

STATE HOUSING APPEALS BOARD

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Minutes of the October 22, 2008 Board Meeting

The State Housing Appeals Board (“SHAB” or the “Board”) held a public meeting on October 22, 2008 at the Warwick City Hall.

ATTENDANCE

The following members attended the meeting: Charles Maynard, Donald Goodrich, Cynthia Fagan and Mary Shekarchi, Esq., Chair. Also present were Steven M. Richard, legal counsel to the SHAB, Katherine Maxwell, and Karen Slavin, administrative staff to the SHAB.

Chairwoman Shekarchi called the meeting to order at 2:00 p.m.

AGENDA ITEMS

1. Approval of minutes of SHAB's April 18, 2008 meeting

A motion was made by Mr. Goodrich to approve the minutes. Mr. Maynard seconded. Motion was passed unanimously.

2. Docket Update by SHAB's Legal Counsel.

Mr. Richard provided a status of the Clarks Falls SHAB Decision (SHAB Appeal 2006-02). Mr. Richard further informed the Board concerning current SHAB appeals and the anticipated increased meeting schedule in 2009. Continuing, Mr. Richard reported that the Highland Hills matter (SHAB Appeal 2005-04) has been settled by the parties. He further noted that to the best of his knowledge judicial activity on appeals taken from SHAB decisions was currently light.

3. Motion for Reduction or Waiver of a Portion of the Appeal Filing Fee.

Attorney Joseph LaMagna, counsel for the developer sought a reduction of SHAB's \$6000 appeal filing fee and asked the Board to consider the limited resources of his clients and the small size of the proposed development. He noted that the SHAB standard fee covered developments up to 25 total units while his client sought only four units plus a limited amount of commercial space. The

Board noted that the regulations allowed a reduction in fees for good cause. Mr. Maynard questioned how the standard SHAB appeal fee had been derived. Mr. Richard provided background on the reasons for developing the fee structure. Ms. Maxwell described the SHAB budgetary analysis undertaken by Rhode Island Housing to establish the fee. Chairwoman Shekarchi inquired about the correlation of the number of units to the fee. Mr. Richard noted that the volume of the record also effected the time and resources needed. Ms. Maxwell confirmed that the volume of the record of the appeal in question was comparatively low. Mr. Maynard noted that the SHAB appeal fee charged to non-profit developers is \$2000 according to the SHAB regulations. Mr. Goodrich proposed that the appeal fee be reduced to \$3000. Mr. Maynard seconded. Motion passed unanimously.

4. NEMA Enterprises v. Town of Westerly SHAB appeal # 2008-01

On behalf of the developer, Karen Pelczarski, Esq. informed the Board of the events surrounding NEMA's comprehensive permit application to the Town of Westerly. She acknowledged her client's omission of the name of an abutter legally entitled to notice of the application. She agreed this rendered the hearings conducted by the Westerly Planning Board a nullity. However, she argued that the town's position that this nullity required the developer to file an entirely new application was wrong. The town and developer had come to an impasse on this issue and this unreasonable delay. She

reasoned this was effectively a denial of the comprehensive permit application. The developer thus appealed to SHAB to remand the matter back to the town to reopen the hearing.

Arguing for the town, Andrew Teitz, Esq. affirmed that the town's position that a new application is required for this comprehensive permit. He noted that NEMA's application had been filed within a few days of the passage of a new zoning ordinance which specified density bonuses for affordable housing. NEMA's comprehensive permit application sought density in excess of that permitted by that ordinance. He contended that NEMA's application notice omission could be fatal but that it was not within SHAB's jurisdiction to determine that. According to his reasoning, the town's refusal to reopen NEMA's hearing was not a denial of the application, therefore SHAB lacked the authority to hear the appeal. He maintained that the developer may have an appropriate remedy in seeking a declaratory judgment in Superior Court, noting that the omitted abutter had an appeal pending there. Mr. Teitz continued, claiming SHAB's ability to determine the "substantial completeness" of comprehensive applications was limited to the period of time before the General Assembly passed the moratorium. Finally, Mr. Teitz argued that the town's certification of NEMA's application only certified that it appeared complete at the time it was filed but in fact, it was flawed because of the notice failure.

The Board deliberated the question of whether the towns demand for

a new application from NEMA constituted a denial. Mr. Richard pointed out the statutory language delineating SHAB's jurisdictional authority in the case of denials. Ms. Pelczarski maintained that Westerly's actions amounted to a denial by procedural means.

Mr. Maynard questioned whether the Superior Court might determine whether NEMA's application as filed remained viable. Ms. Pelczarski maintained that since the application was not going forward, Westerly had denied it. Mr. Goodrich concurred but noted there was not an actual decision to examine or potentially remand. Ms. Fagan stated her opinion that there was no denial to consider.

Mr. Maynard again questioned SHAB's authority to remand the appeal in the absence of a written decision to assess in accordance with the standards of review. Mr. Goodrich questioned alternatives available to developers in situations where towns declined to move forward on complete comprehensive permit applications.

On questioning by Chairwoman Shekarchi, Mr. Richard outlined the legislative grant of jurisdiction to SHAB, the required findings in adjudicating the appeal and the remedies SHAB is entitled to grant.

Upon deliberation by the Board, Mr. Maynard moved that SHAB determine it does not have jurisdiction to hear this appeal. Chairwoman Shekarchi and Ms. Fagan voted Aye. Mr. Goodrich voted Nay, reflecting his opinion that SHAB had jurisdiction in this

matter. Mr. Richard stated that he would write brief decision focused on SHAB's determination of jurisdiction.

5. Other Business

The Board briefly discussed the upcoming meeting schedule and administrative matters related to appointments.

Adjournment

Meeting adjourned at 3:45 PM.

Respectfully submitted,

Chairperson

Mary B. Shekarchi, Esq.

