

STATE OF RHODE ISLAND
HOUSING APPEALS BOARD

DIVISION ROAD NEIGHBORHOOD, LLC
Appellant

vs.

TOWN OF EAST GREENWICH PLANNING BOARD
Appellee

and

DIVISION ROAD MITIGATION FUND;
STEPHEN J. CORNWALL; AND DEBORAH THOMAS,
Intervenors

**DECISION VACATING PLANNING BOARD'S DENIAL
AND GRANTING MASTER PLAN APPROVAL
OF COMPREHENSIVE PERMIT APPLICATION**

I. INTRODUCTION¹

This appeal concerns a proposed development on a site located on Division Road in East Greenwich, Rhode Island. Division Road Neighborhood, LLC ("Applicant") filed an application for a comprehensive permit ("Application") under the Low and Moderate Income Housing Act, R.I.G.L. Chapter 45-53 ("Act"). The Planning Board of the Town of East Greenwich ("Planning Board"), acting in its capacity as the "local review board" as defined in §45-53-3(8) of the Act, declined to grant master plan level approval of the Application for the reasons stated in its written decision recorded on August 4, 2023.

¹ References in brackets below (*e.g.* [2022-03-15 DRN]) are to numbered items of the administrative record filed by the Planning Board. References to pages of the transcripts of the Planning Board's master plan public informational meeting include the meeting date, followed by "Tr_" with pertinent page numbers inserted.

While the record pertaining to this Application is expansive, the Planning Board's three-page decision rested on three grounds as the reasons for its denial: (A) whether the Application was in conformance with the Comprehensive Plan (Chapter 6 – Housing Plan and Affordable Housing Plan, particularly provisions found at pages 69-70); (B) the Town's progress toward the Act's 10% goal; and (C) traffic issues relating to proposed project.

The Applicant filed a timely appeal to the State Housing Appeals Board ("SHAB"). A neighborhood group identifying themselves as Division Road Mitigation Fund, Stephen J. Cornwall, and Deborah Thomas ("Intervenors") were allowed to intervene in the appellate proceedings with the consent of the Applicant and Town. As SHAB expressed during the November 27, 2023 hearing to receive oral arguments and question counsel, the relevant appellate focus concerns the three grounds stated in the Planning Board's Decision.² SHAB finds and concludes that the Planning Board erred on all three grounds, justifying SHAB's reversal of the denial and the granting of master plan approval of the Application.³

Regarding its impact, SHAB stresses that this appellate ruling is limited **only** to the master plan review of the proposed project. Nothing in this ruling should be construed to limit the Planning Board's ability to address relevant issues, including but not limited to traffic, environmental, planning and engineering issues during the preliminary plan phase of review and its associated public hearing process, and the final plan stage of review.

It is important to state brief words on the drafting process associated with this appellate decision. Typically, SHAB, through its legal counsel and with the members' editing, would draft and approve the decision from start to finish. The General Assembly's amendments to the Act in

² For ease of reference, SHAB attaches the Planning Board's Decision as Exhibit A hereto.

³ SHAB also refers the reader to the transcript of its November 27, 2023 hearing.

July 2023 require SHAB to complete its work and decide the appeals on its docket by December 31, 2023. As of the fall of 2023, SHAB had three pending appeals on its docket with significant records (including this appeal), in which the developer in each appeal exercised its right to have SHAB hear and decide the appeal, rather than staying the appeal for a transfer to the Superior Court after January 1, 2024. Here, after its deliberations and to assist in ensuring the completion of a written decision by the December 31, 2023 deadline, SHAB requested that the Applicant, the Town, and the Intervenors confer to present a proposed form of decision for SHAB's consideration, editing, and entry. While the goal was to have as much consensus as possible among the parties in this drafting process, the result was not achieved. Respectfully, the Applicant proposed a form of decision that was far too long, and the Town and Intervenors sought the entry of a decision that was far too short. SHAB has issued this decision seeking to strike the right balance.

II. PROJECT BACKGROUND

The basic details of the proposed project are undisputed and require only a summary description for purposes of reviewing the Planning Board's three grounds for its denial. The Applicant proposes to develop a parcel located at Assessor's Map 67, Plat 13, Lots 35 and 53, which is located on the north side of Division Road in East Greenwich ("Property"). Division Road is a State Highway under the jurisdiction of the Rhode Island Department of Transportation.

