

Tiverton Planning Board of Appeals
343 Highland Road, Tiverton RI 02878



May 13, 2014

**In Re: Eagleville Road Realty, LLC, a/k/a Site Ready
Materials and Recycling**

Decision of The Board

Appellant/Applicant: Eagleville Road Realty, LLC, a/k/a Site Ready Materials and Recycling, by Marcello Louro, Eagleville Road Realty, 322 Eagleville Road, Tiverton, RI 02878

Parcel: Plat 205 / Lot 101

Zone: Industrial (I) Zoning District

Counsel of Record for Applicant / Appellant: Eric S. Brainsky, Brainsky Levinson, LLC, 1547 Fall River Avenue, Suite 3, Seekonk, MA 02771

Appeal is from a **Decision of the Tiverton Planning Board** dated **April 5, 2013**

Counsel of Record for The Planning Board: Peter D. Ruggiero, Assistant Town Solicitor, Ruggiero and Brochu, 20 Centerville Rd., Warwick, RI 02886

Counsel of Record for The Board of Appeals: Mark C. Hadden, Law Office of Mark C. Hadden, PO Box 6647, Providence, RI 02940.

Proposed Development:

“The Applicant proposes to construct two 25,000 sf +/- buildings to process single stream recyclables and to transfer construction & demolition debris, recyclables, and municipal solid waste (the ‘Application’).”

Proceedings before the Board of Appeals (hereafter, “The Board”):

This matter was duly and legally advertised and noticed, and public hearings were held by the Board, during which counsel for the Appellant and the Planning Board presented plenary argument and several legal memoranda for the consideration of the Board, on the following dates: November 6, 2013; January 23, 2014; March 25, 2014; April 22, 2014 and May 13, 2014. Final arguments and Memoranda were submitted by counsel on April 22, and the matter scheduled for final decision on May 13.

I. Standard of Review on Appeal

Under Tiverton “Land Development and Subdivision Regulations,” Appendix B to the Tiverton Town Code, Section 23-81:

“When reviewing a decision of the planning board or administrative officer on matters subject to these regulations, the board of appeals shall not substitute its own judgment for that of the planning board or the administrative officer, but must consider the issue upon the findings and record of the planning board or administrative officer. The board of appeals shall not reverse a decision of the planning board or administrative officer except on a finding of prejudicial procedural error, clear error, or lack of support by the weight of the evidence in the record.”

This follows form and substance to state law, RIGL section 45-23-70.

II. The Board Finds That the Planning Board Was Within Its Authority to Deny The Master Plan Based On the Grounds of its Inconsistency With the Tiverton Comprehensive Plan

The Appellant contends that the Tiverton Planning Board did not have the authority to deny this Master Plan on the grounds of inconsistency with the Tiverton Comprehensive Plan. This Board rejects this argument of Appellant, and upholds the Planning Board’s Decision on this issue.

The Appellant contends that The Board is bound by a recent Superior Court decision in the case of *Love’s Travel Stops v DiOrio (Hopkinton Planning Board), et. al. (Washington Superior, March 21, 2014)*, in which the court decided that the Hopkinton Planning Board did not have the authority to deny a Master Plan on the grounds that the Master Plan was inconsistent with the town’s Comprehensive Plan. This Board, on March 25, 2014, requested further briefing from the parties regarding the effect of this decision, and requested the opinion of legal counsel to the Board. The Board accepts, and finds convincing, the opinion of its legal counsel that (1) the *Love’s* decision is not binding precedent to this Board, and (2) this Board declines to follow the *Love’s* precedent, for all those reasons that legal counsel delineated on the record of these proceedings, most particularly on April 22, 2014.

In brief, this Board accepts the opinion of its legal counsel that the *Love’s* decision did not involve any of the present parties to this appeal, and therefore is certainly not of *collateral estoppel* or *res judicata* effect. As a unique decision, of a lower court, treading into uncharted territory on an argument never before accepted, on this narrow issue, it can hardly be characterized as “the prevailing law” of the jurisdiction, and is not binding precedent. Furthermore, the R.I. Supreme Court has stated, in *dictum*, in specific reference in a case concerning the application of the required findings at the Master Plan stage of review, that “Section 45-23-60 sets out the required findings that planning boards must make when reaching decisions on land development applications. Adherence to this

statute constitutes drafting a substantial written decision.” *New England Development, LLC v Berg*, 913 A.2d 363, 373 (RI 2007).

