

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: SEPTEMBER 19, 2012)

TOWN OF SMITHFIELD

V.

**BICKEY DEVELOPMENT, INC. and
STATE HOUSING APPEALS BOARD**

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C.A. No.: PC-2011-1017

DECISION

MCGUIRL, J. Before this Court is an appeal by the Town of Smithfield (“Town” or “Appellant”) of a decision by the State Housing Appeals Board (“SHAB”), vacating the Town of Smithfield Zoning Board of Review’s (“Zoning Board”) decision, which had denied Bickey Development, Inc. (“Bickey” or “Applicant”) master plan approval of an application for a comprehensive permit (“Application”), and thus approving Bickey’s application. Jurisdiction is pursuant to R.I. Gen. Laws 1956 § 45-53-5(c).

I

Facts and Travel

In July of 2008, Bickey, a for-profit corporation, filed an Application for Comprehensive Permit with the Zoning Board, acting as a local review board, pursuant to Article 12 of Smithfield Zoning Ordinance and the Low and Moderate Income Housing Act, codified in G.L. 1956 § 45-53-1, et seq. (“Act”). The Applicant is the owner of an eighteen-lot subdivision (“Property”), located in a R-80 zoned district on Dillon Lane in Smithfield, Rhode Island, and identified as Lots 227, 228, and 229 on Assessor’s Plat 42. The Property was part of one of the

four primary sections of Smithfield designated as an affordable housing site by the Town's Affordable Housing Plan.

The Applicant sought a comprehensive permit to construct thirty-one residential condominium units on three of its eighteen lots. The project was titled "Dean Estate Affordable Housing" ("Dean Estate" or "Project"), and proposed that eight out of the thirty-one condominium units be sold to buyers with low or moderate income, who qualify under the Act. As part of its Application, Bickey sought numerous variances including a ten-foot variance from the minimum front set back for the housing units identified one to three, and twenty-eight to thirty-one; a forty-five foot variance from the minimum rear yard set back for the three housing structures identified as units eighteen to twenty, twenty-one to twenty-four, and twenty-five to twenty-seven. Applicant also requested a variance of 4.2 percent from the Town's maximum lot coverage requirements and a variance to allow the construction of multifamily housing units in a R-80 zoned district.

Upon review of Bickey's Application, the Zoning Board issued a certificate of completeness on September 2, 2008. In consideration of Bickey's Application, the Zoning Board held four hearings on October 1, 2008; October 29, 2008; November 19, 2008; and December 17, 2008. During the hearings, Mr. David D'Amico ("Mr. D'Amico"), a licensed professional engineer and principal of Casali & D'Amico Engineering, presented testimony on Bickey's behalf regarding the details of the proposed development. With respect to sewage disposal, Bickey proposed that the thirty-one condominium units at Dean Estate be connected to an existing sewer line on Dillon Lane. Said sewer line is part of the sewer system of the Village of Summerfield Condominium Development ("Summerfield"), which connects to a Town pump station on Camp Street ("Camp Street Station"). This Summerfield sewer system initially was

owned and maintained by Summerfield. However, on November 7, 2008, while Bickey's Application was still pending, the Town assumed ownership and maintenance responsibilities of the Summerfield sewer system.

Mr. D'Amico also testified that the proposed development only would increase the capacity of the sewer flow by one percent in the existing system. However, the Town's sewer system was experiencing two separate problems. One of the issues is caused by a deficiency in the construction of one of the two pipes in the Summerfield sewer system. This led to a sag in the pipeline, thus causing the residents to experience overflow and toilet leakage. The second issue, according to Mr. D'Amico, relates to the servicing pump station. Specifically, Mr. D'Amico explained that excessive storm water was infiltrating, from various sources, into the sewer system leading to the Camp Street Station, thus causing the station to operate at near overflow capacity during heavy rains.

Mr. Kevin Cleary ("Mr. Cleary"), P.E., Town Engineer for the Town of Smithfield, also presented testimony regarding the condition of the sewer system in connection with the proposed development. Mr. Cleary agreed with Mr. D'Amico's testimony that under normal circumstances, the sewer line and system servicing the proposed development is working at a remaining capacity of thirty-three percent.¹ However, Mr. Cleary noted that Mr. D'Amico's report does not reflect the pumping station capacity during major rainstorms. (Decision at 5.) Mr. Cleary further explained that on December 12, 2008, during a twenty-five year rain event resulting in approximately four and one-half inches of rain within a twenty-four hour period, the Camp Street Station was operating at "high alert" and near flood capacity level. Cleary also expressed concern that under similar circumstances, there could be a sanitary discharge, which

¹ Although the parties misstate the percentage of the unused capacity, it is evident from the Transcript that the remaining capacity, rather than the used capacity of the sewer system is thirty-three percent. See Tr. at 82.

could create a serious health and safety concern situation for the current and future residents of the community. (Decision at 5.) According to Mr. Cleary, the proposed development would exacerbate the current sewer deficiency. Id. at 5-6.

