STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: October 1, 2014)

CODDER 02806, INC., DEBORAH FRANCIS, FRANCES DELLASANDRO, TIMOTHY DELLASANDRO, DEBORAH CAPOVERDE, SIDNEY MANCHESTER, and CARRIE RUGGIERI	:	
V.	:	**C.A. No. PC 13-4355**
EAST BAY COMMUNITY DEVELOPMENT CORPORATION and TOWN OF BARRINGTON PLANNING BOARD, by and through its members, MICHAEL McCORMICK, EDGAR ADAMS, MICHAEL CARROLL, ANNE GALBRAITH, SETH MILMAN, JEAN ROBERSTON, and LAWRENCE TRIM	:	

DECISION

PROCACCINI, J. Maya Angelou aptly stated that: "The ache for home lives in all of us, the safe place where we can go as we are and not be questioned."[1] As this Court considers the case before it, it keeps Maya Angelou's wise words in mind.

The Court is presented with the Town of Barrington's attempt to comply with a longstanding legislative mandate that every Rhode Island city and town provide homes for low and moderate income families. The Legislature's intent could not be clearer: "it is imperative that action is taken immediately to assure the availability of affordable, accessible, safe, and sanitary housing for these persons [and] it is necessary that each city

[1] Maya Angelou, All God's Children Need Traveling Shoes 196 (Random House 1986).

and town provide opportunities for the establishment of low and moderate income housing." G.L. 1956 § 45-53-2. Twenty-three years later, the Town of Barrington has yet to meet this legislative directive.[2] This appeal is brought by a group of town residents staunchly opposed to the location of low and moderate income homes in their neighborhood.

The instant case comes before the Court on appeal from a decision of the Town of Barrington Planning Board (the Board) granting a comprehensive permit to East Bay Community Development Corporation (East Bay) to develop affordable housing on Sowams Road, located in the Town of Barrington (the Town). CODDER 02806, Inc.,[3] a non-profit corporation, and landowners abutting the proposed affordable housing project[4] (collectively, the Appellants) contend that the application submitted by East Bay to the Board was "not consistent with local needs" because it did not conform to the Town of Barrington Comprehensive Community Plan (the Plan), did not provide for proper integration between the proposed development and the surrounding community, and had not adequately addressed "concerns for the environment and the health and safety of the current and future residents of Barrington." This Court's jurisdiction is pursuant to § 45-53-4(a)(4)(x).

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[2] While the Town of Barrington has provided some affordable housing for low and moderate income families, it has failed to meet the ten percent requirement mandated by the General Assembly. See § 45-53-3(4)(i).

[3] CODDER stands for Committee Opposed to Detrimental Development and for Environmental Responsibility.

[4] All of the Appellants in the instant case, with the exception of CODDER 02806, Inc., are abutting landowners. East Bay moved to dismiss CODDER 02806, Inc. from the case for lack of standing. That motion was granted without prejudice on April 28, 2014 in an order which stated that "leave [was] simultaneously granted to CODDER 02806, Inc. to amend its complaint further particularizing allegations of fact deemed supportive of [its] standing[.]" On May 6, 2014, the Appellants filed a Third Amended Complaint, including a section entitled "Allegations of Specific Injury to Plaintiffs."

I

Facts and Travel

In March of 2013, East Bay filed an application for a comprehensive permit with the Town, pursuant to § 45-53-4(a). The application proposed building affordable housing at 91 and 97 Sowams Road, Assessor's Plat 28, Lots 72, 73, 246, 248, 249 and 263 (the Sowams Road site), a former nursery. The Sowams Road site borders the Palmer River and a portion of the property is wetlands. The application submitted by East Bay provided for the renovation of two single-family dwellings already located on the property, which were to be sold at market price. It also provided for the construction of an affordable housing neighborhood called Palmer Pointe which included sixteen new buildings encompassing forty-eight attached single-family dwellings, a maintenance garage, an office, and laundry facilities. The application reflected plans to implement site improvements including landscaping, a roadway, parking, sidewalks, common greens, site drainage and grading. East Bay's application was certified as complete on April 24, 2013. East Bay then presented the proposal contained in its application, including providing the testimony of experts, at several public meetings before the Board ruled on its application.

The Decision of the Town of Barrington Planning Board

On August 13, 2013, in a written decision (the Decision), the Board approved the application and granted East Bay a comprehensive permit with eighteen enumerated conditions. (Board's Decision at 1.) The Decision discussed each of the seven requirements for the grant of a comprehensive permit enumerated in § 45-53-4(a)(4)(v) separately before reaching its conclusion. Id. at 1-11. This Court will confine its

discussion of the Board's Decision to only those requirements which the Appellants challenge in this appeal.

The Board began by finding that the proposed affordable housing development was "consistent with local needs as identified in the local comprehensive community plan" and it provided a detailed discussion in support of that conclusion. Id. at 1-6. Specifically, the Board addressed the "Developer Guidance" portion of the Plan which deals with areas, like the Sowams Road site, that are identified in the Plan as being eligible for village zoning. Id. at 2; the Plan, Appendix III at III-1 to III-3. The Developer Guidance requires that thirty-five percent of units in a development be low and moderate income housing to be eligible for village zoning—in the instant case, other than the two existing houses to be renovated, the development is one hundred percent low and moderate income housing. (Board's Decision at 2-4.) Therefore, the Board found that the site of the planned development could be converted to a village zone. Id. at 2.

According to the Board, village zoning would allow "higher density development" (up to five units per acre), than the property's existing zoning designation of Residence 25. Id. at 2. However, the Board noted that the development, as proposed, exceeded the five units per acre permissible in a village zone—the density was projected by the Board to be 8.87 units per acre. Id. at 4. Looking to the Plan's Housing & Neighborhoods Directives, the Board found that a "50 percent maximum one-step percentage" increase in density is allowed when the proposed development is comprised of over fifty percent low and moderate income housing. Id. at 5. Accordingly, the Board stated that if the total number of units in the proposed development was reduced from fifty to forty-two then the density would be 7.45 units per acre, which represented a forty-

nine percent increase over the maximum allowed five units per acre. Id. Since the increase was within the allowed fifty percent one-step percentage increase, at forty-two units the development would be in line with local needs and the Plan. Id. The Board also found that the mix of unit types was consistent with the Developer Guidance and "should be maintained." Id. at 6.

The Board next found that the low and moderate income housing units were integrated throughout the proposed development and were "compatible in scale and architectural style to the market rate units in the [proposed development] and the surrounding neighborhood." Id. at 9. Additionally, the Board found that there were no "known negative environmental impacts from the proposed development"; the Board took into account the concerns about environmental impacts presented by the Appellants' expert, Thomas B. Nicholson, but found that consideration of the issue of environmental impact was "premature" prior to submission of "full detailed engineering plans." Id. at 9-10.

