

## **ZONING BOARD OF REVIEW MINUTES**

**Tuesday, April 26, 2016 Meeting 7:00 pm**

**Town Council Chambers, Town Hall**

Present: Richard Land, Chair; Renu Englehart, Vice-Chair; Ashley Cullion, Christopher Mulhearn, Jody Sceery, Barry Golden (Alternate) and Melody Alger (Alternate).

Staff: Lea Anthony Hitchen, Assistant Town Planner; Wayne Pimental, Building/Zoning Official; and Town Solicitor Peter Clarkin.

Mr. Land, Chair of the Board, called the meeting to order at 7:05 PM and introduced the members and staff present. He then read the Board's procedures into the record. Each person addressing the Board will first state his or her name and address for the record. The applicant and his or her legal representative will present the case and witnesses may be called to testify. Such testimony must be relevant to the application. Expert witnesses will be sworn in and there will be no prejudgment as to the expertise of any witness. Pictures, diagrams and other documents given to the Board as evidence will be appropriately marked as exhibits and will be retained by the Board for the record. Upon completion of the applicant's presentation all other persons wishing to offer evidence in favor of the application may then do so one at a time. Following that all persons wishing to offer evidence against the application may then do so one at a time. It is asked that comments are confined to the zoning matter being heard and that repetitive remarks are avoided. Cross examination or rebuttal may be allowed if the Board feels it would be appropriate and useful. All questions from the floor will be directed through the Chair only. After all relevant facts have been heard the Chair will call for a motion; the Board will then discuss the motion and the Chair will call for a vote. During the discussion among voting Board members, the Board will not accept any new and further testimony unless it is specifically requested by a Board member. The Board will make every attempt this evening to render a decision. The written decision will be recorded in the Town Clerk's Office as soon as possible following the approval of the minutes of the meeting.

**Zoning Board of Review Hearings – 7:00 PM**

1. **James Smith** for property located at 11 Birchwood Way; Map 54 A.P. 7 Lot 257 (Zoned Residential, R-10). The Applicant requires a Dimensional Variance from Table 2 of Chapter 260 of the Town Code; Zoning Ordinance, Dimensional Regulations by Zone which sets forth the setbacks for the zone. The Applicant is requesting to construct a front porch to the existing structure which will not comply with the front setback requirement.

Mr. Wayne Sawyer, contractor for the Applicant, represented the application. He explained Mr. Smith is requesting to construct a porch on the front of his house and also an extension to the garage on the right-hand side of the existing structure. Both of these extensions will protrude into the 30 foot setback. Mr. Sawyer noted the maximum protrusion will be 6.1 feet and the minimum projection, located on the garage side will be 1.7 feet. In summary, Mr. Smith will be asking for relief of the front setbacks in order to construct the porch.

Mr. Land asked the Board members if there were any questions. None noted.

Mr. Land opened the hearing for public comment. No public comments.

Mr. Land asked for a motion.

Ms. Sceery made a motion to approve the application as presented. Seconded by Mr. Mulhearn.

Mr. Land commented that he reviewed the plans and drove through the Birchwood Way area itself. He thought even with the addition, it would not encroach on the land, on the street any further than some of the other properties along that street. Mr. Land added that the project will be an improvement as well as a positive change for the neighborhood.

Ms. Sceery agreed with Mr. Land's sentiments.

VOTE: 5 – 0.

2. **David and Kathleen Keeffe** for property located at 4 Brookfield Court; Map 58 A.P. 14 Lot 178 (Zoned Farming, F-2). The Applicant requires Dimensional Variances from Table 2 of Chapter 260 of the Town Code; Zoning Ordinance, Dimensional Regulations by Zone which sets forth the setbacks for the zone and Section 8(F) of the same chapter pertaining to the siting of accessory structures and swimming pools. The Applicant seeks to construct an 18'x36' swimming pool and related covered grilling area within the side setback.

Ms. Kathleen Keeffe, represented the application. She explained she and her husband are looking to construct a pool and grilling area with fire pit in the backyard area which will extend into the side setback area and will need relief.

Ms. Englehart asked the Applicant if she saw the staff report regarding whether or not the accessory structures could be moved further to the west to reduce the amount of relief necessary.

Ms. Keeffe noted she had submitted photos which might not have clearly shown the topography but the yard is a lot higher on the right side of the property than the left, so it has a lot to do with how much soil has to be brought in to dig a pool. Additionally, Ms. Keeffe noted on the left side there is a conservation easement which cannot be encroached upon. She commented when the plans were first put together was to be farthest away from the conservation easement.

Ms. Englehart commented that the subject lot is an odd-shaped property. Ms. Keeffe agreed. Ms. Englehart added that with the conservation easement it makes it even that more odd.

Mr. Land clarified if the Board were to ask the Applicant to move it further over it would actually be closer to the conservation easement itself. Ms. Keeffe said yes.

Ms. Cullion asked if there is a grading issue and if that would be an inconvenience if the pool was moved further to the left. Ms. Keeffe stated yes, the water table is a lot higher on that side; on the proposed area where we would like to install the pool there are no water table concerns.

Mr. Land opened the hearing for public comments. No public comments.

Mr. Land asked for a motion.

