MEMORANDUM

TO: **Cranston City Plan Commission**

FROM: **Stephen J. Sypole, Esq.**

HEARING DATE: **August 5, 2025**

RE: **Vaughn Lane RPD Master Plan Application**

Dear President Frias and Honorable Members of the Commission:

We are returning for the third public hearing on this matter in addition to the recent site visit. My arguments on behalf of my clients remain the same today as they were on July 1st because the applicant has still failed and refused to provide any meaningful responses to the important questions and concerns that have been raised by my clients, other community members, and this Commission. It is even more apparent now than it was in July that they cannot satisfy their burden of proof when it comes to access and other basic elements that are required for approval. The Commission should vote to deny the application on August 5, 2025.

While it is my clients' position that this application is ripe for denial, I have included in this memorandum a list of conditions that should be imposed upon this project in the unfortunate event that it does ultimately receive approval.[1] The following sections of this memorandum explain the manner in which the applicant continues to fail to satisfy its burden of proof and it concludes with the aforementioned list of requested conditions.

---

[1] This list of conditions is being provided now in order to make it part of the record and to preserve my clients' rights. It is our position that this application absolutely should be denied. There are no conditions that can effectively prevent the irreparable harm that the developer's plans would cause.

A. <u>The developer has provided no evidence that public road easements or rights-of-way exist or that the City "owns" property that would allow it to widen, extend, or otherwise enlarge "Wini Street" and Vaughn Lane.</u>

On July 1, 2025 my clients and I argued that the developer failed to carry its burden of proof with respect to access. The developer and its representatives have claimed – over and over again *ad nauseam* – that easements or public-rights-of way exist, or that the City "owns" property, that would allow them to enlarge and extend Wini Street and Vaugh Lane. Those of us who attended the site visit heard the developer's representatives make these representations numerous times. The problem is that they still have not come forward with any evidence that this is correct.

The law on this issue is clear and well-established. "[T]he dedication of property to the public is an **exceptional and unusual** method by which a landowner passes to another an interest in his or her property." <u>Ucci v. Town of Coventry</u>, 186 A.3d 1068, 1071 (R.I. 2018) (emphasis added). Land does not become a public right-of-way unless there is "manifest intent by the landowner to dedicate the land in question." <u>Id.</u> Then there must be "acceptance by the public either by public use or by official action to accept the same on behalf of the municipality." <u>Id.</u> Accordingly, a developer cannot just state that an easement or right-of-way exists, or that lands are "owned" by the city, unless they come forward with facts to prove that this legal standard has been satisfied. They need to produce a deed(s), an approved and recorded plat map, or some other legally enforceable instrument that shows the land was dedicated to the public by its owner at some point in history and also that such a dedication was, in fact, accepted. They have not done so. They keep repeating these claims and – by now – they must know that they have no evidence to support them.

Section II of the City's Land Development and Subdivision Regulations contain the following definitions:

> **Easement:** The right of a party to use all or part of the property of another for a specific purpose.
>
> **Street, Public:** All public property reserved or dedicated for street traffic.
>
> **Street Right-of-Way:** The entire area to be dedicated for the passage of people and goods, including the pavement or travel surface, and the areas on both sides of the pavement or travel surface that may be reserved for installation of sidewalks, bike lanes, curbs, bus stops, street vegetation, landscaped areas, street furniture, utilities, drainage improvements or other purposes.

The City's definitions use the same language as the case law that we have cited. An easement is a *property right*. It can only exist if it was the intent of the landowner to *dedicate* a portion of his or her land to the public for that purpose. The developer has not provided any evidence to the Commission that the City's definitions have been satisfied. If there is no evidence that these so-called public easements and rights-of-way exist then the developer has no access and its application must be denied.

It has been over a month since my clients and I raised this issue. **If this evidence existed then surely the developer would have it in their possession by now. If the developer had it, then surely it would have been brought to the Commission's attention by now.** Their failure to produce any competent evidence that the City "owns" this property or that these easements and/or public-rights-of-way exist speaks volumes. This is what it looks like when a party knows that it cannot satisfy its burden of proof and is trying to bluff their way through it. The lack of such evidence – standing alone – is sufficient grounds for the Commission to deny the application because the developer cannot satisfy the access requirement.

B. <u>The developer has not provided any evidence that "Wini Street" is, in fact, a public road either before or past the gate.</u>

This is another issue that remains outstanding despite the fact that the developer has had plenty of time to do their homework and provide an answer. There is no evidence in the record that explains the legal status of "Wini Street" or that establishes the developer's right to use it for access. It cannot be stressed enough that this is the developer's burden of proof.

1. <u>The paved area before the gate.</u>

During the site visit we heard from Mr. Farias, who owns the multi-family home at the corner of Wini and Main Street. He stated state that he – not the City – has maintained the paved area of Wini Street and that he – not the City – clears the snow in the winter. During the site visit we saw a fallen tree in the "road." If this were truly a public road then certainly the City would have addressed that problem.

My clients have lived and owned property in the neighborhood for many years, in some cases since they were children. They know that Wini Street has never been utilized by the public as a roadway. In reality it is nothing more than a driveway. There is not a single building with a Wini Street address. The paved portion has been used as parking for the multi-family home. It provides access to Ms. Pimentel's home (although she has a Main Street address). It is used by the water authority to access its aqueduct pursuant to the easement that it acquired from the *private* property owners many years ago. There has been no use of this by the general public for road purposes. There is no evidence presently in the record that it was ever dedicated to the City or accepted by the public or that it is publicly owned.

2. <u>The unimproved area past the gate.</u>

When we walked onto the undeveloped area past the gate during the site visit, we all heard the developer's engineer tell us that we were walking on land that was "owned" by the

City. There is no evidence in the record that this is correct. This is not something we can just presume to be true. *See* Ucci, 186 A.3d at 1071.

The document attached as **Exhibit A** is a printout from the City's online GIS map depicting the area around "Wini Street." Ms. Pimentel's home is Lot 14. Lot 17 is privately owned – it belongs to my clients the Meysembourgs. Lot 28 is also privately owned. Lot 35 – which is a small 5,000 sf. rectangle – is the only property depicted here that is "owned" by the city. The GIS map has lines drawn for a "paper street" between lots 17 and 28, but this by itself means absolutely nothing. A **GIS map cannot be relied upon for legal purposes**. The City's GIS map comes with the following disclaimer that is prominently displayed to every user:

> "This map/data/geospatial product is **not the product of a Professional Land Survey**. It was **created for general reference**, informational, planning **and guidance** use and is **not a legally authoritative source** as to location of natural or manmade features. Proper interpretation of this data may require the assistance of appropriate professional services. **The City of Cranston makes no warrantee, expressed or implied related to the spatial accuracy, reliability, completeness or currentness of this map/data.**"

(emphases added). At best, the land past the gate is a "paper street" on a GIS map that cannot be used for legal purposes. There is no competent evidence in the record to suggest that this land is publicly owned or that the developer has a right to put a road there.

I would encourage the Commissioners to ask the developer what it has relied upon to conclude that these so-called easements and rights-of-way exist, or that the City "owns" the land it wants to develop for road purposes. If their answer is that they relied upon City's GIS map, then that would be a bad answer indeed.

C. The developer has not presented any evidence that the City "owns" any land abutting Vaughn Lane.

Those of us at the site visit will also recall that the engineer stood in my client's front yard on Vaughn Lane and declared that the City "owns" that as well. Just as with Wini Street,

discussed above, there is not a shred of reliable evidence in the record presently before this Honorable Commission to support that conclusion.

As much as the developer wants to downplay and deny it, the developer's plan is to take and destroy the property that has been privately owned and maintained by my clients and their predecessors in title on Vaughn Lane going back as far as the 1800's. Your own planning department wrote in its May 28, 2025 memo that "some encroaching private structures may need to be removed."[2] Please do not believe the developer when they disingenuously say that this is not their intent. We all saw with our own eyes at the site visit that there is no room on Vaughn Lane for them to accomplish their plan without obliterating the neighborhood that is already there and that pre-dates the existence of the City's zoning ordinance and development regulations.

D. <u>The fact that the developer may have satisfied the bare-minimum requirements for the application checklist does not mean it is entitled to an approval.</u>

During the site visit we also heard the developer's representatives state multiple times that they did not have to provide information in response to people's questions because they had satisfied the requirements for their master plan application to be deemed "complete." Apparently, according to the developer, if the planning department deems the application "complete" then they are entitled to a rubberstamp approval of their plans. The developer is wrong. There is more to planning than ticking off boxes on a checklist. Submitting a "complete" application is not an accomplishment – it is literally the bare minimum.

[2] It is unfortunate that your planning department seems to have accepted all of the developer's representations without question and without being provided any evidence.

The Development Review Act unambiguously states that the Commission may require the submission of information that goes above and beyond the minimum requirements of the checklist. In a section of the Act that addresses certificates of completeness it says:

> "Notwithstanding other provisions of this section, **the planning board may subsequently require correction of any information found to be in error and submission of additional information** specified in the regulations but not required by the administrative officer prior to certification, as is necessary to make an informed decision."

RIGL § 45-23-36(d) (emphasis added). This above-referenced statute was recently relied upon by the Superior Court to uphold a denial of a master plan application where the developer failed to provide information about its project that was important to the community members and the planning authority. This occurred in the case Sakonnet Partners. LLC v. Gescheidt which was attached to my July 1, 2025 Memorandum. Another copy is attached hereto as **Exhibit B**. My clients and I would encourage the Commission members to read that decision if you have not already done so, because it shows that the Vaughn Lane RPD can be denied and that a denial is likely to be upheld. The developer in the Sakonnet case took the exact same position that 777 Main Street LLC has taken with its application. We can see that the developer's misguided actions were rejected by the Superior Court.