On January 30, 2009, the Zoning Board issued a written decision on the Application, which was generally favorable to the Applicant. The Zoning Board determined that the Project was consistent with local needs as identified in the Smithfield Comprehensive Community Plan and the Town's Affordable Housing Plan. However, by a unanimous vote, the Zoning Board denied approval of Bickey's Application for a comprehensive permit. (Decision at 8.) The Zoning Board found that "[t]here will be a significant negative environmental impact from the proposed development given the present condition of the sewer system that will service the proposed development." Id. The Zoning Board also found that "[t]here will be a significant negative impact on the health and safety of current or future residents of the community, in areas including, but not limited to, sewer disposal and surface water run-off" Id. Additionally, based on the testimony of Mr. Michael DiDomenico, the president of Bickey, the Zoning Board was unable to determine that:

"all low and moderate income housing units proposed will be integrated throughout the development; will be 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 the market rate units." Id. at 7.

Bickey appealed the Zoning Board's decision to SHAB. SHAB vacated the Zoning Board's decision and granted a master plan level approval to Bickey's Application, subject to couple of requirements. The instant appeal followed. Additional facts will be provided in the Analysis portion of this Decision.

II Standard of Review

When an application for a comprehensive permit filed pursuant to § 45-53-4 is denied by the local review board, the applicant has a right to appeal to SHAB for review of the application. Sec. 45-53-5(a). In reviewing the local review board's decision, 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" Sec. 45-53-6(b). Section 45-53-6(c) provides a nonexclusive list of the standards SHAB may follow in making its determination, including "[t]he consideration of the health and safety of existing residents" and "[t]he consideration of environmental protection." Furthermore,

"[i]f 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 affordable 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." Sec. 45-53-6(d).

Under the Act, this Court is vested with specific authority to review SHAB's decision or order. Sec. 45-53-5(c). The Superior Court conducts the review without a jury, reviews the record of the hearing before SHAB, and 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, which evidence, along with the report, constitutes the record upon which the determination of the court is made." Id.

Rhode Island General Laws § 45-53-5(d) governs the Superior Court’s review of a SHAB decision, and provides that:

“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 of the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.”

Our Supreme Court has explained that 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.” Cortellesso v. Town of Smithfield Zoning Bd. of Review, 888 A.2d 979, 981 (R.I. 2005) (order) (quotation omitted). Furthermore, “[t]his Court employs a deferential standard when reviewing a SHAB decision” Town of Burrillville v. Pascoag Apartment Associates, LLC, 950 A.2d 435, 443 (R.I. 2008). In doing so, however, “[t]he court is limited to an examination of the certified record to determine if there is any legally competent evidence therein to support the [SHAB’s] decision.” Barrington Sch. Comm. v. Rhode Island State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992) (citation omitted). Furthermore, “[l]egally competent evidence is indicated by the presence of ‘some’ or ‘any’ evidence supporting [SHAB’s] findings.” Rhode Island Pub. Telecommunications Auth. v. Rhode Island State Labor Relations Bd., 650 A.2d 479, 485 (R.I. 1994).

Where administrators have acted within their authority, the reviewing court should uphold their decision. Goncalves v. NMU Pension Trust, 818 A.2d 678, 682-83 (R.I. 2003) (citing Doyle v. Paul Revere Life Ins. Co., 144 F.3d 181, 184 (1st Cir. 1998)). The Court, however, may reverse an agency’s findings “only in instances wherein the conclusions and the findings of fact are ‘totally devoid of competent evidentiary support in the record,’ or from the reasonable inferences that might be drawn from such evidence.” Bunch v. Board of Review, Rhode Island Dept. of Employment and Training, 690 A.2d 335, 337 (R.I. 1997) (internal citation and quotations omitted).

