STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

WASHINGTON, SC. **SUPERIOR COURT**

(FILED: August 16, 2013)

LAUREL K. BRISTOW	:	
	:	
v.	:	**C.A. No. WC-11-0508**
	:	
KENYON TERRACE APARTMENTS, INC.; OPPORTUNITIES UNLIMITED FOR PEOPLE WITH DIFFERING ABILITIES, INC.; and PLANNING BOARD FOR THE TOWN OF SOUTH KINGSTOWN	:	

DECISION

CLIFTON, J. Before the Court is an appeal taken by abutter Laurel K. Bristow (Appellant) from an amended decision of the Town of South Kingstown Planning Board (Planning Board) granting the application of Kenyon Terrace Apartments, Inc. (Kenyon) and Opportunities Unlimited for People with Differing Abilities, Inc. (Opportunities Unlimited)[1] for a Comprehensive Permit sought in accordance with the Rhode Island Low and Moderate Income Housing Act, chapter 53 of title 45 of the Rhode Island General Laws. Jurisdiction is pursuant to G.L. 1956 § 45-53-4(a)(4)(x).

I

Facts and Travel

Kenyon and Opportunities Unlimited (collectively, Appellees) applied to the Planning Board for a Comprehensive Permit to convert the single-family home located at 327 Kenyon Avenue, Wakefield, Rhode Island (the Property) to a multi-unit apartment complex. See June

[1] The Application lists the Applicant as Kenyon Terrace Apartments Inc., with its address "care of" Opportunities Unlimited. The Amended Decision considers Opportunities Unlimited to be the Applicant, although the decision was mailed to Kenyon.

27, 2012 Planning Board Decision (Amended Decision). The Property, which is identified as Lot 199 of Assessor's Plat 57-4 and which is located in an R-10 zone, consists of a large single-family home and an accessory building on a 22,419-square-foot lot. See Bristow v. Kenyon Terrace Apartments, Inc. (Bristow I), C.A. No. WC-11-508, 2012 WL 1014579 (R.I. Super. Mar. 22, 2012); Amended Decision at 1, 3. According to the Town of South Kingstown Graphical Information System Map, the Property has frontage on Kenyon Avenue to the east, Elm Street to the south, and Pine Street to the north. Driveway access to the Property is on Pine Street. (Amended Decision at 4.)

Previously, the State of Rhode Island used the Property as a group home housing adults with developmental disabilities, during which time the accessory building was converted to living space. Bristow I, slip op. at 2. The use of the Property as a group home was discontinued in 2008. Id.

Appellees, desiring to use the Property to provide housing for people with disabilities, sought and received a commitment from the United States Department of Housing and Urban Development (HUD) to provide funds to "rehabilitate an independent living project consisting of 5 one-bedroom and 1 two-bedroom units for 6 persons with multiple disabilities under Section 811 Supportive Housing for Persons with Disabilities." See December 14, 2010 Letter from Margaret Laurence Submitting the Kenyon Terrace Apartments Inc. Application (Application). The approval from HUD committed $934,500 to the project and was mailed on July 30, 2010. Id. Thereafter, Appellees filed an application with the Planning Board for a Comprehensive Permit pursuant to § 45-53-4. The Application sought waivers of various requirements, including those relating to density, parking, and landscaping, as well as from the sewer tie-in fee. Id.

The Planning Board held a public hearing in accordance with § 45-53-4(a)(4),[2] which took place on February 8, 2011; May 10, 2011; and June 14, 2011. See Amended Decision at 2-3. During the hearing, testimony was presented both in support and in opposition to the Application. Id. at 2.[3] One of the issues debated extensively during the public hearing was the potential traffic impact of granting the Application. Id. at 5.

At the February 8, 2011 hearing, the Planning Board "referred the project to the Town's Transportation Traffic Review Committee (T^2RC) for review and comment." Id. According to the Amended Decision, "[t]he T^2RC is comprised of eight professional Town staff members representing the Town Manager's Office, the Police Department, the Department of Public Services and the Planning Department and is responsible for review of traffic and transportation related issues that come to the Town's attention." Id. On March 17, 2011, the T^2RC's initial

[2] The Amended Decision says that a public hearing was held in accordance with the provisions of § 45-23-4(4), but that section has been repealed. It appears to be a typographical error, however, as § 45-53-4(a)(4)(iii)-(iv) requires public hearings on Applications for Comprehensive Permits that are filed in accordance with chapter 53 of title 45, entitled "Low and Moderate Income Housing."

[3] Testifying in support of the Application were Margaret Laurence, attorney; Linda Ward, Executive Director of Opportunities Unlimited; John O'Hearne, Project Architect; Barbara Sokoloff, Planning Consultant; Taylor Ellis from the House of Hope Community Development Corporation; John Carter, Project Landscape Architect; Paul Jordan, Chair of the South Kingstown Affordable Housing Collaborative and representative of the Church of the Ascension; Dr. Craig Stenning, Director of the Rhode Island Department of Behavioral Healthcare, Developmental Disabilities and Hospitals; Norman Orrall, Commonwealth Engineers; Kathleen Ellis, Executive Director of Avatar Residential Services and neighborhood resident; Craig Bornholm, Prospectives Corporation and neighborhood resident; Paula Staples, resident of Narragansett; Emily Staples, resident of Narragansett; Mary Roth, neighborhood resident; Deedra Durocher, neighborhood resident; Dr. Steven Roth, Thundermist Health Center and neighborhood resident; and Steven Clarke, Commonwealth Engineers.

