STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: August 21, 2024)

151 Narragansett, LLC	:	
Appellant,	:	
	:	
v.	:	**C.A. No. PC-2023-03526**
	:	
Rhode Island State Housing Appeals Board; Town of Narragansett Planning Board	:	
Appellees,	:	
	:	
v.	:	
	:	
Marie Falsey; Ann Falsey; and Green Inn Landing Condominium Association	:	
Intervenors.	:	

DECISION

LANPHEAR, J. Before this Court is 151 Narragansett, LLC's appeal of the State Housing Appeals Board's (SHAB) July 5, 2023 decision affirming a decision of the Narragansett Planning Board. Jurisdiction is pursuant to G.L. 1956 § 45-53-5.[1] For the reasons set forth, this Court affirms SHAB's decision.

[1] 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 Atlantic East submitted its application before January 1, 2024 and SHAB issued a decision prior to 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").

I

Facts and Travel

On October 17, 2007, Atlantic East, Ltd. filed a comprehensive permit application to develop 151 Ocean Road, Narragansett, Rhode Island (Property). The proposed project would add twenty units to an existing thirty-six rental units and designates fourteen of the existing rental units as low-income housing. The Planning Board initially denied the Master Plan application, but SHAB vacated and reversed on November 3, 2009. The Town of Narragansett and abutters filed separate appeals to Superior Court, and the Superior Court affirmed. *Grilli, et al. v. Atlantic East, Ltd. et al.*, Nos. PC-2009-7122 and PC-2009-7095, Feb. 10, 2012, McGuirl, J. (Appellant's App. at 277).

In June 2019, after a lapse of several years, Atlantic East submitted a preliminary plan application for the Property and the Town Planner issued a certificate that the application was complete. The Planning Board held public hearings on the preliminary plan—in which a myriad of witnesses testified—on August 28, 2019; September 18, 2019; and October 2, 2019.

On June 3, 2019 and August 5, 2019, the Sewer Policy Committee contemplated Atlantic East's application for a waiver from the Town of Narragansett's Sewer Policy and forwarded the application to the Town Council without a recommendation because it was split on what to recommend.[2] Two days before the Planning Board was to hold its second public hearing, the Town Council met to consider Atlantic East's separate application for a waiver of the sewer policy and voted to deny the request. Atlantic East filed a claim for declaratory judgment in Superior

[2] The relief sought was for Area II. Section 2(d) of Narragansett's Sewer Policy states that "[a]ny parcel of land located within the Sewer Areas which abuts a sewer line may be permitted to tie in to the Narragansett Sewer System, and: [p]ermits issued under this Section will be on a one (1) permit per unit basis, with no more than one (1) permit issued per platted lot, with all said lots legally platted, filed, and recorded prior to the adopted of this Policy." (R. at 1442-43.)

Court and that case remains pending. *See 151 Narragansett, LLC v. Town of Narragansett* (WC-2023-0165).

Following the Town Council's denial of Atlantic East's application for a waiver of the sewer policy, the Planning Board voted 4-1 to deny the preliminary plan application. *See* R. at 1485.[3] On October 21, 2019, the Planning Board issued its decision in writing, stating that the denial of a waiver of the sewer policy rendered the application "a physical impossibility[] and incomplete[.]" (R. at 1485-87.) The Planning Board noted that it did not act upon the merits of the application. *Id.* at 1487.

On November 18, 2019, Atlantic East filed a timely appeal to the SHAB. *See id.* at 2159. In November 2021, Atlantic East sold the Property to 151 Narragansett who was substituted as the Appellant. *See id.* at 2163-64. On April 20, 2023, 151 Narragansett filed a motion requesting that the SHAB review additional evidence pertaining to sewer capacity and availability. That request was denied. On May 23, 2023, SHAB unanimously voted to deny the appeal because 151 Narragansett lacked approval for the sewers, thereby upholding the finding of "incompleteness of the application." (R. at 2149-50, Tr. 93:2-94:25.)

On July 5, 2023, the SHAB issued a written decision. The SHAB's decision noted that its review of the Planning Board's decision was limited to whether it acted reasonably—when finding that Atlantic East's preliminary plan was incomplete—and concluded in the affirmative. On July

[3] Atlantic East asked the Town Council to approve the sewer connection in a meeting on September 16, 2019. Testimony was introduced by Atlantic East that an independent on-site septic system (OWTS) would be a near improbability, given that a sewer line is nearby and other challenges with the site. *See* testimony of Mr. Chateauneuf, SHAB appendix 12, at 1589-95, Planning Board Tr. 43-49, Sept. 16, 2019, Set 12 of Admin. R.

