

**STATE OF RHODE ISLAND PROVIDENCE PLANTATIONS  
TOWN OF BARRINGTON PLANNING BOARD**

**Public Hearing In Re:  
East Bay Community Development Corporation's  
Preliminary Plan/Comprehensive Permit Application:  
Palmer Pointe Neighborhood**

**APPLICANT, EAST BAY COMMUNITY DEVELOPMENT CORPORATION'S  
CLOSING STATEMENT**

**I. Introduction**

Based on the testimony and evidence submitted by the East Bay Community Development Corporation (the "Applicant") to the Barrington Planning Board (the "Board") on April 5, 2016, May 3, 2016 and June 7, 2016, the Applicant has addressed all of the conditions of the master plan approval as well as the comments made during the public comment phase of this process. In addition, the Applicant has satisfied the requirements under Rhode Island General Laws §45-53-4(a)(4)(v) by providing legally competent evidence on the record to allow the Board to make positive findings in support of its application. In support thereof, the Applicant provides the following closing statement:

**II. No significant negative environmental related to the presence of children and arsenic**

Specifically, the Applicant provided expert testimony that this development will not have a significant negative environmental impact on the health and safety of current or future residents of the community. See Rhode Island General Laws R.I. Gen. Laws §45-53-4(a)(4)(v)(D). The Board heard from Mr. Shawn Martin, of Fuss & O'Neill, who was qualified as an expert in civil engineering with a focus on brownfields, storm water management and urban renewal/urban redevelopment. See 6/7/16 Transcript, P. 17-40, 40-47, P. 101 L. 15- P. 102 L. 9; See also 4/5/16 Transcript, P. 14 L. 13- P. 21 L. 7, P. 34 L.17- P. 35 L. 20. In addition to Mr. Martin's expert testimony, the Applicant provided the Board with an e-mail from the Mr. James Byrne, Senior Environmental Scientist assigned to this development project with the United States Environmental Protection Agency's ("EPA"). The introduction of Mr. Byrne's e-mail as part of

the record was to provide the Board with information regarding the collaboration of the Applicant, EPA and the Rhode Island Department of Environmental Management's ("DEM") with the remediation efforts at this site including their time tables, investment and his opinion that the site can be safely and successfully remediated. According to Mr. Byrne, EPA's environmental contractor NOBIS will be conducting additional investigation to address the presence of dieldrin and arsenic. More importantly, Mr. Byrne's e-mail provided information to the Board that any subsequent cleanup will be completed under RIDEM Rules and Regulations and that the site will be cleaned "*to the strictest standards under RIDEM Remediation Regulations*". See e-mail from J. Byrne to Applicant's Attorney C. Capizzo dated 6/7/16. Mr. Byrne also stated:

Although the site is contaminated and needs to be cleaned up in order to be reused safely, in my opinion this site does not compare to the risks of more seriously contaminated sites such as an EPA Superfund Site. In that the site investigation is not complete as of yet, we cannot accurately determine what the final remediation will be at this point in time. It is my experience however, that sites of this nature can be effectively remediated & reused in a safe manner with the easily implemented, appropriate remediation technologies and other tools such as Environmental Land Use Restrictions.

Email from James Byrne, USEPA Sr. Scientist to Applicant's Attorney, C. Capizzo dated 6/7/16

There was no evidence presented to the Board that this development would have a significant negative environmental impact on the health and safety of the community due to the presence of dieldrin and arsenic. The only witness presented by Attorney Harsch was Thomas Nicholson. Despite testifying that he is a licensed professional engineer with over 34 years of experience in Rhode Island, Mr. Nicholson failed to conduct an independent review of any files at DEM related to the site and failed to speak to any of the technical staff from DEM, EPA, Fuss & O'Neill or PARE Engineering regarding their respective site investigations. See Transcript, 5/3/16, P.67, L. 18- P.69 L. 11. Furthermore, there was no evidence presented that any of Attorney Harsch's witnesses conducted any independent site investigation to support their testimony. The Board can clearly give no weight to Ms. Hahn Sweet's testimony related to the presence of dieldrin or arsenic at the site. Despite lacking any testimony about her experience in

environmental engineering and/or as an environmental scientist, Ms. Hahn Sweet admitted that she was not a soil scientist and not an expert on chemicals. See Transcript, 5/3/16, P.10, L. 24-25. She even went so far as to admit that “... *I am not standing up here professing to tell you that there is something wrong with what DEM is doing ...*” See Transcript, 5/3/16, P. 13, L. 15-18.

