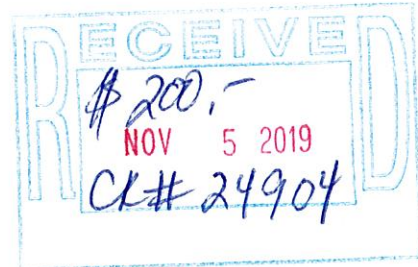


SILVA, THOMAS, MARTLAND & OFFENBERG, LTD.
ATTORNEYS & COUNSELORS AT LAW

ROBERT M. SILVA
ANDREW A. THOMAS
DAVID P. MARTLAND
CRISTINA M. OFFENBERG
SEAN M. BOUCHARD

Appeal Dec-1

November 5, 2019



Guy Weston, Zoning Official
City of Newport
43 Broadway
Newport, Rhode Island 02840

Re: Notice of Appeal of Decision of City Planner
to Zoning Board of Review Sitting as Board of Appeal
Joseph Toole & Toole Companies, Inc., Applicant

Dear Mr. Weston,

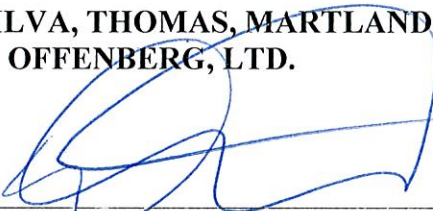
Enclosed herewith please find the above-referenced Notice of Appeal to the Zoning Board of Review sitting as the Board of Appeal.

If you should have any questions or concerns with regard to this matter, please do not hesitate to contact my office.

With best wishes, I remain,

Very truly yours,

**SILVA, THOMAS, MARTLAND
& OFFENBERG, LTD.**



David P. Martland, Esq.

DPM:slm
Enclosures
Cc: Girard Galvin, City Solicitor
City Clerk

STATE OF RHODE ISLAND
NEWPORT COUNTY

CITY OF NEWPORT
ZONING BOARD OF REVIEW
SITTING AS BOARD OF APPEAL

IN RE: JOSEPH TOOLE & TOOLE COMPANIES, INC., APPELLANT
PLAT 4, LOTS 82 & 52
202 JT CONNELL HIGHWAY

NOTICE OF APPEAL

Joseph Toole & Toole Companies, Inc., ("Toole"), hereby takes an appeal from the determination of Peter Friedrichs, City Planner that an application for Development Plan Review is "incomplete" as set forth in that certain email correspondence dated Wednesday, October 16, 2019 and appended hereto as Exhibit A. Toole seeks to develop the vacant Pizza Hut building and adjacent property located at 202 JT Connell Highway, designated as Lots 82 & 52 on Plat 4 (the "Property") into a car wash. Toole began exploring the proposed redevelopment of the property in early August. On August 9, 2019, Toole contacted the City Planner via email to discuss the project and the permitting requirements. Toole learned that the property was in the Commercial-Industrial Zone and the use was permitted by right. Toole sent building elevations to the City Planner, which the City Planner confirmed receipt of on August 13th. Toole entered into a contract to purchase Plat 4, Lot 82 on August 26, 2019. Shortly thereafter, the City, in reaction to the proposed redevelopment of the Newport Grand property, began the push to enact a moratorium for development in the North End. On October 9, 2019, the City passed a moratorium on all development activity for uses requiring Development Plan Review in what is designated as the Mixed-Use Innovation District on the Future Land Use Map which includes the Property.

Toole first learned of the moratorium proposal on September 8, 2019. Toole retained engineers and consultants to assist in the permitting of the Property. Although the car wash is a use permitted by right, it is subject to the Development Plan Review ("DPR") process because of the required minimum number of parking spaces (10). The DPR process is a prerequisite to apply for a building permit. Therefore, Toole began the process to obtain Development Plan Approval. Toole's engineers and consultants reviewed the submission requirements for the DPR process and put together drafts. Toole and his consultants and engineers had a Pre-Application meeting with the City Planner, the Director of Planning and Economic Development and the Zoning Officer on September 30, 2019 to review the submission requirements. Toole made it abundantly clear at the meeting that his goal was to provide the City with a complete application prior to October 9, 2019, and that he did not want the application denied for lack of any information and asked the City to identify any information it thought relevant. This was important so that in the event the City adopted a moratorium his application could proceed. The parties reviewed the draft plans and what was required to be submitted. **At no time was Toole, his engineers or consultants told that any of the following would be required:** 1) RIDEM verification of the wetland edge; 2) traffic study identifying peak queuing; or 3) architectural plans and elevations. Toole was asked to have a preliminary meeting with the Director of Utilities, which was done. On October 8, 2019,

Toole submitted the application with all submission requirements. Upon initial review of the DPR application, the City Planner indicated that it would be necessary to submit a proposed administrative subdivision plan merging Lots 82 & 52. This plan and the application were submitted on October 9, 2019, prior to the Council hearing.

