STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, S.C. **SUPERIOR COURT**

(FILED: FEBRUARY 10, 2012)

STEPHAN GRILLI; ANNETTE GRILLI; MARIA ROCCHIO; SUSAN ROSE; RICHARD ROSE; DANIEL KOURY; WILLIAM FALK; GRACE FALK: GERALDINE GODINO; JOSEPH GODINO; HARRY ZISSON; DENISE SCHMITT; R. BARRIE SCHMITT JOHN DWYER and EDWARD FALSEY	:	**C.A. No. P2-2009-7122 (consolidated)**
v.	:	
ATLANTIC EAST, LTD and the STATE HOUSING BOARD OF APPEALS	:	
TOWN OF NARRAGANSETT and the PLANNING BOARD of the Town of NARRAGANSETT, et als.	:	**C.A. No. P2-2009-7095 (consolidated)**
v.	:	
ATLANTIC EAST, LTD and the STATE HOUSING BOARD OF APPEALS	:	

DECISION

MCGUIRL, J. This matter is a consolidated appeal to this Court of a decision of the State Housing Appeals Board ("SHAB") on November 23, 2009, in regard to a proposed modification and development of low and moderate income housing units in Narragansett, Rhode Island. On August 8, 2008, the Narragansett Planning Board ("Planning Board") denied Master Plan approval to an Application for a Comprehensive

Permit that had been submitted by Atlantic East, Ltd. ("Atlantic East") pursuant to the Low and Moderate Income Housing Act, codified in G.L. 1956 § 45-53-1, *et seq* ("Act"). On November 23, 2009, SHAB overturned and vacated the Planning Board's decision, thus effectuating approval of the Application. Two appeals of the SHAB decision were filed with this Court. The first appeal was filed by the Town and its Planning Board against the developer, Atlantic East, Ltd. ("Atlantic East"), and SHAB. The second appeal was filed by Stephen Grilli and other abutting property owners ("Abutters"). Jurisdiction is pursuant to G.L. 1956 § 45-53-5(c).

I
Facts and Travel

On October 17, 2007, an application for a Comprehensive Permit was filed by Atlantic East, a developer seeking to renovate an existing apartment building and construct new condominiums on property located at 151 Ocean Road, identified as Lot 210 on Assessor's Plat D, (the "Property") in Narragansett. The Property is owned by Irwin and Richard Greenberg. It consists of 3.38 acres of land and currently contains a three-story, thirty-six unit apartment building. The Application listed Atlantic East as the "Name of the Applicant" and listed "Irwin & Richard Greenberg" as the "Name of the Property Owner." The Application was signed by Francis Spinella, as a consultant for Atlantic East, but not signed by an owner or anyone else with an ownership interest in the Property. The Application initially proposed to convert fourteen of the existing thirty six rental units to low and moderate income housing, as defined in the Act, and build twenty new market-rate condominium units to be contained within a new building fronting Ocean Road.

The application was referred to the Narragansett Planning Board ("Planning Board"), which sits as a "local review board" as defined by section 45-53-3(4). Hearings on the Application were held before the Planning Board. In response to the comments from the Planning Board and the objectors, the Application was modified. The final version of the Application proposed to renovate the interior and exterior of the existing apartment building; eliminate two of the thirty six units in that building, designate fourteen of those units to low and moderate income housing for the elderly, and construct twenty-two units in the new building, two of which would be designated for low and moderate income housing. In total, the proposed project would dedicate sixteen of the fifty-six units for affordable housing.

On August 8, 2008, the Planning Board issued a written decision on the Application. The Planning Board's decision was, in most respects, favorable to the developer Atlantic East. The Planning Board found that the proposed development was consistent with local needs, as outlined in the Narragansett Affordable Housing Plan and the town's Comprehensive Plan. However, by a 3-2 vote, the Planning Board denied their approval of the Application, holding that the proposed plan did not meet the integration requirements as set forth in §45-53-4(a)(4)(v)(C) of the Act. The Planning Board found that the market rate units are "not similar in scale and style to the LMI units to be rehabilitated in the existing structure," and that "[t]he location of the fourteen affordable units in the present building and the two affordable units in the proposed new building represents an imbalanced dispersion onsite."

Atlantic East appealed the Planning Board's decision to SHAB, which vacated the findings of the Planning Board. SHAB found that:

> "the Planning Board did not adequately explain the integration standards that it sought to apply in its Decision and that the record evidence does not support the Planning Board's denial of the Application solely on the grounds of 'integration issues.'"