24, 2023, 151 Narragansett timely appealed the SHAB's decision to this Court. On July 17, 2024, the Court heard oral arguments.[4]

Additional facts are set forth below as necessary.

II

Standard 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] . . . 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 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[.]" Section 45-53-6(b).

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 abutters Marie Falsely, Ann Falsely, and Green Inn Landing Condominium Association were intervenors before SHAB. There was no motion to intervene filed in this Court, but these abutters filed a memorandum of law as intervenors. Their counsel was heard at oral argument.

> "(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).

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 appeals board by statute or ordinance;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Id*.

On appeal, the Superior Court 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

A

Procedural Due Process & the Rhode Island Low- and Moderate-Income Housing Act

It is averred by 151 Narragansett that the Planning Board violated the Rhode Island Low- and Moderate-Income Housing Act and its procedural due process rights by mandating sewer review at the Preliminary Plan stage. Specifically, 151 Narragansett argues that it was never given a meaningful opportunity to be heard on the sewer capacity issue and Narragansett thereby frustrated the purpose behind the Low- and Moderate-Income Housing Act by halting this project. The Planning Board contends 151 Narragansett incorrectly restates the facts and travel of this case to make these claims and avers that the Planning Board reached the proper conclusion when it found that the application was incomplete. (Planning Board's Mem. in Supp. of SHAB's Decision at 14-21.)

The Due Process Clause "provide[s] a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State." *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992). "Procedural due process guards against the modalities of state action, addressing itself to the task of rectifying perceived procedural deficiencies." *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1153 (R.I. 2006). '"[P]rocedural due[ ]process requires certain minimal standards of notice, hearing, and opportunity to respond adequately before a governmental agency may effectively deprive an

individual of life, liberty, or property."' *Id.* (quoting *State v. Manocchio,* 448 A.2d 761, 764 n.3 (R.I. 1982)). "Due process is a flexible concept and the degree of protection afforded to an individual may vary with the particular situation." *Barber v. Exeter-West Greenwich School Committee,* 418 A.2d 13, 20 (R.I. 1980).

The Low- and Moderate-Income Housing Act states:

> "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. This procedure is only available for proposals in which at least twenty-five percent (25%) of the housing is low- or moderate-income housing." Section 45-53-4(a).

Narragansett Ordinance, Appendix A, Section 7A (Affordable Housing) 1(c)(3) states in pertinent part, "[n]otwithstanding, the planning board's express authority under R.I.G.L. 45-53 [Low- and Moderate-Income Housing Act], the town council shall be the sole authority to issue sewer permit waivers." On September 16, 2019, the Town Council held a meeting where it discussed an application for a waiver of the sewer policy which included Atlantic East's counsel calling Mr. Ceasrine, an engineer (and former Town Engineer) who testified about the sewer policy. *See* R. at 21-37. At the same meeting, Atlantic East's counsel provided arguments relating to their desire for a waiver of the sewer policy. The request for a waiver was rejected by the Town Council that evening.

Based on that procedural history, 151 Narragansett's arguments are divorced from the facts and travel of this case. In other words, the predecessor to 151 Narragansett had an opportunity to be heard: witnesses testified and arguments were presented at the September 16, 2019 Town Council meeting. *See* R. at 21-79. Further, the procedural history shows that the Town Council and Planning Board abided by the edits set out in the Low- and Moderate-Income Housing Act

and the Narragansett Ordinances. Therefore, the Planning Board did not engage in arbitrary or capricious government action.

B

Substantive Due Process

It is averred by 151 Narragansett that the Town Council sewer waiver policy is pretext for denial because sewer capacity is available. Additionally, 151 Narragansett avers that there was no basis to deny the application at that stage of the process, and 151 Narragansett asserts that the sewer waiver policy empowers the Town Council to usurp the Planning Board's power which violates 151 Narragansett's substantive due process rights. While the Planning Board did not provide a separate argument regarding substantive due process, the Intervenors contend that the Narragansett Ordinance sets forth the process to obtain a waiver of the sewer policy which places the Town Council as the final arbiter at the town level.

