

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

Filed – November 18, 2008

WASHINGTON, SC

SUPERIOR COURT

BARRY A. JAGOLINZER and :  
ELLEN HORVITZ JAGOLINZER :

v. :

DONNA KENNEDY, MICHAEL :  
MCCLOUGHLIN, THE :  
NARRAGANSETT PLANNING BOARD, :  
and TERRENCE FLEMING, :  
RICHARD BOURBONNAIS, PETER :  
MURRAY and JOSEPH O'NEILL, :  
in their capacities as members of the :  
Narragansett Planning Board :

C.A. No. W.C. 07-0218

**DECISION**

**INDEGLIA, J.** Before this Court is an appeal of a decision by the Narragansett Planning Board (Planning Board), granting approval of a comprehensive permit application submitted by Donna Kennedy and Michael McLoughlin. Kennedy and McLoughlin seek permission, pursuant to G.L. 1956 § 45-53-1 et. seq., “Rhode Island Low and Moderate Income Housing Act” (the act), to subdivide Kennedy’s property to recreate three previously-merged lots and to develop affordable housing on one of those lots. Barry A. Jagolinzer and Ellen Horvitz Jagolinzer (Jagolinzers, or Appellants), who own nearby property, filed this timely appeal on April 2, 2007. Jurisdiction is pursuant to § 45-53-4(a)(4)(x).

**I**

**Facts and Travel**

Donna Kennedy is the owner of property located at 83 Robinson Street in Narragansett, Rhode Island and also bordering Fifth Avenue in Narragansett. Michael McLoughlin is the president of the Narragansett Affordable Housing Corporation, a non-

profit corporation which seeks to expand the availability of affordable housing in Narragansett.<sup>1</sup> Barry A. Jagolinzer and Ellen Horvitz Jagolinzer own property at 51 Fifth Avenue in Narragansett and located across the street from the property owned by Kennedy.

In 2006, Kennedy and McLoughlin applied to the Planning Board for approval of their preliminary plan to subdivide Kennedy's property into three lots and to create affordable housing on one of the lots. The application was filed pursuant to the Rhode Island Low and Moderate Income Housing Act, G.L. 1956 Chapter 53 of title 45, which creates "a streamlined and expedited application procedure" for proposals to develop low and moderate income housing. Town of Coventry Zoning Bd. of Review v. Omni Development Corp., 814 A.2d 889, 894 (R.I. 2003). Pursuant to the act, a single application for a comprehensive permit may be submitted to a "local review board" in lieu of "separate applications to the applicable local boards." Section 45-53-4(a); see also Omni Development Corp., 814 A.2d at 894. This procedure is available only for proposals in which at least 25 percent of the housing is low or moderate income housing, as defined by the act. Section 45-53-4(a).<sup>2</sup> A "local review board" may be either the municipality's planning board or the zoning board of review. See Section 45-53-3(9). In

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<sup>1</sup> McLoughlin testified that in addition to being President of the Narragansett Affordable Housing Corporation, he is Executive Director of the Narragansett Housing Authority. See Transcript dated December 5, 2006 at 6.

<sup>2</sup> The act defines "low or moderate incoming housing" as:  
"any housing whether built or operated by any public agency or any nonprofit organization or by any limited equity housing cooperative or any private developer, that is subsidized by a federal, state, or municipal government subsidy under any program to assist the construction or rehabilitation of housing affordable to low or moderate income households, as defined in the applicable federal or state statute, or local ordinance and that will remain affordable through a land lease and/or deed restriction for ninety-nine (99) years or such other period that is either agreed to by the applicant and town or prescribed by the federal, state, or municipal government subsidy program but that is not less than thirty (30) years from initial occupancy." Section 45-53-3(5).

Narragansett, the Planning Board acts as the town's local review board. A local review board has "the same power to issue permits or approvals that any local board or official who would otherwise act with respect to the application" would have. See Section 43-54-4(a)(4)(vi). Thus, the act grants local review boards the authority to grant any necessary variances from zoning ordinance provisions and waivers or modifications from subdivision regulations.

The property at issue, located in Narragansett's R10 zoning district, formerly consisted of three separate lots on the Narragansett Tax Assessor's Map D: Lot 98, a 10,014 square foot vacant lot; Lot 99, a 7160 square foot lot with a garage; and Lot 100, a 5460 square foot lot with a single-family house and garage. The Narragansett Zoning Ordinance (zoning ordinance) requires lots in the zoning district to have a minimum area of 10,000 square feet and widths of at least 100 feet. Narragansett Zoning Ordinance § 6.4. The zoning ordinance also requires that adjacent lots under common ownership which do not meet the zoning ordinance's dimensional requirements "shall be combined . . . to establish a lot or parcel having at least the minimum dimensions and area . . . ." Narragansett Zoning Ordinance § 8.1(d); see also G.L. 1956 § 45-24-38 (permitting municipalities to enact merger provisions in zoning ordinances). Because no single lot satisfied both the minimum width and area requirements of the zoning ordinance, the three lots merged when they came under the common ownership of Kennedy.

