THE STATE OF NEW HAMPSHIRE

SUPREME COURT

APRIL 2018 TERM

DOCKET NO.: 2017-0595

TRUSTEES OF DARTMOUTH COLLEGE

vs.

TOWN OF HANOVER

RULE 7 APPEAL BY TRUSTEES OF DARTMOUTH COLLEGE
FROM FINAL ORDER OF GRAFTON COUNTY SUPERIOR COURT

BRIEF OF INTERVENORS JEFFREY DOYLE, MAUREEN DOYLE, JULIE KIM, FRANCIS J. MANASEK, NINA LLOYD, DAVID DENT AND KELLY DENT

David W. Rayment, Esquire (Orally)
NH Bar No. 2110
Mark S. Derby, Esquire
NH Bar No. 13856
CLEVELAND, WATERS AND BASS, P.A.
Two Capital Plaza, Fifth Floor
P.O. Box 1137
Concord, NH 03302-1137
603-224-7761

TABLE OF CONTENTS

TABLE OF CASES

Cases

TABLE OF STATUTES AND OTHER AUTHORITIES

Statutes

Other Authorities

QUESTIONS PRESENTED

I. DID THE TRIAL COURT PROPERLY UPHOLD THE PLANNING BOARD'S DENIAL OF SITE PLAN APPROVAL BECAUSE THE APPELLANT FAILED TO MEET THE GENERAL CONSIDERATIONS IN THE SITE PLAN REGULATIONS?

See, e.g., Answer and Brief Statement of Affirmative Defenses of the Intervenors dated March 20, 2017 at Pages 11-17. See Appendix to Brief of Intervenors Jeffrey Doyle, Maureen Doyle, Julie Kim, Francis J. Manasek, Nina Lloyd, David Dent and Kelly Dent at Pages 24-30 (hereinafter, "Int. App. 24-30");[1] Intervenor's Memorandum of Law for the August 9, 2017 Merits Hearing dated August 8, 2017 at Pages 9-18, Int. App. 40-49; Intervenors' Response to Dartmouth College's "Post-Hearing Memorandum" dated August 29, 2017 at Pages 3-6, Int. App. 58-61; Transcript of August 9, 2017 Final Hearing at Pages 24-46, A. 135-157.

II. COULD A REASONABLE PERSON HAVE RULED AS THE TRIAL COURT DID, AND SUSTAIN THE PLANNING BOARD'S DENIAL OF SITE PLAN APPROVAL?

See, e.g., Answer and Brief Statement of Affirmative Defenses of the Intervenors dated March 20, 2017 at Pages 5-11, Int. App. 18-24; Intervenor's Memorandum of Law for the August 9, 2017 Merits Hearing dated August 8, 2017 at Pages 2-7, 10-18, Int. App. 33-28, 41-49; Intervenors' Response to Dartmouth College's "Post-Hearing Memorandum" dated August 29, 2017 at Pages 2-3, Int. App. 56-57; Transcript of August 9, 2017 Final Hearing at Pages 24-46, A. 135-157.

---

[1] References to documents contained in the Appellant's Appendix will follow the convention set forth in the Appellant's Brief, and be cited as "A.", and citations to the documents appended to the Appellant's Brief pursuant to Supreme Court Rule 16(3)(i) will be cited as "Add."

STATUTES AND ORDINANCES INVOLVED

RSA 674:44, II and III

II. The site plan review regulations which the planning board adopts may:

(a) Provide for the safe and attractive development or change or expansion of use of the site and guard against such conditions as would involve danger or injury to health, safety, or prosperity by reason of:

(1) Inadequate drainage or conditions conducive to flooding of the property or that of another;

(2) Inadequate protection for the quality of groundwater;

(3) Undesirable and preventable elements of pollution such as noise, smoke, soot, particulates, or any other discharge into the environment which might prove harmful to persons, structures, or adjacent properties; and

(4) Inadequate provision for fire safety, prevention, and control.

(b) Provide for the harmonious and aesthetically pleasing development of the municipality and its environs.

(c) Provide for open spaces and green spaces of adequate proportions.

(d) Require the proper arrangement and coordination of streets within the site in relation to other existing or planned streets or with features of the official map of the municipality;

(e) Require suitably located streets of sufficient width to accommodate existing and prospective traffic and to afford adequate light, air, and access for firefighting apparatus and equipment to buildings, and be coordinated so as to compose a convenient system;

(f) Require, in proper cases, that plats showing new streets or narrowing or widening of such streets be submitted to the planning board for approval;

(g) Require that the land indicated on plats submitted to the planning board shall be of such character that it can be used for building purposes without danger to health;

(h) Include such provisions as will tend to create conditions favorable for health, safety, convenience, and prosperity;

(i) Require innovative land use controls on lands when supported by the master plan; and

(j) Require preliminary review of site plans.

(k) As a condition of site plan approval, require that the applicant protect or document archeological resources in areas of archeological sensitivity that have been identified in the master plan in accordance with RSA 674:2, III(h).

III. The site plan review regulations which the planning board adopts shall:

(a) Provide the procedures which the board shall follow in reviewing site plans;

(b) Define the purposes of site plan review;

(c) Specify the general standards and requirements with which the proposed development shall comply, including appropriate reference to accepted codes and standards for construction;

(d) Include provisions for guarantees of performance, including bonds or other security; and

(e) Include provision for waiver of any portion of the regulations. The basis for any waiver granted by the planning board shall be recorded in the minutes of the board. The planning board may only grant a waiver if the board finds, by majority vote, that:

(1) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations; or

(2) Specific circumstances relative to the site plan, or conditions of the land in such site plan, indicate that the waiver will properly carry out the spirit and intent of the regulations.

