STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: March 21, 2014]

TOWN OF CUMBERLAND	:	
	:	
v.	:	**C.A. No. PC-2013-2272**
	:	
JOSEPH CAFFEY, BRENDA CLEMENT, JAMES GRUNDY, JUNE SPEAKMAN and ROBERT CUTTLE, in their capacity as Members of the State of Rhode Island Housing Appeals Board, and FRED PESATURO and ROY GEMMA	:	

DECISION

VOGEL, J. The Town of Cumberland (Town) appeals from a decision of the State Housing Appeals Board (SHAB) overturning and vacating a decision of the Cumberland Planning Board (Board). In its decision, the Board had denied an Application for a Comprehensive Permit (Application) submitted by Fred Pesaturo and Roy Gemma (collectively, Appellees[1]) pursuant to the Low and Moderate Income Housing Act (Act), codified in G.L. 1956 §§ 45-53-1, et seq. By overturning the Board's decision, in effect, SHAB approved the Application. The Town took a timely appeal to this Court from the SHAB decision.[2] Jurisdiction is pursuant to § 45-53-5(c). For the reasons set forth herein, the Court affirms the decision of SHAB and rejects the Town's appeal.

[1] Appellee SHAB has not filed any memoranda in this matter. Thus, where this Decision refers to Appellees, it shall refer to Mr. Pesaturo and Mr. Gemma alone, and only to SHAB when specifically noted.

[2] The original Appellant in this matter was the Town of Cumberland Planning Board. On June 24, 2013, the Town of Cumberland filed a motion to intervene, which Procaccini, J. granted on July 11, 2013. On July 29, 2013, the Town of Cumberland Planning Board was dismissed from the case with prejudice.

I

Facts and Travel

Appellees own real property located at the corner of Mendon and Albion Streets in Cumberland, Rhode Island, designated as lots 81, 82, and 83 on Cumberland Tax Assessor's Plat 58 (Property). Compl. ¶ 2. The Property is located in an R-1 Zoning District for single-family residences. R. Ex. 4, Statement of Agreed Facts, ¶ 2. The Property is currently vacant, and spans the distance between a residential area and Mendon Road, which houses a number of commercial buildings. Id. ¶ 5; see also R. Ex. 13, Abutter Comments. Specifically, the Property is located at the intersection of Mendon and Albion Roads, next to a dentist's office and across the street from two shopping plazas. The plazas house a variety of businesses, including a bank, a pharmacy and a supermarket. R. Ex. 4 ¶¶ 1, 7-8. The Property is 371 feet away from an affordable housing apartment complex and 0.4 miles away from another apartment complex. Id. ¶¶ 9-10. Behind the Property is a neighborhood of single-family homes.

On March 3, 2008, Appellees filed an Application for a Comprehensive Permit with the Board to construct a mixed-use development with five office units on the first floor and four affordable housing residential units on the second floor. Id. ¶ 15. The Board denied the Application on May 28, 2008, and SHAB affirmed the denial of the Application on appeal. Id. SHAB noted that because the proposed project was primarily commercial, the Board acted with reasonable discretion in its denial. See id.

On March 1, 2010, Appellees filed another Application to construct a sixteen-unit residential development. The proposed project would be dedicated exclusively to affordable housing in which resident income would not exceed eighty percent of the area median income. R. Ex. 4 ¶¶ 17-18; R. Ex. 6, Appeal of Frederick Pesaturo and Roy Gemma (includes

Application, Mar. 1, 2010). Specifically, the development would consist of two buildings with eight units each, ten two-bedroom units and six one-bedroom units. R. Ex. 4 ¶ 17. Two of the units would be handicap accessible. Id. ¶ 19. The Application stated that the proposed buildings would be under the thirty-five foot height limit mandated by the Cumberland Zoning Ordinance. Id. ¶ 20. Finally, the Application indicated that public water and sewer access would be available for the Property and that Rhode Island Housing had approved the developers' application for affordable housing for the Property. Id. ¶ 21.

A

Cumberland Comprehensive Plan

The Town of Cumberland's Housing Element, adopted into its Comprehensive Plan in 2003, aims to "respect property rights and wishes to see the value of its properties" increase. Incorporated in the Housing Element is Goal HS.3, which outlines the Town's intentions to promote affordable housing. Action HS.3.1.1 guides the Town to "[s]atisfy the State's minimum affordable housing requirement . . . by working with public, private and non-profit housing developers to develop affordable housing in areas in town that would lend themselves to affordable housing." See Plan at III-31. Specifically, the Town intends to "[s]atisfy the State's minimum affordable housing requirement (or greater goal as based by Cumberland Housing Board's annual determination) by working with public, private and non-profit housing developers to develop affordable housing in areas in the Town that would lend themselves to affordable housing." Id. The "Town should proactively guide affordable housing to certain areas that can best accommodate higher densities due to existing water, sewer, and other services." Id.

