reversed on the grounds that:

> "(1) [the Planning Board] refus[ed] to acknowledge that the Commercial and Residential Lots were approved as a coordinated site specifically for the Land Development Project; (2) [the Board] refus[ed] to approve a change to the as-planned stormwater management system required by DEM as a minor change; (3) [the Board] refus[ed] to approve the change to the stormwater management system as a minor change even though the Town of Tiverton had not promulgated required regulations by defining a minor versus major change; (4) [the Board] refus[ed] to approve the change based on the position that the Commercial Lot would be rendered unusable for any commercial purpose; (5) [the Board] [took] the position that required zoning setbacks would be violated if the Commercial and Residential Lots were not merged; and (6) [the Board] rel[ied] on a Comprehensive Plan that post-dates the vesting of Northborough's rights." (Pet'r's' Mem. at 11; *see also* AR at 00593-00657.)

The appeal was heard on or about May 26, 2021. On June 10, 2021, the Board of Appeals issued a seven page written decision (the Appeals Decision), finding that "the proposed changes to the storm water management plan constitute a major change to [Final Plan Approval] that necessitates notice and a full public hearing." (AR at 00731). Northborough timely filed this appeal pursuant to § 45-23-71, the Zoning Ordinance of the Town of Tiverton, and the Town of Tiverton Subdivision and Land Development Regulations. (*See* Compl., filed on June 25, 2021). A Timeline of Events is attached hereto as Exhibit A and provides a concise chronology of Northborough's actions regarding the Project from 2005 to the present.

[10] "Such a change effectively makes the commercial lot (Lot 122) . . . unusable except for what is essentially an open retention pond that fronts a busy state highway and that has been designated in the Town's comprehensive plan as a commercial lot *in a pedestrian friendly overlay zone*." *Id.* (emphasis added).

II

Standard of Review

Under § 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[.]" Section 45-23-70 governs the standard of review to be utilized by a zoning board when sitting as a board of appeal, providing as follows:

> "(a) [I]n instances of a board of appeal's review of a planning board or administrative officer's decision on matters subject to this chapter, the board of appeal shall not substitute its own judgment for that of the planning board or the administrative officer but must consider the issue upon the findings and record of the planning board or administrative officer. The board of appeal shall not reverse a decision of the planning board or administrative officer except on a finding of prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record.
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> …
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> "(d) The board of appeal shall keep complete records of all proceedings including a record of all votes taken, and shall put all decisions on appeals in writing. The board of appeal shall include in the written record the reasons for each decision." Section 45-23-70.

The Superior Court has review of these appellate decisions by a board of appeal pursuant to § 45-23-71. "[T]he record of the hearing before the planning board" and any "additional evidence … necessary for the proper disposition of the matter … shall constitute the record upon which the determination of the court shall be made." *Id.* "The court shall not substitute its judgment for that of the planning board as to the weight of the evidence on questions of fact." Section 45-23-71(c). However, the Superior Court does "give[] deference to the findings of fact of the local planning board." *West v. McDonald*, 18 A.3d 526, 531 (R.I. 2011).

On appeal, the Superior Court may: "affirm the decision of the board of appeal or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the

appellant have been prejudiced because of findings, inferences, conclusions or decisions which are:

> "(1) In violation of constitutional, statutory, ordinance or planning board regulations provisions;
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> "(2) In excess of the authority granted to the planning board by statute or ordinance;
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> "(3) Made upon unlawful procedure;
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> "(4) Affected by other error of law;
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> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
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> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id.*

The Superior Court's review of a board of appeal's decision is "not *de novo*[,]" and the Court therefore should not "consider the credibility of witnesses, weigh the evidence, or make its own findings of fact." *Munroe v. Town of East Greenwich*, 733 A.2d 703, 705 (R.I. 1999). Instead, the Superior 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*, 18 A.3d at 531 (quoting *Kirby v. Planning Board of Review of Town of Middletown*, 634 A.2d 285, 290 (R.I. 1993)).

III

Analysis

A

Timeliness of the Instant Appeal

In addition to arguing that the Board of Appeals did not err in upholding the Planning Board Decision, Respondents mount a procedural challenge to the instant appeal. Namely, that in

failing to appeal the Original Decision to the Superior Court (upholding the Administrative Officer's finding that Northborough's stormwater management change to Final Plan Approval constituted a "major" change), Petitioner is both time- and procedurally-barred from appealing the same "major" change decision for a third time:

> "Having failed to file the necessary appeal in a timely fashion, Northborough cannot now be permitted to circumvent the initial [January 5, 2021] decision of the Appeals Board upholding the [Administrative Officer's] determination by now appealing an application for a minor approval that they submitted contrary to the [Administrative Officer's] initial determination. By doing so, [Petitioner has] created a "shoots and ladder" type record where the Appeals Board was forced to hear again, as an appeal from the Planning Board, what it already determined was a major modification by the [Administrative Officer] in the guise of an appeal of an application for approval as a minor change." (Resp'ts' Mem. at 10-11).[11]

If Respondents are correct regarding the untimeliness of Petitioner's Complaint, then the appeal itself is moot regardless of the substance. Therefore, the Court will first consider whether Northborough's appeal is properly before the Court.

