STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 20, 2021)

TOWN OF HOPKINTON	:	
	:	
v.	:	**C.A. No. PC-2008-7865**
	:	
CLARKS FALLS REALTY, LLC and RHODE ISLAND STATE HOUSING APPEALS BOARD	:	

DECISION

MATOS, J. Before this Court is an appeal by the Town of Hopkinton (the Town) of a decision by the Rhode Island State Housing Appeals Board (SHAB) vacating a decision by the Hopkinton Planning Board (Planning Board) which had granted, with conditions, Clarks Falls Realty, LLC's (Clarks Falls) application for a comprehensive permit (Application). Jurisdiction is pursuant to G.L. 1956 § 45-53-5(c). For the reasons set forth below, this Court affirms that decision.

I

Facts and Travel

In January 2004, Clarks Falls, a for-profit developer, submitted its Application for a Comprehensive Permit pursuant to the Low and Moderate Income Housing Act, codified at chapter 53 of title 45 (the Act), to the Hopkinton Zoning Official, who deemed the Application incomplete. In December 2004, SHAB ruled that the Application was substantially complete and remanded the matter to the Town for further

consideration.[1] (SHAB Decision, Dec. 29, 2004.) The parties subsequently agreed that the Planning Board would act as the local review board under § 45-53-3(9), and that the Application would receive review in three stages: master plan, preliminary, and final. (Planning Board Tr. 5:20-25, May 18, 2005.)

Clarks Falls' Application was proposed for 104.57 acres on Clarks Falls Road in Hopkinton, identified as Assessor's Plat 7, Lots 11 and 14, which sit in an RFR-80 district. (Ex. 1, Comprehensive Permit Narrative and Supporting Material for Clarks Falls, Hopkinton, RI, at 1-3.) The project, as set out in the initial Application, was for the construction of 64 single-family, traditional New England style homes in 77.7 interior acres of the 104.57 acres, with 20 percent of those units being designated for low- and moderate-income housing. *Id.* at 3-4, 18; Ex. 4, Application for Comprehensive Permit Pursuant to R.I.G.L. § 45-53-1, *et seq.*, at 4. In addition, Clarks Falls proposed that some of the remaining acreage would be used for the future development of five additional house lots. (Planning Board Tr. 90-93, July 20, 2005.) Clarks Falls later revised its proposal,[2] withdrawing its plan to separate the two parcels and reducing the number of units to fifty-four, with a total of fourteen being deed-restricted for low- and moderate-income housing. (Planning Board Tr. 3-4, May 17, 2006.) It also proposed deploying

[1] This was necessary because of a moratorium on the use of the provisions of the Act by for-profit developers that the General Assembly had put in place in 2004. *See* P.L. 2004, ch. 3, § 1; P.L. 2004, ch. 4, § 1. That moratorium was later modified and allowed for-profit developers to move forward if their applications had reached "substantial completeness" according to SHAB. *See* P.L. 2004, ch. 286, § 10.

[2] For reasons not explained, the Planning Board characterized the project in its decision as being comprised of sixty total units, twelve of which would be affordable. (Planning Board Decision at 16.) However, Clarks Falls provided testimony to the Planning Board that they amended the project to include fifty-four rather than sixty units. (Planning Board Tr. 3:17-23, May 17, 2006.) Testimony regarding the number of proposed affordable units changing from eleven to fourteen was also presented to the Planning Board. (Planning Board Tr. 31:4-18, June 21, 2006.)

condominium development so separate houses would share a single lot and land as a common area. (Planning Board Tr. 9:18-21, July 20, 2005.)

Between May 18, 2005 and October 18, 2006, the Planning Board held thirteen hearings on the Application. Clarks Falls presented the testimony of Kevin Morin (Mr. Morin), a registered professional civil engineer in Rhode Island, who is also a licensed Class 3 Individual Sewage Disposal System (ISDS) designer through the Department of Environmental Management and had at that time eleven years of experience working for DiPrete Engineering. (Planning Board Tr. 48:5-16, May 18, 2005.) Mr. Morin testified that by May 2005, the following had been completed: site mapping analysis, the original layouts, regulatory permits, site suitability, wetlands, water quality certificate potentially for the community septic field and soil evaluations, which had been completed with DEM. *Id.* at 50-51. Mr. Morin offered detailed testimony as to where soil test holes, the ISDS fields, runoff water, and wells would be located. *Id.* at 54-58. Regarding the ISDS location, the Hopkinton Conservation Commission, in a letter read into the Planning Board record, "commend[ed] the applicant for locating the proposed community ISDS in the better soils and utilizing wastewater treatment" while also noting that it did "not have enough information to comment on the specifics of the proposed plan." (Planning Board Tr. 108:14-18, July 20, 2005.)