The Property entails vacant wooded land spanning slightly over 80 acres of developable area. The Property is located in a F-2 (single family residential and farm zone) zoning district. Most of the Property is separated from Division Road by other properties and buffering from the site to those properties.

The proposal calls for 410 residential units in a variety of housing types, ranging from multi-family apartment buildings to small single family cottages. The development will be serviced by public water. The Application materials reflect that the development will be phased, and will proceed at a pace of approximately fifty (50) units per year, a Town requirement.

Consistent with the Act, twenty five percent (25%) of the units are proposed to be deed restricted to households of low or moderate income. Occupancy of the home-ownership units will be limited to households with income less than one hundred twenty percent (120%) of Area Median Income ("AMI"). Occupancy of the rental units will be limited to households with income less than eighty percent (80%) of AMI.

The Applicant applied for a letter of eligibility to proceed with the Application under the Act. Rhode Island Housing and Mortgage Finance Corporation ("RIHousing") reviewed the proposal and issued the required eligibility letter.

III. THE CONTROLLING STANDARDS OF REVIEW

A. The Master Plan Stage of Review

In order for a developer to obtain a final comprehensive permit to begin construction, the local review board must grant approvals at three successive stages of review: master plan, preliminary plan, and final review. R.I. Gen. Laws §45-23-39(b). The focus here is on the first stage. A central issue concerns what level of presentation and evidentiary proof satisfies the conceptual requirements of a master plan review, particularly with respect to health, safety, and environmental issues.

As SHAB sunsets and reflects on its history, parties have often differed before it regarding where the line should be drawn between (1) the conceptual presentation to justify a master plan approval and (2) the engineering analysis and expert evidence that should be deferred to the

preliminary plan phase. In its final appeal and decision, SHAB concludes that the line is easily drawn here, and the Applicant clearly surpassed it with a detailed conceptual plan that justifies master plan approval.

B. The Applicable Standards at the Local Review Board Level

Before issuing a comprehensive permit, a local review board must make the following positive findings, supported by legally competent evidence: (a) the proposed development is consistent with local needs as identified in the municipality's comprehensive community plan; (b) where the proposed development is not in compliance with the municipality's zoning ordinance, whatever local concerns that are affected do not outweigh the need for affordable housing; (c) all affordable housing units proposed are integrated throughout the development; (d) the proposed development as shown on the final plan will not have significant negative impact on the environment; and (e) the proposed development will not have a significant negative impact on the health and safety of current or future residents of the local community. §45-3-4(a)(4)(v).

A local review board may deny the application for any of the following reasons: (a) the municipality 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 having at least ten percent of the year-round housing units designated as affordable; or (e) concerns regarding the environment and the health and safety of current residents have not been adequately addressed. §45-53-4(a)(4)(vii).

C. SHAB's Standard of Appellate Review

Section 6(b) of the Act provides in pertinent part: "In hearing the appeal, the state housing appeals board shall determine whether: (i) In the case of the denial of the 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;" §45-53-6(b). Additionally, standards for SHAB's review include, but are not limited to, the following factors:

1. The consistency of the decision to deny or condition the permit with the approved housing plan and/or 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 the 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.

§45-53-6(c).

East Greenwich has an approved Affordable Housing Plan. Consequently, SHAB's review was obligated to determine whether the Application is consistent with that Plan and apply the factors in §45-53-6(c) as non-exclusive criteria. Further, under §6(d), if SHAB finds, "in the case of a denial, that the decision or the local review board was not consistent with an approved affordable housing plan, ..., 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."

IV. AFFORDABLE HOUSING IN EAST GREENWICH

A. The Affordable Housing Plan

The Town's Affordable Housing Plan is stated at Chapter 6 of its Comprehensive Plan (Housing Plan and Affordable Housing Plan found at pages 64-86). The Affordable Housing Plan (adopted in 2004 and updated in 2013) was prepared in accordance with the Act and the Rhode Island Comprehensive Planning and Land Use Regulation Act (R.I.G.L. § 45-22.2 *et. seq.*)

The Affordable Housing Plan prescribes goals and policies to achieve the Act's 10% requirement of affordable or LMI units by 2025. It states that, "[i]n the past thirty years, the Town of East Greenwich built 230 units of affordable housing, well short of the required 10% or 540 units. To keep pace as new housing units are built by the target year 2025, the Town must produce at least 343 new affordable housing units." (*Id.* at 68).