Mr. Mulhearn motioned to approve the application as presented. Seconded by Ms. Cullion.

Mr. Land asked for a discussion on the motion.

Ms. Cullion was of the opinion it is a reasonable request and the Applicant does have an odd-size lot which restricts where the pool and covered structure can be installed.

Mr. Land read the standards for granting the application into the record:

- The hardship from which the Applicant seeks relief is due to the unique characteristics of the subject land and not the general characteristics of the surrounding area.
- The hardship is not the result of any prior action by the applicant and does not result primarily from the desire for greater financial gain.
- Granting the request will not alter the general character of the surrounding area or impair the purpose or intent of the Zoning Ordinance or Comprehensive Plan.
- The relief to be granted is the least relief necessarily; and
- The hardship suffered by the owner if the variance is not granted shall amount to more than a mere inconvenience.

Mr. Land believed all the standards in this particular case meet the circumstances, the shape of the lot and the topography standard.

VOTE: 5 – 0.

3. **Allen B. Gammons Jr.** for property located at 24 Upland Avenue; Map 75 A.P. 3 Lot 153 (Zoned Residential, R-6). The Applicant requires Dimensional Variances from Table 2 of Chapter 260 of the Town Code; Zoning Ordinance, Dimensional Regulations by Zone which sets forth the minimum lot size for the zone and use and Section 8(A) of the same chapter pertaining to number of residential structures permitted on a lot. The Applicant seeks to construct a 26'x46' structure to contain a 4-vehicle garage and residential unit detached from the existing 2-family residence without sufficient land area.

Attorney John C. Revens, Jr. of Revens, Revens & St. Pierre, 946 Centerville, Warwick, represented the Applicant, Allen B. Gammons. Atty. Revens explained the property currently consists of a two-family residence. He is of the understanding the home was moved to the site about 75 years ago off Main Street; when the home was moved the front porch was positioned to face toward the lot on the side which is where Alpha & Associates is located.

Atty. Revens noted Mr. Gammons has owned the property for the last several years. He is proposing a 4-unit garage with a one bedroom residence above the garage. The garage is allowed under the current zoning ordinance. The only restriction on the garage that this structure does not meet is it does not meet the height requirement because of the proposed one-family dwelling unit above.

Atty. Revens went on to say that the subject lot is in an R-6 zone and the street has seven homes on it; those seven homes are also in an R-6 zone which require 4,000 square feet of land per dwelling unit. Diagonally across the street from this property is Piazza Zarrella, which has four residential units and four office units at a much higher density. Next to that is the building that is occupied on the first floor by Home Loan and Investment.

Atty. Revens recognized that he cannot meet the density requirement of the ordinance, but many of the multi-family dwellings that are in this part of town do not meet it; this street is a reasonably well-maintained street, probably a little better than some of the other streets in the area. And this would be another upgrade to this property. Atty. Revens said his client is

going to be undertaking a major renovation of the two apartments in the existing structure.

Atty. Revens points out the Staff Report refers to the Town's Comprehensive Plan that the town is proposing to change the character of this neighborhood in the comp. plan. – he did not think that is a realistic goal as seven of the homes have been improved upon in recent years, in fact one of them is brand new.

Atty. Revens stated that his client thinks that upgrading this property is the best thing that can happen to it and to maintain the quality of the residences on the street; and that is why he is seeking relief.

Atty. Revens commented there was an understated issue of what the garages would be used for – there was a suggestion, it is not in the application but it is in the staff report, which Mr. Gammons intended to use the garage for storage. Atty. Revens said he intends to use at least two of the garages for his tenants, maybe three depending on how much additional rent the tenants would pay for the garages. He might use one of the garages for his own vehicles and personal equipment. Atty. Revens added that Mr. Gammons has gone around to the neighborhood and has obtained the signatures of all the neighbors he could reach to discuss the application and to get their support. (Documents submitted to Chair.)

Atty. Revens said there are four existing parking spaces in front of a stockade fence which is located to the left of the house. The driveway or parking area would remain and the structure would be removed with the fence; the structure would look a lot better in the neighborhood than that expansive stockade fence does which blocks the view of the remaining portion of the property and it creates some privacy in the yard for anybody who might choose to enjoy being outdoors in that portion of the yard.

Atty. Revens went on to say the whole neighborhood except for the seven homes on the street is all asphalt – every building in the area has been paved to the curb on both sides of the street. So the structures on the end of the street where Alpha begins, the medical office that is across the street from this house, the pavement runs from the rear of the building to the street.

The last issue in the staff report Atty. Revens noted was about connecting the structure to the existing building. In order to do that, one would have to take the screen porch that is on the front door of the building which faces the back of the Alpha building as opposed to the street and tear that off and connect this apartment to the house; that architecturally would be unattractive which is why Mr. Gammons has proposed the style he did.

Ms. Englehart questioned the reasoning behind the garage and not just a separate residential structure. Atty. Revens stated there is a real demand in apartment living with garages; there is a huge demand for people who choose to rent now, have a fancy car or other items they want to have stored. He added that it is very easy to get tenants who prefer to rent property because it has a garage.

Ms. Englehart asked if the rent would be in addition to the rent on the apartment or if the garage could be rented to someone different. Atty. Revens stated the garage would only be rented to people who occupy the premises; that is the whole purpose of it. People choose where they rent based on amenities that go with the rent.

