

STATE OF RHODE ISLAND  
NEWPORT S.C.

ZONING BOARD OF REVIEW  
TOWN OF TIVERTON

In Re: Appeal of Island Avenue Realty LLC, 182-184 Leger Lane, of the Issuance of a Cease and Desist Letter Dated September 18, 2019.

## **DECISION**

### **Introduction and Procedural Posture**

This matter came before the Town of Tiverton Zoning Board of Review (the “Board”) for a duly noticed and advertised hearing on Wednesday, December 4, 2019 on the petition of Island Avenue Realty LLC, owner of the property located at 182-184 Leger Lane in Tiverton Rhode Island, being Tiverton Tax Assessor Map Plat 219, Lot 622, on an appeal of a notice to cease and desist construction dated 9/18/2019 and issued on 9/23/2019. Present and voting for the Board were Chairwoman Lise Gescheidt, Mr. David Collins, Mr. John Jackson, Mr. George Alzaibak, and Ms. Jennifer Hilton, first alternate, voting on this petition for the absent member Ms. Wendy Taylor-Humphrey. Also present for the Town were Matthew Fabisch, Assistant Town Solicitor and William Moore, Building Official.

The cease and desist notice provides in pertinent part “I have found the Subject Property to be located in an R-60 Zone where Duplex or 2 family dwellings are generally allowed. However the Subject Property lots 1, 2, and 3, are all part of a Rural Residential Development. Due to the restrictions applicable to Rural Residential Development plans it is a Prohibited use for a duplex to exist at the Subject property as per, Article IX section 6 of the Zoning Chapter of the Tiverton Town Code.” The notice goes on to provide “[t]herefore you are hereby ordered to Cease and Desist Construction at the Subject Property and the permits issued to such location

until relief is granted by the Tiverton Zoning Board. You have the right to appeal this decision within 30 days to the Tiverton Zoning Board of Review as per, Article XV, section 4, (a) of the Town of Tiverton Zoning Ordinance.” The notice is signed “William Moore, Tiverton Building Official.”

In 2018 Island Avenue Realty, LLC obtained an Amended Final Plan approval for a three lot rural residential subdivision. Under the Tiverton Zoning Ordinance Rural Residential Subdivisions prohibit “Manufactured homes, mobile homes, multi-family homes and duplexes, as well as any use prohibited in the zoning or applicable overlay district.” Tiverton Zoning Ordinance, Art. IX § 6. On or about October 18, 2018 the Town of Tiverton issued two building permits for a left and right side duplex. The permits expressly note that the Appellant has permission to build “[p]rovided that the person accepting this Permit shall in every respect conform to the terms of the application on file in this office and to the provisions of the Statutes and Ordinances relating to Zoning . . . of Buildings in the municipality . . .”

### Hearing

Mr. Robert Johnson, a member of Island Avenue Realty LLC, appeared before the Board represented by his Counsel Attorney Cort Chappell, Esq. In support of its appeal, the applicant submitted a written letter which reads,

“On or about August 15, 2018 I inquired of the building official, and town planner whether I could build a two unit residential structure on my land. After checking with their solicitor I was told I could and I filed appropriate plans and paid appropriate fees to construct these units and received separate building permits, one for each side of duplex. I received permits on October 17, 2018. As a result of the permit and no appeals being filed I constructed the same and finished the structure. I was then told of an issue and had been trying to straighten it out. The Town issued electrical permit and inspected the service with separate meters on January 22, 2019 and has since refused to issue electrical permit to do the interior work even though I had been given permits and inspections for installing the three meters. On or about

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September 23, 2019 I received a formal cease and desist from working on a valid permit issued to me in good faith with full disclosure of my plans that was never appealed. I am appealing the Town's issuance of the cease and desist claiming they have no right to change their mind at this stage."

Aside from this letter, the Appellant did not provide any written legal briefing.

An objector, Ms. Susan McCormack, an abutting resident with property located at 180 Leger Lane, was represented by Attorney Matthew Landry. Mr. Landry submitted a five page brief urging the Board to uphold the issuance of the Cease and Desist notice.