Testifying in opposition to the Application were Appellant Ms. Bristow; Kevin Bristow, Esq., who is also a direct abutter living at 24 Pine Street and who represents Ms. Bristow in this appeal; James Sloan, real estate consultant testifying on behalf of neighborhood resident Kathleen Lindvall; Faith Williams, direct abutter; Dennis Wichman, neighborhood resident; Daniel Northup, neighborhood resident; Patrick Strickland, neighborhood resident; and Michael Desmond of Bryant Associates, who offered testimony in the form of a peer review of Appellees' traffic report.

review induced it to request that Appellees "prepare a formal traffic study." Id. On Appellees' behalf, Commonwealth Engineers (Commonwealth) prepared a Traffic Impact Assessment (TIA), which the T^2RC reviewed on April 21, 2011. Id. The T^2RC considered the time at which the Property would experience its peak traffic, the number and nature of recent motor vehicle accidents in the area, and traffic-sight-distance requirements, and noted in its May 6, 2011 recommendation that the proposed renovation of the Property "would have little to no impact on the Average Annual Daily Traffic volume." See id.

Although the TIA initially said that traffic-sight-distance requirements "were met or exceeded," Commonwealth revised the TIA on April 24, 2011, and reported that "the sight distance to the east along Pine Street for a vehicle exiting the [Property's] driveway" was 155 feet rather than 280 feet. Id. The Planning Board was made aware of these corrections during the public hearing on May 10, 2011, and Commonwealth summarized the corrections in a memorandum to the chair of the T^2RC on May 23, 2011. Id. at 5-6. The May 23, 2011 memorandum noted "the geometry of Pine Street as a limiting factor both in terms of safe vehicle travel speeds and necessary sight distance." Id. at 6.

At the May 10, 2011 hearing, objectors requested that the Planning Board continue consideration of the Application so the objectors could obtain a peer review of the TIA. Id. at 6. On June 14, 2011, the Planning Board heard the testimony of Michael Desmond, who reviewed the TIA prepared by Commonwealth. Id. "The peer review of Mr. Desmond noted numerous minor errors, questions on methodology and disagreements with the contents of the TIA." Id.

The Planning Board issued a written decision on July 13, 2011, and a timely appeal was taken. Bristow I, slip op. at 4. Because the Planning Board failed to make sufficient findings of fact in its original decision, the Court remanded the case for additional findings of fact. Bristow

I, slip op. at 13-14. The Amended Decision was dated June 27, 2012, and was filed in the Land Evidence Records on June 29, 2012, and with this Court on July 9, 2012. See Amended Decision at 1; Response of Town of South Kingstown Planning Board Following Remand by the Superior Court at 1.

II

Rhode Island Low and Moderate Income Housing Act

After finding "an acute shortage of affordable, accessible, safe, and sanitary housing for its citizens of low and moderate income," the General Assembly passed the Rhode Island Low and Moderate Income Housing Act (the Act). Secs. 45-53-1, -2. The Act's stated purpose was

> "to provide for housing opportunities for low and moderate income individuals and families in each city and town of the state and that an 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."

Id. § 45-53-2.

To accomplish its goals, the Act provides that an "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." Sec. 45-53-4(a). The "[l]ocal review board means the planning board . . . , or if designated by ordinance as the board to act on comprehensive permits for the town, the zoning board of review . . . ." Sec. 45-53-3(8). In considering a comprehensive permit application, that local board of review has the same power that the various local boards would have over separate applications. Sec. 45-53-4(a)(4)(vi). "Any person aggrieved by the issuance of an approval" is permitted to appeal to this Court within twenty days of the issuance of the approval. Sec. 45-53-4(a)(4)(x).

III

Standard of Review

The Act does not prescribe the standard of review for appeals taken to this Court. However, the Supreme Court has directed that the "standard of review is analogous to that applied by the Superior Court in considering appeals from local zoning boards of review pursuant to . . . § 45-24-69." Curran v. Church Cmty. Hous. Corp., 672 A.2d 453, 454-55 (R.I. 1996).[4] According to subsection (d) of § 45-24-69, the Superior Court "shall not substitute its judgment for that of the . . . board of review as to the weight of the evidence on questions of fact." The reviewing court

> "may affirm the decision of the . . . board of review or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
> (1) In violation of constitutional, statutory, or ordinance provisions;
> (2) In excess of the authority granted to the zoning board of review by statute or ordinance;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Clearly erroneous in view of the reliable, probative, and substantial evidence of the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

Sec. 45-24-69(d).[5]

A court's role in reviewing the decision of a board of review is to "'examine the entire

[4] Previously, the Act provided for direct appeals to the Supreme Court, so the Curran Court was considering its own standard of review. See id.; Pub. L. 2006, ch. 511.

[5] While persons aggrieved by an application's approval may appeal to this Court, see § 45-53-4(a)(4)(x), those who file applications that are either denied or "granted with conditions and requirements that make the building or operation of the housing infeasible" appeal to the State Housing Appeals Board (SHAB). See §§ 45-53-5, -7. Decisions of the SHAB may then be appealed to the Superior Court. Sec. 45-53-5. The standard of review provided in § 45-24-69(d) is the same as the standard specifically provided in § 45-53-5 for the Superior Court's review of decisions of the SHAB.

record to determine whether substantial evidence exists to support the board's findings.'" Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting DeStefano v. Zoning Bd. of Review, 122 R.I. 241, 245, 405 A.2d 1167, 1170 (1979)) (internal quotation marks omitted). "Substantial evidence" is "'more than a scintilla but less than a preponderance.'" Id. (quoting Apostolou v. Genovesi, 120 R.I. 501, 508, 388 A.2d 821, 824-25 (1978)). If the court "'can conscientiously find that the board's decision was supported by substantial evidence in the whole record,'" then it should not substitute its decision for that of the board. Id. (quoting Apostolou, 120 R.I. at 509, 388 A.2d at 825).