Mr. Allen Gammons of 80 Pheasant Drive, East Greenwich said he owns approximately 25 rental properties in RI and multiples in East Greenwich. He commented that he has a difficult time to get market rate tenants without a garage. Mr. Gammons provided an example of a condo he owns in Eagle's Nest on the EG/Warwick town line, it is a two bed, two bath condo but people often will not rent it because it does not have a garage. He explained that he has just renovated the interior of the existing two-unit, he thought it would be nice to build a really nice large one-bedroom apartment over a garage for all the units to use.

Atty. Revens clarified that the Applicant is not in front of the Board for a garage but it makes more sense for the area to add the apartment; that is a judgement for the Board to make. Atty. Revens said his client has indicated that he will build the garage in that location; he does not mean that as being adversarial to the Planning Staff, but he just wants it to be clear that he fully intends to build the 4-unit garage on the site. But he would like to be able to have the amenity of the additional apartment above it for several reasons,

one of which is there could be one more tenant to live there who hopefully would want to live there because it has a garage – and that would be the justification for the 4 garages, the four units.

Mr. Land stated that one thing that he was struggling with is the fact that the property has already been granted relief to have two units there. So now it is just sliding down the path of it is zoned one unit, now two, now three.

Mr. Gammons stated that when he purchased the property, he was unaware that it was not a two-family.

Mr. Land said he was not suggesting Mr. Gammons was and he understands it was not his doing but one looks down the street and what is to stop your neighbor three doors down that has a nice big garage on the property to turn around and want to do the same thing. Now the whole neighborhood is expanding in a way that was not necessarily intended. Mr. Land went on to say that recognizing that you cannot necessarily make decisions based upon speculation, which is on this property, but it is a concern.

Atty. Revens recognized it is a legitimate concern but it abuts properties on the Main Street side which are all businesses and it looks to the back of those properties. He added it is not the most appealing residential neighborhood in town. Going to the east of these properties it is all business on the other side; this is a row of seven houses sandwiched between two very intense business areas.

Atty. Revens commented that the proposal is an upgrade to the neighborhood; anything that would get people to invest in the area like that and upgrade is a positive thing for the Town. He added the property is on sewer and on public water.

Ms. Sceery questioned the appearance of the proposed structure. Atty. Revens commented if the structure is just a garage there is a height limit of 15 feet.

Mr. Land commented that Atty. Revens eloquently described the neighborhood. Mr. Land wanted to be clear that even though a neighbor

may not object does not mean that the Board's job is done; the Board has to make an independent decision based upon what is presented to us. He wanted to be clear that he recognized it is possible no one is here to object, but that would not necessarily be the arbiter of the Board's decision.

Atty. Revens appreciated Mr. Land's remark and agreed with it. Atty. Revens added that the Applicant is here saying that it does not meet the zoning because it is R-6; one could take the zoning across the street and just zone all this way and then could go in and get a building permit for multi-family – this is not like it is unique to the neighborhood. He went on to say that Piazza Zarrella has four residential units and four office units. The density is greater than the proposed density on this lot. The building where Home Loan & Investment is has a much higher density than is proposed on this lot. Atty. Revens added that due to the proximity of these different zoning districts and the way the property has been developed, these homes are here, they have been here for 75 or 100 years; that the only reason they are here, no one will build that way today. Everything that is new is either office or large, larger multi-family – so to let this neighborhood evolve into that isn't, per se a bad thing as long as it is done tastefully and reasonably and with some balance. He did not think one addition unit on this property or any of the other residential properties that have proportionally as much space would be a bad thing for the area.

Atty. Revens suggested to actually get someone to spend money on a residential street that is sandwiched between two commercial uses is a good thing. He added that it says a lot for the town that people are willing to do that because the housing demand here is strong that there is people who are willing to pay those kinds of rents to live off of Main Street in East Greenwich.

Ms. Cullion echoed Mr. Land's sentiments and concerns in regards to the density. She questioned who is anticipated to live in the residential unit above the garage, whether it would be a single person or family.

Atty. Revens stated the unit is one-bedroom so it would be for one or two people. Ms. Cullion asked if it would for a tenant or family member. Mr. Gammons asserted it could be for a family member.

Atty. Revens confirmed that even if it was for a family member initially it would not be for a family member forever. He was not presenting the application in that it is being asked for a family member; this is a business decision to try to upgrade the property so even if for a short time it is for a family member it is an apartment it is going to be an apartment for the next 50 years. Atty. Revens added that he was not trying to persuade the Board to support the application based on it being a family member even though it may be initially.

Mr. Land asked about the siting of the garage and how far back it would be from the front property line. Mr. Gammons indicated it would be 20 feet off the road; there are two small existing sheds that will be removed and he will push the new structure closer to the house. He testified that he met with the neighbors and explained to them what he wanted to do. Mr. Gammons stated that he bought the property and intends to keep it for a long period of time. Like many of the other properties that he has purchased in Town he has improved upon them and he hopes to put a beautiful carriage house there that would increase the value for the neighbors. Mr. Gammons added that he had every abutter sign in support for the application although a couple of neighbors he could not get in touch with.

