

STATE OF RHODE ISLAND

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: June 12, 2024)

THE TOWN OF WARREN,	:	
<i>Appellant,</i>	:	
	:	
v.	:	C.A. No. PC-2023-03477
	:	
THE STATE HOUSING APPEALS	:	
BOARD,	:	
<i>Appellee,</i>	:	
	:	
v.	:	
	:	
LAST EVER REALTY, LLC,	:	
<i>Interested Party Appellee.</i>	:	

DECISION

LANPHEAR, J. Before this Court for decision is the Town of Warren’s appeal from a June 29, 2023 decision of the State Housing Appeals Board (“SHAB”).¹

The Town of Warren Planning Board considered and rejected Last Ever Realty, LLC’s application for a comprehensive permit for a mixed residential development (“Application”). Last Ever Realty appealed to the SHAB. The SHAB reversed the Planning Board’s decision. The matter was then appealed to this Court by the Town which seeks reversal of the SHAB’s decision. Jurisdiction is pursuant to G.L. 1956 § 45-53-5, as

¹ The SHAB was abolished effective January 1, 2024. See P.L. 2023, ch. 310-313; G.L. 1956 §§ 45-53-5.1 and 45-53-5. However, because Last Ever Realty submitted its application before January 1, 2024, and SHAB dutifully issued its appellate decision in December 2023, it is reviewable by this Court. See *East Bay Community Development Corporation v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1144 (R.I. 2006) (explaining that the appropriate standard for an appeal is “the law in effect at the time when the applicant . . . submitted its application for a permit to the zoning board[.]” absent a “clear expression of retroactive application”).

enacted by P.L. 2022, ch. 208, § 3 and ch. 209, § 3 (eff. Jan. 1, 2023 through June 30, 2023).²

I

Facts and Travel

A

Rhode Island Low and Moderate Income Housing Act

The Rhode Island Low and Moderate Income Housing Act, G.L. 1956 chapter 53 of title 45, aims to address the “acute shortage of affordable, accessible, safe, and sanitary housing” by providing “housing opportunities for low and moderate income individuals and families in each city and town of the state.” Section 45-53-2. “Any applicant proposing to build low or 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 local boards.”³ Section § 45-53-4 (2009 Reenactment, eff. to June 29, 2022). The single application procedure “is only available for proposals in which at least twenty-five percent (25%) of the housing is low or moderate income housing.” *Id.*

In 2004, the Act was amended with the passage of the “Comprehensive Housing Production and Rehabilitation Act.” *See* G.L. 1956 § 42-128-8.1(a). As a result, the State was required to “maintain a comprehensive housing strategy applicable to all cities and

² The Rhode Island General Assembly continues to modify statutes in an effort to limit the lack of affordable housing in the state. It is important to note that the references to G.L. 1956 § 45-53-5 hereinafter cite to the statute as amended by P.L. 2022, ch. 208, § 3 and ch. 209, § 3, effective January 1, 2023 through June 30, 2023.

³ The “local review board” is defined as “the planning board as defined by subdivision 45-22.2-4(26), or if designated by ordinance as the board to act on comprehensive permits for the town[.]” Section 45-53-3(8). Hereinafter, references to the “local review board” are replaced with the “Planning Board.”

towns that addresses the housing needs of different populations[.]” Section 42-128-8.1(b)(1). After adoption of a strategic plan, “towns and cities shall bring their comprehensive plans into conformity with [the State’s] requirements[.]” Section 42-128-8.1(f). This ensuing strategy mandated that at least 10 percent of each municipality’s housing be affordable. *See* §§ 45-53-3.1, 45-53-4(2)(iii)(F), 45-53-5.1(e)(1)(ii). Municipalities not in compliance were required to develop an “Approved Affordable Housing Plan,” defined as an “affordable housing plan that has been approved by the [state] director of administration as meeting the guidelines for the local comprehensive plan as promulgated by the state planning council[.]” Section 45-53-3(2) (2009 Reenactment) (eff. to July 31, 2021).⁴

B

Town’s Comprehensive Plan

The Town of Warren’s Comprehensive Plan was last amended over twenty years ago. *See* Comprehensive Plan 2003.⁵ That plan emphasized Warren’s “rural atmosphere” and specified a goal to “[p]rotect farmland and other valuable rural and natural resources[.]” *Id.* at 13, 16. That plan expired in 2009.⁶

In 2004, the Town adopted a “Plan for Low and Moderate Income Housing” (2004 Plan). *See* Town’s Br., Ex. 3 (“Town’s 2004 Affordable Housing Plan”).⁷ At that time,

⁴ Hereinafter, references to G.L. 1956 § 45-53-3 cite from the 2009 Restatement, effective until July 31, 2021.