Turning to the Appellant's presentation of the merits of the Appeal<sup>1</sup>, Attorney Chappell began by explaining his client's view of the background of this matter. He explained the Appellant applied for a permit to construct a duplex on the lot and was granted permission and began construction. After the duplex was framed and completed to its present condition but before completion of the interior, the building inspector at that time realized the permit should not have been issued based on a provision of the Tiverton Subdivision Ordinance limiting lots created under the Rural Subdivision provision of the ordinance to single family houses. A cease and desist order was issued to the applicant creating a hardship caused by the erroneous legal opinion to issue a permit for a duplex. Mr. Chappell went on to say the applicant went to the

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<sup>1</sup> The Appellant initially raised a concern that the Zoning Board may lack jurisdiction to hear the appeal because the cease and desist letter was signed by Mr. Moore, the Town's Building and Zoning Official, in his capacity as Tiverton Zoning Official which would have required an appeal to the Tiverton Building Code Board of Appeals pursuant to the Town of Tiverton Code Chapter 18, § 33, rather than the instant appeal to the Zoning Board of Review pursuant to Article XV §4(a) of the Tiverton Zoning Ordinance. Mr. Fabisch observed that the order is based on a zoning violation issued by the town's authorized zoning officer at the time and the notice was issued and specifically indicates that you can appeal the decision to this board. Mr. Moore testified that he had a dual capacity as the building and zoning officer responsible for overseeing zoning enforcement and he is authorized to issue a cease and desist order for zoning violations. He indicated that a building code appeal board appeal would only be appropriate for technical matters relating to the application of the building code and not for zoning violations. Attorney Landry argued that there were strong arguments for this being a building board of appeals case and argued that the Board should find that it was which would result in the end of this matter as the Appellant had not filed a Building Board of Appeals case. After hearing argument from all parties, and the advice of its counsel, The Chairwoman made a motion that this board recognize its own jurisdiction to proceed under regular zoning appeals process to hear this matter because the cease and desist is written as a zoning violation and specifically directed the applicant to appeal to this Board. Mr. Alzaibak seconded. The vote was unanimous.

Planning Board to seek a conditional rescission of the existing plan and apply for a two lot subdivision as a means of allowing the existing duplex while creating a second conforming lot. However, the Planning Board rejected that approach, and no appeal of that decision was taken. Mr. Chappell then presented the testimony of Mr. Johnson who testified, in pertinent part, that he did file and obtain approval for the amended rural residential subdivision, and was represented by counsel. Mr. Johnson offered testimony consistent with Mr. Chappell's explanation of the procedural travel of this matter. In response to questioning from the Board, Mr. Johnson detailed the areas where he incurred more expenses than he would have if he had developed the property from the outset, as the costs for the building permit, framing two garages and two doors, and installing a firewall between the two units. He admitted that a septic system is based on the number of bedroom and not the number of units. Mr. Chappell concluded by saying to deny this petition would result in more than a mere inconvenience as the applicant will incur additional damages if the matter is litigated. The Board also accepted two building permits and the Amended Final Recorded Plat Plan into evidence. In essence, the Appellant's contentions sound in the equitable argument that the Town should be estopped from enforcing the strict requirements of the zoning ordinance against the Appellant because a Town Official erroneously indicated that he could proceed to build a multifamily structure on the lot; building permits were issued; and building was started notwithstanding that the recorded plat plan was expressly and specifically limited to single family residences and expressly prohibited the construction of a duplex.

Attorney Landry argued the Board should uphold the Building Official's determination that the duplex violates the Tiverton Zoning Ordinance. Mr. Landry explained the Planning

Board rendered a decision in connection with the applicant's preliminary plan application for a three lot rural residential subdivision comprised of three single-family residences. The Planning Board approved the final plan in a decision recorded August 17, 2018. Subsequent to receiving final plan approval, the applicant constructed an unlawful and unapproved duplex in direct violation of the plans approved by the Planning Board. Attorney Landry further stated the duplex constitutes a prohibited and illegal use in direct violation of the Tiverton Rural Residential Subdivision Regulations. In conclusion, Attorney Landry requested the Zoning Board deny the petitioner's appeal and uphold the decision of the building official and enforce action be taken against the petitioner to remove the illegal use and impose fines up to \$500 per day until the structure is removed.

Mrs. McCormack was called as a witness by Mr. Chappell. She testified that she contacted the town in mid-November of 2018 with her concerns on the structure being built. Mr. Chappell asked Ms. McCormack how she contacted the town and Ms. McCormack responded she called and came in and personally spoke to Mr. Compton who was the town planner at the time and wrote letters to the Planning and Zoning boards and attached photographs.

### **Deliberations**

Thereupon, the Board began its deliberations. Mr. Collins began and stated the petitioner could have or should have known that there was a potential issue by looking at the chart that addresses the uses in an area and recognize that a multi-family structure is not permitted. Collins went on to say even though the petitioner relied on the opinions issued by the town, he should have been cautioned because of the fact that the ordinance is pretty clear. The town tried

to find a solution and it was suggested that a cease and desist order be issued in order to get the matter before the Court and ultimately this matter is going to be resolved in court. Mr. Collins further stated he would not overturn the decision of the building/zoning official to issue the cease and desist order. Ms. Hilton agreed with Mr. Collins and added unfortunately there's just too many variables here and this board does not know them all.