On a related note, we heard the developer's representatives patting themselves on the back during the site visit because some of the land proposed for open space could be developable and it is not all wetlands. They certainly tried to make it sound like they were doing this voluntarily and benevolently. This is another example of the developer taking credit for doing the bare minimum. Section VII(A)(2)(b)(7) of the Land Development and Subdivision regulations, which addresses "Residential Planned Districts," says that "[a]t least 50% of the total open space provided shall possess no land unsuitable for development." Dedicating

developable land as open space is not something the developer is doing out of the goodness of its heart. This is only being done because it is required by the regulations.

My clients, other community members, and the Commission have asked reasonable, appropriate questions directly related to the developer's burden of proof at master plan. These include questions as simple and fundamental as whether the developer actually has the property rights that it claims to have. The developer's response has been denial, obstruction, delay, and statements that are, at best, misleading. If the developer fails and refuses to answer these questions and provide this evidence then the Commission should feel more than comfortable denying the application at the master plan stage.

E. <u>The applicant's answer to virtually every question is that it doesn't have to provide any more information until the preliminary plan stage. The Commission does not have to accept this excuse.</u>

The other excuse we heard from the developer's representatives at the site visit, which they repeated over and over, is that they should not have to provide any more information until the preliminary plan stage. They even went so far as to say they should not have to survey the property in question until preliminary.[3] This is another tactic that consistently has been rejected by the Superior Court. I had attached to my prior Memorandum the decisions in <u>Green Development LLC v. Town of Exeter</u> and <u>Asa Davis v. Town of Exeter Zoning Board</u>. Copies of those decision are again attached here as **Exhibits C-D**. My clients and I would respectfully ask the Commissioners to review these decisions if you have not already done so. In both cases the developer made the exact same argument, i.e. that it did not have to provide basic information requested by the planning authority at the master plan stage. The developer lost in both cases. If

[3] Perhaps the developer is worried that a proper survey would not produce the result that it wants?

the Commission were to deny 777 Main Street LLC's application based on the reasoning set forth in these decisions, then that denial is likely to be upheld.

F. <u>The developer's strategy is to provide as little information as possible at the master plan stage and then try to silence the public at the preliminary plan stage.</u>

The developer's strategy is not difficult to discern. Its strategy is to (1) provide as little information as possible and answer as few questions as possible at the master plan stage and then (2) object to public participation at the preliminary plan stage.

The RI General Assembly, for better or worse, has seen fit to remove the requirement for a public hearing at the preliminary plan stage. *See* RIGL § 45-23-39. This was done in connection with the amendments to the Development Review Act that took in effect in the last few years. My clients and I were grateful for President Frias's comment on July 1 that he would be inclined to allow public participation at the preliminary plan stage. Our concern, however, is that if the Commission allowed public comment at preliminary, the developer may appeal and argue that was a reversible error. I am not aware of a court decision on this issue yet, and it is a chance that we hope we don't have to take.

The best way for the developer to take advantage of this recent change in State law is to squeak past the master plan stage while providing as little information as possible and then to object to public participation at the next review stage. We saw and heard the developer's representatives unabashedly implementing this strategy during the site visit when they repeatedly stated that they would not provide more information until preliminary. The Commission is very likely to be appealed whether it votes against or in favor of this application. Voting against this application is the most effective way to push back against this strategy and protect the rights of the public.

G. <u>The conditions listed below should be imposed upon this application if it is ultimately approved.</u>

My clients' position is that this application should be denied. However, in order to preserve their rights and to get this into the record, the following are a list of conditions that should be imposed if the project does ultimately get approved. We are providing this out of an abundance of caution and because of the risk that public participation could be limited at the next stage of review.

Section III(F)(9) of the Land Development and Subdivision Regulations authorizes the Commission to impose "professional review fees" in order that peer reviews may be conducted for, among other things, "drainage, traffic, noise, environmental assessments, and geotechnical sampling and testing." Accordingly, the developer should be ordered to comply with the following conditions and pay for the following studies <u>and for those studies to be thoroughly peer reviewed</u>.

- A peer-reviewed "**impact assessment**" should be required as described in Section III(K), which is necessary for any applicant proposing a "planned district" as is the case here. This is also required when "there is a reasonable expectation that a proposed subdivision or land development project will have a significant negative impact on a site or nearby properties, or on the built or natural environment." This standard is clearly satisfied based on the concerns and testimony expressed by the public.

- A **peer-reviewed traffic study** is necessary to address the concerns that the public has raised about congestion and safety issues in the area. Similarly, a peer review should be required to identify necessary "**off-site improvements**" in accordance with Section X(K) of the Land Development and Subdivision Regulations. Pursuant to that section the Commission may require off-site improvements if a project will have "a significant negative impact on existing conditions." Identifying those improvements would be an appropriate task for a third-party expert chosen by the City and paid by the developer. Among other things, the off-site improvements should include repair of any roads or driveways damaged by the construction activity and the installation of crosswalks and safety systems to protect pedestrians on Main Street, particularly in the vicinity of the post office – which is where all Fiskeville residents must visit to receive their mail.

- The developer should be required to retain a **geotechnical expert** in light of the fact that this property is located on ledge and the construction is likely to cause vibrations and other impacts to other properties also built on the ledge. Any work done by the developer's geotechnical expert should be peer-reviewed.

- The geotechnical expert should identify every existing property and structure that might be impacted by the developer's proposed construction because of the presence of the ledge. **The developer should pay to have every potentially impacted property and structure inspected** such that its pre-construction condition can be documented and the developer can be held responsible for any damage. The developer should be **required to indemnify anyone whose property is damaged** as documented by the pre-construction inspection.

- All of the engineering related to **stormwater and drainage** should be peer reviewed. The testimony and comments from the public that are in the record on this topic certainly justify maximum scrutiny of these issues. The developer should fund a **groundwater impact analysis** to ensure that new construction will not negatively affect pre-existing wells. It should also be a condition that there be **no net increase in impervious surface runoff** and that all rooftops, driveways and roads be mitigated with permeable materials or catchment systems.

- Conditions should be placed on the site work. The developer should be prohibited from exporting top soil or fill and, if the developer seeks to import fill, it should be environmentally tested for heavy metals, chemicals, organic pollutants, etc. to prevent any contaminants from being introduced to the site. All best practices for erosion and soil retention should be implemented and all erosion control devices should be regularly inspected.

- The developer should fund an **independent historical and archeological study** of the property to be developed and the surrounding area so that any and all items of historic and archaeological significance, such as stone walls, can be identified, catalogued and preserved.

- There should be absolutely no **blasting or clear-cutting** allowed during construction. At least 50% of the mature trees on the site should be preserved and all plans for tree clearing should be peer-reviewed and approved by a certified arborist.

- Reasonable conditions should be imposed to protect the **neighbors' quality of life during construction**. The hours during which construction may be performed, and during which construction vehicles may travel through the neighborhood, should be limited to 8 am to 4 pm and no construction should be permitted on weekends or holidays. Any work that may be especially loud, such as jackhammering, should be limited to hours when it would be the least

disruptive. The developer should be required to employ dust suppression measures including use of water trucks and should also be prohibited from burning any materials on-site. Best practices should be employed to perform the construction in phases to limit erosion and other environmental impacts that could negatively impact the neighborhood.

- Reasonable conditions should also be imposed to protect the **neighbors' right to quiet and peaceful enjoyment of their properties post-construction**. There should be a 50-100 foot vegetated buffer between the new construction and any abutting existing homes. Installation of new utility poles on private property should be prohibited. Dark-sky compliant lighting should be used and lighting should be directed away from existing residential properties.

- Conditions should be imposed for the protection of the **environment and wildlife habitat**. The developer should fund a wildlife survey and protection plan for known habitats, the plan should include a wildlife corridor or designated conservation area, and construction should be limited during nesting/breeding seasons.

- The developer should be asked to ***agree*** **that public comment be permitted at all subsequent stages of development review**.

- The developer should be required to **employ a "Clerk of the Works"** that is chosen by the City to supervise construction, to ensure that all conditions of approval are satisfied, and to serve as a liaison to communicate with the neighbors and address their concerns.

The Commission is not only empowered to impose reasonable conditions such as those identified above, but it is also empowered to impose requirements for improvement guarantees. A **cash bond** deposited into a bank account controlled by the City is the most reliable form of a financial guarantee and cash bonds are authorized by Section XII of the Land Development and Subdivision Regulations. The applicant in this case should be required to post a cash bond to guarantee that all improvements are constructed appropriately as would be the case with any subdivision, but should also be required to **post a cash bond that may be used to indemnify owners of property that is damaged by the construction**, which should last for a period of at least ten years following completion of all construction. The amount of such surety would be determined after all potentially impacted properties are identified.

The Board has consistently heard from a number of residents that, because the neighborhood is built on ledge, their houses will shake from things like a heavy rain event. The vibrations from constructing a large new neighborhood and its accompanying infrastructure are very likely to damage, among other things, the foundations and underground utilities that serve this historic neighborhood containing very old homes and other structures. The neighbors should not be left holding the bag. They should not have to pay for damage caused by the developer nor should they have to retain attorneys and file lawsuits to get their properties restored to their pre-construction condition. They should not have to take the risk that "777 Main Street LLC" could become insolvent or that claims could be denied by its insurance carrier. If this project were to unfortunately move forward then a cash bond to indemnify the owners of the affected properties based on a pre-construction inspection baseline is the only effective and fair way to address this problem and to prevent irreparable losses to the neighbors.