Kennedy and McLoughlin's plan would subdivide her property, unmerging Lots 98, 99, and 100 and recreating them in roughly the same form in which they once existed. Lot 98 would be sold to the Narragansett Affordable Housing Corporation, which would build a duplex on the lot consisting of two low-or-moderate-income dwelling units. A

single-family dwelling, not intended as low or moderate income housing, would be built on Lot 99. Lot 100 would not be developed further.

The Planning Board held public hearings on the matter on December 5, 2006; January 16, 2007; and February 13, 2007. Neighboring property owners, including Barry A. Jagolinzer, raised concerns about how the proposal would impact the character of the neighborhood, known as the “Pier” district of Narragansett. (Transcript, December 5, 2006 [Tr. I] at 33.) For instance, neighboring property owners opined that the proposed development would unduly increase the density of the neighborhood and diminish its historic value. (Tr. I at 37, 41; Transcript dated January 16, 2007 [Tr. II] at 43.) The Planning Board also received testimony alleging that Kennedy was using the Low and Moderate Income Housing Act both to make a profit and to circumvent the merger and dimensional provisions of the zoning ordinance. (Tr. I at 43-45, 51.) Some neighboring property owners argued that other strategies should be pursued for increasing affordable housing in Narragansett. (Tr. I at 41-45; Tr. II at 10, 20-21.) Also, noteworthy, McLoughlin testified at the December 5, 2006 hearing that only 2.65 percent of housing units in Narragansett qualified as low or moderate incoming housing under the act. (Tr. I at 7.)

On March 7, 2007, the Planning Board held a fourth meeting at which it privately discussed Kennedy and McLoughlin’s application. While a stenographer was present at the first three hearings,<sup>3</sup> no stenographer was present at the March 7, 2007 meeting.<sup>4</sup> The decision of the Planning Board indicates that at the conclusion of the fourth meeting, it

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<sup>3</sup> Transcripts of those meeting were provided to this Court. The Jagolinzers apparently paid for a stenographer to be present at these meetings. (Tr. dated February 13, 2007 at 20.)

<sup>4</sup> A hearing transcript has not been produced for that meeting, though, according to the Jagolinzers, a tape of the meeting exists.

decided, by a vote of three to one, with another member recusing himself, to grant preliminary approval to the application. (Decision at 6.)

The written decision approving the application was issued on March 14, 2007. (Decision at 1.) Although it found that the proposed development would require multiple variances, including a variance from the merger provision of the zoning ordinance, it determined that the need to increase affordable housing in Narragansett was more important than the need to adhere to the zoning ordinance. Id. at 4. Implicit in the Planning Board's decision was that it had the authority, pursuant to the act, to place affordable housing needs above zoning-related concerns. The decision nonetheless attached eight conditions to the approval.<sup>5</sup>

The Jagolinzers filed a timely appeal on April 2, 2007. Their principal argument on appeal is that Kennedy and McLoughlin's application required such an extensive degree of zoning ordinance relief that the Planning Board lacked authority to approve the application. Thereafter, this matter was transferred to Providence County pursuant to administrative order of the Presiding Justice of the Superior Court.

## II

### Standard of Review

The Low and Moderate Income Housing Act provides for two separate avenues of appeal depending on the circumstance. When an application filed pursuant to the act is denied or conditionally approved, the applicant may appeal the decision to the State Housing Appeals Board (SHAB), and thereafter to the Superior Court. Section 45-53-

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<sup>5</sup> These ranged from a requirement that Lot 98 be maintained as low or moderate income housing for at least 30 years, thereby complying with the definition of "low and moderate income housing" in § 45-53-3(5), to a condition that the "DPW Director review grading drainage erosion control and driveway plans prior to construction." (Decision at 6.)

5(c). However, when an application is approved, “any aggrieved party” may appeal directly to the Superior Court within 20 days of the issuance of the decision. Section 45-53-4(a)(4)(x). Prior to 2006, the act instructed that appeals of approvals of low-income housing applications were to be made directly to the Rhode Island Supreme Court. See, e.g., Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 4 (R.I. 2005) (hearing appeal of approval of comprehensive permit application). Because the act did not contain an “explicit standard” of review, our Supreme Court applied a standard “analogous to that applied by the Superior Court in considering appeals from local zoning boards.” Id. (quoting Curran v. Church Community Housing Corp., 672 A.2d 453, 454 (R.I. 1996)). In 2006, the General Assembly revised the act, requiring that such appeals be made to the Superior Court. See P.L. 2006, ch. 511, §1.<sup>6</sup> Although the act still does not specify an explicit standard of review, this Court concludes that the standard of review announced in Curran is to be applied by this Court. As such, this Court applies the same standard it applies to review of zoning board decisions. That standard is stated at § 45-24-69(d), which provides:

“The court shall not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact. The court may affirm the decision of the zoning board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:

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<sup>6</sup> In addition to the 2006 amendments, the General Assembly made recent amendments to the act in 2004 and 2005. See, e.g., East Bay Community Development Corp. v. Zoning Bd. of Review of Barrington, 901 A.2d 1136, 1144 (R.I. 2006). Because these amendments preserved the essential structure and language of the act, this Court still turns for authority to the body of Rhode Island Supreme Court cases interpreting the act.