Ms. Enghart asked if Mr. Gammons could speak to the TRC question about drainage issues, parking and whether any spots would be eliminated.

Atty. Revens asserted that goes with every building permit application – the Applicant will have to get the drainage approved by the Town Engineer. None of the parking spaces will be eliminated.

Atty. Clarkin questioned how the size of the proposed structure compares to the existing building; he asked if it will be the same height as the existing building. Atty. Revens stated he did not calculate the square feet. Mr. Gammons stated the new building will not be as high. Atty. Clarkin confirmed that it will not dwarf what is currently there. Atty. Revens said it is 20 feet off of the street and 22'-9" from the rear – there is no setback relief required and no height relief required.

Mr. Gammons advised that he was trying to keep the parcel within character of the area, even though it is not within the historic district. He would hire a landscape architect to help with plantings in order to make it look like a residential property as opposed to a commercial property.

Atty. Revens said if a landscaping plan is going to be required the Applicant will provide one; if the Board would seriously entertain the application with a landscaping plan then one would be provided. He added there is going to be parking to lead into the garage, and that pavement already exists, but there is a lot that could be done to this property in terms of landscaping and we would be happy to do that.

Mr. Land commented that to the extent that the Board is going to ask for anything further, that would be subject to the Applicant's willingness to continue the application to the next hearing date.

Mr. Revens said the Applicant would be willing to do that; if the Board thought that the landscaping was an issue a landscape architect will be engaged to develop a plan and return to the next meeting.

Mr. Land suggested seeing if there is anyone who would like to speak in favor or against the application.

No public comments.

Mr. Land reiterated for the record that Mr. Gammons submitted correspondence/signatures from abutters who did not object to the application.

Ms. Hitchen confirmed there were eight exhibits submitted; those being:

1. Mr. Frank Realejo, owner of Dunkin Donuts;
2. Dr. Anthony Mendillo;
3. Mr. Danny E. Moone;
4. East Side Associates (Carmine J. D'Ellena);
5. Mr. And Mrs. Lee Cresser;
6. Indian River Company (Mr. Robert Green);
7. Gerald and Debra Zarrella

8. Piazza Zarrella, LLC condo association (Gerald & Debra Zarrella).

Mr. Land noted the suggestion of a landscape architect or plan was made by the Applicant; he questioned if it is something that the Board would like to see the Applicant provide.

No response from the Board members. Mr. Land asked for a motion.

Ms. Sceery motioned to approve the application as submitted.

Mr. Land seconded the motion in order to have discussion.

Mr. Land stated that he has an enormous respect for the Planning Department and their recommendation on this matter but he looks at this neighborhood and he does not see a neighborhood that is going to be impaired by this type of development. He looks at the existing landscaping and sees something that is being done to make this property appeal from the street, to make it attractive to the neighborhood and he does not care for the stockade fence that will be eliminated. Along the street there is the landscape that appears to be arborvitae or something similar planted. To the rear of the property is all industrial, parking – cars parked in a random manner and to the north is further commercial. Mr., Land added that he does recognize that this is an intensification of the use on this particular lot, in this particular location its unique characteristics in the surrounding area, he is not offended by it and he thinks it does satisfy the intent of the zoning recommendations, at least relative to the surrounding area. Mr. Land stated therefore in this particular case, going on the record, as he is concerned about a slippery slope regarding going from 1-unit to 2-units, to 3-units. But ultimately, Mr. Land asserted the Board is capable of making the decision on a case by case basis and in this particular it justifies, which is a slight expansion of the use of this particular property. Mr. Land also recognized that Mr. Gammons could simply build a 4-car garage which he thought would be a lesser use of this property in this particular location. He did not consider it a threat; just speaking to the Board that perhaps if there were a four car garage and the apartment it might not be as aesthetically pleasing, rather than to build something that we would all view as beautiful. He did

think that Mr. Gammons would build something that would fit nicely. Mr. Land stated he will be voting in favor of the application.

Ms. Sceery agreed with Mr. Land's sentiments; she said the carriage house presentation is very pretty. She noted she lives in the historic neighborhood and even though this particular property is not in the district it is a welcome addition especially considering the condition it is in now.

Ms. Englehart noted she too will be voting in favor of the application based upon the argument of garage and apartment. She did find the proposed structure to be attractive.

Mr. Land read the standards into the record:

The hardship from which the applicant seeks relief is due to the unique characteristics of the subject land and not the general characteristics of the surrounding area.

The hardship is not the result of any prior action by the applicant and does not result primarily from the desire for greater financial gain.

Granting the request will not alter the general character of the surrounding area or impair the purpose or intent of the Zoning Ordinance or Comprehensive Plan.

The relief to be granted is the least relief necessary.

The hardship suffered by the owner if the variance is not granted shall amount to more than a mere inconvenience.

Mr. Land opined that for the reasons he stated before he will be voting for the application.

VOTE: 5 – 0.

**Zoning Board of Review Business**

1. Minutes: Review/action on the minutes of the March 22, 2016 meeting meetings.

Minutes of the March 22, 2016 meeting tabled to the following month.

Mr. Land asked for a motion to adjourn.

Ms. Sceery motioned to adjourn. Seconded by Mr. Mulhearn. Approved 5 – 0. Zoning Board of Review meeting adjourned.