H. Conclusion

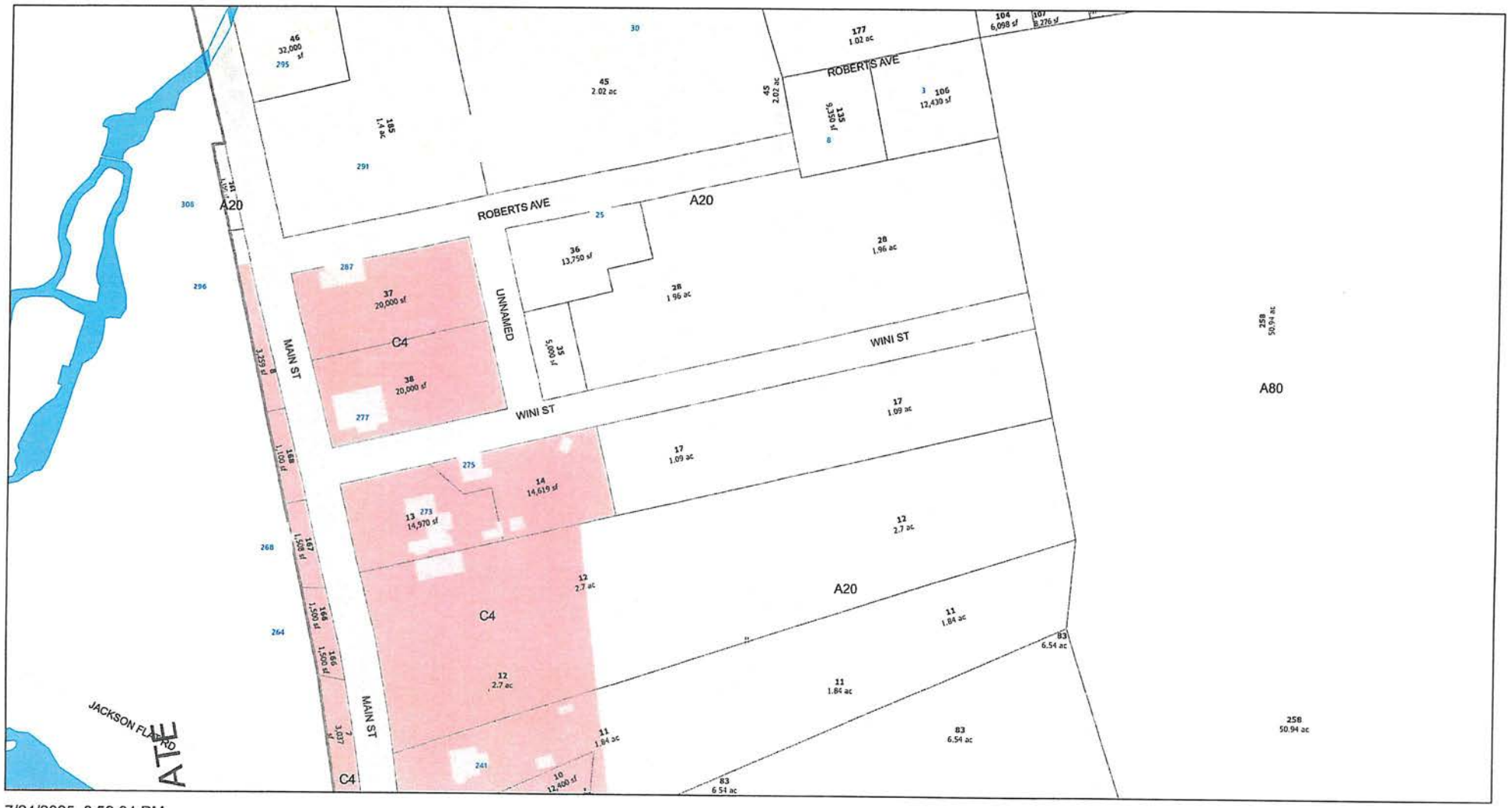
The developer has had all the time in the world to do its homework and provide evidence to support the claims it has made, including those relating to the so-called easements, rights-of-way, and land they say is "owned" by the City. They have failed to produce the evidence and failed to satisfy their burden of proof. August 5 should be the end of the line. The application should be denied.

Respectfully submitted,

Stephen J. Sypole, Esq. RI Bar #8833
Kenneth J. Sylvia, Esq. RI Bar #9791
Gidley, Sarli & Marusak, LLP
One Turks Head Place, Suite 900
Providence, RI 02903
401-274-6644
401-331-9304 (fax)
ssypole@gsm-law.com
kjs@gsm-law.com

EXHIBIT A

Cranston RI



7/24/2025, 3:59:04 PM

E911 Site Addresses
Labels_TaxMap
Hydro Lines 2001
Hydro Poly 2001
Stream/Water Body
Buildings
Cranston Boundary
Parcels
Cranston Boundary
Roads
Zoning
A20
A80
C4

1:1,655

0 0.01 0.03 0.06 mi
0 0.02 0.04 0.09 km

EXHIBIT B

STATE OF RHODE ISLAND

WASHINGTON, SC.

SUPERIOR COURT

[Filed: September 28, 2022]

ASA S. DAVIS III, *Appellant,*	:	
v.	:	C.A. No. WC-2019-0383
TOWN OF EXETER ZONING BOARD OF REVIEW, sitting as a BOARD OF APPEAL, *Appellee.*	:	

DECISION

TAFT-CARTER, J. Before the Court for decision is the appeal of Asa S. Davis III (Appellant or Applicant) from a decision of the Town of Exeter Zoning Board of Review, sitting as a Board of Appeal (ZBR), affirming the decision of the Town of Exeter Planning Board (Planning Board). The Court has jurisdiction pursuant to G.L. 1956 §§ 45-23-66 and 45-23-71.

I

Facts and Travel

This case concerns a major land development wherein the Applicant seeks to develop a solar project known as "DuTemple Solar" (the Project). The Project was described as a 10 MW Alternating Current ground-mounted photovoltaic solar facility to be located on 32.6 acres of the Property. (Compl. ¶ 4; Zoning Board of Review Decision (ZBR Decision, July 1, 2019 (ZBR Decision) 2.) Proposed access to the project was through a paper road existing on the town maps at the termination of the Estate Drive cul-du-sac. (ZBR Decision 2.) Appellant owns property located at 0 Ten Rod Road, in the Town of Exeter (Town), Rhode Island (the Property). (Compl. ¶ 1.) The Property consists of 109 acres that was enrolled in the open space program. (ZBR

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 adjust 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 sparce 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 time[6] 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:	
For Appellant:	James P. Howe, Esq.; John O. Mancini, Esq.
For Appellee:	James P. Marusak, Esq.; Stephen J. Sypole, Esq.

EXHIBIT C

Neutral
As of: June 20, 2025 2:33 PM Z

Green Dev., LLC v. Town of Exeter Zoning Bd. of Review

Superior Court of Rhode Island, Washington

April 20, 2020, Filed

C.A. No. WC-2018-0519

Reporter
2020 R.I. Super. LEXIS 29 *

GREEN DEVELOPMENT, LLC A/K/A WIND ENERGY DEVELOPMENT, LLC, Plaintiff, v. TOWN OF EXETER ZONING BOARD OF REVIEW; RICHARD BOOTH, IN HIS CAPACITY AS CHAIRMAN OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; JOSEPH ST. LAWRENCE, IN HIS CAPACITY AS VICE-CHAIRMAN OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; THOMAS MCMILLAN, IN HIS CAPACITY AS A MEMBER OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; RICHARD QUATTROMANI, IN HIS CAPACITY AS A MEMBER OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; TIMOTHY ROBERTSON, IN HIS CAPACITY AS A MEMBER OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; SUSAN FRANCO-TOWELL, IN HER CAPACITY AS AN ALTERNATE MEMBER OF THE TOWN OF EXETER ZONING BOARD OF REVIEW; MARIA LAWLER, IN HER CAPACITY AS TOWN TREASURER FOR THE TOWN OF EXETER; TOWN OF EXETER, AS A MUNICIPAL ENTITY, AND FRANCIS DIGREGORIO, PERSONALLY, Defendants.

Prior History: *WED Coventry Seven, LLC v. Town of Coventry Zoning Bd. of Appeals, 2019 R.I. Super. LEXIS 93 (Aug. 7, 2019)*

Core Terms

planning board, zoning board, comprehensive plan, zoning ordinance, solar, Zoning, Planning, projects, site, bias, variance, special use permit, recuse, Farm, environmental impact, automatically, substantial evidence, permitted use, impartiality, installation, memorandum, ordinance, argues, adjudicator, consistency, residential, resources, habitat, fields, rural

Counsel: [*1] For Plaintiff: John O. Mancini, Esq.; Nicholas J. Goodier, Esq.; William M. Dolan, Esq.; Elizabeth M. Noonan, Esq.; Nicholas L. Nybo, Esq.; John Tarantino, Esq.; William K. Wray, Jr., Esq.

For Defendant: Stephen J. Sypole, Esq.; Michael DeSisto, Esq.

Judges: Lanphear, J.

Opinion by: Lanphear

Opinion

DECISION

LANPHEAR, J. This matter is before the Court on the appeal of Petitioner Green Development, LLC a/k/a Wind Energy Development, LLC (Petitioner) from a decision of the Town of Exeter Zoning Board of Review (Zoning Board or Respondents). The Zoning Board's decision upheld the findings of the Exeter Planning Commission

(Planning Board), which, in turn, denied the Petitioner's application for a master plan approval to construct a ground-mounted commercial solar array within the Town of Exeter. Jurisdiction is pursuant to G.L. 1956 § 45-24-69. For the reasons set forth herein, Petitioner's appeal is denied, and the Zoning Board's decision is affirmed.