Town of Hanover Site Plan Regulations, last amended April 18, 2015[2]

Article IX(A)(2)

The Reviewing Authority may approve a proposed project, including a minor project plan and a final site plan, only upon determination that the following requirements have been met:

. . .

(A)(2) General Considerations:
In its review of the final site plan, the Planning Board shall assess:

a. The character of the land proposed for development;

b. Conformance with the Hanover Master Plan and local ordinances;

c. The likely impact upon the abutters, neighborhood and others, public infrastructure, town services and fiscal health, and natural and cultural resources on the property and abutting properties;

d. The adequacy of drainage and likelihood of flooding on the property or that of another;

e. The possible impacts on the quality of groundwater;

---

2 See A. 5-20.

f. The extent to which the project guards against undesirable and preventable elements of pollution such as noise, smoke, soot, particulates or any other discharge into the environment that might prove harmful to persons, structures or adjacent properties;

g. The adequacy of fire safety, prevention, and control;

h. The relationship of the project to the harmonious and aesthetically pleasing development of the town and its environs;

i. The provision of open spaces and green spaces of adequate proportions;

j. The proper arrangement and coordination of streets within the site in relation to existing or planned streets; and

k. The suitability of streets of sufficient width to accommodate existing and prospective traffic, to afford adequate light, air, and access for firefighting apparatus and equipment to buildings, which shall be coordinated so as to compose a convenient system.

STATEMENT OF THE CASE

Jeffrey Doyle and Maureen Doyle, Julie Kim, Francis J. Manasek, Nina Lloyd, David Dent and Kelly Dent (the "intervenors") are direct abutters and/or residents of a neighborhood of single-family homes on Tyler Road and Chase Road in the Town of Hanover. Add. 52, Int. App. 74, 81. With the exception of Mr. Manasek, who lives at 9 Chase Road just beyond the intersection of Chase Road and Tyler Road, all of the intervenors are direct abutters to the 41-acre property owned by Dartmouth College (the "appellant" or "applicant"). Id., Int. App. 211-212. The intervenors do not dispute the general description of the procedural posture of the case set forth in the Statement of the Case section at Pages 1-4 of the appellant's brief. However: (1) the Court should not be led to believe that compliance with "General Regulations" is equivalent to compliance with "General Considerations" when the appellant claims that its site plan application "met all of the General and Specific Requirements of the Hanover Site Plan Regulations", when it clearly did not; (2) the appellant incorrectly speculates, with no citation to any authority that "*no objection* to the existing Athletic Complex buildings (two of which the court described as "similar in size to the proposed facility") *had ever been raised* on the basis of inconsistency with the character of that neighborhood"; and (3) the appellant uses the phrase "recused Board member" to imply wrongdoing by intervenor Kelly Dent and undermine her credibility. See appellant's brief at Pages 2-4.

As set forth at length in the Trial Court's well-reasoned Order and in this brief, the appellant failed to meet Sections IX(A)(2)(c) and (h) of the Site Plan Regulations, upon which the Planning Board based its denial, and the Trial Court based its affirmance. The appellants then make the startling claim that "*no objection* to the existing Athletic Complex buildings . . . *had ever been raised* on the basis of inconsistency with the character of that neighborhood",

and cites to Page 1 of the Trial Court's Order. Add. 37. That portion of the Trial Court's Order merely explains the existing buildings on the appellant's land, both of which are much closer to South Park Street and the more intensive Residence Office (RO) and Business (B) districts than the proposed Indoor Practice Facility (the "IPF"). Setting aside the fact that the two existing buildings are clearly distinguishable based on their location and configuration, Int. App. 83, 92, 211-212, 222-224, 228-229, 242-245, it is impossible to state with any certainty whether any objections were raised in 1975 (the Thompson Arena) or 2000 (the Boss Tennis Center) when those buildings were built. Indeed, the appellant's brief is devoid of any citations to the Certified Record which would document or support this claim.

Additionally, throughout its brief, the appellant makes much of the fact that intervenor Kelly Dent is a member of the Planning Board who (properly) recused herself from consideration of this project because she is a direct abutter. See, e.g., appellant's brief at Pages 4, 8, 10, 13-14. Ms. Dent and her spouse reside at 8 Chase Road, Tax Map 35, lot 32, directly across Tyler Road from the proposed IPF. A. 165, Int. App. 75, 82, 210-211, A. 452. Her home is one of the three closest homes to the IPF, and by any measurable standard her home will be the most severely impacted by the proposed IPF. She had, and ethically exercised, her fundamental constitutional rights to speak out against the appellant's proposal and to prevent adverse impacts to her home. The Certified Record is devoid of any allegations of wrongdoing or efforts by Ms. Dent or any efforts to unduly influence the other Planning Board members. For that reason, the Court should not draw any adverse inferences from the appellant's repeated and unnecessary description of her as a "recused" Planning Board member.