Joseph Frisella (Mr. Frisella), a third party engineer with Frisella Engineering in Wakefield, evaluated the water table test holes and testified that he disagreed with the placement of some of the holes and opined that some should have been tested after a more significant rain event. (Planning Board Tr. 44-45, Apr. 19, 2006.) Although Mr. Morin admitted there were some "discrepancies" between the evaluations, he asserted

that even giving Mr. Frisella the "benefit of the doubt" and using his data, the site would still be suitable for development. (Planning Board Tr. 9:6-13; 14:8-22, May 17, 2006.)

Clarks Falls also presented the testimony of Alex Rothchild (Mr. Rothchild) of consulting firm LFR, a groundwater hydrologist with eighteen years of experience in the field. (Planning Board Tr. 49:8-22, Aug. 17, 2005.) Mr. Rothchild offered detailed testimony on the adequacy of water at the proposed site. *Id.* at 51-58. He also testified that the wells proposed for the site will not deplete the amount of available water for uses in the area. *Id.* at 3-4. Mr. Rothchild likewise submitted a report that indicated that his evaluation of the "significant data" yielded by studies at that point indicated that "the project is feasible, suitable and sustainable relative to the environmental carrying capacity of the site." (Letter from Alex Rothchild to William Landry, Esq. (Jan. 18, 2006) (re: Preliminary Data and Proposed Work Plan, Geohydrologic Evaluation, Proposed Clark [*sic*] Falls Project, Hopkinton, Rhode Island at 2).)

Matthew Largess (Mr. Largess), an ISA-certified arborist from Jamestown, gave testimony regarding the wildlife of the project site to the Planning Board. (Planning Board Tr. 70:2-4, Oct. 19, 2005.) Mr. Largess opined about the state of the forest, stating that when he visited the area of the proposed site, he observed "a very interesting forest of Shagbark Hickory and American Beech which is a very rare forest type that I have never seen in the state before." *Id.* at 70:22-24. He also stated that the forest is inhabited by bobcats, black bears, and contains a brook inhabited by native brook trout, and that the trees exhibit old and mature growth. *Id.* at 72:12-24. In addition, he submitted a brief report to the same effect which concluded with the recommendation that "Natural History Survey of RI, and the DEM begin a study and record this rare ecosystem. The forest land

should be preserved forever and used as a natural classroom for the citizens of Rhode Island. The developers should be compensated and allowed to develop in other more appropriate areas." (Report on Clarks Falls Project, Prepared by Largess Forestry, Inc., submitted on January 18, 2006, at 4.)

Charles Mauti (Mr. Mauti), Town Building and Zoning Official, gave testimony regarding the proposed septic system. He discussed the proposed AdvanTex IA ISDS septic systems, which he said the Town has "had some problems" with concerning "engineering" and "installation." (Planning Board Tr. 26:3-10, June 21, 2006.) He noted that one such system floated out of the ground because "proper buoyancy calculations were not adhered to." *Id.* at 26:13-14. He also noted that the systems are "sensitive" in terms of installation and maintenance. *Id.* at 15-24.

Mr. Frisella provided testimony on the issue of the use of fill at the project site. In response to concerns about the use of fill expressed by a member of the Planning Board, he stated that "you're not going to fill that much. It's not much of a concern." (Planning Board Tr. 72, Apr. 19, 2006.) Mr. Mauti likewise testified that while fill would need to be imported to the site, it would not cause the project to run afoul of any regulation such that it would prevent development on the site, and that another site with similar water tables to the Clarks Falls site had been approved for development in the Town recently. (Planning Board Tr. 13-15, June 21, 2006.)