"This deferential standard of review, however, is contingent upon sufficient findings of fact by the [board of review]." Kaveny v. Town of Cumberland Bd. of Review, 875 A.2d 1, 8 (R.I. 2005). Without sufficient findings of fact, "'judicial review of a board's work is impossible.'" Bernuth v. Zoning Bd. of Review, 770 A.2d 396, 401 (R.I. 2001) (quoting Irish P'ship v. Rommel, 518 A.2d 356, 358 (R.I. 1986)). The findings "'must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany.'" Kaveny, 875 A.2d at 8 (quoting Bernuth, 770 A.2d at 401). It is not the reviewing court's role to "'search the record for supporting evidence or decide for itself what is proper in the circumstances'" if the board of review failed to state sufficient findings of fact. Id. (quoting Bernuth, 770 A.2d at 401).

Unlike a board's findings of fact, issues of statutory construction are reviewed de novo. West v. McDonald, 18 A.3d 526, 532 (R.I. 2011) (citing Pawtucket Transfer Operations v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008)). "A planning board's determinations of law, like those of a zoning board or administrative agency, are not binding on the reviewing court; they may be reviewed to determine what the law is and its applicability to the facts." Id. (citing

Pawtucket Transfer Operations, 944 A.2d at 859). "[R]ules of statutory construction apply in the same manner to the construction of an ordinance," and comprehensive plans are treated the same as ordinances. See id. at 532, 539 (citing Ryan v. City of Providence, 11 A.3d 68, 70 (R.I. 2011); Town of E. Greenwich v. Narragansett Elec. Co., 651 A.2d 725, 728 (R.I. 1994)).

IV

Analysis

A

Emergency Motion

After the Amended Decision was filed and the parties had filed their additional memoranda with this Court, Ms. Bristow filed an "Emergency Motion for Relief Based Upon a Material Change in Circumstances," with the "material change in circumstances" being the elimination of the HUD approval for the Property. According to this motion, Appellees requested that HUD transfer the funding that had been attached to the Property to another project that Appellees were pursuing, and because this request was granted, Ms. Bristow argues that the Amended Decision should be "immediately vacated." In response, Appellees objected, arguing that the "Emergency Motion" is both procedurally improper and legally insufficient to warrant a reversal of the Planning Board's Amended Decision. As was made clear during a hearing on this motion, the parties agreed about the substance of the additional evidence—the project was no longer a HUD project—but disagreed about the propriety and wisdom of the Court considering that evidence.

According to the statute governing zoning appeals, which the Supreme Court in Curran, 672 A.2d at 454-55, used as an analogue for appeals brought under the Act that provides no standard of review for the appeal of denied applications, there are two ways that additional

evidence may be presented in a zoning appeal. Section 45-24-69(b) provides that

> "[i]f, before the date set for the hearing in the superior court, an application is made to the court for leave to present additional evidence before the . . . board of review and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for the failure to present it at the hearing before the . . . board of review, the court may order that the additional evidence be taken before the . . . board of review upon conditions determined by the court."

After hearing the additional evidence, "[t]he . . . board of review may modify its findings and decision by reason of the additional evidence and file that evidence and any new findings or decisions with the [S]uperior [C]ourt." Separately, § 45-24-69(c) says that "[t]he [C]ourt shall consider the record of the hearing before the . . . board of review" but that

> "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, which evidence, along with the report, constitutes the record upon which the determination of the court is made."

In Ridgewood Homeowners Ass'n v. Mignacca, 813 A.2d 965, 976-77 (R.I. 2003), the Court reviewed a consolidated case involving a miniature horse, the keeping of which allegedly violated a restrictive covenant and prompted the application for a special-use permit, the approval of which had been appealed. The trial justice "heard extensive testimony and conducted a 'view' of the . . . property to observe the horse and the surrounding lots in the subdivision." Id. at 970. The Court said that even though § 45-24-69(c) allowed a trial justice to permit parties to present additional evidence, as it related to the zoning appeal portion of the case, the trial justice had "exceeded his authority" by conducting the view and calling the city clerk. Id. at 976. Acknowledging the Superior Court's limited role in an appeal from a zoning board, the Court explained that "facts relevant only to the restrictive covenant issue cannot be subsumed or commingled in deciding the zoning appeal," and that the better course would have

been to remand to the zoning board because it had failed to make findings of fact or conclusions of law. See id. at 976-77. Notably, the Court emphasized the complete absence of findings of fact and conclusions of law. Id.

Although the Administrative Procedures Act provides a slightly different standard according to which the Superior Court might consider new evidence, requiring "alleged irregularities in procedure before the agency" to permit the Court to take additional evidence itself, the Court's role is similarly deferential. See § 42-35-15; Davis v. Wood, 444 A.2d 190, 191-92 (R.I. 1982). In Davis, the Supreme Court held that "[i]n excluding evidence of what might have occurred subsequent to the posthearing order, the trial justice . . . properly limit[ed] the scope of his inquiry" because "judicial review . . . shall be confined to the record." 444 A.2d at 191-92.