STATEMENT OF THE FACTS

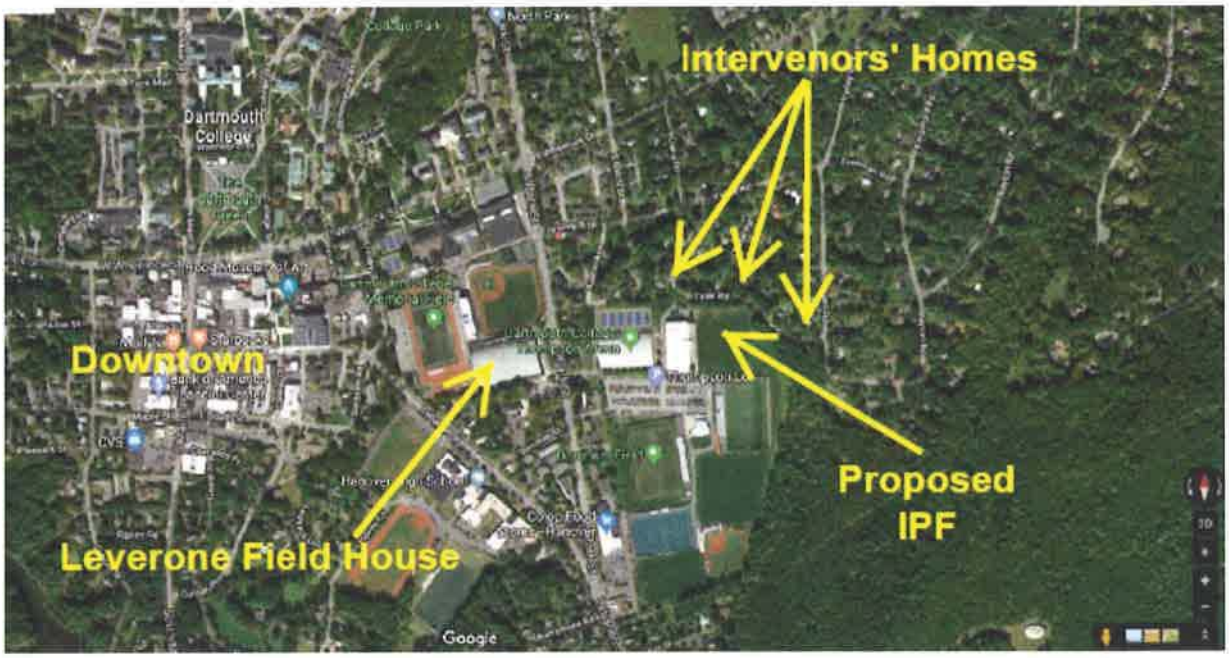
At the beginning of its Statement of the Facts, the appellant attempts to minimize the magnitude of its proposal by stating that the third (and apparently the largest) indoor athletic building owned by the intervenor, the Leverone Field House,[3] is actually located on "Dartmouth's 41-acre Athletic Complex along South Park Street." This is not true. The 41-acre tract of land under consideration is identified throughout the proceedings below as Tax Map 34, Lot 102. Int. App. 211-212. That lot contains approximately 41 acres. Id. A comparison between the aerial photograph on Page 5 of the appellant's brief and the site plans in the Certified Record, A. 452, Int. App. 211-212, demonstrates that the 91,800 square foot Leverone Field House is actually located on a 23.35-acre parcel on the west side of South Park Street, known as Tax Map 34, Lot 16-2, with an address of 26 South Park Street.[4] The Leverone Field House is separated from the lot in question by a row of buildings on the east side of South Park Street, as well as South Park Street itself. See appellant's brief at Page 5, Int. App. 63-64.

This distinction is important because the Leverone Field House is located closer to the appellant's 'core' campus and cluster of academic and related buildings centered around the Dartmouth Green, and following the general boundaries of the Institution (I) zoning district. Int. App. 63-64. More importantly, the Leverone Field House is contained within a tight cluster of appellant-owned athletic fields and other buildings between South Park Street, Lebanon Street and Crosby Street, as follows, with Downtown Hanover to the west, centered around South Main Street:

---

3 In addition to the Thompson Arena and the Boss Tennis Center.

4 See http://gis.vgsi.com/HanoverNH/Parcel.aspx?Pid=2153



Therefore, the proposed 69,860 square foot IPF is to be located at the easternmost edge of the appellant's campus, directly to the east of the Boss Tennis Center. A. 165, 273,[5] Int. App. 211-212. The numerous existing outdoor athletic fields that surround the proposed IPF and the other athletic buildings on the site provide a logical and natural buffer of open space around the existing large buildings. Id. This is particularly the case with the IPF's proposed location, where currently an athletic practice field abuts Tyler Road and the single-family neighborhood to the north. Id., Int. App. 81-87.

Not only does the subject 41-acre lot represent the easternmost edge of the appellant's primary campus buildings, but it is also the eastern end of the I district, where the I district borders the residential districts where the intervenors live. A. 273-276, Int. App. 63-64, 211-212. There appears to be forest to the southeast. A. 273.

The existing 41-acre lot is already well developed. The improvements on it nicely track the residential uses to the north as they move from west to east, becoming less intense, less

5 Note that there is a white block on A. 273 where the proposed IPF would be located.

permanent, and more open. Int. App. 211-212, A. 273. Starting at South Park Street, the strip of properties between South Park Street and the appellant's property is located in the Residence and Office (RO) district, which is colored dark red on the zoning map. Int. App. 64, 224-227. To the south of the RO zone is the salmon or pink-colored Business (B) district, the primary use in which is the Co-Op grocery store, a retail establishment. Int. App. 211-212. In other words, there is significant commercial and high-density residential development on South Park Street, one of the major streets in Hanover. Id., A. 273.

To the north of the appellant's property, the residential districts start with the brown General Residence-2 (GR-2) district running along South Park Street, Int. App. 64, followed on the east by the dark yellow, less intensive Single Residence-2 (SR-2) district, followed by the even less intensive Single Residence-1 (SR-1) district. Id. The descriptions of these districts are cited in the memorandum at Int. App. 44-45, which was explained to the Planning Board by the intervenors, Int. App. 224-227, and they generally allow for less intensive development as one moves east from the development on South Park Street to the low-traffic, low-intensity single-family neighborhoods to the north and east of the appellant's property. Id.

Because the proposed IPF would so radically change the development patterns in the area and replace an open athletic field with a massive, permanent, metal industrial building, the intervenors spoke out against the proposal before the Planning Board.