On March 31, 2010, John J. Aubin III, the Town Planner, wrote a memorandum to the Board describing the project. See Compl. Ex. 1, Decision at 6. He referenced the Town's Comprehensive Plan and within Housing Element, and noted that the development of affordable housing units is not limited to specifically-listed locations in the Housing Element. Id. Instead, he explained, "[t]he operative determination in regard to the appropriateness of a site for affordable housing is whether the subject site can best accommodate the proposed higher density due to existing water and other services." Id. In terms of the subject Property, Mr. Aubin confirmed the availability of public sewer and water systems, and noted that the applicants would need to install a dry well system, requiring an underground injection control permit from the Department of Environmental Management and a physical alteration permit from the Rhode Island Department of Transportation. See id. Finally, Mr. Aubin advised the Board that:

> "In reviewing the application, the two major areas of concern would appear to be traffic impacts on the abutting residential properties (the site currently buffers residential uses along Peachdale Road from Mendon Road). The relief requested as a result of the application includes the aforementioned zone change for the proposed R-3 use. Also, all required state permits should be at least submitted to the appropriate agency and with regard to reviews by other town bodies that recommendation be sought [from] the Town Council on the required zone change and Conservation Commission to review any potential environmental impacts." Id. at 7.

B

Board Hearings and Decision

The Board held two hearings on the Application on March 31, 2010 and April 28, 2010. At the March 31, 2010 hearing, Appellee Pesaturo provided an overview of the proposed project. Board Tr. 25-39, Mar. 31, 2010. On April 28, 2010, the Board heard testimony from several

people, including the Town Solicitor; Anthony DeSisto, attorney for Appellees; David Garrigan, a professional land surveyor; and various individuals submitting statements for public comment.

Counsel for Appellees introduced the project and provided an overview of the proposal. Board Tr. 4-6, Apr. 28, 2010. He then noted that although the Town's Comprehensive Plan did not include the Property on its list of areas "deemed by the Town to be suitable for affordable housing," the Property was arguably located in an "appropriate" location for low-income housing given the nearby commercial developments and its location on a bus route. Id. at 6-7. Finally, counsel noted that the Town had not yet met its ten percent affordable housing goal and highlighted the fact that the project would provide a net gain of sixteen units in furtherance of this goal. Id. at 7.

Mr. Garrigan answered questions from the Board regarding the development of the Property. Id. at 8. He stated that the depth of the lot is roughly 104 feet and slightly varied and described the proposed drainage system as designed by a professional engineer, as well as plans to level the Property. Id. at 8-13. He noted that the applicants designed the driveway of the Property in such a way as to increase visibility and lessen the impact on nearby traffic. Id. at 11-12. In addition, he described plans to locate two handicapped parking spaces near the two handicapped housing units, and after members of the Board expressed concerns, he indicated that the developers would be willing to include more handicapped spaces. Id. at 14-18.

The Board then addressed the issue of the project's proposed density in comparison to the size of the lot. Id. at 18-49. Members acknowledged that it was unlikely that the Property would be able to accommodate the three single-family residences for which the area was currently zoned. Id. at 22. The Board noted that changing the Property's zone to R-3 for multiple dwelling unit structures would allow for six units across the entire square footage of the

Property. Id. at 22-23. The Board raised the possibility of reducing the number of units in the two buildings from sixteen to twelve to lower the height of both buildings. Id. at 24. Counsel for Appellees noted that a sixteen-unit development would contain smaller individual units, ensuring that they would appeal to "work force or senior housing" rather than families—a benefit, given the traffic in the area. Id. at 28. Mr. Pesaturo stated that it would not be economically feasible to reduce the number of units in the project to twelve, even if some of the units were rented at the market rate rather than as affordable housing. Id. at 36, 43-45.

The Board then opened the floor to public comment regarding the project. Id. at 49. Mr. Gettinger, the Chairman of the Conservation Commission, voiced concerns about the development in the area, and urged the Board to ensure that the rear of the Property remained buffered. Id. at 49-50. He acknowledged that the project included a twenty-five foot buffer zone, but remained concerned regarding the longevity of the shrubbery to be planted in that zone. Id. at 51. Various other individuals, including owners of homes neighboring and abutting the project, spoke in opposition to the project on the grounds of increased traffic and that commercial development in the area was inconsistent with the Town's "desired character." Id. at 52-90.

At the conclusion of the hearing, counsel for Appellees noted that a Bryant Associates traffic study submitted with the Application indicated that "this development would not change the level of service on Albion and Mendon Road." Id. at 91. The Board then resumed discussion about the number of units appropriate for the development, ranging from eight to sixteen. Id. at 94-95. The Board subsequently closed the hearing to public comment and a Board member made a motion to deny the application, specifically on the grounds that:

> "The proposal is not consistent with the 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 and 16 units versus the homeowners." Id. at 123.

The movant clarified his statement by noting that the proposal was for sixteen rental units which would be "[d]irectly adjacent to or abutting single-family homes." Id. at 124. The Board took a roll call vote resulting in a tie, which the Chairman broke in favor of denying the application. Id. at 124-25.