In her September 28, 2020 letter, the Administrative Officer left very little doubt that she considered Northborough's proposed changes to Final Plan Approval to be of the "major" variety: "I consider the request to modify the Bayview Condominiums Final Plan . . . to be a major change." (AR at 00268). Northborough timely appealed pursuant to § 23-79 of the Tiverton Code of Ordinances, with the Board of Appeals upholding the adverse ruling in the form of the Original Decision. (*See* AR at 00264-00265) ("[T]he decision of the [Administrative Officer] referring this matter to the Tiverton Planning Board for further review of the stormwater management amendment is upheld[.]"). Respondents contend that the Original Decision "specifically upheld

[11] *See also* § 45-23-71 (giving the aggrieved party twenty (20) days to file an appeal to Superior Court after a final decision has been posted by the board of appeal).

the decision of the [Administrative Officer,]" inclusive of her finding that Northborough's "request to the stormwater management plan . . . [constituted] a major change." (Resp'ts' Mem. at 10) (internal citations omitted). Therefore, as the Board of Appeals' "decision regarding the Minor Change issue was somehow made in January of 2021[,]" Respondents assert that Northborough's present appeal to this Court is ultimately time-barred. (Pet'r's Reply Mem. at 2; *see also* § 45-23-71[12]).

Respondents' argument as to the timeliness of the instant appeal fails on both legal and procedural grounds. On the former, Respondents incorrectly frame the Board of Appeals as having affirmed the "major change" determination, while the actual text of the Original Decision is far narrower in scope. As to the latter ground, Respondents plainly ignore the effects of the Planning Board's own (re-)consideration of the "major change" question. The Court will discuss each ground for rejecting Respondents' timeliness argument in detail.

1

The Limited Affirmance of the Original Decision

As a preliminary matter, the Board of Appeals was correct in its interpretation of Tiverton Land Development and Subdivision Regulations, Article IX, § 23-50(b). Namely, that an "administrative officer *may* approve a minor change but is not required to do so . . . [and likewise] retains the discretionary right to refer even minor changes to the Planning Board for their review and input." (Original Decision, AR at 00265) (emphasis in original). However, in arguing that the Original Decision affirms Northborough's proposed change as "major," Respondents fail to

[12] "An aggrieved party may appeal a decision of the board of appeal, to the superior court for the county in which the municipality is situated by filing a complaint stating the reasons of appeal ***within twenty (20) days after the decision has been recorded*** and posted in the office of the city or town clerk." (emphasis added).

address the number of times the Board of Appeals *could have* expressly upheld the Administrative Officer's "major change" determination, but ultimately elected not to do so.[13] For example, immediately after the above-quoted excerpt affirming the Administrative Officer's right of referral, the Board of Appeals elaborates that a "*discretionary*" referral to the Planning Board "*is exactly what occurred*, and therefore [Tiverton's failure to define "major" versus "minor change"] is irrelevant as the characterization of the change is either minor or major." (*Id.*) (emphasis added). In other words, the Original Decision by the Board of Appeals can only appropriately be read to support the upholding of the Administrative Officer's outsourcing the final major-minor determination to the Tiverton Planning Board, not to the determination itself.

Put another way, the sole issue upheld in the Original Decision was whether, under applicable Tiverton regulations, Northborough's "modification should have been granted by the Planner as a matter of right[.]" (AR at 00264). Since the Administrative Officer had the discretion to refer even a minor change to the Planning Board, there was effectively nothing for Northborough to appeal. As such, it was entirely reasonable for Petitioner to view the Planning Board as the logical next step in exhausting administrative relief. *See Richardson v. Rhode Island Department of Education*, 947 A.2d 253, 259 (R.I. 2008) ("It is well settled that a plaintiff aggrieved by a state agency's action first must exhaust administrative remedies before bringing a claim in [Superior] [C]ourt.") (internal quotations omitted). As such, since the resolution of the "major/minor change" issue had not been resolved, Northborough had no choice but to go to the Planning Board to seek a minor change approval.

[13] E.g., *compare* "The [Administrative Officer]'s decision of September 28, 2020 contains sufficient factual reasons to support [her] findings as to why the proposed modifications necessitated further input and review by the Tiverton Planning Board[;]" *with* "Therefore, the decision of the [Administrative Officer] referring this matter to the Tiverton Planning Board for further review of the stormwater management amendment is upheld." *Id.*

2

The Planning Board Record

Northborough's decision to appear before the Planning Board rather than appeal to Superior Court is buttressed by what the Planning Board decided. Following a full hearing on March 2, 2021, the Planning Board voted seven to zero that Northborough's application requires "major changes" to Final Plan Approval. The Board's written decision, released a month later, confirmed as much:

> "[T]he ***only issue*** before the [Planning Board] is whether th[e] new storm-water plan can or should be approved administratively as a minor change. For all the reasons stated above, the [Planning Board] by a unanimous vote, concluded that it can not and must be presented to the entire [Planning] Board as an amendment to a preliminary plan[.]"(the Decision, AR at 00591) (emphasis added).

Ultimately, the Planning Board's transparency regarding the "only issue" under consideration raises the question: *why would the Planning Board hear, consider, and ultimately vote on an issue that had already been decided by its own appellate body* (i.e., the Board of Appeals)?

Anticipating the Court's question, Respondents clarify in their Memorandum that "[w]hile it is true that the Planning Board heard Northborough's application on March 2, 2021, ***[the Planning Board] was duty bound to hear the application that was submitted***." (Resp'ts' Mem. at 10) (emphasis added). The Planning Board did not treat this as an obligatory or perfunctory matter. The minutes of the March 2nd meeting evidence a question-intensive colloquy between members of the Planning Board and Petitioner, culminating in the Board making independent findings of fact even after hearing testimony from the Administrative Officer on her reasons for ruling the alterations as "major":

> "[Board Member] Gill considered the changes major, citing the following reasons why: the Special Use Permit granted by the Zoning Board only referenced the residential lot, and a stipulation existed that the permit was limited to the plan presented to the Zoning Board; if changes were made the Zoning Board must approve of them.
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> . . .
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> "[Board Member] Hardy inquired if all changes made to the plan related to stormwater management to comply with RIDEM's updated regulations. Mr. Russo responded in the affirmative. Mr. Hardy agreed with Ms. Gill that the changes should be considered major." (AR at 00563.)