- (1) In violation of constitutional, statutory, or ordinance provisions;
- (2) In excess of the authority granted to the zoning board of review 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.”

When reviewing a decision of a zoning board, the trial justice “must examine the entire record to determine whether substantial evidence exists to support the board’s findings.” Salve Regina College v. Zoning Bd. of Review of City of Newport, 594 A.2d 878, 880 (R.I. 1991) (quoting DeStefano v. Zoning Bd. of Review of Warwick, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)) (quotations omitted). The term “substantial evidence” has been defined as “such relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means [an] amount more than a scintilla but less than a preponderance.” Lischio v. Zoning Bd. of Review of North Kingstown, 818 A.2d 685, 690 n.5 (R.I. 2003) (quoting Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981)).

In conducting its review, the trial justice “may ‘not substitute its judgment for that of the zoning board of review as to the weight of the evidence on questions of fact.’” Curran, 672 A.2d at 454 (quoting § 45-24-69(d)). The deference given to a zoning decision is due, in part, to the fact “that a zoning board of review is presumed to have knowledge concerning those matters which are related to an effective administration of the zoning ordinance.” Monforte v. Zoning Bd. of Review of East Providence, 93 R.I. 447, 449, 176 A.2d 726, 728 (1962). “This deferential standard of review, however, is

contingent upon sufficient findings of fact by the zoning board.” Kaveny, 875 A.2d at 8; see also JCM, LLC v. Town of Cumberland Zoning Bd. of Review, 889 A.2d 169, 176 (R.I. 2005).

However, like administrative agencies, a zoning board’s determinations of law “are not binding upon [the Court] and may be freely reviewed to determine the relevant law and its applicability to the facts presented in the record.” Dep’t of Env’tl Mgmt. v. Labor Rels. Bd., 799 A.2d 274, 277 (R.I. 2002) (citing Carmody v. Rhode Island Conflict of Interest Comm’n, 509 A.2d 453, 458 (R.I. 1986)); see also Pawtucket Transfer Operations, LLC v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008). Accordingly, “[a]lthough factual findings . . . are afforded great deference, a dispute involving statutory interpretation is a question of law to which [the Court] appl[ies] de novo review.” Rossi v. Employees’ Retirement System, 895 A.2d 106, 110 (R.I. 2006) (citing In re Advisory Opinion to the Governor, 732 A.2d 55, 60 (R.I. 1999)).

### III

#### Analysis

##### A

#### **The Rhode Island Low and Moderate Income Housing Act**

The General Assembly passed the Low and Moderate Income Housing Act in 1991 to address “the acute shortage of affordable, accessible, safe, and sanitary housing for . . . [Rhode Island] citizens of low and moderate income.” Section 45-53-2. The act declares it “imperative that action is taken immediately” to ease the affordable housing shortage and calls upon “each city and town [to] provide opportunities for the establishment of low and moderate income housing.” Section 45-53-2; see also Kaveny,

875 A.2d at 3. For most municipalities, the goal set by the act is that at least 10 percent of the year-round housing units consist of low and moderate income housing. Section 45-53-3(2).<sup>7</sup>

As noted above, the act provides for a streamlined and expedited application procedure whereby a single application for a comprehensive permit is filed with the local review board in lieu of separate applications to the various applicable local boards. The act defines a “local board” as follows:

“Local board” means any town or city official, zoning board of review, planning board or commission, board of appeal or zoning enforcement officer, local conservation commission, historic district commission, or other municipal board having supervision of the construction of buildings or the power of enforcing land use regulations, such as subdivision, or zoning laws. Section 45-53-3(4).

Accordingly, the local review board — in this case, the Planning Board — is empowered to make all decisions that would ordinarily be considered by various boards and officials when faced with a development not involving low or moderate income housing. Further, there is no intermediate review when a local review board approves a comprehensive permit application. Again, an “aggrieved party” may immediately appeal directly to this Court for review. Section 45-53-4(a)(4)(x). This expedited procedure has been referred to as “one stop shopping.” Town of Burrillville v. Pascoag Apartment Associates, LLC, 950 A.2d 435, 440 (R.I. 2008).

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<sup>7</sup> For cities or towns with at least 5000 occupied year-round rental units comprising a minimum of 25 percent of the year-round housing units, the goal set by the act is that 15 percent of those rental units consist of low and moderate income housing. See Section 45-53-3(2)(i). In all other cities and towns, the 10 percent goal applies. Id.