The Board issued its Findings of Fact & Decision on May 26, 2010. R. Ex. 3. The decision provided an overview of the project and outlined the concerns raised by neighboring property owners at the hearings. Id. at 2. The Board concluded that the "proposed development is not consistent with local needs as identified in the Cumberland Comprehensive Community Plan as the subject site is not listed as a site for low or moderate income housing in the Housing Element of the Comprehensive Plan." Id. at 3. In addition, the Board stated that "the proposed multi family development at the proposed density and in consideration of the size of the parcel is inconsistent with the existing zoning for the property and the character abutting single family residential uses." Id.

Appellees timely appealed the Board's decision to SHAB on June 21, 2010, contending that the Board's decision was "inconsistent with the local needs of the Town of Cumberland as the Town is far from meeting its 10% state-mandated goal for affordable housing units." R. Ex. 6, Developer Appeal at 2. In addition, the Appellees noted that the Board's findings of fact indicated that it "merely denied the application because the subject property was not identified as a site for affordable housing in the Town's outdated Comprehensive Plan." Id. Both parties submitted memoranda in support of their respective positions in 2011.

C

SHAB Hearings and Decision

SHAB held a hearing on February 14, 2013 to hear oral arguments from both parties. The parties submitted a Statement of Agreed Facts (Agreed Facts) on March 15, 2013. R. Ex. 4. SHAB adopted the stipulations contained therein and convened a hearing to deliberate and vote on the appeal. SHAB Tr. 3-4, Apr. 1, 2013. A member made a motion to vacate the Board's decision as "[in]consistent with the approved Affordable Housing Plan." Id. at 10. In support of this motion, a SHAB member noted that "[t]he landowner provided a traffic study that showed that the development wouldn't impact traffic as to any major extent." Id. at 12. In addition, another member reiterated that the site had existing water and sewer services. Id. Finally, that member expressed concern with a Board member's statement that he would have approved the project with twelve units. In expressing such concern, he commented that the Board's decision was "more about a density than an overall siting [issue]." Id. Following this discussion, SHAB unanimously voted to vacate the Board's decision and approve the Application. Id. at 14.

SHAB issued a decision vacating the Board's decision on April 30, 2013. R. Ex. 1, Decision. In the decision, SHAB noted that the Town had not yet met its 10% affordable housing requirement and that although the Property was not included in the Town's Housing Element list of appropriate affordable housing sites, that list is "not intended as an exclusive list." Id. at 12. SHAB emphasized that the record from the proceedings at the Board indicated that the Property was "suitable and appropriate for multi-family development," and that two members who voted against the Application had stated that they would have supported a development of between eight and twelve units. Id. SHAB noted that the Board "failed to provide any justifiable explanation for its draconian step of denying the project entirely." Id. at

13. After a review of the record, the arguments presented, and the stipulated findings, SHAB concluded that the "record supports the allowance of the sixteen units as requested in the Developers' application." Id. SHAB also noted the concerns of neighboring landowners, and stated that there would be a twenty-five foot buffer at the Property; the buildings would be within the thirty-five foot height limit in the Zoning Ordinance; and a traffic analysis concluded that the project would not significantly impact local traffic. See id. In addition, SHAB noted that the Board did not indicate that "traffic issues were a dispositive consideration to the denial of the application" in oral deliberations or its decision. Id.

SHAB next addressed what it considered to be a "reasonably proper density of development at the Site." Id. SHAB noted that the Board did not dispute the Developers' contention that the Property is not optimal for single-family developments as currently mandated by the Zoning Ordinance. Id. The record from the Board's proceedings "clearly suggests," SHAB opined, that the Application would have been approved if the project consisted of twelve units. Id. at 13-14. Thus, in vacating the Board's decision, SHAB stated that it "sees no reasonable justification for the denial of the application based upon four less units within the two buildings, especially given that all sixteen units would be dedicated to diminishing the Town's current 538 [unit] shortfall to reach the ten percent threshold mandated by the Act." Id. at 14. Appellants timely appealed SHAB's decision.

II

Standard of Review

When an application for a comprehensive permit filed pursuant to § 45-53-4 is denied, the applicant may appeal the local review board's decision to SHAB for a review of the application. Sec. 45-53-5(a). SHAB's review of the decision of the local review board is outlined in § 45-53-6(b)-(d). Section 45-53-6(b) provides that SHAB "shall determine whether . . . in the case of the denial of an application, the decision of the local review board was consistent with an approved affordable housing plan." A nonexclusive list of standards for reviewing an applicant's appeal is delineated in § 45-53-6(c) and includes:

> "1. The consistency of the decision to deny or condition the permit with the approved affordable housing plan and/or approved comprehensive plan;
>
> "2. The extent to which the community meets or plans to meet housing needs, as defined in an affordable housing plan, including, but not limited to, the ten percent (10%) goal for existing low and moderate income housing units as a proportion of year-round housing;
>
> "3. The consideration of the health and safety of existing residents;
>
> "4. The consideration of environmental protection; and
>
> "5. The extent to which the community applies local zoning ordinances and review procedures evenly on subsidized and unsubsidized housing applications alike."