⁵ The plan may be found at [https://cms7files.revize.com/warrenri/document_center/Plans/Warren%20Comprehensive%20Plan%20\(2003\)%20TEXT%20ONLY.pdf](https://cms7files.revize.com/warrenri/document_center/Plans/Warren%20Comprehensive%20Plan%20(2003)%20TEXT%20ONLY.pdf).

⁶ *See Comprehensive Plans and State Approval Status*, DIVISION OF STATEWIDE PLANNING (Apr. 1, 2024), <https://planning.ri.gov/planning-areas/local-comprehensive-planning/comprehensive-plans-and-state-approval-status>.

⁷ The Town provided an Exhibit Index to this Court on June 3, 2024, and the Court accordingly refers to the documents by their respective names and numbers.

“only 4.60 percent of the year-round housing units in Warren were considered to be affordable to persons of low and moderate income.” *Id.* at 2-4. The 2004 Plan designated Lots 16 and 159 as “developable parcels and redevelopment sites that will provide the Town with more affordable housing options[.]” *Id.* at 6-14; 6-18, Table 27.

As of 2020, 4.5 percent of Warren’s housing was set aside for affordable housing. (Last Ever Realty’s Br., Ex. 8 (“Meeting Tr., July 30, 2020”) at 3:6.)⁸ The parties agree that the Town has not been—and currently is not—complying with the 10 percent minimum for affordable housing units. *See id.* at 3:3-14; *see also* 4-6, 10-11 (acknowledgement by Director of Planning and Community Development, Bob Rulli, that Warren currently is “not meeting the state requirement on affordable housing units” and it does not “have an accepted Affordable Housing Plan”).

C

Proposed Development

On June 1, 2020, Last Ever Realty applied for a Comprehensive Permit⁹ pursuant to the Low and Moderate Income Housing Act to develop “Settlers Green,” a proposed development plan of 16.22 acres on the intersections of Kinnicutt Avenue and Denver Avenue in Warren, Rhode Island. *See generally* Last Ever Realty’s Br., Ex. 1 (“Application”). The property additionally is identified by the Town’s Tax Assessor as

⁸ Last Ever Realty provided this Court with an Appendix of Exhibits on March 1, 2024; accordingly, this Court refers to the Exhibits by their respective names and numbers.

⁹ Prior to submitting its Application, Last Ever Realty received a “Letter of Eligibility” from the Director of Development for RI Housing. (Last Ever Realty’s Br., Ex. 4.) RI Housing concluded that: “Last Ever Realty, LLC is eligible to pursue a Comprehensive Permit application in the town of Warren to develop Kinnicutt Avenue and Denver Avenue, plat 20, lots 16, 159 and 164.” *Id.* at 2.

Plat 20 and contains Lots 16, 159, and 164.¹⁰ *See generally id.* Last Ever Realty’s proposal seeks to create:

“[a] mixed residential community consisting of twelve (12) single family, three (3) bedroom “home ownership” dwellings on individual lots, together with two (2) four (4) story garden-style apartment buildings, each containing a mixture of fifty four (54) and one (1) two (2) bedroom rental apartments, together with parking, stormwater controls, and amenities as set forth in the Master Plan set. Subject to demand and need, the current concept proposal involves sixty (60) one (1) bedroom, one (1) bath units, and the remaining forty eight (48) will be two (2) bedroom, one (1) bath units.” (Application 1.)

The proposal further states that “[a]t least twenty five percent (25%) of the proposed units will be deed restricted to persons of low or moderate income in accordance with the Act, and they will be integrated throughout the development, including both the home ownership and rental components.” *Id.* at 2. Additionally, the proposal describes plans for parking, stormwater controls, and amenities. *See id.* at 1-2. If approved, the development will use public water and public sewer connections. *See id.*

Last Ever Realty initially requested thirteen waivers from the requirements of the Town’s Zoning Ordinance and the Planning Board/Land Development Regulations; the request later was reduced to five. *See* Application 3-4; Last Ever Realty’s Br. at 32 and Last Ever Realty’s Br., Ex. 20 (“Board Meeting Tr., Feb. 22, 2021”) at 13:1-3.

The Application addressed the development’s potential impact on the surrounding neighborhood: the proposal “is not expected to have adverse traffic impacts”; “all environmental impacts (e.g., stormwater, wetlands) will be designed to meet State of

¹⁰ Of note, Lots 16 and 159 were described in the Town’s 2004 Plan as “developable parcels and redevelopment sites that will provide the Town with more affordable housing options[.]” Town’s 2004 Plan at 6-14; 6-18, Table 27.