"Substantive due process, as opposed to procedural due process, addresses the 'essence of state action rather than its modalities; such a claim rests not on perceived procedural deficiencies but on the idea that the government's conduct, regardless of procedural swaddling, was in itself impermissible.'" *L.A. Ray Realty v. Town Council of Town of Cumberland*, 698 A.2d 202, 211 (R.I. 1997) (quoting *Amsden v. Moran,* 904 F.2d 748, 753 (1st Cir. 1990), *cert. denied*, 498 U.S. 1041 (1991)). The substantive due process standard protects individuals against state actions that are '"egregiously unacceptable, outrageous, or conscience-shocking.'" *Id.* (quoting *Jolicoeur Furniture Co. v. Baldelli,* 653 A.2d 740, 751 (R.I. 1995)). "The substantive component of due process 'guards against arbitrary and capricious government action."' *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1150 (R.I. 2006) (quoting *Brunelle v. Town of South Kingstown,* 700 A.2d 1075, 1084 (R.I. 1997)).

The Narragansett Ordinance states "[n]o authorized person shall uncover, make any connections with or opening into, use, repair, disconnect, alter or disturb any public sewer or appurtenances thereof and/or building sewers without first obtaining a written permit from the town." Ordinance § 78-321(a). The Ordinance further provides that the "owner of any house, building or property wishing to obtain a sewer permit shall make application on the prescribed forms furnished by the town. Ordinance § 78-321(b).

First, the Ordinance gives the ultimate authority to the Narragansett Town Council. Thus, the Town Council was not supplanting the Planning Board's authority. Second, the sewer waiver policy is not pretext for denial. Rather, the Town Council's denial of the sewer waiver was based on substantial evidence, including a memorandum to the Town Council President from Narragansett's Engineer dated September 12, 2019 stating that the staff cannot support sewer waivers at the time due to capacity issues. *See* R. at 113. Therefore, the Town Council's actions were neither arbitrary nor capricious. *See East Bay Community Development Corp.*, 901 A.2d at 1150. Third, while an allegation of a discriminatory pretext promptly draws the Court's attention, the appropriate time to question the Town's decision was in 2019, when the sewer tie-in application was formally denied.

This is not an action under 42 U.S.C. § 1983, or any state law forbidding discrimination—it is an administrative appeal. It does not appear that the allegations of discrimination were raised below. Atlantic East should have had a septic plan approved during its twelve-year delay before the Planning Board hearing (if not at the time of application). When appearing before the Narragansett Town Council, Atlantic East foreclosed its option of seeking state approval for an on-site septic system at the final plan stage, and then was denied permission to tie into the sewer.

Atlantic East failed to appeal the decision of the Sewer Board. It left itself with no options when it appeared before the Planning Board. The Court cannot find a discriminatory pretext here.

C

State Housing Appeals Board's Decision

It is contended by 151 Narragansett that the SHAB's decision not to consider additional evidence regarding sewer capacity prejudiced it in part because the SHAB employed an improper standard of review by deferring to the Planning Board. Conversely, the Intervenors aver that SHAB properly denied 151 Narragansett's motion to consider additional evidence given its untimely nature. The Intervenors also argue that SHAB lacked jurisdiction and standing on this issue. Finally, the Planning Board contends that there is competent evidence to support the SHAB's decision.

The SHAB's standard of review pursuant to the Low- and Moderate-Income Housing Act states:

> "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 . . . ." Section 45-53-6(b).

A subsection within SHAB's decision focuses on the standard of review and its limitations. Namely, the SHAB decision discusses whether the Planning Board acted reasonably in relation to local needs, and the SHAB considered timing within that framework. While it was within the SHAB's discretion to review additional evidence, SHAB properly exercised their discretion to deny that motion because, in part, it deemed it unnecessary. On these points, 151 Narragansett's arguments are unavailing.

The right to appeal to the SHAB is outlined in § 45-53-5(b):

> "Whenever an application filed under the provisions of § 45-53-4 is denied . . . the applicant has the right to appeal to the state housing appeals board ("SHAB") established by § 45-53-7, for a review of the application. The appeal shall be taken within twenty (20) days after the date of the recording and posting of the decision by the local review board by filing with the appeals board a statement of the prior proceedings and the reasons upon which the appeal is based."

The SHAB Rule 2.5(E) states that the SHAB "may require reasonable fees from the filing party . . . ." Further, "the fee shall be paid in full upon the filing of the appeal . . . ." SHAB Rule 2.5(E)(2). Finally, the rule provides that an applicant may file a motion to reduce the fee. SHAB Rule 2.5(E)(3).

Next, Intervenors argue that the SHAB failed to notify the local review board within ten days of the appeal, which violated § 45-52-5(b)[5]. The Intervenors' exhibit is not attached to support its second argument. *See* Intervenors' Mem. Ex. W. Thus, this Court has no evidence to support their argument. Assuming *arguendo* that the SHAB failed to notify the local review board within ten days, this should not be fatal to the SHAB's jurisdiction.