Similarly, the Board found "no known negative impacts on the health and safety of current or future residents of the community," again referencing Mr. Nicholson's concerns, in addition to the concerns raised by another of the Appellants' experts, Ashley Hahn. Id. at 10. According to the Board, any issues with density, roadway width, traffic impacts, etc. would be addressed by the required revisions to the proposed development that the Board made conditions of its granting East Bay a comprehensive permit, such as requiring the number of units be reduced to forty-two. Id.

Among the eighteen conditions to the Board's grant of the comprehensive permit were the following: 1) "[t]he maximum number of units within the development shall be

reduced from 50 to 42"; 2) "[s]treet pavement width shall be widened to a minimum of 22 feet"; 3) "[s]ubmit one full copy plus the executive summaries of environmental site assessments completed at the site as part of the preliminary plan submission, to include an assessment of chemicals used at the nursery and potential risks to human health and the environment"; and 4) "[s]ubmit the required traffic impact analysis" which "shall evaluate conditions for pedestrian access on Sowams Road in the study area . . . ." Id. at 11-13.

The Appellants have timely appealed the Board's Decision to this Court.

II

Standard of Review

The Rhode Island Low and Moderate Income Housing Act (the Act) provides in § 45-53-4(a)(4)(x) that "[a]ny person aggrieved by the issuance of an approval may appeal to the superior court within twenty (20) days of the issuance of approval." [5] However, the statute fails to provide any instruction with regard to what standard of review should be applied by this Court when reviewing the approval of an application for a comprehensive permit.

The Rhode Island Supreme Court, when reviewing a zoning board's grant of an application to build low and moderate income housing for the elderly, recognized the lack of a standard of review in chapter 53 of title 45 and elected to apply the standard this Court typically applies to appeals from local zoning boards of review—the standard

[5] It merits noting that the Act provides for two distinct avenues of appeal. When an application for a comprehensive permit is denied or conditionally approved, the applicant may appeal to the State Housing Appeals Board and thereafter to this Court. Sec. 45-53-5(a),(c). However, when an application is approved, "any person aggrieved" may appeal, as in the instant case, directly to this Court pursuant to § 45-53-4(a)(4)(x). See Kaveny v. Town of Cumberland Zoning Bd. of Review, 875 A.2d 1, 6 (R.I. 2005).

articulated in § 45-24-69(d). See Curran v. Church Cmty. Hous. Corp., 672 A.2d 453, 454 (R.I. 1996). We will likewise apply the standard of review enumerated in § 45-24-69(d) to the appeal in the instant case.

Section 45-24-69(d) provides that:

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

When reviewing a zoning board appeal, this Court uses the "'traditional judicial review' standard applicable to administrative agency actions" and, thus, lacks the authority to "weigh the evidence, to pass upon the credibility of witnesses, or to substitute [its] findings of fact for those made at the administrative level." Restivo v. Lynch, 707 A.2d 663, 665-66 (R.I. 1998) (quoting E. Grossman & Sons, Inc. v. Rocha, 118 R.I. 276, 284-85, 373 A.2d 496, 501 (1977)); Lett v. Caromile, 510 A.2d 958, 960 (R.I. 1986). A zoning board is presumed to be knowledgeable about matters pertaining to an effective administration of the zoning ordinances and, consequently, this Court affords a high level

[6] This Court notes that the Appellants provide no guidance with respect to which subsections of § 45-24-69(d) they contend apply in the instant case.

of deference to the decision of a zoning board. Cohen v. Duncan, 970 A.2d 550, 561 (R.I. 2009). Accordingly, this Court's review is limited to examining the "'certified record to determine if there is any legally competent evidence therein to support the agency's decision.'" Johnston Ambulatory Surgical Assocs., Ltd. v. Nolan, 755 A.2d 799, 804-05 (R.I. 2000) (quoting Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)). Legally competent or substantial evidence has been defined by our Supreme Court as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion, and means an amount more than a scintilla but less than a preponderance." Caswell v. George Sherman Sand & Gravel Co., 424 A.2d 646, 647 (R.I. 1981). If the Court can "'conscientiously find that the board's decision was supported by substantial evidence in the whole record,'" it must uphold the decision. Mill Realty Assocs. v. Crowe, 841 A.2d 668, 672 (R.I. 2004) (quoting Apostolou v. Genovesi, 120 R.I. 501, 509, 388 A.2d 821, 825 (1978)). However, if this Court finds that the Board's decision was "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record," "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion," in violation of statutory provisions, or "affected by [an]other error of law" then the Court may remand the case for further proceedings or vacate the Board's decision. Sec. 45-24-69(d); see Bernuth v. Zoning Bd. of Review of New Shoreham, 770 A.2d 396, 399 (R.I. 2001).

III

Analysis

A

Parties' Arguments

The Appellants contend, in their memorandum before this Court, that the Board's grant of East Bay's application for a comprehensive permit must be reversed due to the fact that the Decision: "(1) was not consistent with the local needs as defined by R.I. Gen. Laws § 45-53-3" because the Sowams Road site is unsuitable for the proposed development and the proposed development is not in line with the Plan; (2) did not find that the proposed development was properly integrated as required in § 45-53-4(a)(4)(v)(C); and (3) did not "address concerns for the environment and the health and safety of current and future residents."

In response, East Bay argues that the proposed development is consistent with local needs and the Plan; moreover, it contends that any inconsistencies between the Plan and the proposed development have been satisfactorily addressed by the Board in the Decision. Additionally, East Bay posits that there will be no significant negative impacts on the environment or the health and safety of the current residents and that the conditions imposed by the Board are sufficient to deal with any concerns presented by the Appellants' experts. The Town filed its own memorandum, which largely echoes the arguments presented by East Bay.

B

Applicable Law

1

The Rhode Island Low and Moderate Income Housing Act

The passage of the Rhode Island Low and Moderate Income Housing Act in 1991 was motivated by "an acute shortage of affordable, accessible, safe, and sanitary housing for . . . citizens of low and moderate income, both individuals and families." Sec. 45-53-2. The "aspirational language of the act continues by declaring" that "it is imperative that action is taken immediately to assure the availability of affordable, accessible, safe, and sanitary housing for these persons [and] it is necessary that each city and town provide opportunities for the establishment of low and moderate income housing." Id.; East Bay Cmty. Dev. Corp. v. Zoning Bd. of Review of Barrington, 901 A.2d 1136, 1144 (R.I. 2006). The stated goal of the Act is to have at least ten percent of "year-round housing units" in each city or town consist of low and moderate income housing. Sec. 45-53-3(4)(i).