Rhode Island (RIDEM) requirements and best practices”; and “the proposed development is expected to have no adverse impact on the neighborhood and the Town.” (Application 2.) As to the proposal’s consistency with the Town’s Comprehensive Plan, Last Ever Realty emphasized that the Town’s 2004 Plan designated Lots 16 and 159 as sites that could accommodate such a development particularly “because [the property] is served by water and sewer, and is vacant, and has the capacity for higher density multi-family development.” *Id.* at 6. Further, the proposed development would co-exist within the Town’s diverse housing landscape of multi-family buildings because multi-family development currently makes up about 50 percent of the Town’s housing. *Id.* at 5.

On July 17, 2020, the Planning Board issued a Certificate of Completeness pursuant to § 45-53-4(a)(2) which confirmed that the Application contained all the required materials and information. *See* Last Ever Realty’s Br. at 14.

D

Preliminary Review Committee

The Town’s Preliminary Review Committee¹¹ met with Applicant’s attorney and reviewed the Application on July 30, 2020 and September 9, 2020. *See* Town’s Br., Ex. 1 (“Planning Board Denial”). The Preliminary Review Committee is tasked with “review[ing] the applicant’s comprehensive permit[,]” “evaluat[ing] all evidence of the low and moderate housing stock[,]” and making a “recommendation to the permitting board.” Town’s Zoning Ordinance, § 32-157;¹² *see also* Meeting Tr., July 30, 2020 at 2:20-25.

¹¹ The Preliminary Review Committee also is referred to by the parties as the Technical Review Committee or Preliminary Review Commission. *See* Meeting Tr., July 30, 2020. This Court refers to this body as the Preliminary Review Committee.

¹² The Town’s Zoning Ordinance may be found at <https://library.municode.com/ri/>

The Preliminary Review Committee made the following findings of fact: it was not persuaded “that the development will not impact and produce noise [and] air pollution”; it needed additional information on soil evaluation and ground water supply data; the waiver requested for impervious surface lot coverage cannot be waived since it is an “environmental control”; Last Ever Realty’s flow projections would exceed the limit provided by DEM; and the Fire Chief had concerns regarding the water’s flow and pressure. *See* Town’s Br., Ex. 5 (“Planning Board Minutes, Sept. 28, 2020”) at 3. The Preliminary Review Committee reasoned that it did not have sufficient information to make a recommendation; thus, it requested that the Application be forwarded to the Planning Board. *See id.* at 1.

E

Planning Board

The Planning Board held hearings in consideration of the master plan on September 28, 2020 and February 22, 2021.¹³ *See* Planning Board Denial.

1

September 28, 2020 Meeting

At the September 28, 2020 meeting, Last Ever Realty proffered one witness, Thomas J. Principe III, of Principe Engineering, Co., to discuss the proposal’s engineering details. *See* Planning Board Minutes, Sept. 28, 2020. Chairman Massie proposed that the

warren/codes/zoning_ordinance?nodeId=CH32ZO_ARTXXVIILOMOINHO_S32-157PRECODUPO.

¹³ While not the official record, the September 28, 2020 Planning Board meeting can be viewed at: <https://www.youtube.com/watch?v=nVXwvsEIwg0>. The February 22, 2021 Planning Board meeting can be viewed at: <https://www.youtube.com/watch?v=2xgtfN6XHWm&t=451s>.

Planning Board wait to vote until presented with reports from the flow meter. *See id.* at 6; *see also* Last Ever Realty’s Br., Ex. 12 (“Board Meeting Tr., Sept. 28, 2020”) at 27. During public comment, residents expressed concerns regarding the number of requested waivers and the proposal’s effects on the wetlands, traffic, and public safety. *See* Planning Board Minutes, Sept. 28, 2020 at 6-7. The Planning Board voted to continue the hearing to October 26, 2020. *Id.* at 7.¹⁴

Thereafter, Last Ever Realty worked to address the Planning Board’s concerns. On November 1, 2020, Mr. Principe informed Director Rulli that a flow meter had been installed on the property and would continue to gather flow data for at least ninety days. *See* Last Ever Realty’s Br., Ex. 14. On December 23, 2020, Mr. Principe updated Director Rulli, stating: “this sewer line can handle more than the [amount] that was estimated.” *See id.* at Ex. 16. On January 28, 2021, Mr. Principe e-mailed Director Rulli informing him of the following updates to be presented at the next meeting: an updated traffic study, sewer flow data, shadow study report, and testimony from a real estate expert. *See id.* at Ex. 19.

