

STATE HOUSING APPEALS BOARD

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Minutes of the December 8, 2004 Board Meeting

The December 8, 2004 meeting of the State Housing Appeals Board (“SHAB” or “Board”) was called to order at 9:10 AM in the Board Room at Rhode Island Housing,

44 Washington Street, Providence, Rhode Island by Judge Stephen Erickson, Chair. Board members in attendance were Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, Michael Milito (designee of Richard Godfrey for several appeals as noted), 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. and William Dolan, Esq., legal counsel to the Board, and Judy Jones, Katherine Maxwell, and Christine DaRocha, administrative staff to the Board. With seven members present, Judge Erickson declared a quorum.

Approval of Board Meeting Minutes

Mr. Goodrich moved and Dr. Ramos seconded the motion to approve the minutes of the following Board meetings: November 8, 2004, November 15, 2004, November 22, 2004 and November 29, 2004. 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.

Approval of the December 8, 2004 Meeting Minutes

Mr. Godfrey moved and Mr. Maynard seconded the motion to authorize the Chair of the Board to approve the minutes of the December 8, 2004 Board meeting upon their completion and circulation to Board members. 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.

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

Board of Review

The written decision for Appeal No. 2004-18 Spectrum Properties vs.

the Town of Coventry Zoning Board of Review was adopted and promulgated at this meeting.

Appeals from Board Decisions

The Town of Exeter has requested the Supreme Court to stay the enforcement of SHAB's decision overturning the Exeter Zoning Board of Review's denial of the Deer Brook Development Corporation's comprehensive permit application.

The Town filed two arguments in support of its request for a stay:

(1) Since its hearings on the application, leading to the denial, the composition of the Zoning Board has changed. The Town argues that, upon remand, the Board as presently composed must start the process over from the beginning rather than move forward with preliminary and final plans.

(2) The Town is seeking to hold the owner of an illegal gravel operation on the property in contempt in a pending Washington County Superior Court case. The gravel corporation claims that pursuant to SHAB's decision, it is no longer obligated to reclaim the property.

The Board has no role in these court proceedings.

Substantial Completeness Rulings

All Board members had access to the following information for each appeal:

- Written briefs and oral arguments from all parties.**
- Transcripts of the November 2004 Board meetings.**
- Minutes of the November 2004 meetings.**
- Staff reviews of the comprehensive permit applications.**
- At the December 8 meeting, an informal review of all documents on record for each appeal.**

The transcript of this meeting is the record of the proceedings and available for public review upon request.

Before beginning its deliberations, Judge Erickson and Mr. Richard lead the Board in a discussion of the voting procedure and the principles that will guide the Board's decisionmaking.

Judge Erickson suggested that, in order to properly record the Board's position, the vote to remand the application back to the Zoning Board will have three alternate parts: the application was substantially complete, the Zoning Board acted as if the application was substantially complete or both standards apply. There must be a total of five votes within the three categories for a dispositive decision to remand.

Mr. Richard reminded the Board that it is determining substantial completeness not substantial correctness. The Board should

determine whether any deficiencies are material enough to prevent administrative review. Mr. Richard noted that the Zoning Board's review process for an application typically evolves with information supplemented over the course of the hearings. Therefore, the Board must determine if there was enough meaningful, qualitative information for the Zoning Board to proceed on remand.

There are two tests of substantial completeness: (1) substantial completeness of substantially all and/or (2) the Zoning Board acted in a manner demonstrating that it considered the application to be substantially complete for the purposes of reviewing the application. There is no "brightline" test for determining whether the Zoning Board acted as if the application was substantially complete. Board members should rely on their experience and the actual content of the administrative record to make their determinations.

In conducting the staff review of the application, the question of whether deficiencies that were ripe for consideration, but not briefed, should be included. The common legal standard is that an issue is waived if not addressed by the parties.

The last issue for Board's consideration is which standard for a master plan should the Board use: the state standard or the municipal standard? R.I.G.L. 45-23-40 sets the threshold for the state standard, but allows the municipality to supplement the state standard with local ordinances.

