

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Sun Coast Properties, LLC

v.

Town of Windham, et al.

218-2011-CV-00725

218-2011-CV-01003

ORDER

These consolidated cases concern a residential development project designed and proposed by the petitioner, Sun Coast Properties, LLC (“Sun Coast”) to include workforce housing under RSA 674:58, et seq. in the Town of Windham.

The first case, Sun Coast Properties, LLC v. Town of Windham, et al., Rockingham County Superior Court, Docket # 218-2011-CV-00725, was originally filed on June 24, 2011 by Sun Coast as a “Verified Petition for Legal, Equitable and Injunctive Relief.”¹

Sun Coast asserted in its Count I that it is entitled to a “builder’s remedy together with interest, costs, and reasonable attorney’s fees,” contending, among other things, that the Town of Windham Planning Board’s refusal to accept jurisdiction of its site plan/subdivision applications results in a failure to comply with workforce housing requirements imposed on the Town by the Workforce

¹ This case is referred to as the “Planning Board Appeal” and references to the Certified Record in the case shall be noted as: “PB C.R. Item #.”

Housing Act (“the Act”), RSA 674:58 et seq., and “[t]he Town of Windham maintains a bias against Workforce Housing.” See Petition, ¶¶ 67-81.

In Count II, Sun Coast appealed the Planning Board's decision to deny jurisdiction of its site plan/subdivision applications on the basis that the applications were incomplete, characterizing this decision as “illegal and unreasonable,” and in “bad faith.” Id. ¶¶ 82-94. Here, the focus is on the Planning Board's conclusion that a variance was needed for it to deem the applications “complete.”

In Count III, Sun Coast sought a declaratory judgment that a variance requirement with respect to density for the project at issue is contrary to state law regarding workforce housing development, as the project “need only be approved by the Planning Board on a test of reasonableness and no variance is needed.” Id. ¶¶ 95-106.

Finally, in Count IV, Sun Coast sought injunctive relief against Mr. Ross McLeod, identified as Chairman of the Town's Board of Selectmen and an ex officio member of the Planning Board, oriented to prohibiting him from engaging in further communications with Planning Board or Zoning Board members relative to the project. It was claimed that Mr. McLeod had improperly acted herein, and relief was needed to restrain him from further improper activity. Count IV has been stayed.

The second case, Sun Coast Properties, LLC v. Town of Windham, Rockingham County Superior Court, Docket # 218-2011-CV-01003, filed August 23, 2011, is an appeal by Sun Coast of the Town of Windham Zoning Board of

Adjustment's ("ZBA") decision to deny its variance request pertaining to density requirements.² In that case, Sun Coast avers that the ZBA's decision to deny the variance was illegal and/or unreasonable.

The cases were consolidated by the Court on September 28, 2011. A hearing was held on December 22, 2011. After considering the arguments/submissions of the parties, the applicable law, and the presented evidence including the certified records, the Court finds and rules as follows.

FACTUAL BACKGROUND

Sun Coast is a real estate development company. In late December, 2010, Sun Coast purchased a lot of about 2.6 acres located at 66 Mammoth Road ("the Property") in Windham, New Hampshire to construct a multi-unit housing development, to include workforce housing, as defined under RSA 674:58 et seq. See PB C.R. #2; see also ZBA C.R. #2. This Property is also referred to as Lot 19-A-300. PB C.R. #3.

In 2008, the New Hampshire Legislature found that the State has been "experiencing a shortage of housing . . . affordable to working households," which "present[s] a barrier to the expansion of the state's labor force, undermines state efforts to foster a productive and self-reliant workforce, and adversely affects the ability of many communities to host new businesses." N.H. Laws 2008, 229:2. The Legislature adopted RSA 674:58, et seq., to provide municipalities with the "maximum flexibility . . . in exercising the zoning powers under RSA 674 consistent with their obligation to provide reasonable opportunities for the

² This case is referred to as the "Zoning Board Appeal" and references to the Certified Record from the case shall be noted as: "ZBA C.R. Item #."

development of workforce housing.” Id. In essence, the legislation was designed to encourage, and have towns apply, their land use regulations in such a manner as to reasonably allow opportunities for the development of workforce housing. See also RSA 672: 1, III-e (“Opportunities for development of . . . [housing which is decent, safe, sanitary, and affordable to low and moderate income persons and families] shall not be prohibited or unreasonably discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.”).

Some cities and towns have proceeded to adopt forms of workforce housing ordinances or forms of “inclusionary zoning” per RSA 679:59, I, while others have not done so.

The Act provides, in regard to a municipality’s exercise of its “power to adopt land use ordinances and regulations,” that the municipality act to “provide reasonable and realistic opportunities for the development of workforce housing”;³ assure “[i]n order to provide such opportunities” that “lot size and overall density requirements . . . [are] reasonable”; “allow workforce housing . . . in a majority, but not necessarily all, of the land area that is zoned to permit residential uses within the municipality . . . [with] the discretion to determine what land areas are appropriate to meet this obligation,” and without the requirement “to allow for the development of multifamily housing in a majority of its land zoned

³ RSA 674:58 defines “reasonable and realistic opportunities for the development of workforce housing” to mean: “opportunities to develop economically viable workforce housing within the framework of a municipality’s ordinances and regulations adopted pursuant to this chapter and consistent with RSA 672:1, III-e . . . [with] [t]he collective impact of all such ordinances and regulations on a proposal for the development of workforce housing . . . considered in determining whether opportunities . . . are reasonable and realistic.”

to permit residential uses.” Id. The Act allows for the Court to grant permission for the development of workforce housing upon an appeal of a municipality’s decision to deny an application to develop such housing. See RSA 674:61.

The Town of Windham has twice rejected amendments to its ordinances proposed by its Planning Board to broadly address workforce housing. See PB C.R. # 52. The Planning Board first presented a workforce housing ordinance to the voters at the 2010 Town Meeting where it was rejected. The Planning Board then made minor revisions to the proposed form of the ordinance and presented the revised proposal to the voters at the 2011 Town Meeting, where it was again rejected. The Town thus remains without the guidance, or governing rules, of such an ordinance.

In determining where to build its new development, Sun Coast saw the Mammoth Road property in the Town as suitable for a residential project offering workforce housing. It appears that Sun Coast initially wanted to construct a residential development consisting of five duplexes, with all ten units being workforce housing. PB C.R. # 7.