2

February 22, 2021 Meeting

At the beginning of the February 22, 2021 meeting, Chairman Massie moved to close the public hearings for the Settler’s Green proposal. *See* Board Meeting Tr., Feb. 22, 2021 at 2:25-3:2. Last Ever Realty’s attorney alerted the Chairman that he had prepared a presentation; however, the Chairman did not let counsel present evidence. *See id.* at 3:3-7.

¹⁴ Despite the October 2020 date, the transcript indicates that the parties were aware that a meeting might not be scheduled until early 2021 given the reliance upon daily flow testing and monitoring which could take at least 120 days. *See* Board Minutes, Sept. 28, 2020 at 6; Last Ever Realty’s Br. at 33 (explaining that the delay “had been deliberately scheduled in order for [daily flow] testing [and monitoring] to be conducted”).

After the motion to close was granted, Last Ever Realty’s attorney explained that he had been working to address the issues that were left open at the September 28, 2020 meeting. *See id.* at 6:4-14. Specifically, he had submitted updated reports to the Planning Board and “had a testing protocol on the sewer issue that resolved in [its] favor as to the testing” indicating that “[t]here is more than sufficient capacity of the sewer.” *Id.* at 7:5-9. Despite counsel’s pleas to present evidence, the Planning Board deprived him of the opportunity. *See generally id.* Director Rulli explained:

“I totally get that your traffic engineer is going to say there’s no issue, our traffic engineer will probably say there’s an issue. Your architect is going to say there’s no water flow problem. The fire chief and his experts might say there is a water flow problem. So, we can agree to disagree. I think at this point . . . the Planning Board’s position is if they’re not supportive of this project, then, there’s no reason to continue to kick this can down the round [*sic*].” *Id.* at 24:1-11.

3

Planning Board Decision

On February 22, 2021, the Planning Board voted 7-0 denying the Application. *See* Planning Board Denial; *see also* Board Meeting Tr., Feb. 22, 2021 at 28:8-32:14 In its written decision, the Planning Board found that the proposal was not consistent with the Town’s Comprehensive Plan. (Planning Board Denial at 4.) It further found that the requested waivers represented “significant deviations” from other approved development plans and outweighed the need for low and moderate income housing. *Id.* The Planning Board additionally concluded that the proposal may impact pedestrian and vehicular safety, Town and State roads, and the infrastructure of existing construction. *Id.* at 6.

F

State Housing Appeals Board

Last Ever Realty timely appealed to the SHAB pursuant to § 45-53-5, asserting that the Planning Board’s decision was “not consistent with local housing needs” and “is unreasonable in relation to those housing needs, particularly in view of the fact that the Town has no Approved Affordable Housing Plan[.]” *See* Last Ever Realty’s Appeal at 2; Town’s Br., Ex. 2 (“SHAB Decision”) at 2. The SHAB held a hearing on February 15, 2023. (SHAB Decision at 27.) On June 29, 2023, the SHAB issued its written decision vacating the Planning Board’s decision and granting master plan approval of the Application. *Id.* at 32. The SHAB reasoned that the Planning Board’s conclusion that the proposal was not consistent with the Town’s Comprehensive Plan was not a “thorough and balanced” analysis. *Id.* at 31. The SHAB concluded that there was “sufficient conceptual proof to grant master plan approval[.]” *Id.* at 32. It further concluded that Last Ever Realty “demonstrate[d] its willingness to address and resolve all appropriate health and safety concerns[.]” *Id.* at 30. However, SHAB emphasized that the second phase of review would require more details. *Id.* at 32. The Town timely appealed the SHAB’s decision to this Court on July 19, 2023.¹⁵

¹⁵ At the time this appeal was filed, decisions by the SHAB were to be appealed to the Superior Court pursuant to § 45-53-5(c).

II

Standards of Review

A

The SHAB Standard of Review

If an applicant's comprehensive permit application is denied, "the applicant has the right to appeal to the [SHAB] . . . established by § 45-53-7, for a review of the application." Section 45-53-5. The General Assembly articulated the following standard of review which SHAB was required to apply at the time:

"In hearing the appeal, the [SHAB] shall determine whether: (i) in the case of the *denial* of an application, the decision of the [Planning 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*[".]” Section 45-53-6(b) (2009 Reenactment, eff. to June 29, 2022) (emphasis added).¹⁶

The SHAB also was guided by the following list of non-exclusive factors:

"(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

¹⁶ Hereinafter, references to G.L. 1956 § 45-53-6 cite from the 2009 Restatement, effective to June 29, 2022.

“(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).

