

STATE HOUSING APPEALS BOARD

44 Washington Street

Providence, Rhode Island 02903

Phone - (401) 457-1285

Fax (401) 457-1140

e-mail: jjones@rihousing.com

Minutes of the September 14, 2004 Board Meeting

The September 14, 2004 meeting of the State Housing Appeals Board (i\$SHABi" or i\$Boardi") was called to order at 2:10 PM in Room 306 at the East Providence City Hall, 145 Taunton Avenue, East Providence, Rhode Island by Judge Stephen Erickson, Chair. Board members in attendance were Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'iBrien, Steve Ostiguy, and Dr. Isadore Ramos. Board members Frank Giorgio III and Thomas Hodge were not present. Also present were Steven Richard, Esq., legal counsel to the Board, and Judy Jones and Christine DaRocha, administrative staff to the Board. With seven members present, Judge Erickson declared a quorum.

Mr. Ostiguy moved and Mr. Goodrich seconded the motion to approve the minutes of the August 11, 2004 Board meeting. The motion was approved unanimously with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'iBrien, Steve

Ostiguy, and Dr. Isadore Ramos voting in the affirmative.

Substantial Completeness Determinations

Ms. Jones reported on the current status of the substantial completeness determinations:

„h Sixteen (16) were determined by the towns not to be substantially complete.

„h Two (2) were determined to be substantially complete.

„h One (1) town asked the SHAB to make the determination of substantial completeness.

„h One (1) town moved to dismiss the appeal.

**Appeal No. 2004-20 Lincoln Hills, LLC vs. the Town of Lincoln ZBR ;V
Motion from the Zoning Board and Town to Dismiss the Appeal**

George Prescott, Esq. represented the Town of Lincoln Zoning Board of Review and the Town. Mr. William Landry, Esq. represented Lincoln Hills, LLC.

Mr. Prescott noted that in addition to this motion to dismiss the appeal before the SHAB, the Lincoln Zoning Board also responded to the request for a substantial completeness determination by listing items that were not included in the Lincoln Hills, LLC comprehensive permit application.

Mr. Prescott described the travel of the appeal from its initial filing as Appeal No.

2003-04 through the filing of the current appeal, No. 2004-20. Mr. Prescott argued that the current appeal was inappropriately filed because the original appeal was withdrawn without prejudice and the developer's petition for a writ of mandamus is pending civil action in Superior Court.

Mr. Richard asked Mr. Prescott if this appeal was affected by the moratorium. Mr. Prescott responded that as of February 13, 2004, there was no comprehensive permit application pending before the Zoning Board or appeal pending before the SHAB.

Mr. Landry stated that this case concerns the issue of substantial completeness. The appellant is arguing in Superior Court that the Zoning Board ordinances establishing criteria for the submission of a comprehensive permit application were too burdensome. The new Housing Act gives SHAB responsibility for determining substantial completeness and establishes the standards for substantial completeness. Mr. Landry agreed that there was neither an application before the Zoning Board nor an appeal before the SHAB.

Judge Erickson observed that the other applications for which the SHAB must make a determination of completeness were before zoning boards when they were appealed to the SHAB. He asked if all

the critical events in this case occurred before the effective date of the moratorium. Mr. Landry said they had.

Judge Erickson noted, and Mr. Landry agreed, that the current appeal before the SHAB was an attempt by the appellant to exhaust all administrative remedies.

Mr. Godfrey moved and Mr. O'Brien seconded the motion to grant the motion to dismiss the appeal. The motion is based on the determination that all of the other appeals requiring substantial completeness determinations were before zoning boards when they were appealed to the SHAB. Also, the writ of mandamus was sought in Superior Court prior to the effective date of the moratorium and, therefore, the developer's application was not impacted by the moratorium.

The motion was approved unanimously with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative. A written decision will be submitted for the Board's review at its next meeting.

Report on the Status of the Highland Hills Appeals before the

Supreme Court

Mr. Richard said that Justice Weisberger was unable to mediate a settlement of any of the Highland Hills/Town of Cumberland appeals pending before the Supreme Court. The Court established a briefing schedule. The appeals will likely be heard late this year or in early 2005.

Adoption of the Decision in Appeal No. 2004-02 Boyd Brook Partners, LLC vs. the Town of Coventry Zoning Board of Review

Mr. Richard noted that he had sent a letter to all the counsel informing them that the decision would be issued a few days later than the thirty-day requirement and invited any objections. Counsel for the Zoning Board and the abutters responded that they had no objection. Mr. Richard said that he did not hear from the appellant's attorney.