SHAB further found that the Planning Board's review of the plan and interpretation of the integration requirement was too narrowly focused, and did not support a conclusion that the integration requirement had not been met. SHAB reversed and vacated the Planning Board's decision, granting Atlantic East's, master plan level approval of its amended application.

In the instant case, the Planning Board, and several owners ("Abutters") of lots abutting the subject Property (collectively, "Appellants"), appeal SHAB's decision. Pursuant to an agreement of the parties, the Superior Court granted the Appellants' motion to consolidate their respective actions.

II
Standard of Review

An applicant whose application was filed under the provisions of § 45-53-4 and was subsequently denied by the local review board has a right to appeal to SHAB for a review of the application. Sec. 45-53-5(a). In reviewing the decision of the Planning Board, SHAB must apply the standards prescribed by §§ 45-53-6(b)-(d). Section 45-53(b) provides in relevant part:

> "In hearing the appeal, the state housing appeals board shall determine whether: . . . (i) in the case of the denial of an application, the decision of the local review board was consistent with an approved affordable housing plan, or if

> the town does not have an approved affordable housing plan, was reasonable and consistent with local needs . . . . "

A nonexclusive list of standards that SHAB may consider in its review of an applicant's appeal are delineated in § 45-53-6(c) and include:

> "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 and/or approved comprehensive plan;
> 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(d) provides in relevant part:

> "If the appeals board finds, in the case of a denial, that the decision of the local review board was not consistent with an approved affordable housing plan, or if the town does not have an approved housing plan, was not reasonable and consistent with local needs, it shall vacate the decision and issue a decision and order approving the application, or approving with various conditions consistent with local needs . . . . Decisions or conditions and requirements imposed by a local review board that are consistent with approved affordable housing plans and/or with local needs shall not be vacated, modified, or removed by the appeals board notwithstanding that the decision or conditions and requirements have the effect of denying or making the applicant's proposal infeasible."

Rhode Island General Laws § 45-53-5(c) provides this Court with the specific authority to review a decision or order of SHAB. Sec. 45-53-5(c). The review shall be conducted by the Superior Court without a jury, and the Court shall consider the record of the hearing before SHAB and, if it appears to the court that additional evidence is

necessary for the proper disposition of the matter, it may allow any party to the appeal to present that evidence in open court. Id. The Superior Court's review of a SHAB decision, with respect to a comprehensive permit to build low or moderate income housing, is governed by § 45-53-5(d) of the Act. Sec. § 45-53-5(d). Section 45-53-5(d) reads as follows:

> "The court shall not substitute its judgment for that of the state housing appeals board as to the weight of the evidence on questions of fact. The court may affirm the decision of the state housing appeals board 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:
>
> (1) In violation of constitutional, statutory, or ordinance provisions;
> (2) In excess of the authority granted to the state housing appeal board by statute or ordinance;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Id.

This Court's standard when reviewing a SHAB decision "is analogous to that applied by the Superior Court in considering appeals from local zoning boards." Kaveny v. Town of Cumberland Zoning Board of Review, 875 A.2d 1, 7 (R.I. 2005) (quoting Curran v. Church Community Housing Corp., 672 A,2d 453, 454 (R.I. 1996)). Similar to its review of zoning board and administrative agency decisions, this Court employs a deferential standard when reviewing SHAB decisions. Town of Smithfield v. Churchill & Banks Companies, LLC, 924 A.2d 796 (R.I. 2007). In doing so, however, "[t]he court is limited to an examination of the certified record to determine if there is any legally

competent evidence therein to support [SHAB's] decision." Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). Furthermore, "[l]egally competent evidence is indicated by the presence of 'some' or 'any' evidence supporting [SHAB's] findings." Rhode Island Pub. Telecommunications Auth. v. Rhode Island State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994).

The reviewing court should uphold a decision in instances when administrators have acted within their authority. Goncalves v. NMU Pension Trust, 818 A.2d 678, 683 (R.I. 2003) (citing Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998)). The court, however, "may reverse or modify the agency's final decision if it is [c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Environmental Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993). Accordingly, a reviewing court may reverse an agency's findings "only in instances wherein the conclusions and the findings of fact are totally devoid of competent evidentiary support in the record, or from the reasonable inferences that might be drawn from such evidence." Bunch v. Board of Review, Rhode Island Dept. of Employment and Training, 690 A.2d 335, 337 (R.I. 1997). It is well established that a reviewing court may "affirm a ruling on grounds other than those stated by the lower-court judge." State v. Brown, 900 A.2d 1155, 1161 (R.I. 2006) (quoting State v. Nordstrom, 529 A.2d 107, 111 (R.I. 1987)).