To be sure, the Property is located in the Town’s Rural District zone, one of a number of residential zoning districts, but a zone which only allows one house per lot regardless of acreage, see Windham Zoning Ordinance Section 602.1.2, and Sun Coast wished to construct five buildings, or duplex units, on the Property. Yet, the Property is also located in the Aquifer Protection District; is located off a well-traveled state road, also known as Route 128; borders a portion of the Residential “C” Zoning District, which would allow for the proposed

development; is in close proximity to large condominium developments—to the south are communities known as “Windham Meadows I,” “Windham Meadows II,” and “Whispering Winds”; is partially encumbered by a utility easement; and is advantaged by soil that would allow for a higher density development. See ZBA C.R. # 2, 9, 14, Appendix pg. 14; PB C.R. # 4; Pl.’s Ex. 8. It appears as well that land in Windham outside the Rural District is not practically or realistically very much available, if at all, to take on, or accommodate, projects involving workforce housing like the one at bar.

On about December 3, 2010, the previous owners of the Property (with Mr. Peter Zohdi of Edward N. Herbert Associates, Inc. representing them)⁴ filed a Design Review/Conceptual Application for the proposed development with Ms. Elizabeth Wood, a Community Planner for the Town of Windham, for a Technical Review Committee (TRC) meeting. PB C.R. #3, 4. On December 14, 2010, the TRC met to consider the application, and Ms. Wood for Planning stated, in part, that,

[a]ny application materials submitted for this workforce housing proposal will be reviewed with [sic] accordance with the Workforce Housing Ordinance that has been proposed for 2011 Town Meeting. If the Workforce Housing Ordinance is not approved by voters in the March election, this application will require Variances from the Zoning Board of Adjustment.

PB C.R. # 7.

As indicated previously, the Town did not adopt a workforce housing ordinance at the March 2011 meeting. By that point, Sun Coast had purchased the Property and had taken steps to continue the previous proposal.

⁴ These prior owners appear to be also then working with Sun Coast.

On March 16, 2011, counsel for Sun Coast sent a letter to Ms. Laura Scott, the Town's Community Development Director, regarding approvals Sun Coast wished to obtain to construct its workforce housing project. PB C.R. #9. In the letter, Sun Coast's counsel questioned, with the Town's failure to adopt a workforce housing ordinance, where the proper jurisdiction lay to deal with Sun Coast's project, and advanced that he "d[id] not believe a visit to the [ZBA] would be productive or necessary," but the "best manner to proceed with this case is to file an application for workforce housing with the Planning Board [given that] all aspects of the ordinance will be adhered to other than density requirements that apply in a rural zone." PB C.R. #9.

On March 31, 2011, Sun Coast filed a somewhat different proposal from what the TRC had seen, one that advanced that the development proceed as a condominium, "Deacon Place," with four of the ten units to be workforce housing. PB C.R. # 10-11. Representatives from Sun Coast then met with Ms. Scott to discuss the process to secure the proper land use permits and approvals, and were advised to attend a meeting with the Planning Board for design review. PB C.R. # 12. Although it did not believe it to be necessary, Sun Coast had already submitted its application for a variance from Section 602.1.2 to allow more than one single-family dwelling unit per lot to the ZBA. Id.; see also ZBA C.R. # 1-2.

On or about April 4, 2011, Sun Coast filed an Application for Site Plan Review/Preliminary Review with the Windham Planning Board. See PB C.R. #13-18. The next day, on April 5, 2011, Sun Coast followed up by filing an Application for Major Site Plan Review and an Application for Subdivision

Approval for “Deacon Place.” PB C.R. #19-28. The application was to construct a total of five duplex dwellings, for a total of ten units on the property. PB C.R. # 23.

These applications included information specified in the Planning Board’s Site Plan Regulations and Subdivision Regulations for an application to be deemed complete. The Letter of Intent filed with them indicated that a portion of the units would be constructed as “Workforce Housing under RSA 674:58-61.” PB C.R. # 23. The applications also included a letter indicating that a variance had been requested from the Windham ZBA from Section 602.1.2. PB C.R. #26. Sun Coast submitted certain additional documents after April 5. See PB C.R. #38.

On April 14, 2011, Ms. Scott sent a Memo to the Planning Board informing it of the applications. PB C.R. #43. She stated, “I have reviewed the items submitted and have no concerns at this time. The application went through the TRC process (12/14/10) and all outstanding items have been addressed. The application has been submitted to the Soils Consultant for review and he has signed-off on the proposal.” Id.

On April 20, 2011, Sun Coast appeared before the Planning Board for Design Review. PB C.R. #45. At the design review meeting, Sun Coast’s application was read into the record, and “[t]he Board clarified that [it was] a non-binding, notified hearing which will be formally opened to the public for discussion and then formally closed. It [was] both a site plan preliminary review and a subdivision design review application.” Id., pg. 2. Ms. Scott explained the

contents of Sun Coast's application. Id. Specifically, the minutes reflect that she stated:

The applicant is proposing 5 duplexes or 10 total units on the site. Four of these units will be Workforce Housing units in a condominium form of ownership on a private road, utilizing the Pennechuck water system and on-site septic. The plan has been seen by the Town engineer, Town legal, the TRC Board, and the soil consultant. The engineering and legal reviews are expected imminently; TRC and the soil consultant have no outstanding issues, and Ms. Scott has no concern. The application will be presented next week before ZBA for a variance. Once the variance is received, the application will return to the Planning Board for a formal application.

Id. Vice-Chair Margaret Crisler then motioned to open the case for a public hearing, which was seconded by Member Ms. Carolyn Webber. Id. The Motion passed 6-1, with Member Mr. Jonathan Sycamore opposed. Id.

Mr. Zohdi, representing Sun Coast, presented an overview of the details and location of the plan. Id. Members of the Board asked questions regarding, among other things, parking, trees, and condominium covenants. Id., pgs. 2-3. Member Mr. McLeod questioned Sun Coast's counsel about workforce housing. Id.