**B**  
**Variance Standard**

The act provides that local review boards must make certain “required findings” before approving comprehensive permit applications for low and moderate income housing. The key provision in the instant matter is § 45-53-4(a)(4)(v)(B), which requires local review boards to determine that:

“[t]he proposed development is in compliance with the standards and provisions of the municipality’s zoning ordinance and subdivision regulations, and/or where expressly varied or waived [sic] local concerns that have been affected by the relief granted do not outweigh the state and local need for low and moderate income housing.”  
Section 45-53-4(a)(4)(v)(B).

Responding to this provision in its decision, the Planning Board found that multiple aspects of Kennedy and McLoughlin’s proposal would not be in compliance with the zoning ordinance or the Narragansett Subdivision and Land Development Regulations (subdivision regulations). Specifically, the Planning Board found that variances would be needed from the density requirements of the zoning ordinance; that the three lots would each require frontage and lot area variances; that a variance would be needed from the merger provision of the zoning ordinance; and that a variance was necessary to construct a two-family dwelling on Lot 98, which, pursuant to the zoning ordinance, would lack sufficient frontage or area for a two-family home. (Decision at 3-4.)

The Planning Board construed § 45-53-4(a)(4)(v)(B) as allowing it to approve Kennedy and McLoughlin’s application, despite the need to grant multiple variances, as long as it found that “local concerns” affected by the granting of the variances would not “outweigh the state and local need for low and moderate income housing.” Essentially,

the Planning Board, acting as the local review board, found that it could grant the variances if, in its judgment, the need for affordable housing was greater than the community needs that would be served by requiring compliance with the zoning ordinance. The Planning Board determined that this standard was met. After listing the necessary variances, the decision states: “The Board specifically finds that compliance with these requirements does not outweigh the substantial need for low and moderate income housing in Narragansett.” (Decision at 4.) The decision includes findings supporting this conclusion as discussed below.

The initial issue before this Court is whether the Planning Board used the proper standard before granting preliminary approval for the variances. Outside the context of comprehensive permit applications, before granting a variance, a zoning board of review must ensure that a strict set of requirements is satisfied. Among these, for instance, the zoning board must find that “the hardship [necessitating the variance] is not the result of any prior action of the applicant” and that the “granting of the requested variance will not alter the general character of the surrounding area.”<sup>8</sup> This Court concludes that the Planning Board’s interpretation of the act was not affected by error of law. Pursuant to

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<sup>8</sup> Before granting a variance in circumstances not involving a comprehensive permit application, a zoning board of review is required to obtain evidence of the following:

- (1) “That the hardship from which the applicant seeks relief is due to the unique characteristics of the subject land or structure and not to the general characteristics of the surrounding area; and is not due to a physical or economic disability of the applicant, excepting those physical disabilities addressed in § 45-24-30(16);
- (2) That the hardship is not the result of any prior action of the applicant and does not result primarily from the desire of the applicant to realize greater financial gain;
- (3) That the granting of the requested variance will not alter the general character of the surrounding area or impair the intent or purpose of the zoning ordinance or the comprehensive plan upon which the ordinance is based; and
- (4) That the relief to be granted is the least relief necessary.” Section 45-24-41(c).

In addition to the above standards, where the variance requested is a use variance, the zoning board must ensure evidence is entered into the record showing that “the subject land or structure cannot yield any beneficial use if it is required to conform to the provisions of the zoning ordinance.” Section 45-24-

§ 45-53-4(a)(4)(v)(B), the Planning Board was required only to weigh affordable housing needs against “local concerns” that would be affected by granting the variances.

In reaching this conclusion, the Court is mindful that the Rhode Island Supreme Court has never directly addressed the meaning of § 45-53-4(a)(4)(v)(B). However, when considering the structure of the act, it becomes evident that, before approving applications requiring zoning ordinance relief, the act simply requires only a determination that affordable housing needs outweigh local zoning and planning concerns. It is particularly helpful to examine the requirements imposed by the act before a local review board may deny a comprehensive permit application. Importantly, before denying comprehensive permit applications on the basis that the proposal would violate a zoning ordinance provision, the act generally requires local review boards to balance affordable housing needs against zoning and planning concerns. The relevant provision is § 45-53-4(a)(4)(vii)(B), which provides that a comprehensive permit application may be denied where “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.”

The act defines “consistent with local needs” in § 45-53-3(2). For cities or towns that have promulgated an affordable housing plan and met the applicable statewide affordable housing goal—which, as indicated is usually 10 percent affordable housing—zoning ordinance provisions and subdivision regulations automatically are “consistent with local needs.” See Section 45-53-3(2)(i); Omni Development Corp., 814 A.2d at 898-

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41(d)(1). When granting a dimensional variance, the zoning board must obtain evidence “that the hardship suffered by the owner of the subject property if the dimensional variance is not granted amounts to more than a mere inconvenience.” Section 45-24-41(d)(2).