III
Analysis

Appellants assert that SHAB should have never heard Atlantic East's appeal because the Application was fatally defective and Atlantic East did not have standing.

Appellants also contend that SHAB's reversal of the Planning Board was in error because SHAB failed to make certain findings mandated by statute and erred in making determinations of sufficient compliance where there was only partial compliance.

In response, Atlantic East maintains that the Planning Board lacks standing to file this appeal. Atlantic East further argues that SHAB did not err in reversing the decision of the Planning Board's decision and that the Superior Court must give due deference to the SHAB decision.

A
Standing

1
Standing of the Planning Board

Atlantic East argues that the Planning Board does not have standing to appeal a decision of SHAB to the Superior Court. Section 45-53-4(a)(4)(x) provides that "[a]ny person aggrieved by the issuance of an approval may appeal to the Superior Court within twenty (20) days of the issuance of the approval." Sec. 45-53-4(a)(4)(x). The Act does not define "aggrieved person"; however, the Zoning Enabling Act does provide a definition that has been adopted in appeals of SHAB decisions on comprehensive permits. G.L.1956 §45-24-31(4); see, e.g., Gifford v. Rhode Island State Housing Appeals Board, 2007 WL 2344034 (R.I. Super.) (citing Kaveny v. Town of Cumberland Zoning Bd. Of Review, 875 A.2d 1, 1 n.1). It provides that:

> "An aggrieved party, for purposes of this chapter, shall be: Any person or persons or entity or entities who can demonstrate that their property will be injured by a decision of any officer or agency responsible for administering the zoning ordinance of a city or town; or anyone requiring notice pursuant to this chapter." Id.

In considering the issue of standing concerning SHAB appeals, this Court has held that "aggrievement remains a fundamental prerequisite for a party to possess the requisite standing to obtain judicial review of SHAB decisions and orders." Omni Development Corp., 814 A.2d at 897. The Omni Court further held that in order to obtain review of a decision that approved a special exception for low and moderate income housing, "the appeal must be taken by an aggrieved person who has an actual stake in the outcome of the controversy." Id. at 896. Aggrievement "results when the order, decision, or decree adversely affects in a substantial manner some personal or property right of the party or imposes upon it some burden or obligation." New England Tel. & Tel. Co. v. Fascio, 105 R.I. 711, 717, 254 A.2d 758, 761-62 (1969). Atlantic East contends, and this Court agrees, that the Planning Board was not technically aggrieved in this manner.

This Court has recognized several exceptions to the aggrievement requirement. Altman v. School Committee of Town of Scituate, 115 R.I. 339, 347, 403 A.3d 37, 43 (1975). Atlantic East nevertheless maintains that the Planning Board cannot establish standing pursuant to these exceptions.

In proper circumstances, an administrative agency or head of an agency, though not technically aggrieved, may obtain review of a decision reversing one of its own rulings "if the public has an interest in the issue at stake which reaches out beyond that of immediate parties." Buffi v. Ferri, 106 R.I. 349, 351, 259 A.2d 847, 849 (1969).

However, in Newman-Crosby Steel, the court noted that this exception typically applies "only to an agency or head of an agency that is invested with regulatory as opposed to quasi-judicial powers." 423 A.2d 1162 at 1165. Furthermore, the court "[took] the position that an agency or individual that performs a solely quasi-judicial function has no responsibility for or interest in ensuring that a decision is upheld by an appellate court." Id. (citing Board of Police Comm'rs v. Reynolds, 86 R.I. 172, 133 A.2d 737 (1957). For example, our Supreme Court has repeatedly held that a zoning board, which, until recently, was the board authorized to hear Comprehensive Permit Applications, could not avail itself of this exception and therefore had no standing to appeal a decision of SHAB. See Town of Coventry Zoning Board of Review v. Omni Dev. Corp., 814 A.2d 889, 896-897 (R.I. 2003); Kirby v. Planning Board of Review of Middletown, 634 A.2d 285, 288 n.3 (R.I. 1993). With respect to a zoning board, the court in Town of Coventry noted that "it is an administrative body whose duties are quasi-judicial," and "is without powers, rights, duties or responsibilities save for those conferred upon it by the legislature." 814 A.2d at 896 (quoting Hassell v. Zoning Board of Review of East Providence, 108 R.I. 349, 351, 275 A.2d 646, 648 (1971)). Those statutorily proscribed powers and duties do not include, directly or by implication, the authority to ensure that its decisions are upheld. See id. In contrast, an agency or board charged with the responsibility of administering a particular set of rules and regulations designed to promote the public safety and welfare acts for the people, must be permitted to represent the people when a matter of public interest is involved. Newman-Crosby Steel, 423 A.2d at 1165.