III

Analysis

The Appellant asserts that SHAB’s decision clearly is erroneous in the view of the reliable, probative, and substantial evidence which established that a clear threat of sewerage overflows and associate adverse health, safety, and environmental impact exists, and that there was no plan to integrate the affordable units into the development. The Appellant further contends that SHAB exceeded its statutory authority, and otherwise erred as a matter of law, by affording Bickey a second opportunity in the future to prove that its proposal would have no adverse health, safety, or environmental impact, and would meet statutory integration requirements, after its comprehensive permit was granted. The Appellant also argues that SHAB erred as a matter of law when it disregarded Bickey’s burden of proving that Dean Estates would not have an adverse impact on health, safety, and environment, and would meet statutory integration requirements. Moreover, Appellant asserts that SHAB erred in considering evidence outside the record and that SHAB erred as a matter of law when it weighed Smithfield’s needs for affordable housing against the serious health, safety, and environmental concerns. Lastly,

Appellant alternatively argues that SHAB erred in its failure to remand the matter to the Board to consider attaching appropriate conditions.

In response, Bickey contends that SHAB acted within its statutory authority when it overturned the decision of the Smithfield Zoning Board and granted master plan approval on Bickey's comprehensive permit application. Bickey further asserts that SHAB properly determined that Bickey met the requirements of the Housing Act at the master plan approval stage of its Application. Lastly, Bickey also contends that SHAB did not rely on evidence outside the record in its Decision, and that it would be highly prejudicial to Bickey to remand the matter to the Board for more hearings on the entire project for master plan.

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," in 1991, the General Assembly passes the Low and Moderate Income Housing Act ("Act"). Sec. 45-53-2. To increase housing opportunities for such citizens, the Act provides for a streamlined and expedited application procedure whereby a single application for a comprehensive permit is filed with the local review board in lieu of separate applications to the applicable local board. See § 45-53-4. The act vests the zoning board of review with "the same power to issue permits or approvals [as] any local board or official who would otherwise act with respect to the application." Id.

Whenever the application for a comprehensive permit is "denied, or is 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. 45-53-5(a). Section 45-53-6(b) of the Act explicitly sets forth

the standard of review applied by SHAB when hearing appeals from local zoning boards to grant or deny a special exception from the low and moderate income housing. The Act 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.” Sec. 45-53-6(b).

Additionally, regardless of whether the board’s decision is a denial of the application, or an approval with conditions:

“[i]n making a determination, the standards for reviewing the appeal include, but are not limited to:

- (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.” Sec. 45-53-6(c).

Our Supreme Court in East Bay Community Development Corp. v. Zoning Bd. of Review of Town of Barrington, 901 A.2d 1136, 1148 (R.I. 2006) once again explained, as it did in Coventry Zoning Board of Review v. Omni Development Corp., 814 A.2d 889 (R.I. 2003) and reiterated in JCM, LLC v. Cumberland Zoning Board of Review, 889 A.2d 169 (R.I. 2005), “the above

factors are in addition to the reasonableness analysis contained in § 45-53-3(2)'s definition of '[c]onsistent with local needs.'" (Internal quotations omitted).² Furthermore, our Supreme Court is mindful "of the degree of overlap between the reasonableness analysis of § 45-53-3(2) and the illustrative factors of § 45-53-6(b), [and] noting that the latter largely mirror the former." Id. (quotations omitted). Additionally, our Supreme Court explained that "[f]or municipalities lacking the statutory quota, however, the act calls upon SHAB to conduct an analysis under both subsections." Id. (quotations omitted).

² This Court notes that the definition of "consistent with local needs" is now contained in § 45-53-3(4) which reads as follows:

"'Consistent with local needs' means reasonable in view of the state need for low and moderate income housing, considered with the number of low income persons in the city or town affected and the need to protect the health and safety of the occupants of the proposed housing or of the residence of the city or town, to promote better site and building design in relation to the surroundings, or to preserve open spaces, and if the local zoning or land use ordinances, requirements, and regulations are applied as equally as possible to both subsidized and unsubsidized housing. Local zoning and land use ordinances, requirements, or regulations are consistent with local needs when imposed by a city or town council after comprehensive hearing in a city or town where:

(i) Low or moderate income housing exists which is: (A) in the case of an urban city or town which has at least 5,000 occupied year-round rental units and the units, as reported in the latest decennial census of the city or town, comprise twenty-five percent (25%) or more of the year-round housing units, is in excess of fifteen percent (15%) of the total occupied year-round rental units; or (B) in the case of all other cities or towns, is in excess of ten percent (10%) of the year-round housing units reported in the census.

(ii) The city or town has promulgated zoning or land use ordinances, requirements, and regulations to implement a comprehensive plan which has been adopted and approved pursuant to chapters 22.2 and 22.3 of this title, and the housing element of the comprehensive plan provides for low and moderate income housing in excess of either ten percent (10%) of the year-round housing units or fifteen percent (15%) of the occupied year-round rental housing units as provided in subdivision (2)(i)."