I

Facts and Travel

A

The Application and Planning Board Review

In 2016, Petitioner was actively working toward installing several solar energy fields in Exeter, Rhode Island (Town).[1] Petitioner sought to construct the fields on approximately seven acres of land, designated as Assessor's Plat 68, [*2] Block 1, Lot 1, with an address of 84 Exeter Road, Exeter, Rhode Island. Petitioner planned to install a gravel road to service the fields. The lot, in its existing state, contained a church with a parking lot, grassy fields, and a wooded area.

The land that Petitioner sought to construct the fields on is designated RU-4 Zoning District (Rural/Residential), which required a special use permit. Concerning the purpose of RU-4 Districts, the Town Ordinances state the following:

> "2.1.3 *Rural District, RU-4.* The purpose of this [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 Zoning Ordinances, Art. II, Sec. 2.1.3.

To complete these fields, Petitioner needed permission and permits from the Town. First, Petitioner would have to gain approval from the Planning Board and the Zoning Board. In the fall of 2017, Petitioner submitted its application for development to the Planning Board.

Utility scale solar projects [*3] were considered a major land development by the Town, which require review in three stages--Master Plan/Comprehensive Plan review, Preliminary Plan Review, and Final Plan review. During the Master Plan Review, the Planning Board reviewed the application in four separate hearings over the span of six months.

During this time, Exeter's Town Planner, Ms. Ashley Sweet, issued a memorandum to the Planning Board recommending that Petitioner's application be denied. Ms. Sweet's memorandum stated that the project consisted of 7160 solar panels covering 7.07 acres of the 15-acre lot, which already contained a church, an outbuilding, and parking areas. Ms. Sweet found that the project would simply be too large--it was poised to occupy a majority of the field and all of the wooded area on site. Ms. Sweet was also concerned that the site would be visible from the public road.

Ms. Sweet further found that the project failed to comply with lot coverage requirements stipulated by the Town Zoning Ordinances--the project would result in 23.2% lot coverage, while the Zoning Ordinances only allow 15%

---

[1] In 2015, the Town had enacted an ordinance establishing regulations governing the construction of solar projects. The ordinance allowed solar projects to be built in rural/residential districts upon issuance of a special use permit. All projects must be in compliance with the Town Comprehensive Plan in order to be approved.

coverage on RU-4 zoned parcels. As such, Ms. Sweet found Petitioner's calculations and assessments to be [*4] inaccurate. Lastly, Ms. Sweet found that the solar panels were "structures" under the Zoning Ordinances. This designation was significant because "structures" must be considered when calculating lot coverage. Overall, Ms. Sweet believed the project to be an industrial use, which is verboten in an RU-4 zone.

After Ms. Sweet's memorandum was published, the Planning Board continued to consider the application during its meetings. The Planning Board heard from Kevin Morin, an engineer from DiPrete Engineering, who was contracted by Petitioner. Mr. Morin submitted an environmental community impact study in support of the application. Mr. Morin testified that the project would raise tax revenue to the Town, as well as provide alternative energy. Mr. Morin also stated the project would be shielded from the view of the public by vegetation. However, Mr. Morin explained that the project would not create additional costs for schools and other community facilities.

On February 27, 2018, at a meeting of the Planning Board, Board Member Francis DiGregorio explained that he was worried that the project would not "complement the rural nature of the area." Resp't's Mem. 3. He believed that the scale [*5] of the project did not comply with the Town Comprehensive Plan and the project would mingle the solar panels with the church buildings.

On March 10, 2018, the Planning Board visited the site where Petitioner sought to construct the project accompanied by a representative of Petitioner, Mr. Mark DePasquale, who advocated for the project. Mr. DePasquale testified that the project would leave most of the natural land undisturbed.

After the Planning Board's site visit, Mr. DiGregorio again expressed objection to the project, stating that the project could not go forward because it would be an industrial use in a residential zone. Shortly thereafter, Ms. Sweet drafted a memorandum that stated the proposed project was industrial in nature and therefore not allowed in a residential zone. The minutes of the March 27, 2018 Planning Board meeting state the project is inconsistent with the Town Master Plan. Petitioner took objection to both Mr. DiGregorio's objection and Ms. Sweet's memorandum. Petitioner wrote to Attorney Peter Ruggiero, the Town's Assistant Solicitor, stating that Ms. Sweet was rendering her personal opinion on the project, in violation of Petitioner's due process rights.

At the [*6] May 22, 2018 meeting of the Planning Board, Petitioner moved for a continuance in order to request a variance from the Zoning Board. The Planning Board denied Petitioner's motion. Mr. DiGregorio testified that Petitioner's motion was a distraction and the Planning Board could issue a decision that evening.

On June 26, 2018, in response to Mr. DiGregorio's comments, Petitioner's counsel, Attorney John Mancini, delivered correspondence to Mr. DiGregorio and Ms. Sweet, expressing Petitioner's disapproval of their respective comments and alleging personal biases. Petitioner requested that Mr. DiGregorio and Ms. Sweet recuse themselves from the matter. Petitioner also alleged that Mr. DiGregorio and Ms. Sweet were conferring with independent counsel, Attorney Kelly Morris. Petitioner asserted that this was inappropriate. At that evening's Planning Board meeting, Attorney Ruggiero advised the Planning Board that personal bias is not to be considered. Mr. DiGregorio and Ms. Sweet denied all allegations of bias and did not recuse themselves.

At the June 26, 2018 meeting, the Planning Board unanimously denied Petitioner's application. It found that the project was inconsistent with the Town Comprehensive [*7] Plan.[2] Petitioner timely appealed the Planning Board's decision to the Zoning Board.

---

[2] The Planning Board found, among other things, that the project did not conform to the Town Comprehensive Plan because: the project would fail to promote economic diversification because it would only provide temporary jobs; the project would be large and therefore inconsistent with the rural characteristics of the Town; the project would harm natural and cultural resources; Petitioner had not supplied detailed drainage and stormwater designs; the project would make the area less desirable to live in; the project would constitute a commercial/industrial use in a residential zone; and the project would not promote conservation. The Planning Board also found that it was unable to make a positive finding regarding any environmental impacts of the study.

B

Amendment to the Town Zoning Ordinances

On July 16, 2018--in between the Planning Board's decision and the Zoning Board's decision--the Exeter Town Council, by a vote of 3-2, passed an amendment to the Town Zoning Ordinances. This amendment changed the zoning designation of fifteen lots to permit the construction of solar projects as a matter of right--Petitioner no longer needed permission from the Zoning or Planning Board for its project. However, the Planning Board objected to the amendment, finding that it did not comply with the Town's Comprehensive Plan.

In November of 2018, after the election of several new Town Council members, a subsequent amendment was enacted that revoked the July amendment allowing the construction of solar projects by right. Petitioner nevertheless sought to continue its project as a matter of right under the July amendment. This Court denied that request in *Green Development, LLC v. Town of Exeter, No. WC-2018-0636, 2019 R.I. Super. LEXIS 17, 2019 WL 1348609 (R.I. Super. Mar. 21, 2019)*.

C

Appeal to the Zoning Board

Petitioner submitted its appeal to the Zoning Board on August 3, 2018. The Zoning Board conducted a hearing on September 13, 2018, [*8] where Petitioner argued that the Planning Board improperly decided its application because it complied with the Town Comprehensive Plan.

The Zoning Board considered the following questions:

> "(a) Whether the Planning Board properly denied the application on the ground that it was inconsistent with the Exeter Comprehensive Plan as set forth in Paragraph One of its Decision.
>
> "(b) Whether the Planning Board properly denied the application on the grounds that it did not conform to the Exeter Zoning Ordinance as set forth in Paragraph Two of its Decision.
> "(c) Whether the Planning Board properly denied the application because the Board could not make a positive finding as to [the Land Subdivision Ordinances (LDSR)] § 3.5.3-that there "will be no significant negative environmental impacts"-as set forth in Paragraph Three of its Decision.
> "(d) Whether the Planning Board properly denied the application because the Board could not make a positive finding as to LDSR § 3.5.6—that the proposal will "provide for adequate surface water run-off" and "preservation of natural, historical, or cultural features that contribute to the attractiveness of the community"—as set forth in Paragraph Six of its Decision.
>
> "(e) Whether the alleged [*9] bias of the Town Planner and/or Planning Board Member Frank DiGregorio violated the Applicant's procedural due process rights and amounted to "prejudicial procedural error." Pet'r's Mem. 16 (quoting Zoning Board Decision 4-5); *see also* Zoning Board Decision 5.

Petitioner argued that the Planning Board's findings were not supported by evidence and were clearly erroneous. Petitioner also argued that a project that is allowed via special use permit is automatically consistent with the Comprehensive Plan. According to Petitioner, because the Town Zoning Ordinances allow utility scale solar projects, applications for these projects are automatically consistent with the Comprehensive Plan by operation of law.

Petitioner also argued a number of other issues to the Zoning Board, namely: that the Planning Board's characterization of the project as "industrial" was erroneous because solar projects are not defined by that term in the Town Zoning Ordinances; that the Planning Board should have conditionally granted Petitioner's application in order to allow Petitioner to seek a variance from the Zoning Board; that Petitioner's environmental impact study showing no negative environmental impacts **[*10]** was uncontested; the issue regarding storm and drain water designs was considered too early; that the Planning Board exceeded its authority by making findings concerning the Zoning Ordinances and variances; that the Planning Board erroneously required Petitioner to provide engineering plans; and Ms. Sweet and Mr. DiGregorio should have recused themselves.