In the instant case, the Court must address essentially the same issue that was addressed in Town of Coventry: namely, whether the administrative body charged with

hearing Comprehensive Permit applications had standing to appeal a reversal of its decisions and a duty to the public to see that its decisions are upheld. Section 45-53-4, as it existed in 2003, when Town of Coventry was decided, authorized the zoning board to hear Comprehensive Permit Applications. See Pub. L. 2002, ch. 416, §1. In 2005, Section 45-53-4 was amended, revoking the authority of the zoning board to hear Comprehensive Permits Applications, and granting this authority to "local review boards," in this case, the Narragansett Planning Board. See Pub. L. 2005, ch. 139, §3. The language describing the scope of this authority, and the administrative bodies' functions with respect to the Act, remains substantially unchanged today. Compare Pub. L. 2002, ch. 416 §1 with P.L. 2006, ch. 511, §1. Since Town of Coventry has already decided that this authority does not include the right to appeal a reversal of the administrative body's decisions, this Court has no compelling reason to find otherwise with respect to a planning board performing the same functions with respect to comprehensive permits.

Notably, the Rhode Island Supreme Court has indicated that there would be sufficient legal grounds to deny a planning board standing to challenge a reversal of its decisions. See Kirby v. Planning Board of Review of the Town of Middletown v. Peckham Bros. Co., 634 A.2d 285, 289 n.3 (1993). In Kirby, our Supreme Court stated:

> "Some courts hold that tribunals such as planning boards have standing to defend their positions by appealing judgments that reverse their decisions. Other courts hold that such tribunals lack standing to appeal reversals of their own decisions, for their function 'is to conduct hearings and render decisions.' This court has not yet considered whether planning boards have standing to appeal reversals of their decisions. We note, however, that, in general, agencies and heads of agencies that perform only quasi-judicial functions do not have standing to seek review in

> this court, for they have no responsibility to the public to ensure that their decisions are upheld." 634 A.2d at 289 (quoting 83 Am. Jur.2d Zoning and Planning §1041 (1992)).

Like a zoning board, the planning board is a statutory creation that is charged with quasi-judicial powers, defined and limited by its enabling legislation mainly to the enforcement of the Land Development and Subdivision Review Act and local regulations. Secs. 45-22-7, 45-23-51. While the planning board is vested with significant discretion and responsibility to act "with reference to [the community's] physical, economic, and social growth and development as affecting the health, safety, morals, and general welfare of the people," this Court notes that the planning board has not been charged with either the authority, responsibility to the public, or interest in seeing that its decisions are upheld. Secs. 45-22-7, 45-23-51. Neither directly by statute nor by implication is the obligation to act as a representative of the public interest included within the planning board's statutorily prescribed powers. Id.; See Liguori v. Aetna Casualty & Surety Co., 384 A.2d 308, 119 R.I. 875 (1978). Accordingly, the Planning Board does not have standing.

However, dismissing the Planning Board from the instant case will not cause this matter to escape review. Grilli and other landowners (collectively, "Abutters"), all of whom are persons entitled to notice of the underlying proceedings are owners and occupiers of land abutting the project site, have filed a separate appeal and have standing to move forward with this appeal.[1] Challenges to reversals of Planning Board decisions

[1] Section 45-24-31(4) defines "aggrieved party" as "(2) anyone requiring notice pursuant to this chapter."

are most properly made by butters, whose rights and land use will be affected by the outcome of the appeal. See Hassell 108 R.I. at 351-352, 275 A.2d at 648.