As it pertains to Professor Diebold’s testimony related to arsenic, although academically informative, there was no evidence presented to the Board that he reviewed any Site Investigation reports or spoke with any technical staff from DEM, EPA, PARE or Fuss and O’Neill. Professor Diebold’s testimony was certainly contradicted by Mr. Martin’s testimony and the e-mail from EPA’s Senior Environmental Scientist James Byrne dated June 7, 2016, regarding how EPA and DEM will address the remediation of arsenic and dieldren at the site. It should be of great significance to not only the Board but to the members of the public that the two lead federal and state environmental agencies responsible for regulating and enforcing the environmental rules and regulations are charged with developing the remediation plans, to be implemented by the Applicant, that will protect the health and safety of the public to the strictest of residential standards.

During the Public Hearing there was a concern raised about how future tenants of the development may be notified of any potential environmental land use restrictions (“ELUR”) implemented on the site. It should be noted that DEM’s ELUR declarations contain a provision requiring the owner in interest to provide notice to lessees and other holders in interest and “*shall cause any lease, grant or other transfer to include a provision expressly requiring the lessee, grantee, or transferee to comply with the ELUR*”. See Provision E in DEM’s ELUR Declaration entitled Notice of Lessees and other holders of interest in the property/contaminated site. ([www.dem.ri.gov/brownfields/documents/elur.doc](http://www.dem.ri.gov/brownfields/documents/elur.doc) ). Finally, Applicant will continue to work with DEM and EPA as they develop and implement the most appropriate remedial strategies to address the presence of arsenic and dieldren at the site to protect not only the environment but the health and safety of the current and future residents of the community.

### **III. Traffic and Pedestrian Safety**

The Applicant presented legally competent evidence to allow the Board to find that there will be no significant negative impact on the health and safety of the current or future residents of the community, related to the safe circulation of pedestrian and vehicular traffic. See RIGL 43-23-41(4)(V)(E). Specifically, the Board received testimony from the Applicant's traffic engineering expert, Derek Hug of Fuss & O'Neill a registered professional engineer with 18 years of experience in the area of traffic and transportation engineering. See Transcript, 6/7/16, P. 4 L. 24- P.6 L. 6, P. 57 L12- P.67 L: 13; See also Transcript, 4/5/16, P. 42 L. 20 – P. 57 L. 2. Mr. Hug's Traffic Impact Study and analysis was supported by the Town's own independent consultant PARE Corporation ("PARE"). In fact, PARE completed an extensive peer review of the Applicant's revised Comprehensive Permit Preliminary Plan and concluded, consistent with the Applicant's conclusion that "*additional traffic is anticipated to have little or no impact to the surrounding roadway network*". See PARE's engineering review services letter to Town of Barrington, Town Planner, Phillip Hervey dated April 4, 2016. Furthermore, PARE's own witness, John Shevlin, testified that they reviewed Fuss & O'Neill's Traffic impact study and found it acceptable. See Transcript, 4/5/16, P. 39 L.25- P. 40 L. 1. Mr. Shevlin also testified that PARE was in agreement with Fuss & O'Neill's conclusions and recommendations and accepted their "*...methodology for how they determined the number of trips, how they distributed traffic, how they looked at safety analysis, the capacity analysis, and there conclusion recommendations....*". See Transcript, 4/5/16, P. 40 L.10-14.

The Applicant and its experts took seriously the comments from the Board and the Public related to pedestrian safety and the distance required for residents of the development to access public transit. As stated in Applicant's response to testimony and public comment filed with the Board, there is no doubt that the area would be safer for pedestrians if a sidewalk was provided along the roadway. Such a sidewalk would be a benefit not only to prospective Palmer Pointe residents, but all residents of this area. However, building the sidewalk is a task that must be undertaken by the Town, as it will require at least temporary property use agreements or easements, and perhaps permanent easements or acquisitions.

