

SUPERIOR COURT

Appellees.

LANPHEAR, J. Before this Court is Winn Properties, LLC; Crosswind, LLC; Essential Realty, LLC; and Ocean Club Properties, LLC's (Applicants) appeal of the Town of Westerly Planning Board's decision denying their application for a comprehensive permit to redevelop the Winnapaug Country Club located at 180 Shore Road in Westerly, Rhode Island into 2,300

residential apartment units with 30 percent of the units designated for low- and moderate-income families.¹ For the reasons set forth herein, this Court affirms the Planning Board’s decision.

I

Facts and Travel

A

The Application

The property consists of thirteen individual lots with a combined area of about 120 acres. Of the thirteen lots: six are zoned MDR-30 (Medium Density Residential 30), five are zoned CR (Commercial Recreation), one is zoned GI (General Industrial), and one is zoned SCG (Shore Commercial-General). The Master Plan was submitted on December 22, 2023 and certified complete on December 28, 2023, R. 000412-17.²

The Application requests 2,300 residential units across ninety³ three-story buildings which amounts to a density ratio of over nineteen units per acre. R 000931. Thirty percent of the residential units, or 690 units, would be deed-restricted to low- or moderate-income households

¹ In 2023, the Rhode Island Legislature enacted new legislation affecting the statute which governs the procedure for the approval of construction projects for low- and moderate-income housing in the state, *see* G.L. 1956 § 45-53-4, and the appeals process of planning board decisions. *See* § 45-53-5 (repealed); *see also* § 45-53-5.1. Because Applicants submitted the Master Plan Application in December 2023, before the 2024 changes for § 45-53-4 took effect, the appropriate standard for the appeal is “the [substantive] 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.” *East Bay Community Development Corp. v. Zoning Board of Review of Town of Barrington*, 901 A.2d 1136, 1144 (R.I. 2006). However, the Planning Board’s decision was issued on July 18, 2024 and Applicants appealed on July 20, 2024; thus, the current version of § 45-53-5.1 which became effective on January 1, 2024 and governs judicial review of appeals applies procedurally. *See* P.L. 2023, ch. 312, § 1, eff. June 24, 2023; *see also* P.L. 2023, ch. 313, § 1, eff. June 24, 2023.

² The official record is Bates stamped; as such, this Decision will refer to the Bates stamped number when citing to the official record.

³ The initial Application requested fifty-eight buildings, but this was later amended to ninety buildings. (R. 000066.)

and the remaining 1,610 units would be market-rate units. Application, R 000003. The Application requested the following waivers: (1) waiver of the maximum density requirements⁴ as set forth in the Town’s Schedule of Dimensional Regulations for R-30, CR, GI, and SCG Zoning Districts; (2) approval for multifamily dwelling with four or more units that are typically only permitted by variance in HDR-10 and HDR-15 Zoning Districts; (3) waiver of maximum density for multifamily dwellings of four or more units which only allow six units per structure⁵; (4) waiver of residential uses allowed for the CR, MDR-30, SC-G, and GI Zoning Districts which do not permit residential multifamily dwellings with four or more units; (5) waiver of off-site parking requirements in § 260-63(B)(9) of the Westerly Zoning Ordinance which require two parking spaces per dwelling unit of 270 square feet⁶; and (6) blanket waiver from any Westerly “Zoning and/or Planning regulations deemed necessary [to] permit the proposed residential development[.]” (Master Plan Submission, R 000020-21.)

B

The Planning Board Hearings

The Planning Board held the first hearing on Applicants’ Master Plan submission on February 6, 2024. Due to the lengthy testimony on this Application, the hearing was continued by mutual agreement to June 4, 2024 and June 18, 2024, with the Applicants agreeing to extend the deadline for decision on the Application until July 16, 2024. R. 000894, 000926-27. In support of their position, Applicants offered the expert testimony of: (1) David Held, a civil engineer who

⁴ Westerly’s Schedule of Dimensional Regulations does not explicitly state the maximum density requirements but, based on the minimum requirements, the maximum density requirements are calculated by dividing 43,560 square feet (or one acre) by the minimum lot size per dwelling unit. Town of Westerly’s Schedule of Dimensional Regulations, 260 Attachment 10.

⁵ The Application requested up to sixty units per structure.

