STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 14, 2016)

TOWN OF BARRINGTON, Appellant	:	
and	:	
FOUR TOWN FARM, INC.; JASON LAWRENCE; BARRINGTON LAND CONSERVATION TRUST, INC.; THE BARRINGTON PRESERVATION SOCIETY; and RICHARD AND MARTHA BROOKS, Intervenor-Appellants	:	
VS.	:	**C.A. No. PC-2014-3500**
NORTH END HOLDINGS COMPANY, LLC and STATE HOUSING APPEALS BOARD, Appellees	:	

DECISION

CARNES, J. The Town of Barrington (the Town or Barrington) appeals a decision (Decision) from the State Housing Appeals Board (SHAB) reversing a decision (Planning Board Decision) issued by the Barrington Planning Board (Planning Board) denying master plan approval of North End Holdings Company, LLC's (North End) application for a comprehensive permit (Application). Jurisdiction is pursuant to G.L. 1956 § 42-35-15. For the reasons set forth herein, the Decision is hereby remanded.

I

Facts and Travel

North End owns a vacant, 6.8 acre parcel of land off George Street in Barrington. The parcel is situated at the border of the Town and the Commonwealth of Massachusetts. In April 2011, North End submitted a proposal to the Planning Board seeking permission to construct twenty-seven units—seven of which would be designated as "affordable"—on the above-mentioned parcel.[1] See Planning Bd. Hr'g Tr. 4:25-5:18, June 5, 2012.[2]

Prior to submitting a formal Application, North End stated an intention to seek a comprehensive permit, as authorized by the Rhode Island Low and Moderate Income Housing Act (the Act). On June 7, 2011, pursuant to the Act, the Planning Board held a pre-application hearing, where it expressed concern that the development would be inconsistent with the character of the surrounding area. See Planning Bd. Mins., June 7, 2011. The Planning Board informed North End that the development would result in a density contrary to the goals stated in the Town's Comprehensive Plan (the Plan); said goals include the protection of environmentally sensitive areas, as well as the agricultural and rural character of the George Street area. See id. at 1.

On December 28, 2011, North End submitted an Application for a comprehensive permit. See Appellant's Mem. at 4. North End proposed to build six multi-family buildings, with a density of 10,200 square feet per unit. See id. The Planning Board certified the Application as

[1] Although North End never formally amended its Application, it did present to the Planning Board an alternative proposal consisting of twenty-four units, six of which would be affordable. See Planning Bd. Hr'g Tr. 60:6-61:10, June 5, 2012. It was this proposal to which SHAB eventually granted master plan approval. North End Holdings Co., LLC v. Town of Barrington Planning Bd., SHAB No: 2012-1, at 26 (June 26, 2014) (Decision).

[2] All references to the transcript of the June 5, 2012 hearing before the Planning Board are referenced as T1.

complete on March 26, 2012 and forwarded it to the Town's Conservation Commission and Technical Review Committee (the Committee) for further consideration. See Planning Bd. Decision at 4 (Aug. 29, 2012).

At a hearing before the Committee on April 12, 2012, North End's project engineer, Scott Moorehead (Mr. Moorehead), testified concerning North End's proposal. Technical Review Comm. Mins. at 1. Mr. Moorehead stated that North End had applied to construct the number of units that the parcel could "reasonably accommodate." Id. Members of the Committee noted that a 6.8 acre parcel in the George Street area would normally accommodate no more than five or six units and that North End had requested a density bonus exceeding what is typically provided under the municipality's Mandatory Inclusionary Zoning scheme.[3] Id.

North End nonetheless appeared before the Planning Board on June 5, 2012 to argue for master plan level approval of its Application. See generally T1. North End contended that it had attempted to develop a proposal compatible with the Town's aspirations for the area. Id. at 7:4-12. However, North End also noted a certain amount of tension between the Town's desire to preserve the rural character of the George Street area and the State's insistence that the Town provide additional affordable housing. Id. at 6:20-7:12.

During the June 5, 2012 hearing, Planning Expert Joseph D. Lombardo (Mr. Lombardo) testified regarding a report that he had prepared at the request of North End. Id. at 26:6-32:9; 42:19-46:21. The report cited to the Town's Zoning Ordinance, Chapter 185-190, which states that the Town estimates that as of 2007, five hundred additional affordable units were required in order for the Town to meet its affordable housing goal. Id. at 28:22-29:3. Mr. Lombardo further

[3] Mandatory Inclusionary Zoning is discussed in Part II Chapter 185, Article XVII of the Barrington Legislative Code.

noted that the Town had only 300 acres of developable land available, and the Plan subjects the parcel and the surrounding area to its affordable housing strategies. Id. at 29:4-30:14.

Following the June 5, 2012 hearing, counsel for North End and the Town submitted legal memoranda regarding the effect of then-recent amendments to the Plan. See Planning Bd. Hr'g Tr. 6:14-20, July 10, 2012;[4] see also Memorandum from William R. Landry, on behalf of North End to the Town Board of Review (July 3, 2012); Memorandum from Nancy E. Letendre, Esq., AICP and Andrew M. Teitz, Esq., AICP, to the Honorable Members of the Planning Board (July 5, 2012) (Barrington Strategy 5-8 Mem.). In November 2011, the Town amended what it commonly refers to as either Housing and Neighborhoods Strategy 5-8, or simply Strategy 5-8.[5] The amendment essentially restricted density bonuses to twenty percent unless the development devoted at least fifty percent to low and moderate income housing. However, the amendment was not approved by the State and made part of the Town's Affordable Housing Plan until May of 2012, long after North End's comprehensive permit Application was certified as complete.

The parties argued their positions relating to the amendments before the Planning Board on July 10, 2012. See generally T2. North End asserted that determinations relating to comprehensive permit applications may only be based on the Plan in place at the time when the application is certified as complete. Id. at 7:2-8:19. Thus, according to North End, the Planning Board would not be permitted to consider any amendments to the Plan approved after March 26, 2012. Id. The Town, on the other hand, took the position that **"[a] comprehensive plan is adopted for the purpose of conforming municipal land use decisions . . . when it has been**

[4] All references to the transcript of the July 10, 2012 hearing before the Planning Board are referenced as T2.