Chairwoman Ruth-Ellen Post then opened the hearing to the public. Id., pg. 3. Two abutters posed questions about the development. Id. Chairwoman Post then closed the Public Hearing and reviewed the various concerns of the Board. Id. Vice-Chair Crisler then motioned to close the Preliminary Site Plan Review, which was passed 7-0. Id.

A few days later, after receiving additional information from Town counsel, see PB C.R. #47, and an engineering firm, see PB C.R. #48, Ms. Scott sent a

Memo to Mr. Zohdi, following up and informing Sun Coast of the next step in the process. PB C.R. #49. In that Memo, she stated that Sun Coast had twelve months to submit a Final Application and that the application was scheduled for a public hearing on May 4th. Id. She also noted the following items that were outstanding:

- Please note any conditions of approval or make the required changes to the Plan set as a result of the 4/26 ZBA public hearing.
- Address items outlined in April 21st KNA and Legal Reviews
- Plan Changes:
 - Show the location of the fire hydrant, per Fire Department Request
 - Change Road name and Unit Numbers, per Assessing and Police Department Requests
- NHDOT & NHDES Subdivision Permits

Id.

In response to the information from the Town, counsel for Sun Coast maintained contact with Ms. Scott, and further requested that she inform it of the Town's "official position" with respect to its need for workforce housing. PB C.R. #50. Ms. Scott maintained that the Town did not have an "official position" and that although the Planning Board had twice put forward a Workforce Housing Ordinance, which voters rejected, it was planning on doing so again at the 2012 Town Meeting. PB C.R. #52. She also sent Sun Coast a "Workforce Housing Information" sheet, which included information about current workforce housing in Windham. Id. This one-page document indicated that in 2010, 23% of total home sales in Windham met workforce housing criteria, and that in 2011, 6% of total homes/condos then on the market and approximately 21% of total homes met the criteria. Id.

As stated previously, on March 28, 2011 Sun Coast had filed an application with the Town's ZBA seeking a variance from the density/house lot restriction set forth in Zoning Ordinance § 602.1.2. ZBA C.R. #1-7. In its application, Sun Coast had included conceptual drawings of the proposed duplexes and had included a Letter of Intent that four of the ten condominium units would be considered workforce housing. ZBA C.R. #5, 8.

On April 26, 2011, the ZBA conducted a public hearing on Sun Coast's variance application. ZBA C.R. #14. At the hearing, Sun Coast, represented by Mr. Zohdi, presented its case. Id. Counsel for Sun Coast again took the position that Sun Coast believed that zoning relief was not required in light of the state law and the Town's failure to adopt the Workforce Housing Ordinance, that the real issue was whether the project was a reasonable one, but that, in the spirit of cooperation, Sun Coast would address the variance issues. Id. Counsel also stated that a "builder's remedy" from the Superior Court was another option. Id. He submitted, as an Exhibit A, a packet of information containing the case of Britton v. Town of Chester, sections of RSA 672:1 and RSA 674:58-60, and fact sheets regarding the Town of Windham (which showed, among other things, that in 2000 Windham was a generally affluent community with housing that was generally of relatively high value or cost). See ZBA C.R. # 15.

When questioned by Board Member Ms. Elizabeth Dunn regarding the need for statistics to show that Windham does not meet its quota for workforce housing, Sun Coast's counsel replied that it was the Town's obligation to adopt an Ordinance, and that typically a survey would provide that information. ZBA

C.R. #14. Sun Coast's counsel then went through supporting facts for each element of the variance application, contending that each of the criterion had been satisfied. Id.

Board Members questioned Sun Coast representatives concerning lot loading, financial figures, and the design of the units. Id. Board Member Mr. Mark Samsel asked Ms. Scott about the project being allowed in a zone other than a rural zone. Id. Ms. Scott responded that duplexes would be allowed in the Residential B, C, and Village Center Districts without a variance. Id. Sun Coast's counsel stated:

if Windham had adopted a Workforce Housing Ordinance and allowed Workforce Housing in whatever zones [the Town] deemed appropriate but not in the rural zone that would have been a different case. Windham did not do that and Britton v. Chester says the Town is your target and Workforce Housing can go anywhere.

Id.

Four residents spoke in opposition to the variance, including Mr. McLeod, who, at the time, was Chairman of the Board of a Selectmen and a member of the Planning Board. Id. Mr. McLeod submitted a copy of an email describing a Hooksett workforce housing case recently decided by the Merrimack Superior Court, Plus Fifty-Five v. Town of Hooksett, which Chairman Tom Murray marked as Exhibit B. Id.; ZBA C.R. #16. He also referenced, and marked Exhibit C, Ms. Scott's Memo regarding Windham's workforce housing information that had previously been provided to Sun Coast and members of the Board. ZBA C.R. #17. Mr. McLeod raised several concerns about the development—that it would not close any gaps in housing needs, and further, that it would not pay school

impact fees. Id.

Although Member Mr. Samsel motioned to go into a deliberative session, Member Mrs. Dunn suggested that the issue be left open so that the Board Members could study the submitted exhibits. Id. Member Mr. Mike Scholz stated that he wanted to review the Hooksett case. Id. The Board decided to continue the hearing until May 10, 2011 so that its members could review the submitted material and consult with legal counsel. Id.

In regard to Sun Coast's applications before the Planning Board, these were scheduled for a public hearing on May 4, 2011. PB C.R. # 61. On April 29, 2011, Sun Coast requested that the public hearing be postponed until May 18, 2011 to allow it an opportunity to address comments made by the Town's consultant. PB C.R. # 54.

Sun Coast followed up with Ms. Scott and informed her, among other things, of the status of certain pending approvals regarding the development. PB C.R. #57. On May 4, 2011, Ms. Scott sent Sun Coast a letter informing it of the outstanding items:

1. NHDOT Driveway Permit
2. NHDES Subdivision Permit
3. Revised legal documents for review by Town Legal Counsel and sign-off that items outlined in the April 21st memo have been addressed
4. Financial information to be provided for review by Town consultant
5. Sign-off from KNA that their April 21st review items have been addressed
6. Please note any conditions of approval or make the required changes to the Plan set as a result of the 5/10 ZBA public hearing

PB C.R. #60.

In response, on May 6, 2011, Sun Coast filed a financial analysis, which assessed the economic viability of the proposed development, in support of its application before the Planning Board. PB C.R. #63. The Town's consultant reviewed the analysis and did not object to its conclusions, and on May 10, 2011, wrote a letter to the Town indicating that Sun Coast had addressed many of the comments which had caused the postponement of the public hearing. PB C.R. # 65.