B

Board's Decision

In its decision denying Bickey's application for a comprehensive permit, the Zoning Board acknowledged that Smithfield has adopted a Low and Moderate Income Housing Plan ("Housing Plan"), approved on May 2, 2005, which provided the following "Vision Statement:"

“The vision for housing in the future of Smithfield is to plan for future development to provide for housing that can be afforded by the median income family of Smithfield spending not more than 30 percent of their annual income for housing. The Town should cultivate an understanding of the direction the Town should go in the future, recognizing the availability of utilities, Town facilities and transportation.” (Town of Smithfield Low and Moderate Income Housing Plan at 52, section 8.0 “Vision and Goals.”)

The Board summarized Mr. D'Amico's testimony, explaining that the proposed development would connect to an existing sewer line located on Dillon Lane, which line, however, had several flaws. Id. at 4. Specifically, Mr. D'Amico explained that “one of the pipes in ‘Summerfield’ is deficient in construction and that there is a ‘sag’ in the pipeline and that the defect was being studied.” Id. Furthermore, the Board pointed to Mr. D'Amico's concern regarding insufficiency of the servicing pump, noting that “if the pump station is not sufficient, then adjustments would have to be made.” Id. Additionally, the Board relying on D'Amico's testimony, explained that “the sewer line also had ‘in flow’ problems,” specifically explaining that “ground water runoff was getting into the sewer line from various sources.” Id. The Board further explained that according to D'Amico's testimony, “the present use of the existing sewer line is at approximately thirty-two percent (32%) and that the proposed development would increase use by approximately one percent (1%); therefore there is sufficient capacity to accommodate the proposed development.” Id. at 5.

The Board also summarized the testimony of Mr. Cleary, with regard to the condition of the existing sewer line, where he acknowledged that “the sewer line and system servicing the development site is only at thirty-three percent (33%) capacity.” Id. The Board further noted Cleary’s concern that the report does not take into account the pumping station’s capacity during major rainstorms. Id. Mr. Cleary explained that during a twenty-five year rain event on December 12, 2008, when the area received approximately four and one-half inches of rain within twenty-four hours, the Camp Street Pumping station was operating “at ‘high alert’ and near flood capacity level.” Id. at 5. He testified that the pump and the wet well were at near capacity during the peak of the rain event, and he expressed his concern that “in a similar rain situation there could be a sanitary discharge situation” which would create “a serious health and safety concern and that the proposed development will only exacerbate the situation.” Id. at 5-6.

Thereafter, the Zoning Board made the following findings of fact:

“(A) The proposed Project as conditioned by this decision is consistent with local needs as identified in the Smithfield Comprehensive Community Plan with particular emphasis on the Town’s Affordable Housing Plan. The proposed development substantially meets the standards set forth in the Town’s Affordable Housing Plan. The Project will consist of a total of thirty-one (31) residential condominium units, of which eight (8) units will be low and moderate-income units; in compliance with the twenty-five percent (25%) requirement.

“(B) The proposed Project is in compliance with the standards and provisions of the Smithfield Zoning Ordinance and Subdivision Regulations, and where expressly varied or waived, local concerns that have been affected by the relief granted does not outweigh the state and local need for low and moderate income housing. The Board’s findings set out in this decision justifies this conclusion.

“(C) Based on the testimony of Mr. Michael DiDomenico, the president of Bickey Development, Inc., it has not been determined that: all low and moderate income housing units proposed will be integrated throughout the development; will be 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 the market rate units.

“(D) There will be a significant negative environmental impact from the proposed development given the present condition of the sewer system that will service the proposed development. This conclusion is supported by the expert testimony of Mr. Kevin Cleary, P.E., Town Engineer for the Town of Smithfield, Rhode Island.

“(E) There will be a significant negative impact on the health and safety of the current or future residents of the community, in areas including but not limited to, sewer disposal and surface water run-off, and the preservation natural, historical or cultural features that contribute to the attractiveness of the of the community. This conclusion takes into account the present condition of the sewer system that will service the proposed development. This conclusion is also supported by the expert testimony of Mr. Kevin Cleary.

“(F) All proposed land development and all subdivision lots will have adequate and permanent physical access to a public street, in accordance with the requirements of Section 45-23-60(5). . . .” (Board’s Decision at 8.)

