

STATE OF RHODE ISLAND  
NEWPORT COUNTY

TOWN OF MIDDLETOWN  
ZONING BOARD OF REVIEW  
SITTING AS  
PLANNING BOARD OF APPEAL

IN RE: HORAN BUILDING COMPANY MASTER PLAN APPROVAL  
PROPOSED SUBDIVISION  
PLAT 129, LOT 53  
208 HOWLAND AVENUE

**ZONING BOARD DECISION**

**TRAVEL**

The above captioned matter came before the Middletown Zoning Board on May 25<sup>th</sup>, 2021, whereby the Zoning Board was sitting in its capacity as a quasi-judicial appeals board, thereby holding a hearing on the Middletown Planning Board’s December 2, 2020 decision related to the above captioned subdivision. Objecting neighbors (together, the “Appellants” or “Objectors”) were heard through counsel with respect to their Appeal of the “Notice of Planning Board Decision,” dated December 2, 2020 (the “Decision”) and recorded on December 2, 2020 in Book 1684, Page 292 of the Middletown Land Evidence Records. Legal Counsel for the Middletown Planning Board was heard with respect to their argument to uphold the Decision. After the hearing, the Zoning Board voted 5-0, unanimously to reverse the Decision and remand the matter for further findings related to Master Plan Approval.

Major land subdivisions are reviewed in three stages: Master Plan, Preliminary Plan, and Final Plan review. At each stage, the Planning Board must make decisions so that the application can move forward. During the Master Plan review stage, the Planning Board must make a determination as to whether the application should proceed as a conventional subdivision or as a conservation subdivision. It must also decide at the Master Plan review stage whether variances or waivers will be required. It must, among other things, decide the basic number of residential

lots allowed. Finally, at each stage, the Planning Board must confirm that the proposal is consistent with Middletown's Comprehensive Plan.

This is an appeal from a decision at the Master Plan stage of review. Through its Decision, the Planning Board approved Horan Building Company's ("Horan" or the "Applicant") application for Master Plan of the Howland Farm Subdivision (the "Application") by a vote of 5 to 1. Appeal was taken pursuant to R.I.G.L. 1956 § 45-23-67 and § 319 of the Middletown Zoning Ordinance. The Objectors filed Notices of Appeal with the Middletown Building Department on and around December 18, 2020.

The Middletown Zoning Board members, sitting as a Board of Review, have reviewed the Decision and the record of the proceedings before the Planning Board. The Zoning Board of Review now decides that there are reasons to have the Planning Board reconsider legal issues and evidence again on a remand.

#### **STANDARD OF REVIEW**

In ruling on this appeal, the Zoning Board shall not substitute its own judgment for that of the Planning Board. This means that the Zoning Board is reviewing the Decision of the Planning Board, not making its own independent decision. While reviewing a planning board's decision, it is improper for the zoning board to "consider the credibility of witnesses, weigh the evidence, or make its own findings of fact." *Munroe v. Town of E. Greenwich*, 733 A.2d 703, 705 (R.I. 1999). Instead, "its review is confined to a search of the record to ascertain whether the board's decision rests upon 'competent evidence' or is affected by an error of law." *Id.* (quoting *Kirby v. Planning Bd. of Appeal of the Town of Middletown*, 634 A.2d 285, 290 (R.I. 1993)). Legally competent evidence is "relevant evidence that a reasonable mind might accept as adequate to support a

conclusion, and means an amount more than a scintilla but less than a preponderance.” *Arnold v. Dep't of Labor & Training Bd. of Review*, 822 A.2d 164, 167 (R.I. 2003).

The Zoning Board must reverse the Decision of the Planning Board if it finds that one or more of the following three elements are present:

1. Prejudicial procedural error;
2. Clear error; or
3. Lack of support by the weight of the evidence in the record.

Here, the Zoning Board reverses the Planning Board’s Decision, and remands the matter back to the Planning Board for further proceedings, which shall be consistent with the Zoning Board’s decision.