On May 10, 2011, the ZBA resumed the public hearing on Sun Coast's variance application. ZBA C.R. # 21. In addition to the three exhibits submitted at the April 26, 2011 hearing, the ZBA accepted four additional items: (1) the court decision in Plus Fifty-Five, LLC v. Hooksett; (2) a letter to Sun Coast's counsel dated 5/3/11 from McKeon Appraisal Services, Exhibit D; (3) a revised site plan for "Deacon Place" – 66 Mammoth Road dated 4/26/11, Exhibit E; and (4) a May 6, 2011 Letter & Financial Analysis of project by Sun Coast Properties, Exhibit F. Id.; see also ZBA C.R. #22-25. When asked by the Board what the differences were between the plan previously submitted and the current plan, Mr. Zohdi stated that the differences were the landscaping and the number of leach beds. ZBA C.R. # 21.

Sun Coast's counsel argued that the application met the five variance criteria and referenced the submitted exhibits, including the information from McKeon Appraisal Services that there would be no diminution in value of the surrounding properties, nor would there be a negative impact on the community. Id. He also referenced Mr. McLeod's prior testimony and requested that the

Board members make it known on the record if they spoke with anyone about the case outside of the meeting. Id. He also requested that specific findings be made on each prong of the variance test. Id. Several other Board Members questioned Sun Coast's counsel on other issues, including the rate of return, agricultural uses of the property, and other zoned properties in the area. Id.

Sun Coast's counsel distinguished the Hooksett case, contending that there, the court came to the conclusion that it was not a workforce housing application. Id. Mrs. Dunn disagreed, and stated that she believed it did address workforce housing before a zoning board. Id.

Member Mr. Scholz, an alternate to the Board, asked the Chairman to waive a provision in the bylaws allowing alternates to provide information during deliberations for this particular case. Id. Member Mrs. Dunn stated that she had concerns about changing the bylaws, but was interested in the information Mr. Scholz could provide and that the Board could hear it if they went into deliberative session. Id. Mr. Scholz then went on to state that he also believed the Hooksett case was relevant and that he was not sure if it was in the public's interests, from a safety concern, to have a greater number of houses on a small lot, as there might not be enough area for children to play. Id. Another alternate, Member Mr. Jim Tierney, stated that the Legislature did not require towns to adopt a workforce housing ordinance as long as they have an ordinance ready to allow reasonable and realistic workforce housing opportunities, and that Windham's current regulations allow workforce housing in the proper zones. Id.

Mr. Zohdi, representing Sun Coast, stated that he had attended the TRC

meetings and that both the Police and Fire Departments had no problem with the project. Id. Further, he advance the significant point that “there is almost no zone Res C left in town [and] in regard to density, this development complies with the NH Department of Environmental Services loading requirements.” Id. at 4.

At the end of the hearing, the ZBA moved to go into a deliberative session. Id. After deliberation, the Board voted 4-1 to deny the variance. Id. On May 13, 2011, the Town issued a Notice of Decision which set forth the alleged basis for each ZBA member’s denial vote. ZBA C.R. # 26.

On May 18, 2011, after the ZBA had denied Sun Coast’s application for a variance and after Sun Coast had had the opportunity to address comments made by the Town, the Planning Board again took up Sun Coast’s Site Plan/Subdivision Applications. PB C.R. #71. At the hearing, Member Mr. McLeod, who had spoke in opposition to the variance at the April 26, 2011 ZBA hearing, recused himself. Id.

Additionally, at the hearing, Ms. Scott informed the Planning Board of the ZBA’s denial of the variance (and included the Minutes from the May 10, 2011 ZBA hearing) and of Sun Coast’s intent to seek a rehearing as to that decision. Id. Ms. Scott again informed the Board that this was a workforce housing application seeking to place five buildings, with ten units total, on a lot, four of the units being workforce housing. Id.

Upon being advised of the denial, the remaining members of the Planning Board discussed whether the Board should refuse to accept the application, as some of its members suggested it was incomplete because Sun Coast had not

obtained a variance. Id. Noting a recent decision regarding workforce housing in regard to another proposed project in Windham, Member Mr. Sycamore stated that the Board needed to be consistent with how it treated applications. Id.

Sun Coast's counsel addressed the Board regarding his view of the workforce housing statute, and that for reasonable opportunities for workforce housing to exist, towns may need to overlook density requirements. Id. He stated that it was his belief that the Board had jurisdiction to accept the application because the Town had not adopted a Workforce Housing Ordinance and there was a regional need. Id.

Vice-Chair Crisler asked for the Board's decision. Id. The responses varied, with certain members wishing to obtain more information and/or await a ZBA appeal. Id. Sun Coast's counsel asked that a decision be made that night. Id. Certain Board members and Sun Coast's counsel then discussed what "reasonable development opportunities" means and if Windham has the necessary housing stock to accommodate workforce housing. Id. Vice-Chair Crisler then cited the Workforce Housing Act which indicates that existing housing stock should be taken into consideration and that the Town's assessor believes Windham's existing housing stock to be at 23%. Id. She then stated that to meet HUD's goal of 46% workforce housing, 50% of each application should be workforce housing. Id.

The Board continued to discuss the pros and cons of accepting jurisdiction and imposing conditions, or continuing the application in order to obtain legal advice from the Town's counsel. Id. Ultimately, Member Ms. Webber made a

motion, the language of which was offered by Member Mr. Sycamore, to

not accept this site plan for Public Hearing given that the applicant has failed to procure the substantive and material variance necessary for him to develop his plan in conformance with Windham's zoning ordinance, specifically, a variance from section 602.1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the construction of 5 duplex residential buildings - 10 residential units in total, when that is not a use permitted in the Rural District.

Id.

The Board then continued discussing the issue of jurisdiction. Board Member Ms. Kristi St. Laurent suggested working with Sun Coast utilizing conditions and restrictions and mentioned that the court would want to see the Board's effort to work with the applicant. Id. Board Member Mr. Sy Wrenn stated that if density was the only concern, then the development should move forward in the application process. Id. After further discussion, the previous motion was withdrawn and the Planning Board moved to meet with legal counsel. Id. Counsel for Sun Coast agreed to a one-week extension. Id. The hearing was continued until May 25, 2011. Id.