99. Municipalities that have met such goals have the authority to deny comprehensive permit requests simply because the proposal would violate a zoning ordinance provision.

Conversely, “[i]n cities and towns that fall short of the statutory quota for low and moderate income housing units, land use ordinances and requirements are not conclusively deemed consistent with local needs.” Omni Development Corp., 814 A.2d at 899. Rather, for these municipalities, “consistent with local needs” is defined as:

“reasonable in view of the state’s 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 residence 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.” Section 45-53-3(2).

Thus, before denying a comprehensive permit application on the basis that the proposal would not be in compliance with a zoning ordinance provision, subdivision regulation, or comprehensive plan provision, a municipality, like Narragansett, which has not reached the 10 percent statutory quota for low and moderate income housing must balance various factors. The municipality’s local review board must weigh zoning and planning objectives such as health and safety, acceptable site and building design, and open space against the need for low and moderate housing in the community and state. See Omni Development Corp., 814 A.2d at 899 (“These criteria must be weighed against the state’s need for low and moderate income housing and the number of low income residents in the community.”) Additionally, it must be considered whether the zoning ordinance provisions at issue are being “applied evenhandedly to all development proposals” and not frustrating or defeating “low and moderate income housing

initiatives.” Id. at 900. Furthermore, any denial of a comprehensive permit application may be appealed to SHAB, which has authority to reach its own independent conclusions on these and other factors. See Section 45-53-6(c);<sup>9</sup> Omni Development Corp., 814 A.2d at 898 (noting that SHAB does not employ the same deferential standard of review employed by the Court).

This statutory scheme means that local review boards cannot always deny comprehensive permit applications which do not conform to local regulations or which counter local ideas of proper planning and zoning. Indeed, because zoning ordinances and the concerns they embody do not necessarily supplant affordable housing needs when a comprehensive permit application is evaluated, the Rhode Island Supreme Court has observed that the act endeavors to “remove zoning barriers to the creation of low-and moderate-income housing in each city and town of the state.” Curran, 672 A.2d at 455; see also Kaveny, 875 A.2d at 3 (act responds to the “ineffectiveness of local land use controls to address the statewide affordable housing crisis in the face of . . . exclusionary zoning”).

For example, in East Bay Community Development Corp. v. Zoning Bd. of Review of Barrington, 901 A.2d 1136, 1142 (R.I. 2006), applicants for a comprehensive permit application sought, among other variances, relief from a provision of the zoning

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<sup>9</sup> SHAB’s standards for reviewing appeals, include, but are not limited to:

- (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.” Section 45-53-6(c).

ordinance prohibiting multifamily dwellings, and relief from zoning ordinance provisions related to dimensional area and lot coverage. Id. at 1141. The Barrington Zoning Board of Review, the town’s local review board, denied the application partly on the grounds that the proposal would not be “consistent with local needs.” Id. at 1142. The zoning board’s decision focused on several concerns, many of them related to the zoning ordinance relief, including increased traffic and density. Id. at 1142. The zoning board found that the proposal was not consistent with the town’s requirement in its comprehensive plan that the site be used for business or elderly housing. Id. SHAB, noting that only 1.48 percent of the Town of Barrington’s housing units qualified as low or moderate income housing, rejected each of the local review board’s reasons for denial and reversed the decision. Id. at 1143, 1152. On appeal, the Rhode Island Supreme Court affirmed SHAB’s reversal, thereby allowing the project to continue. Id. at 1163.

However, the need for affordable housing does not always takes precedence. In Housing Opportunities Corp. v. Zoning Board of Review of Johnston, 890 A.2d 445, 447 (R.I. 2006), a comprehensive permit applicant sought several variances, including variances to construct multifamily dwellings and to exceed the density and height requirements of the zoning ordinance. Id. at 446. The local review board denied the application based partly on a finding that the application was not consistent with local needs. Id. Both SHAB and the Rhode Island Supreme Court affirmed the decision. Id. at 448, 453. The Court found it “decisive” that the record was “replete with evidence” that the proposal “would not fit harmoniously within the surrounding neighborhood.” Id. at 448, 452-53. According to the Court, these community concerns were an adequate basis upon which to uphold the decision denying the application, “even though the

development would further the town’s goal of providing more low and moderate income housing.” Id. at 451.

Regardless of the outcome in particular cases, it is clear that before denying a comprehensive permit application on the grounds that the proposal is inconsistent with a community’s zoning or planning framework, a local review board is required to weigh competing community needs. Given that a weighing process takes place before denying a comprehensive permit application on zoning or planning grounds, it is evident that, pursuant to § 45-53-4(a)(4)(v)(B), a similar balancing process must occur before approving a comprehensive permit application necessitating zoning ordinance relief.