David Cabral (Mr. Cabral) of RAB Engineers, a professional registered traffic engineer, testified on behalf of Clarks Falls regarding traffic volume and the impact that the project would have thereon. (Planning Board Tr. 43-44, Sept. 21, 2005.) Mr. Cabral prepared a traffic impact analysis after undertaking comprehensive steps to study the

existing roadways in the area, their current volume, their potential new volume, and how an access road to the project would affect conditions using personal observation and data from the Rhode Island Department of Transportation and the Hopkinton Police Department. *Id.* at 45-50, 63-64. He determined that the project as originally proposed would generate an additional 575 trips per day, compared to the current volume on Clarks Falls Road, which is about 600 trips per day. *Id.* at 51-52; 73. Regardless of the increase in volume, Mr. Cabral maintained that there was no justification for providing additional mitigation. *Id.* at 60. He indicated in a report that it was his professional opinion that the increased traffic volume "will not have a detrimental effect on public safety and welfare in the study area." (Ex. 31, RAB Professional Engineers, Inc., Traffic Impact Study, Proposed Residential Development, Clarks Falls, at 13 ("As indicated in this report, the analysis results indicate that the estimated increase in traffic during the peak periods from the proposed residential development will have little effect on the overall traffic operations on Clarks Falls Road, as indicated by the favorable operations at the intersection of the site access road.").)

The Planning Board also hired a traffic expert to testify, Nate Urso (Mr. Urso) of Crossman Engineering. (Planning Board Tr. 17-17-25, Apr. 19, 2006.) Mr. Urso noted that the area was a low-volume area and had a low number of traffic incidents. *Id.* at 20-21. He also testified that while widening Clarks Falls Road might be ideal to provide room to pull over or turn around, he noted that doing so could increase the average traffic speed. *Id.* at 28:5-17. Finally, Mr. Urso stated that a detailed traffic study, subject to approval by the Rhode Island Department of Transportation, would be needed at subsequent stages of the project. *Id.* at 29:1-18.

The Planning Board rendered its decision on October 23, 2006, granting Clarks Falls' Application subject to conditions. In particular, the first of those conditions related to density:

> "The [Town] will allow the Applicant to build the number of market rate units that it could build as of right, pursuant to a proper density calculation – under the residential cluster subdivision regulation – taking into account required deductions from the gross acreage for land unsuitable for development (including the wetlands, slopes exceeding 15%, and the utility easement) and the 10% deduction for roads and other infrastructure.
>
> "The Applicant will receive a density bonus of 10% (rounded to the nearest whole number) plus 1 unit, for construction of the additional affordable housing units the Town would need on account of the additional market rate units.
>
> "The Applicant will receive an additional bonus of one market rate unit for each affordable unit (to subsidize the affordable units), plus such additional market rate bonus units as are proved by peer-reviewed economic analysis to be needed to subsidize the affordable units." (Planning Board Decision at 33-34.)

The Planning Board continued by providing a calculation for "illustration only" because "the record now before the Local Review Board is insufficient to permit an accurate density calculation":

> "Suppose a proper density calculation yields 24 units. The Applicant will be allowed that number of market rate units, plus a bonus of three affordable units (24 x 10% = 2.4, rounded to 2, plus 1). The Applicant would receive an additional bonus of three market rate units to subsidize the affordable units. Thus, the Applicant would be allowed 26 units in all. In addition, the Applicant could receive additional bonus market rate units by proving they are needed to fully subsidize the affordable units." *Id.* at 34.

On the point regarding density, the Planning Board concluded by stating that the "goal is simply to avoid having the project *add* to the Town's affordable housing deficit, without having this sensitive site carry any burden of actually *reducing* that deficit." *Id.* at 35.

The Planning Board also instructed that the project "must conform to the Town residential cluster regulation and present the Local Review Board with a project that has at least 30% of the buildable land set aside for open space," that there should be no age-restricted units in the project, and that Clarks Falls "shall file a certificate of eligibility from appropriate State or Federal agencies." *Id.*

The rationale behind these conditions was as follows: (1) the project does not conform to the density and setback provisions of the Town's zoning ordinance; (2) the project does not comply with the Town's subdivision regulations concerning residential cluster development; (3) the project does not conform to the Town's comprehensive plan because it does not comport with the goal of maintaining the Town's rural character; (4) the project would only contribute a "trivial" amount to the Town's 10 percent affordable housing goal; and (5) the project would "destroy a pristine natural site." *Id.* at 23-31. The Planning Board also added in its assessment of the Application that the zoning ordinance and subdivision regulations mentioned above are applied even-handedly to all types of development and are consistent with local needs. Specifically, they are consistent with the "legitimate goal" of "retaining at least some of [the Town's] rural character in the face of relentless development pressure."[3] *Id.* at 32.

[3] The Planning Board noted that in the past it had granted density bonuses for three specific previous projects featuring affordable housing in what the Town deemed appropriate circumstances. (Planning Board Decision at 32-33.)