In response to the events that had transpired at the May 18, 2011 hearing, counsel for Sun Coast sent a letter to Ms. Scott on May 23, 2011, highlighting that the motion offered by Member Mr. Sycamore at the previous hearing was drafted in advance, and asserting that issues of improper influence or lack of impartiality existed. PB C.R. #73.

On May 25, 2011, the Planning Board again took up Sun Coast's Site Plan/Subdivision applications. PB C.R. #74. At this hearing, Chairwoman Post recognized the letter sent by Sun Coast's counsel respecting the last hearing,

and stated that it would be addressed later in a non-public session with Town Council. Id. Planning Board members advised Sun Coast that its legal counsel had advised the Planning Board to deny the application due to it being incomplete because the zoning requirements of Section 602.1.2 had not been met. Id. Certain Members indicated they would support workforce housing, but needed to follow their counsel's advice and be consistent throughout their applications. Id. Member Ms. St. Laurent believed the application was distinguishable from others and expressed reservations as to whether such a course of action showed good faith on the part of the Town. Id. Sun Coast's counsel asserted that the Town's regulations did not provide that a zoning approval (or variance) must first be obtained in order for an application to be deemed complete. Id.

Before the hearing concluded, Sun Coast's counsel renewed his inquiry respecting the pre-drafted motion which Member Mr. Sycamore offered at the prior hearing. Id. Member Mr. Sycamore came to acknowledge that member Mr. McLeod, who had recused himself, had helped him in drafting the motion. Id. After Sun Coast's request that he do so, Member Mr. Sycamore then recused himself from the matter and was replaced by an alternate, Member Mr. Wrenn. Id.

Chairwoman Post addressed the issue of workforce housing and her belief that the Board was attempting to meet its obligations under the law. Id. After another vote, the Planning Board voted five to two to not accept the application because it was incomplete and did not meet the zoning requirements. Id. There

was then further discussion with Mr. McLeod and Sun Coast's counsel regarding Mr. McLeod's influence on the application. Id.

Following the Planning Board's decision, Sun Coast filed its first case in court in late June, 2011.

On June 7, 2011, Sun Coast filed a rehearing petition with the ZBA regarding the denial of the variance. ZBA C.R. #27. Sun Coast's counsel argued, among other things, that the ZBA misapplied or misunderstood the New Hampshire workforce housing law in that a variance was not required in the circumstances presented. Id. Sun Coast's counsel also argued that the ZBA improperly relied on evidence in unrelated cases and unreasonably rejected certain evidence, and further that the ZBA failed to vote on each prong of the variance test independently and failed to disclose any ex parte communications. Sun Coast' counsel highlighted the view that "the ZBA task was complicated by the testimony of Attorney Ross McLeod . . . the Chairman of the Board of Selectmen and Ex-Officio Member of the Planning Board [who had spoken] in opposition to workforce housing in general and the application in particular." Id.

After considering in good detail Sun Coast's arguments, the ZBA voted on June 28, 2011 to rehear the variance application as it "believe[d] that it made a technical error relative to Points of Error, Paragraph 30, Prong 5, and that under Paragraph 32 the application should have been heard on its merits with consideration of the requirements of the workforce housing legislation." ZBA C.R. # 30. The rehearing was scheduled for July 26, 2011. ZBA C.R. #31.

Prior to the rehearing, Sun Coast submitted additional materials to the

ZBA, including a Rockingham Planning Commission Regional Housing Needs Assessment, dated October 31, 2008. ZBA C.R. # 32. Additionally, an abutter filed a letter expressing concerns with the proposed development. ZBA C.R. #35.

On July 26, 2011, the rehearing was conducted by the ZBA. ZBA C.R. #37. At the hearing, counsel for Sun Coast again presented the case for developing the property and, among other things, requested that the ZBA review the application in the context of the workforce housing statute. Id. He contended that the application warranted the granting of a variance even if it were not a workforce housing project. Id. He stated that all state permits and approvals have been received for both septic and water and that the site can support the number of units from a density point of view. Id. A discussion then transpired between Chairman Murray and Sun Coast's representatives regarding the Town's ordinances and density requirements. Id.

Counsel for Sun Coast again addressed the five variance criteria and referenced the Rockingham Planning Commission Workforce Housing Report, as well as other documents that had been submitted to the Board. Id.

Chairman Murray questioned Sun Coast's counsel concerning the circumstance that Windham does not have a workforce housing ordinance. Id. Chairman Murray read from the Workforce Housing Challenge Guidebook from the Municipal Association and stated that following these guidelines, if a municipality determines that it has enough workforce housing stock, it does not need to do anything further, but if not, the municipality needs to consider whether

its current regulations allow for sufficient future workforce housing developments. Id. Counsel for Sun Coast indicated that per his reading of the Rockingham Planning Commission Assessment report, a workforce housing need plainly exists for the region in which Windham is located and the Town needs to bear its share of this need. Id. There was further discussion regarding whether workforce housing income calculations should be based on the region as a whole, or the Town of Windham alone. Id.

Chairman Murray further observed that the Board must consider whether the existing workforce housing stock in Windham, stated by him to be approximately 29%, is enough. Id. Counsel for Sun Coast stated that that was really an issue for the Planning Board, and that the ZBA needed to consider the variance criteria and whether this specific project was reasonable. Id. Because of the cost of land in Windham, Counsel for Sun Coast averred that there was not a reasonable opportunity to put forth a project such as this. Id. Mr. Zohdi then underscored the lack of affordable land in the Village District and the Multi-Family Zone and that the project left over 80% open space. Id. There was further discussion about the lack of economic feasibility for putting fewer units on the lot at issue. Id. It is clear that the Board struggled with what obligations, if any, the Town needed to meet in regard to workforce housing.

A number of members of the public spoke in opposition to, or in regard to, the variance request. Id. The statements generally focused on the desirability of workforce housing or lack thereof, with some residents believing there was enough workforce housing and some residents believing there was not. Id.

Member Mr. Partington questioned Ms. Scott whether Windham met its fair share burden of workforce housing, to which she squarely responded that “the Planning Board looked at the data available to it prior to the 2010 [vote] and had determined that Windham did not offer a realistic opportunity for workforce housing.” Id.

