

**TOWN OF WEST GREENWICH  
ZONING BOARD OF REVIEW  
280 VICTORY HWY.  
WEST GREENWICH, RI 02817  
DECEMBER 16, 2014  
7:30 P.M.**

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A regular meeting of the West Greenwich Zoning Board of Review sitting as Planning Board of Appeal was held on December 16, 2014. Present were Chairman Ken Jones, Dr. Clyde Fish, Gilbert Rathbun, Ted Stone and Ray Stewart. Also present was alternate Charlotte Jolls and Attorney Mark C. Hadden, representing the Board of Review.

Attorney Nicole Martucci appeared, representing appellant Graceco  
Attorney Michael Ursillo appeared, representing the Planning Board  
Attorney John M. Boehnert, representing the applicant, the receiver, Matthew J. McGowan

**A. CALL TO ORDER – 7:30 P.M.**

Chairman Jones called the meeting to order at 7:30 p.m.

**Appeal of GRACECO, LLC:** Appeal of the decision of the West Greenwich Planning Board, dated October 22, 2014, approving a Minor amendment to the Project as well as the decision of the West Greenwich Planning Board to approve the Preliminary Plan for the Project concerning the proposed Auto Repair Facility (formerly called Firestone Tire) Major Land Development Plan: 755 Center of New England Blvd., AP 1, Lot 4-3, according to Zoning Ordinance of The Town of West Greenwich Article I, Section 7.1.

Attorney Nicole Martucci, representing Graceco, LLC. stated that they filed the appeal because of “procedural prejudicial error” and “clear error”. The Town Planner had sent out a memo stating that there was a Minor amendment, and the Planning Board approved the amendment as a minor amendment, not requiring abutter notice. We believe it was a Major Amendment, and therefore believe that direct notice to abutters was required. The amendment was for a four- lane intersection, but now it is going to be phased to two lanes and have another two lanes put in at another time. Phasing will prolong construction which will impact Graceco as a nuisance. We would like this to be remanded back to the Planning Board so the abutters can be heard. This is also a violation of the Exit 7 Performance Standards.

Chairman Jones asked if the road abuts the clients Lot 4-2. Attorney Nicole Martucci answered not based on what I am looking at on the map. Chairman Jones asked were you aware that your client came to this Zoning Board for occupancy of their building. Attorney Martucci answered yes, but I am unclear what the relevance is. Chairman Jones stated your property is not serviced by this road and it doesn't abut your property either. Attorney Martucci answered the subject property that is being constructed was certainly an abutting property. Chairman Jones replied of this building, but not the roadway that you are bringing the appeal on. Attorney Martucci answered its all part of the same plan, so the Preliminary Plan was approved for this property of which my client abuts. Attorney Mark Hadden clarified that the road does not abut the property of your client. Attorney Martucci agreed.

Town Solicitor Ursillo, representing the West Greenwich Planning Board, stated for the record that on December 2, 2014 Jennifer Paquet, the Town Planner, sent to the Zoning

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Board the full record of this matter. I don't believe it's in contest, but I wanted to state that you have all that information before you in regard to this appeal. Now, a major change of a Preliminary Plan in my mind would be taking a two way boulevard and turning it into a four way boulevard. That would be the type of change that would go to the heart of the conditions of approval first time around when it was approved in 2011. The strange thing is that the four lanes are still out there it's just that the construction of those four lanes is going to be phased. This is something the Planning Board does on a regular basis. You have a map which clearly shows the intersection, the map is stamped received September 29, 2014. What it shows is that when you come in from the boulevard you can go left or right. The only change is instead of going directly straight across there's going to be an adjustment so you go a little to the left because there's going to be two lanes instead of four. This is all part of the record. In fact, it stated that the phasing to complete the road is identified in the previously approved Preliminary Plan is still in effect and will be widened upon future development. It is simply a phasing plan. So, when Graceco argues that proper notice was not given because this constituted procedural error and this constituted a major change that's contrary to the original plan. I don't believe that's a correct statement. It clearly is a minor change. It's certainly not contrary to the plan that was already approved. The only change approved was the phasing, which is quite common under our ordinance and is generally granted whenever anyone asks for it.