⁶ The Application proposes 3,102 parking spaces where 4,600 spaces would be required.

worked on the Application; (2) Douglas McLean, concerning the Town's Comprehensive Plan and the affordable housing aspect of the Application; (3) Steven Ulman, who testified regarding his preliminary traffic report; and (4) Eric Prive concerning the Onsite Wastewater Treatment Systems (OWTS) plan for the proposed development.

The Planning Board also heard from many members of the public who were opposed to the Application. Members of the public raised numerous concerns, including the environmental impact of the proposed development, its misalignment with the local needs of the community, potential risks to health and safety, and the threat of overdevelopment.

C

The Planning Board Decision

The Planning Board closed the public hearing on June 18, 2024 and began deliberations on July 16, 2024. On July 16, 2024 the Planning Board unanimously voted to deny Applicants' Master Plan Application and issued a written decision. R. 000926-51. In support of its decision, the Planning Board concluded that the Application was inconsistent with the Town's Comprehensive Plan and affordable housing production plan; noncompliant with zoning; and lacking evidence of compatibility, absence of environmental, health, and safety risks, or adequate public street access. R. 000932. Further, the Planning Board made the requisite findings that the Town has an approved affordable housing plan to meet the state goal of 10 percent deed-restricted low- and moderate-income units and has made significant progress toward that goal. *Id.*

Applicants appealed the Planning Board's decision.

II

Standard of Review

General Laws 1956 § 45-53-5.1 grants the Superior Court jurisdiction to review planning board decisions on applications for low- and moderate-income housing developments. To reach its decision, the court must review the Planning Board's hearing record and may request the parties to present additional evidence in open court if needed.

Section 45-53-5.1(e) sets forth the criteria this Court must use to review the appeal, outlining specific factors it must consider in determining whether the decision was "arbitrary and capricious or clearly erroneous[.]" Section 45-53-5.1(e). Specifically, this Court must consider the following:

- "(i) The consistency of the decision to deny or condition the permit with the approved affordable housing plan;
- "(ii) 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;
- "(iii) The consideration of environmental protection;
- "(iv) The state's need for low- and moderate-income housing;
- "(v) The need to protect the health and safety of the occupants of the proposed housing or the residents of the city or town;
- "(vi) The need to promote better site and building design in relation to the surroundings or to preserve open space; and
- "(vii) Whether the reasons for denial, local zoning or land use ordinances, requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing." Section 45-53-5.1(e).

Further, "[t]he court shall not substitute its judgment for that of the local review board as to the weight of the evidence on questions of fact." Section 45-53-5.1(g). Instead, this Court's "review is confined to a search of the record to ascertain whether the board's decision rests upon 'competent evidence' or is affected by an error of law." *Munroe v. Town of East Greenwich*, 733

A.2d 703, 705 (R.I. 1999) (quoting *Kirby v. Planning Board of Review of Town of Middletown*, 634 A.2d 285, 290 (R.I. 1993)).

III

Analysis

Applicants pose three arguments on appeal: (1) the Planning Board violated § 45-53-4(a)(4)(iv) by delaying its decision for more than ninety days after the Application was certified complete; (2) the Planning Board was clearly erroneous when it found that the Application was inconsistent with the Town's Comprehensive Plan; and (3) the Planning Board prematurely denied the Application based on environmental concerns and by requiring more details at the Master Plan stage of review. The Planning Board argues: (1) the Planning Board's decision was based on competent evidence, (2) the Planning Board could not make the required findings to support approving the Application as required by § 45-53-4(a)(4)(v), and (3) the Planning Board made the necessary findings to support its denial of the Application under § 45-53-4(a)(4)(vii). (Appellees' Br. 28-29.)

A

Delay

Applicants suggest the Planning Board violated § 45-53-4(a)(4)(iv) by issuing a decision more than ninety days after the Application was certified complete. Section 45-53-4(a)(4)(iv) stated,

“Review of major projects. In the review of a comprehensive permit application involving a major land development . . . the local review board shall hold a public hearing on the master plan and shall, within ninety (90) days of issuance of the certification of completeness, *or within such further amount of time as may be agreed to by the local*

*review board and the applicant, render a decision.” Section 45-53-4(a)(4)(iv) (emphasis added).*⁷

“The statutory right, once waived, is not applicable and cannot be revived by the waiving party. ‘[A] right once waived is gone forever and cannot be reclaimed.’ The time limit is not a statutory spigot which is turned on and off only by the applicant to the inconvenience of the local board, the public attempting to participate at the public hearing, and the abutters who may be seeking to schedule their own witnesses.” *West v. Goldblatt*, No. NC-2024-0026, 2025 WL 1513764, *3 (R.I. Super. May 22, 2025) (quoting *MacKnight & Hoffman, Inc. v. Programs for Achievement in Reading, Inc.*, 96 R.I. 345, 346, 191 A.2d 354, 355 (1963)); *see also Orr v. Superior Court*, 52 R.I. 335, 161 A. 139, 140 (1932) (“[A] waiver is a waiver for all time.”).