### **Zoning Board of Appeals Agenda**

1. **Philip Ryan Homes, Ltd.** for property located on Middle Road, being Map 52 A.P. 11 Lot 499 and zoned M/LIO (Manufacturing/Light Office Industry). The Appellant seeks to appeal the recorded March 17, 2016 “The Residences At Middleberry” Master Plan Decision issued by the Town’s Planning Board. The Appellant seeks the reversal of the Planning Board Decision such that conditional master plan approval is granted, and the matter is allowed to be considered by the Town Council (also conditional) and returned to the Planning Board for the Preliminary Plan stage of review and corresponding public hearing process.

Mr. Land opened the hearing for the hearing for the Zoning Board of Appeals and read into the record the matter before the ZBA.

Mr. Mulhearn recused himself from the application and stated he filed a statement of conflict of interest with the Planning Department as well as with the RI Ethics Commission insofar as his office has had a prior business relationship with Philip Ryan Homes, Ltd.

Ms. Hitchen confirmed that Ms. Alger will be voting on the matter.

Mr. Land also noted for the record that he was contacted by Attorney Peter Rotelli – he did not ask any specific questions regarding the project and did not have any communications regarding the project itself as Mr. Land

informed Atty. Rotelli that he could not discuss it and Atty. Rotelli understood. Mr. Land felt compelled to put that on the record so that if anybody had any concerns or questions about it could be addressed in advance of this hearing.

Mr. Land stated that with respect to appeals to the Zoning Board of Review from the Planning Board, the ZBA follows the following guidelines: In instances of a board's appeal, review of a Planning Board Commission decision the Board of Appeals shall not substitute its own judgement for that of the Planning Board, but that it must consider the issue upon the findings and records of the Planning Board. The Board of Appeals shall not reverse a decision except on a finding of prejudicial procedural error, clear error, or lack of support by the weight of evidence in the record. The concurring vote of three of the five members of the BOA's sitting at the hearing is necessary to reverse any decision of the Planning Board. In this instance where the Board of Appeals overturns a decision of the Planning Board, the proposed project application is remanded to the Planning Board at the stage of process from which an appeal is taken for further proceedings and/or for the final disposition which shall be consistent with the Board of Appeals decision. The BOA shall keep records of all proceedings, including a record of all votes taken, and shall put all decisions on appeal on the record. In exercising its powers with respect to all other appeals, the ZBA may reverse or affirm wholly or partly and may modify the order, requirement, decision, or determination appealed from and may make any orders, requirements, decisions, or determinations that ought to be made and, to that end, has the power of officer from whom the appeal was taken.

Mr. Land read into the record the following pieces of evidence that were presented to the Zoning Board of Appeals:

- A letter dated March 18, 2016 from Attorney William Landry on behalf of the Appellants;
- Land development application;
- Staffing reports dated November 4, 2015, February 3, 2016, and March 2, 2016;
- East Greenwich Housing Authority letter dated December 8, 2016;
- Traffic study memorandum regarding data group study;
- Public Works master plan memorandum dated October 26, 2015;

- DiPrete Engineering letter to Lorri Byrnes dated November 19, 2015;
- DPW memo dated February 25, 2016 regarding a master plan submission;
- DiPrete Engineering master plan narrative and supporting material;
- Fiscal impact study dated November, 2015;
- Planning discussion points dated December 2015;
- Planning Board minutes dated November 4, 2015, December 9, 2015, February 3, 2016 and March 2, 2016;
- Transcript from the March 2, 2016 Planning Board meeting on the subject matter master plan review.
- Planning Board decision dated March 11, 2016;
- Master plan resubmission together with drawings;
- Addendum to the Fiscal Impact Study;
- Addendum to a comparison of The Residences at Middleberry to office development

Attorney Scott Spear submitted the green cards for the certified mailings that went to the notified abutters.

Attorney Scott Spear, a partner of William Landry with the law firm of Blish & Cavanagh, represented the Appellant, Philip Ryan Homes, Ltd. He explained the appeal developed from the decision of the Planning Board dated March 11, 2016 which was denying a master plan approval for a 50-unit two-bedroom age-restricted development on Middle Road.

Atty. Spear explained the Planning Board's stages of development approvals – Master Plan is a concept plan; in this case it was a master plan application that was denied. But it was a little bit unusual in the sense that it was a master plan application with a gigantic condition attached to it – and that condition was Town Council approval would be necessary for a zoning change to give the Planning Board's approval of the master plan the legs necessary to even precede. He went on to say that it was an unusual application because it was seeking an approval that required a vote by the Town Council to take extraordinary relief in rezoning the property and also amending the town's future land use map to rezone the property so that the proposal could sit on the property.

Atty. Spear stated the Planning Board was not voting on the zone change, they were voting on the master plan application to see whether or not the concept fit. He explained the site in question is presently zoned light industrial office. The master plan wanted to get this to Town Council so they could consider a planned development residential-4 zoned for the property which appears to be a much more beneficial use of the property from the Town's perspective in terms of development potential use of the property and eventually tax revenue that would be driven by it.