As the Supreme Court expressly said that appeals by persons aggrieved by a decision on a petition for a comprehensive permit filed pursuant to the Act should be viewed through § 45-24-69's standard of review, this Court will similarly apply that section's provisions regarding attempts to expand the record after taking an appeal. See § 45-24-69(b), (c); Curran, 672 A.2d at 454-55. Under the relevant subsections, the Court must find that the "evidence is necessary for the proper disposition of the matter," in which case the Court may receive the evidence itself, or that the "evidence is material and that there were good reasons for the failure to present it at the hearing . . . ," which would result in a remand to the Planning Board. See § 45-24-69(b), (c). Even though Ms. Bristow's "Emergency Motion" did not actually make an application to present additional evidence to the Planning Board, when asked by this Court the procedure by which she hoped the status of Appellees' HUD approval might be considered, Ms. Bristow referred to both subsection (b) and subsection (c) of § 45-24-69. However, this Court finds as a matter of law

that the evidence is neither material nor necessary.

The Act defines "low or moderate income housing" as "housing . . . that is subsidized by a federal, state, or municipal government subsidy under any program to assist the construction or rehabilitation of housing affordable to low or moderate income households . . . and that will remain affordable" for ninety-nine years or some other period of at least thirty years. Sec. 45-53-3(9). "Municipal government subsidy" is "assistance that is made available through a city or town program sufficient to make housing affordable," and includes "approval of density bonuses." Sec. 45-53-3(11). The Planning Board in this case specifically found that while "[a] HUD grant is an example of an appropriate subsidy . . . in accordance with [§] 45-53-3(11) the density bonus offered by the Town of South Kingstown also qualifies as a government subsidy . . . ." See Amended Decision at 8 (emphasis added). Even though the Application based its request only on the HUD subsidy, see Application at 2, the Planning Board's findings thus indicate that it found that the proposed project has more than one subsidy, either of which would qualify it to pursue "a single application for a comprehensive permit to build [low or moderate income housing] in lieu of separate applications to the applicable local boards." See §§ 45-53-3(9), -4(a); Amended Decision at 7.

As described in more detail below, the Act dictates that "the local review board shall make positive findings . . . on each of [seven] standard provisions, where applicable." See § 45-53-4(a)(4)(v). None of those enumerated provisions to be considered by a review board requires funding for a development to come from any particular source, nor does any provision say or imply that approval by any agency, such as HUD, is a prerequisite to the review board making the necessary "positive findings." See id. Although the Act's streamlined, comprehensive-permit process is available only if 25% of the proposal's housing is "low or moderate income

housing," the fact that a project must be subsidized does not alter the review board's role in the comprehensive-permit process, which is the issue before this Court. See § 45-53-4(a)(4)(x).

In fulfilling its role in this case, the Planning Board published a lengthy Decision in which it discussed the evidence presented and made several findings of fact. See Amended Decision at 1-10. The Amended Decision certainly does not conceal the fact that the project was a "HUD Section 811 Independent Living Project," indicating as much in the description of the matter being decided, id. at 1; the Board also received testimony about a survey of other projects by HUD under Section 811, Tr. 42:5-46, May 10, 2011. However, the Planning Board did not treat that fact as a substitute for considering the appropriate standards under the Act. See, e.g., Amended Decision at 3, 4, 7. Although the Planning Board noted South Kingstown's "need for [twenty] units of supportive housing for the disabled" and that the units in this project would help meet that need, the entire Amended Decision reveals that the project's HUD status was not a condition without which the Planning Board would have denied the application. See id. at 3. Rather, the Planning Board considered the evidence before it, referencing the project's HUD-approved status and the specific reference to HUD 811 programs in South Kingstown's plan to provide sufficient affordable housing as additional support for the Planning Board's conclusions. See, e.g., id. at 3-4.

Moreover, the Planning Board granted "Combined Master and Preliminary Plan Approval" to Appellees' project. (Amended Decision at 1.) When describing the approval, the Planning Board said "[t]he approval of this [p]lan shall be equivalent to Combined Master and Preliminary Plan Approval of a Major Land Development Project" and that Appellees were required to "return to the Planning Board for Final Plan Approval in accordance with the procedures contained in the South Kingstown Subdivision and Land Development Regulations."

Id. at 2. The Amended Decision by expressed terms requires Appellees to appear before the Planning Board prior to their proposed project receives final approval. A review of the South Kingstown Subdivision and Land Development Regulations reveals the same fact, that the preliminary approval granted by the Planning Board is not the last step in the process. See South Kingstown, Rhode Island, Subdivision and Land Development Regulations at 61-71 (Feb. 14, 1995), available at http://www.southkingstownri.com/files/tsk_plan_subreg_0.pdf.

The evidence attempted to be added to the record here is similar to the evidence in Davis, 444 A.2d at 191-92, in that it concerns events occurring after the decision being reviewed. Because the Planning Board relied on multiple types and pieces of evidence before it and found that the project's eligibility for the comprehensive-permit process was founded on multiple bases, the Court is not persuaded that a transfer of a HUD approval requires either a remand to the Planning Board or an expansion of the record before this Court. See § 45-24-69(b), (c); Amended Decision at 2, 4, 7.

B

Board's Decision

Ms. Bristow argues that the Planning Board again failed to provide adequate findings of fact to support its grant of the comprehensive-permit application.

