

North Smithfield Zoning Board of Review
November 12, 2013 7:00pm
Kendall Dean School
83 Green St., Slatersville, RI

The Chair called the meeting to order at 7:02 pm.

1. Roll Call

Present: Chair William Juhr, Vice Chair Steve Scarpelli, Mario DiNunzio, Scott Martin, Vincent Marcantonio, Paul Pasquariello. Absent: Susan Overfield. Also present was and Building and Zoning Official Robert Benoit, Town Planner Robert Ericson, Town Solicitor James Lombardi III and Assistant Town Solicitor Stephen Archambault

2. Mr. Juhr made disclosure of no compensation or pension credits are received by the board members.

3. Approval of minutes, September 24, 2013.

Mr. Scarpelli made a motion to approve the minutes of September 24, 2013. Mr. Martin seconded the motion, with all in favor.

4. Mr. Benoit stated Valley Alliance for Smart Growth (VASG) is appealing the decision of the Building and Zoning Official and Town Planner's decision to deny the complaint against Dowling Village, LLC by VASG which alleged non-compliance of the Town of North Smithfield's Major Land Development approval. The allege non-compliance involves the Town approval's terms and conditions, the Zoning Ordinance/Soil Erosion and Sediment Control, and this subdivision Land Development and subdivision Regulation.

Both Mr. Benoit and Mr. Ericson agreed the complaint was null and void. Mr. Juhr stated we have a motion to intervene from Attorney Michael A. Kelly representing Dowling Village, the owners. Mr. Juhr stated he feels Mr. Kelly has a legitimate reason to intervene.

Mr. Archambault gave his legal opinion which includes two threshold questions 1) whether or not the motion by Mr. Kelly should be allowed. Its well-settled law in Rhode Island that a property affected in an interest has a right to intervene. So clearly, Mr. Kelly's motion should be granted. Mr. Archambault suggested the Board make a motion, second the motion and allow him to intervene. The second threshold question is whether VASG perfected their appeal? Mr. Archambault reviewed the Zoning Ordinance Section 8.4 and

for the record, that subsection states "Appeals to the Board may be taken by any party aggrieved or by any officer, department, board, or bureau affected by any order or decision of the Inspector concerning the provisions of this ordinance. Such appeal shall be taken within 20 days by filing with the Inspector and with the Board a notice of appeal specifying the grounds for the appeal.

The Inspector shall make available to the Board all papers constituting the record upon which the action appealed from was taken. In filing for an appeal, the applicant, in addition to filing any plans and specifications supporting the request, shall accompany the request with a list of property owners within 200 feet of the property in question and a filing fee payable to the Town.”

Mr. Archambault stated the North Smithfield Zoning Ordinance required two things – appeals shall be taken within 20 days and a list of abutters included with the application. After careful review of the file, Mr. Archambault said the complaint was put forth on December 27, 2012 and there was a hearing and it was denied on January 16, 2013. An appeal was filed on February 4, 2013 by VASG. That was within the 20 days; however, the appeal did not include the abutters list. After researching and talking to Mr. Ericson and Mr. Benoit, Mr. Archambault learned the abutters list was not provided until August 5, 2013 to Mr. Benoit which is required by statute and it still did not include notification from RI Department of Transportation as it abuts a state road and should be part of the abutters list. Even though it was filed timely within 20 days it was not perfected. Mr. Archambault said the statute states it “shall” which is mandatory not may, it’s not discretionary. Mr. Archambault advised the Board to make a motion to grant Mr. Kelly’s motion to intervene, and let Mr. Kelly put some testimony as to why he is intervening then let VASG respond why the appeal should not be denied. The Board should then make a ruling.

Mr. Christopher D’Ovidio from Merolla & Accetturo stated the complaint is against the Zoning Officer and Administrative Officer asking them to enforce permit conditions and subdivision approval. Mr. D’Ovidio said this is not directed at Bucci Development. Notification of the motion to intervene or motion to dismiss was not received by Mr. D’Ovidio or his client, VASG, until Monday, November 11, 2013 at 1:13 p.m and no certification on the motions by Bucci Development was received. Mr. D’Ovidio stated he had less than 24 hours to review. In fairness to Valley Alliance, Mr. D’Ovidio said he should have an opportunity to review the motion and file a thorough objection.