Atty. Spears went on by saying that the traditional planning issues with a concept plan is trying to establish that the concept design is something that would fit within the framework of the property; in this case the Applicant went through the Planning Board process presenting a tremendous amount of information which is evidenced by the volume of exhibits. He commented that multiple expert witnesses were brought in to testify on traffic issues, land use issues, consistency of the proposal with the comprehensive plan, the ability of the site to handle the density and in the process of presenting a multitude of professional, well-designed, well-engineered plans.

Atty. Spears commented the Applicant also went through a healthy process with the Town Planning department addressing issues like density and there was give and take in that process where the density was getting dialed down more and more. There were also issues dealing with dimensional regulations and whether or not it was encroaching too much on the surrounding properties-that was all worked through as well. Additional land was brought into the project to make it more fitting as well. So all the relevant land use issues were touched upon in the master plan application in a very thorough process. As part of that process, the town staff actually prepared the proposed decision which integrated a lot of give-and-take issues and conditions that the Planning Board and the Planning Staff thought would be a logical in the best interest for this application to proceed. He noted it is not proceeding anywhere except to the Town Council where they would have the opportunity to decide the merits of whether a zone change would be in the best interest of the community.

Atty. Spears asserted the decision that the Planning Board had in front of them at the time a vote was taken on the application was a decision that was well drafted, was in accord with all of the testimony that was heard, was in accord with all of the evidence that was heard, and it was in accord with the recommendation that the Planning Department thought would be good conditions and caveats in the decision to make sure that this was done in a good, acceptable and proper way. Atty. Spears noted the Planning Board hearing was interesting in the sense that there was no substantive evidence against the application; this is a rarity in an appeal like this to find a record that is virtually devoid of any evidence that stood in the way of granting of the master plan approval. In fact, there was no expert testimony presented to challenge the expert testimony of the witnesses that were there on behalf of the Applicant.

Atty. Spear asserted there are three inherent legal arguments built into this appeal according to Mr. Landry's memorandum; these are the standards that these appeals operate from. The first is there was prejudicial procedural error and clear error because the Planning Board is required to build into their decision findings of fact. These findings of fact are very important in the development process; it requires a very detailed analysis of the factors being made to be very deliberate about weighing the evidence, taking that evidence into consideration and logically linking that evidence to the decision that is being made.

In this appeal, Atty. Spears stated the Planning Board's decision is devoid of any findings of fact whatsoever in support of the denial – there are none; it is a flawed decision in the sense that the Planning Board made no findings of fact in its decision to deny the application as required by law. Atty. Spears added that the decision actually has findings of fact in favor of the application. This goes back to his earlier point he raised where it seemed to be the sense of the Planning Department and everyone that was involved in this case this matter would most likely get approved by the Planning Board and that is why the decision was written in such a way that anticipated an approval.

Atty. Spears advised that in addition to the lack of findings of fact in support of a denial, there was also lack of any evidence to support a denial. The

record does not support any findings of fact supported by any evidence that needs to be in the record upon which to base a denial.

Atty. Spears referred to page 10 of Mr. Landry's memo, specifically where the five standards are enumerated which are the goal standard for a Planning Board in evaluating a land development project; and these are the standards that have to be analyzed, and the weight of the evidence in the record has to support or challenge these findings.

Atty. Spears noted the conclusions one would have to make in looking at these standards are that the standards in place and the evidence in place recorded findings of fact approving the application rather than denying it. So it was error by the fact that a decision has no findings of fact in support of the denial. It was error in the sense that the facts that were before the Planning Board do not support a denial. And in fact the evidence in the record supports an approval of the project, and that is where the great weight of the evidence applies. If the Planning Board had approved the master plan, the state law dictates the sequence of procedures where one needs a zoning change. It is a conditional Planning Board approval of the master plan would then go to the Town Council for a vote. And if the Town Council approved the zoning change, the matter would then go back to the Planning Board where it would pick up again and continue through the process to the preliminary plan stage which is the engineering stage where the Planning Board would have yet another opportunity to vet the application to make sure that all the standards, engineering, drainage, site plans, all the types of things that the Planning Board/Planning Department are so adept at pointing out. Eventually they would have to get all the permits to go to final plan approval.

Atty. Spears stated the last issue in the legal argument is pointing out that there was some sense of confusion before the Planning Board; he was not sure he could do this justice trying to articulate what happened. But this was one of those rare alignments where an application is presented to the board and the Chairman has to recuse because of a relationship, and the second in line has to recuse because of a relationship, and then the third in line is called away on an emergency. So the Planning Board, to some extent, was a bit caught off guard; and when the matter was being heard, there were two

issues before the Planning Board on this application – one was a simple issue that is the subject discussion, an application for a conditional master plan approval. The second issue was the Planning Board was going to make the decision on whether or not to recommend to the Town Council the zoning change. Planning Boards often opine on those issues and send recommendations to the Town Council. That was a second thing that was on that evening. And if one reads the transcript from the hearing, the Planning Board member that actually made the motion to approve, ended up voting against it. This is an issue where he actually made the motion to approve it, suggesting that he was in favor of it. But after a discussion about the two issues that were before the board, the application and the zone change, we think the things got a bit confusing; and when he voted to deny it, that he may have thought he was voting to deny something to do with the recommendation to the Town Council on the zone change. Atty. Spears said although he could not tell, but he just knew that at the end of the day it seemed to be that there was something very confusing about the way things were handled. It is not anyone's fault; there was just confusion.