Notably, Mr. McLeod again spoke in opposition to the variance request, underscoring his view that the hardship requirement had not been met. Id. He also again raised the issue of whether the project would pay impact fees and Ms. Scott indicated that it would pay some but not school impact fees, because of its condominium form of ownership. Id.

The Board voted to enter into deliberative session. Id. Chairman Murray first polled the members regarding whether Windham has its fair share of workforce housing and if it allows for reasonable opportunities for workforce housing. Id. A majority of the voting Board indicated that they did not believe that Windham has its fair share of workforce housing. Id. As to whether Windham allows for reasonable opportunities for workforce housing, two voting members indicated it did not, one could not answer and was not sure the question was relevant, and two said that the Town did, in fact, allow for reasonable opportunities. Id.

Chairman Murray then polled the Board regarding the five variance criteria. Id. The ZBA voted to again deny the variance on three grounds: (1) that it would be contrary to the public interest; (2) that the spirit of the ordinance would not be observed; and (3) that literal enforcement would not result in

unnecessary hardship. ZBA C.R. #40. A majority of the voting members found, however, that granting the variance would do substantial justice and would not result in the surrounding properties suffering a diminishment in value. Id.

On August 18, 2011, Sun Coast applied for a rehearing. ZBA C.R. # 41. Sun Coast highlighted its view that the ZBA had failed to treat the application as a Workforce Housing Application, and that its denial was inconsistent with its finding that the Town was in need of workforce housing. Id. On September 13, 2011, the ZBA denied the motion for rehearing. ZBA C.R. #42-43. Sun Coast then appealed the ZBA's decision to this Court.

ANALYSIS

In this case, there are two decisions/determinations presented for review—the Planning Board action and the ZBA decision—and the Court must also consider Sun Coast's request for relief in the form of a "builder's remedy," and its request for an award of attorney's fees.

With respect to the Planning Board, Sun Coast seeks review of the determination to not accept Sun Coast's application and deny jurisdiction. As set forth above, the Planning Board determined that because Sun Coast's application did not conform to the Town's Zoning Ordinance in that it sought permission to build multiple housing units on a lot that is zoned for only a single unit structure, Sun Coast's applications were incomplete—that Sun Coast needed to obtain a variance from the ZBA before its plans could be moved forward and dealt with effectively by the Planning Board.

This "appeal" from the Planning Board shall be treated as a request to

invoke the Court's certiorari jurisdiction. See DHB v. Town of Pembroke, 152 N.H. 314, 318-19 (2005) (determining that when a person "appealed" a Planning Board's determination that an application was not complete, the person had no statutory appeal under RSA 677:15, as it was not "a decision of the board to approve or disapprove its application," but could seek relief by means of a writ of certiorari).

Certiorari review "is an extraordinary remedy, usually available only in the absence of a right to appeal and only at the discretion of the Court." Petition of Chase Home for Children, 155 N.H. 528, 532 (2007) (citation omitted). The standard of review is limited to determining if the administrative body has "exceeded its jurisdiction or authority, otherwise acted illegally, abused its discretion, or acted arbitrarily, unreasonably, or capriciously." See Appeal of McKerley Health Facilities, 145 N.H. 164, 166 (2000) (quotation and citation omitted). The Court's certiorari power is to be used "sparingly and only when to do otherwise would result in substantial injustice." See Petition of State of New Hampshire (State v. Laporte), 157 N.H. 229, 230 (2008) (citation omitted).

Here, the Town contends that the Court should decline to exercise its certiorari jurisdiction because the Planning Board did not act illegally or unreasonably. Further, the Town contends that no injustice would occur because Sun Coast has an adequate remedy at law—the ability to pursue a variance through the ZBA—and then the further remedy of appealing any adverse decision by the ZBA to the Superior Court. The Town further argues that should the Court determine that the variance was improperly denied, the matter could

then be remanded to the Planning Board for consideration.

Sun Coast contends that the Planning Board acted contrary to state law and to its own regulations when it refused to accept jurisdiction over Sun Coast's applications because the applications were, in fact, complete and the Town's regulations did not require Sun Coast to first obtain a variance.

RSA 676:4, I(b) provides, in pertinent part, that:

- I. The procedures to be followed by the planning board when considering or acting upon a plat or application submitted to it for approval under this title shall be as set forth in the board's subdivision regulations, subject to the following requirements:
 - (b) The planning board shall specify by regulation what constitutes a completed application sufficient to invoke jurisdiction to obtain approval. A completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision. A completed application sufficient to invoke jurisdiction of the board shall be submitted to and accepted by the board, only at a public meeting of the board, with notice as provided in subparagraph (d). An application shall not be considered incomplete solely because it is dependent upon the issuance of permits or approvals from other governmental bodies; however, the planning board may condition approval upon the receipt of such permits or approvals in accordance with subparagraph (i).

While the Court has not been presented with a "regulation" which explicitly states that an application will not be deemed "complete" if it is understood that a variance is needed for a project to be realized, it is plain that if a project lacks such a variance, it hardly makes sense to move forward with it in Planning Board proceedings. See P. Loughlin, 15 N.H. Practice Land Use Planning and Zoning (4th Ed.) at § 29.03 at 503 ("Enactments in the field of zoning and subdivision

control are necessarily related to each other and must be read and considered together. A subdivider seeking approval of a subdivision plan must first meet applicable zoning regulations. Thus where a preliminary plat indicates on its face that it is violative of the zoning ordinance, the subdivision plan must not be approved.”); see also Town of Seabrook v. Tra-Sea Corp. 119 N.H. 937, 941-42 (1979) (holding there that a Planning Board’s authority had to be exercised consistently with zoning ordinance).

To be sure, while workforce housing is to be allowed and must not be unreasonably obstructed, a planning board still retains the authority to carefully review plans under a Town’s existing policies and procedures, and the record reflects that the Windham Planning Board wanted to maintain consistency in how it handled applications offering workforce housing. Here, though it felt it did not have to do so, Sun Coast did present its project and its request for a variance to the ZBA, and, as previously described, the ZBA determined to not allow the variance and to thus not allow the project to go forward.