[5] Strategy 5-8 describes the Comprehensive Permitting process as a "negotiation" and states that "the Town will pursue an aggressive strategy to ensure that the goals and values of the community are upheld." Planning Bd. Decision at 4.

enacted by the legislative body of the municipality." Barrington Strategy 5-8 Mem. at 2 (emphasis in original) (quoting G.L. 1956 § 45-22.2-8(c)) (internal quotation marks omitted). The Town therefore contended that "[t]he Affordable Housing Plan amendment applicable to [North End's] application is the version enacted by the Town Council in November 2011. The state approval effects only state agency actions which will subsequently take place." Id.

Also on July 10, 2012, the parties discussed payment of a fee by North End in order to provide for expert review of the proposal. T2 at 3:11-6:13. North End argued that such review was not required at the master plan stage and should be conducted after master plan approval was granted. Id. North End also presented a yield plan, showing that if the parcel were developed in conformity with the Town's Zoning Ordinance, it would yield four or five single-family residences. Id. at 28:9-30:20.

Following the presentation by North End, the Planning Board heard testimony by Town Planner Philip Hervey (Mr. Hervey) regarding a memorandum he drafted concerning the inconsistency of North End's proposal with certain aspects of the Plan. Id. at 80:2-84:4; see also Memorandum from Philip Hervey, AICP, Barrington Town Planner, to Michael McCormick, Planning Board Chair, and Andy Tietz, Assistant Town Solicitor (July 10, 2012) (Hervey Mem.). The memorandum referenced steps taken by the Town to implement the Plan, including the adoption of Mandatory Inclusionary Zoning. Hervey Mem. at 1-3. The memorandum also discussed the Town's Future Land Use Map, showing areas Mr. Hervey asserted had been designated for high-density development. Id. at 2. Mr. Hervey noted in his memorandum that the parcel "is designated on the Future Land Use Map . . . as 'Rural Residential'" and that "[t]he Future Land Use Map defines 'Rural Residential' as a '**designation for low-density residential areas** . . .'" Id. at 3 (emphasis in original). Finally, the memorandum addressed environmental,

health, and safety concerns relating to North End's proposal, as well as North End's plans to build a septic system and wells to service the development. Id. at 5. After hearing the testimony of Mr. Hervey, the Planning Board voted to deny North End's Application and directed Mr. Hervey to draft a written decision for its consideration. T2 at 84:5-85:6. The decision was approved by the Planning Board on August 7, 2012 and entered on August 29, 2012.

A

The Planning Board Decision and North End's Appeal

The Planning Board based its denial principally upon the proposal's density, design, and location. See generally Planning Bd. Decision. The Town noted that the proposal conflicted with multiple goals, policies, and strategies of the Plan and raised concerns regarding the development's potential impact on the environment, as well as the health and safety of the surrounding community. Id. at 6-11. The Town acknowledged Mr. Moorehead's statement that the proposal would have no negative environmental effects, but found that peer review by a third-party engineer would have enabled the Town to more thoroughly evaluate the Application and assess the veracity of Mr. Moorehead's assertion. Id. at 10-11. In addition, the Planning Board Decision discussed progress made by the Town toward the achievement of its affordable housing goal, referencing the acquisition of land in the George Street area and the Town's intent to develop the lot as affordable housing. Id. at 9-10. The Planning Board Decision further cited the Application for its failure to comply with the Town's amended Affordable Housing Plan, including the portions that had been recently amended, id. at 4-5—the application of which were in dispute.

On September 18, 2012, North End appealed the Planning Board Decision to SHAB. In the supporting memoranda it provided to SHAB, North End referenced a finding stated in the

Barrington Zoning Ordinance that the Town "has only 300 acres of developable land left, and has to create 500 affordable housing units in the next 20 years." Appellee's SHAB Mem. at 8. North End cited Mr. Lombardo's testimony that "traditional zoning by itself is not capable of creating desirable neighborhoods," id. (internal quotation marks omitted), as well as the Town's own Plan for the proposition that the parcel is "suitable for the Town's affordable housing strategies such as to permit development at increased densities up to 10 units per acre in the R-40 zone;" id. at 10. Furthermore, North End reiterated its position that peer review was not required at the master plan level. Id. at 18.

The Town argued in response that the Planning Board's denial of North End's Application was consistent with Barrington's Comprehensive and Affordable Housing Plans. See Appellant's SHAB Mem. at 12-15; 23-24. In particular, the Town noted that it had implemented a plan to achieve its affordable housing goal, and it had made significant progress toward achieving that goal. Id. at 15-20. The Town also contended that North End's proposed development would have an adverse impact on the rural and agricultural character of the George Street area. Id. at 20-23.

Additionally, interested third parties such as the Barrington Land Conservation Trust, Inc. (the Trust), the Barrington Preservation Society (the Society), and owners of property located near the subject parcel sought permission to intervene in the proceedings relating to North End's appeal. See generally SHAB Tr., Apr. 3, 2013.[6] SHAB conducted a hearing concerning the requests for intervention on April 3, 2013, during which counsel for the Town and North End presented their respective arguments regarding intervention and the standard of review to be applied to the requests therefor. Id. Counsel for North End contended that, under Rule 8.0 of the

[6] All references to the transcript of the April 3, 2013 hearing before SHAB are referenced as T3.

Rules Implementing the Rhode Island Low and Moderate Income Housing Act, a party seeking to intervene must "demonstrate that their property will be injured by a reversal or modification of the decision of the board below." Id. at 18:8-10. According to counsel for North End, the parties seeking to intervene failed to demonstrate a particularized injury. Id. at 18:11-20:10. Instead, they made claims primarily relating to harm which would befall the environment and the George Street area, in general. Id. Because these interests were shared by the Town, counsel for North End urged SHAB to deny intervention on the basis that the interests of the parties seeking to intervene were adequately represented by a party to the proceedings—i.e., the Town. Id. at 20:6-10.