Judge Erickson said that the decision before the Board will be entered.

Appeal No. 2003-08 JCM, LLC vs. the Town of Cumberland Zoning Board of Review

Before taking up this specific appeal, Mr. Richard reviewed the standards and criteria, which the Board must use to address the

substantive issues of an appeal. Section 6 of the Low and Moderate Income Housing Act (R.I.G.L. 45-53) states that in the case of a denial by a zoning board, the SHAB must determine whether the decision was reasonable and consistent with local needs. The Supreme Court ruled in the Omni case that the decision of the zoning board is consistent with local needs if the municipality exceeds the 10% or 15% standard and has adopted a comprehensive plan that includes a housing element that addresses the need for low and moderate income housing for that community. Any zoning or land use ordinance that is properly enacted under these circumstances is considered consistent with local needs. Based on these standards, the SHAB cannot vacate a decision of the zoning board.

If the community has not met that standard, then the SHAB cannot make the assumption that the decision of the zoning board was consistent with local needs and must apply the standards found in Section 2.07 (i)(a-e) of the rules and regulations and make specific finding of fact based on the following criteria:

2.07 Consistent with local needs means:

- (i) consistent with local zoning and land use ordinances and other requirements and regulations which are reasonable in view of:-**
 - (a) the State's need for low and moderate income housing;**
 - (b) the number of low income persons in the city or town affected;**
 - (c) the need to protect the health and safety of the occupants of the proposed housing or of the residents of the city or town;**

- (d) the need to promote better site and building design in relation to the surroundings or to preserve open space; and if**
- (e) local zoning or land use ordinances, requirements and regulations are applied as equally as possible to both subsidized and unsubsidized housing.**

The question of consistency with local needs is the over-riding question that the Board must address.

Mr. O'Brien said that his understanding is that if the community has a state-approved affordable housing plan in the housing element of its comprehensive plan, it has met the standard set forth in R.I.G.L. 45-53-4. He asked if the SHAB has the same understanding.

Judge Erickson said that raised the question of what "plans to meet" the 10% or 15% standard means. Mr. O'Brien said that once the state has approved the affordable housing plan, a determination of how the community is actually implementing the plan would have to be made.

Judge Erickson said that it is not within the jurisdiction of the SHAB to evaluate an affordable housing plan. The SHAB would operate on the principle of the "presumptive validity" of a state-approved affordable housing plan. However, the SHAB can make a judgement on the implementation of the plan.

Dr. Ramos asked when an affordable housing plan becomes effective.

Judge Erickson said that is the critical question. Is an approved plan enough or must the community do something further?

Mr. Richard said that applying the “consistent with local needs” standard, the SHAB cannot overrule a zoning board if the community has implemented local ordinances and regulations and exceeds the 10% or 15% standard.

Mr. O'Brien noted that the state's planning law says that when a municipality adopts a comprehensive plan, land use decisions going forward must be rendered according to that locally adopted plan.

Mr. Godfrey said that in this appeal there was an adopted plan, but no hearing on the comprehensive permit application. Is the mere approval of a plan sufficient? Mr. Richard said a second issue is that the Zoning Board did not make findings of fact that the application was inconsistent with local needs or the plan.

Judge Erickson said that if having an approved plan is sufficient, then SHAB should go no further with this appeal. However, if having only a plan is not sufficient, then the question is whether the comprehensive permit application is in accordance with the plan.

The attorneys representing the parties in Appeal No. 2003-08 identified themselves: Anthony DeSisto, Esq. for the appellant;

Richard Kirby, Esq. for the Cumberland Zoning Board; and J. William Harsch, Esq. for the abutters.

Referencing the Appellant's Memorandum in Support of its Appeal dated July 20, 2004, Mr. Richard asked Mr. DeSisto if the appellant waived the issues of whether the Zoning Board failed (1) to schedule a hearing within thirty days of the receipt of the application and (2) to issue a written decision within 40 days. Mr. DeSisto said those matters are waived.

Mr. DeSisto presented his argument that the Zoning Board never addressed the consistency of the application with local needs. He also argued that the Town does not have an affordable housing plan until it adopts the necessary ordinances to implement the plan.

Judge Erickson noted that in the Omni decision, the Supreme Court gave great deference to local plans. Mr. Richard said that the Town would have to act in consistency with the plan. Mr. O'Brien noted that a town would put itself at great risk if it adopted its comprehensive plan and zoning ordinance implementing that plan at the same time, since Statewide Planning would not have approved the plan at that point.

