

TIVERTON ZONING BOARD OF REVIEW
SPECIAL MEETING
Planning Board of Appeals
March 25, 2014
7:00 p.m.

The following Special Meeting of the Tiverton Zoning Board of Review was conducted on Tuesday, March 25, 2014 at the Tiverton Town Hall, 343 Highland Road.

Members present: Chairwoman Lise Gescheidt, Susan Krumholz, Dick Taylor, David Collins, Jay Jackson and Wendy Taylor-Humphrey.

Also present were: Mark Hadden, Town Solicitor and Sally Ferreira, Court Reporter.

1. The Continued Hearing on the Appeal of Eagleville Road Realty, LLC/Pleasant Sales and Construction, Inc. d/b/a Site Ready Materials Recycling Company from the decision of the Planning Board dated April 2, 2013 denying their Application and Master Plan Application for the premises located at 322 Eagleville Road, Tiverton, RI, also designated as Plat 205, Lot 101 on the Tiverton Tax Assessor's maps located in an Industrial zoning district. Continued from 11-06-13 and 01-23-14.

DISCUSSION: Chairwoman Lise Gescheidt stated the record should reflect the last time the Board met a briefing schedule was set up and the Board has received a responsive brief and a brief from Mr. Ruggiero. The Chairwoman also stated the Board is in receipt of a case that was decided by Judge Thunberg last Friday that may or may not have applicability to the legal standards that the Board has to apply tonight. The Chairwoman went on to say there are so many issues that are presented that it would make sense to go point by point so the Board can ask questions. The Chairwoman further stated she read the decision that Mr. Brainsky sent the Board and it may have relevance to what the standard the Board has to follow or it may not.

At this time, Mr. Brainsky, an attorney representing the appellants, introduced himself and indicated he filed a responsive memo to Mr. Ruggiero's memo before tonight's meeting. Mr. Brainsky stated typically, having set a briefing schedule, he would not be handing the Board another brief with another case but the case that was decided by Judge Thunberg on Friday from the Superior Court will have relevance to the issues presented tonight. At this time, Mr. Brainsky handed each member of the board a 51 page memorandum in support of this appeal.

Mr. Brainsky stated he realizes sitting here this evening the Board would not be able to read the 51 page memorandum and the case in complete detail so he suggested he give a brief summary. Mr. Brainsky started his summary by stating the Loves decision is the most recent decision that is controlling of this Board and controlling of the decision that needs to be made which is the reversal of the Planning Board, the approval of the master plan and a remand for consistent proceedings with that decision. Mr. Brainsky went on to say Judge Thunberg's decision really cleared up law that was otherwise unclear.

Mr. Brainsky explained there was clear error when the planning board held his client to a standard that was higher and required more detailed evidence at the master plan stages of approval than should have been required. The purpose of the master plan is a conceptual plan where you explain to the planning board what it is you want to do and there is a public informational meeting as opposed to a public hearing where information is presented and then the planning board has to either approve, deny or approve with conditions within the given statutory time period. Mr. Brainsky suggested that his argument that he made to this Board in his very first brief last November was essentially upheld through the Loves case by last Fridays decision from Judge Thunberg.

Mr. Brainsky spoke further on his memorandum and quoted passages from it. Mr. Brainsky stated the Board of Appeals has the power to reverse, reverse in part, or to simply remand a case back to the Planning Board for further proceedings consistent therewith just as the Superior Court has the power to reverse and remand it back to either this board or the planning board for consistent proceedings or to just reverse it and approve the master plan altogether.

Mr. Brainsky concluded by saying Judge Thunberg's decision controls. Mr. Brainsky presented all the information required for master plan approval and he suggested this Board reverse the planning board's decision, remand it back to the planning board directing them to approve the master plan. The Board had an opportunity to ask Mr. Brainsky questions.