Clarks Falls appealed the Planning Board's decision to SHAB on November 10, 2006. SHAB held two hearings, on July 9, 2007 and December 11, 2007. The July 9, 2007 hearing focused mostly on whether certain third parties would be allowed to intervene as interested parties. SHAB then heard oral arguments from the parties at the December 11, 2007 hearing. SHAB deliberated following those arguments, primarily focusing on the consistency of the density and residential subdivision cluster requirements with local needs. (SHAB Tr. 71-84, Dec. 11, 2007.) The Planning Board then requested for counsel to submit supplemental briefs on that issue. *Id.* at 84-85.

SHAB reconvened on April 18, 2008. Following further deliberation and making several findings of fact, the Planning Board voted unanimously to vacate the conditions imposed by the Planning Board and to grant master plan level approval. (SHAB Tr. 88-89, Apr. 18, 2008.) The key consideration for SHAB was the rigidity with which the Planning Board sought to apply the RFR-80 zoning requirement. *See id.* at 40-49. As one SHAB member pointed out, the Planning Board did not "giv[e] this project any different consideration than they would any other project that would come forward. . . . [The Planning Board] did nothing but apply the standard to this with the exception of giving the . . . extra bonus market unit for every affordable unit over and above . . . the traditional calculation." *Id.* at 48:10-20.

In its written decision, SHAB listed its findings supporting their decision as follows: (1) the Planning Board's decision constituted an approval with conditions rather than an outright denial; (2) the Town has not met the 10 percent minimum threshold for affordable housing imposed by the Act; (3) the zoning and subdivision regulations for the project site were not consistent with local needs; (4) the Planning Board's decision was

consistent with the Town's Comprehensive Plan; (5) the record evidence at the master plan level was insufficient to determine the consistency of the Planning Board's decision with regard to the protection of the health and safety of the existing residents of the Town; (6) the record evidence at the master plan level was insufficient to determine the consistency of the Planning Board's decision with regard to environmental protection issues; (7) the Town did not apply local zoning ordinances evenly to subsidized and non-subsidized housing; and (8) Clarks Falls did not need to demonstrate that the conditions imposed on the permit approval rendered the project "infeasible." (SHAB Decision at 13-14.)

The Town appealed SHAB's decision to this Court.[4] The Town argues that it was clear error for the Planning Board to: (1) find that the Planning Board's decision was inconsistent with local needs; (2) discount the intent of the Town's zoning ordinance and subdivision regulations; (3) disregard its affordable housing plan, which was promulgated after the initial submission of the project but before SHAB's decision; (4) conclude that the Town does not evenly apply its zoning and review procedures to market rate and affordable units; (5) overlook record evidence regarding environmental concerns; and (6) overlook record evidence regarding negative effects to the health and safety of current residents.[5]

[4] This appeal was filed in 2008. However, the parties did not fully brief the matter until late 2018. The reason for the delay is unclear. Subsequent briefing was later submitted following oral argument.

[5] The Town originally also asserted that it was an error of law for SHAB to not require Clarks Falls to demonstrate that the conditions imposed on the project rendered the project infeasible. However, it conceded in a later filing, after oral argument, that the infeasibility requirement does not apply to Clarks Falls under § 45-53-5(a). Hence, it is no longer pursuing that argument. (Appellant Town of Hopkinton Planning Board's Further Suppl. Br. at 1.)

Clarks Falls responds that, given the review was only at the master plan or conceptual stage, there was sufficient evidence in the record to support the SHAB decision. Clarks Falls also argues that SHAB did not err in deciding that the restrictions imposed by the Planning Board were inconsistent with local needs given the shortage of affordable housing in Hopkinton at the time, even if the project was not consistent with the Town's comprehensive plan, zoning ordinance, and subdivision regulations.

II

Standard of Review

The reviews by the Planning Board and SHAB in this case were pursuant to the provisions of the Act as it existed on February 13, 2004, because Clarks Falls' Application was filed prior to August 1, 2004. *See* § 45-53-6(f)(2); *see also East Bay Community Development Corp. v. Zoning Board of Review of the Town of Barrington*, 901 A.2d 1136, 1144 (R.I. 2006) (declining to apply amendments to governing law retroactively and instead applying the law as it existed "when the applicant-developer submitted its application for a permit to the zoning board"). An applicant whose comprehensive permit application is either denied or granted with conditions has the right to appeal the decision of the local review board to SHAB. Sec. 45-53-5(a). The standard of review that 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: . . . (ii) in the case of an approval of an application with conditions and requirements imposed, whether those conditions and requirements make the construction or operation of the housing infeasible and whether those conditions and requirements are consistent with an approved affordable housing plan, or if the town

> does not have an approved affordable housing plan, are consistent with local needs." Sec. 45-53-6(b).