The Act provides for a "streamlined and expedited application procedure"—a single application for a comprehensive permit may be submitted to the local review board, rather than submitting separate applications to the applicable local boards. Sec. 45-53-4(a); East Bay Cmty. Dev. Corp., 901 A.2d at 1145. Our Supreme Court has noted that zoning boards have considerable power under the Act since a board "is not merely performing its limited statutory duties, but rather is vested with significant discretion and responsibility to act in the best interest of the community." East Bay Cmty. Dev. Corp., 901 A.2d at 1145 (internal quotation marks omitted). However, a local review board

must support its decision with "findings of fact and reasons for the action taken." JCM, LLC v. Cumberland Zoning Bd. of Review, 889 A.2d 169, 176 (R.I. 2005) (internal quotation marks omitted).

When granting a comprehensive permit, the Act, in relevant part, requires that a local review board make the following "positive findings, supported by legally competent evidence on the record which discloses the nature and character of the observations upon which the fact finders acted":

> "(A) The proposed development is consistent with local needs as identified in the local comprehensive community plan with particular emphasis on the community's affordable housing plan and/or has satisfactorily addressed the issues where there may be inconsistencies.
> . . .
>
> "(C) All low and moderate income housing units proposed are integrated throughout the development; are compatible in scale and architectural style to the market rate units within the project; and will be built and occupied prior to, or simultaneous with the construction and occupancy of any market rate units.
>
> "(D) There will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval.
>
> "(E) There will be no significant negative impacts on the health and safety of current or future residents of the community, in areas including, but not limited to, safe circulation of pedestrian and vehicular traffic, provision of emergency services, sewerage disposal, availability of potable water, adequate surface water run-off, and the preservation of natural, historical or cultural features that contribute to the attractiveness of the community."[7] Sec. 45-53-4(a)(4)(v).[8]

[7] The Town of Barrington Zoning Ordinances § 185-184 contains nearly identical language to § 45-53-4(a)(4)(v).

[8] The Act also provides that a local review board "may deny" the request for a comprehensive permit:

The term "[c]onsistent with local needs" is defined, in pertinent part, as follows:

> "[R]easonable 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." Sec. 45-53-3(4).

The Appellants in the instant case allege that the Board's findings with regard to the enumerated requirements in § 45-53-4(a)(4)(v) were in error.

> "(A) if city or town has an approved affordable housing plan and is meeting housing needs, and the proposal is inconsistent with the affordable housing plan; (B) the proposal is not consistent with local needs, including, but not limited to, the needs identified in an approved comprehensive plan, and/or local zoning ordinances and procedures promulgated in conformance with the comprehensive plan; (C) the proposal is not in conformance with the comprehensive plan; (D) the community has met or has plans to meet the goal of ten percent (10%) of the year-round units or, in the case of an urban town or city, fifteen percent (15%) of the occupied rental housing units as defined in § 45-53-3(2)(i) being low and moderate income housing; or (E) concerns for the environment and the health and safety of current residents have not been adequately addressed." Sec. 45-53-4(a)(4)(vii).

The Appellants rely on § 45-53-4(a)(4)(vii) and organize their arguments based on its provisions. However, given that § 45-53-4(a)(4)(vii) is permissive and only states the reasons an application may be denied (rather than why it must be denied), this Court is more appropriately focused on § 45-53-4(a)(4)(v) which lists positive findings that have to be made before granting a comprehensive permit application. See Downey v. Carcieri, 996 A.2d 1144, 1151 (R.I. 2010) ("It is an axiomatic principle of statutory construction that the use of the term 'may' denotes a permissive, rather than an imperative, condition."). But, this Court notes that the provisions of the two statutory sections at issue in the instant case address very similar issues and require very similar analyses.

2

The Town of Barrington Comprehensive Community Plan

The Plan initially sets out its goals and strategies; among them is providing for "future housing needs, including a range of housing types and prices for families and seniors, in a manner that preserves Barrington's character and quality of life through sensitivity to existing neighborhoods, historic resources, important open spaces and environmentally sensitive areas." The Plan at 19. The Plan goes on to state that its policies are to:

> "1. Ensure that future development is compatible with the character of Barrington in general and that of individual neighborhoods.
>
> "2. Continue to work toward achieving the State-mandated 10 percent affordable housing goal through implementation of the Town's adopted Affordable Housing Plan, as approved by the State and incorporated in the updated Housing element. Adopt strategies that will encourage the development of affordable housing in an integrated fashion.
>
> "3. Allow for a more diverse housing stock to provide housing opportunities for young families and for the elderly to live within multi-generational communities.
>
> "4. Promote well-designed, compatible mixed-use development within commercial areas of town, while enhancing the pedestrian environment." Id.

Also included in the Plan—in the Housing and Neighborhoods Directives—is Strategy 5-8, entitled "Strongly negotiate new comprehensive permits." Id. at 30. Strategy 5-8 provides that the Town will "strongly negotiate with developers submitting future comprehensive permits to uphold the [principles that] . . . [d]evelopments should contain a mix of unit types (rental, ownership, and bedroom size) and housing types (single

family, duplex); . . . [p]lanning and design [should] respect the surrounding community, [and] . . . [low and moderate income] housing [should] be distributed throughout the community and integrated within existing communities to the greatest extent possible." Id. Additionally, with respect to the general goals of the Plan, the Appellants discuss a report entitled "Housing for Barrington's Future: Housing Land Use Study" (the Land Use Study) which contains the results of a community workshop and reflects the fact that local Barrington residents are interested in emphasizing "[p]edestrian-oriented neighborhoods" and "[c]ontext–sensitive development." Housing for Barrington's Future: Housing Land Use Study § 3 at 31 (April 29, 2008).

According to the Appellants, the Land Use Directives in the Plan manifest an intention to "require more land per parcel" at the Sowams Road site. The Plan at 107. Moreover, as the Appellants point out, while the Plan does recognize that the Sowams Road property at issue in the instant case is an area where "future development is still possible," it also recognizes certain constraints to that development "including wetlands, floodplains and coastal zone setbacks." Id. at 5, 16.

Moving from the general goals of the plan to its more specific provisions, the Plan clearly designates the Sowams Road site as a "Future Village Site," meaning it is eligible for village zoning; village zoning would require any development on the Sowams Road site to be thirty-five percent affordable housing and would allow development of a higher density. Id. at 30 & Future Land Use Map, LU-6. Moreover, Appendix IV of the Plan specifically provides that the Sowams Road site is identified as a candidate for a future affordable housing development. Id. Appendix IV at IV-5 to IV-6.

The Developer Guidance section of the Plan provides further instruction with respect to village zones. That section is relied on heavily by the Board in its Decision and is appended to the Plan as Appendix III. The purposes of the Developer Guidance section include:

> "A. Increase diversity of housing types in Barrington, with dwelling units that meet the needs of residents at varying life stages, recognizing that single-family homes in traditional subdivisions may not meet the needs of all segments of the population, especially the senior population.
> . . .
> C. Encourage a form of development that embraces the town and neighbors, and does not give the appearance of a stand-alone development or 'gated community.'
> . . .
> O. Provide mixed use for developments with more than 20 contiguous acres of upland, to assure convenient access to some of the goods and services needed for a diverse population." Id. Appendix III at III-1 to III-3.