Ultimately, this Court simply cannot square the Planning Board giving this degree of thoughtful consideration to an issue that they knew had already been decided by their own appellate body. The more plausible explanation—and the one this Court accepts—is that the relevant parties at the time considered the Original Decision as having addressed *only* whether the Administrative Officer had the right to refer the DEM-required alterations as potentially "major," *not* whether that Officer's major-minor determination itself was in error.

In their Memorandum, Respondents criticize Northborough's circuitous route to the Superior Court (i.e., Town Planner to Board of Appeals to Planning Board back to Board of Appeals) as "hav[ing] created a 'shoots and ladder' type record." (Resp'ts' Mem. at 11)[14] (internal citations omitted). However, what Respondents ignore is that had Northborough appealed the Original Decision to the Superior Court, it would only be appealing the Board of Appeals' conclusion that it did not matter whether the change was major or minor because the Administrative Officer had the right to refer the issue to the Planning Board whether it was major or minor. There would have been a scant record for the Superior Court to review.

[14] The full excerpt reads: "By doing so, they have created a 'shoots and ladder' type record where the [Board of Appeals] was forced to hear again, as an appeal from the Planning Board, what it already determined was a major modification by the [Administrative Officer] in the guise of an appeal of an application for approval as a minor change."

As such, for the sake of administrative finality, there was no "harm" in Northborough appearing before the full Planning Board as (i) this Court has already ruled that Northborough's requested relief before the Planning Board was not duplicative of the relief sought before the Board of Appeals, and (ii) the resources of the Planning Board were not being overtaxed, as Northborough had not yet availed themselves of the full forum since the 2008 application. *See Johnston Ambulatory Surgical Associates, Ltd. v. Nolan*, 755 A.2d 799, 810 (R.I. 2000) (the "Rhode Island doctrine of administrative finality . . . prevents repetitive duplicative applications for the same relief, thereby conserving the resources of the administrative agency and of interested third parties that may intervene."). Instead, the ultimate effect of Northborough's circuitous route is that the administrative record now contains additional factual findings and conclusions of law that enable this Court to thoroughly consider the matter. *See Ridgewood Homeowners Association v. Mignacca*, 813 A.2d 965, 977 (R.I. 2003) ("[W]hen a zoning board of review or other municipal board acting in a quasi-judicial capacity does not provide a record sufficient to allow for judicial review, the case should be remanded to the board with directions to make findings of fact and conclusions of law based on the required evidence.").

B

Imposition of a Retroactive Condition

Respondents take the position that, as part of granting Final Plan Approval, those portions of the Commercial Lot not allocated to Project infrastructure were to remain viable for a then-unspecified commercial use. In support of this contention, Respondents point to various Planning Board minutes leading up to the 2008 approval which "all mention and reference the future viability and creation of a commercial lot as part of the original development plan." (the Planning Board Decision, at AR 00591.) As a particularly salient example of these references, Respondents

highlight the comments of Northborough Managing Director, Kevin Gillis, who when asked in 2006 about the razing of the buildings currently situated on the Commercial Lot, stated "that he had not intended to demolish the existing buildings *until he found a commercial tenant*." (Tiverton Planning Board Meeting, April 11, 2006, at AR 00735) (emphasis added); (*see also* Resp'ts' Mem. at 12-13 for additional references). Therefore, as the surface area dedicated to stormwater management gradually ballooned from 5.9% to perhaps 100%, thus rendering any future development of the Commercial Lot impossible, the tacit agreement supposedly undergirding the approvals became materially altered. In turn, these materially altered conditions naturally substantiate the Planning Board's "major change" determination.

For its part, Petitioner counters that Respondents' reading of a "presumed condition" (i.e., a future commercial development) into the Planning Board minutes amounts to the retroactive imposition of an additional condition on a vested land development project. Such a reading impermissibly adds to the plain language of Final Plan Approval, as Counsel for Petitioner noted at hearing:

> "So, we take the position, your Honor, that[] [Respondents are trying to impose] a retroactive condition, and what my brother said in his objection on behalf of the town, . . . is that the record is clear that the commercial lot would be suitable land, presumably suitable for future development. Well, you can't have a presumed condition. Those conditions . . . when you're seeking to develop a piece of property, . . . have to be express conditions. There are no presumed conditions." (Tr.17:13-23, Mar. 11, 2022.)

As such, Northborough contends that any attempt by the Planning Board to ground their "major change" determination upon the now absence of developable commercial land is clearly erroneous in view of the alleged condition's omission from Final Plan Approval.

Northborough's Final Plan Approval contemplated a coordinated, separate site to house Project infrastructure, (AR at 00729),[15] and anticipated later modifications to the stormwater drainage system. (June 3, 2008 Tiverton Planning Board Decision, AR at 00018).[16] While Final Plan Approval is silent regarding who, exactly, would approve such modification, DEM has exclusive statutory authority over stormwater drainage facilities and it is presumed that the Planning Board was aware that only DEM could approve modifications to the stormwater system. Importantly, there is no mention of any future "commercial" development or required pedestrian-friendly use, much less any language that approval is conditioned on, say, the construction of a "7-Eleven or [] Cumberland Farms." (Tr. at 17:12).

After expending significant effort attempting to find Rhode Island case law relevant to the issue of retroactive conditions—postdating final approval—being placed upon a vested development project, the Court has come up empty in its search. The Court attributes its failure to locate such case law not to the rarity of the issue's occurrence, however, but rather to the

[15] "Thus, is clear [*sic*] that the development and the two lots were envisioned as a coordinated site."