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).

Where a municipality has failed to meet the statutory minimum for affordable housing, SHAB applies the following definition of "consistent with local needs":

> "local zoning or land use ordinances, requirements, and regulations are considered consistent with local needs if they are reasonable in view of the state need for low and moderate income housing, considered with the number of low income persons in the city or town affected and the need to protect the health and safety of the occupants of the proposed housing or of the residen[ts] of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if the local zoning or land use ordinances, requirements, and regulations are applied as equally as possible to both subsidized and unsubsidized housing." (SHAB Decision at 8 (quoting language of § 45-53-3(2) as it existed in February of 2004).)

There is considerable overlap between the reasonableness analysis of § 45-53-3(2) and consideration of the factors of § 45-53-6(c). *East Bay Community Development Corp.*, 901 A.2d at 1148.

A decision made by SHAB may be appealed to the Superior Court. Sec. 45-53-5(c). The Superior Court may only 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." Sec. 45-53-5(d).

This Court employs a deferential standard when reviewing a SHAB decision. *See Town of Smithfield v. Churchill & Banks Companies, LLC*, 924 A.2d 796, 800 (R.I. 2007). 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). Rather, it is "limited to an examination of the certified record to determine if there is any legally competent evidence therein to support [SHAB]'s decision." *See Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1138 (R.I. 1992). '"Legally competent evidence is indicated by the presence of 'some' or 'any' evidence supporting [SHAB's] findings."' *See Rhode Island Public Telecommunications Authority v. Rhode*

Island State Labor Relations Board, 650 A.2d 479, 485 (R.I. 1994) (quoting *Strafach v. Durfee*, 635 A.2d 277, 280 (R.I. 1993)).

III

Analysis

The purpose of the 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" intended to encourage the construction of affordable housing. *Town of Burrillville v. Pascoag Apartment Associates, LLC*, 950 A.2d 435, 438 (R.I. 2008). 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).

When a local review board approves an applicant's comprehensive permit application with conditions, the applicant may appeal the decision to SHAB. On appeal, SHAB must determine whether the conditions are consistent with the town's approved affordable housing plan, or, if the town is without such a plan, local needs. SHAB's review is determined by the time at which the application was submitted; in this case, that timeframe is early 2004. The Town did not at that point have an approved affordable housing plan. *See* Planning Board Decision at 20 (noting the Town's affordable housing plan was approved in September 2005). Thus, SHAB's review was appropriately to consider whether the conditions imposed on the project were consistent with local needs pursuant to § 45-53-3(2) as it existed in early 2004. *Accord East Bay Community Development Corp.*, 901 A.2d at 1144.

A

Consistency with Local Needs

The Town argues that the conditions the Planning Board imposed were consistent with local needs in that the Planning Board considered the density of the proposal, environmental impacts, and the preservation of open space. The Town argues, as a corollary, that the Planning Board placed too much weight on the Town's lack of affordable housing because, although the Town had not yet met its statutorily prescribed affordable housing goal at the time of the decision, the Town had several years remaining to accomplish that goal.

Regarding density—which goes hand in hand with the preservation of open space—the Planning Board's decision imposed as a condition of development that Clarks Falls would be allowed to develop only within the parameters of the Town's zoning ordinance. SHAB noted in its decision that density and maintaining the Town's rural character seemed to be the primary reasons for the conditions placed on the project. The Planning Board is correct that maintaining the Town's rural character is a "legitimate goal." However, SHAB is likewise correct that certain considerations must give way for the development of affordable housing. As our Supreme Court noted, one of the main reasons for the passage of the Act was "to remove zoning barriers to the creation of low- and moderate-income housing in each city and town of the state." *Curran v. Church Community Housing Corp.*, 672 A.2d 453, 455 (R.I. 1996). Edward Pimental, a certified national planner through the American Institute of Certified Planners, testified that the RFR-80 zoning requirements, which requires 80,000 square feet—roughly 2 acres—per housing unit, would prevent the Town from achieving its 10 percent goal if they did not allow relief from that requirement, which suggests that the Town's zoning requirements are themselves inconsistent with the local need to provide affordable housing in the community. (Planning Board Tr. 32-33, Oct. 19, 2006) ("There has to be a balancing act of how much density you provide or you will never achieve the 10 percent. It's impossible.").