The Developer Guidance goes on to state that the proposed development "shall provide 35 percent affordable units" and "shall include a mixture of housing types, including single-family, town-house, cottage and, where appropriate, multifamily units, to encourage a diversity of housing types." Id. at III-4. Additionally, the affordable units should "[b]e reasonably dispersed throughout the development," "[b]e indistinguishable in appearance of quality of construction from the other units in the development," "[c]ontain a mix of two and three bedrooms," and "[b]e compatible in architectural style to the market rate units within the project." Id. Also specifically provided in the Developer Guidance is the fact that the Sowams Road property shall have a density of "no more than 5 units per acre." Id. Strategy 5-8 allows for a "one step" increase in the allowed density of "[c]omprehensive permit proposals that provide 50% or more" low

and moderate income housing. Id. at 30. An area with village zoning would thus be eligible for an increase in the permitted density by not more than fifty percent of the allowed density.[9] Id. Thus, village zone density could be increased to a maximum of 7.5 units per acre and still be in compliance with the Plan. Id.

The Appellants also reference a document (which is not incorporated into the Plan) entitled "Rhode Island Five Year Strategic Housing Plan: 2006-2010" (the Housing Plan).[10] In Appendix D, guidelines are provided for "[s]iting" affordable housing:

> "Locating affordable housing near community assets can decrease capital costs and improve the workforce/employment proximity by increasing density near existing business, commercial, and mixed-use zones. Proper location of affordable housing can turn

[9] The Decision states that a village zone is permitted an increase in density up to fifty percent of the originally permitted density of five units per acre stating that there is a "50 percent maximum one-step percentage increase for comprehensive permit projects in zones where there is no further step increase available." (Board's Decision at 4-5.) It is unclear what portion of the Plan the Board was relying on. The Plan does not provide how much a one-step percentage increase in a village zone would be, nor does it provide a general rule for the percentage increase allowed "in zones where there is no further step increase available." However, there is a footnote that explains the one-step increase as follows:

> "Whereby the following is applied: Residence 25 dimensional standards are applicable for such projects proposed in the Residence 40 zone, and R-10 standards are applicable for such projects proposed in the R25 zone. For projects in the R-10 or Neighborhood Business zone, the minimum dimensional standards shall not be reduced by more than 50 percent." The Plan at 30, n. 11.

R-10 is the highest density zoning designation for residential zoned areas (other than village zoning which only select areas are eligible for) and a fifty percent increase in density is permitted in an R-10 zone. Town of Barrington Zoning Ordinances § 185-6. Village zones would also be the highest density zone designation possibly applicable to the areas eligible for village zoning and, therefore, it is presumed that the Board correctly concluded that village zones would be entitled to a fifty percent increase in density. Id.

[10] This document is available at: http://www.planning.ri.gov/documents/guide_plan /shp06.pdf.

> commercial/business zones into 'new urbanism' style growth centers with long-term economic rewards. Affordable housing development should be encouraged near assets such as:
>
> - Sewer infrastructure (existing or planned)
> - Public transportation (existing or proposed)
> - Commercial and retail centers (for shopping and employment)
> - Business zoning (enabling mixed-use developments)
> - Parks and recreation (for active and passive recreation)
> - Schools and supportive services
> - Services including churches, temples, civic centers, medical facilities, etc.
> - Market-rate housing, to create mixed-income communities"
>
> Rhode Island Five Year Strategic Housing Plan: 2006-2010, State Guide Plan Element 423, Appendix D at D-2 (June 2006).

In addition, the Housing Plan states that development should be discouraged on sites with constraints such as "[p]oor topography and critical environmental areas (i.e. floodplains, wetlands)." Id. at D-3.

C

Discussion

The Appellants present three arguments on appeal. This Court will address each in turn.

1

Local Needs—Section 45-53-4(a)(4)(v)(A)

Section 45-53-4(a)(4)(v)(A) provides that the Board must make a positive finding that:

> "The proposed development is consistent with local needs as identified in the local comprehensive community plan

> with particular emphasis on the community's affordable housing plan and/or has satisfactorily addressed the issues where there may be inconsistencies."

According to the Appellants, the Board's positive finding that the proposed development was consistent with local needs as identified in the Plan was in error. However, after careful review of the Decision and the certified record, as well as the parties' submissions, this Court can detect no such error in the Board's finding that the proposed development was consistent with local needs, as identified in the Plan.

i

Suitability

The Appellants initially argue that the Sowams Road site is inconsistent with local needs because it is unsuitable for affordable housing. They contend, in their memorandum, that it is unsuitable because it is not "within a reasonable walking distance to necessary services, such as a grocery store, post office, bank, or medical facility" and, thus, not in line with the policies set forth in the Housing Plan. They further state in their memorandum that, "[t]o a great degree, residents of affordable housing developments do not own vehicles and rely on proximity to public services or public transportation to fulfill daily necessities, including access to work environments." Specifically, they point out that the Sowams Road site is a mile and a half from the nearest grocery store and a half mile from the nearest bus stop. Additionally, according to the Appellants, Sowams Road is not a safe walking environment because it does not have sidewalks and, thus, would be dangerous, especially in the winter. In support of their arguments, the Appellants look to the testimony of their expert in the field of planning, Ashley Hahn, who testified about the lack of suitability of the Sowams Road site, stating that it was her

opinion that "the site is less than ideal for low-to-moderate income housing." (Tr. at 15, July 16, 2013.) Her reasons for that conclusion were the distance of the site from public transport and the commercial center of Barrington (where the grocery stores and banks are located), in addition to the lack of sidewalks on Sowams Road. Id. at 15-16.

The Appellants are correct that the Housing Plan suggests that affordable housing should be near public transportation and "retail centers." However, they fail to recognize that the Housing Plan merely provides suggested strategies—it is not a state statute and, by its own terms, provides only "[d]evelopment [g]uidelines" to provide municipalities some direction on where to position affordable housing. Rhode Island Five Year Strategic Housing Plan, Appendix D at D-1 to D-2. Therefore, even if the Court were to accept that the proposed development did not meet some of the criteria in the Housing Plan because it is not "near" public transport and the commercial center of Barrington, the proposed development could still be found to be consistent with local needs. Id. at D-2. Moreover, this Court certainly would not consider the Decision to be in violation of statutory provisions, affected by an error of law, "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record," or "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion" because it granted a comprehensive permit when the site in question did not meet some of the guidelines provided in the Housing Plan. Sec. 45-24-69(d).