B

The Superior Court Standard of Review

Decisions by the SHAB may be appealed to the Superior Court. *See* § 45-53-5. The Superior Court’s review “is analogous to that applied . . . in considering appeals from local zoning boards of review[.]” *Curran v. Church Community Housing Corporation*, 672 A.2d 453, 454 (R.I. 1996). Further, the Superior Court “employs a deferential standard when reviewing a SHAB decision[.]” *Town of Burrillville v. Pascoag Apartment Associates, LLC*, 950 A.2d 435, 443 (R.I. 2008) (internal quotation omitted). The Superior Court may not substitute its judgment for that of the SHAB as to the weight of the evidence relating to questions of fact. *See* § 45-53-5(d).

The Superior Court may remand the case for further proceedings or reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings or conclusions made by the SHAB that 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.*

On appeal, the Superior Court must consider the record of the hearing before the SHAB and only may consider additional evidence if it “is necessary for the proper disposition of the matter.” Section 45-53-5(c).

III

Analysis

The Town asserts that the SHAB Decision did not properly weigh the impact of the proposal on the Town’s needs and that the decision fails to adequately consider the Town’s Comprehensive Community Plan. (SHAB Decision at 7, 14.) The Town also avers that the SHAB Decision failed to properly assess engineering and health and safety issues. *Id.* at 17. The Town repeatedly refers to the SHAB Decision as arbitrary and capricious.

A

Planning Board’s Decision

In order to review the SHAB Decision, this Court must begin by reviewing the Planning Board’s decision. At the outset, this Court is troubled by the abrupt manner in which the Planning Board conducted its February 22, 2021 meeting. Last Ever Realty was not able to present updates on testing that the Planning Board itself had requested on September 28, 2020. The September meeting was continued to allow Last Ever Realty to submit further evidence on the sewer, flow plan, environmental issues, and the like. The Chairman noted that it was better to wait to obtain this information, even if it took several months. (Planning Board Minutes, Sept. 28, 2020 at 6.) Cutting off future discussion and evidence on February 22, 2021 eclipsed Last Ever Realty’s opportunity to be heard. While

this may not rise to the level of a due process violation, it demonstrates the Planning Board's reluctance to consider the merits of a full presentation and any modifications by Last Ever Realty to comply with its requests. Already woefully behind in revising its Comprehensive Plan and meeting its own affordable housing goals, the abrupt change was both unexpected and unfair.

Turning to the merits of the Planning Board's decision, it made certain findings of fact.¹⁷ In regard to § 45-53-4(4)(v)(A)'s consistency with local needs evaluation, the Planning Board found that "[t]he proposal is not consistent with the currently adopted Comprehensive Plan and the percentage of long-term affordable homes [would] increase[] fractionally from 4.49% to 4.83%." Planning Board Denial 4; *see also* § 45-53-4(4)(v)(A)(2009 Reenactment, eff. to June 29, 2022).¹⁸

Regarding § 45-53-4(4)(v)(B)'s criteria that a proposed development comply with the standards and provisions of a town's zoning ordinance and regulations, the Planning Board found that "[t]he amount and scope of the waivers and relief requested, which represent significant deviations from any other approved sub-division or development plan, *far outweigh* the need for low and moderate-income housing based on the number of units offered." (Planning Board Denial 4) (emphases added).

The Planning Board stated that § 45-53-4(4)(v)(C)'s requirement of integration of units was "not an issue for this Application." Planning Board Denial 5; *see also* § 45-53-

¹⁷ After the vote was taken at the February 28, 2021 meeting, the Town Solicitor was quick to note that findings of fact needed to be incorporated, and rushed to incorporate them, even though the applicant had not finished its presentation. (Last Ever Realty's Br., Ex. 20 ("Board Meeting Tr., Feb. 22, 2021") at 29:14-20.)

¹⁸ Hereinafter, references to G.L. 1956 45-53-4(v) cite from the 2009 Reenactment, effective June 29, 2022.

4(4)(v)(C).

As to § 45-53-4(4)(v)(D)'s requirement regarding negative environmental impacts, the Planning Board reviewed Last Ever Realty's request for "a waiver of the maximum impervious surface lot coverage requirement of 15%." *See* Planning Board Denial 5; *see also* Application 3. The Planning Board concluded that, since this requirement is an "environmental control," it is therefore "not discretionary" and "cannot be waived as part of a Comprehensive Permit application." Planning Board Denial 5; *see also* § 45-53-4(4)(v)(D).

With respect to § 45-53-4(4)(v)(E)'s requirement regarding health and safety impacts, the Planning Board found the following: the proposal "will significantly impact both pedestrian and vehicular safety"; the "[t]raffic and sight lines on Kinnicutt Avenue are already high and dangerous"; a new sanitary sewer "could impact both Town and State roads" and "has the potential to cause structural damage to existing structures"; "[r]ural character is very important [to] Warren's identity and must be protected through appropriate zoning and land planning techniques[.]" Planning Board Denial 6; *see also* § 45-53-4(4)(v)(E).