In summary, the preliminary issues the Board must address in determining substantial completeness are: (1) materiality of any deficiencies, (2) deficiencies ripe for consideration, but not briefed, and (3) whether to accept the state definition of a master plan.

Mr. Goodrich asked whether the Board could remand an application if it was not substantially complete, but the Zoning Board acted as if it were. Mr. Richard said that yes, either standard or both together could result in the application being remanded. However, the standard would have to be fully met; parts of both standards together would not be sufficient to justify a remand.

Mr. Richard said that formal decisions will be circulated for Board review before being adopted and promulgated. Mr. O'Brien asked if the decisions would include findings of fact. What if there is not a consensus on findings of fact?

Judge Erickson said that in routine appeals, the total Board makes detailed findings of fact. Decisions on these appeals are more procedural, with the majority of members voting that the Zoning Board should go forward with the hearing for whatever reasons each Board member determines to be valid. Board members should go on record on specific issues, and any dissent will be articulated in the written decisions.

Judge Erickson said that if the decision of the Board is in favor of the developer, the decision is not appealable. However, if unfavorable, the developer can appeal to the Supreme Court. If the community loses and appeals, the Supreme Court will have to decide if it is an appealable case. However, the Board will proceed as if all the cases are appealable in order to insure an adequate record.

Mr. Richard said that if there are differences in the reasons for remanding an appeal, the written decision will reflect all points of view.

Judge Erickson asked the Board how it wanted to proceed if an issue was not raised – would it be waived? Mr. Goodrich said that it is a matter of fairness if the Board raises an issue without allowing the parties to object or interpret. He stated that the Board should rely on the record before it. Mr. O'Brien noted that would be in keeping with the Board's past practice.

Regarding the applicable master plan standard, Mr. Goodrich suggested that the Board use the state standard, since municipal master plan checklists are not consistent. Mr. O'Brien said that the law allows municipalities to supplement the master plan standards. The Planning Boards, in their advisory capacity, looked at the municipal master plan standards. If the local standard is reasonable and material it should be considered.

Mr. Richard suggested that the Board consider which standard is appropriate on a case-by-case basis. Judge Erickson said that the Board would start with the state standard as the threshold and include local requirements as they are critical to supplement the master plan submission.

Mr. Ostiguy said that another factor to look at is whether the community actually had in place a comprehensive permit application process.

The Board then took up the nineteen appeals on its agenda.

Appeal No. 2004-07 The Dolben Company, Inc. vs. the Town of Johnston Zoning Board of Review

Legal counsel for the Town of Johnston and the Johnston Zoning Board of Review and The Dolben Company, Inc. signed a stipulation that the comprehensive permit application filed on behalf of the Dolben Company, Inc. satisfies the substantial completeness requirements of R.I.G.L. 45-53-6(f)(1) and (2). Judge Erickson signed the stipulation.

Appeal No. 2004-09 Essex Affordable Housing Assoc., Inc. vs. the Town of Westerly Zoning Board of Review

Judge Erickson put on the record an e-mail to the Board dated December 8, 2004 from Steven Hartford, the solicitor for the Town of Westerly, asking that the stipulation stating that the comprehensive permit application of Essex Affordable Housing Associates, Inc. is substantially complete be approved. Mr. Godfrey moved and Dr. Ramos seconded the motion to approve the stipulation. The motion was approved with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative.

Appeal No. 2004-11 Churchill & Banks Companies, LLC vs. the Town of Smithfield Zoning Board of Review

William Dolan, Esq. sat in place of Steven Richard, Esq. as legal counsel to the Board for this appeal. Michael Milito sat as the designee of Richard Godfrey for this appeal because he attended the meeting on November 29 and heard the oral arguments for this appeal.

Mr. Goodrich moved and Dr. Ramos seconded the motion to remand the Churchill & Banks Companies, LLC comprehensive permit application back to the Town of Smithfield Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson,

Donald Goodrich, Charles Maynard, Michael Milito, Steve Ostiguy, and Dr. Isadore Ramos voting that both standards were met, and John O'Brien voting that the Zoning Board acted as if the application was substantially complete.