As an action item, Policy H-1 calls for the zoning character of the Property to be modified from low density two acre zoning ("F-2") to a status that would permit a "density bonus, appropriate to the carrying capacity of the land, for a density ranging from 12, 16, and 20 units per acre", with "Multifamily allowed by right in projects utilizing the density bonus"; and with at least twenty percent (20%) affordable housing. (*Id.* at 69, 70).⁴

⁴ The Plan provides for this treatment to be given to a total area involving four parcels comprising 90.15 developable acres, two parcels comprising the Property (at just over 80 developable acres); two additional parcels in the area (owned by others) comprising the remainder of the designated area. Unlike the Property, some or all of that remainder is presently commercially zoned ("CH" [Commercial Highway]), as reflected in Table 6E of the Plan. (*See also* SHAB 11/27/23 Tr. at 36-38).

Of most relevance to the issues before the Planning Board at the local review level and SHAB on appeal, the Plan "allows", as a developer "option", but does not require, commercial units. The pertinent language states as follows:

H.1. Create a new Zoning District: The Town will amend the Zoning Ordinance to create a new zoning district in the northwest quadrant (Shippeetown area: west of Shippeetown Road, south of Crompton Road, and north of Middle Road) by changing the current zoning from Commercial (CH) and Farming (F2) to Residential Mixed Use (MUPD) Zoning District.

The new District will *allow* mixed use development, thereby helping to arrest the strip-style suburban development that has begun to emerge near that area. The dimensional requirements will *allow* commercial structures and will also *require* upper-story residential use, which will require at least 20% LMI units, and commercial development at the street level. These zoning measures are intended to implement policies and recommendations of the Comprehensive Plan's Land Use Element relative to retaining and enhancing the Town's villages as vital centers, for curbing urban sprawl outside the village centers, and for ensuring that the character of new development is consistent with the traditional development patterns of the Town. All new subdivisions on vacant acreage will also be required to have at least 20% LMI units

(*Id.* at 69-70) (bolded language in original, italics added here for emphasis, and footnote citations omitted).

Footnote 6 in the Affordable Housing Plan, which describes the above-referenced Residential Mixed Use (MUPD) Zoning District, states as follows:

MUPD *allows* for multiple uses on one parcel. It is offered as a *development option* as an *encouragement* to construct and develop low-density commercial uses to offset the tax burden of higher density residential units. Low- and moderate-income residential units are particularly encouraged in an MUPD.

(*Id.* at 69, n.6) (italics added for emphasis).

As "Strategy 1," Table 6E calculates the number of units that could be generated from the area by applying the mid-point of the planned densities (16 units per acre). (*Id.* at 70). This calculation projects 865 market rate units and 115 affordable housing units (a total of 980 units).

(*Id.*)

A color coded Map 6A, entitled "Affordable Housing – Existing and Proposed," shows the location the Plan targets for affordable housing. (*Id.* at 75). Some proposed sites are identified for Mixed Use Plan Development (MUPD's) or Planned Development (PD's), the area of the Property is the only one targeted specifically for "Residential Mixed Use". (*Id.*)

The record evidence does not demonstrate that the Town has implemented this Policy 1/Strategy 1 of its Affordable Housing Plan.

B. Status of Progress

The most recent (October, 2023) edition of the Housing Fact Book by HousingWorks RI,⁵ shows the Town at 303 affordable dwelling units, 5.55% of its housing stock of 5,340 units, 231 units short of the 10% threshold under the Act, the level the Plan projected to reach by 2025.⁶

V. THE LOCAL REVIEW BOARD PROCESS REGARDING THE APPLICATION

A. Relevant reviews and recommendations

Lisa Bourbonnais was the Town's Planning Director during the 2013 updating of the Affordable Housing Plan Element of the Town's Comprehensive Plan. Her first Planning Department Staff Report to the Planning Board on the project noted its consistency with the

⁵ HousingWorks RI at Roger Williams University is a clearinghouse of information about housing in Rhode Island, funded in part by Rhode Island Housing and Mortgage Finance Corporation.