Section 45-53-4 requires the board of review to "make positive findings, supported by legally competent evidence on the record which discloses the nature and character of the observations upon which the fact finders acted." Sec. 45-53-4(a)(4)(v). Additionally, when considering zoning appeals brought pursuant to chapter 24 of title 45, reviewing courts have looked to § 45-24-61, requiring a board of review to "include in its decision all findings of fact and conditions, showing the vote of each participating member, and the absence of a member or

his or her failure to vote." Sec. 45-24-61(a). The requirement that a board "make findings of fact and conclusions of law in support of its decisions permits a court to engage in judicial review." Bernuth v. Zoning Bd. of Review, 770 A.2d 396, 401 (R.I. 2001) (citations omitted). A reviewing court "'must decide whether the board members resolved the evidentiary conflicts, made the prerequisite factual determinations, and applied the proper legal principles.'" Id. (quoting Irish P'ship v. Rommel, 518 A.2d 356, 358-59 (R.I. 1986)). "'Those findings must, of course, be factual rather than conclusional, and the application of the legal principles must be something more than the recital of a litany.'" Id. (quoting Irish P'ship, 518 A.2d at 358-59).

As stated above, this case, when it was first reviewed, was remanded for additional findings of fact. See Bristow I, 2012 WL 1014579. Unlike the original decision, the Amended Decision points to specific evidence on which the Planning Board relied. See generally Amended Decision at 3-7. For example, rather than stating generally that the testimony of applicant and Dr. Stenning showed that the proposed parking was adequate, the Amended Decision says that the testimony "indicated that the target population was unlikely to drive or own a motor vehicle due to financial, physical, or developmental limitations." See id. at 4. Additionally, the Planning Board more specifically tied the evidence of the project's target population of disabled individuals to the goals of low and moderate income housing. See id. There are sufficient findings of fact within the Amended Decision so that this Court's judicial review is not impossible. See Bernuth, 770 A.2d at 401.

C

Sufficiency of the Evidence

The Act provides that "the local review board shall make positive findings, supported by legally competent evidence on the record which discloses the nature and character of the

observations upon which the fact finders acted, on each of the . . . standard provisions, where applicable." Sec. 45-53-4(a)(4)(v). This language is adopted and included in the South Kingstown Zoning Ordinance (Ordinance). See Ordinance § 509.6. The Ordinance then describes the "standard provisions":

> "(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.
> (B) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance and subdivision regulations, and/or where expressly varied or waived local concerns that have been affected by the relief granted do not outweigh the state and local need for low and moderate income housing.
> (C) All low and moderate income housing units proposed are integrated throughout the development; are compatible in 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.
> (D) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval.
> (E) There 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, safe circulation of pedestrian and vehicular traffic, provision of emergency services, sewerage disposal, availability of potable water, adequate surface water run-off, and the preservation of natural, historical or cultural features that contribute to the attractiveness of the community.
> (F) All proposed land developments and all subdivisions lots will have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered in compliance with this requirement.
> (G) The 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, unless created only as permanent open space or permanently reserved for a public purpose on the approved, recorded plans."

Id.; see also § 45-53-4(a)(4)(v) (providing nearly identical descriptions of the standard

provisions).[6]

The first "standard provision" requires a finding that a project is "consistent with local needs," which is a defined term under the Act and the Ordinance. The Ordinance defines that term as

> "reasonable in view of the state need for low or moderate income housing, considered with the number of low income persons in the town affected and the need (a) to protect the health and safety of the occupants of the proposed housing or of the residents of the town, (b) to promote better site and building design in relation to the surroundings, or (c) 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."

Ordinance § 509.3; see also § 45-53-3(4).

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[6] The Supreme Court has said that "the [A]ct is more circumscribed with respect to the . . . board's ability to deny an application," with § 45-53-4 "provid[ing] that a . . . board may deny an application only if based on one or more" of certain grounds. E. Bay Cmty. Dev. Corp. v. Zoning Bd. of Review, 901 A.2d 1136, 1145-46 (R.I. 2006) (emphasis added) (citing § 45-53-4). Section 45-53-4 currently permits a review board to deny a comprehensive-permit request for the following five reasons:

> "(A) if city or town has an approved affordable housing plan and is meeting housing needs, and the proposal is inconsistent with the affordable housing plan; (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; (C) the proposal is not in conformance with the comprehensive plan; (D) the community has met or has plans to meet the goal of ten percent (10%) of the year-round units or, in the case of an urban town or city, fifteen percent (15%) of the occupied rental housing units as defined in § 45-53-3(2)(i) being low and moderate income housing; or (E) concerns for the environment and the health and safety of current residents have not been adequately addressed."

Sec. 45-53-4(a)(4)(vii); see also Ordinance § 509.7 (permitting denial for the same reasons); E. Bay Cmty. Dev. Corp., 901 A.2d at 1145-46 & n.10 (listing the latter four reasons and noting that an amendment had added the first).

The Planning Board found that the proposal is consistent with local needs. The South Kingstown Affordable Housing Production Plan (Affordable Housing Plan)[7] calls for housing for the disabled and special needs population, and the Planning Board relied on the expert testimony and report of Barbara Sokoloff in determining that the proposed project would help to fill that need. See Affordable Housing Plan at 49 ("The Town [of South Kingstown] should monitor the housing needs of the disabled and special needs population, and ensure that adequate funding is available for affordable housing for this population."); Amended Decision at 3. The decision whether to accept or reject expert testimony is left to the discretion of the board, Lloyd v. Zoning Bd. of Review, 62 A.3d 1078, 1089 (R.I. 2013) (citing Restivo v. Lynch, 707 A.2d 663, 671 (R.I. 1998)), and here the Planning Board accepted the testimony of Ms. Sokoloff regarding the project's role in filling South Kingstown's need for this type of housing. Although Ms. Bristow may disagree with Ms. Sokoloff's testimony and the weight given to it by the Planning Board, it is not this Court's role to substitute its judgment for that of the Planning Board. See § 45-24-69(d).