In response, the Planning Board advanced that the most important issue on appeal was the weight of the evidence. It stated that if there was even a scintilla of evidence to support the Planning Board's findings, then those findings should be upheld. However, the Planning Board may not simply "rubberstamp" applications it is presented with. Resp't's Mem. 23. The Planning Board asserted that the main reason for the denial of Petitioner's application was "the scale of the project and the fact that such a large percentage of the lot would be developed." *Id.* at 7 (quoting Zoning Board Decision at 6).

The Planning Board also addressed the accusation of bias and demand for recusals. It argued that Ms. Sweet and Mr. DiGregorio did not meet the standard for bias under *Champlin's Realty Associates v. Tikoian, 989 A.2d 427, 443 (R.I. 2010)* (holding that adjudicators have a presumption of honesty and integrity that may only be overcome by evidence **[*11]** that "'the same person(s) involved in building one party's adversarial case is also adjudicating the determinative issues' or if 'other special circumstances render the risk of unfairness intolerably high'") (quoting *Kent County Water Authority v. State (Department of Health), 723 A.2d 1132, 1137 (R.I. 1999)*). Specifically, Mr. DiGregorio testified that he acted appropriately, and that his consultation with Attorney Morris was solely regarding a proposed amendment to the Town Zoning Ordinances which would have affected his real property. He also stated that he is not predisposed against solar projects.

Ms. Sweet denied that she was biased against this proposed development and that her job is to advise the Planning Board. She explained that she believed Petitioner sought to develop too large of an area; as such, much of the site would have to be redeveloped, which puts the property's habitat and natural features at risk. She also expounded that the Planning Board could not make a positive finding that the project would comply with the Comprehensive Plan. She reiterated that the Comprehensive Plan seeks to maintain a rural character for the Town.

The Zoning Board unanimously affirmed in part and reversed in part. It upheld the Planning Board's finding that Petitioner's application **[*12]** was inconsistent with the Town Comprehensive Plan. The Zoning Board held the following: the site of the project would be overdeveloped; the unique natural characteristics of the land would be lost; and the project would negatively affect the character of the Town. The Zoning Board also upheld the Planning Board's finding that the project would cause significant negative environmental impacts. Namely, the Zoning Board noted that the Planning Board was concerned with issues regarding wildlife habitat, drainage and stormwater, cutting of woodland, preservation of natural features, and visibility. The Zoning Board held that there was contradictory evidence regarding these issues but deferred to the factual findings of the Planning Board. Zoning Board Decision 7, 8. Notably, the Planning Board held that "the Applicant's plans were, by themselves, sufficient evidence to support the Planning Board's determination that the proposal was inconsistent with the Comprehensive Plan." Resp't's Mem. 16 (quoting Zoning Board Decision 7.).

Regarding the issue of Ms. Sweet and Mr. DiGregorio's alleged bias, the Zoning Board found the record to be devoid of any evidence of such. The Zoning Board held that **[*13]** Ms. Sweet "appropriately provided her professional opinions about the Applicant's proposal to the Planning Board." Zoning Board Decision 9. The Zoning Board also held Mr. DiGregorio's actions to be proper. The Zoning Board noted, as concurrent to this matter, the Planning Board heard a case regarding a property to which he was an abutter. Mr. DiGregorio recused himself from that case. The Zoning Board looked to be satisfied that he was sensitive to issues of bias and that his recusal was probative of his objectivity.

However, the Zoning Board did not believe the Planning Board's decision was flawless. The Zoning Board held that the Planning Board erred by rendering a decision based on "dimensional requirements" because issues of dimensional variances fall solely under the jurisdiction of the Zoning Board. Pet'r's Mem. 17 (quoting Zoning Board Decision 8). The Planning Board was reversed on this issue. Petitioner's application as a whole was unanimously denied.

Petitioner sought review by this Court pursuant to § 45-24-69. In its action, Petitioner filed suit against the Chairman and Vice-Chairman of the Zoning Board, members and alternate member of the Zoning Board in their official capacities, [*14] the Town Treasurer in her official capacity, the Town of Exeter, and Mr. DiGregorio personally.

II

Standard of Review

When reviewing a local zoning board's decision, § 45-24-69(d) mandates the following:

> "(d) The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review 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, or ordinance provisions;
> "(2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 45-24-69(d).

Our Supreme Court requires this Court to "review[] the decisions of a . . . board of review under the 'traditional judicial review' standard [*15] applicable to administrative agency actions." Restivo v. Lynch, 707 A.2d 663, 665 (R.I. 1998) (quoting E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 284-85, 373 A.2d 496, 501 (1977)). Judicial review of an administrative agency is essentially an appellate proceeding. Notre Dame Cemetery v. R.I. State Labor Relations Board., 118 R.I. 336, 338, 373 A.2d 1194, 1196 (1977). Accordingly, the trial justice "lacks authority to weigh the evidence, to pass upon the credibility of witnesses, or to substitute his or her findings of fact for those made at the administrative level." Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986) (citing E. Grossman & Sons, 118 R.I. at 285-86, 373 A.2d at 501). However, the applicant always bears the burden to demonstrate why the requested relief should be granted. See Dilorio v. Zoning Board of Review of City of East Providence, 105 R.I. 357, 362, 252 A.2d 350, 353 (1969) (requiring "an applicant seeking relief before a zoning board of review to prove the existence of the conditions precedent to a grant of relief").

In reviewing a zoning decision, the Court "'must examine the entire record to determine whether 'substantial' evidence exists to support the board's findings.'" Salve Regina College v. Zoning Board of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting De Stefano v. Zoning Board of Review of City of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)). "'Substantial evidence . . . means such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.'" Lischio v. Zoning Board of Review of Town of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., Inc., 424 A.2d 646, 647 (R.I. 1981)). If the Court "'can conscientiously find that the board's decision was supported by substantial evidence in the whole record,'" it must uphold that decision. Mill Realty Associates v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting Apostolou v.

Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). However, in cases that [*16] involve questions of law, this Court conducts a *de novo* review. *Tanner v. Town Council of East Greenwich, 880 A.2d 784, 791 (R.I. 2005)*.

III

Analysis

Petitioner challenges the Planning Board's denial of its application and argues that the Zoning Board, which sat in an appellate capacity, erred by upholding the Planning Board's decision. This Court also sits as an intermediate appellate court—as such, this Court will not find facts or weigh the credibility of the evidence but shall review each finding to determine whether the Planning Board's decision was supported by substantial evidence. *Salve Regina College, 594 A.2d at 880*. This Court will do so by reviewing the record, evidence, and conclusions of the Planning Board. *See id.*

Petitioner further contends that its application is automatically consistent with the Comprehensive Plan; that the Planning Board made legal and procedural errors; and that Ms. Sweet and Mr. DiGregorio should have recused themselves.

A

Substantial Evidence of Inconsistency with the Town Comprehensive Plan

The main thrust of the Planning Board's decision was that Petitioner's application was inconsistent with the Town Comprehensive Plan. The Zoning Board upheld this Planning Board's finding. Petitioner argues that there is a lack of evidence that showed inconsistency with [*17] the Comprehensive Plan. This Court finds there to be substantial evidence that supports the Planning Board's decision.[3]

The Planning Board made a thorough and detailed analysis regarding Petitioner's application. In sum, the Planning Board found that the project was inconsistent with the Comprehensive Plan chiefly because it would not compliment the goal of furthering the Town's rural nature as solar panels are industrial in nature. The Planning Board was also concerned that the project would harm the natural features of the land, as well as its habitat. The Planning Board was not convinced by Petitioner's environmental impact study; the Planning Board feared there was inadequate preparation to deal with water run-off issues.

The record demonstrates that the Planning Board carefully studied Petitioner's application in conjunction with the Comprehensive Plan. At the start of the Planning Board's decision, it noted the pertinent parts of the Comprehensive Plan, including:

- Preserving the Town's rural character.
- Minimizing development impacts to natural and cultural resources.

---

[3] It should be noted that a similar application was filed with the Town of Coventry. The applicant sought to construct a solar field in western Coventry. Mr. Morin, Mr. DePasquale, and Ms. Hannah Morini, who was from Petitioner's organization, all testified in favor of the application. The application was denied by the Coventry Planning Board—the facts and travel of that case are quite similar to this matter. The Coventry Planning Board found that the application was inconsistent with the local Comprehensive Plan because the application was incompatible with the Comprehensive Plan's goal of preserving the rural nature of western Coventry. The Zoning Board upheld the Planning Board findings. The applicant sought further review from this Court, which upheld those findings as well. *See Wed Coventry Seven, LLC v. Town of Coventry Zoning Board of Appeals, No. KC-2018-0567, 2019 R.I. Super. LEXIS 93, 2019 WL 3802363 (R.I. Super. Aug. 7, 2019)*.

- Ensuring the Town remains a low-density [*18] residential community with rural identity.
- Encouraging the Town should work to promote conservation of open space and natural resources.
- Protecting prime farmlands, historic resources, and preventing soil erosion associated with land removal or development, while preserving as many features as possible.

- Expressing concern that loss of forested area results in a reduction of green space, wildlife habitats and passive recreation areas. *See* Planning Board Decision, Ex. 1.

Reviewing these goals, the Planning Board found that Petitioner's application did not further these goals due to the following reasons:

- "Allowing full maximized use of the site with a solar facility installation, leaving little to none of the site in its natural state is not supporting minimization of development impacts to natural resources." *See* Planning Board Decision, Ex. 1, Section 2.5.5.

- "Allowing such a development proposal DOES adversely affect and DOES detract from Exeter's unique natural and environmental resources and the general character of the Town." *Id.* at Section 4.1.1.