⁶ As noted both by the Planning Board's counsel and the Town's Planning Director during the hearing process (6/15/22 Tr. at 14, 33), and SHAB during its hearing and deliberation process (SHAB 11/27/23 Tr. at 62, 63, 109, 112, 113) units are counted as affordable units (for purposes of the "numerator" in the affordable housing fraction) when they are built and actually exist. However, the "denominator" in the fraction remains constant notwithstanding the development of new market rate housing until "it is adjusted for total housing units based on the decennial U.S. census." This latter dynamic is part of the basis for SHAB's rejection of the mathematical analysis that appears on page 2 of the Planning Board Decision. (*Id.* at 88, 89, 110; *see also* R.I.G.L. §45-53-3(4)(i)).

Affordable Housing Plan, particularly citing the above-referenced language on pages 69-70. The Town of East Greenwich Affordable Housing Committee, directly involved in the development of the Affordable Housing Plan, also provided a favorable recommendation to the Planning Board concerning the proposed development's consistency with the Plan.

The Planning Board dismissed summarily the conclusions of Ms. Bourbonnais and the Affordable Housing Committee. (*See Ex. A*, Planning Board Decision at 2). SHAB disagrees. SHAB has carefully reviewed the recommendations of Ms. Bourbonnais and the Affordable Housing Committee, which are informative and persuasive regarding the proper interpretation and application of the Affordable Housing Plan's language on pages 69-70.

B. The Planning Board Meetings Spanning Over a Year

The Planning Board's first public informational meeting session concerning the Application occurred on June 15, 2022. Following the Applicant's initial summary presentation, there were a number of questions and answers between the Applicant's professional team and the Planning Board, and the majority of the meeting was devoted to eliciting public comments.

Thereafter, over a period of several months, there was continuation of the Technical Review Committee meeting process during which various technical issues were addressed, including but not limited to traffic impacts and studies; the public sewer connection to the Town of Coventry; private versus public ownership of roads and infrastructure; school bus stops within the development; roadway widths and driveway lengths, and fire and garbage turning radiuses, etc., standards. (3/14/23 TRC Report; 4/19/23 Tr. at 14, 15, 27-30, 52, 53). The Applicant procured a favorable written evaluation from Kent County Water Authority of its ability to provide public water to the project. (1/12/22 KCWA letter [2022-01-12 DRN]). The Town of Coventry Town Council provided a conditional approval letter for a sewer connection from the project site through

their system to the West Warwick Sewer Treatment facility. (1/27/23 Sewer Letter [2023-02-27 DRN])).

The public informational meeting process resumed on April 19, 2023, and continued with additional sessions on May 3, 2023, May 17, 2023, June 21, 2023, July 19, 2023, and August 2, 2023. A detailed description of this long course of proceedings is not necessary, based upon the limited three grounds upon which the Planning Board based its denial. SHAB provides a summary, with a description of the issue that garnered highlighted attention – traffic impacts.

The Applicant presented the following experts:

- Joseph Lake (an architect with Union Studio Architecture and Community Design),
- Nicole Reilly (a civil engineer with DiPrete Engineering, who testified as to the conceptual stormwater/drainage design for the site, the RIDEM wetland verification, and the further engineering and RIDEM permitting that takes place with respect to those issues at later review stages);
- Joseph Lombardo (a planner, who opined that the proposed development is consistent with the Affordable Housing Plan - including the relevant language at pages 69-70 - and with the local needs of the Town for housing);
- Robert Clinton, (a traffic engineer who provided traffic studies and reports).

The Intervenors presented the following experts:

- Douglas McLean (a planner, who opined that the Applicant should have sought a zone change from the Town Council, rather than filing the Application under the Act, and that the language on pages 69-70 of the Affordable Housing Plan requires mixed use (commercial and residential));
- John Shevlin (a traffic engineer, who opined with respect to traffic impact issues and provided a report).

C. The Traffic Impacts

As noted above and reflected in the Planning Board's Decision, much of the public information meeting was devoted to traffic impacts of the proposed project. Because the Planning Board stated traffic concerns as a specified ground for its denial (*see Ex. A* at 3), SHAB provides a summary of the relevant evidence.

Though not required under the Act, or under the Town's checklist requirements for the master plan stage of review, the Applicant provided a Comprehensive Traffic Impact And Access Study conducted by VHB (dated December, 2020) as part of its master plan submission. [2022-03-DRN]. The study was favorable in terms of the high capacity of Division Road and its ability to sustain a free, uncongested flow of traffic, including in and out of the intersections, and that the required controlling "safety" criteria were met.