Addressing the issue of a hearing before the Zoning Board, Mr. DeSisto said that the appellant had no opportunity to argue that the comprehensive permit application was consistent with local needs.

The Board took a ten-minute break.

Mr. Kirby presented the argument on behalf of the Cumberland Zoning Board that the denial is valid because the Town had a plan to meet the 10% standard. He said the Zoning Board "reviewed" the application, offered the developer an opportunity to submit information, and heard from the town planner regarding the application's inconsistencies with the plan.

J. William Harsch, Esq., representing the abutters, raised the water supply issues as they pertained to the development of this project. Judge Erickson and Mr. Godfrey both interjected that this issue was not presented at the Zoning Board hearing. As an appellate body, the SHAB can only address what was presented at the hearing.

Mr. Harsch noted that the abutters were never given an opportunity to voice their concerns before the Zoning Board.

Judge Erickson and Mr. Richard noted that, although the abutters may agree with the decision of the Zoning Board to deny the application, they would be in a stronger legal position if there were a full hearing where they could have presented their views.

Mr. O'Brien and Mr. Richard both observed that the Zoning Board still had to complete the hearing process in order to deny the

application. Mr. O'Brien also noted that not all actions called for in a plan rely on the revision of the local ordinances.

Judge Erickson asked Mr. DeSisto if, in his opinion, the plan required the Town to adopt ordinances one year after its adoption. Mr. DeSisto replied that if the plan lays out a one-year timeline, the plan is not adopted until those steps are taken.

Mr. Richard observed that Mr. Landry, counsel for the appellant before the Zoning Board, never said that the proposal was consistent with the plan. He focused on implementation of the plan. Mr. DeSisto said that this appeal is primarily based on a procedural argument; there are no findings of fact.

Mr. O'Brien moved to deny the appeal and sustain the decision of the Cumberland Zoning Board for the following reasons: (1) an approved plan was in place at the time of the December Zoning Board meeting; (2) the Zoning Board found the application inconsistent with the comprehensive plan based on the testimony of the town planner; and (3) it is not a reasonable that the ordinances must be in place. There was no second to this motion.

Mr. Ostiguy moved and Mr. Goodrich seconded the motion to remand the case back to the Cumberland Zoning Board to conduct a hearing. Mr. Ostiguy said that his motion was based on the fact that it is difficult to find sites for development and therefore, communities

should hear proposals for sites that may not be identified in their plans, but still may be suitable. Mr. Goodrich said he seconded the motion because of the Zoning Board's procedures in addressing this application; decisions should be based on testimony.

In discussing the motion, Mr. O'Brien said that he supported it based on the procedural issue, not on the premise that the applicant can propose a better location not identified in the plan. Plans should be given precedence, and their validity not questioned. Mr. Ostiguy agreed that there also are procedural concerns, and there should be an opportunity for determinations to be made by the Town.

Judge Erickson said that sending the case back to the Town has the advantage of giving each party an opportunity to develop a record. The validity of the plan is not in question. Remanding the case provides an opportunity for the Town to review the consistency of the application with the plan and make findings of fact.

The motion was approved unanimously with Judge Stephen Erickson, Richard Godfrey, Donald Goodrich, Charles Maynard, John O'Brien, Steve Ostiguy, and Dr. Isadore Ramos voting in the affirmative. Mr. Richard will draft an order.

Appeal No. 2004-01 Deer Brook Development Corporation vs. the Town of Exeter Zoning Board of Review

Scott Spear, Esq. represented the appellant, and Stephen Brouillard, Esq. represented the Town of Exeter Zoning Board.

As the Board did not have sufficient time at this meeting to complete the hearing of this appeal, it was re-scheduled to September 20, 2004.

Mr. Spear said that he may also need to come before the Board on a matter relating to Appeal No. 2001-01 Omni Development Corporation vs. the Town of Coventry and requested that it be addressed by the Board on the same day. The SHAB retained jurisdiction over the Omni appeal. Judge Erickson said it would be posted for the next meeting.

Mr. Goodrich moved and Mr. Maynard seconded the motion that the Board continue the hearing on Appeal No. 2004-01 until September 20, 2004 at 2:00 PM, location to be determined.

The Board adjourned at 4:45 PM.

Respectfully submitted,

Stephen P. Erickson, Chair