APQS | ADLER POLLOCK & SHEEHAN P.C.

Memorandum

To: **Jeff Willis**
From: **Joseph DeAngelis & Robert Craven, Jr.**
Date: **August 16, 2021**
Re: **Gardner, Bruce: Sea Lea Ave, Charlestown, Rhode Island**

The permitting process for the proposed residential development on the property located at Sea Lea Avenue, Charlestown, Rhode Island, Assessor's Map 9, Lot 387 (the "Property") has spanned over the course of the last fourteen years. In 2007, the property owners, Bruce Gardner and Charles Sweet (collectively the "Applicants") were required to obtain variances from the Rhode Island Department of Environmental Management for the location of the proposed Onsite Wastewater Treatment System ("OWTS"). Specifically, due to size and configuration of the Property, the OWTS could only be located within two feet of the property line, seventy-one feet from a nearby well, and fifty feet from Green Hill Pond, which did not meet the dimensional standards under DEM's regulations. Following an initial denial of the application by RIDEM staff, an appeal to the DEM Administrative Adjudication Division followed and after a three day hearing, the RIDEM staff determination was reversed and the proposed OWTS was approved. The RIDEM Director summarily reversed the Decision of the Hearing Officer and an appeal was filed with the Rhode Island Superior Court. Associate Justice Matos reversed the Director's Decision resulting in a Consent Agreement in 2016 whereby DEM approved the variances requested. The site plan for this project remains unchanged from the provisions of the Consent Agreement agreed to by the applicants and RIDEM.

Thereafter, the Applicants were required to seek a special use permit from the Town of Charlestown Zoning Board of Review (the "Zoning Board") because the proposed OWTS was within one hundred feet of a boundary of fresh water or coastal wetland and within the one hundred year flood hazard boundary. Between the winter of 2018 and the spring of 2019, the Zoning Board of Review held four contentious hearings on the matter and ultimately voted to deny the Applicants' requested special use permit. (Three members voted to approve the special use permit but the votes of four members was required for approval). The Applicants appealed the Zoning Board of Review's Decision to the Rhode Island Superior Court. On December 18, 2020, the Rhode Island Superior Court reversed the denial and granted the special use permit.

On February 10, 2021, in what was to be the last leg of the permitting process, the Applicants submitted its application for Assent with CRMC (the "CRMC Application"). Following review of the CRMC Application, CRMC determined that the Applicants need to obtain a setback variance from the Charlestown Zoning Board.

The Rhode Island Supreme Court has held that petitioners have a right of final adjudication of their petition within a reasonable period of time and that a remand of a matter could be prejudicial. *See Easton's Point Association, Inc. v. CRMC,* 559 A.2d 633, 636 (1989) (court held that a remand would not provide decisive new information and would prejudice [the petitioners'] right to a final adjudication of their petition within a reasonable period); *see also Sakonnet Rogers, Inc. v. CRMC,* 536 A.2d 893 (R.I. 1988) (court denied remand to CRMC and allowed petitioner to proceed with construction of dwelling reasoning that it was seven years since the application was filed and a remand would not be in the best interest of justice). Pursuant to the rationale set forth in *Easton's Point Association* and *Sakonnet Rogers, Inc.*, the Applicants are entitled to a final resolution of their permitting process that commenced *fourteen* years ago. Throughout the fourteen years, the Applicants have been before various applicable state and municipal permitting authorities, with the applications to both the DEM and the Town of Charlestown Zoning Board of Review resulting in proceedings before the Rhode Island Superior Court.

Requiring the Applicants to do so would not be in the best interest of fairness and justice and would cause an intolerable delay in the already lengthy permitting process. *See Ratcliffe v. CRMC,* 584 A.2d 1107, 111 ("If seven years was a long wait in *Sakonnet Rodgers*, the [petitioners'] wait has been an extraordinarily and unjustifiably long wait…[f]ourteen years have come and gone. At this point any further delay would be intolerable."). Should CRMC require the Applicants to return to the Zoning Board at this late stage to seek *additional* relief, it would effectively moot the last fourteen years of regulatory and legal proceedings. Applicants OWTS variance expires on December 22, 2021 and cannot be renewed. It is highly unlikely, if not a procedural impossibility, that proceedings before the Zoning Board will be completed before that time. Were CRMC to require Applicants seek a front yard variance—as inexplicably suggested by CRMC staff—Applicants would not only be required to return to DEM to seek an OWTS variance over *five years* after DEM approved the very same variance, but also to the Zoning Board to seek the same special use permit which the Superior Court granted in its December 2020 opinion, since the site plan would change. And given the contentious nature of the previous Zoning Board proceedings, to ask the Applicants to again return to this Zoning Board to seek a special use permit would undoubtedly result in another denial and further court proceedings.

Nothing in the lengthy administrative record in this case indicates the front yard setback is problematic from an environmental standpoint. This absence is telling; a ten-foot front-yard variance will not materially change the environmental impact of the proposed construction. It is our opinion that the RED Book contains no requirement for seeking a front yard variance. The fourth variance criteria is and remains the burden of the Applicants which they are prepared to meet without returning to the Zoning Board and risking the expiration of their valid OWTS permit.

In summary, these Applicants are entitled to a speedy hearing by the Council. As stated, their OWTS permit expires in a matter of months. As our Supreme court has determined, Applicants are entitled to a final resolution and the simplistic approach by CRMC staff to suggest a return to the Zoning Board is unreasonable, without any support within the CRMC Program and a denial of the Applicant's right to a hearing.