Section 45-23-60 delineates the standard by which a planning board is to be guided as to “all” applications:

“§ 45-23-60. Procedure - Required findings

(a) All local regulations shall require that for all administrative, minor, and major development applications the approving authorities responsible for land development and subdivision review and approval shall address each of the general purposes stated in § 45-23-30 and make positive findings on the following standard provisions, as part of the proposed project's record prior to approval:

(1) The proposed development is consistent with the comprehensive community plan and/or has satisfactorily addressed the issues where there may be inconsistencies;

(2) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance;

(3) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval;

(4) The subdivision, as proposed, will not result in the creation of individual lots with any physical constraints to development that building on those lots according to pertinent regulations and building standards would be impracticable. (See definition of Buildable lot). Lots with physical constraints to development may be created only if identified as permanent open space or permanently reserved for a public purpose on the approved, recorded plans; and

(5) All proposed land developments and all subdivision lots have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered in compliance with this requirement.”

(emphasis added).

There are no exemptions for Master Plans as to any of these required standards.

Furthermore, applicants that have been granted Master Plan approval are granted, by statute, certain rights that become *vested* as a result of the approval. Under RIGL 45-23-40:

“(g) Vesting.

(1) The approved master plan is vested for a period of two (2) years, with the right to extend for two (2) one year extensions upon written request by the applicant, who must

appear before the planning board for the annual review. Thereafter, vesting may be extended for a longer period, for good cause shown, if requested by the applicant, in writing, and approved by the planning board. Master plan vesting includes the zoning requirements, conceptual layout and all conditions shown on the approved master plan drawings and supporting materials.”

A planning board failing to deny a Master Plan that might be found inconsistent with the Comprehensive Plan will risk having vested a project, and waived objection, to a project that might otherwise be found to be inconsistent with the Comprehensive Plan. This is an important consideration not addressed by the *Love's* decision, and is an important context to the interpretation of the statute as a whole.

Accordingly, for all these reasons, as well as those reasons provided by legal council on the record, the Board finds that the Planning Board did have the authority to deny the Master Plan based on its inconsistency with the Tiverton Comprehensive Plan.

III. The Board Rejects Appellant's Claim of "Surprise" That the Comprehensive Plan Could Form the Basis for Denial of the Master Plan

The Board also rejects the Appellant's argument that it could not have known, and was surprised by the fact, that the Planning Board denied the plan based on inconsistency with the Comprehensive Plan, because the Board never gave the Applicant some sort of prior notice of its intention to do so. First, there is no obligation on the Board to alert the Applicant to those standards clearly delineated in Section 45-23-60, and Appellant cites no authority for a contrary proposition.

Second, present counsel was before the Tiverton Planning Board at a time *before* the *Love's* decision was (just recently) handed down, and was previously counsel of record before the Hopkinton Board in the *Love's* case when that Hopkinton Board followed the exact same standard of review, and therefore could not possibly have been surprised that the Tiverton might follow the same standard clearly delineated by Section 45-23-60.

Third, there is absolutely no evidence on the record to support the Appellant's allegation of "sandbagging", bad faith or any other improper conduct on the part of the Board or its officers, and this Board firmly rejects such allegation.

This Board, accordingly, rejects the claim of error based on "surprise."

IV. The Board Also Finds That There is Sufficient Support by the Weight of the Evidence in the Record to Support the Planning Board Decision Relating to the Comprehensive Plan

The Board also finds that there is sufficient support by the weight of the evidence in the record to support the Planning Board decision, and that there is no clear error or prejudicial procedural error in the Planning Board's decision.

Under the Master Plan, no direct access is proposed to Highway Route 24 and all traffic would be routed through small residential areas, and the Board finds that the Planning Board's decision (at pp3-5) relating to Element 5 – Land Use Plan, to be supported by the evidence. The applicant failed to provide a traffic mitigation plan, and failed to address dangers posed to pedestrians and children walking to a nearby bus stop; numerous curves in the road, as well as numerous changes in grade and elevation, and competent and appropriate lay and other testimony from town officials provided evidence sufficient to support the Planning Board's decision.

