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MEMORANDUM

TO: West Greenwich Planning Board

FROM: Nancy E. Letendre, Esq., AICP; Assistant Town Solicitor

DATE: December 13, 2010

SUBJECT: Review of SWAP Preliminary Plan Application

At your request I have put together a detailed discussion of the status of SWAP's Master Plan and the vested conditions of the development plan.

The result of the SHAB appeal and its decision was the approval of the April 2004 Master Plan for the Victory Woods subdivision. The conditions on that plan were approved *de facto*. They include the number of lots, the road configuration, a private community well and private OWTSS. However, some of the master plan details have been modified by the Consent Order of the Rhode Island Supreme Court.

Specific Conditions of the approved Master Plan

The conclusions of the SHAB left open for discussion at Preliminary "conditions concern(ing) material issues in the **consistency with local needs analysis**, water availability, egress issues, and health and safety concerns". Page 19 of the decision of the SHAB is attached here as Exhibit 1. These conditions include those originally considered as part of the Zoning Board's draft motion to approve. Again, some of the conditions originally contemplated have been modified by the Consent Order of the Rhode Island Supreme Court.

A list of the conditions of the development vested to the applicant by the interplay of both the SHAB approved master plan and the requirements of the Rhode Island Supreme Court Consent Order is attached here as Exhibit 2.

What is “the consistent with local needs analysis”?

In accordance with R.I. Gen. Laws § 45-53, *“Consistent with local needs means reasonable in view of the state need for low or moderate income housing, considered with the number of low income persons in the town affected and the need (a) to protect the health and safety of the occupants of the proposed housing or of the residents of the town, (b) to promote better site and building design in relation to the surroundings, or (c) 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.”*

To support either a positive or negative finding of “consistent with local needs” discuss DURING the public hearing and write into the decision:

1. Is the proposed development “reasonable” when the “number of low income persons” accommodated by the subdivision is considered in balance with the need to [(a), (b) or (c)]

AND

2. “The local zoning or land use ordinances, requirements, and regulations (applicable to the relevant issue(s)) are applied as equally as possible to both subsidized and unsubsidized housing.”

[You **must** also discuss how under similar circumstances for a 100% market rate development the concern and application would be the same.]

To DENY a Comprehensive Permit application the Planning Board must **also** find:

“(1) The Town has an approved affordable housing plan and is meeting housing needs, and the proposal is inconsistent with the affordable housing plan. In this section “meeting housing needs” means adoption of the implementation program of an approved affordable housing plan and the absence of unreasonable denial of applications that are made pursuant to an approved affordable housing plan in order to accomplish the purposes and expectations of the approved affordable housing plan.”

To support this criteria for denial discuss DURING the public hearing and write into the decision as findings:

- The Town’s Housing Plan, adopted on [date] which was approved by the Director of Administration on [date]
- The Town has implemented the affordable housing plan by
- The Town has approved several applications for LMI Housing under the

Comprehensive Permit process thus

- The Town has also approved ... which was/were made in accordance with the [inclusionary or other] provisions of the approved affordable housing plan.
- The Town denies [x relief/ this application] for the reasons related to [] as discussed in detail in finding of fact(s) above.

AND

*“(2) **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. Local zoning and land use ordinances, requirements, or regulations are consistent with local needs when imposed by the Town Council after comprehensive hearing, and, the Town either has existing low or moderate income housing units in excess of ten percent (10%) of the year-round housing units reported in the latest decennial census of the town, or the Town has promulgated zoning or land use ordinances, requirements, and regulations to implement a comprehensive plan which has been adopted and approved pursuant to state law, and the housing element of the comprehensive plan provides for low and moderate income housing in excess of ten percent (10%) of the year-round housing units.**”*

To support a finding that the proposal **is NOT consistent with local needs** discuss DURING the public hearing and write into the decision:

- The Town has adopted land use requirements designed to implement the approved affordable housing plan. [Describe implementation schedule.]
- The Town has promulgated land use requirements [a,b,c] as part of this implementation effort. [Describe implementation progress.]
- The land use requirement that _____ is presumed to be consistent with local needs because it was imposed by the Town Council after comprehensive hearing on [date]. [Note: This can not be said for Subdivision Regulation provisions.]

OR

- The proposed development IS NOT reasonable when the number of low income persons accommodated by the subdivision is considered in balance with the need to [(a), (b) or (c)]

AND (this must be included)

- The local zoning or land use ordinances, requirements, and regulations (applicable to the relevant issue) are applied as equally as possible to both subsidized and unsubsidized housing.
-

[Discuss how under similar circumstances for a 100% market rate development the concern and application of [(a), (b), (c)] would be the same.]