In addition to sixteen scheduled hearings on Dartmouth's site plan application, Int. App. 65-66, 78-79, 102-110, 115-124, 127-133, 134-135, 146-158, 189-196, 202-206, A. 112-163, 350-353, 360-364, 443-449, 489-554, the Planning Board held two site visits. Int. App. 111-114, 192-193, 219-247, 253-254. The two site visits were held on that corner of the northeast side of Dartmouth's 41 acre parcel on which it proposes to build a 69,860 square foot building.

Id. On the June 14, 2016 site visit, Board members compared the height of cherry picker baskets raised to mark the corners and ridges of the roof of the proposed building against the surrounding natural environment and the adjoining neighborhood of one- to two-story homes in the abutting SR district. 111-114, 192-193, 219-247. Board members walked across the outdoor athletic field to be replaced by the IPF, along the abutting residential street, Tyler Road—the boundary between the I and SR zoning districts—and stood in the front yards of neighborhood homes to evaluate the impact of the proposed IPF. Id. The Planning Board observed that Tyler Road runs below the ground level from which the height of Dartmouth's proposed indoor sports building is measured, sometimes by as much as 10 feet below the proposed building's ground level. Int. App. 82, 111-114, 218-229. This additional elevation depression will magnify the effect of the IPF's already disproportionate height, making it appear to an observer in the neighborhood to be as much as ten feet taller. Id.

Over the course of the sixteen hearings, the Board heard testimony and presentations from Dartmouth staff, abutters, and members of the broader neighborhood who objected not only to the harm posed to abutters, but to the surrounding neighborhood and town. A. Int. App. 65-66, 78-79, 102-110, 115-124, 127-133, 134-135, 146-158, 189-196, 202-206, A. 112-163, 350-353, 360-364, 443-449, 489-554. The minutes of the Planning Board hearings reflect that the Planning Board received numerous written submissions and heard extensive oral testimony from abutters and community members opposing the proposed IPF. Id. This testimony represented a widespread consensus among Hanover residents that the proposed IPF project did not relate "to the harmonious and aesthetically pleasing development of the town and its environs". See Section IX(2)(A)(h) of the Hanover Site Plan Regulations and Int. App. 89-98.

The appellant spends a significant portion of its brief discussing the intervenors' response to, and analysis of, a video produced by the appellant, purporting to show that the towering six-and-a-half-story IPF, looming over the Tyler and Chase Roads neighborhood would have a "negligible" impact on the sunlight received by the residential homes in the neighborhood. A. 351, 363. The intervenors prepared and presented a thorough analysis of the appellant's study, which raised significant and unaddressed concerns, including, but not limited to: (1) the fact that the study chose a mixture of trees that was not representative of the actual trees in the area; and (2) the foliage mix on the trees used in the animation was not accurate. A. 371, et seq. The net result of these inaccuracies was to allow the appellant to incorrectly suggest that the shadows cast on the intervenors' properties were caused by the trees blocking the sunlight and not the IPF. See appellant's brief at Pages 4, 9 and 14. At the same time, technical limitations and restrictions placed on the shadow study hampered the intervenors' ability to analyze it. A. 371 et seq. Nevertheless, the appellant did not meaningfully dispute the claim that the IPF would block as much as ten percent of the sunlight reaching the properties in the neighborhood. A. 373-375.

Beyond that, the Planning Board took two site visits, one on June 14, 2016 at 7:30 PM, Int. App. 112-114, and another on October 4, 2016 at 10:00 PM (principally to observe sound), Int. App. 17, 254. On both occasions, the Planning Board members had a full and complete opportunity to observe the trees between the IPF and the neighborhood, physical representations of what the IPF would look like, in terms of height and bulk, and a simulation of the building height with the assistance of cranes. Int. App. 112-114, 219-247. Armed with that information and based on personal observations of the area, the Planning Board was in the best position to

resolve this dispute between the applicant and the intervenor.[6] Likewise, the Planning Board, having visited the area, was in the best position to judge whether the extent of the IPF's intrusion upon the residential neighborhood, and make a judgment that the IPF would have an unreasonable "impact upon the abutters, neighborhood and others", prohibited by Section IX(A)(2)(c), and that, given its size, height, bulk and location, was adverse to the "harmonious and aesthetically pleasing development of the town and its environs", as required by Section IX(A)(2)(h).

On December 13, 2016, the Planning Board met and deliberated at length before making a motion and voting 4-1 to deny the appellant's site plan application. A. 489-553. The individual Board members discussed their reasoning at length before taking the vote. The transcript of the meeting shows that the four Board members who voted to deny site plan approval generally adopted the reasoning of the members who spoke before them during deliberations, and they reached a consensus that the appellant had not satisfied Sections IX(A)(2)(b), (c) and (h) of the Site Plan Regulations.[7]

The appellant appealed to the Grafton County Superior Court, Int. App. 1, which held a hearing on August 9, 2017, A. 112-165, and affirmed the Planning Board's decision on or about September 21, 2017. Add. 37 et seq. This appeal follows.

---

[6] Because all factual findings of a land use board are *prima facie* reasonable on appeal pursuant to RSA 677:15, the appellants could have, but did not, pursuant to RSA 677:15, III, request a view or permission to introduce additional evidence about the trees or the shadows, when the matter was on appeal before the Trial Court. Having declined to do that and having elected to rest solely on the Certified Record, the Trial Court properly and sustainably deferred to the Planning Board's judgment on this factual dispute.

[7] Section IX(A)(2)(b) relates to compliance with the Master Plan.