Appeal No. 2004-05 New Harbor Village vs. the Town of New Shoreham Zoning Board of Review

William Dolan, Esq. sat in place of Steven Richard, Esq. as legal counsel to the Board for this appeal. Michael Milito sat as the designee of Richard Godfrey for this appeal because he attended the meeting on November 29 and heard the oral arguments for this appeal.

Mr. Milito moved and Dr. Ramos seconded the motion to remand the New Harbor Village comprehensive permit application back to the Town of New Shoreham Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion failed with a 4-3-0 vote with Donald Goodrich, Charles Maynard, Michael Milito, and Dr. Isadore Ramos voting that the comprehensive permit application was substantially complete, and Judge Stephen Erickson, John O'Brien, and Steve Ostiguy voting that neither standard was met. The SHAB upheld the determination of the Town of New Shoreham Zoning Board of Review that the comprehensive permit application was not substantially complete.

Appeal No. 2004-08 Block Island Housing, Inc. vs. the Town of New Shoreham Zoning Board of Review

Mr. Richard resumed the role of legal counsel to the Board for this appeal and the remainder of the appeals. Michael Milito sat as the designee of Richard Godfrey for this appeal because he attended the meeting on November 29 and heard the oral arguments for this appeal.

Mr. Goodrich moved and Mr. Maynard seconded the motion to remand the Block Island Housing, Inc. comprehensive permit application back to the Town of New Shoreham Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Donald Goodrich, Charles Maynard, Michael Milito, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that both standards were met.

Appeal No. 2004-22 Nicholas DePetrillo vs. the Town of New Shoreham Zoning Board of Review

Michael Milito sat as the designee of Richard Godfrey for this appeal because he attended the meeting on November 29 and heard the oral arguments for this appeal.

Mr. Goodrich moved and Mr. O'Brien seconded the motion to sustain the determination of the Town of New Shoreham Zoning Board of Review that the Nicholas DePetrillo comprehensive permit application was not substantially complete pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Donald Goodrich, Charles Maynard, Michael Milito, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that neither standard was met.

Appeal No. 2004-10 Smithfield Hills, LLC vs. the Town of Smithfield Zoning Board of Review

Mr. Godfrey resumed his seat on the Board for this appeal and the remainder of the appeals.

Mr. Goodrich moved and Mr. Maynard seconded the motion to remand the Smithfield Hills, LLC comprehensive permit application back to the Town of Smithfield Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that both standards

were met.

**Appeal No. 2004-15 Armand Cortelleso aka Patriot Homes vs. the
Town of Smithfield Zoning Board of Review**

Mr. O'Brien moved and Mr. Goodrich seconded the motion to dismiss the appeal brought by Armand Cortelleso a/k/a Patriot Homes for lack of jurisdiction.

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative.

Mr. Richard said that he would write a more detailed decision for this case. Mr. Goodrich moved and Dr. Ramos seconded the motion to adopt and promulgate the decision. The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative.

**Appeal No. 2004-16 Crown Properties, LLC vs. the Town of Smithfield
Zoning Board of Review**

Mr. Goodrich moved and Dr. Ramos seconded the motion to remand the Crown Properties, LLC comprehensive permit application back to the Town of Smithfield Zoning Board of Review pursuant to R. I. G. L.

45-53-6(f)(1)(A) and (B) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that both standards were met.

The Board took a break for lunch at 12:30 PM and reconvened the meeting at 1:15 PM with all seven members previously present in attendance.

Appeal No. 2004-17 West Reservoir, LLC vs. the Town of Smithfield Zoning Board of Review

Mr. Godfrey moved and Mr. O'Brien seconded the motion to uphold the determination of the Town of Smithfield Zoning Board of Review that the West Reservoir, LLC comprehensive permit application was not substantially complete pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 6-1-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that neither standard was met, and Charles Maynard voting that the application was substantially complete.