B

The Rhode Island Low and Moderate Income Housing Act

The Low and Moderate Income Housing Act ("Act") was passed 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" and requests "each city and town [to] provide opportunities for the establishment of low and moderate income housing." Sec. 45-53-2. The Act sets a goal for the majority of municipalities: that at least ten percent of the year-round housing units consist of low and moderate income housing. Sec. 45-53-3(4)(i).

The Act provides for a streamlined and expedited application procedure whereby a single application for a comprehensive permit is filed with a local review board, in this case the Planning Board. Sec. 45-53-4. The Act empowers the local review board to make all decisions that would ordinarily be considered by various boards and officials when faced with developments not involving low or moderate income housing. Id. Appeals of a decision of the local review board are governed by Sec. 45-53-5, which provides in relevant part that "the applicant," whose permit is denied, or is granted with unduly burdensome conditions "has a right to appeal to the state housing appeals board [("SHAB")]." Sec. 45-53-5. A decision or order of SHAB may be appealed in Superior Court within twenty days of the issuance of the decision. Id.

C
Review of the SHAB Decision

1
The Application for a Comprehensive Permit

Appellants assert that Atlantic East's Application for a comprehensive permit had fatal defects, and therefore, SHAB should not have reached the merits of the Planning Board's denial of the permit. Appellants contend that the Application was fatally defective because it listed "Atlantic East, LTD." as the Applicant and was never signed by anyone with an ownership or possessory interest in the Property. Moreover, Appellants note, multiple papers, briefs and reports filed in pursuit of the comprehensive permit list Atlantic East, LLC (which is not a legal entity) as the proposed applicant.

Sec. 45-53-4(a) states that "[a]ny *applicant* proposing to build low and moderate income housing may submit to the local review board a single application for a comprehensive permit to build that housing in lieu of separate applications to the applicable boards." (Emphasis added.) Furthermore, the application form used by Atlantic East, entitled "Application for Subdivision and Land Development Projects," contains separate fields to identify the "Name of the Property Owner(s)" and "Name of the Applicant." The application also directs the applicant to submit the form as a cover sheet for the plans, information and reports required by the checklist for the first stage of approval. The Application submitted by Atlantic East clearly identifies the Property Owner(s) as Irwin and Richard Greenberg (Application Section 3) and the Applicant as "Atlantic East, Ltd." (Application Section 4). On its face, the application makes clear who owns the property and who seeks to develop the property.

The permit was properly signed by Francis Spinella, an affordable housing consultant retained by the applicant. The Act does not specify who must sign an application for a comprehensive permit. Nor does the Act define "applicant" in the definition section. See Sec. 45-53-3. However it does state that "[a]ny applicant proposing to build low or moderate income housing may submit to the local review board a single application for a comprehensive permit." Sec. 45-53-4(a). As the listed applicant, Atlantic East was free to appoint Mr. Spinella or another representative agent to sign the application on the corporation's behalf. See Restatement 2d of Agency, §21 cmt. 1 (stating that "[a]ny person can be appointed to act on account of another and to affect the relations of that other by his conduct").

Appellants' argument that Mr. Spinella engaged in the unauthorized practice of law by signing the Application is without merit. A review of the record shows that Mr. Spinella publicly disclosed his role as consultant to the developer as early as the January 15, 2008 hearing, and never purported to have any greater authority. More importantly, Appellants have not cited any statutory basis upon which signing the Application may constitute the "unauthorized practice of law" pursuant to section 11-17. See Wilkinson v. State Crime Laboratory Commission, 788 A.2d 1129, 1131 n. 1 (R.I. 2002) ("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"). Even if the argument that Francis Spinella had engaged in the unauthorized practice of law had merit, the effect of this violation would not be to void Atlantic East's Application, but rather to subject Mr. Spinella to penalties. See Section 11-27-14; In re Ferrey, 774 A.2d 62 64-65 (R.I. 2001). Thus, this Court finds no basis for overturning

the decisions of SHAB on this issue, and accordingly, the Appellants' arguments alleging fatal defects in the Application for a comprehensive permit must fail.

2

Standing and Jurisdiction to Hear the Appeal of the Planning Board Decision

Appellants argue that Atlantic East does not have standing to appeal to SHAB because Atlantic East's notice of appeal, as well as other various filings presented to SHAB, misstated the corporation's name. The Application submitted for a comprehensive permit listed the applicant as "Atlantic East LTD," whereas, the notice of appeal to SHAB listed the appealing party as "Atlantic East LLC." Compare Application Section 4 with Atlantic East's Notice of Appeal. Appellants argue that SHAB should not have heard the appeal because there is no legal entity known as "Atlantic East LLC," and thus Atlantic East LLC could not have had standing to pursue the appeal to SHAB.

