

## Judge upholds approval of redevelopment for extended-stay hotel

The Providence Zoning Board of Review's decision to approve master and preliminary plans for an extended-stay hotel was not arbitrary, capricious or clearly erroneous, a Superior Court judge has ruled. Neighbors of the proposed redevelopment in Providence objected to the project, arguing that it was incorrectly zoned as an extended-stay hotel when it more accurately should have been labeled as an apartment dwelling, in part due to the fact that each room would include a two-burner cooktop. In addition, the neighbors argued that the project was inconsistent with the city's comprehensive plan as it was located within a designated "Jobs District."

When the developers' master and preliminary plans were both approved by the City Plan Commission, the neighbors appealed to the Zoning Board of Review. The board affirmed, and the neighbors appealed again, this time to the Superior Court.

But Judge Richard A. Licht affirmed the administrative agency and zoning board's decisions.

"After reviewing the entire record, this Court finds the decisions of the CPC and ZBR were not arbitrary, capricious, clearly erroneous, or ultra vires, and that any conceivable error did not prejudice the Neighbors' substantial rights," Licht wrote. "The decisions were supported by the record, the statute, and the Zoning Ordinance."

The 26-page decision is *West River Commerce Center Annex, LLC, et al. v. York, et al.*, Lawyers Weekly No. 61-115-16. The full text of the ruling can be found [here](#).

### Comprehensive plan v. zoning ordinance

Lisa Dinerman, senior assistant city solicitor for Providence, said from her employer's perspective, the case was "not about this project or any particular project. We are interested in protecting the system and making sure developers can come to the city and have their applications decided fairly and expeditiously."

With that in mind, she said, the city was extremely pleased that its procedures and the law that it followed were upheld at the Superior Court level.

For example, she said, Licht properly recognized that subsequent to the *West v. McDonald* decision from the Rhode Island Supreme Court in 2011, the Legislature amended state law to reflect that the zoning ordinance trumps the city's comprehensive plan until it "catches up" with the forward-looking plan.

"The Legislature did not intend for the comprehensive plan to overcome the city's official zoning map at all times," she said.

Thomas J. Enright, counsel for the neighbors, strongly disagreed.

"This is a critical case because it is going to change the way that developers will approach analyzing the land use regulations in a municipality," the Providence lawyer said. "It was always paramount to look to the comprehensive plan alongside the zoning ordinance to make sure you complied with both. This decision suggests that you only need to look to the zoning ordinance."

Enright said his clients will continue their challenge to the redevelopment project. In addition to preparing a writ of certiorari to the state Supreme Court to appeal Licht's decision, a companion declaratory action case is pending in Superior Court.

### **Plans and objections**

A group of developers proposed a redevelopment project at 181 Corliss St. in Providence, constructing what they characterized as an extended-stay hotel. Pursuant to state regulations, the developers submitted a master plan and a preliminary plan for approval by the CPC.

At a hearing before the CPC, neighbors presented their three primary objections to the project.

First, they argued that it was inconsistent with the city's comprehensive plan as it was located within a designated Jobs District, meaning that no residential dwellings were permitted.

Second, the neighbors told the CPC that the project was incorrectly classified under Use Code 16.2 of the zoning ordinance as a hotel or motel, when it should really be labeled as Use Code 15.2 for lodging, such as apartments and boarding houses.

Their final and related argument was based on the presence of a two-burner cooktop in each unit, which the neighbors contended constituted a cooking facility prohibited in temporary lodging.

The CPC approved the master plan and, following a hearing, the ZBR affirmed by a 4-1 vote.

Multiple hearings were held for the CPC to consider the preliminary plan, with testimony heard from experts on both sides as well as from Jeffrey Lykins, director of inspections and standards.

Although Lykins initially opined that the project was properly classified, he later changed his mind and authored a letter stating that, after further review of the materials, he believed the project was misclassified because of the presence of cooking facilities in each room, specifically the two-burner cooktop.

The CPC voted to approve the preliminary plan, and the ZBR affirmed, denying the neighbors' appeal.

Reiterating their arguments, and adding that the CPC erred because it was bound by the director's interpretation and lacked the authority to make its own determination, the neighbors then appealed to Providence Superior Court.

### **Microwaves, coffeemakers and cooktops**

Licht began his review with the letter from Director Lykins and the neighbors' argument that the CPC was bound by his interpretation. But the letter itself stated that it was non-binding, the judge said, and the CPC was entitled to come to a different conclusion.

"Thus, even assuming the Director has the power to bind the CPC, it is clear he did not exercise that power with his letter, possibly due to the 'limited information' with which he was provided," Licht wrote, adding that the CPC did not render a decision until after hearing and considering his testimony.

Turning to the appropriate use code for the project, Licht noted that the CPC "grappled" with the right characterization for the redevelopment.

"The record indicates a vigorous back-and-forth between the Neighbors and Developers, with each side presenting evidence — and that the Developers countered the Neighbors' contentions with competent evidence that the information referenced was either out of date or should be discounted," he said. "After a thorough review of the record, this Court finds that the CPC had before it reliable, probative, and substantial evidence to characterize the Project as a hotel at both the Master Plan and Preliminary Plan stages."

The main difference between the use code proposed by the neighbors and that applied by the CPC was the designation as temporary lodging, with the neighbors taking the position that the cooktop excluded characterization under Use Code 16.2 because the burners constitute cooking facilities.

Lacking a definition in the zoning ordinance for “cooking facilities,” Licht considered dictionary definitions as well as practical considerations. Accepting the neighbors’ literal interpretation that a cooking facility encompassed anything that prepared food by applying heat would “eliminate staples of many hotels: the microwave oven and coffeemaker,” Licht said.

“Given that microwaves and coffee makers are common in hotels and motels, neither the CPC nor this Court can interpret ‘cooking facilities’ literally. Doing so would lead to an absurd result; namely, that most, if not all, hotels are prohibited in the City of Providence,” Licht wrote.

“While the CPC came to a conclusion that the Neighbors dislike — that the cooktops are not ‘cooking facilities’ within the meaning of the Zoning Ordinance — this interpretation is supported by the record,” the judge wrote. “The CPC clearly ‘discussed ... at length the nature of cooking and ovens,’ hearing testimony from four experts over three meetings. ... The CPC simply found that the cooktops in the Project more closely resembled and served the same purpose as a microwave, not an oven. The Court finds nothing arbitrary, capricious, or contrary to law about this analysis.”

Licht was similarly not persuaded by the neighbors that the project was prohibited because it was located in a Jobs District found in the city’s comprehensive plan, where no residential uses are allowed.

Noting that the comprehensive plan “is not inviolate,” the judge explained that the CPC must make a positive finding that the proposed development is consistent with the comprehensive plan and/or “has satisfactorily addressed the issues where there may be inconsistencies.”

The CPC “did find overall that the Project was consistent with the Comprehensive Plan,” the judge said. “While most residential Use Codes do not create jobs, it is reasonable to believe that the Providence City Council determined that hotels would, and specifically allowed them to exist in a Jobs District. Notably, the Providence Marriott on Orms Street falls within the same Jobs District as the one at issue here.”

Given that the CPC determined the project fell under Use Code 16.2, as temporary lodging, “there was no prejudicial error in their finding that the Project complied with underlying zoning and planning documents, even if the Jobs District were to apply as implemented at the time the application for the Project was submitted, as the Zoning Ordinance applicable to this case did not exclude Use 16.2 in a Jobs District.”

Licht affirmed the decision of the ZBR approving both the master and preliminary plans.

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