During the Technical Review Committee process that occurred simultaneously over a period of months with the master plan public informational meeting sessions, the Town's senior outside traffic engineering consultant, Anna Nova, P.E., peer reviewed VHB's work, and required additional and updated information, studies, calculations, and analyses. This collaborative process produced a revised, updated report by VHB in October of 2022, and another in February 2023. [2023-02-00 DRN (consolidated)]. At the end of February, Ms. Novo concluded that she was "satisfied with all aspects of where we've ended up here and [VHB's] conclusions". (4/19/23 Tr., 68-76). The April 14, 2023 Report of the Town's Technical Review Committee to the Planning Board (para. 9) confirmed that, "The Town's traffic consultant is satisfied with the approach taken by the Traffic Engineer [VHB] within the revised traffic study." Ms. Novo confirmed her concurrence with VHB's favorable report in her testimony, and confirmed there would be no

adverse traffic impacts on the Westfield Drive Neighborhood. (5/3/23 Tr. at 36 - 40; 5/17/23 Tr. at 120, 121).

The Intervenors provided a peer review report and testimony from John Shevlin of Pare Engineering. He concurred with the favorable analysis in VHB's final report with respect to projected traffic volumes and the absence of adverse traffic impacts, and also found the traffic safety-related conclusions of the VHB Report satisfactory. [3/16/23 Pare Report, part of 2023-05-16 DRN]; (5/17/23 Tr. at 11-12). This included that there would be no adverse traffic impacts – or further need to study such impacts -- with respect to the Westfield Drive neighborhood or its intersection with Division Road, nor other intersections in the vicinity. (*Id.* at 18).

Significantly, the Applicant confirmed to the Planning Board its willingness to expand the study area to any other area and provide further study and analysis at the preliminary plan stage of review. (5/3/23 Tr. at 24-26; 6/21/23 Tr. at 13, 22, 23, 26). Also, the Planning Board's experienced legal counsel advised the members that the full details of traffic studies should be reserved for consideration at the preliminary plan stage of review. (6/5/22 Tr. at 8, 9, 12; 5/3/23 Tr. at 32; 6/21/23 Tr. at 63, 64).

D. The Planning Board's Denial of the Application

At the conclusion of its July 19, 2023 public informational meeting session, the Planning Board provided comments toward a draft motion for a denial of the Application at the master plan level. At its August 2, 2023 meeting session, the Planning Board received, considered, and approved a modified version of a draft decision by a vote of 4-1. The finalized written decision, stating the local review board's three grounds for the denial, was signed by the chair on August 3, 2023, and recorded on August 4, 2023. See Ex. A (the Planning Board Decision).

VI. APPELLATE FINDINGS AND CONCLUSIONS TO REVERSE THE PLANNING BOARD DECISION AND GRANT MASTER PLAN APPROVAL OF THE APPLICATION

As noted above, SHAB received extensive briefing in this appeal, which was supplemented by detailed oral arguments during its November 27, 2023 meeting. Based on its deliberations at the conclusion of the meeting, SHAB entered the following unanimous (5-0) findings supporting the conclusion that the Planning Board erred in its conceptual denial, and that the Applicant had sufficiently presented a master plan presentation to allow the proposed development to proceed to a preliminary plan stage of review.⁷

• Ground C (Traffic Impacts)

SHAB had no difficulty concluding that the traffic impact issues that are stated a basis for the denial were prematurely decided. All such traffic impact concerns should instead proceed to further analysis at the preliminary plan stage. SHAB review of the extensive record confirms, that at least for purposes of master plan review, there were no dispositive health and safety issues, particularly traffic, to justify the denial of the proposed project at the first stage of review. (11/27/23 SHAB Tr., 106-108).

Going forward, further study and analysis will be required for the RIDOT Physical Alteration Permit. The relevant traffic issues are well-framed in this extensive record for further analysis, particularly in view of the several points of consensus so far among the parties' experts, as well as the RIDOT preliminary determination that there would be no adverse traffic impacts to the project area, including the nearby neighborhoods.

⁷ SHAB addressed the three grounds in reverse sequence (C-A) because grounds C (traffic concerns) and B (status of the Town's efforts to reach the 10% goal) presented clear and straightforward determinations.