The Planning Board’s approval of Horan’s Application is the result of prejudicial procedural error and clear error of law for the following reasons:

**Approval Of The Plan With Fewer Lots Than Requested By The Applicant**

Planning Board Member, Ms. BJ Owen (“Ms. Owen”), asked to vote on lowering the number of lots allowed in the Master Plan Application. *See* Planning Bd. Hr’g Tr. at 137:23-138:24 (Dec. 1, 2020) (referred to hereinafter as, “Hr’g Tr.”). Chairman, Mr. Paul Croce (the “Chairman”), asked if there was a desire by the Planning Board to vote on approving the Application with a lower number of lots. *Id.* at 139:1-7. The Planning Board was erroneously told by Town staff that they could not. *Id.* at 139:8-16. After being told that they could not consider fewer lots, the Planning Board voted to “move it along” to the preliminary plan stage by a vote of 5-1. *Id.* at 142:12-22. This is clear error.

Section 304 of the Town of Middletown Subdivision Regulations discusses the yield formula and specifically states that the Planning Board must make an initial determination as to the appropriate number of lots at the Master Plan stage. Section 407(B)(4), entitled “Decision,”

provides that the Planning Board may approve of the Master Plan as submitted, approve with changes and/or conditions, or deny the application. The Planning Board can approve the Master Plan with changes or conditions, including approving it with a reduction in the number of lots allowed. The Chairman was incorrectly told by the Town Planner, that such a vote was impermissible.

The advice given to the Planning Board was clear error of law. This error of law had a direct impact on the result of the hearing, and said error is prejudicial to the Appellants. The Application for Master Plan approval should be returned to the Planning Board so that it can consider a lower number of lots. Given that a conservation subdivision allows for smaller house lots, the Planning Board should articulate specific findings as they relate to Middletown Ordinance, Art. 3, § 301, § 302 and § 304. Specifically, the Planning Board should apply the evidence to make findings as to whether “the conventional plan [is] capable of supporting the proposed development given any land development constraints.” Id., Art. 3, § 302(E). In addition, the Planning Board should exercise particular care in citing whatever portions of the testimony or the evidence, that they find relate specifically to the standards set forth in Section 404 - “Required Findings,” so that their decisions are not merely conclusory; rather, they are required to be based upon the weight of evidence contained in the record.

In support of its appeal, the Appellants also offered argument that Mr. Houle was not qualified to testify as an expert on subdivision planning, as it relates to the aforementioned Subdivision Regulations and the Comprehensive Plan. Further, the appellants argue that one of the Appellants’ attorney, Stephen MacGillivray was deprived of an opportunity to cross-examine Mr. Houle on his qualifications and opinions. Given the contested nature of this matter, cross-

examination of witnesses should be permitted as it relates to the relevant areas of inquiry, in order to approve or deny the Master Plan Application.

Mr. Houle may very well be qualified to give expert testimony on subdivision planning; however the Planning Board should carefully consider this issue again, as it relates to Mr. Houle's knowledge, skill, qualifications, experience, training and education, and any other factors that relate to his specialized knowledge on Planning and Middletown's Comprehensive Plan. If Mr. Houle is accepted by the Planning Board as an expert, the Board should provide why they are making that finding, and they should expressly articulate in which area of expertise his testimony is being considered for its specialized purpose.

**The Master Plan Application And The Planning Board Should Address The Need For Required Waivers**

Rhode Island General Laws § 45-23-40(a)(4) provides that requests for relief from the literal requirements of the Middletown Zoning Ordinance "shall be included as part of the master plan application." See also Section 707 of the Middletown Ordinance. On the plans submitted by the Applicant, there seem to exist non-conforming structures. These requests for relief, if it is determined by the Planning Board that they are necessary, need to be made as part of the Master Plan Application. The plans as submitted do reflect structures that require relief. No relief was requested. As such, the Master Plan should not be approved unless that condition precedent has been satisfied.