In its reply memorandum of February 20, 2009, Atlantic East clarified that the notice of appeal contained a typographical error and that this appeal is, in fact, being pursued by Atlantic East, Ltd.—the applicant named in the Application for the comprehensive permit. This correction was made before SHAB heard the appeal. SHAB was satisfied, and this Court agrees, that the record evidences that that the error was inadvertent, and that the error was clarified. The error did not prejudice the rights of any party nor any other person entitled to notice. See Taft v. Zoning Board of Review of City of Warwick, 76 R.I. 443, 447, 71 A.2d 886, 888-89 (1950) (stating that notice of zoning matters is inadequate if it does not "reasonably convey[] the required information," or if "irregularities in the application and hearing" are "factually prejudicial to the petitioner"). This Court finds that the appeal was, in fact, being properly pursued by the Applicant,

Atlantic East LTD, which by statute,[2] has standing to appeal a decision of the Planning Board to SHAB. Sec. 45-53-5(a).

Most importantly, the appeal was, in fact, being properly pursued by the Applicant, Atlantic East, Ltd., which by statute, has standing to appeal a decision of the Planning Board to SHAB. See 45-53-5(a). That section states in relevant part that "[w]henever an application filed under the provisions of §45-53-4 is denied…the *applicant* has the right to appeal to [SHAB] …for a review of the application." (Emphasis added.)

3

Inadequate Findings

Appellants further contend that SHAB failed to make certain statutorily required findings of fact, namely that of integration. On appeal, SHAB held that the denial of the comprehensive permit based solely on the issue of integration was based on an unreasonably narrow review of the facts, and thus the finding by the Planning Board that the proposal was not integrated was unreasonable. Thus, Applicants maintain, SHAB erred in finding compliance with the integration requirement reversing the decision of the Planning Board.

The Act directs local review boards to make certain "required findings" before approving comprehensive permits for low and moderate income housing. The finding at issue in the instant matter is Section 45-53-4(a)(4)(v)(C), which requires local review boards to determine that:

> "[a]ll low and moderate income housing units proposed are integrated throughout the development; are compatible in

[2] Section 45-53-5(a) provides that "the applicant has a right to appeal . . ."

> scale and architectural style to the market rate units within the project; and will be built and occupied prior to, or simultaneous with the construction and occupancy of any market rate units." Section 45-53-4(a)(4)(v)(C).

The statute requires the planning board make this positive finding, "supported by legally competent evidence on the record which discloses the nature and character of the observations upon which the fact finders acted." Sec. 45-53-4(a)(4)(v).

The Planning Board found that the proposal did not meet this standard. In reviewing the floor plans of the proposed market rate units, the Planning Board concluded that "they are NOT similar in scale and style to the LMI units to be rehabilitated in the existing structure." (P.B. Decision.) Furthermore, they found by a 3-2 vote that the location of the fourteen affordable units in the existing building and only two affordable units in the proposed new building represents an "imbalanced dispersion onsite." Id.

The term "integration" is not defined by the Act or any judicial or administrative rulings. In interpreting the meaning of this term, and reviewing the features of the proposed project, SHAB found that the Planning Board's interpretation was too narrow, in that it only focused on the characteristics of the proposed project.

The Court will defer to an agency's interpretation of an ambiguous statute "'whose administration and enforcement have been entrusted to the agency . . . even when the agency's interpretation is not the only permissible interpretation that could be applied.'" Auto Body Association of Rhode Island, 996 A.2d at 97 (quoting Pawtucket Power Associates Limited Partnership v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993)). Furthermore, "a reviewing court should accord an agency's decision

considerable deference when that decision involves a technical question within the field of the agency's expertise." Rhode Island Higher Education Assistance Authority v. Department of Education, 929 F.2d 844, 857 (1st Cir. 1991) (internal quotations omitted).