Additionally, § 45-53-6(d) provides in relevant part:

> "If the appeals board finds, in the case of a denial, that the decision of the local review board was not consistent with an approved affordable housing plan, or if the town does not have an approved housing plan, was not reasonable and consistent with local needs, it shall vacate the decision and issue a decision and order approving the application, denying the application, or approving with various conditions consistent with local needs . . . . Decisions or

> conditions and requirements imposed by a local review board that are consistent with approved affordable housing plans and/or with local needs shall not be vacated, modified, or removed by the appeals board notwithstanding that the decision or conditions and requirements have the effect of denying or making the applicant's proposal infeasible."

The Act provides this Court with the specific authority to review a decision or order of SHAB. Sec. 45-53-5(c). The Superior Court conducts the review without a jury, and considers the record of the hearing before SHAB. Id. If the Court finds "that additional evidence is necessary for the proper disposition of the matter, it may allow any party to the appeal to present that evidence in open court." Id. The Superior Court's review of a SHAB decision is governed by § 45-53-5(d) of the Act, which provides:

> "The court shall not substitute its judgment for that of the state housing appeals board as to the weight of the evidence on questions of fact. The court may affirm the decision of the state housing appeals board or remand the case for further proceedings, or may reverse or modify the decision if substantial rights of the appellant have been prejudiced because of findings, inferences, conclusions, or decisions which are:
>
> "(1) In violation of constitutional, statutory, or ordinance provisions;
>
> "(2) In excess of the authority granted to the state housing appeal board by statute or ordinance;
>
> "(3) Made upon unlawful procedure;
>
> "(4) Affected by other error of law;
>
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
>
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

This Court's standard when reviewing a SHAB decision "'is analogous to that applied by the Superior Court in considering appeals from local zoning boards.'" Kaveny v. Cumberland

Zoning Bd. of Review, 875 A.2d 1, 7 (R.I. 2005) (quoting Curran v. Church Cmty. Hous. Corp., 672 A.2d 453, 454 (R.I. 1996)). Similar to its review of zoning board and administrative agency decisions, "[t]his Court employs a deferential standard when reviewing a SHAB decision." Smithfield v. Churchill & Banks Cos., LLC, 924 A.2d 796, 800 (R.I. 2007) (quotations omitted). The Superior 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 E. Greenwich, 733 A.2d 703, 705 (R.I. 1999) (quoting Kirby v. Planning Bd. of Review of Town of Middletown, 634 A.2d 285, 290 (R.I. 1993)). Competent evidence "is indicated by the presence of 'some' or 'any' evidence supporting [SHAB's] findings." R.I. Pub. Telecomms. Auth. v. R.I. State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994).

The reviewing court should uphold a decision in instances where administrators have acted within their authority. Goncalves v. NMU Pension Trust, 818 A.2d 678, 683 (R.I. 2003) (citing Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998)). The court, however, "may reverse or modify the agency's final decision if it is [c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Envt'l Sci. Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993). Accordingly, a reviewing court may reverse an agency's findings "only in instances wherein the conclusions and the findings of fact are 'totally devoid of competent evidentiary support on the record,' or from the reasonable inferences that might be drawn from such evidence." Bunch v. Bd. of Review, R.I. Dept. of Emp't and Training, 690 A.2d 335, 337 (R.I. 1997) (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)).

This Court considers questions of statutory interpretation de novo. Tanner v. Town Council of E. Greenwich, 880 A.2d 784, 791 (R.I. 2005). SHAB's "determination of law is not

binding on this Court, and we may review such determination as to 'what the law is and its applicability to the facts.'" Cohen v. Duncan, 970 A.2d 550, 561-62 (R.I. 2009) (citing Pawtucket Transfer Operations v. City of Pawtucket, 944 A.2d 855, 859 (R.I. 2008)).

III

Analysis

On appeal, Appellant makes three challenges to SHAB's decision vacating the Board's denial of the Application. First, Appellant argues that SHAB's decision failed to adequately state findings of fact because it merely incorporated by reference the thirty-one Agreed Facts submitted by both parties and introduced into evidence at the SHAB hearing. Second, Appellant contends that SHAB did not make required findings in accordance with § 45-53-6(b) and (c), which Appellant argues requires SHAB to make specific findings as to each factor. Finally, Appellant argues that SHAB did not afford the Board's findings proper consideration because it did not explain why it chose to discount the Board's conclusions.

In response, Appellees contend that SHAB made sufficient findings of fact by incorporating the Agreed Facts. Second, Appellees argue that SHAB applied the correct standard of review in § 45-53-6(b) and (c) because it considered whether the Board's decision was consistent with Cumberland's approved affordable housing plan and applied the relevant factors as outlined by the statute. They contend that the list of factors outlined in § 45-53-6(c) is not a required list, but are merely guidelines. Finally, Appellees argue that because Cumberland has not met its low income housing quota, SHAB was not required to give any deference to the Board's findings.

A

The Rhode Island Low and Moderate Income Housing Act

In an effort to address "the acute shortage of affordable, accessible, safe, and sanitary housing for . . . [Rhode Island] citizens of low and moderate income," the General Assembly passed the Low and Moderate Income Housing Act in 1991. Sec. 45-53-2. To increase the housing available to such citizens, the Act "provides for a streamlined and expedited application procedure whereby 'a single application for a [comprehensive permit] to build [low and moderate income] housing in lieu of separate applications to the applicable local [municipal] boards' may be submitted to the zoning board of review of a city or town . . . ." Town of Coventry Zoning Bd. of Review v. Omni Dev. Corp., 814 A.2d 889, 894 (R.I. 2003) (quoting § 45-53-4). The zoning board of review has "the same power to issue permits of approvals [as] any local board or official who would otherwise act with respect to the application." Sec. 45-53-4.