C

SHAB’s Decision

On December 15, 2010, SHAB conducted a public hearing to address the merits of Bickey’s timely appeal from the Board’s decision. Thereafter, SHAB made the following findings:

- “SHAB accepted a stipulation by the parties that the Property has been designated by the Town as an appropriate location for development of low and moderate income housing, as reflected in Table 22 of the Town’s Affordable Housing Plan. (SHAB 12/15/10 Tr. at 87-89).
- SHAB found that the Town has not met the 10% threshold for low and moderate income housing prescribed by the Act. (*Id.* at 92-93).

- SHAB found that the Town applied too strict a standard upon the developer regarding health and safety issues at the master plan level of review and in light of the State’s need for affordable housing, such that the issues relating to the sewer pumping station capacity and the impact of the proposed project should have been the subject of further engineering evidence and evaluation during the preliminary and final plan stages of review. (*Id.* at 93-100).
- SHAB found that while the Town raised an appropriate concern about the capacity of the sewer pumping and its impact on the environment, this issue likewise should have been deferred for more detailed consideration during the preliminary and final plan stages of review. (*Id.* at 100-01).
- SHAB found that the Zoning Board erred in denying Bickey’s Application based on integration issues when such analysis should have been subject to further review and conditions going forward in preliminary and final plan stages of review. (*Id.* at 102-03).
- SHAB accepted a stipulation by the parties that there is no issue on appeal as to the extent to which the Town applies local zoning ordinances and procedures evenly to subsidized and unsubsidized applications. (*Id.* at 105-06).” (SHAB’s Decision at 12.)

Furthermore, “SHAB concluded unanimously that Bickey had presented sufficient master plan level proof to allow its Application to proceed forward to preliminary and final plan phases of review.” *Id.* at 12. Additionally, SHAB “expressly conditioned its master plan approval upon the developer presenting and the Town analyzing additional technical evidence to demonstrate that the proposed project can be properly supported by Town’s sewage disposal system.” *Id.* at 12-13. SHAB further reiterated that “the developer has an obligation to demonstrate in these later phases of review that the low and moderate income units will be properly integrated into the other units.” *Id.* at 13.

Sewer Issue

In its decision, SHAB acknowledged the Town's concerns with regard to the Town's sewer infrastructure and agreed that the issue needs further engineering analysis before preliminary and final plan approval can be given to Bickey's application. (SHAB's Decision at 14.) However, SHAB determined that the Zoning Board should not have denied the application outright at the master plan level, but should have allowed the application to proceed to a further and more detailed analysis of the sewer infrastructure issues during the preliminary and final plan review stages. Id. at 13. SHAB pointed out that "the Town has specifically designated the Property as suitable to develop affordable housing" and that Bickey acknowledged that "it must work with the Town to address the sewer infrastructure issues and ensure that the proposed project will not result in any adverse health, safety and environmental concerns." Id. at 14. SHAB further highlighted that the Application has "many positive features . . . that the Zoning Board acknowledged in its Decision" and that denial of Bickey's application was "simply too draconian a result especially in light of the clearly articulated goals and purposes of both the Act and the Town's Affordable Housing Plan." Id. at 14. Thus SHAB found that "the Zoning Board erred in its outright denial of the Application at the master plan level review." Id. at 14.

When reviewing an application for a comprehensive permit the Zoning 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, including, but not limited to, the power to attach to the permit or approval, conditions, and requirements with respect to height, site plan, size, or shape, or building materials, as are consistent with the terms of this section." Sec. 45-53-4(a)(4)(vi). The Act further provides that the Zoning Board may deny the application:

“(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 . . . 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) (emphasis added).

In its decision, the Zoning Board summarized Mr. Cleary’s testimony with regard to the sewer system and its relation to the proposed development. Specifically, the Zoning Board noted that Mr. Cleary agreed with Casali & D’Amico Engineering, Inc. sewer analysis, which explained that the existing sewer has thirty three percent unused capacity and that the proposed development will increase the used capacity by one percent. (Board’s decision at 5.) However, Mr. Cleary expressed his concern that the report did not take into account the pumping station capacity during major rainstorms. Mr. Cleary further testified that on December 12, 2008, there was a twenty-five year rain event and that the area received approximately four and one-half inches of rain within twenty-four hour period. *Id.* at 6. During the event, the Camp Street pump station was operation at “‘high alert’ and near flood capacity level.” *Id.* Mr. Cleary explained that during such events, there is a possibility of a sanitary discharge situation. *Id.* Thus, in its denial of the of the comprehensive plan permit, the Zoning Board concluded that:

“(D) There will be a significant negative environmental impact from the proposed development given the present condition of the sewer system that will service the proposed development. This conclusion is supported by the expert testimony of Mr. Kevin Cleary, P.E., Town Engineer for the Town of Smithfield, Rhode Island.