In response, counsel for the Town advised SHAB to consider, as an initial matter, whether the parties seeking to intervene would be aggrieved by a decision in favor of North End. Id. at 27:8-32:6. Counsel for the Town contended that intervention should be permitted if SHAB found first that the parties seeking to intervene were aggrieved, and second that the Town could not adequately represent the parties' interests. Id. at 27:8-35:3. Counsel for the Town also argued that third parties owning property within 200 feet of the subject parcel should be "automatically presumed to be aggrieved," and the Town could not adequately represent the interests of third-party property owners who either did not reside in Barrington or who would not approve of a hypothetical consent judgment and settlement. Id. at 28:8; 36:20-37:4; 38:19-39:4; 44:13-45:14.

The parties seeking to intervene offered their respective arguments during the hearing as well. Id. at 71:9-92:22. Jason Lawrence, who owns property at 153 George Street, requested permission to intervene on the basis that establishment and operation of a septic system on the subject parcel could produce pollution affecting the quality of well water which he and other

members of the community rely upon. Id. at 71:9-73:21. Charlotte Sornborger (Ms. Sornborger), past president of the Trust, claimed that the Trust should have been permitted to intervene because the Trust "has a direct and unique interest in the outcome given its mission and history of active protection of the environment and wildlife habitat at Nockum Hill Refuge." Id. at 73:24-74:13. Ms. Sornborger noted that the Trust was the party responsible for drafting the Refuge Management Plan; the primary purpose of which was to provide protection for the diamondback terrapin, a locally threatened species of turtle which allegedly nests in the George Street area. Id. at 74:14-19; 75:12-18. Nathaniel Taylor (Mr. Taylor), vice president of the Society, acknowledged that the Society does not own real estate, but claimed that it has a "particular interest in the unique historical resources of the Town of Barrington" that would be "adversely affected by a reversal of the planning board's rejection." Id. at 76:1-3; 77:4-5; 77:23-78:5; 79:15-19. Mr. Taylor requested permission to present to SHAB previously undisclosed findings regarding the "historic nature" of the area, but confessed to a lack of certainty regarding whether the Society should be permitted to participate in the proceedings as an intervenor or as a friend of the Court. Id. at 78:6-80:13. Chris Clegg (Mr. Clegg), speaking on behalf of Four Town Farm, Inc. (Four Town Farm), voiced concern regarding water availability in the George Street area, as well as the effect that sewage runoff from the subject parcel could have on the overall quality of his crops. Id. at 80:20-21; 81:4-13. Mr. Clegg also admitted to confusion concerning "what it is to be an intervenor," stating that he "would like to be an intervenor just in case issues arose where you needed to ask me questions." Id. at 81:1-3; 81:23-24. After receiving an explanation from SHAB's legal counsel regarding what intervention entails, Mr. Clegg asserted that the Town could not adequately represent his interests and reiterated his desire to intervene. Id. at 84:2-6. Martha Brooks, whose address is 138 George Street, also expressed

uncertainty regarding whether the Town could adequately represent her interests. Id. at 85:25-86:17. Mr. Van Edwards, whose address and full name was not disclosed during the hearing, alleged that he was not adequately informed regarding the opportunity to seek permission to intervene.[7] Id. at 95:25-96:2.

After hearing the testimony of the above-mentioned third parties,[8] SHAB proceeded to deliberate on the requests for intervention. Id. at 94:2-102:11. Brenda Clement (Ms. Clement) asserted that she and the other members of SHAB should focus on whether the Town could adequately represent the interests of the parties seeking to intervene. Id. at 99:16-21. Chairwoman Kelley Morris, Esq. agreed in part, but declared that intervention should only be permitted where the party to the proceedings and the parties seeking intervention had adverse interests. Id. at 100:24-101:8. Ms. Clement contended that the issues raised by the Town and the parties seeking intervention were sufficiently similar that the former would be capable of adequately representing the latter, and SHAB proceeded to deny the requests for intervention. Id. at 105:2-6; 105:13-111:10.

SHAB conducted another hearing on December 13, 2013, where the Town and North End restated their respective positions regarding North End's appeal of the Planning Board Decision. See generally SHAB Tr., Dec. 13, 2013.[9] During the hearing, the members of SHAB inquired as to how many units North End would have been permitted to construct if it submitted

[7] Except for Ms. Sornborger, all of the above-mentioned parties appeared without legal counsel present. See T3 at 73:2-3; 77:11-12; 80:22-25. Ms. Sornborger had been accompanied at the hearing by Attorney Jan Reitsma, who departed before having an opportunity to speak on behalf of Ms. Sornborger or the Trust. See id. at 74:1-6.

[8] In addition to Lauren Clegg, who ultimately withdrew her request to intervene. See id. at 92:2-22.

[9] All references to the transcript of the December 13, 2013 hearing before SHAB are referenced as T4.

an Application in compliance with the Town's Zoning Ordinance. Id. at 16:7-13. The following exchange ensued:

> "Mr. Richard: . . . [T]here is also the inclusionary zoning option available to your client as a landowner. What would that result in, how many units?
>
> "Mr. Landry: Probably 6 very expensive houses and 1 affordable unit.
>
> "Ms. Nickson Morris: That unit would have to be integrated with the others? It would have to be built in accordance with the way the others were built, right?
>
> "Mr. Landry: . . . The idea was to not have some separate neighborhood for the affordable units so as not to create a significant stigma, I think. . . .
>
> "Ms. Nickson Morris: Within that 6, yes.
>
> "Mr. Grundy: So we have to round up or round down now.
>
> "Mr. Richard: Round down.
>
> "Mr. Grundy: 20 percent of 6 would be 1.2." Id. at 16:10-17:6.