Witnesses for both parties agreed that many of the proposed vehicles using the proposed exit path will have to traverse to the opposite side of the street, this made more dangerous when considering that the sheer volume of traffic will be increased by an additional 680 vehicle trips per day by various sized large trucks and trailers, as contemplated by the project. See, Planning Board decision at 5, Circulation Element of Comprehensive Plan.

The Planning Board also found the plan inconsistent with Element 10-Economic Development. We do not find any "clear" or other error in the analysis made by the Planning Board relating to Element 10 – Economic Development. The analysis provided by appropriate witnesses cannot be said to lack of support by the weight of the evidence in the record. See, Decision at 6.

As mandated by the standard of review, this Board does not substitute its judgment for that of the Planning Board during this appeal proceeding. This Board recognizes the statutory role of the Planning Board in drafting, amending and administering the Comprehensive Plan, and its expertise in doing so. This Board accordingly upholds the Planning Board's decision denying the Master Plan on grounds of inconsistency with the Comprehensive Plan.

V. Errors Based on the Composition of the Record Have Been Stipulated as Satisfied and Therefore Waived

Counsel for both parties have now stipulated that there are no longer (procedural or other) errors based on the composition of the record before this Board.

VI. Denial of the Master Plan based on Required Finding #2, Zoning Compliance, is Upheld

This Board upholds the Planning Board's decision regarding zoning compliance. The simple answer to this is that if the Master Plan is inconsistent with the Comprehensive Plan, then there can be no zoning compliance in this case, since zoning compliance also requires consistency with the comprehensive plan. The Appellant was free to apply to the Zoning Board for Zoning relief *simultaneously with the Master Plan submission-as specifically permitted by statute* – but chose not to do so for whatever strategic reason. Here, a required special use permit has not been applied for, thus, as it stands, there is no zoning compliance. See, analysis of Planning Board at pp7-8 of Decision.

VII. Appellant's Claim That the Right of Cross-Examination was Denied is Rejected

This Board finds no *prejudicial* procedural error, or other error, in the momentary interruption of Appellant's claimed right to cross-examination (Appellant's Memorandum in Support of Appeal dated 10-23-13 at 6). The right of cross-examination is *not* denied when appropriate ordering of a proceeding is merely conducted. Here, there was a momentary interruption in its exercise, for the purpose of an orderly proceeding, and Appellant made no serious concerted effort to continue at an appropriate time such that any claim of denial of cross-examination could be realistically asserted. This claim of error is denied.

VIII. The Board Finds No Clear or other Error in The Planning Board's determination That the Applicant Failed to provide Sufficient Information That There Would be no Significant Negative Environmental Impacts

The Board finds no clear or other error in the Planning Board's determination that the Applicant failed to provide sufficient information that there would be no significant negative environmental impacts, under Required Finding #3 of RIGL 45-23-60. The Board refuses to substitute its judgment for that of the Planning Board on this issue, particularly when considering that all transfer trailers would travel to the site via Stafford Road and therefore through the Watershed Protection Overlay District, or on issues relating to accidents in light of the dramatic increase in traffic, leakage, noise, odor air pollution and litter of a proposed facility of such dramatic proportions handling refuse and waste.

IX. . The Board Finds No Clear or other Error in The Planning Board's determination That the Applicant Failed to provide Sufficient Information That There Would be *Adequate* Physical Access to a Public Street

The Planning Board decided that there was insufficient credible evidence that there was *adequate and safe* permanent access to a public street. This Board finds no error in that decision that the Applicant failed to submit sufficient evidence to counter the

very basic conclusion that the sheer volume of heavy trucks, when combined with the admitted inevitable queuing of vehicles that would result on Eagleville Road, provided adequate access.

Conclusion

Accordingly, the Applicant's Appeal is denied and the Decision of the Planning Board is upheld.

The Tiverton Planning Board of Appeal

Voted: Unanimous aye, by Lise Gescheidt, Richard Taylor, Susan Krumholz, David Collins and John Jackson.

Date of Decision: May 13, 2014



Lise Gescheidt, Chairperson