- **Ground B (Town's Progress to Reach the 10% Goal)**

The record evidence shows that Town has not achieved the goal of 10% of its housing stock being deed restricted affordable housing, nor does the record show sufficient progress toward that goal. In SHAB's analysis of this issue, it has focused on the "snapshot" of the Town's progress, rather than looking into a running "video" projecting the future. As its numbers stand today (nearly two decades after adopting the Affordable Housing Plan), the Town still falls far short of meeting the 10% goal. Respectfully, at this point, the Town cannot rest on future aspirational intentions to reach the Act's 10% goal and summarily deny a well-supported master plan (such as the Applicant's proposal), given where the Town stands with its affordable housing entering 2024, in comparison to the Plan's targeted goals by 2025. *See Affordable Housing Plan at 68.*

SHAB disagrees with the mathematical analysis stated at the bottom of page 2 of the Planning Board's Decision, which is an erroneous rationalization that this development would not provide more than minimal help to the Town in reaching its 10% goal. One affordable unit will be added for every three market rate units. Hence, the proportion of affordable units in relation to market rate units will not change, and progress at a 1 of 4 rate (25%) is substantially greater than the 10% goal. Moreover, the "denominator" for purposes of the 10% statutory goal under the Act is static until a future point, further rendering the Planning Board's calculation analysis incorrect. (SHAB 11/27/23 Tr. at 109-113).

Also, SHAB finds persuasive the East Greenwich Affordable Housing Committee's support of the project and how it would help meet the Town's affordable housing needs. (*Id.* at 111).

- **Ground A (Consistency with Affordable Housing Plan and the Proper Interpretation of the Language Stated on Pages 69-70 of the Plan)**

SHAB concludes with the central concern in this appeal: Whether the proposed project is consistent with the Affordable Housing Plan. Particularly, the analysis requires the interpretation

and application of the language of Policy H.1 (Create a new Zoning District) and its footnote 6. (See Affordable Housing Plan at 69-70).

To start, SHAB strongly disagrees with the Planning Board's seemingly negative inference against the project because the Applicant proceeded with a comprehensive permit application before the local review board, as opposed to a zone change request before the Town Counsel. SHAB is especially troubled by the Planning Board's conclusion that "[w]hile such procedural defect is not in-of-itself fatal, it does lead to the substantive finding that the proposed development does not represent mixed-use development." (See Ex. A, Planning Board Decision at 2).

To be clear, there was no procedural requirement that the Applicant must proceed with a petition to the Town Council for a zone change in order to effect waivers of zoning requirements. (SHAB 11/27/23 Tr., 114-119). The Applicant had the right and legal option to proceed with a comprehensive permit application to the Planning Board under the Act, to effect zoning-related waivers associated with the proposal and densities and objectives contemplated by the Affordable Housing Plan. The Applicant's procedural utilization of the Act's comprehensive permit process should not have prompted the Planning Board to make a substantive finding against the project. (*Id.* at 119, 120).

Further, a plain reading of the Affordable Housing Plan reveals that its language relating to commercial uses and villages does not require commercial uses, or the creation of a new "village center." In fact, the Planning Board's Decision on this issue does not recite that commercial uses are required. (See Planning Board Decision (Ex. A) at 2 ("The proposed development does not offer any commercial uses, as **suggested** in the Comprehensive Plan (page 69).")) (emphasis added). By its own words, the Planning Board Decision is erroneous, to the extent that it would

deem "required" items set forth in the Affordable Housing Plan as "suggestions". (SHAB 11/27/23 Tr. at 121, 122).

The Planning Board's adoption of the findings of Douglas McLean is erroneous, as it relates to the Board's findings on consistency with the approved Affordable Housing Plan element of the Comprehensive Plan, including, without limitation, the summary in the McLean Report in the box on its page 7 entitled, "Community Character Conclusions." Based upon its review of the record, SHAB concludes that Mr. McLean had a seeming aversion to the process allowed by the Act, which the Applicant legally invoked (as opposed to a zone change petition to the Town Council). (*Id.* at 123-127). SHAB finds much more persuasive the report and analysis of Ms. Bourbonnais, who certainly had more direct understanding of the Plan's adoption and language, leading her to view the proposed project favorably and consistent with the Affordable Housing Plan. (*Id.*)

In the end, the plain language of the Affordable Housing Plan is dispositive. By its express language, there is no **requirement** for a commercial component stated on pages 69-70. The language speaks clearly of commercial usage in terms of something that is "**allowed**" as an "**option**," as opposed to being "required." SHAB disagrees with the Board's misapplication of the Plan's language, which wrongly led it to impose commercial development as a mandatory prerequisite to master plan approval. The language plainly speaks that the Town will "allow" mixed use development and "allow" commercial structures, with the caveat that where commercial structures are elected there will be upper story residential use. (*Id.* at 126-129). The Planning Board misread and misapplied the language, which led to its wrong result in the denial of the Application.