Later, a member of SHAB requested additional information concerning the number of units a developer could construct by right on the parcel in question. Id. at 80:20-24. Counsel for the Town responded as follows: "In the certified record, Item G10 is a plan for 4 units on this property. It's titled Taylor Court. It was presented during the public hearing as the yield plan for this project." Id. 80:25-81:3. SHAB again displayed confusion on the main issue:

> "Mr. Richard: . . . This is what I'm trying to understand. Help the board. The Town does say in its decision, though, that it still finds inconsistency under 5.8 previously enacted.
>
> . . .
>
> "Mr. Landry: The 2009 Comprehensive Plan amendment said this property, Knockum Hill, four town farm areas, said it's suitable for affordable housing strategies up to 10 times base density. . . .
>
> . . .
>
> "Mr. Landry: . . . The 2009 scenario that's applicable to us is up to 10 times base zoning, suitable area for affordable housing strategies. They said that, declared it.

> They had hearings on it, public participation. Town Council voted, sent it to Statewide Planning and got it approved. That is why this is, 99 percent of what has been presented is so far out of bounds. The only issue before the board is whether this is consistent with the approved Affordable Housing Plan applicable to this project. That is up to 10 times base density suitable for the area's affordable housing strategies. That's it. The Town can't make that disappear." Id. at 75:12-77:5.

SHAB reconvened on April 9, 2014 to deliberate and reach a determination concerning the appeal. See North End Holdings Co., LLC v. Town of Barrington Planning Bd., SHAB No: 2012-1, at 19 (June 26, 2014) (SHAB Decision) The members of SHAB unanimously agreed that the amendments made to the Plan after North End's Application was certified as complete were not applicable to North End's Application. See id. The members of SHAB expressed concern regarding the Town's failure to meet its affordable housing goal and found the Town's opposition to North End's Application inconsistent with its stated intention to construct affordable housing on its own land in the George Street area. See id. Finally, SHAB found that, although significant engineering-related issues relating to North End's proposal remained unresolved, such analysis was properly reserved for a phase of review subsequent to master plan level review. See id. SHAB ultimately held that North End's Application was consistent with Barrington's Plan. See id. At the conclusion of the April 9, 2014 hearing, SHAB instructed its legal counsel to prepare a written decision in accordance with its findings and conclusions. See id.

In its Decision, SHAB found that "the Planning Board undertook an unduly restrictive balancing of the competing considerations without giving proper weight to the need to increase Barrington's low and moderate income housing." Id. at 24. SHAB concluded that "the primary driving consideration throughout the Planning Board's analysis was the project's density," and that the Town "assumed that the developer would be able to build four residential units as a

matter of right and would therefore be entitled to just one additional unit as the density bonus." Id. at 23-24. Following its review of the record, SHAB vacated the Planning Board Decision, basing its analysis on the following five factors: (A) Barrington is below the Act's ten percent requirement for low and moderate income units; (B) the Town improperly applied the amended version of its Plan to North End's Application; (C) North End's Application is consistent with the Affordable Housing Plan and Comprehensive Community Plan; (D) the developer has shown its intention to proceed and build the project in a manner that respects the surrounding area; and (E) important engineering issues must still be considered at the preliminary plan level. Id. at 20-26.

The Town appealed SHAB's Decision to this Court on July 14, 2014. In its memorandum supporting its appeal, the Town contends that North End's proposed complex is incompatible with the rural and agricultural character of the neighborhood where the parcel is located; the project is contrary to the Town's Affordable Housing and Comprehensive Community Plans;[10] and North End refused to address serious environmental concerns, including a threat to an allegedly endangered species whose habitat borders the project site. Appellant's Mem. at 30-43. The Town notes that "North End made no effort to explain why it could not make a profit by building at a lower density, even if it meant offering fewer affordable housing units as a result," id. at 7, and "[a] plain reading of the Comprehensive Plan makes it abundantly clear that the Town's plan for the area where North End's property is located is for low density development that is consistent with the rural agricultural character that exists there," id. at 14. The Town also argues that, although North End was not required to submit fully engineered

[10] The Town even goes so far as to contend that North End's proposal is inconsistent with the version of the Affordable Housing Plan that North End itself agrees is applicable, as well as the version the Town argues should apply. Appellant's Mem. at 20 n.34. Therefore, this Court declines to consider whether Strategy 5-8 as amended applies to North End's Application.

plans at the master plan level of review, it did need to provide legally competent evidence permitting the Planning Board to make a positive finding regarding negative environmental impacts, as well as negative impacts on the health and safety of residents of the community resulting from the proposed development. Id. at 25; 34-39. Finally, the Town contends that SHAB committed clear error by denying the above-mentioned third parties' requests to intervene, and SHAB abused its discretion by basing its Decision on evidence concerning a proposal to develop affordable housing near the subject parcel. Id. at 22-23; 26-27.

In response, North End contends that this Court should affirm SHAB's Decision vacating the Planning Board's denial. See generally Appellee's Mem. North End argues that its proposed development is within the density limits contemplated for the George Street area, and SHAB was correct in deciding that the Planning Board prematurely rejected the Application based on environmental considerations. Id. at 21-26. In its memorandum, North End notes that "[t]he total needed affordable housing units to achieve the **minimum** 10% threshold in the Act is 614. The Town has only 125, and – again – only 300 acres of undeveloped land." Id. at 16 (emphasis in original). North End also references the report and testimony offered by Mr. Lombardo, stating that "[w]ith respect to the 6.7 acre project site in particular, Lombardo noted how its traditional base R-40 zoning would result in a maximum of 6 units and not serve the Town's affordable housing needs, whereas the project proposed would itself produce seven (7) **affordable** housing units." Id. (emphasis in original). North End further contends that SHAB examined the factors it was required to consider and properly granted master plan approval after finding that certain engineering-related matters "remain open for full and detailed consideration during the upcoming preliminary plan review." Id. at 17-19 (quoting SHAB Decision at 26) (internal quotation marks omitted).