Mr. Archambault stated there is an ongoing record with the appeal and Mr. D’Ovidio has an obligation to be thorough in his research. Mr. Archambault said nothing precludes Mr. D’Ovidio from reviewing the record. Mr. Archambault said it is not fatal to hear this applicant as to whether or not notice was complied with. Mr. Archambault said there is no Superior court rule that mandates that notice has to be given of the motion to Mr. D’Ovidio.

Mr. D’Ovidio stated Rule 24C Procedure, ability for a party to intervene. Mr. D’Ovidio said a person desiring to intervene should serve a written motion to intervene upon the parties and Rule 5, Rules and Procedure, require written motion to be mailed or electronic email (by written consent of the parties.)

Mr. Archambault stated we are operating under the North Smithfield Zoning Ordinance not before Superior Court. Mr. Archambault said nothing is in the Zoning Ordinance that says Mr. Kelly has to provide notice to Mr. D’Ovidio. Mr. Archambault said the motion is properly before the Board and they can grant or deny the motion to intervene. Focus on whether the motion to intervene should be granted and Mr. Kelly’s argument heard.

Mr. D'Ovidio said he needs more time and would like an opportunity to continue and properly brief the matter. Mr. Benoit explained the procedure and said the applicant, VASG, submits the application to the Zoning Official and the Zoning Official submits the package to the Zoning Board members. Mr. Benoit also added the town information and Mr. Kelly's information to the Zoning Board member packages. Mr. D'Ovidio did not have time to respond to the motion. Mr. Juhr said both sides need to have a fair playing field. Mr. D'Ovidio said he did see factual inaccuracies in the motion.

Mr. Michael Kelly representing Bucci Development, Inc. stated we should following Zoning Board rules not Superior Court rules. Mr. Kelly stated the Ordinance says 1) the applicant files an appeal along with a list of abutters and then the notice goes out. The appeal was filed on February 4, 2013 and neither Mr. Kelly nor his client received notice. Mr. Kelly said VASG did not provide the abutters list to the Town until August which was six months later. Mr. Kelly said it is ironic that VASG did not provide the abutters list to the Town and now complains they did not get a copy of the motion. Mr. Kelly found out about the appeal through hearsay and sent a paralegal and associate to go through the file and that is how they found out the abutters list and the radius map was not provided. Mr. Kelly said Mr. D'Ovidio did not comply with the rules of the Zoning Board. 2) The complaint was filed on December 21, 2012 to the Town to stop the project and mentions Dowling Village and Bucci Development also requesting a cease and desist work order. Mr. Kelly said if this was done properly in February 2013 by VASG, if people were notified, the hearing notice was advertised and proper documents filed with the appeal, it would have been over and done. Mr. Kelly said his client has potential tenants, financing issues and an appeal hanging over their heads since February. Mr. Kelly said VASG did not file the appropriate documents and the list of abutters was not given so no further delay is necessary. Mr. Kelly said a simple issue is to make a motion to dismiss.

Mr. D'Ovidio stated they did not say this action would not affect or involve Bucci Development. Mr. D'Ovidio said they are appealing the decision of the Zoning Official and Administrative Officer. Mr. D'Ovidio said the question is whether notice was required on a procedural level. Mr. D'Ovidio has a certificate checked off by Mr. Benoit along with the abutters list so the application was complete.

Mr. DiNunzio stated we are getting into the arguments of the case and he is not ready to make a decision until he hears both sides. Mr. DiNunzio said the procedural question needs to be settled first. Mr. Juhr asked Mr. D'Ovidio if he was addressing the motion for Mr. Kelly and Dowling Village to intervene or would he like more time. Mr. D'Ovidio has requested more time. Mr. D'Ovidio wanted to be sure if this is continued he doesn't want, at a later date, an argument made by Bucci Development, as intervener, stating that the notice for the hearing was improper. Mr. D'Ovidio said he heard rumors that Mr. Kelly believes notice was improperly provided.