Mr. Alzaibak stated he will not overturn the decision of the building/zoning official to issue the cease and desist order because he believes the petitioner purchased this property knowing exactly what it was approved for which was confirmed by the petitioner going to the Planning Board for final approval of his petition for the creation of residential rural subdivision. Mr. Alzaibak further stated it clearly states on the permit that this permit is issued but it's up to the contractor to still conform to the zoning ordinances. Mr. Jackson stated he is in agreement that this has to go to court however he is not happy that a contractor cannot come into the zoning office and get an opinion and it be correct.

The Chairwoman stated the applicant, although he wasn't the person that initiated the Planning Board request for rural residential subdivision, he finished it, and she believes that he was aware of what the setbacks and prohibitions were. The Chairwoman went on to say the petitioner certainly should have known that these were limited to single family houses because his petition for a residential rural subdivision explicitly prohibited duplexes and he was an experienced developer. Had he not petitioned for the change in the zoning for the establishment of a rural residential subdivision, he would have been permitted to erect a duplex in an R-60 zone. The Chairwoman further stated there is no question that there were a lot of mistakes that were made here and there is no question that the applicant made a mistake when he certified on

his building application that his plans conformed to the Zoning Ordinance which it clearly didn't. There is no question that the structure is not allowed and is specifically prohibited and goes against the purpose and the intent of the Rural Residential Subdivision provisions. The Chairwoman stated there were a lot of personnel problems in the Zoning Department at that time and it is unfortunate that the Town was not responsive to Ms. McCormack's complaints. The application to the Planning Board was made by the applicant for three single family houses. Unfortunately wrong advice was given and the duplex was constructed relatively quickly for whatever reason but there is no question that this is not a permitted use. Based on the way the ordinance is written and the fact that the Zoning Board has no equitable jurisdiction, the Chairwoman stated she would affirm the decision of the building/zoning official in issuing the cease and desist order based on the evidence that this Board heard and the established case law that was provided (in the Memorandum provided by the objector and which is incorporated herein.)

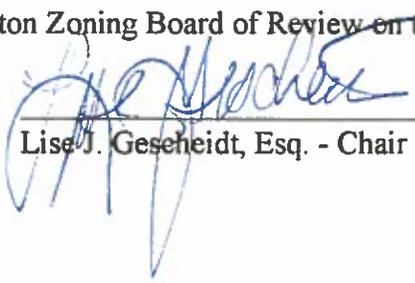
The Chairwoman then made a motion that the Board affirm and uphold the decision of the Tiverton Building and Zoning Official to issue a Cease and Desist letter. Taking into consideration its knowledge and expertise, and after taking into consideration all of the materials contained in the appellate record, all exhibits received, and the testimony at the public hearing, and the case law provided by the objector, The Building and Zoning Official was not clearly erroneous in his interpretation or application of the Tiverton Zoning ordinance to the subject property. The petitioner is a developer who created his own hardship. He sought and received final approval for the Rural Residential Subdivision for three single family houses and was on actual or constructive notice that the development of duplexes was prohibited, illegal, and should

not have been constructed. In addition, the appellant's petition sounds in equity but this board lacks equitable jurisdiction to provide relief from application of the zoning ordinance. Mr. Alzaibak seconded. The vote was unanimous. Voting were: Chairwoman Lise Gescheidt, Mr. David Collins, Mr. John Jackson, Mr. George Alzaibak and Ms. Jennifer Hilton.

Accordingly, the Board finds no clear or other error in the Building and Zoning Official's Determination that a duplex is a prohibited use on the subject property and affirms the issuance of the cease and desist notice.

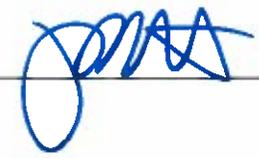
ACCORDINGLY, THE PETITIONER'S APPEAL OF THE BUILDING AND ZONING OFFICIAL'S CEASE AND DESIST NOTICE WAS DENIED.

Entered as the official decision of the Tiverton Zoning Board of Review on this 8th day of January, 2020.

  
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Lise J. Gescheidt, Esq. - Chair 1/8/2020

CERTIFICATION

I, Julio Barret, certify that I sent a true copy of the within decision, by regular mail, postage prepaid, to the applicant on the 8<sup>th</sup> day of January, 2020.

  
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