The Appellants claim that individuals who reside in affordable housing typically do not have cars and that, consequently, the fact that an individual would have to walk a half mile to the nearest bus stop and one and a half miles to the nearest shopping center makes the Sowams Road site unsuitable for affordable housing. However, they provide

no support whatsoever for their assertions; they fail to cite to a single source—legal or otherwise. Even if this Court accepts that, as the Appellants claim, most of the future residents of the proposed development would not own a car, this Court does not detect any error in the Board's failure to find that the Sowams Road site was unsuitable; the distances from the Sowams Road site to public transport and the retail center of Barrington presumably did not seem to the Board to be prohibitive distances (even in the winter), and this Court is in agreement. Consequently, the Appellants' reliance on bare or naked assertions with no data or support on appeal is predictably ineffective.

Additionally, the Plan itself recognizes the suitability of the Sowams Road site for affordable housing. The Plan provides, with regard to the Sowams Road site, as follows:

> "Sowams Nursery is not the largest vacant site zoned for development remaining in town. However, unlike a number of other large vacant parcels, the nursery properties have access to water and sewer and are located in town near services and transit, including within a half mile of the East Bay Bike Path and the edge of Warren's downtown commercial district." The Plan at 113 (emphasis added).

Thus, the Plan identifies the Sowams Road site as being close to services and transit. Id. The Plan also clearly manifests the Town's opinion that the Sowams Road property would be one of several areas where "future development is still possible." Id. at 5. It provides that the Sowams Road site is one of only a few areas eligible for village zoning; village zoning would require that a minimum of thirty-five percent of the total units built on the site be affordable housing units. Id. at 30. Thus, a look at the Plan leads this Court to the inescapable conclusion that the Board was correct in its determination that the Sowams Road site was suitable for the proposed development and the development was consistent with local needs.

Finally, though the lack of sidewalks on Sowams Road could certainly be a factor in finding the Sowams Road site unsuitable for a proposed affordable housing development, it is not enough by itself for this Court to find, given the express acceptance of the Sowams Road site as a site for affordable housing in the Plan, that the Board did not act in compliance with § 45-53-4(a)(4)(v) when it granted East Bay a comprehensive permit. Moreover, the Board specifically addressed the issue of sidewalks on Sowams Road when it required, as a condition of granting East Bay's application for a comprehensive permit, that East Bay submit a traffic impact analysis, including an evaluation of conditions for "pedestrian access on Sowams Road in the study area, to include recommendations for potential . . . sidewalk locations." (Board's Decision at 12-13.)

The Appellants' reliance on generalizations about individuals residing in affordable housing and their exaggeration of the issue of how far one would have to walk to reach the bus stop or the grocery store failed to convince the Board that the Sowams Road site was unsuitable for affordable housing, and it likewise fails to convince this Court that the Board's Decision should be vacated pursuant to § 45-24-69(d).

ii

Consistency with the Plan

The Appellants also contend that, in addition to the Sowams Road site being unsuitable, the proposed development is inconsistent with the provisions of the Plan because it is not suitably integrated[11] into the surrounding community, has too high a

[11] Any discussion of integration in this section is intended to reference only the goals of integration as they are laid out in the Plan and whether the proposed development is in line with those goals. Whether the Board made a positive finding that the proposed

density and does not contain a mix of unit types. The Appellants perceive inconsistencies between the proposed development and both the Housing & Neighborhoods Directives and the Land Use Directives in the Plan. With respect to the Housing & Neighborhoods Directives in the Plan, the Appellants first point to the listed goals of the Plan which include providing for future housing needs "in a manner that preserves Barrington's character" and is "sensitiv[e] to existing neighborhoods." The Plan at 19. They continue by referencing the goals of ensuring that any future development is integrated and "compatible with the character of Barrington in general and that of individual neighborhoods." Id. Additionally, the Appellants discuss Strategy 5-8, which states that development should: 1) be a mix of unit types (i.e., ownership, rental, number of bedrooms, etc.); 2) be designed with respect to the surrounding community; and 3) be "distributed throughout the community and integrated within existing communities to the greatest extent possible." Id. at 30.

The Appellants claim, in their memorandum, that the proposed development is inconsistent with all of the just-referenced goals of the Plan requiring integration of the proposed development into the surrounding community because it is a development made up of entirely affordable housing being built in the "center of a neighborhood of moderate-to-highly priced housing." They point to Ms. Hahn's testimony that expressed concern about the lack of integration of the proposed development with the surrounding community. (Tr. at 15-17, July 16, 2013.) Additionally, they contend that the proposed development is not in line with the goals of the Plan because it is almost all attached,

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development was integrated as required in § 45-53-4(a)(4)(v)(C) is a separate issue and is addressed in Part III.C.2 supra.

single-family dwellings and, thus, does not provide the diversification of housing that the Plan envisioned.

The Appellants also contend that the proposed development is not in keeping with the section of the Plan which acknowledges that there are constraints on development at the Sowams Road site because of wetlands, flood plains and coastal zone setbacks and they argue that that section of the Plan shows that the Sowams Road site is inconsistent with the guidelines set forth in the Housing Plan discouraging development at sites with "[p]oor topography and critical environmental areas (i.e. floodplains, wetlands)."[12] See the Plan at 16; Rhode Island Five Year Strategic Housing Plan, Appendix D at D-3. For these reasons, the Appellants conclude that the proposed development is "in contravention" of the Housing & Neighborhoods Directives in the Plan.

The Appellants next posit that the proposed development is also inconsistent with the Land Use Directives in the Plan. Specifically, they point to one sentence in the Plan which states that the Town was requiring more land per parcel and, in furtherance of that goal, rezoned the Sowams Road site to R-25 in 1994; they contend this shows an intent to decrease the density at the Sowams Road site. They then cite to the Land Use Study which reflected a desire by local Barrington residents to have "[c]ontext-sensitive development" and "[p]edestrian-oriented neighborhoods" and aver that these goals are not met by the proposed development. Housing for Barrington's Future: Housing Land Use Study at 31. Lastly, the Appellants reference the fact that the density of the proposed

[12] Once again, the Appellants' reliance on the Housing Plan is misplaced. While the Housing Plan does provide helpful guidance, this Court simply cannot find that lack of conformity of a proposed affordable housing site with one of the suggested criteria in the Housing Plan is enough to warrant vacating the Board's Decision.

development is over the allowed density of five units per acre for the Sowams Road site provided in Appendix III of the Plan.

This Court's thorough review of the Plan leads it to the determination that the Appellants largely rely on general statements in the Plan which the proposed development is arguably not perfectly in line with, but that they do so at the expense of looking at the Plan in its entirety—most specifically, the many other provisions of the Plan which the Board relied on in finding that the proposed development was consistent with local needs.

In the instant case, the Board made the required positive finding that the proposed development was "consistent with local needs as identified in the local comprehensive community plan," but the Board's Decision went even further than that general determination—the Board devoted over five pages to a discussion of whether the proposed development was consistent with local needs as laid out in the Plan. (Board's Decision at 1-6.) It went through all of the goals listed in the Developer Guidance provided in Appendix III of the Plan for sites, like the Sowams Road site, which the Plan provides are eligible for village zoning and addressed whether the proposed plan was consistent with those goals. Id. at 2-3.