[16] "It was agreed that the following note would be added to the plan and reiterated in the written decision:

> *No certificate of occupancy shall be issued for any condominium unit in Bayview Condominiumx* [*sic*] *until the building official of the Town of Tiverton has received a report from a Rhode Island Professional Engineer on behalf of the applicant certifying the following:*
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> . . .
>
> 2. *That all storm water drainage facilities required by the plan for the entire site of Bayview Condominiums have been installed in accordance with the plans or any approved modifications thereto*." (Emphasis in original.)

obviousness of how a court (or appellate board) must rule when faced with such a problem. Namely, that the express terms of Final Plan Approval and its percussor documents must govern.

Respondents point to three (3) redacted excerpts from three years' worth of Planning Board Meetings as competent evidence that the Commercial Lot was to remain viable for a future commercial development. (*See* Resp'ts' Mem. at 12-13). Respondents maintain this position despite (i) this condition not appearing in either Final Plan Approval or predecessor approvals, and (ii) the Planning Board being the party entirely tasked with drafting Final Plan Approval, which would theoretically contain the express conditions precedent for the certificate of occupancy. (*See* June 3, 2008, Planning Board Decision, AR at 00017-00019).

Taken together, the Planning Board's finding that their minutes substantiate intended future development of the Commercial Lot, despite such a condition not appearing anywhere in Final Plan Approval, is "clearly erroneous" on its face. (Section 45-23-71(5)). As such, this finding cannot be a basis to support a "major change" determination, as the finding itself is simply not grounded in "competent evidence." *West*, 18 A.3d at 531. Were the Board minutes the sole evidentiary basis for the Planning Board's "major change" decision, the instant appeal would be concluded in Petitioner's favor. However, such is not the case, and Respondents still possess other distinct legal arguments to support the Planning Board's ruling.

C

Failure to Define a "Major" or "Minor" Change

As one of the few points of convergence between the parties, both sides acknowledge that the Tiverton Planning Board never adopted a definition of either a "minor" or a "major" change. (*See* Pet'r's Mem. at 19, Resp'ts' Mem. at 16, AR at 00589, 00730). For Respondents, the Board's failure to define is, functionally speaking, no matter, as the Administrative Officer retains "the

legal discretion to refer [(even)] minor changes to the full Planning Board." (Resp'ts' Mem. at 16) (citing to Tiverton Land Development and Subdivision Regulations, Article IX, § 23-50). Petitioner, however, considers this failure to constitute significant constitutional and statutory violations. (*See generally* Pet'r's Mem. at 19-23.) Specifically, the Board's failure constituted: (1) an impermissible delegation of basic policy matters for *ad hoc* and/or subjective resolution (*See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972)); (2) a clear violation of well-established due process protections for zoning statutes (*See State ex rel. City of Providence v. Auger*, 44 A.3d 1218, 1233 (R.I. 2012) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)); and, most importantly, (3) a willful disregard of the statutory requirement that municipalities define a minor versus a major change. *See* § 45-23-65. In short, Petitioner argues that the Planning Board's failure to define a minor versus a major change makes Tiverton's "major change" determination *de facto* erroneous. The Court will now consider each of Petitioner's three asserted violations in reverse order.

1

The Requirements of the Rhode Island Development Review Act

Petitioner repeatedly states that the legislature, vis-à-vis § 45-23-65 of the Development Review Act, "required that Tiverton define a minor versus a major change." (Pet'r's Mem. at 23). Turning to the text of §45-23-65, however, the actual wording of the statute reads less like a legislative mandate and more akin to a presumption that the "local regulations" will already be there: "Procedure – Changes to recorded plats and plans . . . (b) Minor changes, ***as defined in the local regulations***, to a land development or subdivision plan may be approved administratively … (c) Major changes, ***as defined in the local regulations***, to a land development or subdivision plan

. . . [.]" (§ 45-23-65) (emphasis added). However, § 45-23-65 must be read in conjunction with the aptly titled "Requirement in all municipalities" section of the statute:

> "(a) Every municipality in the state shall adopt land development and subdivision review regulations, referred to as local regulations in this chapter, *which comply with all the provisions of this chapter.*
>
> "(b) All municipalities shall establish the standard review procedures for local land development and subdivision review and approval as specified in this chapter. The procedures are intended to provide thorough, orderly, and expeditious processing of development project applications." (§ 45-23-26) (emphasis added).

Therefore, in order for a municipality to be in compliance with Chapter 23 ("Subdivision of Land"), inclusive of § 45-23-65 ("Minor changes, *as defined in the local regulations* . . . Major changes, *as defined in the local regulations* . . . [.]"), that municipality must approve definitions for "major" and "minor" change in their local regulations. *See, e.g.*, *Munroe*, 733 A.2d at 709 (a town's charter and/or regulations authorizing a "town council to control land development and subdivision projects cannot supersede the Development Review Act [§§ 45-23-25 through 45-23-74] . . . because such grant of authority would be inconsistent with § 45-23-26.").

As has been well established, the Town of Tiverton failed to define either "major" or "minor" change in their local regulations. Regarding the process by which Tiverton was supposed to define these two terms, Section 51 of the Development Review Act states that ***"[t]he city or town council shall empower***, ***by ordinance***, ***the planning board*** to adopt, modify and amend regulations and rules governing land development and subdivision projects within that municipality." (emphasis added). Once so authorized, "***[t]he local planning board*** . . . shall adopt . . . and provide for the administration, interpretation, and enforcement of land development and subdivision review regulations . . . consistent with all provisions of [Chapter 23]." (§ 45-23-52) (emphasis added). Indeed, this extra step in the enabling statute—requiring the town council to

first "empower" the Planning Board to adopt "interpretation[s]"—accords with counsel for Respondents' explanation at oral argument as to why, exactly, the Planning Board never promulgated a definition of "major change":

> "[T]he Planning Board statute also requires that before regulations are adopted by the city or cities and towns, that there has to be a delegation of that authority by the town council by ordinance to allow the Planning Board to adopt regulations. [The town council] didn't do that in this case. There is no ordinance in the Town of Tiverton." (Tr. at 29:21-30:2.)