As noted during the deliberations by the Board on June 7, 2016, the Applicant agreed to provide a fee-in-lieu for the Town to add sidewalks along the Palmer Pointe frontage. It should also be noted that regardless of the presence of sidewalks along Sowams Road, this area is inherently a car-dependent zone. The development is located outside of what is normally considered the “pedestrian shed” for transit service from the bus stop at County Road, typically considered to be ¼ mile. The stop itself is serviced by only two bus routes (60 and 61X), with a ride of approximately 20 minutes to any connecting routes at Kennedy Plaza or nearly an hour to the Newport Gateway Center. Therefore, it is the Applicant’s position that the vast majority, if not all, residents of this development will own at least one vehicle.

Although there was testimony by Ms. Hahn-Sweet, on behalf of Codder, that a majority of the low income residents in this development would not be able to afford cars, she failed to provide the Board with any support, legal or otherwise to support her assertion when questioned by the Board. Her testimony was simply a regurgitation of what she presented at the Master Plan which was rejected not only by the Board but also by the Rhode Island Superior Court. See Codder 2014R.I. Super. LEXIS 140, 27. In addition, Mr. Hug testified about alternative pedestrian routes that could provide safe passage to the East Bay Bike Path and bus stops along County Road. Within a few hundred feet of the development, heading south on Sowam’s Road, pedestrians can take crossways over to New Meadow Road where there is a sidewalk to the bike path and a sidewalk on County Road. There are three bus stops on the north side and crosswalks to get to the sidewalk on the south side. See Transcript, 6/7/16, P. 64 L. 10-25.

There was also some discussion during the Board’s deliberation regarding the number of parking spaces allotted for the development. See Transcript, 6/7/16, P.71 L. 23 - P.83 L. 23. According to the Applicant’s expert testimony there were 83 parking spaces approved at Master Plan. Id. The minimum amount of parking spaces required by the Town ordinance is 72. Id. Mr. Martin testified that the proposed 83 (71 spaces/ 12 on street) parking spaces was an attempt by the Applicant to address the concern of the Board as it relates to adequate parking for access to open space and visitors. Id. In attempting to address the Board’s concerns, the Applicant tried to strike a balance between excess impervious versus meeting the minimum

requirements of Town zoning. Recognizing several of the Board members' concerns regarding the number of parking spaces, the Applicant is willing to consider reducing the number of parking spaces to achieve the balance sought by the Board while still providing adequate parking for access to open space and visitors.

**IV. Master Plan Approval – Condition 2 – satisfied by the Applicant**

On May 3, 2016, Ms. Hahn-Sweet testified before the Board in her capacity as a municipal planner that the Applicant had not satisfied Condition of Approval # 2 of the Master Plan Approval. See Transcript 5/3/16, P. 6 L. 22 –P.8 L.15. Pursuant to Condition of Approval #2:

Provide a minimum of ten (10) single-bedroom units (25 percent of the maximum number of units) with the remainder of the units a mix of two and three bedrooms, maintaining the same proportion of the original submission with some master bedrooms on the first floors.

See Town of Barrington Planning Board Decision dated 8/6/13, Conditions of Approval #2

In order to controvert this testimony, one does not have to look any further than the testimony of the Applicant's expert in architecture and community design, Paul Attemann, a registered Architect with Union Studio Architecture and Community Design. Mr. Attemann testified at the June 7, 2016 hearing that, *"Previously in the Master Plan there were two buildings here. These four units here are the one-bedrooms. We have 2 one –bedrooms here, we have one-bedrooms right in here, too (indicating). I should point out that's a total of 10. It's 25% of the units are one bedrooms in the preliminary plan. And at Master Plan 25 % was proposed and approved...for the record, 25% of the 40 units, of the affordable will be one-bedroom."* See Transcript 6/7/13 P. 53 L. 20- p. 54 L.1-7. Based on the Mr. Attemann's testimony and other legally competent evidence submitted by the Applicant as part of the record and in accordance with Rhode Island General Laws, Chapter 45-53, entitled Low and Moderate Income Housing, Applicant clearly meets condition #2 of the Board's Master Plan approval.