Specifically, the Board discussed, at length, conforming the density of the proposed development with the provisions of the Plan. Id. at 3-5. As the Appellants point out, the Plan provides for a maximum density of five units per acre in a village zone. The Plan, Appendix III at III-4. However, as both the Appellants and the Board recognized, the proposed development would have had a density significantly higher than the proscribed five units per acre. (Board's Decision at 4.) The Board, unlike the

Appellants, then looked to the Plan to find what the highest possible density allowed in a village zone would be; it found that the Plan provided for a one-step increase in Strategy 5-8, which meant that a village zone could have a maximum density of seven and a half units per acre. Id. at 4-5. Accordingly, the Board made a condition of its approval of the comprehensive permit that the proposed development be reduced to forty-two total units so that its density would fall into the allowable range at 7.45 units per acre. Id. at 5, 11. In the instant case, the forty-two unit proposed development is actually within the density allowed under the Plan and is thus a far cry from the 650 percent increase in density which merited denial of a comprehensive permit in Hous. Opportunities Corp. v. Zoning Bd. of Review of Johnston, 890 A.2d 445, 452-53 (R.I. 2006). Moreover, unlike in East Bay Cmty. Dev. Corp., 901 A.2d at 1160-61, where the density issues were addressed in one conclusory paragraph, despite the density being "significantly greater than the surrounding neighborhood," the Board in the instant case provided a detailed and lengthy analysis for this Court to review. See also Kaveny, 875 A.2d at 8 (holding that there were inadequate factual findings by a zoning board when its decision reduced the number of proposed units from 343 to 160 because the decision "reveal[ed] nothing about how the board arrived at 160 units") (emphasis in original). Thus, the Appellants' contention that the proposed development has too high a density is clearly not consistent with the Plan.

After reducing the proposed development to forty-two units in order to comply with the Plan, the Board went so far as to address how the proposed development, reduced to forty-two units, would be less likely to give the impression of a gated, stand-alone community in accordance with the Developer Guidance and presumably would be

more integrated into the local community. (Board's Decision at 5.) The Board also made a finding that the "mix of unit types (1-, 2- and 3-bedroom units) is consistent with the Developer Guidance and therefore the current mix of units should be maintained." Id. at 6. This Court fails to see how the Board could have been any more thorough and conscientious in determining that, based on the facts and the Plan provisions, the proposed development was consistent with local needs. It is unlikely that any proposed development would be consistent with every single statement in the Plan (which is a very lengthy document). Thus, even if this Court were to assume that the Appellants are correct and the proposed development is not in line with some of the more general goals stated in the Plan because it is not appropriately integrated into the local community and will not provide a mix of unit types, in the eyes of this Court, that fact simply does not overcome the well-thought-out and articulated findings of the Board, which have their foundation in other, more specific provisions of the Plan dealing explicitly with areas, like the Sowams Road site, that are eligible for village zoning. Moreover, one of the aims of the Plan is to "work toward achieving the State-mandated 10 percent affordable housing goal." The Plan at 19.

A brief look at the evidence and expert testimony presented to the Board by East Bay shows that the Board had legally competent, substantial evidence on which to make its determination that the proposed development was consistent with local needs and confirms this Court's conclusion that the Board's Decision was thorough and correct. See Caswell, 424 A.2d at 647.

East Bay retained Edward Pimentel's "professional land use planning and zoning consulting services" and asked him to evaluate the proposed development. (E. Pimentel's

Report at 2.) Mr. Pimentel's report was submitted to the Board. Id. In it he addresses the applicable provisions in the Plan in great depth and ultimately finds that the Sowams Road site is suitable for the proposed development and that the proposed development is "consistent with the Comprehensive Plan." Id. 2-15. Mr. Pimentel corroborated those statements in his report during his testimony to the Board. (Tr. at 63-90, May 30, 2013.) He testified that, pursuant to the Plan, the Sowams Road site was eligible for village zoning and thus a density of five units per acre. Id. at 66-67. He noted that the proposed development would make significant progress towards the Town's goal of achieving ten percent affordable housing and that the proposed development would also be best at a site, like the Sowams Road site, "that's already been, you know, targeted, identified for affordable housing." Id. at 70-72. It was his testimony that the proposed development, with almost one hundred percent affordable housing, was a much "better balance of achieving everything that's being tried to accomplish for the [Plan]" than a housing development with a smaller percentage of affordable housing. Id. at 72-73. It is true that the Appellants also presented an expert in the field of planning, Ashley Hahn, who testified that the Sowams Road site was unsuitable and that the density of the proposed development was too high and not in line with what was proscribed in the Plan. (Tr. at 10-11, July 16, 2013.) However, the decision whether to accept or reject expert testimony is in the discretion of the Board and this Court will not substitute its judgment for that of the Board. See Lloyd v. Zoning Bd. of Review for Newport, 62 A.3d 1078, 1083, 1089 (R.I. 2013); see also Restivo, 707 A.2d at 666 (stating that this Court may not "pass upon the credibility of witnesses" when reviewing a zoning board).

Thus, there was clearly substantial evidence, between Mr. Pimentel's testimony and the provisions of the Plan itself, on which the Board could have relied, and in fact did rely, in their extensive discussion of whether the proposed development was consistent with local needs. See Caswell, 424 A.2d at 647; see e.g., Curran, 672 A.2d at 455 (holding that "[s]ubstantial and competent evidence exists to support the board's finding that the project is consistent with local needs and adequately addresses health, safety, and environmental concerns").

Section 45-53-3(4) defines "[c]onsistent with local needs" to mean reasonable in view of the need for low to moderate income housing, the need to protect the health and safety of the residents, the need to "promote better site and building design," and the need to have local land use ordinances be applied equally to subsidized and unsubsidized housing. That definition required the Board to weigh the factors and make a determination based on adequate findings of fact that the proposed development was consistent with local needs "as identified in the local comprehensive community plan." Sec. 45-53-4(a)(4)(v)(A); see also Town of Coventry Zoning Bd. of Review v. Omni Dev. Corp., 814 A.2d 889, 899 (R.I. 2003). The Board addressed whether the proposed development was consistent with local needs at length; it made the approval of the comprehensive permit conditional on changes that would bring the proposed development into line with the provisions of the Plan and provide much-needed low and moderate income housing in Barrington, while keeping with the health and safety of the residents, as well as the intentions for the Sowams Road property laid out in the Plan. Moreover, its ultimate granting of a comprehensive permit is further justified by the fact that Barrington has yet to meet the ten percent affordable housing goal mandated by the

State. Thus, as this Court has reiterated, it cannot perceive any error in the Board's Decision that the Sowams Road site was consistent with local needs as provided in the Plan. See § 45-53-4(a)(4)(v)(A). Accordingly, this Court denies the Appellants' invitation to vacate the judgment of the Board.