It is enough for now to note that, per the clear language of the statute, Tiverton's Code of Ordinances were—and still are—out of compliance with the mandates of §§ 45-23-26 and 45-23-65 of the Development Review Act. *See, e.g.*, *Gilbane Co. v. Poulas*, 576 A.2d 1195, 1196 (R.I. 1990) (when the plain language of a statute is clear, the Court's task is merely to apply the plain meaning of the statute).

By contrast, 18 of 39 Rhode Island cities and towns have complied with § 45-23-65 and "specifically defined a modification to a final plan required by DEM as a 'minor change.'" (Pet'r's Mem. at 25) (*see also* AR at 00578-00581). The remaining 20 municipalities are, like Tiverton, "silent" on major versus minor definitions (Tr. at 19:9-10), thus failing to comport *at all* with legislative fiat designed to facilitate "thorough, orderly, and expeditious processing of development project applications." (§ 45-23-26(b)).

A survey of the ordinances of the 18 compliant municipalities demonstrates the great care that was exercised in effectuating the state legislature's goal of consistent and speedy administrative resolutions to changes in development project plans. For example, prior to defining "[m]odifications . . . required by outside permitting agencies," as a minor change, the Town of Lincoln specifies five other modifications/revisions/amendments/etc. to a recorded plan which are "consistent [enough] with the intent of the original approval" so as to remove the Administrative

Officer's discretion to label the change as "major." (*See* Town of Lincoln, Rhode Island Land Development and Subdivision Regulations, Article C, Section 10(B)(1-5)). The City of Cranston specifies the same six categories of changes as *de facto* "minor," while the Town of Westerly, in an effort to retain greater control over the process, delineates just three. (*See* City of Cranston – Subdivision Regulations, Section VI, (B)(2)(a-f), Town of Westerly, Land Development and Subdivision Regulations, Article VIII, Section A261-43(B)(1)(a-c)).

Absent similar thoughtful definitions—or any definition at all for that matter—the Planning Board nevertheless forged ahead and found Northborough's proposed changes to be "major." While it may be tempting to reverse the Board's decision as an "arbitrary" and "capricious" exercise of power on that fact alone, the Court must press on and consider whether that decision prejudiced Petitioner's substantial rights. (*See* § 45-23-71(c).).

2

Due Process and Procedural Implications of Tiverton's Failure to Define Major Versus Minor Change

In their respective memoranda, the parties trade barbs over seminal vagueness doctrine cases that are inapplicable to the present issue; either because they (a) deal with ordinances that *criminalize* behavior (e.g., *Grayned*, 408 U.S. at 109, *Kolender*, 461 U.S. at 357), or (b) contain an at-issue ordinance in the first instance. *See Village of Hoffman Estates. v. Flipside, Hoffman Estates., Inc.*, 455 U.S. 489 (1982). The instant matter, however, is relatively unique in that it involves a municipality's enforcement of a regulation without the actual regulation. As discussed *supra*, the section of the Tiverton Code (§ 23-50) covering changes to recorded plans simply mirrors the language of § 45-23-65(b) without ever defining the operative phrase, "minor change[]." Therefore, the number of relevant Rhode Island cases addressing a complete failure to

adopt regulations mandated by the legislature—and the concomitant effects of such failure—is limited to just two, both of which are cited by Petitioner in its Memoranda.

In *A.F. Lusi Construction, Inc. v. Rhode Island Department of Administration*, plaintiff contractor (Lusi) sought to invalidate Department of Administration's (DOA)'s Procurement Regulation § 8.11.2 as inconsistent with § 37-2-39 of the State Purchasing Act.[17] No. PB 07-1104, 2007 WL 1460214 (R.I. Super. May 7, 2007). More specifically, § 37-2-39 requires a chief purchasing officer (CPO) to "issue regulations providing for *as many alternative methods of management of construction contracting* as he or she may determine to be feasible, *setting forth criteria to be used* in determining which method of management of construction is to be used for a particular project . . . [.]" (emphasis added). Lusi argued that Regulation § 8.11.2 was therefore procedurally defective as it (1) explicitly provided for only one "preferred" management method (rather than as many "alternative methods" as the chief purchasing officer deems "feasible"), and likewise (2) failed to set forth any selection criteria whatsoever.

The Court agreed with Lusi on both points. Regarding the former defect, Justice Silverstein concluded that "the legislature [in passing § 37-2-39] intended that the [CPO] would determine

[17] The full text of G.L. 1956 § 37-2-39 states that the

> "chief purchasing officer shall issue regulations providing for as many alternative methods of management of construction contracting as he or she may determine to be feasible, ***setting forth criteria to be used*** in determining which method of management of construction is to be used for a particular project, and granting to the purchasing agent, or the purchasing agency responsible for carrying out the construction project, the discretion to select the appropriate method of construction contracting for a particular project, provided, however, that the chief purchasing officer shall execute and include in the contract file a written statement setting forth the facts which led to the selection of a particular method of management of construction contracting in each instance." (Emphasis added).

initially which methods were feasible, and state them in the regulations[,]" rather than rely on a single delineated management method—a general contractor—as presumably feasible. *A.F. Lusi Construction, Inc.*, 2007 WL 1460214, at *15. As to the latter defect, Justice Silverstein explained that he "ha[d] not found anything in Regulation 8.11.2 that can be described as 'criteria' under any reasonable definition of the word[,]" and, from there, went on to opine that:

> "although the facts and the outcomes may vary from case to case, *the relevant criteria are expected to be relatively constant*. A fixed set of criteria was deemed necessary by our legislature as part of its plan to increase public confidence in the procurement system, insure fair and equitable treatment of participants in that system, and to achieve a high degree of quality and integrity in that system. *See* § 37-2-2(4), (5), and (7). Because they are to be found in the regulations, the criteria may only be changed through the administrative process." (*Id.* at *18) (emphasis added).