Though the Planning Board’s non-acceptance or incompleteness determination is questionable particularly in view of the requirements of the Workforce Housing Act, the Court determines not to disturb it, in the context of these consolidated matters and given its “builder’s remedy” conclusion, as discussed later. The Court declines to provide certiorari relief respecting the Planning Board’s pertinent determination.⁵

Turning now to the ZBA’s denial of the variance, the Court must decide

⁵ It is not clear whether an administrative appeal to the ZBA was taken respecting the Planning Board’s non-acceptance or incompleteness decision. The Court declines to deal with any exhaustion of administrative remedy contention in that regard.

whether Sun Coast has established that the denial was either unlawful or unreasonable. When reviewing a zoning board decision, the Court “may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.” RSA 677:15, V; see also RSA 677:6. The Court’s review “is not to determine whether it agrees with the zoning board of adjustment’s findings, but to determine whether there is evidence upon which they could have been reasonably based. The court thus may not review the evidence *de novo*.” Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 583 (2005) (quotations and citations omitted).

RSA 674:33 is titled “Powers of Zoning Board of Adjustment.” It provides that:

- I. The zoning board of adjustment shall have the power to: . . .
 - (b) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance if:
 - (1) The variance will not be contrary to the public interest;
 - (2) The spirit of the ordinance is observed;
 - (3) Substantial justice is done;
 - (4) The values of surrounding properties are not diminished; and
 - (5) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
 - (A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area.
 - (i) No fair and substantial

- relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
- (ii) The proposed use is a reasonable one.

- (B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to the special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable reasonable use of it.

In applying the variance criteria, the Windham ZBA concluded that Sun Coast's variance application failed to satisfy three of the five statutory criteria: (1) that the request would be contrary to the public interest; (2) that the request was contrary to the spirit of the ordinance; and (3) that the ordinance did not create an unnecessary hardship. See ZBA C.R. #40. If any one of the Board's grounds for denial is reasonable, then the Board's decision to deny the variance must be upheld.

The Court first addresses the public interest and spirit of the ordinance factors.

"The requirement that the variance not be contrary to the public interest is related to the requirement that [it] . . . be consistent with the spirit of the ordinance." Farrar v. City of Keene, 158 N.H. 684, 691 (2009) (quotation omitted). The first step in analyzing whether granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance is to examine the applicable ordinance. See Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 581 (2005). "As the provisions of the ordinance represent a declaration of public interest, any

variance would in some measure be contrary thereto.” Id. (quotation omitted). Accordingly, to adjudge whether granting a variance is not contrary to the public interest and is consistent with the spirit of the ordinance, [the Court] must determine whether to grant the variance would “unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” Id. (quotations omitted). Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance’s “basic zoning objectives.” Id. (quotation omitted). Mere conflict with the terms of the ordinance is insufficient.

Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011). In Harborside, the Court went on to articulate the “two methods for ascertaining whether granting a variance would violate an ordinance’s ‘basic zoning objectives.’”

One way is to examine whether granting the variance would alter the essential character of the neighborhood. Another approach is to examine whether granting the variance would threaten the public health, safety or welfare.

Id. (citations and quotations omitted).

In this case, the ZBA concluded that placing five buildings, or ten units, on a 2.5 acre parcel of land would work too great a change in the essential character of the neighborhood. Reviewing the minutes and the DVD from the July 26, 2011 rehearing, it is clear that members of the Board believed Sun Coast’s development would cause too much congestion, result in the placement of too many units on the “rural” piece of land in question, and work to undermine the “rural” purposes of the zoning district.

The Court is of the view, however, that that there is strong basis for the conclusion that the ZBA’s findings that granting the variance would be both contrary to the public interest and contrary to the spirit of the ordinance lacked

reasonable support. For one thing, these conclusions are hard to square with the Board's other finding that granting the variance would do substantial justice. Further, the record hardly supports the view that granting the variance would have markedly altered the character of the pertinent area (one already lacking a good deal in "rural" attributes), or operate to threaten public health, safety or welfare.

Although the ZBA did take notice of the fact that there are multi-unit condominium developments in the area, it did not sufficiently acknowledge the similarities between the pertinent properties and their closeness to each other. Further, the development indisputably would be built off a heavily traveled state highway, not a secluded street with only single unit homes.

Additionally, although one ZBA member noted a concern for the safety of children playing in the area, the record reflects that approximately eighty percent of the Property would remain open space, and that both the Windham Fire and Police Departments had no objection to the development. While there was some concern expressed by an abutter at the rehearing regarding septic and water systems, this issue was effectively addressed by Sun Coast, and there was no evidence that State permits or approvals would not be issued or made.

It is also the case, as discussed later, that the ZBA failed to indicate how, if at all, it applied workforce housing concerns to its calculus.

The Court need not squarely decide whether Sun Coast has met its burden of establishing that the ZBA acted unreasonably in concluding as it did with regard to the public interest and spirit of the ordinance variance prongs

because, as discussed below, it concludes that Sun Coast has not established that the ZBA lacked reasonable basis in ruling that the unnecessary hardship prong had not been satisfied.

As stated previously, “‘unnecessary hardship’ means that, owing to the special condition of the property that distinguish it from other properties in the area: (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (ii) The proposed use is a reasonable one.” RSA 674:33, I(b)(5).

Sun Coast seems to claim unnecessary hardship because its application is for workforce housing. At the ZBA hearing, Sun Coast did not focus on the property itself, but instead suggested that the “hardship” was related to the type of application it was putting forward. Sun Coast contends that there is nothing in the Town’s ordinances that provides for a meaningful opportunity for workforce housing, and further that there is no comparable land available in the Village District (which allows multiple buildings), or realistically available, that would allow a developer to build workforce housing.

In Plus Fifty-Five, LLC et al v. Town of Hooksett, Docket # 217-2010-EQ-00081, Merrimack Cty. Super. Ct., Sept. 21, 2010 (McNamara, J.), it was concluded that while the type of project being proposed (such as workforce housing) may influence criteria such as the public interest, spirit and intent of the ordinance, and substantial justice, it does not impact the statutory requirement to satisfy the unnecessary hardship standard. The Court agrees with this

conclusion. Unnecessary hardship, per RSA 674:33, must be related to the special conditions of the land itself and not the type of application under consideration.