VII. CONCLUSION

In unanimously finding and concluding that the Applicant has presented a sufficient master plan, SHAB must reiterate that its granting of master plan approval of the Application signifies only the completion of step one in the required three successive phases of review. Going forward, the Applicant must obtain and present engineering analyses and expert evidence to meet its more detailed burden of proof at the preliminary plan level, subject to the Planning Board's full consideration of all material issues including health, safety, and environmental concerns. Nothing in this decision limits rights of the Planning Board and interested members of the public from raising such concerns during the preliminary plan review proceedings.

All SHAB members, who heard this appeal, have approved this decision before its issuance on the date stated below.

Entered on this 30th day of December, 2023.

STATE HOUSING APPEALS BOARD

/s/ James Grundy

Vice Chairperson and Acting Chair in this Appeal

EXHIBIT A

EAST GREENWICH PLANNING BOARD DECISION



Town of East Greenwich
Planning Board

RECORDED 08/04/2023 11:33:08 AM
B/P:1647/Pgs 336 - 338; (3 pgs)
INST# 20202
TOWN OF EAST GREENWICH, RI
111 Perce Street
PO Box 111
East Greenwich, RI 02818
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Decision: August 02, 2023
Approved: August 02, 2023
Recorded:

**Comprehensive Permit – Master Plan Denial
“Division Road Neighborhood”**

WHEREAS: Representatives of the applicant, Division Road Neighborhood, LLC c/o Ned Capozzi, Modern Industries, Inc., proposes development of a parcel owned by Modern Industries, Inc, located at Assessor's Map 67, Plat 13, Lots 35 and 53. The subject property is a vacant wooded parcel having just over 80 acres. It is located in an F-2 (single family residential and farm zone) zoning district; and

WHEREAS: The proposal calls for the new construction of 410 residential units in a variety of housing types and styles ranging from multi-story apartment buildings to small single-family cottages. The development will be serviced by public water and sewer. All of the roadways are proposed to be owned and maintained by a private condominium association; and

WHEREAS: The applicant will provide 25 percent of the proposed dwelling units as deed-restricted “affordable” units, thus qualifying the project for a Comprehensive Permit review per Rhode Island General Laws Section 45-53 and Chapter 63 of the Town of East Greenwich Code; and

WHEREAS: The Planning Board received reports and testimony from Town Departments, the Technical Review Committee, representatives of the applicant, and other interested parties regarding the proposed land development, including expert testimony from traffic experts and comprehensive planning experts both in favor of and against the proposed developments at public informational meetings held on June 15, 2022, April 19, 2023, May 03, 2023, May 17, 2023, June 21, 2023 and July 19, 2023; and

Having considered the requirements of Rhode Island General Laws of 1956, as amended, §45-23-30 and §45-23-41, and the Low and Moderate Income Housing Act, R.I. General Laws §45-53, and weighing the urgent need for affordable housing against the other factors set forth in such laws, and based on:

- Review and consideration of the Technical Review Committee's report and recommendations of the staff, and
- Review and consideration of the Exhibits made part of the record, and
- Personal knowledge of the area in question, and
- Testimony, including the expert testimony both in favor and against, as presented to the Board during the public informational meetings, now

THEREFORE: The Planning Board hereby **DENIES** the Comprehensive Permit - Master Plan for "Division Road Neighborhood" for the following reasons:

(A) The Planning Board finds that the proposal is not in conformance with the comprehensive plan. The board finds that the applicant did not follow the procedural steps required to change the current zoning district (F-2) to the suggested zoning district (MUPD) as presented in the Comprehensive Plan (page 69). The applicant decided to utilize the procedures of a Comprehensive Permit. While such procedural defect is not in-of-itself fatal, it does lead to the substantive finding that the proposed development does not represent mixed-use development. The proposed development does not offer any commercial uses nor create a village center as suggested in the Comprehensive Plan (page 69). The applicant has indicated that it pursued this direction based on advice from the former Planning Director of the Town, and also from feedback at Technical Review Committee (TRC) meetings. However, neither the former Planning Director nor the TRC had the authority to make such unofficial changes in the Comprehensive Plan. Also, the former Planning Director and TRC did not have the benefit of any public hearings or input before making such suggestions.