As to § 45-53-4(4)(v)(F)'s criteria that "[a]ll proposed land developments and all subdivisions lots will have adequate and permanent physical access to a public street[.]" the Planning Board found that "[t]here is access to public streets." Planning Board Denial 6; *see also* § 45-53-4(4)(v)(F).

Finally, with respect to § 45-53-4(4)(v)(G)'s requirement that "[t]he proposed development will not result in the creation of individual lots with any physical constraints to development that building on those lots according to pertinent regulations and building

standards would be impracticable,” the Planning Board found that “[a]lternative development opportunities exist at this site that would contribute to meeting the Town’s affordable housing needs.” Planning Board Denial 7; see also § 45-53-4(4)(v)(G).

Pursuant to § 45-53-4(4)(vii), “[i]n reviewing the comprehensive permit request, the [Planning Board] may deny the request for” various reasons. The Planning Board made the following conclusions:

“The proposed project is not consistent with the following . . . goals of the existing adopted Comprehensive Plan, to wit: [Action 1.6, Action 1.7, Policy 2, Policy 5, Action 5.1, Policy 6, Action 6.1, Action 6.2, and Policy 7.]¹⁹

“ . . .

“The proposed project does not preserve the rural character and in fact strips it away in its entirety.

“ . . .

“The Town has begun the process of amending its zoning ordinance . . . to allow for increased density and the development of new housing opportunities. As part of the amended zoning is the adoption of Form Based Code which requires that new development address the need for affordable housing, and which offers density bonuses to those projects which exceed the requested mix of affordable units.

“ . . .

“The Application failed to address the safeguards currently in place for the public and natural resources of the Kickemuit Reservoir Watershed District, and there is no evidence in the Application for the protection thereof. . . . The fact that the Applicant requested a waiver on street trees suggests that there was no attempt to consider the stark transition from residential to high density[.]

¹⁹ See Comprehensive Plan for descriptions of action and policy goals: [https://cms7files.revize.com/warrenri/document_center/Plans/Warren%20Comprehensive%20Plan%20\(2003\)%20TEXT%20ONLY.pdf](https://cms7files.revize.com/warrenri/document_center/Plans/Warren%20Comprehensive%20Plan%20(2003)%20TEXT%20ONLY.pdf).

“The fact that a capacity study must be undertaken relative to the sanitary sewer system suggests that the number of proposed units will have a detrimental effect on the existing system without substantial upgrades. Both historic and recent data indicate that in certain storm events the flow in certain portions of the sanitary sewer system increases significantly pushing the limits of the system’s capacity. The risk of any overflow within the sanitary sewer system poses real public health and safety concerns.

“The fact that the Applicant suggests the benefits to the Town of providing affordable units, while guidance from Rhode Island Housing . . . suggest access to public transportation is imperative to new affordable housing given the large percentage of individuals in that demographic who have no access to a motor vehicle is a great concern. There is no nearby bus stop, no nearby food stores, there are no sidewalks on Kinnicut Avenue which would put pedestrians at risk.” Planning Board Denial 7-8.

Incorporating these findings in its final decision, the Planning Board denied the Application. *See* Planning Board Denial.

Presuming open minds, it is possible that some of the findings could have changed had Last Ever Realty been allowed to complete its presentation.

B

SHAB Decision

Turning now to the SHAB’s June 2023 decision, the SHAB first addressed the proposal’s consistency with the Town’s Comprehensive Plan. *See* SHAB Decision at 29. The SHAB explained that it cannot overlook the Town’s lack of progress toward the low and moderate income housing goals. *Id.* at 30. Further, it disagreed with the Planning Board’s critique that the proposal “barely moves the needle of getting more affordable housing[.]” *Id.* The SHAB reasoned that the “Planning Board did not address why the needle has not otherwise moved much, if at all, under the Comprehensive Plan.” *Id.* at 30-

31. According to the SHAB, instead of addressing why the needle has yet to move, the Planning Board concluded that the proposal “is not a good plan.” *Id.* at 31.