- The Application would "result in commercial development on residentially zoned lots that is inconsistent with the rural character of the town." *Id.* at Section 5.2.6b.

- [*19] "Utility scale solar is industrial development. In its simplest terms it is the installation of structure to capture electricity for profit by a company."[4] *Id.* at Section 5.2.7b.

- "This is commercial/industrial development in a residential zone. That concept could be appropriate under certain circumstances but maximizing almost the entire property for use as a utility scale solar installation is not sensitive to the natural environment." *Id.* at Section 5.2.6b.

- "Solar facilities on residentially zoned land must be sensitive to the neighborhood and the character of the Town. This site will be heavily covered by the installation and there is little room left to preserve any character or natural features present with and on the site." *Id.* at Section 5.2.7b.

- "[M]aximizing the land occupied and leaving little to nothing in the way of natural features is contrary to the goals of the Subdivision Regulations and this section of the Comprehensive Plan." *Id.*

- "The manner in which this site is proposed to be developed, with almost the entire property contained within either buildings, driveways and parking or solar development will result in the loss of those forested areas on site and the reduction of green space and wildlife habitats." [*20] *Id.* at Section 5.5.6b-1.

- "[T]his proposal uses a majority of the site without regard for impacts to natural resources and does not retain any natural vegetation. The proposal essentially strips the site of existing vegetation and replaces it with artificial looking landscaped rows of trees and shrubs." *Id.* at Section 5.5.7d.

---

[4] Petitioner faults the Planning Board for finding its project to be an "industrial/commercial" use because solar projects are not defined as such in the Town Zoning Ordinances. However, the Planning Board cannot be faulted for concluding that Petitioner is seeking to make money. The Merriam-Webster Dictionary defines "industry" as "a distinct group of . . . profit-making enterprises." It also defines "commercial" as "viewed with regard to profit." *Industry*, Merriam-Webster Dictionary, 2020 (Mar. 25, 2020); *Commercial*, Merriam-Webster Dictionary, 2020, (Mar. 25, 2020). The Planning Board is justified in using the ordinary, plain meaning of the words. *Lang v. Municipal Employees' Retirement System of Rhode Island*, 222 A.3d 912, 915 (R.I. 2019) (citing *In Re B.H., 194 A.3d 260, 264 (R.I. 2018))* (explaining that unambiguous language is to be given their plain and ordinary meanings).

- "This site presently contributes to the town's rural character and unspoiled natural setting by providing scenic vistas of open fields and stands of forested areas. This proposed development would replace both of those amenities with solar panels screened by a row of landscaped plantings." *Id.* at Section 5.5.8a.

The Planning Board was especially concerned with the possible environmental impacts of Petitioner's application. The Planning Board also said the following:

"It is unknown at this time if there will be known significant negative environmental impacts from the proposed development . . . but it should be noted that a considerable area that currently is available as habitat for wildlife will be altered and leave the majority of the site developed by either existing buildings, driveways/parking . . . or the proposed utility scale solar installation. The small forested area would **[*21]** be clear cut and areas of the site leveled to provide for a flat area void of vegetation for installation of the solar facility. The applicant has provided no information to mitigate this issue and as such the Planning Board is unable to make a positive finding that no negative environmental impact will occur." Planning Board Decision ¶ 3.

Importantly, the record further shows that Ms. Sweet found that the project failed to comply with lot coverage requirements of the Town Zoning Ordinances. Ms. Sweet found that the project would result in 23.2% lot coverage, which would violate the Town Zoning Ordinances because RU-4 zoned land may only have 15% of the lot covered. The Planning Board agreed and found that the project did not conform to the Zoning Ordinances. This finding is significant because applicants have no right to proceed with projects that do not comply with a town comprehensive plan as well as the town zoning ordinances. *See* West v. McDonald, 18 A.3d 526, 536 (R.I. 2011) (explaining that an application must conform with a town comprehensive plan and the town ordinances). In order to proceed with a nonconforming project, an application must seek a variance or other exception. *See* McKendall v. Town of Barrington, 571 A.2d 565, 567 (R.I. 1990) (explaining that a landowner must apply **[*22]** for a variance or an exception in order to build on a substandard lot) (citing R.J.E.P. Associates v. Hellewell, 560 A.2d 353, 355 (R.I. 1989)).

Petitioner claims that the Planning Board only made "general, conclusory statements." Pet'r's Mem. 20. The Court disagrees—it is evident that the Planning Board clearly and scrupulously analyzed Petitioner's application and the Comprehensive Plan. It is clear to the Court that the Planning Board soundly and succinctly enumerated its reasons for denying the application, and the Court finds them to be thorough and appropriate. The Court notes that the Planning Board had a plethora of resources at its disposal to make its findings, including the testimony of witnesses, the DiPrete Engineering environmental impact study, a first-hand view of the property via site visit, and a detailed memorandum from the Town Planner, Ms. Sweet.

Many of Petitioner's objections to the Planning Board's decision are factual in nature. For example, Petitioner argues that its project would not create any adverse environmental impacts based off the DiPrete Engineering study. However, the record shows that the Planning Board reviewed the study, weighed its credibility, and rejected it. For Petitioner to contemporaneously argue that **[*23]** the study is dispositive of the issue regarding whether the project will not have any adverse environmental consequences is asking this Court to make a finding of fact, which it will not do. Notre Dame Cemetery, 118 R.I. at 338, 373 A.2d at 1196.

Petitioner further cites a number of propositions which it believes show that the project would actually aid the town—the project will create a diversified tax base, increase tax revenue, bar further residential development of the land, and shift the tax burden from Town citizens to Petitioner, and so on. Regardless of any veracity of these claims, this Court may not substitute judgment for that of the Planning Board; the Planning Board clearly determined the bad outweighed the good.[5] Notre Dame Cemetery, 118 R.I. at 338, 373 A.2d at 1196.

---

[5] Petitioner also maintains that the grassy field where the solar panels would be placed would remain a grassy field "but for the implementation of solar panels on it." Pet'r's Reply Mem. 9. The Planning Board was entirely free to reject the contention that a grassy field covered in solar panels is manifestly different than a natural, undeveloped, grassy field.

In sum, the Planning Board's decision was supported by substantial evidence. *See id.* The Planning Board thoroughly and conscientiously reviewed the facts of the application and reached a sound conclusion.

B

Procedural and Legal Arguments

Petitioner also makes a number of arguments alleging that the Planning Board made various procedural and legal errors that mandate reversal. Chiefly, Petitioner argues that the Planning Board should have granted Petitioner "conditional" master plan approval, and that it was entitled **[*24]** to completely surpass comprehensive board review because the Town Zoning Ordinances allow solar projects.[6]

i

"Conditional Master Plan Approval"

Petitioner argues that the Planning Board erred by failing to grant conditional master plan approval in order to allow Petitioner to seek a variance from the Zoning Board. To that point, Petitioner also alleges that the Planning Board overstepped its bounds by inappropriately interpreting Zoning Ordinances because planning boards are boards of limited powers and are barred from interpreting zoning ordinances. *See* Mello v. Board of Review of City of Newport, 94 R.I. 43, 49, 177 A.2d 533, 535-36 (1962) (holding that local boards do not have powers beyond what was granted to them in the enabling act). As an issue arose regarding the jurisdictions and powers of planning and zoning boards, the Court finds it necessary to enumerate the roles of each.

Every municipality in Rhode Island must have a planning board or commission. Munroe v. Town of East Greenwich, 733 A.2d 703, 707 n.2 (R.I. 1999) (citing § 45-22-1). Municipal planning boards have the power to "adopt, modify and amend regulations and rules governing land development and subdivision projects within that municipality and to control land development and subdivision projects pursuant to those regulations and rules." *Id.* at 706 (citing § 45-23-51). Accordingly, planning boards **[*25]** create comprehensive plans and review development applications to determine consistency with the comprehensive plan. *See* Camara v. City of Warwick, 116 R.I. 395, 405 n.6, 358 A.2d 23, 30 n.6 (1976) (holding that § 45-22-6 requires planning boards to prepare comprehensive plans for their respective municipalities) (citing § 45-22-6)); West, 18 A.3d at 536 (holding that a planning board, in reviewing an application for a development, must make a finding of consistency with the comprehensive plan in order to approve the project) (citing § 45-23-60)). Importantly, a planning board must also find a proposed project to be in compliance with the municipal zoning ordinances in order to go forward. *Id.* (citing § 45-23-60).

In turn, municipal zoning boards are empowered to hear appeals from the determinations of administrative officers made in the enforcement of the zoning laws, and in addition they may authorize deviations from the comprehensive plan by granting exceptions to or variations in the application of the terms of local zoning ordinances. Olean v. Zoning Board Review of Town of Lincoln, 101 R.I. 50, 52, 220 A.2d 177, 178 (1966) (citing Garreau v. Board of Review, 75 R.I. 44, 49, 63 A.2d 214, 217 (1949)). However, an applicant that requires a variance or a special use permit from a zoning board is required to first obtain an advisory recommendation from the planning board, as well

---

[6] Petitioner makes another procedural argument which may be disposed of briefly. Petitioner argues Respondents made Petitioner submit a comprehensive study, which is not necessary at comprehensive plan review. However, the Planning Board minutes show that the Planning Board only requested "conceptual" plans and that more detailed plans were coming later; Petitioner then chose to submit the DiPrete Engineering study in response to the request. Planning Board Decision ¶ 6.

as conditional approval, in order to obtain zoning board relief. Sciacca v. Caruso, 769 A.2d 578, 584 n.9 (R.I. 2001) (citing § 45-23-61(a)(1)); Section 45-23-61(a)(2).