Atty. Spears did not think there are difficult arguments to understand. He thought the record is fairly clear and straightforward and would ask the board to reverse the Planning Board and by doing so grant the master plan approval with the same conditions and all of the same contours and features that were in the decision that the Planning Department had prepared anticipating approval. And if for some reason this overwhelming argument does not resonate with you, then at a minimum he asked the Board to respectfully remand the matter to the Planning Board to have the Planning Board reconsider their vote to make sure that things were done properly for clarification and re-articulation and set the matter up before the Planning Board again.

Mr. Land asked for questions.

Ms. Englehart questioned the personal knowledge and not being a fact per se. Atty. Spears said personal knowledge does come into play occasionally when board members are making decisions. But there still needs to be an articulation and findings of fact on what personal knowledge they are commenting on, describing the personal knowledge and how the personal

knowledge and the things that they see and know of and how personal knowledge is impacting the standards to be applied and why that knowledge is shifting their thinking in a different way; and this is missing.

Ms. Englehart commented said she too read the transcript and there were several times throughout when people did reference a belief that there was a density issue. Atty. Spear noted there has to be probative evidence. Saying that we think that it may be too dense is an observation that people can make, but the record has to be established based upon probative evidence which would mean that we think it is too dense because of, and we think that the density will cause these problems, or we think that the density will lead to traffic issues, or we think the density will create too much impervious surface that will cause problems with drainage. There has to be a logical link between observations and facts to the standards and show in the findings of fact and standards support a denial of the application. And that is what was missing in this case.

Mr. Land clarified the role of the Zoning Board – this Board is not taking the evidence here; we are not considering new evidence in this proceeding. What the Board is looking at is whether or not the record that is established at the Planning Board meeting was sufficient to have denied the application. And he thought it comes back to Atty. Spear's recent response. What happened at the Planning Board meeting and what determinations were made by the members at that time is the relevant inquiry for this Board. The Zoning Board is not to substitute our judgement for theirs once they have set forth their findings of fact. And having said that, Mr. Land pointed out that in reviewing the transcript on page 55 it was Mr. Tagliatella who actually sets forth the reasons why the application has satisfied the requirements and findings, which he quoted. Mr. Land thought that perhaps it is an aligning of the stars or lack of fortuitous development that the vote itself did not reflect those findings. It is pretty clear you get to the conclusion of those findings and reading it you say this should be approved; and it was not. Mr. Land noted he was simply looking at the record and having difficulty with the decision relative to the findings; he thought that comes back to the point that you were raising that Mr. Spear had spoken to.

Ms. Sceery agreed and commented that she looked at the material very closely and did not see anything in the transcript or the decision that would support a denial.

Ms. Cullion agreed and stated she also read through the entire transcript and felt the same way; there did seem to be some kind of confusion at the end, but there were not enough findings to support a denial – it all seemed to support an approval.

Mr. Land clarified that the Board has an obligation to consider the appeal and in doing so there are several different options for determining its outcome: one of which would be to uphold the Planning Board's decision; we could overturn it; we could overturn it and remand it with specific instructions. He asked if the Board members had any thoughts or can make a motion with respect to the Zoning Board of Appeals.

Atty. Clarkin stated that what is lacking are findings of support of the denial. His feeling is the record needs to be clearer as to why it was denied. If he were a Board member, he would be remanding the case to the Planning Board, not reversing, remanding to the Planning Board for the members who voted "no" to list their reasons, to set forth specific findings in support of the denial. Of course they could also reconsider their vote at that time. Atty. Clarkin thought for the sake of clarity of the record going forward, there should be specific findings in support of the denial because as has been noted by Atty. Spear and by Board members, there were none. He added that for the sake of the record it would help for there to be findings made in support of the denial; or if they reconsider and go another direction, which would be fine.

Atty. Spear responded if it were a close call then he would agree with Atty. Clarkin's approach. But the evidence, when you look at what was presented to the Planning Board is so overwhelming, it was a powerful presentation and the idea that it could have been denied based upon facts – it is not within contemplation that could have taken place. So to send it back to clarify things may create more confusion if the Planning Board gets back involved was Atty. Spears impression.

Atty. Spears went on to say that considering the fact that this is a conditional approval, it still requires Town Council to view, and to the extent that the public has interest in this, and the public will have the opportunity to raise their concerns at the Town Council level as well – they will have another opportunity to challenge it. Atty. Spears urged the Board to let the Planning Board's decision be reversed, give them a conditional approval and let the matter work its way through the system, with all due respect to Atty. Clarkin's suggestion.

Ms. Alger was concerned in remanding the application back to the Planning Board for further findings of fact that in and of itself is a suggestion that there should be findings of fact to uphold the denial of this application. There are already findings of fact within the transcript; the findings of fact, unfortunately, do not support the decision of the Planning Board.

Ms. Sceery agreed with Ms. Alger, noting that it is unfortunate that there is not one thing in the transcript that says the Board should deny it because...

Mr. Land reiterated to audience members on several occasions there would be no new consideration of new testimony or new comments that is outside the scope of the record that was created at the prior hearing.