If an application for a comprehensive permit is "denied, or granted with conditions and requirements that make the building or operation of the housing infeasible, the applicant has the right to appeal to the state housing appeals board established by § 45-53-7, for a review of the application." Sec. 45-53(a). The standard of review that SHAB must apply to such appeals is set forth in § 45-53-6(b), which provides in pertinent part that:

> "In hearing the appeal, the state housing appeals board shall determine whether: (i) in the case of the denial of an application, the decision of the local review board was consistent with an approved affordable housing plan, or if the town does not have an approved affordable housing plan, was reasonable and consistent with local needs; and (ii) in the case of an approval of an application with conditions and requirements imposed, whether those conditions and requirements make the construction or operation of the housing infeasible and whether those conditions

> and requirements are consistent with an approved affordable housing plan, or if the town does not have an approved affordable housing plan, are consistent with local needs."

In addition, regardless of whether the local board denied the application or approved the application with conditions, "the standards for reviewing the appeal include, but are not limited to" five standards, supra at 10. Sec. 45-53-6(c).

The Rhode Island Supreme Court has noted that "the above factors are in addition to the reasonableness analysis contained in § [45-53-6(b)]'s definition of '[c]onsistent with local needs.'" East Bay Community Dev. Corp. v. Zoning Bd. of Review of Town of Barrington, 901 A.2d 1136, 1148 (R.I. 2006); see also JCM, LLC v. Cumberland Zoning Bd. of Review, 889 A.2d 169 (R.I. 2005); Omni Development Corp., 814 A.2d at 889. The Supreme Court has noted "the degree of overlap between the reasonableness analysis of § [45-53-6(b)] and the illustrative factors of § 45-53-6(c), noting that the latter largely mirror the former." East Bay Community Dev. Corp., 901 A.2d at 1148. Nevertheless, "[f]or municipalities lacking the statutory quota . . . the act calls upon SHAB to conduct an analysis under both subsections." Id. (quotations omitted).

B

Adequate Findings of Fact

Appellant first argues that SHAB failed to make findings of fact in its decision as required by § 45-53-6. Appellant contends that the transcript from the April 1, 2013 hearing in which SHAB deliberated and voted on the appeal lacks substantial discussion or findings of fact, and SHAB merely referenced the Agreed Facts in its decision rather than make its own specific findings. In response, Appellees argue that SHAB's explicit incorporation of the Agreed Facts in

both the hearing and its decision suffices to achieve the statutory requirement that SHAB make factual findings.

It is well established in Rhode Island that "[a]n administrative decision that fails to include findings of fact required by statute cannot be upheld." Sakonnet Rogers, Inc. v. Coastal Res. Mgmt. Council, 536 A.2d 893, 896-97 (R.I. 1988) (citing E. Greenwich Yacht Club v. Coastal Res. Mgmt. Council, 118 R.I. 559, 569, 376 A.2d 682, 687 (1977)). Nevertheless, it is equally well established that a stipulation entered into by both sides of a controversy "is conclusive upon the parties" and thus "is no longer a question for consideration by the tribunal." In re McBurney Law Services, Inc., 798 A.2d 877, 881-82 (R.I. 2002). Further, "'a stipulation renders proof unnecessary and both prevents an independent examination by a judicial officer or body with respect to the matters stipulated and binds the parties on appeal.'" R.I. Pub. Telecomms. Auth. v. Russell, 914 A.2d 984, 990 (R.I. 2007) (quoting 73 Am. Jur. 2d Stipulations § 17 at 500-01 (2001)); accord Delbonis Sand & Gravel Co. v. Town of Richmond, 909 A.2d 922, 925 (R.I. 2006) (when a case is tried upon stipulated facts, "the trial court does not play a fact-finding role, but is limited to 'applying the law to the agreed-upon facts'") (quoting Hagenberg v. Avedisian, 879 A.2d 436, 441 (R.I. 2005)).

The Act requires SHAB to "render a written decision and order, based upon a majority vote, stating its findings of fact, and its conclusions and the reasons for those conclusions" in the event of an appeal. Sec. 45-53-5(c). In this case, SHAB met its statutory duty to include findings of fact in its decision by specifically voting to incorporate the thirty-one Agreed Facts into its record and adopting the stipulations made by both parties therein. Moreover, SHAB noted that the Agreed Facts "resolved material findings regarding the Developers' second application" in its published decision. R. Ex. 1 at 2. Not only would repeating such facts have

been duplicative and an inefficient use of time, but under Rhode Island law, SHAB's formal acceptance of the stipulated facts fulfilled its fact-finding role, leaving only the requirement that SHAB apply the law to the agreed upon facts. See R.I. Pub. Telecomms. Auth., 914 A.2d at 990; Delbonis Sand & Gravel Co., 909 A.2d at 925. SHAB's incorporation of the Agreed Facts into its decision satisfied its statutory duty to "stat[e] its findings of fact," and its decision not to repeat each finding within its published decision was neither an abuse of discretion nor affected by other error of law. See § 45-53-5(d).