The Court therefore entered a declaratory judgment finding Regulation 8.11.2 invalid for failure to meet the requirements set forth in § 37-2-39.

Also analogous to the present situation—i.e., where a Rhode Island governmental agency failed to promulgate applicable regulations—Northborough points to the Superior Court's recent decision in *North American Catholic Educational Programming Foundation, Inc. v. Department of Environmental Management for the State of Rhode Island*. No. PC-2019-11876, 2021 WL 625078 (R.I. Super. Feb. 12, 2021). In *North American*, Justice Vogel modified, reversed, and remanded DEM's administrative decision, which required North American to restore wetlands it had impermissibly altered and pay a $50,000 penalty for violating the Freshwater Wetlands Act (FWA). *See id.* at *1. However, in levying the punishment, DEM had previously failed to adopt regulations providing guidance on "what constitutes a normal farming activity or involves the best farm management practices . . ." as required by the 2015 amendment to the FWA. *Id.* at *10. *See* G.L. 1956 § 2-1-22(i)(3). This failure, while not affecting the determination of whether North

American had violated the FWA (they had), ultimately implicated the propriety of DEM's restoration remedy. Thus, while the Court ultimately upheld DEM's finding of a FWA violation against North American, as to DEM's requirement that North American restore the wetlands, Judge Vogel held that:

> "DEM's failure to adopt regulations mandated by [statute] is significant on the issue of restoration. Specifically, *the lack of up-to-date regulations creates uncertainty* as to whether certain activities are normal farming activities or involve the best farm management. *Under such circumstances, it would be arbitrary and capricious to require North American to accept DEM's mere speculation as to what such regulations would require [(*e.g.*, restoration)] if enacted*." (*Id.* at *11) (emphasis added).

Finally, to the extent that the $50,000 financial penalty was increased because of North American's refusal to restore the wetlands, DEM's failure to "adopt[] pertinent regulations required by the 2015 amendment to the [FWA]" rendered that penalty excessive as it "was based upon unlawful procedure and . . . clearly erroneous in view of . . . the whole record." *Id.* at *13.

The Court finds the reasoning of Justices Silverstein and Vogel persuasive in resolving the present matter. Missing criteria, out-of-date regulations, and *post facto* interpretations each serve to undermine public reliance on our local land development review procedures while impermissibly delegating basic policy matters for *ad hoc*, subjective resolution. Indeed, what better example of an "arbitrary or capricious" exercise of discretion could there be than seven different board members each applying seven different standards on what constitutes a "major" versus a "minor" change,[18] particularly when that determination is based on little more than a holistic guess

[18] Just as alarming as the subjectivity underlying the Planning Board's determination is the Board's apparent belief that DEM would simply "rubber-stamp" a revised plan without thorough consideration. According to the Tiverton Planning Board Minutes from March 2, 2021, following Northborough's presentation, one board member "expressed concern over contamination . . . [and] questioned if it was acceptable for an underground stormwater management system to be installed on the residential lot, or if RIDEM just approved the plan they were submitted." AR at 00563. As

as to whether a change to final plan approval *feels* "major" enough?[19] Yet, this is precisely what happened to Northborough through Tiverton's failure to codify those terms pursuant to the Development Review Act.

In passing the Development Review Act, it was the stated intent of the General Assembly that "all proposed land developments and subdivisions [be] reviewed by local officials, *following a standard process*, prior to recording in local land evidence records." (§ 45-23-29(c)(5)) (emphasis added). Additionally, in mandating these "standard review procedures for local land development" projects, the General Assembly further intended to "provide [for] *thorough, orderly, and expeditious processing* of development project applications." (§ 45-23-26(b)) (emphasis added).[20] Yet, to illustrate just how quickly the General Assembly's hoped for predictability,

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the General Assembly granted DEM exclusive authority to protect the natural resources of the state (inclusive of "water" and "soil"), such comments provide circumstantial credence to Petitioner's argument that the Planning Board's decision—and the reasoning behind it—ultimately undercut DEM's exclusive authority. *See generally* Pet'r's Mem. at 23-27, *New Castle Realty Co. v. Dreczko*, 248 A.3d 638, 646 (R.I. 2021). However, as the Court's ruling on appeal rests on more fertile, alternate grounds, it need not further weigh the merits of Petitioner's *"usurpation" of DEM's exclusive authority* argument.

[19] In their Opposition Memoranda, Respondents argue that since the Administrative Officer is responsible for applying § 23-50(b), the Court must afford her (as well as the Planning Board's) interpretation of the statute some amount of weight and deference. *See* Resp'ts' Opp'n Mem. at 16, *Pawtucket Power Associates Limited Partnership v. City of Pawtucket*, 622 A.2d 452, 456-57 (R.I. 1993) (deference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency, and deference is accorded even when the agency's interpretation is not the only permissible interpretation that could be applied). However, the Court credits Petitioner's counterargument in its Reply Memorandum that such deference is not warranted for two (2) reasons. First, a planning board's determinations of law, like those of a zoning board, are not binding on a reviewing court. *See West*, 18 A.3d at 532. Obviously, this principle extends to the legal determinations of an administrative officer acting on behalf of the planning board. Second—and more important—there simply is nothing substantial for this Court to give deference to, as neither "minor" nor "major change" are defined in Tiverton Land Development and Subdivision Regulations, Art. IX, § 23-50(b). Indeed, the Court would be affording deference to a legal definition that exists solely in the Administrative Officer's mind.