“(E) There will be a significant negative impact on the health and safety of the current or future residents of the community, in areas including but not limited to, sewer disposal and surface water runoff, and the preservation natural, historical or cultural features that contribute to the attractiveness of the of the community. This conclusion takes into account the present condition of the sewer system that will service the proposed development. This conclusion is also supported by the expert testimony of Mr. Kevin Cleary. (Board’s Decision at 8.)

Reviewing the Zoning Board’s decision,

- “ SHAB found that the Town applied too strict a standard upon the developer regarding health and safety issues at the master plan level of review and in light of the State’s need for affordable housing, such that the issues relating to the sewer pumping station capacity and the impact of the proposed project should have been the subject of further engineering evidence and evaluation during the preliminary and final plan stages of review. (*Id.* at 93-100).
- SHAB found that while the Town raised an appropriate concern about the capacity of the sewer pumping and its impact on the environment, this issue likewise should have been deferred for more detailed consideration during the preliminary and final plan stages of review. (*Id.* at 100-01).” (SHAB’s Decision at 12.)

When applying for comprehensive permit applications involving major land developments and major subdivisions, the applicant proposing to build low and moderate income housing shall submit:

“unless otherwise agreed to by the applicant and the town; those items included in the checklist for the master plan in the local regulations promulgated pursuant to § 45-23-40. Subsequent to master plan approval, the applicant must submit those items included in the checklist for a preliminary plan for a major land development or major subdivision project in the local regulations promulgated pursuant to § 45-23-41, with the exception of evidence of state or federal permits. All required state and federal permits must be obtained prior to the final plan approval or the issuance of a building permit[.]” Sec. 45-53-4(a)(1)(vii).

Furthermore, section 45-23-32(23) defines a master plan as follows: “An overall plan for a proposed project site outlining general, rather than detailed, development intentions. It describes the basic parameters of a major development proposal, rather than giving full engineering details. Required in major land development or major subdivision review. See § 45-23-40.” Sec. 45-23-32(23). Additionally, the Act lists the submission requirements necessary for the master plan including:

- “(1) . . . items required by the local regulations for master plans.
- (2) . . . information on the natural and built features of the surrounding neighborhood, existing natural and man-made conditions of the development site, including topographic features, the freshwater wetland and coastal zone boundaries, the floodplains, as well as the proposed design concept, proposed public improvements and dedications, tentative construction phasing, and potential neighborhood impacts.” Sec. 45-23-40(a)

On the other hand, the

“[r]equirements for the preliminary plan and supporting materials for this phase of the review include, but are not limited to: engineering plans depicting the existing site conditions, engineering plans depicting the proposed development project, a perimeter survey, all permits required by state or federal agencies prior to commencement of construction, including permits related to freshwater wetlands, the coastal zone, floodplains, preliminary suitability for individual septic disposal systems, public water systems, and connections to state roads.” Sec. 45-23-41(a)(2).

When construing a statute this Court’s function is “to give effect to the General Assembly’s intent.” Ret. Bd. of the Employees’ Ret. Sys. of Rhode Island v. DiPrete, 845 A.2d 270, 279 (R.I. 2004) (citing Champlin’s Realty Assocs., L.P. v. Tillson, 823 A.2d 1162, 1165 (R.I. 2003)). In so doing, the Court must presume that “the General Assembly intended to attach significance to every word, sentence and provision of a statute.” Id. However, when a statute is clear and unambiguous, “there is no room for statutory construction, and the statute will be literally applied, attributing the plain and ordinary meaning to its words.” Id. (citing Interstate

Nav. Co. v. Div. of Public Utilities and Carriers, 824 A.2d 1282, 1287 (R.I. 2003)). Evidently, the plain language of the statute authorizes the Zoning Board to deny an application for a comprehensive plan when “concerns for the environment and the health and safety of current residents have not been adequately addressed,” and although the master plan does not require specific engineering plans, it does require at least a general plan as to the Project. Furthermore, our Supreme Court has noted that when reviewing a comprehensive permit application, the local review boards have “significant discretion and responsibility to act in the best interest of the community.” Omni Development Corp., 814 A.2d at 897. Here, the record shows that the Zoning Board did have sufficient evidence to support its concern with regard to the health and safety of the local residents.