Ms. Englehart thought the decision should be remanded back to the Planning Board in order to have the two members who voted against it explain why they voted the way that they did.

Mr. Land clarified that the ZBA has the right to remand it for further hearing, for a new hearing, for presentation for the record, the this Board so chooses. But he pointed that out for the public to understand his comments and read the standards of review again: The Board of Appeals shall not substitute its own judgement for that of the Planning Board, or Historic District Commission, but must consider the issue upon the findings and record of the Planning Board. If we are looking at the findings, the findings are set forth in this particular record. We are not looking at a record that does not have findings; that would be a different situation. We have a record that specifically states what the findings of the Planning Board are. We are not to substitute our judgement for the Planning Board on those

specific findings. We can evaluate what those findings say, what they mean; but we cannot say that they were wrong.

Mr. Land repeated numerous times and thoroughly explained why there would be no new testimony taken at this hearing to the dismay of audience members.

Ms. Sceery stated that based on the Planning Board transcript and decision she did not see a gray area and did not see where there was a denial, but was not sure what the Planning Board meant and thinks there should be more explanation. There was no evidence on either one of these things about the denial. Ms. Sceery said the decision should be reversed.

Ms. Englehart disagreed and commented that it should be remanded back to the Planning Board in order to know why the denial happened. She did not think it is the ZBA decision whether or not this is a plan we agree with – it is what their decision is and they should explain why they made it.

Ms. Alger noted a remand to explain would imply that the decision will be upheld by the Planning Board – there were no findings of fact. She asked how you remand it and tell the Planning Board to make findings of fact which are contrary to what is on the record.

Ms. Englehart disagreed noting she would like to know why the Planning Board made their decision.

Ms. Alger said she too would also like to know but remanding it to essentially ask them to knit together some justification for a decision that is not based on the competent evidence or the findings of fact is erroneous.

Ms. Sceery felt that sending it back to the Planning Board was a detriment of the Applicant. Ms. Alger agreed and added this is in a preliminary stage, the Applicant still has additional stages of approval to get through.

Mr. Land confirmed there will be additional public hearing for this project regardless of what we do; he was not sure that should be relevant to what we do here – what we do here is based upon this record. He stated that he was

struggling with the idea of remanding it for further findings because this record appears clear to him that the findings were what they were. He thought of a guttural reaction to want to know why it turned out the way it did, but he was not sure that is the ZBA's role. Mr. Land added that it starts to seep into us substituting our judgement or suggesting that there was an error of judgement versus just an error on the findings of facts.

Ms. Englehart commented again that she would like to know why the Planning Board decided to vote the way they did; she also noted that in looking at the decision in another way they needed four positive votes and they did not get four yeses. She went on to say that regardless if they had the facts they would have still lost in this situation. Both Ms. Alger and Mr. Land disagreed. Ms. Alger stated irrespective of whether it is denied by five votes or whether it is denied because it fails to carry by four votes you still have to have findings of fact.

Mr. Land added that there are no competing findings of fact either – this is a problem for the ZBA because we are faced with an existing record that does not have anything negative about this project from a findings of fact perspective, meaning from what the board found as factual determinations at the meeting, not that the public had objections.

There were additional audience members frustrated that they could not ask questions and not make public comments.

Mr. Land asked for a motion, noting if there is no motion the Board will adjourn and can consider the matter for up to ten days.

Ms. Sceery motioned to reverse the Planning Board decision. Seconded by Ms. Alger.

Ms. Cullion questioned if a motion can be made to reverse with the same conditions that apply in the motion made back on March 2<sup>nd</sup> meaning the first motion to approve was based on conditions that were outlined in the original record, made by Mr. Tagliatella.

Mr. Land deferred to Atty. Clarkin as he thought the ZBA was reversing the decision on his vote, on his motion and so effectively if our motion is approved and our motion is simply to reverse that would reverse the decision on his motion and approve the application based upon the conditions in his motion.

Atty. Clarkin asserted it would approve based upon the motion made before the Planning Board.

Ms. Cullion verified that she agreed.

Atty. Clarkin said yes, subject to all of the conditions. Mr. Land said we could certainly make that clear in our decision.

Mr. Land reiterated the procedural requirements – unlike the Planning Board the ZBA is a majority of five, so three yeases carries or fails on two, just to be clear so that that procedural issue is not revisited here.

Mr. Land asked each board member if they needed additional time to consider the motion as there is up to ten days for consideration. All board members responded in the negative. Mr. Land confirmed the motion before the Board is to reverse the decision of the Planning Board.

VOTE: 4 – 1 (Ms. Englehart opposed).

Mr. Land confirmed the motion was to simply reverse the decision of the Planning Board; our understanding in sending it back on a reversal is that the findings of fact in the motion of Mr. Tagliatella are being reversed, and so his motion would carry.

Mr. Land commented that he appreciated all of the public who came to the meeting and apologized but had to follow procedure.

With conclusion of all business, there was a motion by Ms. Cullion second by Ms. Sceery to adjourn at 8:40 PM. Motion supported 5-0.

Minutes respectfully submitted by:

Lea Anthony Hitchen,  
Assistant Town Planner

For more information, please refer to the recording available in the Planning Department.