II

Standard of Review

An applicant whose comprehensive permit application is either denied or granted with conditions that make operation of the development infeasible has the right to appeal the decision of the local review board to SHAB. Sec. 45-53-5(a). The standard of review which SHAB must apply has been articulated by the General Assembly as follows, in pertinent part:

> "In hearing the appeal, the state housing appeals board shall determine whether: (i) in the case of the denial of an application, the decision of the local review board was consistent with an approved affordable housing plan, or if the town does not have an approved affordable housing plan, was reasonable and consistent with local needs . . ." Sec. 45-53-6(b)(i). [11]

Subsection (c) enumerates a list of factors that SHAB may consider in making its determination:

> "(1) The consistency of the decision to deny or condition the permit with the approved affordable housing plan and/or approved comprehensive plan;
>
> "(2) The extent to which the community meets or plans to meet housing needs, as defined in an affordable housing plan, including, but not limited to, the ten percent (10%) goal for existing low and moderate income housing units as a proportion of year-round housing;
>
> "(3) The consideration of the health and safety of existing residents;
>
> "(4) The consideration of environmental protection; and
>
> "(5) The extent to which the community applies local zoning ordinances and review procedures evenly on subsidized and unsubsidized housing applications alike." Sec. 45-53-6(c).

A decision made by SHAB may be appealed in Superior Court. Sec. 45-53-5(c). The Superior Court is not permitted to substitute its judgment for that of SHAB as to the weight of the evidence relating to questions of fact. Sec. 45-53-5(d). The Superior Court may only

[11] In the case of an approval where conditions are imposed, SHAB must also consider whether the conditions make the construction and operation of the housing infeasible. Sec. 45-53-6(b)(ii).

remand the case for further proceedings, or reverse or modify the decision, if substantial rights of the appellant have been prejudiced because of conclusions made by SHAB which are:

> "(1) In violation of constitutional, statutory, or ordinance provisions;
> "(2) In excess of the authority granted to the state housing appeals board by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Id.

On appeal, the Superior Court is required to consider the record of the hearing before SHAB, but may admit additional evidence deemed necessary for the proper disposition of the dispute. Sec. 45-53-5(c).

III

Analysis

The purpose of the Rhode Island Low and Moderate Income Housing Act is to provide eligible individuals and families with opportunities to find affordable housing throughout the state. Sec. 45-53-2. Under the Act, parties seeking to construct affordable housing may apply for comprehensive permits by submitting a single application to a local zoning board, rather than separate applications to the applicable local boards. Sec. 45-53-4(a). The comprehensive permitting process is "a streamlined and expedited application procedure," Town of Burrillville v. Pascoag Apartment Assocs., LLC, 950 A.2d 435, 438 (R.I. 2008), intended to encourage the construction of affordable housing. In order to be eligible for a comprehensive permit, the applicant must guarantee that at least twenty-five percent of the new homes he or she plans to build will be designated as affordable. Sec. 45-53-4(a).

Prior to issuing a comprehensive permit, a local review board must make the following positive findings, supported by legally competent evidence: (a) the proposed development is consistent with local needs as identified in the municipality's comprehensive community plan; (b) where the proposed development is not in compliance with the provisions of the municipality's zoning ordinance, whatever local concerns are affected do not outweigh the need for affordable housing; (c) all affordable housing units proposed are integrated throughout the development; (d) the proposed development as shown on the final plan will not have a significant negative impact on the environment; and (e) the proposed development will not have a significant negative impact on the health and safety of current or future residents of the local community. Sec. 45-53-4(a)(4)(v). A local review board is also permitted to deny the application and may do so for any of the following reasons:

> "(A) [the municipality] has an approved affordable housing plan and is meeting housing needs, and the proposal is inconsistent with the affordable housing plan;
> "(B) the proposal is not consistent with local needs, including . . . the needs identified in an approved comprehensive plan, and/or local zoning ordinances and procedures . . . ;
> "(C) the proposal is not in conformance with the comprehensive plan;
> "(D) the community has met or has plans to meet the goal of [having at least] ten percent (10%) of the year-round [housing] units [designated as affordable]; or
> "(E) concerns for the environment and the health and safety of current residents have not been adequately addressed." Sec. 45-53-4(a)(4)(vii).

A

Stages of Comprehensive Permitting Process

A local review board must grant approval to a comprehensive permit application at all three stages of the comprehensive permitting process before an applicant can begin construction. Sec. 45-23-39(b). The three stages of the comprehensive permitting process are the master plan review stage, the preliminary plan review stage, and the final plan review stage. Id. At each stage, an applicant is required to submit the items and documents required by local regulations

pertaining to each stage. See §§ 45-23-40(a)(1); 45-23-41(a)(1); 45-23-43(a)(1). An applicant at the master plan stage is ordinarily required to provide information concerning natural and built features of the surrounding neighborhood; existing natural and man-made conditions at the development site; freshwater wetland and coastal zone boundaries; floodplains; the proposed design concept, including public improvements and dedications; construction phasing; and potential neighborhood impacts. Sec. 45-23-40(a)(2).

At the preliminary plan stage, an applicant is typically expected to provide engineering plans depicting the existing site conditions; engineering plans depicting the proposed development project; a perimeter survey; and all permits required by state or federal agencies.

At the final plan stage, an applicant for a comprehensive permit must provide all materials required by the Planning Board when preliminary approval was given, as well as construction schedules and financial guarantees, certification by the tax collector showing that all property taxes are current, and, for phased projects, the final plan for phases following the first phase. Sec. 45-23-43(a)(1).

As discussed above, if a local review board denies an applicant's comprehensive permit application, the applicant may appeal the decision to SHAB. For those applications that were denied by the local planning board, SHAB must determine whether the denials are consistent with the town's approved affordable housing plan or, if the town is without such a plan, local needs. Sec. 45-53-6(b)(i). Subsection (c) of § 45-53-6 lays out six factors to consider in determining whether the denials are consistent. Barrington has an approved affordable housing

plan; therefore, SHAB's review was limited to determining whether North End's Application was consistent with such plan, using the factors in subsection (c) as guideposts.[12]

B

Consistent with Affordable Housing Plan

In reversing the Planning Board's Decision, SHAB stated that the Planning Board took an unduly restrictive approach in balancing the competing interests in the Town's Approved Affordable Housing Plan—that being, the need to achieve the ten percent requirement for low