The SHAB next addressed the February 22, 2021 Planning Board meeting. *Id.* It described the Planning Board’s actions as “unfortunate and dismissive[.]” a “‘why bother’ approach toward hearing the evidence[.]” and an “abrupt action in shutting down the public informational meeting[.]” *Id.* at 31. The SHAB reasoned that the Planning Board cannot both reject the additional evidence from Last Ever Realty and also allude to the Town expert’s potential findings. *Id.* Therefore, the SHAB concluded that it was inappropriate for the Planning Board to make determinations about what the Town’s experts “‘might’ have stated or ‘probably’ would have presented on the record.” *Id.* Moreover, the SHAB found that the Planning Board’s decision was especially inappropriate given that the Town “has remained at less than half of the expected . . . goal of 10% low and moderate income housing.” *Id.*

In conclusion, the SHAB found that Last Ever Realty “proffered sufficient conceptual proof to grant master plan approval[.]” *Id.* at 32. It noted that such approval simply allows the proposal to proceed to the preliminary stage of the major land development project. *Id.* The SHAB also encouraged the Planning Board to “proceed in a more complete and transparent manner” during the remaining stages. *Id.*

C

Merits of Appeal

The Court now addresses the Town's arguments on appeal.

1

Local Needs Impact and Consistency with Comprehensive Plan

The Town contends that the SHAB did not properly consider the proposal's impact on local needs nor did it give adequate consideration to the Town's Comprehensive Community Plan. (Town's Appeal at 7, 14.) This Court disagrees.

The Town's Approved Affordable Housing Plan was dated—it had not been updated since 2004.²⁰ *See* Town's 2004 Affordable Housing Plan. When a municipality has failed to meet its quota for low and moderate income housing units, the SHAB must determine the reasonableness and consistency with local needs “in light of the state's need for low and moderate income housing and of the number of low income persons in the community, and if it relates to health and safety, better building design, or preservation of open space.” *Town of Coventry Zoning Board of Review v. Omni Development Corporation*, 814 A.2d 889, 900 (R.I. 2003); *see also* § 45-53-3(4). Here, because the Town lacks an affordable housing plan, the SHAB was required to review the Planning Board's decision to determine if its denial “was reasonable and consistent with [the Town's] local needs[.]” Section 45-53-6(b).

As noted above, the Town's 2003 Comprehensive Plan seeks to protect the Town's rural character. *See* Comprehensive Plan 2003 at 13, 16. The SHAB considered this aspect

²⁰ This Court need not address arguments as to whether the Comprehensive Plan's aim to protect the rural character of the town still may be considered despite the Plan's expiry; the Court's conclusion remains the same.

of the Comprehensive Plan: “While SHAB respects the Town’s adherence to its ‘rural’ tradition, the lack of progress in Warren to enhance its low- and moderate-income housing cannot be overlooked.” (SHAB Decision at 29-30.) The SHAB acknowledged that the proposal would assist the Town’s affordable housing goals and explained how the Town’s 2004 Plan “designated the Property as a suitable site for multi-family housing, yet [the Town] now declines to address its suitability to enhance the Town’s percentage of affordable housing[.]” *Id.* at 30. In other words, since the Town was not meeting its affordable housing needs, SHAB determined that the proposal was reasonable because it would increase the number of affordable housing units in the Town. This Court also takes judicial notice of the State’s “Affordable Housing Progress Report” which classifies Warren as a town which had made “No Significant Progress” toward its affordable housing goal.²¹ Therefore, this Court concludes that the SHAB appropriately reviewed the Town’s local needs. Accordingly, the SHAB Decision was not in error.

2

Concerns at the Master Plan Stage

The Town additionally asserts that the SHAB failed to properly address engineering, health, and life safety issues, such as the “negative effect” that the proposed development would have “on the health and safety of existing residents by increasing traffic and resultant overburdening of the streets in the area.” *See* Town’s Appeal at 17. The Town suggests that Last Ever Realty’s willingness to address and resolve these issues

²¹ *See Affordable Housing Progress Report*, OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT (Apr. 8, 2021), <https://ohcd.ri.gov/online-resources/affordable-housing-progress-report>.

does not mean that the developer can do so. While that may be true, during the September 2020 hearing the Planning Board allowed Last Ever Realty to return with more of its case in February 2021. When Last Ever Realty returned, armed with more evidence, the Planning Board refused to hear more. The Town is in no position to allege that Last Ever Realty could not meet its burden.²²

Before addressing the merits of the Town’s argument, this Court must address the background in which it reviews an application at the master plan stage. *See* Town’s Appeal at 17. In review of an application for major land development and subdivision, approval is required at each of the three stages: (1) master plan, (2) preliminary plan, and (3) final plan. *See* G.L. 1956 § 45-23-39(b) (2009 Reenactment, eff. to December 31, 2023). “[M]aster plan” is defined as “[a]n 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*.” Section 45-23-32(23) (2022 Cumulative Supp., eff. Jan 1, 2014) (emphases added).²³

At this master plan stage, the applicant was required to submit:

“information 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.” Section 45-23-40(a)(2) (2022 Cumulative Supp.,

²² The Town directs this Court to § 45-53-4(a)(4) which explains that a local board may deny an application for failure to “adequately address[.]” “concerns for the environment and the health and safety of current residents[.]” Section 45-53-4(a)(4) (2009 Reenactment, eff. to June 29, 2022). Clearly, Last Ever Realty’s counsel was about to address those concerns at the February 2021 hearing when he was abruptly cut short.