**The Applicant Needs To Establish That It Is Entitled To A 7-Lot Subdivision**

A conservation subdivision allows for smaller house lots than would ordinarily be required in a given zoning district. The intent is that the clustering of residences in a more compact subdivision will provide "substantial public benefits" such as open space, the protection of unique

natural features, the conservation of resources, or “direct visual or physical access to the open space.” Middletown Ordinance, Art. 3, § 301(C)(1).

To this end, the ordinance has a mechanism designed to prevent developers from using the conservation development’s smaller lots to simply create additional residential lots over what would otherwise be allowed with a conventional subdivision. See id. At the Master Plan stage of review, the applicant must provide not just a calculation of allowable lots based on the overall area of the parcel, but also a separate plan showing the number of lots the property would yield as a traditional conventional subdivision. Id. at subsec. A. “[T]he Applicant must demonstrate to the Planning Board that the lots as depicted on the conventional plan are capable of supporting the proposed development given any land development constraints.” Art. 3, § 302(E) (emphasis added).

An applicant’s conventional plan must show that viable conventional lots can be created despite land development constraints. To do this, the plan must depict the relevant constraints. These constraints could be such things as: i) the need for septic and wells properly spaced apart from each other and from wetland features; ii) how dramatic changes in grade will be handled; iii) that setbacks, frontage and other dimensional requirements are met; etc.

On Remand, the Planning Board should ensure that the Applicant meets this requirement. The Applicant submitted a conventional plan that did not include a depiction of the various land development constraints related to the subject parcel. The conservation plan shows possible location of wells, septic facilities, residences, and some wetland features. Without this same information on the conventional plan, it is impossible for the Planning Board to determine if the “lots as depicted on the conventional plan are capable of supporting the proposed development.”

Art. 3, § 302(E). Consequently, the Planning Board needs this information to determine how many lots should be allowed in a conservation subdivision.

Although the maximum number of allowable lots is controlled by a formula, (see Middletown Ordinance, Art. 3, Sec. 304(A)), if the correct number of lots to be allowed were simply the result of a mathematical calculation, there would be no need for the Planning Board to have any role in overseeing the number of permissible lots in a subdivision. See id., Middletown Ordinance Art. 19, § 1904 (providing that the Planning Board should have the conclusive determination on the number of permissible lots).

This matter is remanded to the Planning Board with instructions that the Applicant resubmit the Application with the additional information regarding land development constraints on the conventional plan. In addition, upon consideration of the revised Application, the Planning Board should make explicit factual findings to support a determination “that the conventional plan [is] capable of supporting the proposed development given any land development constraints.” Id., Art. 3, § 302(E).

#### **The Town’s Comprehensive Plan**

A proposed subdivision must comply with the Town’s Comprehensive Plan to obtain Master Plan approval. The Planning Board’s finding that the Howland Farm Subdivision was consistent with the Town’s Comprehensive Plan should be carefully supported by the evidence introduced at the Hearing. In doing so, or in deciding to the contrary, the Planning Board should cite testimony or evidence and then apply it to the specific provisions of the Middletown Comprehensive Plan. In other words, the Planning Board should make specific findings that the evidence supports, or does not support, the express goals and policies of Middletown’s Comprehensive Plan. This approach will avoid a merely conclusory analysis, and it will provide the clarity required for judicial review.

CONCLUSION

For the reasons stated herein, Appellants' request that this Zoning Board of Appeal reverse the Decision of the Planning Board upon a finding of prejudicial procedural error, clear error, and lack of support by the weight of the evidence in the record is sustained, and we unanimously remand the Application for Master Plan with instructions that the Planning Board rehear the Application and consider approval of fewer lots than the Applicant seeks, and otherwise correct the errors enumerated above.

James Miller - Chair

James R. Miller

Thomas A. Heaney - Secretary

Thomas A. Heaney

Dated: 06.09.2021

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