SUMMARY OF THE ARGUMENT

Under the extremely deferential standard of review applicable to Supreme Court appeals of Superior Court appeals from local land use board determinations, the Trial Court did not err when it ruled that Sections IX(A)(2)(c) and (h) were not, as a matter of law, impermissibly vague under RSA 674:44, III(c). Instead, the evidence before the Planning Board and the Trial Court demonstrated that, both in general and as applied to the appellant's development proposal, the area in question provided the necessary "observable character" of the area in question, see, e.g., Webster v. Town of Candia, 146 N.H. 430, 437 (2001); Town of Deering v. Tibbetts, 105 N.H. 481, 485-486 (1964); Berube v. City of Manchester, No. 00-E-441, 2001 WL 34013573, at *3 (N.H. Super. June 21, 2001), such that an "ordinary person" could understand and comply with the regulations. That is, the portion of the appellant's property where the appellant sought to replace an open athletic field with a six-and-a-half story, 69,860 square foot, post-modern industrial-style IPF reminiscent of an airplane hangar, with a volume of almost four million square feet, directly abutted the intervenors' neighborhood of single-family residences along Tyler and Chase Roads.

The imposing and towering impact of the IPF would be magnified by the fact that Tyler Road's elevation is, at points, ten feet lower than the base of the IPF. Int. App. 69, 82. The appellant's property already sits at the easternmost edge of its college campus, and the two existing athletic buildings are located closer to the busy thoroughfare of South Park Street, which leads from Downtown Hanover to I-89. A. 273. They also decrease in size as one moves east from South Park Street and the uses on the appellant's property become less intensive, concluding with open athletic fields before reaching the appellants' neighborhood to the north and ease, and forested woodland to the east and southeast. Int. App. A. 273-276, Int. App. 63-

64, 211-212, 224-227. Given: (1) the obvious incongruity of the IPF and its incompatibility with the immediately abutting residential uses; (2) the location of the zoning boundary lines; (3) the existing development patterns and land uses; and (4) the numerous available less-impacting alternative locations on the appellant's 41-acre property, any ordinary person could easily anticipate that the Planning Board would not agree that the proposed IPF complies with Sections IX(A)(2)(c) and (h).

Moreover, Sections IX(A)(2)(c) and (h) are not, as the appellant argues, solely confined to the zoning regulations applicable to the single parcel of property where the project is proposed. Where, as here, the appellant elected to locate the IPF directly on the zoning boundary line between the I and SR districts, it was reasonable and permissible for the Planning Board to look at the impact of the IPF on the appellant's homes.

The Planning Board's 16 hearings and two site visits over a period of approximately eight months between April and December of 2016, (with pre-submission meetings dating back to later 2015), culminated in the December 13, 2016 meeting transcribed at A. 489-554. This was anything but the "ad hoc" reasoning suggested by the appellant. It followed eight months of thoughtful consideration where all parties were afforded a full and fair opportunity to be heard and respond to arguments made by others.

It is well-settled that "[i]f any of the reasons offered by a planning board to reject a site plan application support its decision, then an appeal from the board's denial must fail." See Star Vector Corp. v. Town of Windham, 146 N.H. 490, 493 (2001) (citing Davis v. Town of Barrington, 127 N.H. 202, 207 (1985)) (Emphasis added). The appellant's primary attack on the Planning Board's reasoning focuses on a factual dispute about the accuracy of the appellant's "shadow" or lost sunlight study, and the extent to which it supports the Planning Board's

finding that the IPF does not comply with Sections IX(A)(2)(c) and (h). The intervenors provided a thorough and well-reasoned analysis of the appellant's study, and, combined with the Board members' personal observations at the two site visits, provide a more than sufficient basis to believe that the IPF in the proposed location would adversely impact the abutters and not foster the harmonious development of the town. The Planning Board's findings in this regard were well within its discretion. The Trial Court properly cited and relied upon the loss of light as an adverse impact, and irrespective of how the parties may have disagreed about how the foliage on the trees would influence the loss of light cause by the IPF, there was and can be no dispute that the IPF would permanently block what had previously been open space.

As part of the adverse "impact upon the abutters" under Section IX(A)(2)(c), in addition to the destruction of the views and nearby open space, the intervenors and others provided evidence that the IPF in its proposed location would make their residential properties less desirable and cause a decrease in value. Int. App. 152, 156-157, 162-163, 168-169, 173-174, 195, 199-201, 204-205, A. 380-408.

In sum, there was nothing "ad hoc", improper or disorganized about the manner in which the Planning Board reached its decision and articulated it to the public and the appellant. It was well-reasoned and amply supported by evidence received and reviewed over at least eight months. As such, the Trial Court properly affirmed the site plan denial, and the appellants have not supplied any reason for this Court to do otherwise.

ARGUMENT

I. THE TRIAL COURT PROPERLY UPHELD THE PLANNING BOARD'S DENIAL OF SITE PLAN APPROVAL BECAUSE THE APPELLANT FAILED TO MEET THE GENERAL CONSIDERATIONS IN THE SITE PLAN REGULATIONS.

A. Standard of Review

This court has consistently ruled that:

> [s]uperior court review of decisions of planning boards is limited. . . . The superior court is obligated to treat the factual findings of the planning board as prima facie lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law. . . . The appealing party bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable. . . . The review by the superior court is not to determine whether it agrees with the planning board's findings, but to determine whether there is evidence upon which they could have been reasonably based. . . ..

See Summa Humma Enterprises, LLC v. Town of Tilton, 151 N.H. 75, 79 (2004), citing Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167, 169-170 (2003), Lone Pine Hunters' Club v. Town of Hollis, 149 N.H. 668, 670 (2003) and 5 A.H. Rathkopf & D.A. Rathkopf, Rathkopf's The Law of Zoning and Planning § 87:10, at 87-18 to 87-19 (2003) (internal citations and punctuation removed) (emphasis added). See also Feins v. Town of Wilmot, 154 N.H. 715, 717 (2007) (same).