This Court concludes that § 45-53-4(a)(4)(v)(B) cannot logically be construed to require that comprehensive permit applications, prior to gaining approval, must meet the customary standards for variances and waivers. See Tidewater Realty, LLC v. State, 942 A.2d 986, 993 (R.I. 2008) (stating rule that Court will “not construe a statute to achieve meaningless or absurd results”). Again, the statute provides that “[i]n approving on [sic] an application,” the local review board shall make a positive finding that “the proposed development is in compliance with the standards and provisions of the municipality’s zoning ordinance and subdivision regulations,” but adds that “and/or where expressly varied or waived [sic] local concerns that have been affected by the relief granted do not outweigh the state and local need for low and moderate income housing.” Section 45-53-4(a)(4)(v)(B). This statutory section, punctuated as written, “may not be considered the epitome of precise legislative draftsmanship.”<sup>10</sup> See generally, R.I. Arms & Sports Center, Ltd. v. Wood, 451 A.2d 817, 818 (R.I. 1982). It is well settled that “when the act

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<sup>10</sup> For more proof that punctuation does matter, see Lynne Truss, Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation, (Gotham Books, 2003).

as punctuated is inconsistent with what is otherwise established to be the clear intent or meaning [,] the punctuation should be disregarded.” 2A Norman J. Singer, Sutherland Statutory Construction, § 47:15 at 347 (2007). Construing the section, the phrase “where expressly varied or waived,” must refer to ordinances and regulations. Accordingly, the remainder of the section requires a balancing of the local concerns affected [by the variance or waiver] against the need for low income housing. If the subsection in question is construed to require that the regular standard for variances be met, the phrase calling for “local concerns” to be weighed against the “state and local need for affordable housing” becomes an inconsistent requirement. The act cannot possibly be read to impose the relatively stricter regular standard for granting variances. Such a construction would cause the entire portion of the subsection after the word “waived” to be superfluous. The only plausible reading of § 45-53-4(a)(4)(v)(B) is that it requires the specified weighing only.

Accordingly, this Court finds that § 45-53-4(a)(4)(v)(B) requires a local review board to find, before approving a comprehensive permit application necessitating zoning ordinance relief, that “local concerns” that would be affected by the relief “do not outweigh the state and local need for low and moderate income housing.” This standard inherently imparts a great deal of discretion to local review boards. The Rhode Island Supreme Court aptly observed such, noting that local review boards have “significant discretion and responsibility to act in the best interest of the community.” Omni Development Corp., 814 A.2d at 897.

## C

### Arguments on Appeal

The Jagolinzers generally argue that the Planning Board overstepped its authority by approving a comprehensive permit application necessitating unduly extensive zoning ordinance relief. They further contend that the Planning Board paid “too much ‘homage’” to affordable housing needs, and that “scant attention” was given to Narragansett’s comprehensive plan, zoning ordinance, and subdivision regulations. (Pl.’s Memorandum at 4.) Although the Jagolinzers do not specify the basis of such objections, it appears that their criticism of the Planning Board’s decision is targeted to the outcome of the Planning Board’s weighing process and not to the balancing standard itself.

The act states that local review boards “shall make positive findings, supported by legally competent evidence on the record which discloses the nature and character of the observations upon which the fact finders acted . . . .” Section 45-53-4(a)(4)(v). Here, the Planning Board made sufficient findings to support its conclusion that the need for affordable housing in Narragansett outweighs the “local concerns” that would be affected by granting the needed variances. McLoughlin testified, as noted above, that the percentage of affordable housing in Narragansett, as of December 2006, was 2.65 percent. The decision does not quantify the level of affordable housing in Narragansett, but it recognizes a “substantial need” for low and moderate income housing. (Decision at 4.) The decision also finds that the proposed development would aid in reaching Narragansett’s goal of 10 percent affordable housing by 2025. Id. at 3.<sup>11</sup>

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<sup>11</sup> This finding was made in response to the requirement that “[t]he proposed development is consistent with local needs as identified in the local comprehensive community plan with particular emphasis on the community’s affordable housing plan and/or has satisfactorily addressed the issues where there may be inconsistencies.” Section 45-53-4(a)(4)(v)(A). Thus, the “consistent with local needs” definition, discussed above, applies to approvals of comprehensive permit applications as well as to denials.

Beyond recognizing the need for affordable housing in Narragansett, the Planning Board's decision contains findings indicating that "local concerns" related to the granting of the variances were less significant than neighboring property owners contended. As to the lot sizes of the proposed development, the decision observes that the average lot size in the area is 14,500 square feet, considerably larger than the lots that would be created. Id. at 5. However, the board found that 13 lots within 10 blocks of the proposed development are less than 5000 square feet, and that certain lots within a quarter mile are as small as 3293 square feet. Id. For these reasons, the board concluded that "the proposed density is not out of character with the surrounding neighborhood." Id.