[12] The Court finds it necessary to note that SHAB's articulation of their own standard of review is a bit convoluted. In its Decision, SHAB quotes East Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Barrington, 901 A.2d 1136, 1144 (R.I. 2006) for the proposition that the definition of "local needs" and the factors listed in subsection (c) largely mirror each other. SHAB Decision at 16. SHAB goes on to state that "'[f]or municipalities lacking the statutory quota . . . the act calls upon SHAB to conduct an analysis under both subsections.' Barrington is a municipality that has not achieved the statutory quota." Id. (alteration in original) (citation omitted) (quoting Easy Bay, 901 A.2d at 1148). SHAB's reference to a dual-avenue standard of review dependent on whether the town has met the statutory quota is reminiscent of case law that preceded the 2004 amendment to § 45-53-6(b)—an amendment that added that the application's denial or approval must be consistent with an approved affordable housing plan or local needs if the town does not have such a plan. See Town of Coventry Zoning Bd. of Review v. Omni Dev. Corp., 814 A.2d 889 (R.I. 2003) (articulating one avenue of review for towns that had adopted a comprehensive plan and met the statutory minimum for low and moderate income housing, and another for those that had not). To be sure, East Bay was actually decided under the pre-2004 statute, as the Court refused to apply the amendment retroactively. 901 A.2d at 1144. Under the current version of § 45-53-6(b), in the case of a denial, SHAB must determine whether the denial is consistent with the approved affordable housing plan, or if the town does not have such a plan, local needs. The definition of "[a]pproved affordable housing plan" is void of any language that references the statutory quota. Sec. 45-53-3(2). However, the factors in subsection (c) serve as a guidepost for SHAB when determining what is and is not consistent. Sec. 45-53-6(c). SHAB is permitted to consider whether the town has met their affordable housing goal or how they plan on doing so under the second factor listed. Sec. 45-53-6(c)(2). There is no evidence that these factors only apply when the town is without an approved affordable housing plan and has not yet met its statutory quota—as appeared to be developed in the case law prior to the 2004 amendment. Sec. 45-53-6(c). While it was not improper for SHAB to consider that Barrington has not yet met its goal, the inquiry falls under § 45-53-6(c)(2), and not under an extinct split standard of review. The legislature is presumed to know the state of existing law and the language of the current statute is clear and unambiguous. See State v. Hazard, 68 A.3d 479, 485 (R.I. 2013); Simeone v. Charron, 762 A.2d 442, 446 (R.I. 2000). Going forward, SHAB should omit all references to the pre-2004 amendment, split standard of review when articulating its standard.

and moderate income housing while still preserving the rural nature of Barrington. SHAB Decision at 24. SHAB focused on the fact that Barrington is "limited [in] acreage of undeveloped land . . . to narrow the gap between where Barrington currently stands and where it needs to be to meet its obligations under the Act." Id. at 21. The Planning Board, on the other hand, focused on the density of the development and how it would affect the surrounding area. Planning Board Decision at 4, 6-11. In essence, SHAB placed more emphasis on Barrington's ability to achieve the ten percent requirement, while the Planning Board concentrated on how the development would flow with the Town's rural environment.

SHAB quotes a large portion of Barrington's Plan. SHAB Decision at 23. The excerpt indicates that while the land is the largest undeveloped parcel in the Town, "housing would likely impact the character of the area in a manner that could erase the district sense of place in [the] rural pocket of Barrington." Id. (quoting Barrington Comprehensive Community Plan: 2009 Update/Amended May 2012, Housing & Neighborhoods Element at 17). However, the passage also establishes that the parcel at issue is still subject to the Plan's affordable housing strategies. Id. Such strategies include development at increased densities, up to ten units per acre in an R-40 zone. Id. The 6.8 acres at issue are zoned R-40. As a result, the acreage could support sixty-eight units after applying the affordable housing strategy of ten units per acre. Under this interpretation, the Application, which proposed twenty-four units, is consistent with the Approved Affordable Housing Plan.

However, Barrington contends that the parcel at issue, known as Nockum Hill, is actually subject to low-density zoning. See Appellant's Reply at 3-5. The Town argues that the increased density mentioned in the excerpt does not apply to Nockum Hill because the Future Land Use Map in effect when the project was reviewed delineates the area as "Rural

Residential." Id. at 4. Rural Residential is categorized as low-density, generally one unit per acre or less. Under this approach, the parcel at issue would yield approximately six to seven units. Id. As discussed supra, a yield plan that was submitted by North End to the Planning Board indicated that, under existing ordinances, the parcel would be approved for four or five single-family residences.[13] See T2 at 28:9-30:20.

Surprisingly, SHAB's Decision is devoid of any discussion of this calculus. Instead, SHAB summarizes the Planning Board's analysis, stating that the Planning Board determined that North End should be limited to a twenty percent density bonus. SHAB Decision at 12-14; 23. A twenty percent density bonus would yield a total of five units—four units as of right and one additional unit after applying the bonus. Id. at 23-24. SHAB then found support in comparing North End's Application with another application that was approved just "a football field's length away." Id. at 24.[14] After describing the similar applications, SHAB found "the Town's attempts to distinguish its project from North End's nearby project to be unpersuasive." Id. at 25. Absent from SHAB's Decision is the number of units that North End could have conceivably received approval of under existing ordinances.[15] On the one hand, SHAB quotes a portion of the Plan that states that the parcel could be approved for ten units per acre, putting the development well within the conforming limits of the density permitted by the Plan. Id. at 23.

[13] The confusion over the correct density permitted under the Plan is apparent from the transcript of the December 13, 2013 hearing. See T4 at 16:10-17; 75:12-77:5; 80:25-81:3.

[14] That application proposed to develop twelve units on three acres that were zoned R-40. SHAB Decision at 24. The application was submitted by Barrington, and "[t]he Solicitor contended that the Town's proposal was justifiable because it [was] 'a more efficient layout and . . . more considerate to the character of the area as well as environmental concerns.'" Id. at 24-25 (alteration in original) (quoting T4 at 62:15-18).

[15] SHAB did hold that the version of the Affordable Housing Plan that was in effect on March 26, 2012 controlled. Id. at 22. This version did not restrict density bonuses based on developments that proposed between twenty-five percent and forty-nine percent of low and moderate income housing. However, SHAB never ultimately arrived at a density bonus that was permissible under the Plan, and the litigants are still arguing about that figure today.