The ZBA, in denying the variance, saw nothing particular about the pertinent lot. There were no special conditions about this lot that did not give Sun Coast a reasonable use of it. Although Sun Coast asserted that the property is near the zoning line to an adjoining district which would allow its development, this “line drawing” is a function of ordinance creation and does not, by itself, create a legal hardship. See Town of Windham v. Alford, 129 N.H. 24, 30-31 (1986). On this prong alone, the Court **AFFIRMS** the ZBA’s variance decision.

This case, however, presents the further question whether the Town authorities acted reasonably and appropriately in dealing with the project as one offering substantial workforce housing, and whether a “builder’s remedy” is warranted.

The Workforce Housing Act, RSA 674:58, et seq., requires that a municipality must act reasonably and with flexibility in dealing with workforce housing projects when it is not providing its fair share of such housing. A “builder’s remedy,” as recognized in RSA 674:61 and Britton v. Town of Chester, 134 N.H. 434 (1991), is available when a municipality does not reasonably act to meet workforce housing obligations with the project at issue demonstrated to be a reasonable one.

If a zoning ordinance or other land regulation in effect when a workforce housing project is presented proves to be unreasonably exclusionary for such

housing, then a “builder’s remedy” may be necessary to insure construction of a town’s “fair share” of workforce housing. RSA 674:59; Britton, 134 N.H. at 443-44.

The ZBA’s application of Section 602.1.2 of the Windham Zoning Ordinance here, coupled with the general failure of the Town in its pertinent processes to deal with this project with sufficient regard for workforce housing concerns, has resulted in the Town not providing requisite reasonable and realistic opportunities for the development of workforce housing.

As was advanced by Mr. Zohdi during the ZBA hearings, there is almost no Zone Residential C land available which would allow for these developments in the Town, and there is a lack of affordable land in the Village District and the Multi-Family Zone. See ZBA C.R. #21, 37. Further, and while the Town has not made an “official” determination as to whether it provides its fair share of affordable housing for the region, see PB C.R. #50, 52, the record shows (as previously noted) that upon a polling of the participating ZBA members at the July 26, 2011 hearing, certain ZBA members (actually a majority then voting) indicated that in their view Windham did not have its fair share of workforce housing, and two of the members (with one not answering) adopted the view that the Town did not allow reasonable opportunities for workforce housing. Moreover, Ms. Scott had stated that “the Planning Board [had] looked at the data available to them prior to the 2010 warrant and had determined that Windham did not offer a realistic opportunity for workforce housing.” See ZBA C.R. #37.

The issue of workforce housing appears to be controversial in the Town,

and its voters have twice rejected ordinances advanced by the Planning Board broadly to address the workforce housing issue. PB C.R. #52. The Town has thus not taken what may have been helpful steps, through ordinance provisions, reasonably to deal with workforce housing development.

The statistics and information that the record contains coming from the Planning Board support the conclusions that the Town fails to provide its fair share of affordable workforce housing for the pertinent region, and fails appropriately to offer reasonable and realistic opportunities for workforce housing. The Court deems this Planning Board information, advanced after a good deal of study, to be probative, though it was put together, with its conclusions, a few years ago and is subject to critique (as received from, for example, the ZBA Chairman). It advances, among other things, that for 2011 about 21% of the Town's housing qualified as workforce housing, and about 6% of the homes/condominiums then on the market met workforce housing criteria, with the percentage needed to meet regional needs in the area of 46%. See P.B. C.R. #52; see also ZBA C.R. #32 (Table 10 of the Rockingham County Commission Assessment Report).

The Court further observes that it has great difficulty discerning how, or to what degree, the ZBA (though a majority of those voting considered Windham to have workforce housing needs) actually factored in a workforce housing obligation in reaching the conclusion to not allow this project.⁶ While it is true

⁶ Further and, in regard to approaches to workforce housing, it does appear that Mr. McLeod, an important Town official, expressed himself quite strongly (as he has the right to do) against the project, indicating, among other things, substantial questions regarding workforce housing at least for Windham, but it appears as well that he continued to involve himself at least in Planning Board

that the project offers just four of its ten units as workforce housing, this appears substantially justified by legitimate financial considerations, though, and as discussed below, the project will now be altered so that five of the units shall be workforce housing.

The Court concludes, upon consideration of the record and evidence presented, that it has been established that the Town has not here reasonably met its workforce housing obligations, and, in the present context, its application of pertinent land use ordinances and regulations may not be upheld or deemed a valid exercise of proper authority. Though the Town Boards and the Town staff struggled with what to do here, and the Court does not deem them to have acted in bad faith or frivolously in their handling of the pertinent project, the record does reflect that they did not act with sufficient concern for the Town's workforce housing obligations.

The record also reflects that this project has many virtues, and Sun Coast has met its burden of establishing that the project is reasonable—a project which may be sustained without much, if any, undermining of the Town's land use rules; one which the Town acted unreasonably in not permitting to go forward. To be sure, its placement at the 66 Mammoth Road location poses a density/unit problem given the zoning standard there in place, but as to this, and as the record reflects, there are strong arguments that the project should nonetheless be allowed, with the "rural" character of the pertinent area a good deal attenuated. The project appears to otherwise easily pass muster.

proceedings and particularly with at least one other member of the Planning Board, in efforts to block the project though he had recused himself. See ZBA C.R. # 14, 21; PB C.R. #71.

The Court **GRANTS** Sun Coast's request for a "builder's remedy" as follows: Sun Coast shall be permitted to build its project without meeting the pertinent zoning requirement, but it must now return to the Planning Board (which shall accept its site plan/subdivision applications as complete) and obtain from this Board requisite approvals. In addition, the project shall have five units for workforce housing instead of four.⁷ The parties shall negotiate in good faith over assurances that the workforce housing components of the project will be maintained for the long term and the Court retains jurisdiction in that regard. See RSA 674:61, III.

The Court declines to grant Sun Coast's request for an award of attorney's fees. The Town's actions and conduct here in dealing with the relatively new Workforce Housing Act do not call for any such award.

So Ordered.

DATED: February 29, 2012

John M. Lewis
Presiding Justice

⁷ At the December 22, 2011 court hearing, Sun Coast agreed that if granted a "builder's remedy" it would agree to alter the project to have five units of workforce housing.