Had the applicant followed the proper procedure and applied for the zoning amendment, such public hearings would have revealed this deficiency. As it was, the Comprehensive Permit public informational meetings did bring these shortcomings to light. The proposed development's deviance from the Comprehensive Plan by not including a village center and commercial use is significant for two reasons. First, without these elements, instead of expanding and recreating the traditional New England development pattern of village nodes, the proposed all-residential development just expands the continuing problem of suburban sprawl. Secondly, such new suburban sprawl leads to significantly increased traffic and the concerns for the environment and the health and safety of the residents as discussed in Section C below.

The Board further accepts and finds credible the findings of planning expert Douglas McLean, AICP, especially with regard to the inconsistency of the proposed development with the Comprehensive Plan, and adopts the findings in his report dated April 20, 2013.

(B) The Planning Board finds that the Town has met or has plans to meet the goal of ten percent (10%) of the year-round units and also finds that the Town has achieved or has made significant progress towards meeting the goals required by this section. The Board finds that the Town has made significant gains in the number of deed-restricted "affordable" units. The Board recognizes a total of 114 deed restricted units that are presently approved and are under construction but not yet registered with Rhode Island Housing. The units that are approved and under construction are; 53 remaining units located at Brookside Terrance, South County Trail, and 65 units at Frenchtown Road Apartments, Frenchtown Road.

The Board realizes that any approved development with more than 10% (even 11%) affordable units will move the Town closer to its 10% goal. This one, with 25% affordable units, will increase the number and percentage of affordable units. However, the typical East Greenwich development is only 10 to 25 units total. The huge size of this development in comparison, with 307 market rate units, will cause the denominator of the 1/10 (10%) requirement to increase so substantially that it will take longer for the Town to reach 10%, assuming typical development patterns continue. Therefore, the Board finds that this development, if approved, would not provide more than minimal help to the Town in reaching its 10% goal over the long term.

(C) The Planning Board finds that the concerns for the environment and the health and safety of current and future residents have not been adequately addressed. Extensive expert testimony was provided by David Clinton of VHB. While acknowledging significant numerical and percentage increase in traffic on the roadways in the immediate vicinity, he concluded that such increase would not be harmful to the public safety.

Peer review of Mr. Clinton's report(s) was conducted by the Town's consulting traffic engineer, Anna Novo of Caputo and Wick. While part of her conclusion was in agreement with Mr. Clinton, she did acknowledge that it has been almost 20 years since a new comprehensive study of this western section of the Town has been undertaken, and thus even her own conclusions that a wider area traffic study was not necessary were based on multiple assumptions related to development that had or had not taken place over the past 20 years, especially with regard to the area of the Division Road and South County Trail (a/k/a Route 2) intersection and some of the key intersections between such locale and the proposed development.

Expert traffic testimony was also presented by John Shevlin of Pare Corporation. Among other concerns, he specifically recommended that "although this intersection [Division Road and South County Trail] is a good distance away from the project site, over 2 miles, there are not a lot of destinations between the project site and the intersection. It is our belief that traffic should be evaluated for Existing, Future No-Build and Future Build conditions." (Shevlin letter – April 19, 2023)

Based on the conflicting expert testimony presented to the Board, as well as the extensive lay testimony by residents which the Board acknowledges is not probative evidence but which does provide insight in to the historical traffic conditions in this area, and the Board members' personal knowledge of the area in question, the Board finds Mr. Shevlin's testimony more credible than that of Mr. Clinton, and the Board finds that Ms. Novo's testimony when taken in its overall context, does not contradict Mr. Shevlin's expert testimony.

Therefore, based on all of the foregoing, the applicant has not adequately addressed the future traffic impacts to the surrounding roadway system.

Member Wood made a motion to approve the draft decision, as amended at the meeting, to DENY the Division Road Neighborhood project Comprehensive Permit. Member Shartenberg seconded the motion. The following Board members voted in the affirmative to issue the final decision to DENY: Members deGroot, Lupovitz, Wood and Shartenberg. Member Renninger voted in the negative. Therefore, Division Road Neighborhood project Comprehensive Permit is DENIED on a 4-1 vote.

By Order of the Planning Board:



Benjamin Lupovitz, Chair

8-3-23