

STATE HOUSING APPEALS BOARD

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Minutes of the August 11, 2004 Board Meeting

The August 11, 2004 meeting of the State Housing Appeals Board ("SHAB" or "Board") was called to order at 2:10 PM in the Council Chambers of East Providence City Hall, 145 Taunton Avenue, East Providence, Rhode Island by Judge Stephen Erickson, Chair. Board members in attendance were Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos. Board members Frank Giorgio III and Thomas Hodge were not present. Also present were Steven Richard, Esq., legal counsel to the Board, and Judy Jones and Christine DeRocha, administrative staff to the Board. With seven members present, Judge Erickson declared a quorum.

Mr. Godfrey moved and Mr. Maynard seconded the motion to approve the minutes of the June 29, 2004 Board meeting. The motion was approved unanimously with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve

Ostiguy, and Dr. Isadore Ramos voting in the affirmative.

Report on Municipal Responses to Request for Substantial Completeness Determinations

Of the fifteen (15) original appeals that required a substantial completeness review by the town with a report to SHAB by August 2:

„h Eleven (11) were determined by the town not to be substantially complete.

„h Two (2) were determined to be substantially complete.

„h One (1) town asked the SHAB to make the determination of substantial completeness.

„h One (1) town was granted an extension to September 3 to respond.

By August 1, the SHAB received five (5) additional appeals that also require a substantial completeness determination. The response from the town regarding these appeals is due on September 3, 2004.

Judge Erickson suggested a procedure on how to proceed on making the substantial completeness determinations on December 1, 2004. During November, the Board would meet to review, discuss, and deliberate the substantial completeness determinations with a formal vote on December 1, 2004. Mr. Richard, legal counsel for SHAB, will begin to review the determinations received from the towns so far to look for common issues and begin to formulate consistent standards

for review. Towns will have one additional opportunity to identify incompleteness issues, and then the appellants will be given an opportunity to respond to the towns' determinations.

Changes in SHAB Procedures as a Result of the Amendments to R.I.G.L. 45-53

Mr. Richard said that except for the requirements for determining substantial completeness and broader authority to promulgate regulations, the new housing act is not a significant departure from the previous statute for the SHAB.

Appeal No. 2003-07 Agostinelli vs. the Town of Narragansett ZBR

In a written communication dated July 20, 2004, Mr. Joseph Agostinelli requested to proceed in this appeal pro se. David Igliozi, Esq., who was representing Mr. Agostinelli, is withdrawing from the appeal. Mr. Agostinelli also asked the Board to decide the pending motion for additional evidence and the merits of the appeal based on the record without any additional legal memorandum.

Mr. Agostinelli was present at this meeting. Mark McSally, Esq. attended as counsel for the Town of Narragansett Zoning Board of Review.

Mr. Agostinelli seeks to admit the following proposed additional

evidence:

(1) a memorandum from Clarkson Collins, the Narragansett town planner, dated 11/20/03 and (2) the building permits and related official town documentation demonstrating that other homes in the Town of Narragansett have recently been built on lots consisting of 4,800 square feet and 5,000 square feet.

Mr. McSally objected to the admission of this additional evidence. He also objected to the request that no additional legal memorandum be required.

Judge Erickson explained that an appeal to the SHAB is an appellate process, requiring written submissions. He also said that new evidence can be admitted only with permission of the Board.

Mr. Ostiguy moved and Mr. Maynard seconded the motion to establish the following briefing schedule: brief due from Mr. Agostinelli in up to 20 days; response from the Zoning Board in up to 30 days; and a response from Mr. Agostinelli in 10 days. The motion was approved unanimously with Judge Stephen Erickson, Richard Godfrey, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative. Mr. Goodrich recused himself from this appeal and, therefore, did not vote.

The Board will take up the appeal on its merits in November.