Mr. Archambault stated the rules of civil proceedings do not apply and it doesn't say in the absence it should apply. Mr. Archambault said the Rules of the Zoning Ordinance and the discretion of the Zoning Board of Review apply. Mr. Archambault asked is it fundamentally fair to require Mr. D'Ovidio to respond to a motion to intervene with one day notice? Mr. Archambault said it is fair and the memo is straight forward. Mr. Archambault said they have a right to intervene and there is no counter argument. Mr. Archambault said the second issue is whether or not the appeal is perfected. Mr. Archambault stated Mr. D'Ovidio knew when he filed

the appeal that he had to apply the Town Ordinance Section 8.4, because he got it in within 20 days notice but the abutters list did not come to Mr. Benoit until August 5, 2013. Mr. Archambault wants to recap 1) the motion to intervene should either be granted or denied and it needs be granted; 2) the motion to dismiss should either be granted or denied based on the strict reading of the ordinance. Mr. Archambault feels nothing before the board is going to change. The issue is about the notice whether it was properly given and whether the appeal was perfected. Mr. Archambault said Mr. D'Ovidio knew he had to get it in by February 5th and he got it in by February 4th and he knew what he had to comply with.

Mr. D'Ovidio said he has the approval and the documents submitted to Mr. Benoit on February 4th that the application is complete along with the abutters list. Mr. D'Ovidio needs to brief this. Mr. Archambault stated the focus needs to come back. Those arguments are properly made before the board, stated Mr. Archambault. Mr. Archambault said if it is to be heard, the board should make a motion to grant or deny the motion to intervene and proceed to the second issue if it does so grant the motion to intervene which is whether to dismiss the complaint based upon the motion to intervene. Those are the proper procedures according to Mr. Archambault.

Mr. Juhr is inclined to move the meeting to a date certain to allow all parties to have more time. Mr. Juhr asked both sides to come back and discuss the motion to intervene and other items of complying with Zoning Ordinance Section 8.4.

Mr. D'Ovidio will stipulate to waive any objection to the motion to intervene to resolve the issues as long as they allow him time to brief it. Mr. Archambault stated that if Mr. D'Ovidio is going to stipulate and because there is no counter motion the following is suggested: A motion from the Board should be made to allow Mr. Kelly and Bucci Development the intervention. A motion to allow the intervention was made by Mr. Pasquariello and seconded by Mr. Scarpelli. Roll call vote was as follows: YES: Mr. Juhr, Mr. Scarpelli, Mr. Martin, Mr. DiNunzio and Mr. Pasquariello. Motion passed, with a vote of 5-0. Mr. Marchantonio, first alternate, is not voting.

Mr. Juhr suggested the hearing be continued to Tuesday, December 10, 2013. A motion to continue the proceedings to December 10, 2013 was made by Mr. Dinunzio, seconded by Mr. Scarpelli with all in favor.

Mr. Archambault stated the rules are loose if Mr. D'Ovidio files a counter motion he should get it to the board before hand. Mr. Archambault said the board should not tie down any strict requirements. Mr. D'Ovidio asked whether or not there is a need to republish the notice of hearing for future objection by Bucci Development. Mr. D'Ovidio said if Bucci Development feels particular language is necessary to have a full hearing, with witnesses he should state it now. Mr. Archambault said there was proper notice for Mr. D'Ovidio to be before the board tonight. Mr. Archambault said if the Board grants a motion to continue the matter to December 10th, then notice is complied with and we are going to have a hearing on December 10th. Attorney Kelly said he has not made a determination yet if proper notice was given to all abutters.

Mr. Juhr wants a fair proceeding so both sides have a fair shake at giving their presentation and bringing all facts to the board so they can make a good decision for the Town of North Smithfield.

5. Mr. Scarpelli made a motion to adjourn at 7:55 pm. Mr. Pasquariello seconded the motion, with all in favor.

Submitted by Diane Agostini