SHAB properly considered the impact on low-income housing when determining whether the Planning Board's decision was consistent with local needs. As our Supreme Court stated in *Town of Coventry Zoning Board of Review v. Omni Development Corp.*, "it is incumbent upon SHAB to examine the decision *and* the [local zoning] ordinance or

regulation on which it rests and determine whether the [local] regulation or ordinance is reasonable[.]" *Omni Development*, 814 A.2d 889, 899 (R.I. 2003). SHAB concluded that the zoning ordinance had the effect of "discourag[ing] or frustrat[ing] the likelihood of success" of a project featuring affordable housing. (SHAB Decision at 21) (quoting *East Bay Community Development Corp.*, 901 A.2d at 1148). Given that there was evidence in the record to suggest that the zoning ordinance was inconsistent with the local need for affordable housing and the goals of the Act itself, it was not clear error for SHAB to conclude that the Planning Board's strict adherence to the zoning ordinance's density requirements was inconsistent with the local need for affordable housing.

B

Weight Given to Zoning Ordinance and Subdivision Regulations

The Town asserts that SHAB also committed clear error by failing to consider the purpose of the Town's zoning ordinance and subdivision regulations. It cites to *Omni Development* to support its argument. (Town's Mem. at 38-41.) In that case, the Court reviewed a decision by SHAB, which reversed a decision by the local review board that had decided that the developer should comply with the town's subdivision regulations calling for residential cluster development in certain circumstances. *Omni Development*, 814 A.2d at 904-05. The Court vacated that portion of SHAB's decision after observing that SHAB did not weigh the merits of adherence to such a requirement in reversing the town's decision. *Id.* at 905. The Town argues here that SHAB likewise did not consider the purpose behind its subdivision regulations regarding residential cluster development nor its zoning ordinance, which it says are designed to "encourage development, including affordable housing, in accordance with its Comprehensive Community Plan in

a way that preserves the defining character of the Town – a consideration that SHAB's decision did not even mention." (Town's Mem. at 40.)

SHAB *did* consider the purpose of the local regulations and the local comprehensive plan. SHAB specifically found that the Planning Board's decision "was consistent with the Hopkinton Comprehensive Plan's goal of preserving the rural features of [the] community." (SHAB Decision at 18.) SHAB went on to note that while it understood the Town's preference for preserving those rural features, it was "not convinced that the proposal would so significantly alter the municipality's rural landscape to violate the spirit of the Comprehensive Plan." SHAB noted that the proposal includes 30 acres of open spaces, features a "village green" at one corner of the site, and only 1.37 acres of the site would be covered by buildings. *Id.* Indeed, SHAB discussed the Town's subdivision regulations regarding residential cluster development, eventually concluding that the Planning Board's "rigid adherence" to that regulation did "little to add affordable housing to Hopkinton" in comparison to Clarks Falls' "reasonable proposal that committed to keep at one-quarter of the developable units as affordable and addressed the Town's concerns about open space." *Id.* at 21-22. SHAB clearly did consider the purpose of the local regulations here, unlike in *Omni Development*. Consequently, SHAB did not commit clear error with regard to the weight afforded to the local zoning ordinance and subdivision regulations.

C

Even Application of Local Regulations

The Town also challenges SHAB's conclusion that the Town does not apply its local zoning ordinance evenly to both subsidized and unsubsidized housing. The Town

argues that SHAB failed to discuss this conclusion in its decision at all and, thus, failed to meet the standard set out in § 45-53-5(c), which requires SHAB to set out a written decision explaining its conclusions and reasoning for its conclusions.

The Town is correct that SHAB did not discuss the even application of local regulations to both subsidized and unsubsidized housing in its decision. SHAB does cite to a hearing where its conclusions were discussed and voted upon. The transcript from that portion of the hearing, however, does not make any clearer how SHAB came to such a conclusion. In the hearing, the Chairperson stated that, when examining the Planning Board decision and other development projects in the Town, "it doesn't seem that they're really taking into account the fact of subsidized versus unsubsidized. They sort of apply just, you know, the Zoning Ordinance right across, right across the board, ... I don't really think they applied it equally." (SHAB Tr. 76:5-12, Apr. 18, 2008.) The other members of SHAB also did not offer reasoning to explain how they came to the conclusion. In fact, SHAB's issue with the Planning Board's decision, as discussed above, is that it evenly and rigidly applied the zoning regulations to Clarks Falls' project without making exceptions for a project featuring affordable housing.