C

Application of Legal Standards

Appellant's second challenge to the decision is that SHAB did not specifically address each factor enumerated in § 45-53-6(c). Specifically, Appellants contend that SHAB failed to address the consideration of the health and safety of existing residents, environmental protection, and whether the Town applies local zoning ordinances evenly to subsidized and unsubsidized housing. Appellees respond that the list provided in § 45-53-6(c) is not mandatory and is rather a suggested list of factors that SHAB may consider. Moreover, Appellees argue that because SHAB found that the first two enumerated guidelines were particularly relevant, it did not need to consider factors which would not be relevant to its ultimate disposition.

This court considers questions of statutory interpretation de novo. See Cohen, 970 A.2d at 561-62; Tanner, 880 A.2d at 791. "When construing a statute our ultimate goal is to give effect to the purpose of the act as intended by the Legislature." Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 168 (R.I. 2003) (quotations omitted). If "'the language of a statute is clear and unambiguous, this Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings.'" State v. Diamante, 83 A.3d 546,

548 (R.I. 2014) (quoting Accent Store Design, Inc. v. Marathon House, Inc., 674 A.2d 1223, 1226 (R.I. 1996)). If a statute is ambiguous, this Court applies the "well established maxims of statutory construction in an effort to glean the intent of the Legislature." Unistrut Corp. v. State Dept. of Labor & Training, 922 A.2d 93, 98-99 (R.I. 2007). In such a situation, this Court will afford deference to an administrative agency's interpretation, which is "entitled to great weight." State v. Cluley, 808 A.2d 1098, 1103 (R.I. 2002) (citing Berkshire Cablevision of R.I., Inc. v. Burke, 488 A.2d 676, 679 (R.I. 1985)); accord Labor Ready Ne., Inc. v. McConaghy, 849 A.2d 340, 344-45 (R.I. 2004). The "ultimate interpretation of an ambiguous statute . . . is grounded in policy considerations," and this Court will not construe a statute in such a way as to "defeat its underlying purpose." Arnold, 822 A.2d at 168.

Section 45-53-6(c) provides SHAB with a list of five considerations in its review of an appeal of a local board's denial of a comprehensive permit application. However, the Act does not state whether this list is a requirement that SHAB make five separate, specific findings, or whether the list is simply an exemplary list of factors to be considered. Specifically, the Act states that "[i]n making a determination [of whether the local board's decision was consistent with the approved affordable housing plan], the standards for reviewing the appeal include, but are not limited to," the five enumerated factors. After a careful review of the Act, this Court finds that SHAB's interpretation of this ambiguous directive, when viewed in the light of the "well-established maxims of statutory construction" is not clearly erroneous. Unistrut Corp., 922 A.2d at 98-99. "'[D]eference will be accorded to an administrative agency when it interprets a statute whose administration and enforcement have been entrusted to the agency * * * even when the agency's interpretation is not the only permissible interpretation that could be applied.'"

Auto Body Ass'n of R.I. v. State Dept. of Bus. Regulation, 996 A.2d 91, 97 (R.I. 2010) (quoting Pawtucket Power Assocs. Ltd. P'ship v. City of Pawtucket, 622 A.2d 452, 456-57 (R.I. 1993)).

This Court's paramount concern in interpreting § 45-53-6(c) is to promote the Legislature's intent in passing this Act, which is "'to assure the health, safety, and welfare of all citizens of this state, and that each citizen enjoys the right to affordable, accessible, safe, and sanitary housing.'" Kaveny, 875 A.2d at 11 (quoting Sec. 45-53-2). An interpretation of an ambiguous provision within the Act making it more difficult to build affordable housing would counteract this expressed intent. Here, interpreting the list in § 45-53-6(c) as mandatory would increase the burden on SHAB to make specific findings and provide increased pathways for overturning the approval of a low-income housing development on appeal.

In addition, there is no provision in the statute requiring SHAB to consider the five enumerated factors in § 45-53-6(c) equally, to weigh one factor over another, or to address each of the factors. The absence of any such requirement indicates that the Legislature, when drafting this provision, did not intend for the list to be exhaustive and mandatory. Moreover, this Court notes that the Act does specifically direct SHAB to make specific findings in § 45-53-6(b) with its use of the word "shall," and chose to use significantly different language in its listing of relevant factors in § 45-53-6(c). "[*E*]*xpressio unius est exclusio alterius* . . . tells us that when a legislature 'includes particular language in one section of a statute but omits it in another . . . it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion.'" In re Plaza Resort at Palmas, Inc., 741 F.3d 269, 277 (1st Cir. 2014) (quoting Russello v. U.S., 464 U.S. 16, 23 (1983)). In this case, it appears as though the Legislature intended for § 45-53-6(b) to be a mandatory consideration, but in choosing different language, intended for § 45-53-6(c) to simply provide examples of factors SHAB may consider

in its review. Although the Rhode Island Supreme Court has not ruled on this issue, it has described § 45-53-6(c) as "illustrative factors," lending further support to this interpretation. East Bay Cmty Dev. Corp., 901 A.2d at 1147-48; accord Bloate v. U.S., 559 U.S. 196, 208-09 (2010) (describing the phrase "including but not limited to" as an "illustrative rather than exhaustive" list); see also Black's Law Dictionary (9th ed. 2009) (defining "includes" and "includes but is not limited to" as indicating a partial list).