On October 16, 2019, the City Planner sent an email to Toole stating as follows:

Your application for Development Plan Review is incomplete. Please provide RIDEM verification of the wetland edge, a traffic study identifying peak queuing, and architectural plans and elevations of your proposed project. **As you may recall, the need for this information was discussed at our preapplication meeting. (emphasis added)**

At no time was there any discussion about the need for this information. Upon receiving the email of the City Planner, Toole called the City Planner and was informed that it was not his decision but the decision of the City Solicitor that the application was incomplete. On October 16, 2019, Toole sent the City Solicitor an email requesting reconsideration of the matter; however, the City Solicitor informed Toole that the decision was the sole responsibility of the City Planner (see email attached). Thereafter, Toole met with the City Planner and he acknowledged that in fact he had not requested the additional information at the preapplication meeting.

The Development Plan Ordinance in section 17.88.40 sets forth the contents required for submission. Toole's application met all the minimum requirements for submission. The City Planner now attempts to rely upon Section 17.88.40.V. to declare the submission incomplete. This section states as follows:

Any additional information deemed necessary by city staff in order to satisfactorily complete review as it pertains to a particular required improvement or other aspect of the proposed development plan. This may include information such as projected average daily water consumption for potable and nonpotable purposes; projected average daily wastewater flow; frequency and duration of peak usage of water and sewer facilities; effluent characteristics; water pressure; existing roadway capacity and traffic counts; projected average daily vehicle trips and peak hour trips generated.

Nowhere in this Section does it list any of the items identified in the October 16th email of the City Planner. Taking each item in order:

RIDEM Wetland Edge Verification. The development plans identify the presence of wetlands. The City Planner asked if the wetland edge was verified by RIDEM. Chris Duhamel from DiPrete Engineering that the wetlands had been flagged by the wetland biologist. There is no legal requirement that RIDEM verify the wetland edge and there is nothing in the Zoning Ordinance that requires such verification.

Traffic Study. The additional information listed in the Section may include "existing roadway capacity and traffic counts; projected average daily vehicle trips and peak hour

trips generated". Had the City Planner requested this information at the meeting of September 30th, the information would have been provided, as it is readily available.

Building Elevations. Building elevations are not set forth anywhere in the DPR ordinance; however, the City Planner did, in fact, have building elevations that Toole provided in early August as to what he would be proposing.

As the Zoning Board reviews this matter, it must keep in mind that according to the DPR ordinance "Development plan review shall not be used for the purpose of denying an applicant a permitted use of the property as established by the zoning code." (Section 17.88.10 Intent.). It is clear and unequivocal that the minimum requirements of the DPR ordinance have been met; however, Toole is not suggesting that supplemental material cannot be requested or required as part of the DPR process. Toole only maintains that, in fact, he met all minimum requirements as set forth by the DPR ordinance by staff at the required preapplication meeting and the decision by the City Planner is clearly wrong, in contravention of the terms of the DPR ordinance and untimely.

Your Appellant requests that this honorable Board of Appeal:

- 1) Require the Administrative Officer to transmit to the Board of Appeal all papers, documents, correspondence, recordings, emails, and plans, or a certified copy thereof, constituting the record;
- 2) Schedule a public hearing to hear this appeal and provide notification of the same to abutters and parties in interest;
- 3) Reverse the decision of the Administrative Officer, certify the development plan review application as complete and require that the application be reviewed and processed by the Technical Review Committee upon a finding of prejudicial procedural error, clear error and lack of support by the weight of the evidence in the record.

Respectfully submitted,
Appellant, Joseph Toole &
Toole Companies, Inc.
By his attorneys,



David P. Martland, Esq.
Silva, Thomas, Martland & Offenberg, Ltd.
1100 Aquidneck Avenue
Middletown, RI 02842
(401) 849-6200

David Martland

From: Friedrichs, Peter <pfriedrichs@CityofNewport.com>
Sent: Wednesday, October 16, 2019 2:45 PM
To: Joe Toole
Cc: David Martland
Subject: FW: Pearl Car Wash

Mr. Toole,

Your application for Development Plan Review is incomplete. Please provide RIDEM verification of the wetland edge, a traffic study identifying peak queuing, and architectural plans and elevations of your proposed project. As you may recall, the need for this information was discussed at our preapplication meeting.

Sincerely,

Peter Friedrichs
City Planner
City of Newport
43 Broadway
Newport, RI 02840
pfriedrichs@cityofnewport.com
o (401)845-5472
f (401)846-1824

From: Friedrichs, Peter
Sent: Wednesday, October 9, 2019 3:37 PM
To: David Martland <DMartland@silvalawgroup.com>
Subject: RE: Pearl Car Wash

Dave,

I gave the Director of Utilities the documents; she is going to need the full 5 business days to determine their adequacy. I will be in touch regarding the need for any additional documents or alterations next Wednesday.