2

Integration—Section 45-53-4(a)(4)(v)(C)

The Appellants next aver, in their memorandum, that the Board's positive finding that the proposed development is "integrated throughout the development" was in error because the Board found that the low and moderate income housing units were integrated in the development itself but failed to determine that they were integrated into the surrounding community. According to the Appellants, the neighborhood is comprised of single-family homes, most of which are not rental homes, whereas the proposed development is comprised of multi-family rental units.

With respect to § 45-53-4(a)(4)(v)(C), the Appellants rely in error on what they claim is a lack of integration of the proposed development with the surrounding community. They state in their memorandum that "[a]ssessing integration within the Development is not relevant . . ." However, a look to the statutory language illustrates that it clearly and unambiguously states the opposite. The standard, as laid out in § 45-53-4(a)(4)(v)(C), requires that:

> "All low and moderate income housing units proposed are integrated throughout the development; are compatible in scale and architectural style to the market rate units within the project; and will be built and occupied prior to, or simultaneous with the construction and occupancy of any market rate units." (Emphasis added.)

This Court is tasked with applying the plain language of the statute, which clearly requires only a positive finding that the units are integrated within the new development. See State v. Diamante, 83 A.3d 546, 548 (R.I. 2014) ("It is a fundamental principle that, when 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.") (internal quotation marks omitted). Thus, based on the language of the statute, the Board, under § 45-53-4(a)(4)(v)(C), was not required to make a positive finding that the proposed development was integrated into the surrounding community; it only had to establish that the affordable housing units were integrated within the proposed development. The Board recognized during a public hearing that the statute only referred to integration and compatibility in scale and architectural style within the development. (Tr. at 20, Aug. 6, 2013.) In the Decision, the Board acknowledged that all of the new units in the proposed development will be low and moderate income housing and, consequently, found that the units are "integrated throughout the development." (Board's Decision at 9.) This Court finds that the Board properly met the requirement of § 45-53-4(a)(4)(v)(C).

Moreover, despite not being required under § 45-53-4(a)(4)(v)(C) to do so, the Board went so far as to address the integration within the surrounding community.[13] It recognized that because the proposed development consists almost entirely of low and moderate income housing, it was potentially creating a "stand-alone development." Id. at 5 (internal quotation marks omitted). However, the Board found that by reducing the

[13] Whether the Board was required to make a finding with respect to integration of the proposed development with the surrounding community under the Plan (rather than § 45-53-4(a)(4)(v)(C)), and the Board's findings in that regard, are addressed in Part III.C.1.ii infra.

total number of units to forty-two it was minimizing the stand-alone aspect of the proposed development. Id. It also found that the proposed development was compatible in scale and style to the surrounding community because the units "feature residential-scale architectural details such as pitched roofs, articulated facades, and front porches." Id. at 9. Expert testimony also suggests that there was evidence that attempts were made to integrate the proposed development into the surrounding community. Don Powers, from Union Studio, the firm "responsible for the land plan and architecture," testified that existing sugar maples on the site had been incorporated into the design. (Tr. at 8, 11, May 13, 2013.) He also testified that the design of the proposed development incorporated the "simple traditional details" of other homes in the local community. Id. at 19. Moreover, he went on to state that the units in the proposed development, while not single-family homes, were "made up of all the same pieces that make up a single-family house. So the scale in architect jargon is going to be single family even if the footprint aggregates to something bigger than that." Id. at 23.

Thus, this Court finds no indication that the Board's Decision that the proposed development was properly integrated, as required in § 45-53-4(a)(4)(v)(C), was in violation of statutory provisions, affected by an error of law, "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record," or "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." See § 45-24-69(d).

3

Environmental Concerns and Concerns for the Health and Safety of Current and Future Residents—Sections 45-53-4(a)(4)(v)(D) + (E)

The Appellants make a final contention that concerns for the environment and the health and safety of current residents, issues on which the Board must make positive findings in accordance with §§ 45-53-4(a)(4)(v)(D) and 45-53-4(a)(4)(v)(E), have yet to be adequately addressed by the Board.

In support of their argument the Appellants reference the testimony presented by their expert, Thomas B. Nicholson, Chief Engineer at C&E Engineering Partners, Inc. Mr. Nicholson testified that he was concerned that the ground at the Sowams Road site could potentially be contaminated with chemicals such as arsenic due to the site's previous use as a nursery. (Tr. at 54-58, July 16, 2013.) The Town of Barrington Conservation Commission also voiced a similar concern.[14] Mr. Nicholson further expressed concern regarding potential drainage problems, though he acknowledged that the drainage systems had not been fully "designed yet." Id. at 50. He also stated that the "roof infiltration systems" in the proposed development, which incorporated the use of dry wells, could create standing water which could potentially flow onto abutting properties. Id. at 47-48. Moreover, it was his testimony that the roadways were inadequate and that there were potential issues with the storm water system. Id. at 42-43, 48-51. Additionally, he found the "preliminary traffic analysis" for the proposed

[14] In a memorandum from the Town of Barrington Conservation Commission Chair to the Board, dated May 22, 2013, it is stated that "[s]ince the property has been used as a nursery for some time, the past use of pesticides (e.g., insecticides, herbicides, and fungicides) may have resulted in soil and/or water contamination to which future residents could be exposed."

development to be "woefully inadequate." Id. at 40-41. In addition to Mr. Nicholson's concerns, the Appellants' other expert, Ms. Hahn, also expressed concerns including the adequacy of the buffers provided between the proposed development and abutting properties and the width of the roadways within the proposed development. Id. at 13-15, 21.

A look at the Board's Decision and the other expert testimony presented at the various hearings before the Board shows that the Board did properly address the environmental and health and safety concerns.

Initially, this Court notes that the Board did in fact make the required positive findings that there were "no known negative environmental impacts from the proposed development" and that there were "no known negative impacts on the health and safety of current or future residents of the community apparent from the proposed conceptual master plan, provided that the Planning Board's conditions of approval are addressed." (Board's Decision at 9-10.) In making its decision with respect to environmental concerns, the Board specifically mentioned the "questions raised by Thomas Nicholson . . . about the design of the street system and the functionality of the storm-water management design, including the long-term performance of underground roof infiltration systems," but it found that a discussion of those issues was premature. (Board's Decision at 9.) The Board stated as follows:

> "The applicant will be required to demonstrate, through the provision of the required detailed engineering plans and other information at the time of their preliminary plan submission, that there will be no significant negative environmental impacts from the proposed development as shown on the final plan, with all required conditions for approval. Environmental issues, cited by Mr. Nicholson and also by the Conservation Commission in its memo

> dated 5/22/13, include: provision of adequate storm-water management, restoration of disturbed areas within the wetland setback and remediation of environmental issues identified in environmental assessments of the property, likely to include soil contamination from the past use of chemicals related to the long-term agricultural use of the site." Id. at 10.