Mr. Hadden, the attorney representing the Board, stated the 52 page decision that Judge Thunberg has written is a Superior Court decision and not a Supreme Court decision. Mr. Hadden suggested that Mr. Ruggiero should have the opportunity to present something in writing in response to Judge Thunberg's decision. It was Mr. Hadden's recommendation that counsel each in turn present their verbal arguments in support of their memos that specifically address each issue so that as that issue comes up, the Board can ask questions on any specific issue of error as claimed by Mr. Brainsky and then go to the next point.

Mr. Ruggiero, Town Solicitor representing the planning board, responded by saying the Loves's case is an interesting case but it is an unprecedented case about how master plans and standard of reviews are applied. Mr. Ruggiero further stated only the Supreme Court has the final say and a Superior Court judge does not have the final say. The Board asked Mr. Ruggiero questions. Mr. Ruggiero advised the Board that on questions of law the Board does not need to resolve them because the Superior Court is free to do what it wants if it ever gets this case. Mr. Ruggiero suggested that the Board treat this case just for what it's worth with due consideration and the Board is not bound by it in any way, shape, or form. Mr. Ruggiero suggested the Board use the Loves's case as guidance and the Board may consider it.

Mr. Taylor stated this Board should keep in mind that the planning board after 1,500 pages of testimony was not convinced that this met the criteria and still turned it down.

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Mr. Taylor went on to say it's really down to the issue of the law.

At this point, a short break was taken at 8:16 p.m. to allow the stenographer a chance to rest. The hearing was reconvened at 8:26 p.m. at which time the Chairwoman suggested the Board needs to decide whether they want to read the case and come back or whether the Board should go through the various other points. Mr. Brainsky asked before the Board decided on that if he could give a quick summary of his first argument and the Chairwoman agreed and suggested if he would like to rebut anything Mr. Ruggiero mentioned. Mr. Brainsky gave an overall general rebuttal and stated the Superior Court's decision is highly persuasive because it's the only law on the issue in this jurisdiction. Mr. Brainsky went on to cite sections of Judge Thunberg's decision and concluded by saying it's a well reason, good decision and it's the only decision on the topic.

Ms. Taylor-Humphrey stated it is necessary that the Board not only listen to the oral arguments but that we read the 51 page memorandum that was submitted by Mr. Brainsky before the Board goes any further.

Mr. Collins made a motion to continue this matter to another date to allow the Board time to review Mr. Brainsky's document and that the Board will start the next hearing with the discussion and the decision as to whether or not the Board wants Judge Thunberg's decision to apply to this appeal. Ms. Taylor-Humphrey seconded. The Vote was four to one. Voting in favor were: Chairwoman Lise Gescheidt, David Collins, Susan Krumholz, Jay Jackson, and Wendy Taylor-Humphrey. Voting against: Richard Taylor. The motion carried.

It was decided that the next special meeting for Planning Board of Appeals will be scheduled for Tuesday, April 22, 2014 at 7:00 p.m.

Ms. Krumholz made a motion to adjourn. Ms. Taylor-Humphrey seconded. The vote was unanimous. Voting in favor were: Chairwoman Lise Gescheidt, David Collins, Susan Krumholz, Jay Jackson, Wendy Taylor-Humphrey and Richard Taylor.

Whereupon the Special Meeting of the Tiverton Zoning Board of Review Planning Board of Appeals meeting was concluded at 8:57 p.m.

ZBR/ssf

C E R T I F I C A T E

I, Salvina S. Ferreira, Registered Professional Reporter, hereby certify that the foregoing pages 1 - 4 of minutes in the matter of Planning Board of Appeals meeting at a special meeting of the Zoning Board of Review held on Tuesday, March 25, 2014, are transcribed to the best of my knowledge, skill and ability.

I further certify that I am not interested in the event of the action.

IN WITNESS WHEREOF, I have hereunto subscribed my hand and affixed my seal of office this 16th day of April, 2014.

Salvina S. Ferreira, RPR

My commission expires: September 26, 2017.

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