Attorney Ursillo continued to argue that, Graceco's argument that the amendment violates the performance standards of the Exit 7 Special Management District constitutes a clear error is not accurate. It won't constitute a nuisance simply because it's being built in phases. Think about it, everything in that entire Special Management District is being built at all different times. No type of construction goes on all at once, it doesn't work that way. All that's going to happen here is that this road is going to be built with two lanes instead of four lanes. And then at some future point when the other side of the roadway gets developed those other two lanes will be built. So to say that this constitutes a nuisance it just doesn't make sense. The definition of a nuisance in the regulations it is a careless construction activity or discharge of liquids, solid waste or other matter into any street property or wetlands. So if construction activity is a nuisance then nothing could be built there. In fact, the legislation creating the Exit 7 Special Management District requires that the development be done in phases.

Attorney Ursillo further referenced that Graceco also argued in its written appeal( but did not argue here in its original presentation) that proper notice was not provided to all abutting property owners before the original Planning Board approval 3 years ago. I just want to point out that they stated in writing that Randolph Savings Bank did not receive notice. But in the affidavit of notice to the original hearing notice, it clearly states that they were given notice and there is also a copy of the green card that was signed. Again, for the record, notice was given.

Attorney Ursillo then addressed the argument of Graceco that the actual activity that is proposed for this particular lot, the auto repair shop, is contrary to the performance standards of the Exit 7 Special Management District. The first issue with that is that this was voted on and approved several years ago and the time for appealing that has passed. The second issue is that no where has Graceco showed any evidence in the record at the time where info or documentation or testimony was introduced to show that this was going to be a nuisance. Also, Graceco is far out of time to appeal. So for all the reasons stated, it is the position of the

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Planning Board that the Town Planner and The Planning Board made the correct characterization of this phasing of a four lane boulevard into two lanes for now and two lanes at some future time. This truly constituted a minor amendment and therefore did not require a public hearing or notice to all abutters. We would request that you uphold the Planning Board decision in this matter.

Chairman Jones stated that for the record it was the striping plan prepared by Crossman Engineering that you referred to. This plan appears to show that the first phase of the road to be built is the closest phase to the abutting property owner that has brought this appeal. And the second phase would be further away than what the first two lanes are. The Town Solicitor agreed that that would be a fair statement. Chairman Jones then stated that, at the time when the other two lanes are to be constructed in the future, it would appear to me by looking at this plan, is that the edge of the roadway lines up with across Center of New England Blvd. where the current roadway is now that comes out of where BJ's is that there is a center island there that they line this up for building the other two lanes later and that they wouldn't need to reconstruct this piece they would only need to construct the other two. Town Solicitor Ursillo said that's exactly right, that's how it was presented. Chairman Jones then stated that when the future construction takes place, this is further from Graceco's property than the original construction and there might be a building in between them at the time of this future construction.

Attorney John M. Boehnert, representing the Receiver (Appellant/Applicant) stated that he was there on behalf of the receiver who now is the owner of the parcel. With regard to this being a Major change, the regulations made it clear that a major change is a change which, in his opinion, the Administrative Officer finds to be a major change that is clearly contrary to the intent of the previously granted approval. Graceco's suggestion that it is a major amendment because they are going from four to two lanes is not the case because it is being phased. The Planner made findings to that effect that it would not adversely affect the abutting parcel. There is nothing in the record in support of the appellant's contention to the contrary. Also, phasing is not only allowed in the district but it is required. What's happening here is that you have a property owner that's in dire financial situation and it's in a court receivership. The receiver is trying to marshal assets of the receivership of the developer for the benefit of creditors of the developer and in doing that we are trying to sell property for development. Because there is a limitation of resources, the two lanes is all that's needed to service this development at the present time.