[20] Presumably, this intent extends to processing agency-required *changes to* previously approved development projects.

alacrity, and responsiveness can evaporate sans statutorily-required definitions, one need only look at the following colloquy between the Court and counsel for the Planning Board:

> "THE COURT: How can you say it's a major change when there is a [*sic*] no regulation on what a minor or major [change] is?
>
> "MR. MARCELLO: Well, Judge, if you look at the regulation, if you look at the regulation, it's not automatic, as you indicated. . . . It's minor and major. There is a lot of discretion. Even if the Administrative Officer thought it was minor, she still had the right to send it back to the Planning Board for further review or what not and they could have considered the change. There is a lot of discretion here. This is not –
>
> "THE COURT: There is discretion where there is no definition[?]
>
> "MR. MARCELLO: Well, the other thing that I want to point out, Judge, is that the Planning Board statute also requires, and there is not mentioned [*sic*] in my brief, but the Planning Board statute also requires that before regulations are adopted by the . . . cities and towns, that there has to be a delegation of that authority by the town council by ordinance to allow the Planning Board to adopt regulations. The[] [town council] didn't do that in this case. There is no ordinance in the Town of Tiverton." (Tr. at 29:4-30:2.)

This exchange, conducted to figure out who, exactly, makes the final "major-minor" determination and on what possible grounds, is illustrative of two points. First, it establishes that Tiverton Code Section 23-50(b) does not meet the requirements of § 45-23-65 of the Development Review Act. Second, the dialogue shows the consequences of failing to promulgate required regulations; namely, that a process designed to be "standard[ized]" and "expeditious" quickly becomes haphazard.

Near the end of his decision in *A.F. Lusi Construction, Inc.*, Justice Silverstein ruminates on how Lusi's successful battle to get Regulation 8.11.2 declared invalid may not necessarily result in the contractor winning the administrative war. Indeed, just because "construction management

at risk" (CMAR)—which Lusi hoped to avoid—cannot be the *only* method of construction contracting management provided,

> "[i]t may be that regulations consistent with § 37-2-39 would ultimately provide for the use of a CMAR in many cases, including [this particular] project. On the other hand, it may be that use of a CMAR is a bad idea in certain cases. It may even be that § 37-2-39 is a poorly conceived statute that ought to be changed. These are questions to be resolved in the legislative and administrative arenas, however, and not in this Court. As the law stands now, Regulation 8.11.2 does not meet the requirements set forth in § 37-2-39." *A.F. Lusi Construction, Inc.*, at *19-20.

Likewise, in the instant matter, there are no guarantees that Northborough would have "won" had Tiverton promulgated the required underlying regulations. While the Court can articulate the myriad ways in which the Planning Board could have defined "major" or "minor," it is not allowed to engage in such speculation.

The Court will not require the Tiverton Planning Board to follow the other eighteen municipalities and conclude that DEM modifications are *per se* minor. Nor will this Court comment on whether expanding the surface area devoted to storm water management exponentially—first from 5.9% to 60%, then upwards to 100% of developable lot space (*See* AR at 00556, 00586-00592)—should be considered the type of change that is "major." Similarly it will not expound on the fact that the visible structure managing stormwater runoff evolved from a small overflow channel connected to a subterranean water tank, all the way to an above-ground, "open retention pond that fronts a busy state highway." (AR at 00591).

It is immaterial whether the Planning Board might have gotten it right as to substance. It has so botched the procedure that the Planning Board Decision, as affirmed by the Board of Appeals, cannot be allowed to stand. Indeed, all that matters on appeal is that Tiverton Code Section 23-50(b) does not comport with the requirements set forth in § 45-23-65 of the

Development Review Act. This, in turn, rendered the Planning Board's determinations as to which changes are "major" and which are "minor" *de facto* capricious and arbitrary, and ultimately prejudiced Petitioner's substantial rights by virtue of both the Board's and Administrative Officer's unwarranted exercise of discretion. *See generally* § 45-23-71.

D

Merger of the Residential and the Commercial Lot

In finding for a major change, the Planning Board heavily relies on the Administrative Officer's determination that the as-modified stormwater retention pond requires a merger of the Commercial and Residential Lots to comply with applicable setback requirements. (*See* Original Decision, AR 00590-00591). The Administrative Officer's reasoning can be traced as follows: (i) the expansion of devoted surface area from 5.9% to (nearly) 100% triggered zoning setback requirements that were not previously implicated; (ii) this includes a rear yard setback of 20 feet for the revised stormwater retention structure[21]; (iii) the stormwater retention structure functionally cannot be "set back" 20 feet from the lot line as it now uses the entirety of available lot space; therefore (iv) the Commercial Lot must be merged with the abutting, larger Residential Lot[22] in order to comport with the Town's Zoning Code. (*See* September 28, 2020 Letter from Jennifer Siciliano to Mark Russo, Esq., AR 00047-00048).

Petitioner advances a two-pronged counterargument. First, Petitioner claims that the Administrative Officer erred in classifying their "underground [water] detention center" (Tr. at 20:6) as a "principal structure." Rather, the DEM-approved underground storm water basin is

[21] The Commercial Lot is situated in a zone designated "General Commercial" (GC) per the Tiverton Zoning Code, Article V, Section 1. While there is no minimum front yard setback in a GC Zone, the Zoning Code does mandate a rear yard setback of 20 feet for any "principal structure."

[22] The Residential Lot is zoned in a Residential "R 60" Zone.

neither "principal" nor a "structure" and, as such, is not subject to the concept of a zoning setback. (*See* Pet'r's Mem. at 28-30). Second, Petitioner highlights that the Administrative Officer impermissibly relied on a 2018 Town Comprehensive Plan that came into effect over a decade after the Project had vested. (*See id.* at 29-31; 2018 Comprehensive Plan). Should this Court accept Petitioner's argument that the redesigned detention center does not constitute a "structure," then the Administrative Officer's entire merger determination is clear error. Therefore, the Court will begin its analysis by assessing whether the retention structure, as presently designed, constitutes a "principal structure" under applicable Tiverton Code.