The Preliminary Plan Submission

The SHAB decision allowed SWAP “to proceed to seek appropriate reviews at the State level” and “reappear before the Zoning Board for further proceedings in the preliminary and final stages of review.” The Consent Order at page 2 reads “The remaining permitting regimen shall follow the course of the preliminary/ final approval process contemplated by the 2004 amendments to the Low And Moderate Income Housing Act, R.I.G.L. § 45-53-1, et seq.” The Act, at 45-53-4(1)(vii) qualifies the submission requirements for a Preliminary Plan application.

“the applicant must submit those items included in the checklist for a preliminary plan for a major land development or major subdivision project in the local regulations promulgated pursuant to § 45-23-41, *with the exception of evidence of state or federal permits*. All required state and federal *permits* must be obtained *prior to the final plan approval* or the issuance of a building permit;”

At the November Planning Board meeting William Landry expressed the applicants desire to proceed with the Preliminary Plan submission without State permits (i.e. RIDEM, DOH and RIDOT) for the proposed major subdivision. It appears that they have a legal right to proceed with their submission without State permits in hand. However, the Planning Board is not prohibited from requesting information in addition to what is on the Preliminary Plan Checklist.

For the Planning Board to approve an application, the applicant has the burden to prove to the satisfaction of the Planning Board that each and every one of the criteria for approval has been met. If the Planning Board is not satisfied that a criteria of approval has been met then the Planning Board needs to indicate the reasons why. The Planning Board may require any documentation or testing that is necessary for them to render a decision on the application.

Attached to this memo is a detailed discussion of the criteria applied to the Comprehensive Permit application and suggestions on how to satisfactorily address each criteria for a decision either to approve or deny an application.

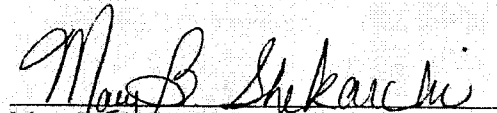
I will gladly discuss this information with the Planning Board at your convenience.

disputed conditions would render the proposed project infeasible.²² See R.I.G.L. § 45-53-6(c) (empowering SHAB to review the feasibility of conditions prescribed as part of an approval of an application for a comprehensive permit).

SHAB has sought to reach a practical result here. It is not, in any way, opining as to the legitimacy of any of the conditions that the Town was considering before its improper denial of the Application. Those conditions concern material issues in the consistency with local needs analysis, such as water availability, egress issues, and health and safety concerns, which will have to be resolved as the Application progresses and before final approvals may be given. After weighing carefully all of the parties' cogent arguments, SHAB believes that SWAP should be allowed to proceed to seek appropriate reviews at the State level and that the developer should be afforded the opportunity to reappear before the Zoning Board for further proceedings in the preliminary and final plan stages of review. SHAB's ruling herein should not be interpreted as constraining the Zoning Board from revisiting, refining and imposing all reasonably appropriate conditions to ensure that the Victory Woods project will be consistent with local needs as defined by the Act.

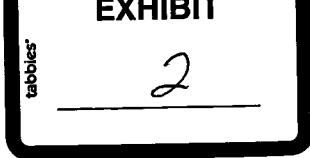
IV. CONCLUSION

SHAB reverses the Zoning Board's denial of the Application and deems that SWAP carried its burden of proof for a master plan level submission. The matter is remanded back to the Zoning Board for further proceedings.



Mary B. Shekarchi
Chairperson
State Housing Appeals Board
Dated: June 23, 2006

²² SWAP has indicated that it is willing to accept some of the conditions and engage in dialogue with the Town on others. On remand, SHAB encourages SWAP and the Zoning Board to stipulate promptly to the conditions that are not in dispute.



Conditions Vested and Relief Granted

Approval by SHAB included the following in accordance with the plans titled "Comprehensive Plan Set for Victory Woods," as revised through April 2004 with modifications made through the Consent Order of the Rhode Island Supreme Court.