The Planning Board further found that the Property's location within walking distance to shopping and public transportation made it "ideally situated for special needs housing" and that "the proposed site improvements are functionally supportive of the project and do not detract from the overall site or neighborhood aesthetic." See Amended Decision at 3. Additionally, as conditions for approval and as a result of traffic issues that had been raised during the hearing, a stop sign and one-way sign were required, and those will aid in protecting the safety of the residents of the Property and the town. See Amended Decision at 9. This Court is satisfied that

[7] An affordable housing plan is "'a component of a housing element, [designed] to meet housing needs in a city or town.'" Housing Opportunities Corp. v. Zoning Bd. of Review, 890 A.2d 445, 449 n.16 (R.I. 2006) (alteration in original) (quoting § 45-53-3(6)).

the Board's decision that the proposal is consistent with local needs is supported by substantial evidence.

One argument advanced in this appeal is that the Planning Board failed to consider the future occupancy of the units on the Property, instead merely accepting Appellee's description of the typical resident. For example, Ms. Bristow argues that the Planning Board merely accepted that the residents would not own vehicles; that the typical resident would be living on Supplemental Security Income, or SSI, which is $713 per month; and that the number of people living in the Property would be limited.

The Planning Board accepted the testimony of Dr. Stenning, who said that the motor-vehicle ownership among the target population was unlikely "due to financial, physical or developmental limitations." See Amended Decision at 4. The Amended Decision reveals that approval is based on providing housing for "very low-income residents" and that the units must remain affordable for ninety-nine years. See id. at 9. The Court is persuaded that the Planning Board did not overlook the future use of the Property, as the evidence it considered applied as long as the Property was affordable housing, and the Planning Board required a ninety-nine-year period of affordability, rather than the thirty years required by the statute. See § 45-53-4(a)(1)(iv); Amended Decision at 4, 9; see also Lloyd, 62 A.3d at 1083 (applying the standard that the Superior Court shall not substitute its judgment for that of the board).

Regarding the additional standard provisions that must be considered, the Planning Board found that the proposed development complies with local zoning and land-development regulations and that where those regulations have been waived or varied, local concerns were not affected by the relief granted. (Amended Decision at 4.) This finding was based on similar evidence as the finding that the project is consistent with local needs. See id. Clear from the

Planning Board's findings is the fact that South Kingstown's need for affordable housing generally, and need for affordable housing specifically for those with disabilities, was a significant reason that it granted the relief sought. Id. at 3-4. In determining that the waivers of regulations have not affected local concerns, the Planning Board relied on the reuse of existing structures, the project's proximity to shopping and public transportation, and its determination that the small office incorporated into the project would not place an undue burden on the Property or neighborhood. These determinations are supported by the record. See, e.g., Tr. 7:5-13:2, Feb. 8, 2011.

Ms. Bristow argues that because the Planning Board failed to make findings of fact relative to the use of the accessory building as living space, this Court must reverse the Amended Decision. Specifically, Appellant contends that the State's earlier unpermitted conversion of the accessory building as living space does not convert it to a legal nonconforming use.

However, the Act dictates that the Planning Board "has the same power to issue permits or approvals that any local board or official who would otherwise act with respect to the application," if it finds that the Act's criteria are met. See § 45-53-4(a)(4)(vi). Among the relief granted to Appellees was relief from Ordinance § 301 allowing development as a multi-household land development project. (Amended Decision at 8.) That use is defined as a "[l]and development project . . . containing either more than 12 dwelling units, or containing more than one principal structure containing dwelling units on a single lot," with "land development project" defined as "[a] project in which one or more lots, tracts, or parcels of land are to be developed or redeveloped as a coordinated site for a complex of uses, units, or structures." See Ordinance at App. A; Subdivision and Land Development Regulations at 7, 55-60. Thus, the Property could be developed with more than one principal structure containing dwelling units

based on the Planning Board's granting of the Comprehensive Permit, rather than based on the Property's former use. Additionally, the Planning Board granted relief from setbacks and minor-street access based on its findings. Although the Amended Decision parenthetically notes that those conditions are existing, those notations do not alter the Planning Board's authority under the Act, which includes the same power as any local board to act with respect to the application. See § 45-53-4(a)(4)(vi). Thus, the Planning Board's granting of relief relative to the accessory use rises or falls with the rest of the relief, based on the criteria in the Act and whether the record supports the finding that those criteria were satisfied. See § 45-53-4(a)(v), (vi).

In consideration of the third provision, the Planning Board found that the project's low- and moderate-income units are fully integrated because the project contains only those units. The Planning Board relied on the testimony of Ms. Ward, Executive Director of Opportunities Unlimited, that the target population of the project is adults with developmental and physical disabilities and that the people who Opportunities Unlimited has supported over her thirty-five years typically live on Supplemental Security Income, or SSI, which is $713 per month. See Amended Decision at 4; Tr. 8:2-4, 10:22-24, Feb. 8, 2011. These observations show that Planning Board's determinations regarding the third "standard provision" are supported by the record. See § 45-53-4(a)(4)(v); Ordinance § 509.6.