However, the extent to which the local community applies its zoning ordinances evenly to subsidized and unsubsidized housing alike is but one of five considerations in § 45-53-6(c), which itself is not the full analysis. Our Supreme Court has upheld other decisions by SHAB in which it has not expressly made findings on every individual consideration in § 45-53-6(c). *See Housing Opportunities Corp. v. Zoning Board of Review of Town of Johnston*, 890 A.2d 445, 448 (R.I. 2006) (summarizing the findings of fact made by SHAB which discussed some, but not all, of the elements of § 45-53-6(c) in

a decision that ultimately upheld SHAB's decision). In addition, in cases involving a similar standard of review, our Supreme Court has allowed decisions to stand where errors were made, provided the aggrieved party was not prejudiced by the mistake. *See, e.g., Robert Derecktor of Rhode Island, Inc. v. Employment Security Board of Review, Department of Employment Security*, 572 A.2d 58, 61 (R.I. 1990) (holding that District Court's error in upholding of Employment Security Board of Review's finding of a lockout by a company when the Board failed to consider evidence of a subsequent offer from the company to union employees was harmless because the subsequent offer was for terms of employment already rejected by the union employees, so the failure to consider this evidence did not prejudice the company); *see also Santini v. Lyons*, 448 A.2d 124, 127-28 (R.I. 1982) (holding that Coastal Resources Management Council's application of statutory amendments and council plans, policies, and regulations, which were not in place until after applicant's application was filed, while erroneous, was not sufficient to warrant reversal because the Council could have come to the same conclusion on alternate legal bases that were in place at the time of the application).

SHAB's failure to explicitly address whether the Town's local regulations were applied evenly is not fatal because SHAB provided several other legal bases upon which to rest its decision. *Accord Santini*, 448 A.2d at 127-28. Hence, there is nothing to suggest that "substantial rights" of the Town were prejudiced or that the decision was affected by an error of law; nor does it render the entire decision clearly erroneous. *See* § 45-53-6(c)(4)-(5).

D

Conclusions Regarding Health and Safety and the Environment

The Town also asserts that SHAB erred in concluding that the record evidence was insufficient to determine whether the proposal was consistent with the protection of the health and safety of existing residents and the environment. In essence, SHAB determined that the Town acted prematurely in using these factors to impose conditions on the project at the master plan stage, a stage that is meant merely as a review of a project at the conceptual level.

Regarding the protection of the health and safety of existing residents, SHAB noted that there was limited information on which to base their decision: they referenced the testimony of Mr. Urso and Mr. Cabral, summing up their testimony by stating "traffic wasn't going to be an issue." (SHAB Tr. 67:16-22, Apr. 18, 2008.) They also noted that "[m]uch of the health and safety issues come later in the process." *Id.* at 68:5-6. Likewise, regarding the protection of the environment, SHAB held "exactly the same position" it held regarding the protection of the health and safety of existing residents because "[a]ll that environmental stuff will have to be met by state standards, and federal standards, and town standards when the full engineering is done." *Id.* at 71:13-16.

According to the statute, when applying for comprehensive permits involving major land developments and major subdivisions, an applicant proposing to build low- and moderate-income housing shall submit,

> "unless otherwise agreed to by the applicant and the town; those items included in the checklist for the master plan in the local regulations promulgated pursuant to § 45-23-40. Subsequent to master plan approval, the applicant must submit those items included in the checklist for a preliminary plan for a major land development or major

> subdivision project in the local regulations promulgated pursuant to § 45-23-41, with the exception of evidence of state or federal permits. All required state and federal permits must be obtained prior to the final plan approval or the issuance of a building permit[.]" Sec. 45-53-4(a)(1)(vii).

Furthermore, § 45-23-32(23) defines a master plan as follows:

> "An overall plan for a proposed project site outlining general, rather than detailed, development intentions. It describes the basic parameters of a major development proposal, rather than giving full engineering details. Required in major land development or major subdivision review. See § 45-23-40." Sec. 45-23-32(23).

The Act thus incorporates the list of submission requirements necessary for the master plan found in § 45-23-40, which includes:

> "(1) [I]tems required by the local regulations for master plans.
> "(2) [I]nformation on the natural and built features of the surrounding neighborhood, existing natural and man-made conditions of the development site, including topographic features, the freshwater wetland and coastal zone boundaries, the floodplains, as well as the proposed design concept, proposed public improvements and dedications, tentative construction phasing, and potential neighborhood impacts." Sec. 45-23-40(a).