Attorney Martucci indicated that she had appeared before the Planning Board at the time of the hearing in question in October, and had addressed the Planning Board before its decision said to phase this into two and two lanes. Then the engineer got up and said we don't need four we only need two. The receivers' attorney just substantiated that saying there's no money to build four we only need two it's going to be unnecessary. This is going from a four lane to a two lane intersection. If the Board isn't satisfied that this is a major amendment, there have now been two people testifying that they are not planning to build four lanes. Board Member Fish interjected "not at this time", they didn't say they weren't going to do it in the future, isn't that what phasing is. Attorney Martucci said yes that is what phasing is. But,

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what the testimony suggests that is not their intention. They are modifying the plan now and then they are going to modify it again later.

Chairman Jones asked Attorney Martucci if she knew when her client purchased the property. Attorney Martucci said I don't have that information nor do I see what the relevancy is. Chairman Jones then asked Town Solicitor Ursillo the plan that's in the Planning Boards packet; the original date was February 14, 2011. Town Solicitor Ursillo said that was correct. Chairman Jones said and in 2011 this property first went in front of the Planning Board and at that time it was Firestone. Town Solicitor said yes that was correct. And in 2011 they showed this road phased in at that time. Town Solicitor Ursillo said correct. Chairman Jones stated to Attorney Martucci that is why I asked when your client purchased the property because if your client purchased the property after that date then they didn't do their due diligence to review the plan on file showing that this road would be phased in. Attorney Martucci stated my client did do their due diligence in filing a timely appeal and showing up on October 22, 2014. The amendment that was before the Board was the phasing of construction. So what happened back in 2011 was irrelevant to right now. I just don't follow the relevancy of the connection you are trying to make. Attorney Hadden indicated that they did get notice and/or appeared at the hearing. Attorney Martucci said we did not get notice. We had to do our due diligence; we were following the case very closely. Other neighbor's due process rights were violated. Attorney Hadden questioned whether Graceco had standing to assert the due process rights (if any) of other neighbors. Attorney Martucci said I don't think that's a fair question. Attorney Hadden said it is a fair question. Attorney Martucci replied I represent Graceco and Graceco did not receive notice. Attorney Hadden said Graceco appeared at the hearing so lack of notice is waived. Attorney Martucci said I would disagree with that statement.

Chairman Jones stated so I guess you heard the previous council's testimony different than I. Board Member Fish said I heard that they were going to do it in the future as the land develops. Chairman Jones said that is what he heard too. Chairman Jones asked Attorney Martucci if she has been to the property. She replied that she has not. Chairman Jones stated that some of us might have more general knowledge of this site than you. The major road that comes through here goes all the way down to the hotel and the apartments. This is a large piece of property here in this development. They are looking to build one building now that went through in 2011 and that plan stated that the road was going to be phased in. I never heard any testimony that they were never going to build the other two lanes. They were phasing it in. It is a phased development. Could you explain to me how it's a nuisance of it being phased in? Attorney Martucci replied yes the unnecessary prolonged construction is considered a nuisance. Although phasing of the entire district is the intent of the regulation it has nothing to do with the phasing of an individual parcel. The parcel itself is what my client abuts, regardless of where the road will be built. The prolonged construction is what is going to cause a nuisance. I have nothing further to add other than a request a remand to the Planning Board to find out if this is a major amendment to the Preliminary Plan.

Town Solicitor Ursillo stated he has nothing further to add.

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Board Member Fish stated that we should uphold the decision of the Planning Board based on the fact that he agreed with the testimony of the counsel for Planning Board that this is not a Major change, but a minor amendment. I also think that it did not violate the Zoning Ordinance Performance Standard for Exit 7 Special Management District. Chairman Jones stated we have a Motion, do we have a second. Motion seconded by Board Member Stewart. Attorney Mark Hadden suggested for consideration that the following conditions should be added to the Motion:

The Standard of Review in RI General Laws 45-23-70 and in West Greenwich Subdivision Regulations Article XII, "Appeals", Subsection B.4 states that this Board shall render a decision on the appeal in the following manner:

"The Board shall not substitute its own judgment for that of the Planning Board or the Administrative Officer, but shall consider the issue upon the findings and record of the Planning Board or Administrative Officer. The Board shall not reverse the 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".

Subdivision Regulations Article VI, B.2 entitled "Minor Changes" states that "For the purpose of these regulations the term "minor changes" shall mean any change which, in the opinion of the Administrative Officer, is consistent with the intent of the original approval. "Major changes" (Section B.2) shall mean changes which, in the opinion of Administrative Officer, are clearly contrary to the intent of the original approval."