The Bayson case, cited by the Supreme Court in Summa Humma and Feins, supra, confirms that the standard of review for planning board and zoning board appeals is identical:

> RSA 677:6 governs appeals from decisions of the zoning board of adjustment and local legislative bodies. RSA 677:15 governs appeals from decisions of the planning board. Although the language of the two provisions is somewhat different, we have consistently applied the same standard of review in appeals brought under RSA 677:6 and RSA 677:15: the burden of proof is on the party seeking to set aside the decision of the zoning board or planning board to show that the decision is unlawful or unreasonable. . . . Under either statute, the appealing party must demonstrate that an error of law was committed or must persuade the trial court by the balance of probabilities that the board's decision was unreasonable. . . .

> [w]e have expressly recognized that both RSA 677:6 and:15 apply the same standard. . . . The superior court is obligated to treat the factual findings of both the zoning board and the planning board as prima facie lawful and reasonable and can not set aside their decisions absent unreasonableness or an identified error of law . . . Judicial review of decisions of zoning and planning boards is limited. Such review is entirely discretionary with the superior court and is ordinarily confined to the record of the lower tribunal. . . . . While additional evidence may be introduced in the trial court, there is no trial de novo. . . . The purpose of the statutory provisions for the receipt of additional evidence is not to afford the appealing party a trial de novo, which is no longer available, but rather to assist the court in evaluating the action of the board.

Id., citing Peter Christian's Inc. v. Town of Hanover, 132 N.H. 677, 683 (1990); Durant v. Town of Dunbarton, 121 N.H. 352, 357 (1981); Star Vector Corp. v. Town of Windham, 146 N.H. 490, 492-493 (2001); Burke v. Town of Jaffrey, 122 N.H. 510, 513 (1982); NBAC Corp. v. Town of Weare, 147 N.H. 328, 331 (2001); Hannigan v. City of Concord, 144 N.H. 68, 70 (1999); Price v. Planning Board, 120 N.H. 481, 486 (1980); Beaudoin v. Rye Beach Village Dist., 116 N.H. 768, 770 (1976); Webster v. Town of Candia, 146 N.H. 430, 443 (2001). (Internal citations and punctuation removed).

The Trial Court, therefore, was bound to follow the standard of review as set forth in RSA 677:6 when reviewing planning board appeals. RSA 677:6 states, in pertinent part, as follows:

> [a]ll findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

The Trial Court could only have overturned the prima facie reasonable findings and rulings of the Planning Board below if there was an error of law or if the Planning Board's factual findings were, on the balance of probabilities, unreasonable:

> [a]ppellate review is limited to determining whether there was legal error or a lack of requisite evidence to support the trial court's fact finding. . . . In another town, on an

> identical fact pattern, a different decision might lawfully be reached by another ZBA [or planning board]. This does not mean that either finding or decision is wrong *per se.* It merely demonstrates in a larger sense the home rule aspects of the law of zoning that are at the core of New Hampshire's land use regulatory scheme. Our standard of review is not whether we would have found as the fact finder did, but whether there was evidence on which he or she could reasonably base his or her findings.

See Nestor v. Town of Meredith, 138 N.H. 632, 634 (1994) (emphasis added), citing Aranosian Oil Co. v. City of Portsmouth, 136 N.H. 57, 59 (1992) and Quinlan v. City of Dover, 136 N.H. 226, 229 (1992) (internal citations and punctuation removed). Put differently, even if the Trial Court might have seen things differently when presented with the same evidence, so long as there is evidence upon which the Planning Board could have reasonably based its decision on the site plan, the decision must be upheld.

The Supreme Court's review of the Superior Court's decision is even more limited. "When reviewing the Trial Court's decision, [the Supreme Court] will then decide whether a reasonable person could have reached the same conclusion based upon the evidence before the Trial Court." See Route 12 Books and Video v. Town of Troy, 149 N.H. 569, 574 (2003) (appeal of Trial Court review of planning board decision). In reviewing the Superior Court's review of a land use board decision, the Supreme Court will not conduct a de novo review of the evidence, but instead look to determine whether a reasonable person could have reached the same decision the Superior Court reached. Id.

B. The Planning Board and Trial Court Properly Relied on the Appellant's Failure to Comply with the General Considerations in Sections IX(A)(2)(c) and (h) of the Site Plan Regulations to Deny, and Affirm the Denial of, Site Plan Approval.

The two General Considerations that the appellant did not meet are set forth in Section IX(A)(2)(c) and (h) of the Site Plan Regulations. They are not impermissibly vague under RSA

674:44, III(c),[8] either in a general sense or as specifically applied to the appellant's development proposal. Section IX(A)(2) requires the Planning Board to "assess" and then make a "determination" that all of the General Considerations have been "met" by the applicant. Section IX(A)(2)(c) requires assessment of "[t]he likely impact upon the abutters, neighborhood and others, public infrastructure, town services and fiscal health, and natural and cultural resources on the property and abutting properties", while Section IX(A)(2)(h) requires assessment of "[t]he relationship of the project to the harmonious and aesthetically pleasing development of the town and its environs".

The appellant's current use of its property starts just beyond the row of buildings on South Park Street with the Thompson Ice Arena, and from there the uses become gradually less intense from west to east. It is at this eastern point where the appellant's Institution District-zoned property abuts the single-family residential neighborhoods on Tyler and Chase Roads. That portion of the appellant's property is currently an open athletic practice field, with several more athletic fields and a large parking lot located all over the property. The appellant sought to replace one of those fields—the field closest to the SR-zoned property—with a massive, 3.88 million cubic foot, six-and-a-half story, 69,860 square foot, 1.6-acre indoor practice facility (the "IPF"). The proposed IPF will sit directly on the boundary between the I and SR Districts, and there was no dispute that it would tower over the one-to-two story single-family residential homes on Tyler and Chase Roads.