1. The approved project includes 50 lots and 50 single-family dwelling units. The house lots range in size from 14,620 to 36,990 square feet, with the average lot size at about 17,000 square feet.
2. Architectural plans exhibiting Cape, Split-level, Ranch, Bi-Level, and Colonial style single family homes have been approved in accordance with the applicant's submission. The dwelling units are approved to be up to 2,100 square feet, all of which shall contain three bedrooms.
3. All roads are approved as described on the April 2004 amended plan as future public roadways.
4. A community well under private ownership and maintenance and private OWTS are proposed subject to approval by State regulators.
5. A buffer area of 50 feet (to include the 25 feet of water line easement) along the south-west boundary and 25 feet between the development and Lot 15-1.
6. Two 10,000 gallon cisterns and one radio call box for fire protection shall be included.
7. A stub road to the boundary of Lot 15-1 shall be maintained in lieu of an alternate or emergency means of egress.

SHAB approval included the granting of the following waivers, variances and exceptions from Town of West Greenwich ordinances and regulations.

	Ord/Reg	Subsection	Description of Relief
1	Zoning Ordinance and Subdivision Regulations	Article II, Section 1 (D) Article XIII, Section C4(B) and C4(C)	Reduction in yard and area dimensions. <ul style="list-style-type: none"> · lot size from 2 acre minimum to as indicated on the approved plan. · frontage from 200 foot minimum to as indicated on the approved plan · front and rear yard from 50 feet (to be spelled out in the Preliminary Plan) · side and corner side yard from 25 feet to 20 feet <p>Building envelope for each lot shall be determined at Preliminary Plan.</p>
2	Subdivision Regulations	Article III, Section C	Land Unsuitable for Development - waiver of this requirement is granted, in accordance with approved Plans dated April 2004 and Table 1 "Summary of Requested Variances"
3	Zoning Ordinance	Addendum February 20, 2002	Growth Management Ordinance- exemption from the building permit cap is granted for all units which qualify as low and moderate income housing units pursuant to R.I. Gen Law 45-53.
4	Subdivision Regulations	Article XIII, Section B.7	Extended dead-end. Waiver of this requirement is granted in accordance with approved Plans dated April 2004.
5.	Subdivision Regulations	Article XIII Section E. 4	Underground utilities. Waiver of this requirement is granted.
6.	Subdivision Regulations	Master Plan Checklist	Waiver is granted for the following checklist requirements: <ul style="list-style-type: none"> · Wetland Edge Verification-deferral to Preliminary Plan stage granted

Any subsequent revision to the plans that requires additional or more expansive relief shall be requested at the time of Preliminary Plan approval.

Criteria Applied to Comprehensive Permit Applications under 45-53 of the R.I. Gen. Laws.

Following is a discussion of the criteria applied to the Planning Board's decision on a Comprehensive Permit application. There are two (2) sets of criteria which may require consideration.

1. Criteria for denial.

If the Planning Board intends to deny an application for a Comprehensive Permit, the Planning Board **must** prove that **at least one** of the five reasons for denial can be supported by evidence *in the record*. The Zoning Ordinance also requires that a denial shall be based on one or more of the criteria for approval NOT being met. Again, these conclusions must be supported by evidence *in the record*. See discussion below.

“(1) The Town has an approved affordable housing plan and is meeting housing needs, and the proposal is inconsistent with the affordable housing plan. In this section "meeting housing needs" means adoption of the implementation program of an approved affordable housing plan and the absence of unreasonable denial of applications that are made pursuant to an approved affordable housing plan in order to accomplish the purposes and expectations of the approved affordable housing plan.”

To support this criteria for denial discuss DURING the public hearing and write into the decision:

- The Town's Housing Plan, adopted on [date] which was approved by the Director of Administration on [date]
- The Town has implemented the affordable housing plan by
- The Town has approved several applications for LMI Housing under the Comprehensive Permit process thus
- The Town has also approved ... which was/were made in accordance with the [inclusionary or other] provisions of the approved affordable housing plan.
- The Town denies [x relief/ this application] for the reasons related to [] as discussed in detail in finding of fact(s) above.

*“(2) 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. Local zoning and land use ordinances, requirements, or regulations are consistent with local needs when imposed by the Town Council after comprehensive hearing, and, the Town either has existing low or moderate income housing units in excess of ten percent (10%) of the year-round housing units reported in the latest decennial census of the town, or the Town has promulgated zoning or land use ordinances, requirements, and regulations to implement a comprehensive plan which has been adopted and approved pursuant to state law, and the housing element of the comprehensive plan provides for low and moderate income housing in excess of ten percent (10%) of the year-round housing units.”*

To support a finding that the proposal is **NOT consistent with local needs** discuss DURING the public hearing and write into the decision:

- The Town has adopted land use requirements designed to implement the approved affordable housing plan. [Describe implementation schedule.]
- The Town has promulgated land use requirements [a,b,c] as part of this implementation effort. [Describe implementation progress.]
- The land use requirement that _____ is presumed to be 'consistent with local needs' because it was "imposed by the Town Council after comprehensive hearing" on [date]. [Note: This can not be said for Subdivision Regulation provisions.]