In overturning the Zoning Board’s decision, SHAB agreed with the Town’s concern regarding to the Town’s sewer infrastructure, whereby Bickey proposed to tie in its sewer to the new housing development, and reiterated that the issue needs further engineering analysis before preliminary and final plan approval. Furthermore, SHAB criticized the Zoning Board for denying the Application “outright at the master plan level of review” and explained that Bickey “should have been allowed to proceed to preliminary plan review where the parties may address the sewer infrastructure issues in more detail and with additional engineering analysis.” (SHAB’s Dec. at 14.) SHAB failed to address, however, the fact the Zoning Board, acting as a sewer authority, explained that it is unable to allow Bickey to connect the Project’s sewer to the Town’s sewer system in its present condition, and that Bickey failed to present the Zoning Board even with a generalized plan as to what solution Bickey proposes that later could be supported with further engineering details. Notwithstanding Bickey’s contention that it was not given “a chance to fully respond to the evidence,” the record shows that the Zoning Board proposed to

extend the 120 day mandatory requirement for the issuance of decision, which offer Bickey refused. See SHAB’S Tr. at 36; 58.

Notably, our Supreme Court in Pascoag, 950 A.2d at 454—with regard to a determination of substantial completeness of an application for a comprehensive permit—determined that the applicant “did not include adequate information on drainage, stormwater runoff, and elevation plans[,]” although with respect to the stormwater runoff and drainage, the application identified the type of soil on the site and the flood zone. However, the application provided no indication on how these issues would be impacted by the proposed development. Id. at 455. Thus, our Supreme Court in Pascoag disagreed with SHAB that the proposed project was substantially completed, and found a minimal discussion of stormwater runoff and drainage to be “a material, important, and essential element of a comprehensive permit application.” Id. Similarly here, although the record shows, and SHAB agreed, that connecting the proposed development’s sewer system could pose a health and safety hazard to the current residents, Bickey did not present even a generalized plan as to a possible solution of the sewer issue, said plan being necessary at the master plan level. See 5 Arlen H. Rathkopf, The Law of Zoning and Planning, §90:36 (2005) (“A planning board has the power to disapprove a proposed subdivision plat if the sewer system is inadequate, or where the plans submitted do not show an adequate method of sewage disposal[.]”). Thus the SHAB’s reversal of the Zoning Board’s denial of the Application was clearly erroneous and in violation of statutory provisions.

2

New Evidence

The Appellant further contends that SHAB erred as a matter of law by considering new evidence in its deliberation. Specifically, Appellant points to the evidence presented during the

SHAB hearing that Bickey had secured a permit to develop additional thirty-five units on a different section of the subject property (“second development”) after the Town had done some remedial work on the Camp Street pump station. Bickey counters that although Bickey discussed this second development, it argued that denial was completely unreasonable based upon facts in the transcript alone. Furthermore, Bickey points out that although SHAB was aware of the information presented with regard to the second proposal for development, SHAB overturned the Board’s decision on the record evidence alone, without any consideration of this evidence.

As a general theory of administrative appellate law, a reviewing body is limited to consideration of the record, and is barred from basing its decision on new evidence. See G.L. 1956 § 45-53-5 (c) (confining judicial review of an administrative appeal to consideration of the record before SHAB); Barrington Sch. Comm., 608 A.2d at 1138 (In reviewing SHAB’s decision, “[t]he court is limited to an examination of the certified record to determine if there is any legally competent evidence therein to support [SHAB’s] decision.”); Norman J. Singer, Sutherland Statutory Construction, §65:4 at 406-407 (6th ed. 2001) (observing that administrative actions that are judicial in nature tend to follow a court model); see e.g. United States v. Edwards, 450 F.2d 49, 53 n.5 (1st Cir. 1971) (barring an agency’s consideration of new evidence at the appeals board level).

Here, during the December 15, 2010 hearing, SHAB heard testimony with regard to Bickey’s second development proposal submitted and being approved by the zoning board. (SHAB’s Tr. at 25-26; 50-55). Although, there is no evidence that SHAB’s decision was based on consideration of the approval of the second development, SHAB erred by allowing such evidence to be introduced during the hearing. See Nickerson v. Reitsma, 853 A.2d 1202, 1206

(R.I. 2004) (our Supreme Court found that the reviewing Court exceeded its authority under the APA when “[a]lthough the trial justice specifically noted that his review was limited to the certified record, he nevertheless proceeded to hear and consider extraneous evidence,” including testimony about post-hearing events, thereby.)

3

Integration

The Appellant next argues that SHAB erred as a matter of law in reversing the decision of the Board by finding compliance with the integration requirement, when there was no evidence proper integration. Specifically, Appellant contends that Bickey did not sustain its burden of showing that the proposed affordable units will be integrated throughout the development and will be built and occupied before or at the same time as the market rate units; because, Bickey failed to present any plans concerning the issue.