In interpreting the meaning of "integration," SHAB turned to the legislative findings and declared purpose of the Act, codified in Section 45-53-2. That section provides:

> "The general assembly finds and declares that there exists an acute shortage of affordable, accessible, safe and sanitary housing for its citizens of low and moderate income, both individuals and families; that it is imperative that action is taken immediately to assure the availability of affordable, accessible, safe, and sanitary housing for these persons; that it is necessary for each city and town to provide opportunities for the establishment of low and moderate income housing; and that the provisions of this chapter are necessary to assure the health, safety, and welfare of all citizens of this state, and that each citizen enjoys the right to affordable, accessible, safe, and sanitary housing. *It is further declared to be the purpose of this chapter to provide for housing opportunities for low and moderate income individuals and families in each city and town of the state and that equal consideration shall be given to the retrofitting and rehabilitation of existing dwellings for low and moderate income housing and assimilating low and moderate income housing into existing and future developments and neighborhoods.*" Sec. 45-53-2 (emphasis added).

In its determination of whether the proposed plan would create sufficiently integrated affordable housing, SHAB was guided by this Act's stated purpose, as well as the tenets of the Town of Narragansett's Affordable Housing Plan. The Town has a clearly demonstrated need for affordable housing. It has only reached a level of 2.8% for low and moderate income housing, far short of the state-mandated goal of 10%. (Town of Narragansett 2008 worksheet *available at* www.HousingWorksRI.org). The Act's

stated purpose clearly demands action to improve this statistic. Furthermore, the Town's Affordable Housing Plan encourages the renovation of existing multi-family buildings, in light of acknowledged challenges that it is facing due to the lack of land available for development.[3] Both SHAB and the Planning Board agreed that the proposal was "statistically consistent" with the development envisioned in the Affordable Housing Plan.

In its more focused examination of the proposed plan's details, SHAB's finding— that the proposal would provide low income housing that was sufficiently "integrated" within the meaning of the Act— was supported by legally competent evidence found in the plans and records. Within the existing building, the submitted plans showing the location of the units demonstrate that the fourteen affordable units would be dispersed throughout the building. (Transcript of Planning Board 6/10/08 at 114.) There was reliable, probative, and substantial evidence from which SHAB concluded that upon the completion of this building's renovations, the low and moderate income rental units will sufficiently blend in with the market rate units. SHAB noted that Atlantic East has proposed the conversion of existing apartments into townhouse style apartments, which will promote the compatibility of the affordable and market rate units. With respect to the proposed new building, testimony from Atlantic East's architect revealed that the two affordable units will be similar in scale and style to the market rate units. (Transcript of Planning Board 6/10/08 at 20-28 (stating that the affordable and market rate units in the proposed new building would both be approximately 1000 square feet.)) Appellants

[3] "Narragansett is already the most densely populated town in the South County region and easily developable land is extremely scarce." Affordable Housing Plan at 3. The plan, as revised in July 2005, envisions that Narragansett "will achieve build-out in the next 20 years" to achieve the 10% goal. Id. at 19.

contend that the two affordable units in this new building are segregated because they will have a separate driveway and do not have ocean views. However, when viewing the plan in its entirety, this Court finds competent evidence to uphold SHAB's finding that the affordable units are integrated with the market rate units. Although the affordable units would not be dispersed equally between the old and new proposed buildings, SHAB has before it the record testimony of Atlantic East that the entire property would be set up as one condominium. Atlantic East also presented evidence that the average size of all proposed new units are comparable in size to the average size of the existing units to be rehabilitated.

The record demonstrates that SHAB carefully reviewed the project plans in their totality and reasonably concluded that the sixteen proposed low and moderate income units are "sufficiently compatible in their architectural features to the market rate units." (SHAB Decision at 23.) This Court finds that SHAB made a reasonable interpretation of the integration requirement by considering the underlying purpose of the Act and the Town of Narragansett's Affordable Housing Plan in addition to the specific details of the proposed plan. See Commercial Union Ins. Co. v. Pelchat, 727 A.2d 676, 681 (R.I. 1999) (statutory interpretation should be undertaken in recognition of the underlying purpose of the enactment). SHAB's finding that the proposed plan would provide for sufficiently "integrated" affordable housing is supported by legally competent evidence and a reasonable reading of the record.

IV

Conclusion

After review of the entire record, this Court finds the November 23, 2009 decision of the State Housing Appeals Board, vacating the Planning Board's decision and approving the application of Atlantic East, is not in violation of statutory or ordinance provisions or clearly erroneous. Substantial rights of the Appellants have not been prejudiced. Accordingly, this Court affirms the decision of the State Housing Appeals Board.

Counsel shall submit the appropriate judgment for entry.