The IPF represents a dramatic and permanent change to the views from the residences on Tyler and Chase Roads. Where before the intervenors and their neighbors could see multiple open athletic fields at the nearby college, this view, together with the attendant light, air and

---

[8] RSA 674:44, III(c) states that "[t]he site plan review regulations which the planning board adopts shall . . . Specify the general standards and requirements with which the proposed development shall comply, including appropriate reference to accepted codes and standards for construction."

sunshine, will be permanently blocked by the IPF. Given the dramatic nature of the change of use, the size and scope of the new building, and its location on the zoning district boundary line, any reasonable person making such a proposal can easily and readily understand how the proposal would have a difficult time meeting the requirements of Sections IX(A)(2)(c) and (h).

It is easy to ascertain that a site plan locating the structure closer to the center of the 41-acre property, and further away from the zoning boundary with the single-family residences, would more easily meet the requirements of Sections IX(A)(2)(c) and (h). For example, it is a well-settled principle of zoning that placing restrictions on the use of property near a zoning boundary line is not unreasonable or invalid, particularly where a valid goal of zoning is "[p]reserving the residential character of a neighborhood". See, e.g., Buskey v. Town of Hanover, 133 N.H. 318, 325 (1990) (citing Wesermann v. Village of La Grande Park, 94 N.E.2d 904, 909 (Ill. 1950)). Likewise, the Planning Board operates under a clear statutory mandate that zoning ordinances "provide adequate light and air . . . [and] prevent the overcrowding of land", see RSA 674:17, I(d) and (e), which inform the General Considerations set forth in the Site Plan Regulations.

Moreover, a review of the overall zoning map and the location of the Institution district reveals that the appellant's 41-acre lot under consideration marks the southeastern-most boundary of the college campus. See A. 63 and Int. App. 63-64. The applicant's campus generally expands outward from the Dartmouth Green near the red "Dartmouth College" label on the zoning map. A. 273, Int. App. 63-64. Not only is this proposed development at the farthest edge and boundary of the Institution zone, but the proposed IPF would represent a significant outward expansion of the applicant's buildings at the very fringes of its campus. Id.

For that reason, the Planning Board acted reasonably in denying site plan approval, and the Trial Court sustainably affirmed the denial.

i. Section IX(A)(2)(c) and (h) Provide an "Observable Character" and Easily Meet the "Tibbets Test"

The appellant suggests in Sections I(A) and (B) of its opening brief that the trial Court erred and misconstrued the holding of Town of Deering v. Tibbetts, 105 N.H. 481, 485-486 (1964), because: (1) the Tyler and Chase Roads neighborhood is not a recognized historically significant neighborhood or district, but simply a "collection of single family homes"; and (2) an "average person" would have concluded that the IPF was consistent with the Institution district in which it was to be built, without regard to any neighboring districts.

As a preliminary matter, the case law upon which the so-called Tibbets test stands does not distinguish one style of residential neighborhood from another. The Hanover Zoning Ordinance's description of the Single Residence (SR) District as a district "for one family dwelling units as is typical in many New England villages", A. 54, stands for the proposition that it is the "typical" everyday single family residence where most of the residents of Hanover reside, which are to be favored, encouraged, developed and protected by zoning and the local land use boards. The fact that Tyler and Chase Roads may be newer than Strawberry Banke or the Deering town common does not render the neighborhood any less worthy of protection. The Court can take judicial notice of the fact, and the Planning Board was well aware, that Hanover itself is a small, historically significant New England town which is home to the state's only Ivy League college. The location of the college in Hanover brings with it a complex mix of benefits and burdens. All of the single family homes in Hanover are therefore worthy of a basic level of protection by the Site Plan Regulations and the Planning Board in applying them, particularly

given the immense and disproportionate size and scope of the appellant's overall operations relative to the size of the Town of Hanover.

Beyond the appellant's elitism in characterizing the intervenor's homes as nothing more than "a collection of single family homes" (to try to distinguish the facts of clearly applicable case law), any ordinary person with basic powers of observation could observe and anticipate how to comply with Sections IX(A)(2)(c) and (h). The essence of the so-called Tibbets test is whether an ordinary person can observe the area in question and, based on those observations, determine what needs to be done to make the development plan comply with Sections IX(A)(2)(c) and (h). See, id., 105 N.H. at 485-486. The area to be analyzed necessarily includes both the appellant's property and the abutters' properties.

The Planning Board and the Trial Court had before them numerous photographs, plans, charts and illustrations in the Certified Record that uniformly showed the appellant's 41-acre property to have two athletic buildings next to each other on the western part of the lot, with a large parking lot, all located near South Park Street, Int. App. 211-212, A. 273, and on the boundary of the Residence and Office (RO) district. Int. app. 63-64. As one moves to the east and toward the SR/I District boundary, the buildings end and the appellant's uses change to a series of outdoor athletic fields—the very definition of open space. At the same time, the zoning to the north changes from the more intensive General Residence-2 (GR-2) to Single Residence-2 (SR-2) and then to Single Residence-1 (SR-1). Depending on how they are counted, there are between seven and eight open outdoor athletic fields surrounding the buildings and the parking lot, with an acre of outdoor tennis courts to the north of the Thompson Arena between it and the GR-2-zoned properties to the north. Int. App. 44-45, 224-227, A. 273. For ease of reference, an enlarged, color version of A. 63 is attached at Int. App. 63-64. The