Contrarily, Bickey asserts that the Zoning Board’s determination with regard to the integration requirement was a “wrong” and “baseless conclusion,” which was not supported by the record evidence. The Appellee argues that Mr. DiDomenico’s testimony during the Board’s hearing shows his intention that all the affordable housing units will be integrated throughout the thirty-three unit development and that Mr. DiDomenico would defer to the Rhode Island Housing (“RIH”) when it comes to the affordable housing units.

Before approving a comprehensive permit for low and moderate income housing, the Act requires the local review board to make certain “positive findings.” The required finding at issue here is section 45-53-4(a)(4)(v)(C), which requires the Board to positively determine that “[a]ll 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.” The Act further requires this finding to be “supported by legally competent evidence on the record which discloses the nature and character of the observation upon which the fact finders acted.” Sec. 45-53-4(a)(4)(v). As stated earlier, the Board found that:

“[b]ased on the testimony of Mr. Michael DiDomenico, the president of Bickey Development, Inc., it has not been determined that: all low and moderate income housing units proposed will be integrated throughout the development; will be 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 the market rate units.” (Board’s Decision at 7.)

In its decision overturning the board’s denial for a comprehensive plan permit, SHAB found that “the Zoning Board erred in denying Bickey’s Application based on integration issues when such analysis should have been subject to further review and conditions going forward in preliminary and final plan stages of review.” (SHAB’s Decision at 12.) SHAB further explains that:

“the Zoning Board’s cursory analysis improperly distorts the testimony of Bickey’s principal, whereby the developer affirmed its intention to work with both Rhode Island Housing and the Town to ensure that the affordable units would be integrated into the entire project and that there would be no discernable difference between the affordable and market rate units. (Zoning Bd. 12/17/08 Tr. at 59-61). The record evidence clearly supports that Bickey **intends** to comply with the statutory mandates of § 42-53-4(a)(v)(C).” (SHAB’s Decision at 15.) (Emphasis added.)

As noted earlier, before approving an application for a comprehensive permit, the Act requires the Board to make certain positive findings. The Act lacks any language pertaining to the proposition expressed by Bickey that if the Board does not make the required findings prior to approving the comprehensive plan permit, the Board will be able to do so in a later stage of

the process. Furthermore, the Act requires the Board to make a finding that the “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,” rather than intent to comply with the Act. Sec. 45-53-4(a)(4)(v)(C) (emphasis added). Thus the plain language of the statute requires Bickey to conform with the requirements of the statute at the comprehensive plan review stage, rather than at some stage in future proceedings. See Ret. Bd. of the Employees’ Ret. Sys. of Rhode Island, 845 A.2d at 279 (when a statute is clear and unambiguous, “there is no room for statutory construction, and the statute will be literally applied, attributing the plain and ordinary meaning to its words”).

Here, Bickey’s master plan provided information that all the units will be the same size and it was planning to work with Rhode Island Housing and the Town to assure that the low and moderate income units would be integrated throughout the development. However, Bickey failed to present before the Zoning Board any evidence that the “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[.]” Sec. 45-53-4(a)(4)(v)(C) (emphasis added.)

Under Rhode Island law, the provisions of a statute may not be interpreted to include a matter omitted unless the clear purpose of the legislation would fail without the implication. See Retirement Bd. of Employees’ Retirement System of State v. DiPrete, 845 A.2d 270, 297 (R.I. 2004) (quoting State v. Feng, 421 A.2d 1258 (R.I. 1980)). Thus, it is well established that courts may not insert in the statute words or language where it is plainly evident that the legislature

intended the statute not contain such provisions. See New England Die Company v. General Products Company, 92 R.I. 292, 168 A.2d 150 (1961). Accordingly, by analogy, SHAB may not include words or language in the statute when it is evident that the legislature did not intend to include them. Thus, this Court finds that SHAB committed the ultimate error of law by ignoring the plain language of the statute; namely requiring proof that the “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,” Sec. 45-53-4(a)(4)(v)(C) (emphasis added); see also Town of Smithfield v. Churchill & Banks Companies, LLC, 924 A.2d 796, 805 (R.I. 2007).

VI

CONCLUSION

After a thorough review of the entire record in this matter, this Court finds that SHAB’s act of vacating the Board’s Decision and approving Bickey’s Application was in violation of statutory and regulatory provisions, was in excess of the authority granted to SHAB, and was arbitrary and capricious. SHAB’s decision also was affected by error of law. Consequently, and for the foregoing reasons, this Court vacates SHAB’s Decision. Counsel shall submit an appropriate order consistent with this Decision.