Regarding the variances that would be necessary from the frontage, lot area, and merger provisions of the zoning ordinance, the Planning Board similarly determined that the size and dimensions of the proposed lots would "not be out of character" with the neighborhood. Id. In support of granting a variance to construct a two-family dwelling on Lot 98, the Planning Board found that other two-family dwellings are located nearby. Id. Accordingly, the Planning Board's decision provides adequate support for the conclusion that the need for affordable housing in Narragansett outweighs the need for adherence to the zoning ordinance.

Arguing against the variance that would be necessary relative to the merger provision of the zoning ordinance, the Jagolinzers draw this Court's attention to a previous Narragansett Planning Board decision denying an application to subdivide lots that had previously merged. (Pl.'s Memorandum at Ex. 7); see also Sciacca v. Caruso, 769 A.2d 578, 580, 585 (R.I. 2001) (overturning zoning board decision granting dimensional variance to construct residence on substandard, unmerged lot). However,

the Appellants' reliance on the referenced cases is unavailing. The two cases cited involved ordinary subdivisions where no low income housing development was proposed and are inapposite here.

Further, the Court finds it necessary to address the fact that, while the Kennedy and McLoughlin proposal calls for the unmerging of Lot 98, Lot 99, and Lot 100, affordable housing will only be constructed upon Lot 98. Lot 100, which has an existing single family home, would remain relatively unchanged. Finally, a single family home which will not meet the criteria for low or moderate income housing will be built upon Lot 99 and sold at market rate. The Appellants criticize the proposal as motivated by profit rather than by a desire to increase affordable housing in Narragansett, but do not cite to any statutory authority or case law prohibiting such a development. As noted above, the act requires an applicant proposing to build low or moderate income housing to submit a proposal "in which at least twenty-five percent of the housing is low or moderate income housing." Section 45-53-4(a). The proposed development clearly meets this requirement, as two of the four resulting housing units will qualify as low income housing. As to profit, in 2004, the General Assembly enacted a moratorium on applications by for-profit developers. P.L. 2004, ch. 3, § 1 (codified as amended at § 45-53-4(b)). However, the General Assembly allowed this moratorium to expire on January 31, 2005. See Section 45-53-4(b)(1).<sup>12</sup> At present, and without further legislative action,

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<sup>12</sup> When first enacted, the act's streamlined review process was available to for-profit developers only for rental housing. P.L. 1991, ch. 154, §1. In 2002, amendments permitting for-profit developers to seek comprehensive permits for non-rental housing resulted in a "deluge of applications." Pascoag Apt. Assocs., LLC, 2008 R.I. LEXIS 81 at \*3 (noting Town of Smithfield v. Churchill & Banks Companies, LLC, 924 A.2d 796, 798 (R.I. 2007)). This persuaded the General Assembly to enact the moratorium in 2004. Id. The General Assembly explained the need for the moratorium as follows:

"The general assembly finds and declares that in January 2004 towns throughout Rhode Island have been confronted by an unprecedented volume and complexity of

the objection that Kennedy may make a profit from her proposal is without merit. Accordingly, it was within the Planning Board's authority to grant preliminary approval to the proposal.

Also, the type and amount of zoning ordinance relief requested by Kennedy and McLoughlin is consistent with previous cases in which relief was granted. In Kaveny, one of the Court's few decisions involving an appeal from an approval of a comprehensive permit application, a real estate developer proposed to build 343 condominium units in Cumberland, about 10 times the density allowed in the applicable zoning district. Kaveny, 875 A.2d at 3-4, 6. The Cumberland Zoning Board of Review — the local review board for the town — approved the development, but, to reduce the density, permitted only 160 units. Id. at 4. When abutting landowners appealed to the Rhode Island Supreme Court, the Court opted to remand the decision for further findings of fact. Id. at 8. The Court did not address the standard the zoning board of review should have used to evaluate the granting of the variance to exceed Cumberland's density requirements, and it did not note that the proposed development would not comply with the zoning ordinance. However, the Court did find that the zoning board could reasonably have approved 111 units, the number of units the public water supply system could support. Id. at 8. Implicitly, the Court concluded that the board could have approved a development whose density was over three times that permitted under the

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development applications as a result of private for-profit developers using the provisions of this chapter and that in order to protect the public health and welfare in communities and to provide sufficient time to establish a reasonable and orderly process for the consideration of applications made under the provisions of this chapter, and to have communities prepare plans to meet low and moderate income housing goals, that it is necessary to impose a moratorium on the use of comprehensive permit applications as herein provided by private for-profit developers." Section 45-53-4(b)(1).

ordinance. Comparatively, Kennedy and McLoughlin's proposal would be less than twice the permitted density in the zoning district.<sup>13</sup>

Finally, as to the number of variances granted, the Rhode Island Supreme Court upheld a denial of an application requiring multiple variances in Housing Opportunities Corp., but approved an application requiring multiple variances in East Bay Community Development Corp. Obviously then, the number of variances required for a proposal is not controlling. The Planning Board was free to deny Kennedy and McLoughlin's application due to the amount of zoning ordinance relief necessary if it found granting such relief affected local concerns to the point that the need for low income housing was outweighed. The Planning Board found otherwise.