OR

- The proposed development IS NOT "reasonable" when the "number of low income persons" accommodated by the subdivision is considered in balance with the need to [(a), (b) or (c)]

AND (this must be included)

- "The local zoning or land use ordinances, requirements, and regulations (applicable to the relevant issue) are applied as equally as possible to both subsidized and unsubsidized housing."
[Discuss how under similar circumstances for a 100% market rate development the concern and application of [(a) , (b), (c)] would be the same.]

"(3) *The proposal is not in conformance with the Comprehensive Plan.*" [Explain in detail how the proposal is nonconforming.]

(4) The Town has plans to meet the goal of ten percent (10%) of the year-round units being low and moderate-income housing in accordance with the approved Affordable Housing Plan. The Town's goal is to meet the 10% goal by [date] and has made significant progress towards this goal since [date] having reached x% currently. ***[Make this finding as strong as possible.]***

(5) As indicated at [x] below concerns for the environment and the health and safety of current residents have not been adequately addressed.

2. Criteria for approval.

For the Planning Board to approve an application, the applicant has the burden to prove to the satisfaction of the Planning Board that each and every one of the criteria discussed below has been met. As mentioned above, if the Planning Board is not satisfied that a criteria of approval has not been met then the decision of the Planning Board **MUST** indicate the reasons why.

*"In approving an application for a comprehensive permit, the local review board shall make **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, on each of the following standard provisions, where applicable:*

*"(A) The proposed development **[is/is not] 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."*

"Consistent with local needs means reasonable in view of the state need for low or moderate income housing, considered with the number of low income persons in the town affected and the need (a) to protect the health and safety of the occupants of the proposed housing or of the residents of the town, (b) to promote better site and building design in relation to the surroundings, or (c) 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."

To support either a positive or negative finding of **"consistent with local needs"** discuss **DURING** the public hearing and write into the decision:

- Is the proposed development "reasonable" when the "number of low income persons" accommodated by the subdivision is considered in balance with the need to [(a), (b) or (c)]

AND

- "The local zoning or land use ordinances, requirements, and regulations (applicable to the relevant issue(s)) are applied as equally as possible to both subsidized and unsubsidized housing."

[You **must** discuss how under similar circumstances for a 100% market rate development the concern and application would be the same.]

“(B) The proposed development is in compliance with the standards and provisions of the municipality's zoning ordinance and subdivision regulations, and/or where expressly varied or waived local concerns that have been affected by the relief granted do/do not outweigh the state and local need for low and moderate-income housing.”

To support either a positive or negative finding with regard to **“local concerns affected”** discuss DURING the public hearing and write into the decision:

- What is the local concern to be affected if relief from [section/requirement] is granted?
- Does the local concern outweigh the local need for LMI housing that will be served?
- If yes, why? If no, why not?

*“(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.”*

[YES or NO? Design demonstrates this how?]

*“(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.”*

[This inquiry is limited to actual technical/ engineering testimony on the record. Keep in mind that this remains the applicant's burden to prove. This standard should not be applied any differently than it would for a conventional application.]

*“(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.”*

[This inquiry is broader than (D) above. Although technical/ engineering testimony is required, this inquiry goes beyond, because of the list of impacts that may be considered and the subjectivity which is required for these considerations. Keep in mind that this remains the applicant's burden to prove. This standard should not be applied any differently than it would for a conventional application.]

“(F) All proposed land developments and all subdivisions lots will have adequate and permanent physical access to a public street. Lot frontage on a public street without physical access shall not be considered in compliance with this requirement.”

[Yes or No? Site plan demonstrates this how? Same issues as usual. Keep in mind that this remains the applicant's burden to prove. This standard should not be applied any differently than it would for a conventional application.]

“(G) The proposed development will not result in the creation of individual lots with any physical constraints to development that building on those lots according to pertinent regulations and building standards would be impracticable, unless created only as permanent open space or permanently reserved for a public purpose on the approved, recorded plans.

[Yes or No? Site plan demonstrates this how? Same issues as usual. Keep in mind that this remains the applicant's burden to prove. This standard should not be applied any differently than it would for a conventional application.]