## V. Density

The issue of density was raised and addressed during the public hearing phase of the preliminary plan. More importantly the density issue is not a new or novel issue raised by CODDER since it has already been decided by the Rhode Island Superior Court. At both the April 4, 2016 hearing and the June 7, 2016 hearing the Town Solicitors' advised the Board and members of the public that the density issue should not be considered by the Board since the Superior Court approved the Board's granting of Master Plan Approval and already ruled on the density issue. See *Codder 02806 v. EBCDC*, 2014 R.I. Super. LEXIS140. In fact, on June 7, the Town Solicitor cited the relevant section of the *Codder* case where the Honorable Justice Daniel Procaccini found:

“...Specifically, the Board discussed, at length, confirming the density of the proposed development with the provisions of the plan....Accordingly, the Board made a condition of its approval of the comprehensive permit that the proposed development be reduced to 42 total units so that its density would fall into the allowable range at 7.45 units per acre. In the instant case, the 42 unit proposed development is actually within the density allowed under the Plan....Thus the Appellants' contention that the proposed development has too high a density is clearly not consistent with the plan.”

See *Codder v. EBCDC*, 2014 R.I., 35, 36

In addition, the Solicitor affirmed that the density issue has already been decided by the Rhode Island Superior Court when he cited the *Codder* case and stated “*So I would say then, that, the unit mix and that density at 42 is something that was both approved at Master Plan and Upheld by the Court. So I think that's something that you can't change at this point*” See Transcript, 6/7/16, P. 144 L. 1-P. 145 L. 1-4; See also Solicitor addressing the Board, Transcript 4/3/16 , P. 2 L. 5-9, L. 14-17, “*So one of the primary issues on appeal of the Master Plan decision was the density of the proposed development...But in regard to the proposed unit density, I would advise the Board that that decision has already been made and approved by Superior Court.*”

## VI. Conclusion

Based on the legally competent expert testimony and evidence submitted by the Applicant over the course of three planning board hearings, the Applicant has addressed all of the conditions of master plan approval as well as the comments from the Board and from members of the public. The purpose of the preliminary phase process is for the Board to conduct a technical review of the supporting materials submitted by the Applicant including engineering plans depicting the development project as well as existing site conditions. The Applicant has met the requirements under RIGL §45-23-41 (a) with its submission of extensive technical reports and expert testimony submitted as part of the record and with its application. At this stage, the Applicant has been and will continue to work closely with state and federal agencies on permitting for the proposed development, however as noted by the Solicitor, such approvals are not required until final plan approval and the lack of the same at this stage cannot be a reason for denial on the preliminary plan. See RIGL 45-53-4 (a)(1)(vii). See also Transcript, 6/7/16, P. 137, L. 18-22 (*“However, with the Comprehensive Permit, it’s specifically set forth by statute that they do not need to have those approvals until the final plan. So the fact that EPA and/or DEM approvals are not in hand is not a reason for denial on the preliminary”*).

There has not been any legally competent evidence submitted by Attorney Harsch, on behalf of Codder to prohibit the Board from approving the Applicant’s development plan. Once again, similar to the testimony that Codder submitted to the Board at master plan, they rely on general statements made by their witnesses rather than assertions supported by legally competent evidence and data. See *Codder v. EBCDC*, 2014 R.I., 27, 28 (*“However they (Codder) provide no support whatsoever for their assertions; they fail to cite to a single source, legal or otherwise...consequently, the Appellant’s (Codder) reliance on bare or naked assertions with no data or support on appeal is predictably ineffective”*). The Board should weigh carefully the testimony of Codder’s witnesses based on their lack of qualifications to testify at this technical stage and their failure to conduct due diligence by reviewing the available reports or even speak with the appropriate federal/state agencies and private environmental engineers/consultants working on this development plan including the Town’s own peer review consultant. <sup>1</sup>

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<sup>1</sup> Attorney Harsch and a group of Barrington residents did meet with EPA Environmental Scientist James Byrne on Friday, June 23, 2016. Mr. Byrne addressed their concerns and communicated the same message that appears in his e-mail to Applicant’s Attorney, Christian Capizzo dated June 7, 2016.

The legally competent evidence presented by the Applicant should lead this Board to the conclusion, at this stage, that the Applicant has met the requirements pursuant to RIGL 45-53-4 (v), that site is suitable for the proposed development and that there will be no significant negative impact on the environment or on the health and safety of the current and future residents from this development. The Applicant will continue to work closely with not only the federal and state agencies overseeing this development but the Town and the Board to ensure that the Applicant continues to meet its statutory and regulatory obligations.

Respectfully Submitted on Behalf of Applicant,  
East Bay Community Development Corporation,  
By their Attorney,



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Date: 6/20/16

### **CERTIFICATION**

I hereby certify that on the 20<sup>th</sup> day of June 2016, the within was sent by U.S. Mail and via email to the following:

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