However, on just the next page, SHAB claims that under existing zoning, the parcel would yield five units, four as of right and one after applying a twenty percent density bonus. Id. at 24. After mentioning these two conflicting figures, SHAB makes only conclusory statements. See id. at 24-25.

All of this said, the main question is whether the dense development is consistent with an approved affordable housing plan that aims to preserve a rural surrounding. SHAB ultimately held that the development was consistent. Id. at 26. Yet, SHAB really failed to tell us why. SHAB barely discusses how North End's Application is consistent with the Town's Plan aside from cursorily stating that the Planning Board took an "unduly restrictive" approach in balancing the Town's needs and mentioning that a similar application was approved. Id. at 23-25. The discussion fails to articulate how SHAB's balancing approach is more consistent with Barrington's Plan. SHAB appears to find its balancing more appropriate because Barrington has few undeveloped parcels of land, making it difficult to achieve the ten percent requirement. See id. at 21. However, SHAB fails to actually balance this need with other environmental and structural concerns—concerns that are also important under Barrington's Plan. Aside from a blanket statement that the crucial interests were improperly balanced, SHAB has not provided any detail on how the interests should be balanced to support its Decision to reverse the Planning Board.[16]

Our Supreme Court has stated that '"a municipal board, when acting in a quasi-judicial capacity, must set forth in its decision findings of fact and reasons for actions taken."' Sciacca v. Caruso, 769 A.2d 578, 585 (R.I. 2001) (quoting Irish P'ship v. Rommel, 518 A.2d 356, 358 (R.I.

[16] On page 25 of its Decision, SHAB acknowledges these other interests but fails to actually engage in any balancing. Instead, SHAB merely notes that North End is cognizant of possible issues and that such will be addressed at later stages. Id. at 25.

1986)) (internal quotation marks omitted). These findings are essential so that the decisions '"may be susceptible of judicial review."' Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 401 (R.I. 2001) (quoting Cranston Print Works Co. v. City of Cranston, 684 A.2d 689, 691 (R.I. 1996)) (internal quotation marks omitted). '"Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany."' Id. (quoting Irish P'ship, 518 A.2d at 358-59). If the board fails to make such findings, '"the [C]ourt will not search the record for supporting evidence or decide for itself what is proper in the circumstances."' Id. (quoting Irish P'ship, 518 A.2d at 359) (internal quotation marks omitted). SHAB's Decision includes contradicting statements as to what density is permissible under Barrington's Approved Affordable Housing Plan. This Court declines to sift through the extensive record to determine the permitted density. Furthermore, this Court may not substitute its own judgment as to the proper balance between that density and other interests relevant under the Plan. As a result, the Decision is hereby remanded to SHAB to determine: (1) The density permitted for the parcel at issue under the then-existing Approved Affordable Housing Plan; and (2) Whether the density proposed by North End is consistent with such a Plan. If the density is in fact higher than that permitted under the Plan, SHAB should use the factors articulated in subsection (c) of § 45-53-6 to balance the need for low and moderate income housing[17] with environmental and preservation concerns.

[17] SHAB also partially based its Decision on the fact that Barrington has not yet reached the ten percent minimum for low and moderate income housing. SHAB acknowledged that Barrington has very little undeveloped land. These considerations were proper under § 45-53-6(c)(2). However, that subsection more explicitly states: "The extent to which the community meets or plans to meet housing needs . . ." Sec. 45-53-6(c)(2) (emphasis added). SHAB states that these considerations were "material" to its reversal, SHAB Decision at 21; yet, SHAB fails to discuss Barrington's own plan to meet the housing needs in its analysis. Specifically, SHAB fails to discuss whether it is possible for Barrington to meet the ten percent minimum without developing the parcel at issue at the proposed density. On remand, SHAB should be sure to

C

Environmental Impacts

Although in dicta, the Court finds it necessary to address the reoccurring issue of whether the environmental concerns were adequately addressed at the master stage level of review. Section 45-53-4(a)(4)(vii) states that a local board may deny an application:

> "(A) if city or town has an approved affordable housing plan and is meeting housing needs, and the proposal is inconsistent with the affordable housing plan; (B) the proposal is not consistent with local needs, including, but not limited to, the needs identified in an approved comprehensive plan, and/or local zoning ordinances and procedures promulgated in conformance with the comprehensive plan; (C) the proposal is not in conformance with the comprehensive plan; (D) the community has met or has plans to meet the goal of ten percent (10%) of the year-round units . . . low and moderate income housing; or (E) concerns for the environment and the health and safety of current residents have not been adequately addressed." (emphasis added).

Furthermore, the local board's findings must be supported by "legally competent evidence on the record." Sec. 45-53-4(a)(4)(v). Barrington argues that SHAB improperly exercised its discretion by holding that the environmental issues have been adequately addressed at this stage and will be further explored at the preliminary and final stages of review. Appellant's Mem. at 25; 34-39. In support, the Town cites to 2012 Superior Court decision, Town of Smithfield v. Bickey Dev., Inc., No. 11-1017, 2012 WL 4339200 (R.I. Super. Sept. 19, 2012) (McGuirl, J.). Appellant's Mem. at 37.

Barrington is correct in its assertion that Bickey does reinforce the proposition that a local review board can deny an application when environmental concerns have not been adequately addressed. Id. at *10. However, Judge McGuirl goes on to state that "the master plan does not require specific engineering plans" but "at least a general plan as to the Project." Id. While

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consider whether Barrington can meet the ten percent minimum without approving a development that requires a high-density bonus.

North End refused to finance a third-party expert at the master plan level, North End did present testimony from Mr. Moorehead, principal engineer, Hail Backman, landscape professional, Mr. Lombardo, professional planner and consultant, and Michael Desmond, traffic engineer. See SHAB Decision at 6-10. In comparison, the applicant in Bickey failed to present even a generalized plan to combat the sewer issues that were raised by the Town of Smithfield. Bickey, 2012 WL 4339200, at *10-11. North End did more than just sweep the environmental issues under the rug for the next stage of review.