In addressing concerns for the health and safety of residents, the Board also recognized the testimony of Mr. Nicholson and Ms. Hahn regarding density, buffers, road width, and potential traffic impact but stated those issues would be addressed by the "revision of the site plan and reduction in density required with the conditions of approval." Id. It further stated:

> "In providing additional information at the preliminary plan stage — including a new layout of the roadway, buffers and parking areas; results of environmental assessments of the site; peer-reviewed engineering plans; and calculations and a full traffic impact study — the applicant will be required to demonstrate there will be no significant negative impacts on the health and safety of current or future residents of the community in areas including, but not limited to, safe circulation of pedestrian and vehicular traffic, provision of emergency services, sewage disposal, availability of potable water, adequate surface water runoff, and the preservation of natural, historical or cultural features that contribute to the attractiveness of the community." Id.

In the conditions of approval, the Board required East Bay to: 1) revise the proposed development "to enhance the buffers on the edges [of] the development"; 2) widen the streets to twenty-two feet; 3) provide a "draft storm-water maintenance agreement subject to review by the Director of Public Works"; 4) "[s]ubmit one full copy plus the executive summaries of environmental site assessments" including "an assessment of chemicals used at the nursery and potential risks to human health and the environment"; 5) "[a]ddress comments from the Conservation Commission, as described in the

memorandum from Conservation Commission Chair Cyndee Fuller dated May 13, 2013"; and 6) "[s]ubmit the required traffic impact analysis" which must, among other things, "evaluate conditions for pedestrian access on Sowams Road." Id. at 11-13.

Hence, the Board's decision makes it abundantly clear that it believed that any issues with regard to environmental or health and safety concerns could be more adequately addressed later in the approval process. In accordance with that belief, the Board went so far as to condition its approval of the comprehensive permit on East Bay addressing the issues of buffers, road width, the storm water system, environmental site assessments, the contamination concerns of the Conservation Committees, and traffic impact. Moreover, in their memorandum before this Court, the Appellants themselves recognize that the Board provided a number of conditions to its approval with respect to environmental and health and safety concerns, and they state that "[t]herefore, because to do so now would be clearly premature, Plaintiffs reserve their right to supplement this appeal pertaining without limitation to the environment and the health and safety of Barrington's current residents." Consequently, this Court finds that any concerns presented by the Appellants' experts were premature, but even if they were not premature, they were adequately addressed in the conditions the Board imposed on its approval of East Bay's application.[15] Based on the conditions imposed by the Board, the proposed development will not be approved until all of the issues raised by the Appellants' experts are addressed.

[15] This Court notes that § 45-53-4(a)(4)(v)(D) requires only a positive finding that there will be no negative environmental impacts "as shown on the final plan, with all required conditions for approval." Thus, this statutory section refers specifically to a final plan which is produced incorporating all conditions of approval. When East Bay produces a final plan which incorporates the Board's conditions, it will presumably address the issues presented by the Appellants' experts.

This Court's conclusion is further supported by a brief look at some of the expert testimony and evidence provided to the Board, which buttressed the Board's finding that there were no known negative environmental or health and safety impacts at this stage in the process of constructing the proposed development, especially given the conditions of approval the Board imposed. Shawn Martin, the civil engineer on the project from the firm of Fuss & O'Neill, testified that there would be a buffer distance provided between the wetlands area on the Sowams Road site and the proposed development. (Tr. at 5, 64, May 13, 2013; Tr. at 28, May 30, 2013; Tr. at 3, July 2, 2013.) He testified that with respect to storm water, East Bay was proposing a system that "complies with the town's standards and the DEM standards and the Coastal Resources Management Council Standards." (Tr. at 33, May 30, 2013.) He stated that the dry wells on the properties, which Mr. Nicholson stated could create standing water, would in fact put the water "back into the ground and recharge the ground water." Id. at 34-35. It was his further testimony that the existence of such dry wells was a criterion of making the proposed development "low impact." Id. at 34. When discussing the environmental impacts, Mr. Martin stated that an environmental site assessment still needed to be completed before the project was funded. Id. at 46.

Scott Rabideau, a wetlands scientist working for a private wetlands consulting firm called Natural Resources Services, Inc., also testified on behalf of East Bay. Id. at 56. He stated that a two hundred foot buffer would be created between the wetlands and the proposed structures. Id. at 58. It was his further testimony that the storm water features of the proposed development would be within that two hundred foot buffer but would be "a benefit at the end of the day" to the Palmer River which is adjacent to the

property. Id. at 60. Additionally, a "Preliminary Traffic Analysis," which East Bay made part of the record before the Board, provided that the Rhode Island Department of Transportation determined that approximately 2,700 vehicles per day used Sowams Road, and the proposed development would increase that by only thirty-five vehicles during the weekday morning peak hour and thirty-five vehicles during the weekday afternoon peak hour. Consequently, the analysis concluded that "there is ample available capacity on Sowams Road to handle the additional traffic volumes generated by the proposed development." Preliminary Traffic Analysis at 1-2 (May 30, 2013). The just-discussed testimony and evidence, coupled with the Board's obvious consideration of environmental and health and safety issues, clearly mandates this Court's conclusion that the Appellants simply have not demonstrated any error in the Board's positive findings with respect to health and safety and the environment which would merit this Court vacating the Decision. See § 45-24-69(d).

In conclusion, the Appellants have not presented any evidence or argument which has convinced this Court that the Board did anything but conscientiously consider the requirements to issue a comprehensive permit, as laid out in § 45-53-4(a)(4)(v) and the Town of Barrington Zoning Ordinances § 185-184. As this Court has repeatedly noted, the Board had substantial, legally competent evidence on which to base its findings that certainly amounted to more than a "scintilla." Caswell, 424 A.2d at 647. Therefore, this Court must uphold the Board's decision. See Mill Realty Assoc., 841 A.2d at 672.

IV

Conclusion

Upon review of the entire record, this Court finds that the Board's approval of East Bay's application for a comprehensive permit was not in violation of statutory or ordinance provisions, affected by error of law, "[c]learly erroneous in view of the reliable, probative, and substantial evidence of the whole record" or "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Sec. 45-24-69(d). Thus, the Board's Decision is affirmed. Counsel shall submit the appropriate judgment for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Codder 02806, Inc., et al. v. East Bay Community Development Corporation, et al.**
CASE NO:	**PC 13-4355**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**October 1, 2014**
JUSTICE/MAGISTRATE:	**Procaccini, J.**
ATTORNEYS:	
For Plaintiff:	**J. William Harsch, Esq.** **Maurene Souza, Esq.**
For Defendant:	**Stephanie L. Federico, Esq.** **Anthony DeSisto, Esq.** **Nancy Letendre, Esq.**