Based on the fact that the Property had been previously developed and contains "no significant natural features that will be altered," the Planning Board concluded that the proposed development will cause "no significant negative environmental impacts." (Amended Decision at 4.) This finding is adequately supported by the record. See, e.g., Kenyon Terrace Site Plan, dated Jan. 17, 2011, and received in the Planning Department on June 13, 2011; Plan of Existing Landscaping and Proposed Screening at Kenyon Terrace by John C. Carter & Company, dated

December 2010 with revisions through May 31, 2011.

The fifth "standard provision" of the Act requires positive findings that "[t]here would be no significant negative impacts on the health and safety of current or future residents of the community," which includes "safe circulation of pedestrian and vehicular traffic." See § 45-53-4(a)(4)(v); Ordinance § 509.6. As described above, the project's impact on traffic was extensively scrutinized. The Planning Board found that "there w[ould] be safe circulation of pedestrian and vehicular traffic." (Amended Decision at 4.) In so finding, the Planning Board relied on the testimony of Dr. Stenning, Director of the Rhode Island Department of Behavioral Healthcare, Developmental Disabilities and Hospitals, and concluded that the members of target population were unlikely to own vehicles and the recommendation of the T^2RC. Id. at 4-6. Ms. Ward also supplied testimony that in her experience, those supported by Opportunities Unlimited tended not to own vehicles. See Tr. 10:19, Feb. 8, 2011. Although the impact on area traffic was highly disputed by those objecting to the project, on whose behalf Mr. Desmond testified about his concerns about the TIA's methodology and content, including the disputed sight distance eastward on Pine Street, the Planning Board considered the evidence and, while it imposed conditions of approval relative to the sight distance along Pine Street, it nonetheless concluded that the traffic impact would not be significant. See Amended Decision at 4-6. That conclusion is supported by substantial evidence, and this Court will not substitute its judgment for that of the Planning Board. See § 45-24-69; Mill Realty Assocs., 841 A.2d at 672.

The positive findings concerning the final two "standard provisions," which required "adequate and permanent physical access to a public street" and prohibited "the creation of individual lots with any physical constraints to development," respectively, were based on the Property's physical access to Kenyon Avenue and driveway access to Pine Street and the fact

that the project was creating no new lots. (Amended Decision at 6-7.) The Planning Board noted its findings of fact relative to the traffic impact as additional support for the Property's continued physical access to a public street. Id. The record adequately supports these findings.

The Planning Board's findings relative to the above criteria are supported by the record and the Court will not substitute its own judgment. However, the Planning Board's conclusions regarding whether the Affordable Housing Plan permitted a density bonus must be considered more closely.

D

Density Bonus

Along with the consideration of whether the project is consistent with local needs as identified in the Comprehensive Community Plan (Comprehensive Plan), see supra, both the Ordinance, see § 509.6, and the Act, see § 45-53-4(a)(4)(v), require "particular emphasis on the community's affordable housing plan." Appellant asserts that the Planning Board gave Appellees a density bonus beyond that permitted by the Affordable Housing Plan, although Ms. Bristow acknowledges that Appellees were able to receive a density bonus smaller than the one actually approved.

This State's focus on promoting the creation of affordable housing is well established. In the Act's section on legislative findings and intent, the General Assembly states that because of "an acute shortage of affordable, accessible, safe, and sanitary housing . . . ," "it is imperative that action is taken immediately to assure the availability of affordable, accessible, safe, and sanitary housing for these persons," and "that it is necessary that each city and town provide opportunities for the establishment of low and moderate income housing." Sec. 45-53-2. Additionally, the Rhode Island Comprehensive Planning and Land Use Regulation Act, located

in chapter 22.2 of title 45 of the Rhode Island General Laws, which dictates the required contents of municipal Comprehensive Plans, includes the requirement that "[t]he plan shall include an affordable housing program that meets the requirements of § 42-128-8.1, the 'Comprehensive Housing Production and Rehabilitation Act of 2004' and chapter 45-53, the 'Rhode Island Low and Moderate Income Housing Act.'" See G.L. 1956 § 45-22.2-6(b)(6). The housing element of a Comprehensive Plan also "must include goals and policies that further the goal of subdivision 45-22.2-3(c)(3) and implementation techniques that identify specific programs to promote the preservation, production, and rehabilitation of housing." Id. The "goal of subdivision 45-22.2-3(c)(3)" is

> "[t]o promote the production and rehabilitation of year-round housing and to preserve government subsidized housing for persons and families of low and moderate income in a manner that: considers local, regional, and statewide needs; achieves a balance of housing choices for all income levels and age groups; recognizes the affordability of housing as the responsibility of each municipality and the state; takes into account growth management and the need to phase and pace development in areas of rapid growth; and facilitates economic growth in the state."

Sec. 45-22.2-3(c)(3).[8] South Kingstown's Affordable Housing Plan is that municipality's attempt to adhere to the clear policy of promoting the maintenance of an adequate supply of affordable housing.

According to the Affordable Housing Plan, which was adopted as part of the

[8] Moreover, § 42-128-8.1, with which the affordable housing portion of municipal comprehensive plans must also be consistent, contains the following finding:

> "Innovative community planning tools, including, but not limited to, density bonuses and permitted accessory dwelling units, are needed to offset escalating land costs and project financing costs that contribute to the overall cost of housing and tend to restrict the development and preservation of housing affordable to very low income, low income and moderate income persons."

G.L. 1956 § 42-128-8.1(b)(5).