Finally, interpreting "include, but is not limited to" in § 45-53-6(c) as a mandatory list would lead to an absurd result in that it would force SHAB to make positive findings on factors it has already determined were not outcome-determinative. "'[I]f a mechanical application of a statutory definition produces an absurd result or defeats legislative intent, this [C]ourt will look beyond mere semantics and give effect to the purpose of the act.'" Commercial Union Ins. Co. v. Pelchat, 727 A.2d 676, 681 (R.I. 1999) (quoting Matter of Falstaff Brewing Corp. re: Narragansett Brewery Fire, 637 A.2d 1047, 1050 (R.I. 1994)). SHAB is required by the Act to determine whether the local review board's decision was consistent with an approved affordable housing plan. Sec. 45-53-6(b). In making such determination, the Act provides SHAB with a list of five "standards for reviewing the appeal." Sec. 45-53-6(c). In this case, SHAB found that two of the five suggested standards weighed so heavily in favor of a reversal that consideration of the remaining three would be futile, and noted that the three remaining factors were essentially irrelevant to the facts of the case. A SHAB member specifically noted that there was no evidence regarding "healthy and safety and environmental" issues raised before the Board or before SHAB. SHAB Tr. 12, Apr. 1, 2013. In addition, neither party raised the issue of the extent to which the Town treated subsidized and unsubsidized housing applications alike, and thus the Board did not consider it.

For all of these reasons, this Court concurs with and defers to SHAB's interpretation of § 45-53-6(c) as illustrative rather than mandatory. See Auto Body Ass'n of R.I., 996 A.2d at 97 (this Court defers to an administrative agency's interpretation of a statute "whose administration and enforcement have been entrusted to the agency"). Although the statute is ambiguous, SHAB's interpretation is "not clearly erroneous or unauthorized," and its consideration of two of the five factors listed within the statute does not constitute grounds for reversal. See Cohen, 970 A.2d at 562.

D

Deference to Local Board

Finally, Appellant argues that SHAB did not give proper consideration to the Board's proceedings, findings of fact, and ultimate decision to reject the Application. Appellant argues that SHAB summarily dismissed the Board's conclusions without explanation. Appellees contend that because the Town had not met its 10% low income housing quota, state case law has established that SHAB was not required to give any deference to the Board's decision. Appellees argue that SHAB simply applied a harsher scrutiny to the Board's decision and concluded that the denial was inconsistent with the Town's Housing Element.

The Rhode Island Supreme Court has stated that "[t]he standard of review SHAB must employ . . . is much less deferential to the zoning board of a municipality that has not reached its statutory quota under the act." East Bay Cmty. Dev. Corp., 901 A.2d at 1149. Specifically, SHAB must "scrutinize a zoning board's denial of an application when the municipality in question has failed to reach its statutory quota of affordable housing." Id. at 1151. On appeal, the Superior Court defers to SHAB's findings, rather than to the findings of the local board. See id. In contrast, in a municipality with the required ten percent of affordable housing already in

place, the applicant must appeal a denial to the Supreme Court, which applies a deferential standard of review to the local board's decision. See Omni Dev. Corp., 814 A.2d at 898. In upholding this deferential standard, the Court noted that "[t]he state unquestionably has a legitimate interest, if not a substantial one, in addressing the housing needs of its impecunious citizenry." East Bay Cmty. Dev. Corp., 901 A.2d at 1151; see also Kaveny, 875 A.2d at 11.

In this case, both parties stipulated that the Town was 538 units from meeting its quota when SHAB heard the appeal. Thus, SHAB's consideration of the appeal did not require a high level of deference to the Board's findings. See East Bay Cmty. Dev. Corp., 901 A.2d at 1149. This Court need not reach the issue of how much deference is required under the Act because in this case SHAB did consider the Board's findings and conclusions and concluded that they were made in error. Appellant appears to base its argument on the fact that at a hearing in which SHAB members discussed and voted on this appeal, a member stated that "the Appeals Board has erred in their decision, and that the decision of the local Review Board was not consistent with the approved Affordable Housing Plan." SHAB Tr. 10, Apr. 1, 2013. However, SHAB's decision clearly addressed its required statutory finding under § 45-53-6(b) regarding whether "in the case of the denial of an application, the decision of the local review board was consistent with an approved affordable housing plan."