By contrast,

> "[the r]equirements for the *preliminary plan* and supporting materials for this phase of the review include, but are not limited to: engineering plans depicting the existing site conditions, engineering plans depicting the proposed development project, a perimeter survey, all permits required by state or federal agencies prior to commencement of construction, including permits related to freshwater wetlands, the coastal zone, floodplains, preliminary suitability for individual septic disposal systems, public water systems, and connections to state roads." Sec. 45-23-41(a)(2) (emphasis added).

The Planning Board's rationale for imposing conditions on the approval was that:

> "It is clear to anyone familiar with the site that the proposed project could not be built without clear-cutting most, if not all of the uplands.
>
> "The proposed development – when we include the houses and the infrastructure – occupies all of the site outside the wetlands.
>
> "The Applicant has repeatedly pointed out that the houses themselves would 'cover' less than 2% of the site, and the total 'site coverage', including driveways and roads, would be 'only' about 5%. These numbers are misleading. For one thing, they include the entire site, including the unbuildable wetlands, in the calculation. Since the wetlands are nearly half of the site, the 'coverage' of the actual buildable land is nearly twice that indicated. For another thing, disturbance of the site will by no means be limited to the actual 'footprint' of the houses, driveways, and road. Even in the best of circumstances, additional clearing would be needed to make way for construction of the houses, driveways and road, not to mention the sewer lines that will go from the houses to the community ISDS site. And these are hardly the best of circumstances: as we have seen, many of the houses and the road, would be built on land with high water tables. Construction to code would require extensive fill and associated grading that would result in the clear-cutting of a mature forest that took many generations to grow." (Planning Board Decision at 30-31.)

Much of the Planning Board's rationale is hypothetical in nature. It starts by relying on a popular perception of the site rather than the record evidence, which would indicate whether the proposal requires "clear-cutting most, if not all of the uplands." The Planning Board also simply states that the construction of some of the homes might require "extensive fill and associated grading that would result in the clear-cutting of a mature forest." *Id.* at 31.

The Town attempts to rectify the Planning Board's error by supplying citations to some of the record evidence in its brief. Specifically, the Town points to the testimony of Mr. Largess on the state of the environment and Mr. Mauti's testimony on the proposed septic system in an attempt to demonstrate that there was sufficient record evidence upon

which they could reasonably base the imposition of the conditions on the project. The testimony of Mr. Largess, while highlighting the unique flora and fauna of the area, does not, however, delve into any discussion of how the project would disrupt that wildlife. He also did not note that there were any legally protected areas or species within the development site. Similarly, on the ISDS system, Mr. Mauti's testimony only stated that there could be some issues with the systems if the specification and maintenance requirements were not followed.

Conversely, there was evidence in the record to show that Clarks Falls met its burden at the master plan stage. Mr. Morin provided testimony to demonstrate that Clarks Falls had undertaken extensive study of the project site prior to presenting their plan to the Planning Board. The Town noted its concerns with water tables and testing hole sites, but these were viewed approvingly by both Mr. Frisella and Mr. Mauti.

Additionally, there was no record evidence to support the Planning Board's concern with the amount of fill to be used, as the two people to testify on the matter both stated that the fill would not constitute a significant concern nor run afoul of any existing regulations. All of this evidence is sufficient to meet the conceptual standard outlined by § 45-23-32(23) at this first stage of review. Consequently, SHAB did not commit clear error when it concluded that there was insufficient record evidence to deny master plan conceptual approval to the project.[6]

[6] It is important to note that approval at the master plan stage does not mean that the project will go forward as proposed; there are yet two more stages of review that involve greater engineering details which could well result in alterations to the proposal.

IV

Conclusion

For all the reasons discussed above, this Court affirms the decision by SHAB.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Town of Hopkinton v. Clarks Falls Realty, LLC and Rhode Island State Housing Appeals Board**
CASE NO:	**PC-2008-7865**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 20, 2021**
JUSTICE/MAGISTRATE:	**Matos, J.**
ATTORNEYS:	
For Plaintiff:	**James P. Marusak, Esq.** **Stephen J. Sypole, Esq.** **Per C. Vaage, Esq.**
For Defendant:	**William Landry, Esq.** **Steven M. Richard, Esq.**