SHAB's written decision emphasizes that Atlantic East made its own decisions regarding the preliminary plan process. Namely, "Atlantic East did not challenge the Town Council's authority to make the sewer connection determination, and, in fact, the developer submitted to the Town Council's jurisdiction under the Town's Ordinance to review requests to connect to the municipality's sewer system." R. at 2169.

The decision further found

> "Atlantic East represented during the October 2, 2019 public meeting that the developer would not seek a future approval of an onsite water treatment system (OWTS) on the Property, which could have allowed a preliminary plan review to proceed further because

[5] This was a version of § 45-53-5(b) that was in effect until June 29, 2022. *See* RI LEGIS 22-208, 2022 Rhode Island Laws Ch. 22-208 (22-S 2504).

> an OWTS review could be deferred to the final plan stage under § 45-53-4(a)(1)(vii) as subject to state-level approvals. Consequently, before the Planning Board, the preliminary plan review process reached its end point once Atlantic East's sewer connection request failed before the Town Council." *Id.* at 2169-70.

SHAB considered the extensive procedural history, including some tactical choices by 151 Narragansett and its predecessor early on. Ultimately, the SHAB concluded that 151 Narragansett did not make "any compelling argument to alter or vacate the Planning Board's decision." R. at 2170. SHAB was within its wheelhouse to consider the action or inaction taken by the applicant before the case reached SHAB in its decision. The Narragansett Planning Board correctly notes in their memorandum that the issue of sewer capacity was discussed at length and decided at the September 16, 2019 Narragansett Town Council meeting. Contemplating the deference this Court must afford to the SHAB's decision, the SHAB's decision was not clearly erroneous based on the evidence in the record. *See Environmental Scientific Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993).

IV

Conclusion

151 Narragansett came before the Narragansett Planning Board seeking approval for an application to build much needed affordable housing. In presenting its proposal, the applicant failed to demonstrate any means of providing sewage disposal for the proposed development. Prior applicant and prior counsel[6] placed all their eggs in one basket—that the Town Council would approve a sewer tie in.[7] While the Planning Board had already commenced hearing the application,

[6] The applicant before the Court, 151 Narragansett, is the successor in interest to the original applicant.

[7] On the Application Checklist (Town's exhibit F to its memorandum, checklist at 4, answer 8), completed by the applicant and reviewed by the planner at the time of the application, applicant indicated the need for state approval of an individual septic system was not applicable. The next question asked for written confirmation from the town agency that a sewer tie-in was available. The applicant wrote in that the permission was pending approval from the town council (*id.*, answer 9). Giving the applicant every benefit of doubt, the planner executed a Certificate of

the Town Council denied the sewer tie-in application, indicating the Town was contractually prevented from allowing the tie-in. The applicant never appealed the Council decision.[8] The Planning Board then denied the application and, over four years later, the applicant seeks relief here.

With that history, the Court is now asked to find a discriminatory animus and pretext. Neither 151 Narragansett nor the original applicant ever pled this issue which is raised for the first time in appellant's memorandum here. 151 Narragansett is woefully short of proof for this assertion and, based on the record, the Court finds no discriminatory animus or pretext. The Court understands the statutory policy (and the General Assembly's relentless efforts) toward expanding affordable housing – particularly in areas of the state which have been slow to respond. In this instance, however, the decision of the Planning Board must be upheld.

For the foregoing reasons, 151 Narragansett's appeal is denied, and this Court affirms the SHAB's decision. The Preliminary Plan application remains denied. Counsel shall submit the appropriate order for entry.

Completeness. He should not have. While this 'starts the clock' to the advantage of the applicant, it creates a time crunch for the local board and objectors. This act was contrary to G.L. 1956 §§ 45-23-38, 45-23-41 (b), and 45-53-4. The function of the Town Planner in executing the certificate is ministerial, not discretionary, and part of a well-crafted statutory design. The Court should not need to state the obvious: Local planners should not issue a certificate of completeness if the application is incomplete.

[8] The Town Council action is not before the Court here.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**August 21, 2024**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
For Plaintiff:	**John O Mancini, Esq.**
For Defendant:	**Steven M. Richard, Esq.** **Stephen H. Marsella, Esq.**
For Intervenor:	**Elizabeth M. Noonan, Esq.** **M. Hamza Chaudary, Esq.**