Peter Friedrichs
City Planner
City of Newport
43 Broadway
Newport, RI 02840
pfriedrichs@cityofnewport.com
o (401)845-5472
f (401)846-1824

From: David Martland <DMartland@silvalawgroup.com>
Sent: Wednesday, October 9, 2019 2:09 PM
To: Friedrichs, Peter <pfriedrichs@CityofNewport.com>
Subject: Pearl Car Wash

Hi Peter,

I am having a check in the amount of \$50 dropped off in connection with the administrative subdivision. Can you please confirm that application for DPR is complete. Thank you,

Dave

David P. Martland, Esq.
Silva, Thomas, Martland & Offenberg, Ltd.
1100 Aquidneck Avenue
Middletown, RI 02842
Tel no 401-849-6200
Fax no 401-849-1820
email: dmartland@silvalawgroup.com

David Martland

Subject: FW: updated renders

From: Joe Toole
Sent: Tuesday, August 13, 2019 11:44:55 AM
To: Friedrichs, Peter <pfriedrichs@CityofNewport.com>
Subject: Re: updated renders

Hi Peter,
I believe our next step is to have some civil work done including study of the vegetation patch at the rear of the property. This is being done by DiPrete Engineering for DEM approval. The C I zone allows for car wash use and the building will meet sideline, setback and other requirements.
Meanwhile, if you have any questions or thoughts please let me know.
Regards,
Joe

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From: Friedrichs, Peter <pfriedrichs@CityofNewport.com>
Sent: Tuesday, August 13, 2019 10:30:06 AM
To: Joe Toole <jtoole@toolecompanies.com>
Subject: RE: updated renders

Thank you, I received the renderings. I'm in the office all day if you would like to give me a call.

Peter Friedrichs
City Planner
City of Newport
43 Broadway
Newport, RI 02840
pfriedrichs@cityofnewport.com
o (401)845-5472
f (401)846-1824

From: Joe Toole <jtoole@toolecompanies.com>
Sent: Friday, August 9, 2019 2:34 PM
To: Friedrichs, Peter <pfriedrichs@CityofNewport.com>
Subject: Fwd: updated renders

Paul,
Let's talk when you're available, Maybe Tuesday if possible.
Thanks
Joe
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From: Larry Toole <larry@toolecompanies.com>
Sent: Wednesday, August 7, 2019 6:13:45 PM
To: Joe Toole <jtoole@toolecompanies.com>
Cc: Colin Toole <ctoole@toolecompanies.com>
Subject: updated renders

David Martland

Subject: FW: Pizza Hut property

From: Behan, Christopher <cbehan@cityofnewport.com>
Sent: Thursday, October 17, 2019, 4:01 PM
To: Joe Toole
Cc: Galvin, Girard; Friedrichs, Peter
Subject: RE: Pizza Hut property

Mr. Toole

Thank you for your e mail communication. While the Planner has reviewed this issue with this office, it is actually his decision to make as to whether your application meets the standard of substantially complete. He made a good faith decision that it did not.

Assistant City Solicitor Girard Galvin will be actually handling this matter and I have copied him on this response and your original e mail to me. He will review and consider what you have submitted and respond.

From: Joe Toole <jtoole@toolecompanies.com>
Sent: Wednesday, October 16, 2019 6:24 PM
To: Behan, Christopher <cbehan@cityofnewport.com>
Subject: Pizza Hut property

Hi Chris,

First, both Peter and Trish have been great and as they'll tell you, we've pulled out all the stops to deliver an application that gives the city a clear picture of what is planned and addresses the various checklist items listed on the application sheet. Obviously, there are many folks that will have to weigh in, including State environmental, DOT, etc. and like all projects, much more work yet to be done to satisfy various departments. In the final analysis, the project could fail to clear all of the roadblocks but we could proceed knowing that at least the use is permitted. The application is only the starting point, not the final product, as we all know. I sincerely believe that the information we provided, including a supplemental revision requested, does in fact satisfy the intent and meaning of the language; "substantially completed".

The below renderings are an idea of what we could create, although we will work with the City as I explained to Peter and Trish as well as Susan Taylor, who termed the design "Elegant". Trish will tell you that I will work with her to create "hardscape" and other features to help realize the vision of "Innovation". The car wash itself will be a huge asset not only in it's contemporary design and be strongly desired by the millennial generation but the equipment is highly innovative, will run quietly and will reclaim 80%+ of water usage.

Unfortunately, I can not close on the Pizza Hut property if the future determination of the car wash as a use is left to the discretion of a permitting authority. Because the zone currently lists this use as a by-right, I feel compelled to seek your consideration of whether or not the application and information I've submitted meets the requirements for a substantially complete application.

I know you are a fair-minded attorney and I think when the matter is fully considered, you will concur that our application should be allowed and as of it's date of submission.

Respectfully and cordially,
Joe Toole



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