The Application was certified complete on December 28, 2023. (R. 000900.) The Planning Board held public hearings on the Application on February 6, 2024, June 4, 2024, and June 18, 2024. R. 000900-01. The ninety-day deadline set forth in § 45-53-4(a)(4)(iv) was extended by agreement between the Planning Board and the Applicants to July 16, 2024, R. 000901 and R. 000932. As such, the statutory right to a Planning Board decision within ninety days was waived by the Applicants.

B

Consistency with Comprehensive Plan

Applicants argue that the Planning Board’s decision was clearly erroneous when it found that the Application was inconsistent with the Town’s Comprehensive Plan, including its affordable housing plan. Specifically, Applicants argue that the Town has a severe shortage of low- and moderate-income housing which has not been adequately addressed, and thus, it was

⁷ This quote is from the statute as of December 2023, as are the statutory quotes on page 9 herein.

improper for the Planning Board to deny the Application. The Planning Board counters the Town is making progress toward its affordable housing goal and the Application was inconsistent with local needs as identified in the Comprehensive Plan. The Planning Board states the Application was inconsistent with the Comprehensive Plan because “it failed to offer a variety in the housing, failed to maintain the character of the surrounding community, and failed to meet the needs of individuals and families who qualify for [Low- and Moderate-Income] housing according to the finding of a housing study which was performed for the Town.” Appellees’ Br. 15.

Section 45-53-4 establishes required findings for an approval of a master plan application including,

“In approving an application, the local review board shall make positive findings, supported by legally competent evidence on the record that discloses the nature and character of the observations upon which the fact finders acted, on each of the following standard provisions, where applicable:

“(A) The proposed development is consistent with local needs as identified in the local comprehensive community plan with particular emphasis on the community’s affordable housing plan and/or has satisfactorily addressed the issues where there may be inconsistencies.” Section 45-53-4(a)(4)(v)(A).

The statute outlines the reasons for which a local review board may deny an application, including,

“In reviewing the comprehensive permit request, the local review board may deny the request for any of the following reasons: . . . (B) The proposal is not consistent with local needs, including, but not limited to, the needs identified in an approved comprehensive plan, and/or local zoning ordinances and procedures promulgated in conformance with the comprehensive plan[.]” Section 45-53-4(a)(4)(vii)(B).

Section 45-53-3(4) defines “consistent with local needs” to mean:

“reasonable in view of the state need for low- and moderate-income housing, considered with the number of low-income persons in the city or town affected and the need to protect the health and safety of the occupants of the proposed housing or of the residents of the city

or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if the local zoning or land use ordinances, requirements, and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Local zoning and land use ordinances, requirements, or regulations are consistent with local needs when imposed by a city or town council after a comprehensive hearing in a city or town where:

“ . . .

“(ii) The city or town has promulgated zoning or land use ordinances, requirements, and regulations to implement a comprehensive plan that has been adopted and approved pursuant to chapters 22.2 and 22.3 of this title, and the housing element of the comprehensive plan provides for low- and moderate-income housing in excess of . . . ten percent (10%) of the year-round housing units[.]” Section 45-53-3(5)(ii).

The Town’s Comprehensive Plan was adopted and approved by the State pursuant to sections 22.2 and 22.3 of chapter 53 of title 45 in May 2021. The Comprehensive Plan has a policy goal of “achieving the State requirement for a minimum of 10% of the total year-round housing stock to be subsidized, deed-restricted, and occupied by LMI households.” Policy HSNG-1.1 Town of Westerly, Rhode Island Comprehensive Community Plan, 2020-2040, at 66.⁸ Thus, the Town’s zoning regulations are entitled to a presumption that they are consistent with local policy and needs.

In its decision, the Planning Board acknowledged the Town had not met its affordable housing goal as required by the state and outlined in the Comprehensive Plan but the Town had made significant progress toward its affordable housing goal. (R. 000934-39.) The law did not require the Planning Board to approve the Application if the Town has not met the state-wide affordable housing goal. Here, the Planning Board’s decision found that the Application was inconsistent with the Town’s affordable housing plan as outlined in the Comprehensive Plan. The

⁸ Oddly, neither the Comprehensive Plan nor quotations from it are set forth in the certified record or appendices to briefs. It is, however, attached by hyperlink to the Planning Board’s decision at R. 000907.