Mr. Godfrey moved and Mr. Ostiguy seconded the motion to accept

the memorandum from Mr. Collins and a newspaper article from the South County Independent, "Board votes against single lot application," as additional evidence. The motion was approved unanimously with Judge Stephen Erickson, Richard Godfrey, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative. Mr. Goodrich recused himself from this appeal and, therefore, did not vote. Mr. McSally can respond to the additional evidence.

Appeal No. 2004-19 East Bay Community Development Corporation vs. the Town of Barrington ZBR

Anthony DeSisto, Esq. represented the appellant, and S. Paul Ryan, Esq., and Dennis Grieco, Esq., represented the Barrington Zoning Board of Review.

Mr. Ryan said that the Barrington Town Council has no jurisdictional objection to the appeal.

Mr. DeSisto asked to have the record supplemented with documents that were referred to at the comprehensive permit application hearings, but not included in the appeal submission: the Barrington zoning ordinances, the comprehensive plan, and subdivision ordinances. Mr. Ryan agreed to admit those documents that were referred to in the case. Mr. Richard suggested that the relevant portions of the documents could be submitted as appendices to the

memorandum.

Mr. Goodrich moved and Dr. Ramos seconded the motion to accept jurisdiction of Appeal No. 2004-19. The motion was approved unanimously with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative.

A briefing schedule already has been established.

Appeal No. 2004-02 Boyd Brook Partners, LLC vs. the Town of Coventry ZBR

G. John Gazerro, Jr. Esq., represented the appellant, and Frederick Tobin, Esq., represented the Town of Coventry Zoning Board of Review.

The Board addressed a motion from J. William Harsch, Esq., on behalf of abutters Diane Jordan, Lynda Marzahan, Tracy Jordan-Cardillo and Susan Howe, to intervene in this appeal. G. John Gazerro, Esq., representing the appellant, objected to the motion to intervene. Both parties presented their arguments in favor and against the motion to intervene. Frederick Tobin, Esq., said the Zoning Board had no objection to the intervention by the abutters and asked the Board to allow it. Mr. Godfrey moved and Mr. Goodrich seconded the motion to allow this group of abutters to intervene. The

motion was approved unanimously with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative.

The Board addressed the motion of the Coventry Zoning Board of Review to dismiss the appeal. Mr. Tobin presented the seven reasons outlined in his memorandum in support of dismissal. Board members and Mr. Tobin discussed the lack of any record that the SHAB could refer to in considering some of the arguments for dismissing the appeal, particularly the doctrine of administrative finality. Mr. Godfrey suggested that the issues of proper notice and the failure to appear were the primary matters for SHAB's review in addressing the motion. All the other issues raised by the Zoning Board's memorandum would require additional evidence. Board members questioned Mr. Tobin on the Town's procedure for giving notice.

The Board took a ten-minute recess.

Mr. Gazerro said that the developer did not participate in the two hearings because the lack of proper notice left the Zoning Board without jurisdiction over the comprehensive permit application.

Judge Erickson stated that if the Zoning Board failed to open the hearing within 30 days, the developer's proper remedy would be to seek that the Superior Court issue a writ of mandamus. Mr. Gazerro

stated that the developer contends that it is entitled to an automatic approval of its application.

Judge Erickson asked if there would be any objection to remanding the case back to the Zoning Board for a substantive hearing. Mr. Gazerro said he would have to review that option with his client. Both the abutters and the Town indicated they had no objection to remanding the case back to the Town.

Mr. Goodrich said there seemed to be three options: the appellant could seek that the Superior Court issue a writ of mandamus, the Board remand the case back to the Town, or the Board uphold the decision of the Zoning Board. Judge Erickson noted that what is currently before the Board is a motion to dismiss the appeal.

Judge Erickson outlined potential actions the Board could take:

(1) Grant the motion to dismiss and issue a decision; this would end the appeal at the SHAB level; or

(2) Deny the motion to dismiss and either (a) remand the case back to the Zoning Board or (b) hear the appeal on its merits to determine if the denial by the Zoning Board was justified.