²³ Hereinafter, references to G.L. 1956 § 45-23-32(23) cite from the 2022 Cumulative Supplement, effective January 1, 2014.

eff. to Dec. 31, 2023) (emphases added).

Notably, the language in both § 45-23-40(a)(2) (2022 Cumulative Supp., eff. to Dec. 31, 2023) and § 45-23-32(23) refers to the *identification* of potential issues, not *resolution*.

Both Last Ever Realty and SHAB refer to the master plan stage as “conceptual,” although they do not derive such description from the statutory language. *See* Last Ever Realty’s Br. at 2; 13; *see also* Town’s Br. Ex. 4 (SHAB Meeting Tr., Feb. 15, 2023) at 28:9 (“Master plan is conceptual”); SHAB Decision at 2 (noting that Last Ever Realty “has met sufficiently its conceptual burden of proof”).

Given that the Application is at the master plan stage, this Court reviews SHAB’s Decision keeping in mind that only a general outline of the development’s intentions is required. *See* § 45-23-32(23). As to the engineering concerns, the SHAB concluded that the Application was sufficient for the master plan stage. (SHAB Decision 9.) It noted that Last Ever Realty would submit a “more particularized preliminary plan level of review with its engineering reviews and permitting.” *Id.* As to the health and safety concerns, the SHAB concluded that Last Ever Realty “went to great lengths and expense to demonstrate its willingness to address and resolve all appropriate health and safety concerns, such as water, sewer, and traffic issues.” *Id.* at 30.

SHAB correctly reviewed the Application for master plan approval. Section 45-23-41 states that engineering plans and permits are appropriate for the preliminary stage. *See* § 45-23-41 (2022 Cumulative Supp., eff. to Dec. 31, 2023). Last Ever Realty did not need to provide “full engineering details” in the master plan stage. Section 45-23-32(23). *See also* *Town of Smithfield v. Bickey Development, Inc.*, No. 11-1017, 2012 WL 4339200, at *10 (R.I. Super. Sept. 19, 2012) (explaining that, “although the master plan does not

require specific engineering plans, it does require at least a general plan as to the Project”). Last Ever Realty did not need to resolve the health and safety concerns at the master stage. Of course, by the final stage, the Town deserves a more detailed explanation of how the health and safety concerns will be resolved; however, at the master plan stage, the SHAB’s conclusion that Last Ever Realty was willing “to address and resolve all appropriate health and safety concerns” was not in error. (SHAB Decision 30.) Accordingly, the SHAB did not err in reversing the Planning Board’s findings with respect to the engineering and health and safety concerns.

It is not until the later stages of the major land development and subdivision process where an applicant is required to put forth evidence of how its proposal *resolves* such issues identified in the master plan application. For example, at the preliminary plan stage, the applicant is required to submit engineering plans, a perimeter survey, and permits. *See* § 45-23-41 (2022 Cumulative Supp.). Then, at the final plan stage, the applicant is tasked with submitting finalized documents indicating it has resolved any former issues, including a “construction schedule and/or financial guarantees” and “[c]ertification by the tax collector[.]” Section 45-23-43(a) (2009 Reenactment). Additionally, the determination as to whether there are significant negative environmental impacts of a proposed development is analyzed at the final plan stage. *See* § 45-53-4(4)(v)(D) (2009 Reenactment); *see also* *Town of Barrington v. North End Holdings, Co., LLC*, No. PC-2014-3500, 2016 WL 1569319, at *11 (R.I. Super. Apr. 14, 2016) (determining that “a general plan for environmental issues” was sufficient at the master plan stage of review because the specifics would come “at the preliminary and final stages of review”).

IV

Conclusion

For the foregoing reasons, this Court upholds SHAB's grant of Last Ever Realty's master plan application and affirms its June 29, 2023 decision. The Master Plan is approved. This matter is remanded to the Town of Warren Planning Board for further proceedings, specifically to pursue preliminary plan review approval and other approvals which may be necessary.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **The Town of Warren v. The State Housing Appeals Board v. Last ever Realty, LLC**

CASE NO: **PC-2023-03477**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **June 12, 2024**

JUSTICE/MAGISTRATE: **Lanphear, J.**

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