Planning Board specified “the size and scope of the proposed development do not reflect the mix of unit types required to meet local needs or the existing character of the neighborhood or the Town of Westerly.” R. 000939. The decision explicitly highlights the varying housing needs of the residents who are cost-burdened in Westerly and notes that the one-size-fits-all approach of the proposed development does not adequately meet the identified affordable housing needs of the community. R. 000937-41. While recognizing the need for additional affordable housing, the Town recognized its concomitant responsibility of safeguarding the Town’s orderly development within the guidelines set by the Town’s Comprehensive Plan. Surely, the Planning Board does not serve to rubber stamp an application—even though it requests affordable housing—the Planning Board is charged with applying its reasoned discretion.

The Planning Board provided ample evidence to support its decision to deny the Application because it was inconsistent with the affordable housing plan identified in the Town’s Comprehensive Plan. The statute identifies this as an allowable reason to deny this type of application, § 45-53-4(a)(4)(vii)(B), and the Planning Board was well within its realm. The Planning Board’s decision denying the Application was proper.

C

Environmental, Health, & Safety Impact

By statute the Planning Board only needs to identify one of the allowable reasons for denying a comprehensive permit request. (“In reviewing the comprehensive permit request, the local review board may deny the request *for any of the following reasons . . .*”) Section 45-53-4(a)(4)(vii) (emphasis added). However, the Planning Board also denied the Application because the proposed development did not adequately address the environmental impact of the project and the health and safety concerns raised at hearing, and in comment. Applicants contend the Master

Plan only requires a conceptual plan and the Planning Board erred by requiring a more detailed Application.

To approve the Application, the Planning Board was required to “make positive findings, supported by legally competent evidence on the record” that the proposed development will have no “significant negative environmental impacts” and “[t]here will be no significant negative impacts on the health and safety of current or future residents of the community, in areas including, but not limited to, . . . sewerage disposal[.]” Section 45-53-4(a)(4)(v)(D-E). Here, the Planning Board’s statutory task is more than conceptual. In its decision, the Planning Board could not make the required positive findings regarding the environmental, health, and safety impact of the proposed development as described in the Application. R. 000950-51. The Planning Board was particularly concerned about the environmental, health, and safety concerns regarding the sewerage disposal for a proposed development of 2,300 units. Applicants presented an expert witness, Mr. Prive, on the last day of the public hearings⁹ who testified regarding a plan that was created on June 11, 2024 in response to the Planning Board’s concerns about the sewer’s capacity to handle an additional 2,300 housing units. During this last public hearing, Mr. Prive presented his report which contained a proposal for a leachfield. At this point in the process, it was too late for the Planning Board to retain its own expert to review Mr. Prive’s report and still meet the agreed upon deadline for the written decision.¹⁰ There was little time for review and no time for others to be heard.

⁹ Mr. Prive testified regarding a plan created on June 11, 2024, almost six months after the Application was submitted and after nights of public hearings. The testimony was on a controversial and unresolved issue not resolved previously and only several days before the agreed deadline for a decision.

¹⁰ The deadline for the Planning Board to issue its decision is generally ninety days unless extended by mutual agreement. The countdown begins on the date the Town Planner certifies the application as complete. *See* § 45-53-4(a)(4)(iv). It is imperative that Town Planners ensure the applications

Although such comments may extend beyond the strict scope of a Master Plan review, it is appropriate for the Planning Board to include in its decision any concerns or issues it believes should be addressed in future submissions. Even if these concerns are not the basis for denial, identifying them early is intended to assist the applicant and promote a more efficient review process. This practice is reasonable and fair, as it benefits the applicant by clarifying expectations.

IV

Conclusion

The Planning Board's decision was supported by competent evidence. The appeal is denied, and the Planning Board's denial of the master plan is therefore affirmed.

are sufficiently detailed so that local review boards have enough information to make the required positive findings.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Winn Properties, LLC, et al. v. Town of Westerly Planning Board, et al.

CASE NO: WC-2024-0399

COURT: Washington County Superior Court

DATE DECISION FILED: August 26, 2025

JUSTICE/MAGISTRATE: Lanphear, J.

ATTORNEYS:

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