Comprehensive Plan, South Kingstown should use several techniques to increase the amount of available affordable housing. See Affordable Housing Plan at 38-45. One of the strategies is to "Negotiate Comprehensive Permit Density Increases with Housing Developers." Id. at 41. The description of this strategy indicates that it should be used to allow developers utilizing the comprehensive-permit process to develop at a greater density than they otherwise could, "balance[ing] the density bonus incentive with good planning and growth management" while avoiding proposals that render the Ordinance "meaningless." Id. The Affordable Housing Plan contemplates a density increase of one-step from the zone in which the property sits to the next denser zone, and lists among the factors to be considered in granting a density bonus "the general suitability of the site, [the] project design, [and] the parcel's relationship to supporting infrastructure and relationship to the existing neighborhood." Id. at App. C.

Regarding this project's consistency with the Comprehensive Plan, in particular the Affordable Housing Plan, the Planning Board found that a comprehensive-permit application "can expect a density bonus equivalent to a one step increase in the zoning density for the property." (Amended Decision at 3.) That bonus would allow the Property to have the density of a lot located in an RM zone, which allows 7.71 developable units per acre, despite its location in an R-10 zone, which permits only 4.35 units per developable acre. Id. Based on the Property's size, this one-step bonus would permit four units. Id. Because the entire project would be subsidized and restricted to low income individuals and because the Property is "ideally situated" for housing for individuals with special needs, the Planning Board negotiated an additional density bonus, which resulted in the approval for Appellees' requested six units. Id. Ms. Bristow contends that the one-step bonus was the upper limit on the density available to Appellees.

The purpose of the Affordable Housing Plan is to provide tools to South Kingstown to meet the town's need for affordable housing. See Affordable Housing Plan at 2-5 (providing, inter alia, that the overall goal is "[t]o encourage a range of housing choices, including affordable housing options, so that the Town can continue to be a home to a vital mix of people"). Accordingly, it recognizes the flexibility necessary to achieve its goals. For example, immediately before describing the density-bonus negotiation and the one-step density bonus described above, the Affordable Housing Plan states that "[c]omprehensive permitting provides flexibility and allows a Town to negotiate with developers to reach an agreement acceptable to both parties." Id. at 40. Further, the Affordable Housing Plan acknowledges that the Act "affords Cities and Towns the flexibility to work with developers to provide affordable housing opportunities without having to make changes to the Zoning Ordinance." Id. at 33. This Court is satisfied with the Planning Board's consideration of the Application and determination that the density bonus that it granted is consistent with the Affordable Housing Plan.

Rather than applying the one-size-fits-all density bonus advocated by Appellant, the Planning Board utilized the flexibility envisioned in the Affordable Housing Plan to consider the Application and determine that six units is consistent with local needs, particularly the Comprehensive Plan and Affordable Housing Plan. "[W]hen passing upon an application for a special exception for low and moderate income housing," a local board of review "is not merely performing its limited statutory duties, but rather is vested with significant discretion and responsibility to act in the best interest of the community." Town of Coventry Zoning Bd. of Review v. Omni Dev. Corp., 814 A.2d 889, 897 (R.I. 2003). The Planning Board found that the project was "reasonable when the number of low income persons accommodated is considered," and that the Property's proximity to Main Street and downtown Wakefield provides access to

shopping and public transportation. See Amended Decision at 3. Notably, the Affordable Housing Plan, the document with which the Planning Board should find the project consistent, specifically advises that South Kingstown should attempt to locate affordable housing in town centers such as Wakefield. See Affordable Housing Plan at 1, 42.

This Court also notes that as disclosed in the Amended Decision and discussed above, Appellees' development was approved as a multi-household land-development project, which is a "[l]and development project . . . containing either more than 12 dwelling units, or containing more than one principal structure containing dwelling units on a single lot." See Amended Decision at 3, 8; Ordinance at App. A. However, as the Ordinance's schedule of dimensional regulations reveals, a multi-household land-development project in an R10 zone is entitled to use the density of an RM zone without the need for any density bonus. See Ordinance § 401. The Affordable Housing Plan uses as an example the development of a lot in an R-10 zone that could receive a bonus to use the density of an RM zone, but the Property was able to develop at the density of the RM zone by virtue of its status as a multi-household land-development project. See Affordable Housing Plan at 41; Ordinance at App. A. Thus, although the Planning Board did not approve six units based on the application of the one-step increase to the RM density to which Appellees were already entitled, this Court recognizes that to limit the project to the density bonus suggested by Ms. Bristow would effectively deprive Appellees of any bonus at all, which would clearly be inconsistent with the Affordable Housing Plan. See Affordable Housing Plan at 1, 38-45, App. C.

This Court is satisfied that the Planning Board's determination that the project is consistent with the Comprehensive Plan, particularly the Affordable Housing Plan, is supported by substantial evidence and does not constitute an error of law.

IV

Conclusion

After review of the entire record, the Court is satisfied that the Planning Board's Amended Decision is supported by substantial evidence, is not affected by error of law, and does not constitute an abuse of discretion. Therefore, this Court affirms the Amended Decision. Counsel for the prevailing party will prepare an order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Laurel K. Bristow v. Kenyon Terrace Apartments, Inc.; Opportunities Unlimited for People with Differing Abilities, Inc.; and Planning Board for the Town of South Kingstown
CASE NO:	WC 11-0508
COURT:	Washington County Superior Court
DATE DECISION FILED:	August 16, 2013
JUSTICE/MAGISTRATE:	Clifton, J.
ATTORNEYS:	
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