In its decision, SHAB emphasized that the Town had not yet met its 10% affordable housing requirement under the Act, and that although the Housing Element of the Comprehensive Plan did not identify the Property specifically, other sites throughout the Town "that lend themselves to potential affordable housing should be considered." R. Ex. 1 at 12. SHAB found that the record from the Board's deliberations illustrated that the Property was "suitable and appropriate for multi-family development," and specifically "support[ed] the

allowance of the sixteen units as requested in the Developers' application." Id. at 12-13. In support of this conclusion, SHAB cited to the Agreed Facts and specifically noted the Property's proximity to commercial developments and other apartment complexes, including an affordable housing complex 371 feet away. See id. at 13. SHAB also acknowledged the concerns voiced to the Board by neighbors of the Property and noted that the proposed buildings are within the local zoning ordinance's height requirements, and a traffic study concluded that there would be no significant impact on traffic in the area. Id. Finally, SHAB remarked that the record suggested that the Application would have been approved with twelve units instead of sixteen and stated that it saw "no reasonable justification" for the Board's "draconian step of denying the project entirely." Id. at 13-14.

This Decision clearly illustrates that although SHAB rejected the Board's conclusions, it certainly considered them and provided reasons for its decision to vacate the Board's denial. Moreover, in this appeal, this Court must defer to SHAB's findings as long as they rest on "competent evidence." See Munroe, 733 A.2d at 705; see also Smithfield, 924 A.2d at 800. Although SHAB's decision is admittedly brief, it certainly cites to "competent evidentiary support on the record" and is thus not in violation of statutory provisions. See Bunch, 690 A.2d at 337. Therefore, this Court shall uphold SHAB's decision.

E

Equal Access to Justice Act

Appellees seek to be reimbursed for "reasonable litigation expenses" pursuant to the Equal Access to Justice for Small Businesses and Individuals Act (Equal Access to Justice Act), G.L. 1956 §§ 42-91-1 et seq. However, they fail to provide the Court with a legal basis for such request. Appellees contend that the Board's decision constituted an "adjudicatory proceeding";

the Board's decision was not substantially justified; and Appellees have less than $500,000 in net assets. In response, Appellants argue that the Equal Access to Justice Act does not apply to proceedings before the Board; the Board's decision was substantially justified; and Appellees have not established that their net worth is less than $500,000.

The Equal Access to Justice Act "was propounded to mitigate the burden placed on individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings." Taft v. Pare, 536 A.2d 888, 892 (R.I. 1988) (citing §§ 42-92-1 et seq. (1985, as amended 1994)). The Act is intended to "encourage individuals and small businesses to contest unjust actions by the state and/or municipal agencies." Sec. 42-92-1(b). The Court may award reasonable litigation expenses to a prevailing party if it finds that the agency's action was not substantially justified, meaning that the agency's position "has [no] reasonable basis in law and fact." Id. § 42-92-2(7); Taft, 536 A.2d at 892. An "agency," as defined under the Equal Access to Justice Act, includes "any state and/or municipal board, commission, council, department, or officer, other than the legislature or courts, authorized by law to make rules or to determine contested cases, to bring any action at law or in equity . . . or to initiate criminal proceedings. Sec. 42-92-2(3). In addition, an individual seeking to collect litigation expenses must demonstrate that his or her "net worth [was] less than five hundred thousand dollars ($500,000) at the time the adversary adjudication was initiated." Id. § 42-92-2(5).

The Rhode Island Supreme Court has not yet determined whether the Equal Access to Justice Act applies to zoning and planning boards. See Campbell v. Tiverton Zoning Bd., 15 A.3d 1015, 1025 (R.I. 2011) (merely assuming "arguendo" that a building official may be deemed an "agency" and affirming the denial of litigation expenses on other grounds). In this

case, however, the Court need not reach the issue of whether this Act applies to the Cumberland Planning Board. The Board's decision to deny the Application does not rise to the level of unreasonableness that would warrant compensation under the Act.[3] See Taft, 536 A.2d at 893 (quoting U.S. v. 1,378.65 Acres of Land, 794 F.2d 1313, 1318 (8th Cir. 1986) (noting that an agency must show that its position was "solid though not necessarily correct"). Although this Court affirms SHAB's reversal of the Board's decision, it makes no finding that the decision of the Board was arbitrary, capricious, or totally without basis in law or fact. Appellees' request for litigation expenses is hereby denied.

IV

Conclusion

After review of the entire record, the Court finds that SHAB's decision contains reliable, probative, and substantial evidence to support its findings. Further, this Court concludes that SHAB's decision was not in violation of constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Substantial rights of the Appellant have not been prejudiced. Thus, SHAB's decision is affirmed. Counsel shall submit the appropriate judgment for entry.

[3] Moreover, assuming arguendo that this Court could apply the Equal Access to Justice Act, Appellees have not adequately proven that their individual net worth was less than $500,000 at the time of their Application. See § 42-92-2(5). Appellees merely state that they have less than $500,000 in net assets, and fail to respond to Appellant's challenge to this unsubstantiated statement.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Town of Cumberland v. Joseph Caffey, et al.
CASE NO:	PC 2013-2272
COURT:	Providence County Superior Court
DATE DECISION FILED:	March 21, 2014
JUSTICE/MAGISTRATE:	Vogel, J.
ATTORNEYS:	
For Plaintiff:	Michael F. Horan, Esq.; Thomas E. Hefner, Esq.; John J. Garrahy, Esq.
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