Therefore, [*26] in our matter, the Planning Board had the duty to determine whether Petitioner's application was consistent with the Comprehensive Plan and the Zoning Ordinances. West, 18 A.3d at 536. The Planning Board undertook this duty and determined Petitioner's application was inconsistent with both; the evidence shows that the Planning Board did not interpret the Zoning Ordinances, but simply applied them. *See id.* The Planning Board then found that Petitioner's application was ineligible for a dimensional variance under the Zoning Ordinances—this determination was not for the Planning Board to make; this power falls solely to the Zoning Board. Olean, 101 R.I. at 52, 220 A.2d at 178. However, the Zoning Board caught this error and reversed the Planning Board on these grounds. There is nothing more for this Court to do—the error has been corrected.

Further, the Planning Board's error regarding eligibility for a variance is collateral to its adverse decision against Petitioner—the Planning Board's slim error does not alleviate Petitioner of the burden of undergoing Comprehensive Plan and Zoning Ordinances review. The evidence demonstrates that the Planning Board examined Petitioner's application in light of the Comprehensive Plan, as well as the Zoning [*27] Ordinances, and found that it was inconsistent with both.

Lastly, Petitioner could not apply to the Zoning Board for a variance as a matter of right—the Planning Board's approval of the application was prerequisite to its ability to seek a variance. Sciacca, 769 A.2d at 584 n.9. Therefore, Petitioner can lodge no objection against the Planning Board for failing to allow Petitioner conditional approval to seek a variance because Petitioner must receive approval of its application in order to proceed. *Id.* The Planning Board may not simply rubber stamp the application. *See* Coffey v. Maryland-National Capital Park and Planning Commission, 293 Md. 24, 441 A.2d 1041, 1044 (Md. 1982). Concurrently, Petitioner cannot cast blame on the Zoning Board because the application was not in its hands yet. Sciacca, 769 A.2d at 584 n.9.

Although the Planning Board marginally exceeded its authority, it was corrected by the Zoning Board. The Planning Board was still legally bound to consider the merits of Petitioner's application—the evidence demonstrates that the Planning Board completed its statutory duty free of other error.

ii

"Conditionally Permitted Use"

Petitioner believes that it was entitled to bypass Comprehensive Plan review. Petitioner argues that a town ordinance that allows a specific use inherently means that the use is automatically consistent with the [*28] town comprehensive plan. Translating that to our matter, Petitioner argues that because solar projects are conditionally permitted uses in RU-4 zones by the Town Zoning Ordinances, they are automatically consistent with the comprehensive plan.[7] Petitioner advances that the Planning Board's denial of its application is a veto of the Town Zoning Ordinances and the wishes of the Town Council.

In response, Respondents argue that just because utility scale solar projects are conditionally permitted uses does not mean a project is automatically consistent with the Comprehensive Plan. Respondents claim that the Comprehensive Plan review is not a "rubber-stamp" of applications and that automatic consistency would render planning and zoning boards useless. Coffey, 441 A.2d at 1044 (citing Levin v. Livingston Township, 35 N.J. 500, 173 A.2d 391, 394 (N.J. 1961) (explaining that planning boards do not merely rubber-stamp applications)).

[7] Petitioner is correct that the Town Council amended the Zoning Ordinances in 2015 to allow utility solar projects in RU-4 zones upon the issuance of a special use permit.

Petitioner is incorrect; Petitioner's argument places the burden of proof on the Town. Petitioner does not believe it need make a showing of consistency, and believes the Town has the burden to disprove the validity of the project. Petitioner cites *Westminster Corp. v. Zoning Board of Review of City of Providence*, for this proposition, arguing that land uses **[*29]** that have been permitted by special use permit are otherwise deemed permissible uses, subject to reasonable conditions of approval, if necessary. *103 R.I. 381, 385-86, 238 A.2d 353, 356 (1968)*.

However, *Westminster* itself states that the purpose of the special use permit in the context of zoning "is to establish within the ordinance conditionally permitted uses" and "require[] proof that the public welfare and convenience will be substantially served . . ." *Id. at 391, 238 A.2d at 359*. The case law is clear that this burden of proof rests squarely on the petitioner—the burden of proof in a special use permit application is on the applicant. Thus, if the applicant fails to present adequate competent evidence to prove that the applicable standard for issuing a special use permit has been met, the zoning board of review must deny the application. *See Toohey v. Kilday, 415 A.2d 732, 735 (R.I. 1980)*; *Dean v. Zoning Board of Review of City of Warwick, 120 R.I. 825, 831, 390 A.2d 382, 386 (1978)*; *R-N-R Associates v. Zoning Board of Review of City of Providence, 100 R.I. 7, 12, 210 A.2d 653, 656 (1965)*.

While it is true that allowing a use in a particular district implicitly demonstrates a legislature conclusion that the use is harmonious with other uses in the district, it still may be excluded if standards for special exceptions are not satisfied. *Perron v. Zoning Board of Review of Town of Burrillville, 117 R.I. 571, 574, 369 A.2d 638, 640 (1977)*. Essentially, these permits "partake of the character of permitted uses, but they are not permitted uses." Roland F. Chase, *Rhode Island Zoning Handbook*, § 77, 160 **[*30]** (3d ed. 2016).

Concurrently, the Planning Board's denial of Petitioner's application is not a veto of the Zoning Ordinances; an action of a local board is only considered a veto if a planning or zoning board bars applications "under any circumstances." *Perron, 117 R.I. at 574, 369 A.2d at 640-41*. It does not remove the requirements of planning or zoning board approval. Further, there is no requirement that a town's ordinances and its comprehensive plan be completely in unison—our Supreme Court has explicitly stated "[t]here is no requirement that the zoning ordinances and comprehensive plan be identical." *West, 18 A.3d at 541*. In fact, the two are intended to work in concert. *See id. at 535-36*. One is not automatically consistent with the other. *See id.*

Here, the Planning Board did not advance a policy of automatic or unconditional denial; to the contrary, it examined Petitioner's application thoroughly in the context of the goals of the Comprehensive Plan. Only after careful examination and consideration did the Planning Board deny the application; it also did so on specific and well-articulated grounds. There has been no mutiny against the Town Zoning Ordinances or Town Council.

Petitioner also urges this Court to look to *Old Farm, LLC v. Silveira, et al.*, **[*31]** a prior decision of this Court, where the Middletown Zoning Board was reversed for failing to consider the merits of an application to build a shopping center. *No. NC-2012-0288, 2013 R.I. Super. LEXIS 23, 2013 WL 399237 (R.I. Super. Jan. 28, 2013)*. Petitioner posits that *Old Farm* stands for the proposition that a plaintiff may proceed forward with the development of a solar facility, without regard to the comprehensive plan, if the zoning ordinances allow for the construction of solar facilities. The Court disagrees.

In *Old Farm*, the petitioner sought a special use permit to construct a 35,000 square foot shopping center. *2013 R.I. Super. LEXIS 23, [WL] at *1*. The town's comprehensive plan allowed for the construction of these types of shopping centers if a petitioner was granted use variance and dimensional relief. *Id.* The town ordinances also allowed construction if a petitioner obtained a special use permit. *Id.* The Middletown Zoning Board did not review the merits of Old Farm's application, citing that Old Farm did not request the proper relief, and finding that the town ordinance that allowed for these types of shopping centers was invalid because it was inconsistent with the town comprehensive plan. *Id.* The Zoning Board then found it did not have jurisdiction to hear the matter. ***[*32]*** *Id.*

This Court, sitting as an appellate court, reversed, holding that the Zoning Board lacked the power to determine the validity of zoning ordinances. *2013 R.I. Super. LEXIS 23, [WL] at *3*. The Court remanded the case and instructed

the Zoning Board to consider the merits of the application. 2013 R.I. Super. LEXIS 23, [WL] at *6. Importantly, and contrary to Petitioner's assertion, the Court stated the following:

> "While the Board may properly consider the compatibility between Old Farm's petition for special use permits and the comprehensive plan at a hearing on the merits of the application, the Board committed error when it concluded that the comprehensive plan trumped existing zoning ordinances such that the Board lacked jurisdiction to hear Old Farm's petition." *Id.* at 5.

This language clearly finds that a board may still review an application in light of a comprehensive plan. *Old Farm* made findings on the powers and jurisdiction of a zoning board to determine the validity of town ordinances—nothing further. Thus, it is clear that *Old Farm* does not stand for the proposition that a zoning ordinance robs a board from the ability to consider an application's consistency with a comprehensive plan—Petitioner's argument that it may surpass Comprehensive Plan review is [*33] misplaced.

In sum, the existence of conditionally permitted uses in a town ordinance does not equate to automatic consistency with the town comprehensive plan; the burden rests solely on the applicant to present adequate competent evidence to prove that the applicable standard for issuing a special use permit has been met. Dean, 120 R.I. at 831, 390 A.2d at 386.

C

Alleged Bias and Recusal Motion

In the natal stages of this case, it was alleged by Petitioner that Exeter Town Planner Ms. Ashley Sweet and Planning Board Member Mr. Francis DiGregorio were biased against the application and injected personal dislike for solar projects into their deliberations. Petitioner alleged that Ms. Sweet and Mr. DiGregorio improperly refused to recuse themselves and that the Zoning Board erroneously upheld their decisions. Petitioner argues that both Mr. DiGregorio and Ms. Sweet were predisposed against solar projects.