Appeal No. 2004-12 Pascoag Apartment Assn., LLC & Yorkshire Properties vs. the Town of Burrillville Zoning Board of Review

Judge Erickson took note of the joint supplemental memorandum filed by the Town of Burrillville and the Town of Burrillville Zoning Board of Review (received by the SHAB on December 7, 2004 and distributed to members of the SHAB at this meeting). The memorandum pertained to SHAB Appeal Nos. 2004-12, 2004-13, and 2004-14 and argued that the SHAB does not have jurisdiction over these appeals because they are neither denials by the local zoning board or approvals with conditions that make the projects infeasible. Judge Erickson said that although the Town of Burrillville has preserved its right to challenge jurisdiction by raising the issue here, he does not believe that the Board had to take any action on the jurisdictional issue. SHAB actions over the past six months indicate that the Board believes it does have jurisdiction over these appeals pursuant to R.I.G.L. 45-53-6(f).

Mr. Godfrey moved and Mr. Goodrich seconded the motion to remand the Pascoag Apartment Assn., LLC & Yorkshire Properties comprehensive permit application back to the Town of Burrillville Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1)(A) and (B) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien,

Steve Ostiguy, and Dr. Isadore Ramos voting that the comprehensive permit application was substantially complete.

Appeal No. 2004-13 Crystal Lake Builders, LLC vs. the Town of Burrillville Zoning Board of Review

Mr. Godfrey moved and Mr. Goodrich seconded the motion to remand the Crystal Lake Builders, LLC comprehensive permit application back to the Town of Burrillville Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that the comprehensive permit application was substantially complete.

Appeal No. 2004-14 East Avenue Development Realty, LLC vs. the Town of Burrillville Zoning Board of Review

Mr. Godfrey moved and Mr. Goodrich seconded the motion to remand the East Avenue Development Realty, LLC comprehensive permit application back to the Town of Burrillville Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien,

Steve Ostiguy, and Dr. Isadore Ramos voting that the comprehensive permit application was substantially complete.

Appeal No. 2004-23 Dry Bridge Development, LLC vs. the Town of North Kingstown Zoning Board of Review

Mr. Godfrey moved and Mr. Goodrich seconded the motion to remand the Dry Bridge Development Corporation, LLC comprehensive permit application back to the Town of North Kingstown Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that the comprehensive permit application was substantially complete.

Appeal No. 2004-24 Pinnacle Partners vs. the Town of North Kingstown Zoning Board of Review

Mr. Godfrey moved and Mr. Goodrich seconded the motion to remand the Pinnacle Partners comprehensive permit application back to the Town of North Kingstown Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1)(A) and (B) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien,

Steve Ostiguy, and Dr. Isadore Ramos voting that both standards were met.

Appeal No. 2004-03 E. G. Land Company vs. the Town of East Greenwich Zoning Board of Review

Mr. Godfrey moved and Dr. Ramos seconded the motion to remand the E. G. Land Company comprehensive permit application back to the Town of East Greenwich Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that both standards were met.

Appeal No. 2004-04 Clarks Falls Realty, LLC vs. the Town of Hopkinton Zoning Board of Review

The Town of Hopkinton Zoning Board of Review asked that the SHAB make the determination of substantial completeness; therefore, the Town did not identify specific deficiencies.

Mr. Godfrey moved and Mr. Goodrich seconded the motion to make a determination that the application was substantially complete and remand the Clarks Falls Realty, LLC comprehensive permit

application back to the Town of Hopkinton Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that the application was substantially complete.

Appeal No. 2004-06 EFC Construction Company vs. the Town of Charlestown Zoning Board of Review

Mr. Godfrey moved and Mr. Goodrich seconded the motion to remand the EFC Construction Company comprehensive permit application back to the Town of Charlestown Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting that both standards were met.

Appeal No. 2004-21 EFC Construction Company vs. the Town of Scituate Zoning Board of Review

Mr. Godfrey moved and Mr. Goodrich seconded the motion to remand the EFC Construction Company comprehensive permit application

back to the Town of Scituate Zoning Board of Review pursuant to R. I. G. L. 45-53-6(f)(1) and (2).

The motion passed with a 7-0-0 vote with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, Steve Ostiguy, and Dr. Isadore Ramos voting that the both standards were met, and John O'Brien voting that the application was substantially complete.

Other Business

The SHAB as it is presently constituted will dissolve on December 31, 2004. Board members thanked Judge Erickson for his leadership over the past thirteen years.

The Board adjourned at 5:10 PM.

Respectfully submitted,

Judge Stephen P. Erickson, Chair