Possibly most compelling, the Planning Board actually acknowledged Mr. Moorehead's opinion that the plan posed no negative environmental impacts, but stated that a third-party review would have assisted the Planning Board with assessing Mr. Moorehead's assertions. Planning Bd. Decision at 10-11. This finding neatly fits within the confines of Bickey—there is a general plan for environmental issues but more specifics would have been helpful. Those specifics will come at the preliminary and final stages of review. Therefore, SHAB did not abuse its discretion in finding that the environmental issues have been adequately addressed at the master plan stage of review. However, SHAB is required to discuss the environmental issues presented thus far when balancing the competing interests on remand. See also supra note 16.

D

Intervention

Section 45-53-6(a) states that SHAB may adopt rules and regulations that are consistent with the Act and necessary for the Board to hear and decide appeals from town planning boards. From this authority, SHAB established the Rules Implementing the Rhode Island Low and Moderate Income Housing Act in 2006 (SHAB Rules). Section 8 of the SHAB Rules provides: "any person or persons who can demonstrate that their property will be injured by a reversal or

modification of the decision of the Local Review Board shall be permitted to move to intervene." SHAB is required to rule on all motions to intervene, SHAB Rules § 8; however, the SHAB Rules do not prescribe a standard by which such a ruling should be made. Since the SHAB Rules do not articulate a standard for intervention, this Court finds guidance in Super. R. Civ. P. 24. Rule 24(a)(2) states that intervention as of right occurs when

> "the applicant claims an interest relating to the property or transaction which is the subject matter of the action, the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, and the applicant's interest is not adequately represented by current parties to the action." Tonetti Enters., LLC v. Mendo Rd. Leasing Corp., 943 A.2d 1063, 1072-73 (R.I. 2008).

Four Town Farm, Jason Lawrence, the Trust, the Society, and Richard and Martha Brooks (collectively, the Intervenors) moved to intervene at a public hearing held on April 3, 2013. SHAB ultimately denied each request, holding that the "Barrington Town Solicitor would adequately represent the interests and concerns of all of the property owners and interested parties who requested intervenor status." SHAB Decision at 17. Conversely, the Superior Court granted the Intervenors' Motion to Intervene in this appeal on April 17, 2015.[18] The Intervenors argue that the Barrington Town Solicitor cannot adequately represent their interests because the Intervenors have "narrower and more parochial interests that are not shared by the general citizenry." Intervenor's Mem. at 21. Specifically, they allege that the proposed development will negatively impact sewage runoff, septic systems, protection of the diamondback terrapin, and the overall historic nature of Barrington. Id. at 19-22. In addition, some of the Intervenors are Massachusetts residents, arguing that a Rhode Island town solicitor cannot possibly protect their interests. Id. They posit that the Barrington Town Solicitor's overall interest is balanced

[18] The Motion to Intervene was granted by a different justice.

with the need to increase affordable housing and comply with the Plan, a more general and less particularized interest. Id.

In using the above standard, the Superior Court has already determined in the previous Motion to Intervene that the Intervenors have a right to intervene.[19] See Richardson v. Smith, 691 A.2d 543, 546 (R.I. 1997) ("Ordinarily, after one judge has decided an interlocutory matter in a pending suit, a second judge on that same court, when confronted at a later stage of the suit with the same question in the identical manner, should refrain from disturbing the first ruling."). North End has failed to persuade this Court that a different standard should be used by SHAB when considering intervention. In fact, SHAB's primary focus was on whether the Barrington Town Solicitor could adequately represent the interests of the Intervenors.[20] See SHAB Decision at 17. As a result, this Court has no reason to stray from its prior ruling on the intervention issue.

Moreover, the Supreme Court has recognized that adjoining property owners should be able to '"intervene as a matter of course unless [there are] compelling reasons against such intervention."' Caran v. Freda, 108 R.I. 748, 753, 279 A.2d 405, 408 (1971) (quoting Wolpe v. Poretsky, 144 F.2d 505, 508 (D.C. Cir. 1944)) (internal quotation marks omitted). The Intervenors' interests are much more particularized than the Town's general concern for the overall landscape of Barrington and cannot be adequately represented by the Barrington Town Solicitor. The group has presented sufficient evidence that "their property will be injured by a reversal or modification of the decision of the Local Review Board." SHAB Rule § 8. The

[19] See supra note 18.

[20] This Court does not find that the Intervenors' interests are adequately represented merely because their positions were summarily included in the Town's papers to SHAB. Intervention permits a third party with a stake in the outcome to become a party to a case. The procedural tool would be completely useless if a possible intervenor's interest could be represented by merely including their argument in a pre-existing party's papers. Intervention grants the intervenor the right to protect his interest in a manner of his own choice.

Intervenors had the right to intervene; therefore, their substantial rights were prejudiced when they were not permitted to fully and adequately participate in the SHAB appeal.

IV

Conclusion

Based on the findings and conclusions of this Court as stated above, this case is hereby remanded to SHAB for further consideration and findings of fact. While environmental issues have been appropriately dealt with at this stage of review, it remains to be seen whether the proposed density of the development is consistent with Barrington's Approved Affordable Housing Plan. SHAB is directed to determine the density permitted under the Approved Affordable Housing Plan and to compare that density to that requested by North End. Only then can it begin to determine whether the Application is consistent with the Town's Approved Affordable Housing Plan. If the proposed density is in fact higher than permitted under the Plan, SHAB is directed to make specific findings of fact on how the Town's interests should be weighed in order to determine whether the Application is consistent with Barrington's Approved Affordable Housing Plan. Moreover, the above-listed Intervenors should be granted the right to intervene in the proceedings conducted on remand. Counsel shall submit an appropriate order and judgment consistent with this Decision for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Town of Barrington and Four Town Farm, Inc., et al. v. North End Holdings Company, LLC, et al.**
CASE NO:	**PC-2014-3500**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 14, 2016**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
For Plaintiff:	**Michael A. Ursillo, Esq.**
For Defendant:	**William R. Landry, Esq.** **Steven M. Richard, Esq.** **Melissa M. Horne, Esq.**