Petitioner points to Mr. DiGregorio's statements made in Planning Board meetings, such as that he believed "no solar" should be permitted in any RU-4 zone. Pet'r's Mem. 43. Petitioner also points to Ms. Sweet's memorandum, where she urged that Petitioner's application be rejected. Petitioner also objects to Mr. DiGregorio and [*34] Ms. Sweet's contact with Attorney Morris; Petitioner posits that the parties had been in contact for "months" during the process of Petitioner's application. *Id.* at 45. Both Mr. DiGregorio and Ms. Sweet strongly protested Petitioner's claims. The Zoning Board sided with both Mr. DiGregorio and Ms. Sweet.

"When an administrative agency carries out a quasi-judicial function, it has an obligation of impartiality on par with that of judges." Champlin's Realty Associates, 989 A.2d at 443 (citing Town of Richmond v. Wawaloam Reservation, Inc., 850 A.2d 924, 933 (R.I. 2004)). Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, administrative tribunals must not be "'biased or otherwise indisposed from rendering a fair and impartial decision.'" *Id.* (quoting Davis v. Wood, 444 A.2d 190, 192 (R.I. 1982)); *see also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242, 100 S. Ct. 1610, 64 L. Ed. 2d 182 (1980) (holding that the Due Process Clause entitles a person to an impartial and disinterested tribunal).

At the same time, as the trial justice noted, adjudicators in administrative agencies enjoy a "presumption of honesty and integrity." Champlin's Realty Associates, 989 A.2d at 443 (quoting Davis, 444 A.2d at 192). This presumption may be overcome through evidence that "'the same person(s) involved in building one party's adversarial case is also adjudicating the determinative issues' or if 'other special circumstances render the risk of unfairness intolerably high.'" *Id.* (quoting Kent County Water Authority, 723 A.2d at 1137). Significantly, an agency adjudicator must not become an "'advocate or participant.'" *Id.* (quoting Davis v. Wood, 427 A.2d 332, 337 (R.I. 1981)). [*35] To maintain public confidence in the fairness of the agency's decision making, an agency adjudicator also must not

prejudge a matter before the agency. *Id.* (citing *Barbara Realty Co. v. Zoning Board of Review of Cranston, 85 R.I. 152, 156, 128 A.2d 342, 344 (1957)).*

Our Supreme Court has held that a judge must recuse himself or herself when the judge possesses "'a personal bias or prejudice by reason of a preconceived and settled opinion of a character calculated to impair his [or her] impartiality seriously and sway his [or her] judgment.'" *Id.* (quoting *Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 185 (R.I. 2008)).* A finding of bias is a finding of fact; thus, the factfinder must be accorded deference on this issue. *Id.*

The standard for recusal is high—the preconceived or settled opinion of the adjudicator must "'seriously'" impair his or her impartiality or sway his or her judgment. *Id.* (quoting *Ryan, 941 A.2d at 185*). As such, this Court does not believe the actions of Mr. DiGregorio or Ms. Sweet rise to serious impartiality.

The Court believes that Mr. DiGregorio's "no solar" comment was taken out of context. The minutes of the February 27, 2018 Planning Board meeting show that Mr. DiGregorio said the following:

> "Utility scale solar systems are an industrial type use that is currently and appropriately prohibited in residential zones by our zoning ordinance. I **[*36]** have since come to the conclusion that utility scale solar systems are clearly in conflict with both the Comprehensive Plan and Zoning Ordinance[s] and should be prohibited in residential zones..." and "should be permitted by Special Use Permit only in locations where they are not in conflict with the Comprehensive Plan and zoning [sic], do not negatively impact abutters, and are appropriately regulated." Planning Board Minutes, Feb. 27, 2018.

It is therefore clear to the Court that Mr. DiGregorio does not display an improper bias against solar projects. Mr. DiGregorio simply does not believe it is appropriate to place industrial uses in rural/residential zones unless they are harmonious with the Comprehensive Plan and Zoning Ordinances. The fact that Mr. DiGregorio believes exceptions can be made to the bar on industrial uses in RU-4 zones removes any question of bias and is indicative of his impartiality and objectivity. Mr. DiGregorio simply made an adverse finding against Petitioner, which in itself is not sufficient to prove bias. *See Recycling, Inc. v. Commissioner of Energy & Environmental Protection, 179 Conn. App. 127, 178 A.3d 1043, 1063 (Conn. App. Ct. 2018)* (citing *State v. Fullwood, 194 Conn. 573, 484 A.2d 435, 440 (Conn. 1984)).*

The Court further observes that Mr. DiGregorio expressed objection to the landscaping and buffering of the property. This was a concern **[*37]** that was shared by many on the Planning and Zoning Boards—there is no indicia of bias in these statements and observations.[8]

Regarding Ms. Sweet, this Court finds no error in her memorandum or her statements. Ms. Sweet, as the Town Planner, has the specific task of determining whether projects are in conformance with the Comprehensive Plan. The evidence demonstrates that Ms. Sweet's conclusion was on the merits of the application—she believed that the project was too large and that large-scale utility solar projects are not rural/residential uses. At no point did Ms.

---

[8] Mr. DiGregorio was named as a defendant in his personal capacity, even though this is an administrative appeal and Petitioner has not sought any relief against him. This Court disfavors naming public officials in their personal capacity when the matter spurs from actions taken in their official capacities—such lawsuits may serve to have a chilling effect on public officials, who may worry about taking controversial actions out of fear of being sued. *See generally Mancini v. City of Providence, 155 A.3d 159, 165 (R.I. 2017)* (noting that individual liability of supervisors for official acts would create a chilling effect on decision making); *Bramesco v. Drug Computer Consultants, 834 F. Supp. 120, 123 (S.D.N.Y. 1993)* (noting that individual liability for the acts of an entity can have a chilling effect on the ability of the entity to perform). As such, Mr. DiGregorio may be protected from liability under *G.L. 1956 § 9-1-31.1*, which states "(b) Limitation of Liability. Notwithstanding any other law, a qualified member of a public body shall not be held civilly liable for any breach of his or her duties as such member, provided that nothing herein contained shall eliminate or limit the liability of a qualified member: (1) For acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (2) For any transaction from which such member derived an improper personal benefit; or (3) For any malicious, willful or wanton act."

Sweet render anything but her professional and learned opinion. There is no evidence in the record that shows Ms. Sweet would object to a solar project that conformed to proper standards.

Turning to the parties' contacts with Attorney Morris, both Mr. DiGregorio and Ms. Sweet explained that the representation was regarding an independent matter.[9] Specifically, Mr. DiGregorio retained Attorney Morris to challenge the July 2018 amendment to the Zoning Ordinances because he believed that his real property was going to be affected.[10] Regarding the representation, Mr. DiGregorio said the following:

> "I only sought outside [*38] legal counsel after I became an abutter to one of the properties requested to be rezoned by Mr. Mancini's client to permit utility scale solar systems 'by right.'" Planning Board Minutes, June 6, 2018.

Mr. DiGregorio was free to retain counsel to protect his rights. The record is devoid of evidence that Attorney Morris ever represented or advised Mr. DiGregorio and Ms. Sweet regarding Petitioner's application.

In sum, this Court finds nothing that it believes seriously impaired the impartiality or swayed the judgment of either Mr. DiGregorio or Ms. Sweet. *Ryan, 941 A.2d at 185*. The holding of the Zoning Board is affirmed.

IV

Conclusion

This Court holds that the decision of the Planning Board was supported by substantial evidence and that the Planning Board made no meaningful errors of law. Nor does this Court believe Mr. DiGregorio or Ms. Sweet demonstrated personal bias against Petitioner's application. Petitioner's appeal is denied. The decision of the Zoning Board affirming and denying the holdings of the Planning Board is affirmed. Petitioner's requests for attorney's fees is denied.

End of Document

[9] This matter is *DiGregorio v. Lawler, Nos. WC-2018-0407, WC-2018-0590, 2020 R.I. Super. LEXIS 1, 2020 WL 203834 (R.I. Super. Jan. 8, 2020)*.

[10] Mr. DiGregorio did in fact recuse himself from this matter when it was before the Planning Board. Mr. DiGregorio is clearly aware and sensitive to issues of impartiality.

EXHIBIT D

STATE OF RHODE ISLAND

WASHINGTON, SC.

SUPERIOR COURT

[Filed: September 28, 2022]

ASA S. DAVIS III,
Appellant,

v.

TOWN OF EXETER ZONING BOARD OF REVIEW, sitting as a BOARD OF APPEAL,
Appellee.

C.A. No. WC-2019-0383

DECISION

TAFT-CARTER, J. Before the Court for decision is the appeal of Asa S. Davis III (Appellant or Applicant) from a decision of the Town of Exeter Zoning Board of Review, sitting as a Board of Appeal (ZBR), affirming the decision of the Town of Exeter Planning Board (Planning Board). The Court has jurisdiction pursuant to G.L. 1956 §§ 45-23-66 and 45-23-71.

I

Facts and Travel

This case concerns a major land development wherein the Applicant seeks to develop a solar project known as "DuTemple Solar" (the Project). The Project was described as a 10 MW Alternating Current ground-mounted photovoltaic solar facility to be located on 32.6 acres of the Property. (Compl. ¶ 4; Zoning Board of Review Decision (ZBR Decision, July 1, 2019 (ZBR Decision) 2.) Proposed access to the project was through a paper road existing on the town maps at the termination of the Estate Drive cul-du-sac. (ZBR Decision 2.) Appellant owns property located at 0 Ten Rod Road, in the Town of Exeter (Town), Rhode Island (the Property). (Compl. ¶ 1.) The Property consists of 109 acres that was enrolled in the open space program. (ZBR

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 adjust 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 sparce 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 time[6] 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:	
For Appellant:	James P. Howe, Esq.; John O. Mancini, Esq.
For Appellee:	James P. Marusak, Esq.; Stephen J. Sypole, Esq.