According to Section 16 of the performance standards of Exit 7 Special Management District. "No nuisance shall be permitted to exist or operate upon any lot so as to be offensive or detrimental to any adjacent lot or property or to its occupants. A nuisance shall include, but not be limited to, any of the following conditions: Any use including careless construction activity, that emits dust, sweepings, dirt or cinders into the atmosphere, or discharges liquid, solid wastes or other matter into any street, property or wetland which may adversely affect the health, safety, comfort of or intended use of their property by persons within or adjacent to the Special Management District."

Based upon the record, there is no finding on any record that would indicate that the phasing of a roadway is in any way a nuisance that would violate Section 16 of performance standard of Exit 7 district regulations.

There is no evidence on this record that the phasing of a roadway is a nuisance. By making two lanes instead of four lanes, there would be less of a nuisance at the present time. Nonetheless, the Applicant is still bound to create such four lanes in any event at the appropriate time. Accordingly, The Amendment is a minor change and not a major change to the Preliminary Plan, and there is no defect in notice for the Hearing.

Graceco, LLC participated in and made statements at the Planning Board hearing on October 22, 2014 and therefore waived any defect in notice to their party. Graceco has no

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standing to assert the rights of any other party to lack of notice based on the present record.

With respect to the contention of Graceco that the original Preliminary Plan should be nullified because of alleged lack of notice to their predecessor, Randolph Bank: The letter of Graceco counsel dated November 10, 2014 specifically states that Graceco contends that the predecessor owner of AP: 1, Lot 4-2, namely Randolph Savings bank, did not receive proper notice of Preliminary Plan. There was no factual basis to make that contention. It is clearly on the record that notice of the hearing on the original Preliminary Plan approval was sent to Randolph Savings Bank which Graceco could have seen if they did their due diligence to review the record. There is also in the record of that hearing the affidavit of the mailing person at the time of mailing to Randolph Savings Bank and the green card was returned signed and stamped. Graceco's contention in this regard is wholly without any basis.

Furthermore, the approval of the Preliminary Plan was more than 3 years ago and the time to appeal any issue relating to the original approval of the Preliminary Plan is by law barred as untimely, and Graceco is estopped from doing so as well.

With regard to the entire Exit 7 project, the phasing is a necessary and anticipated aspect of all the construction on the site which has been ongoing as different parcels become purchased and developed. That does not constitute any type of nuisance.

Board Member Fish adopted the changes to the motion and Stewart seconded. All in Favor of the motion as amended (5-0)

Vote: Jones (aye), Fish (aye), Stewart (aye), Stone (aye), Rathbun (aye)

Chairman Jones made Motion to adjourn as Planning Board of Appeal and reconvene as Zoning Board. Board Member Fish seconded. All in Favor (5-0)

Vote: Ken Jones (aye), Clyde Fish (aye), Ray Stewart (aye), Ted Stone (aye), Gilbert Rathbun (aye)

November 18, 2014~ APPROVED

Chairman Jones: made Motion to approve minutes from the previous meeting.

Seconded by Board Member Fish. All in favor (5-0)

Vote: Ken Jones (aye), Clyde Fish (aye), Ray Stewart (aye), Ted Stone (aye), Gilbert Rathbun (aye)

2015 Meeting Schedule ~APPROVED

Chairman Jones made Motion to approve Meeting Schedule for 2015.

Seconded by Board Member Fish. All in Favor (5-0)

Vote: Ken Jones (aye), Clyde Fish (aye), Ray Stewart (aye), Ted Stone (aye), Gilbert Rathbun (aye)

Chairman Jones: made Motion to adjourn.

Board Member Fish Seconded. All in Favor (5-0)

Vote: Ken Jones (aye), Clyde Fish (aye), Ray Stewart (aye), Ted Stone (aye), Gilbert Rathbun (aye)

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Meeting Adjourned: 8:35 p.m.

Barbara Sweet, Clerk  
West Greenwich Zoning Board of Review