Mr. Godfrey moved and Mr. Ostiguy seconded the motion to grant the motion to dismiss the appeal. In discussing the motion, Mr. Godfrey said that he believed the Zoning Board did all that it could do in this

situation and acted in good faith, opening the hearing in a timely manner. However, the appellant refused to participate. After the appellant refused to participate in the second meeting, the Zoning Board acted within its jurisdiction to deny the application for lack of proof.

Mr. O'Brien said that he was concerned about the defective notice and a potential challenge by abutters because of it and that the town should not be rewarded for having defective procedures. He said he preferred remanding the case back to the Zoning Board to be heard on its merits. Mr. Ostiguy noted that the Town of Coventry has been involved with comprehensive permit applications in the past and does know how to proceed.

Judge Erickson reiterated that if it is the appellant's position that the Zoning Board did not have jurisdiction, then the application was approved, SHAB does not have jurisdiction, and the appellant should proceed to Superior Court.

Mr. Godfrey pointed out and Judge Erickson concurred that conversely, by bring the appeal of a denial to the SHAB, the appellant acknowledged the procedural validity of the Zoning Board's decision.

The Board voted 6-1 to grant the motion to dismiss with Judge Stephen Erickson, Richard Godfrey, Charles Maynard. John O'Brien,

Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative and Donald Goodrich voting in the negative. Legal counsel will write a decision that will be issued at the next meeting of SHAB.

**Appeal No. 2004-18 Spectrum Properties vs. the Town of Coventry
ZBR**

William Landry, Esq., represented the appellant, and Patrick Sullivan, Esq., represented the Town of Coventry Zoning Board of Review.

Judge Erickson said that Board will be deciding whether to accept jurisdiction of Appeal No. 2004-18 and the impact of the new housing statute on this appeal.

Mr. Sullivan argued that the SHAB should decline to accept jurisdiction of an appeal. Filing an appeal is intended only to meet certain timelines. The General Assembly created a "drop dead" date for SHAB's jurisdiction over appeals, and this appeal does not fall within that deadline.

Judge Erickson noted that the deadline in the new law for taking jurisdiction is May 1, 2004. He asked Mr. Sullivan where the appellant would go for relief if not to the SHAB. Mr. Sullivan said to the Supreme Court.

Judge Erickson commented that the General Assembly had some

intention when it established a deadline, which acknowledged a jurisdictional process. He also said that the General Assembly was aware of the status of the Spectrum appeal.

Mr. Richard asked if a court asks for subject matter jurisdiction, does that relate back to the filing date of the appeal. Judge Erickson said that if there is no subject matter jurisdiction, SHAB cannot proceed with this appeal. Mr. Godfrey said that the filing date is the key measuring date. Mr. Landry added that if there is a defect in the appeal at filing, there is no jurisdiction, but no such argument has been made here.

Judge Erickson asked if the Board must decide jurisdiction only if it is contested. Mr. Landry argued that the Board had jurisdiction on the day the appeal was filed. R.I.G.L. 45-53-5 gives the Board jurisdiction over denials.

Mr. Landry said that a second version of the bill included the May 1, 2004 deadline, and that new deadline would only impact the Spectrum appeal. He claimed that it was the General Assembly's intent to include and not exclude this appeal. If this appeal were excluded, it would be placed in an inferior position even after a full hearing at the local level and a timely appeal of a written decision.

Mr. Goodrich moved and Mr. Maynard seconded the motion that the State Housing Appeals Board recognizes jurisdiction over Appeal No.

2004-18 as of the date it was filed, April 23, 2004. The motion was approved 6-1 with Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative and Judge Stephen Erickson voting in the negative.

A briefing schedule of 30 days/30days/ 10 days was established.

There was no need to go into executive session.

The next meeting of the Board will be on Tuesday, September 14, 2004 at 2:00 PM at a location to be determined. The Board will begin to hear substantive cases and receive an update on the substantial completeness determinations.

Mr. Goodrich moved and Mr. Maynard seconded the motion to adjourn the meeting at 4:45 PM. The motion was approved unanimously.

Respectfully submitted,

Stephen P. Erickson, Chair