## **D**

### **Procedural Arguments**

The Jagolinzers raise three procedural arguments on appeal.<sup>14</sup> First, they argue that a stenographic copy should have been kept of the Planning Board's March 7, 2007 meeting; and, that in the absence of such a record, the Planning Board is required to transcribe a tape of the meeting. Appellants' first argument is unavailing. Although the Low and Moderate Income Housing Act requires stenographic records to be kept of

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<sup>13</sup> The Planning Board found that the density of the proposed development would be one dwelling unit per 5645 square feet, requiring a variance of 4355 square feet per dwelling unit. (Decision at 5.) The permitted density is one dwelling unit per 10,000 square feet. Therefore, the proposed development would be approximately 1.77 times (10,000/5645) the permitted density.

<sup>14</sup> It must be noted that although the Appellants raise their procedural arguments in the "Introduction" portion of their memo, it does not contain a single citation to any authority in support of the arguments raised. In fact, there is not one citation to authority within the entire nine pages of the memo. This Court would be well within its right to waive Appellants' arguments. "Simply stating an issue for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue." Kaveny, 875 A.2d at 10, (citing Wilkinson v. State Crime Laboratory Commission, 788 A.2d 1129, 1131 n.1 (R.I. 2002)). See also, Rule 1.6 of the Superior Court Rules of Practice. Nonetheless, for purposes of discussion, the Court will briefly address Appellants' procedural challenges.

SHAB proceedings, see § 45-53-5(c), the act does not require local review boards to keep stenographic records of proceedings, nor does it require transcription of recorded tapes of meetings.<sup>15</sup>

The second procedural defect alleged by the Jagolinzers is that one of the Planning Board members recorded as voting to approve the comprehensive permit application actually did not vote. The Jagolinzers claim that a member of the board, when discussing the vote on the application, commented “you don’t have to ask how I will vote – I am on the Affordable Housing Board.”<sup>16</sup> This comment, if made, does not constitute a non-vote. Passage of a comprehensive permit application requires a “majority vote of the membership of the board.” Section 45-53-4(a)(4)(viii). The record in this matter clearly reflects that three of the five members of the Planning Board voted to approve the comprehensive permit. (Decision at 6.) Obviously, three of five constitutes a majority. Finally, the Jagolinzers also argue that the same Planning Board member’s association with the Affordable Housing Board “was a clear and absolute conflict” requiring his recusal. However, there is no prohibition against being a member of both entities in the Town Charter. See Narragansett Code § 10-1-2. They further contend that the alleged comment “made it clear to all in attendance at the end of the fourth hearing” that the member decided the issue “before any of the four (4) hearings

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<sup>15</sup> Although there is no statutory requirement for stenographic recordkeeping in the Act, the Rhode Island Open Meetings Act does provide that “[a]ll public bodies shall keep written minutes of all their meetings.” G.L. 1956 § 42-46-7(a).

<sup>16</sup> There is no evidence of this comment in the record. Plaintiffs state in their memorandum that the board member made the comment.

ever took place.”<sup>17</sup> (Appellants’ Memorandum at 3.) The Court declines to attach such weight to the alleged comment. The Town Charter requires public servants to “safeguard their ability to make independent, objective, fair and impartial judgments . . . .” Narragansett Code § 16-2-2. The record reflects that the member was in attendance at every meeting, and is replete with instances of this member directing questions toward the various individuals who testified in this matter. Such participation reflects independent, fair and impartial judgment. The offhand comment, if made, was unfortunate, but this Court finds it to be harmless error and not indicative of bias.

#### IV

#### **Conclusion**

The Low and Moderate Income Housing Act grants the Planning Board the authority to approve comprehensive permit applications requiring variances or waivers upon a finding that “local concerns” related to the granting of the variances or waivers “do not outweigh the state and local need for low and moderate income housing.” The Planning Board’s decision contains positive findings supporting its decision to make affordable housing needs in Narragansett the priority. Furthermore, none of the arguments raised, which were not adequately briefed by the Jagolinzers, are meritorious.

The discretion that the act grants to local review boards clearly was a response to the pressing need to increase affordable housing in Rhode Island. If the act grants too

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<sup>17</sup> The proper forum for any conflict of interest allegation is the Rhode Island Ethics Commission, which has the authority under § 36-14-12 to investigate, inter alia, alleged conflicts of interest of municipal officials.

much flexibility to local review boards to approve comprehensive permit applications necessitating variances, the General Assembly may always revisit the act.

After review of the record, this Court upholds the Planning Board's decision. Counsel shall submit an appropriate order consistent with this Decision.