Tracing the interplay of the relevant Tiverton zoning definitions, a "setback line or lines" is defined as "[a] line or lines parallel to the lot line at the minimum distance of the required setback for the zoning district in which the lot is located, that establishes the area ***within which the principal structure must be erected or placed***." Zoning Ordinance Article II(c)(82) (emphasis added). There is no definition provided for "principal structure." Instead, "Principal or main use" is deemed "[t]he specific primary purpose to [for] which a lot of land or structure is used" while "Structure" is defined as "[a] combination of materials to form a construction ***for use***, occupancy or ornamentation, ***whether installed on, above or below the surface of land or water***." *Id.* at (c)(80) and (c)(87) (emphasis added). Finally, "Use" is specified as "[t]he purpose or activity for which land or buildings are designed, arranged or intended, or for which land or buildings are occupied or maintained." *Id.* at (c)(90).

Ultimately, the Court credits Northborough's position that Respondents' overly focus on the term "principal" to the disservice of the noun it modifies, namely "structure." (*See* Pet'r's Mem. at 29). Even considering Tiverton's expansive definition of "structure," the Court cannot conceive how a rainwater pretreatment detention center qualifies as such. Owning to their

importance and unobtrusive nature, stormwater control basins and their accompanying drainage systems are regularly permitted where ordinances otherwise prohibit the construction of conventional "structures." *See Sprague v. Zoning Board of Review of Town of Charlestown*, No. 2002-0254, 2002-0255, 2004 WL 2813763, at *13 (R.I. Super. Sept. 21, 2004) ("While generally no structures may be built in the [vegetated perimeter] buffer, the [Charlestown Planning] Commission may permit stormwater control and drainage structures in the buffer zone.") (citing to *Charlestown Zoning Ordinance* § 218-60.F).

Interpreting the Tiverton Zoning Ordinance "as a whole" (i.e., considering individual definitions in the context of the entire statutory scheme), the Court finds that Petitioner's DEM-mandated stormwater detention basin does not constitute a "structure" pursuant to Tiverton Zoning Ordinance Article II. *Ryan v. City of Providence*, 11 A.3d 68, 71 (R.I. 2011) (internal quotation omitted). As such, the Town's zoning set back requirements are not applicable to the detention basin and, consequently, the revised plan does not "require[] the merger of lots 121 and 122[] . . . [as] originally approved as two separate lots in the 2008 approved plan." (Planning Board Decision, AR at 00591). Therefore, the Planning Board's reliance on the Administrative Officer's merger determination—as well as the Zoning Board's subsequent affirmance of the Planning Board's March 31, 2021 decision—was in clear error. (*See* § 45-23-71(5)).

IV

Conclusion

Having determined that the Planning Board Decision and the Board of Appeals Decision were arbitrary and capricious and that substantial rights of Northborough were prejudiced the Court must fashion a remedy. The Court cannot subject Northborough to have to wait until the Town Council authorizes and the Planning Board defines "major" and "minor." To do so would

further subject the Petitioner to indefinite delay and bureaucratic hurdles. On the other hand, even a minor change must be approved either by the Administrative Officer or the Planning Board and the Court does not believe that it has the authority to simply approve the change. Consequently, this Court reverses the Planning Board Decision and the Board of Appeals Decision and remands this case back to the Board of Appeals with instructions to refer it back to the Planning Board to consider Northborough's amendment to its Final Plan Approval as a minor change.

EXHIBIT A

Timeline of Events

Date	**Event**
June 2005	Northborough acquires the **Subject Property** in Tiverton, Rhode Island
September 2007	Northborough secures Preliminary Plan Approval; Northborough's rights in the Project vest
June 2008	Northborough secures **Final Plan Approval** for 52-unit **Land Development Project**
Late 2008	Project is tolled due to recession pursuant to R.I. Gen. Laws § 42-17.1-2.5; Final Plan Approval *not recorded by Northborough
June 30, 2014	Town of Tiverton revises Commercial Form-Based Code (the **2014 Commercial Code**)
April 30, 2018	Town of Tiverton passes its **2018 Comprehensive Plan**
Sometime in early-to-mid 2020	Northborough resumes efforts on the Project
June 16, 2020	DEM grants Northborough Construction General Permit No. RI101946 for above-ground detention basin redesign
June 19, 2020	**Administrative Officer** for Tiverton, Jennifer Siciliano, denies Northborough's change to Final Plan Approval.
September 10, 2020	Northborough sends letter to Administrative Officer seeking reconsideration
September 28, 2020	Administrative Officer sends letter (containing findings of fact) denying reconsideration
November 18, 2020	Hearing on appeal of Administrative Officer's decision to the Tiverton Zoning Board of Review sitting as the **Board of Appeals**
January 5, 2021	Board of Appeals denies Northborough's appeal in the form of the Original Decision
March 2, 2021	Hearing before Planning Board requesting administrative change that Northborough's storm water management system change be labelled a "minor" change
March 31, 2021	Planning Board renders the **Planning Board Decision**, denying Northborough's application and labelling its change as a "major" change
May 26, 2021	Hearing before Board of Appeals to overturn the Planning Board Decision
June 10, 2021	Board of Appeals issues **Appeals Decision** affirming the Planning Board Decision
June 25, 2021	Northborough timely appeals the Appeals Decision to Superior Court

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Northborough Realty Holdings, LLC v. Tiverton Zoning Board of Review Sitting as the Board of Appeals, et al.**

CASE NO: **NC-2021-0201**

COURT: **Newport County Superior Court**

DATE DECISION FILED: **June 8, 2022**

JUSTICE/MAGISTRATE: **Licht, J.**

ATTORNEYS:

For Petitioner: **William M. Russo, Esq.**

For Respondents: **Michael J. Marcello, Esq.**