more intensive dark red RO district and the pink Business (B) district separate the appellant's property from South Park Street. The residentially-zoned property to the north changes from the brown GR-2 to the dark yellow SR-2 to the light yellow SR-1 districts as one moves from west to east. Id. Put differently, the intensity of the residential districts to the north of the appellant's property decreases from west to east. The last significant building[9] on the applicant's property—the Boss Tennis Center—ends about 100 feet west of the Chase Road/Tyler Road intersection. The Boss Tennis Center is demonstrably smaller than the Thompson Arena. Int. App. 222. After that, everything to the east and south is open space. As currently configured, the development on the north part of the appellant's property generally follows the intensity of the residential zones, i.e., large building (Thompson Arena), smaller building (Boss Tennis Center) and then open space, tracking the transition from GR-2 to SR-2 to SR-1. The IPF would radically disrupt that by replacing an open field with a massive permanent building right on the boundary of the two zones. Notably, the proposed IPF would have a façade area (13,850 square feet) that is approximately 8,500 square feet larger than the Boss Tennis Center (5,500 square feet). Int. App. 222. Any ordinary person with average powers of observation can easily see that.

The simple, direct answer, under the so-called Tibbetts "observable character" test is that the building needs to be further from the zoning boundary line and situated so that it does not tower and "loom", A. 494, Int. App. 69, 161, 198, over and obstruct the views, light and enjoyment of the residential homes on Tyler and Chase Roads. An ordinary person could easily see that placing the IPF on any one of the six or seven other flat, landscaped athletic fields on the 41-acre parcel, or somewhere on the Thompson parking lot (and relocating the parking as

---

9 The Burnham Field Sports Pavilion is a smaller building to the south of the parking lot.

necessary to preserve open space), would minimize or eliminate the reasonable objections the intervenors raised in front of the Planning Board.[10]

This review of the relevant area and the Certified Record before the Planning Board provides a more than sufficient "observable character" of the area to inform an ordinary person how to comply with Section IX(A)(2)(c) and (h) of the Site Plan Review Regulations. A reasonable person might have looked at the Planning Board's decision not to approve the applicant's proposal and reached a different conclusion, but it was not the Trial Court's role to second-guess that decision if there was any evidence to support the Planning Board's decision. While a reasonable person may look at the Planning Board's decision and reach a different result, that is not this Court's role or the Trial Court's role below. See, e.g., Nestor v. Town of Meredith, 138 N.H. 632, 634 (1994) (holding that "[i]n another town, on an identical fact pattern, a different decision might lawfully be reached by another ZBA. This does not mean that either finding or decision is wrong *per se.* It merely demonstrates in a larger sense the home rule aspects of the law of zoning that are at the core of New Hampshire's land use regulatory scheme."); Route 12 Books and Video v. Town of Troy, 149 N.H. 569, 574 (2003); Property Portfolio Group, LLC v. Town of Derry, 154 N.H. 610, 613 (2006).

---

10 Though the appellant did not mention it in its brief, the appellant's presentation at A. 257-260 suggests that it made a half-hearted effort to exclude the other possibilities. However, the explanations were vague and reflect no serious effort to address or explain the challenges. Additional, there was no explanation of why it could not go in the parking lot and why some of the parking could not be relocated, thereby preserving open space and keeping the large buildings closer together. Beyond that, the appellant did not apply for any of the zoning relief that it may have taken to put the IPF somewhere else, even after the intervenors offered in writing to work with the appellant and to support the necessary requests for zoning relief. Int. App. 89, 99-100. With the strong support of the intervenors and, it turns out, a 4-1 majority of the Planning Board, it would not have been hard for the applicant to obtain whatever zoning relief it thought it needed in order to locate the IPF closer to South Park Street or away from the Tyler and Chase Road neighborhood.

ii. The General Considerations Require Consideration of the Impact on Both the Institution and Single Residence Districts

At Section I(C) of its brief, the appellant suggests that the Trial Court erred by discussing the impact upon the homes in the SR zone and for allegedly not focusing on the characteristics of the I zone, where the IPF is to be located. That is, because the IPF is to be located in the I zone, an "ordinary person" would only look at whether the IPF belongs in the IPF zone, and presumably turn a blind eye to the impact on abutters and neighboring property owners.

This distinction is irrelevant because the plain language of Section IX(A)(2)(c) requires consideration of the "likely impact upon the abutters, neighborhood and others" (emphasis added) and "the town and environs". In both instances, the inquiry is focused on the "abutters" without any qualification as to whether they are located in the same zoning district, or "the town and environs", which encompasses the entire town of Hanover and its "environs", or surrounding area.

An "average person" would therefore know that an "abutter" for the purposes of New Hampshire zoning law is "any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board." See RSA 672:3. Most of the intervenors fit the statutory definition of "abutter", and others have shown standing by virtue of their proximity to the site. Therefore, any average person could learn that many property owners are abutters, even though their properties are located in a different zoning district. The location of abutters in another zoning district is therefore more than sufficient to alert an applicant that he or she may have to address the impact that the proposal would have on land outside the district where the project is located.

Moreover, the appellant's suggestion that the more rigorous height limitations on projects in the Institution District within 150 feet of a residential district somehow preempts or supplies the only restriction or specific qualification upon projects in the Institution district lacks merit. See appellant's Brief at Page 24. If anything, this restriction implements the underlying purpose of zoning, which is to protect residential properties from the adverse impact of large-scale developments which would otherwise be located in industrial or commercial zones. If anything, the height restriction is a signal that, as stated above, residential districts are where permanent full-time residents of Hanover actually live, and where most of them have their most valuable asset, i.e., their home.

Finally, there is nothing in the appellant's suggestion that because "Governmental use: limited to public safety, education, recreation", A. 54, are allowed by special exception in the SR District, an "ordinary person" would not be on notice that the IPF would be problematic in or immediately adjacent to the SR District. For starters, the appellant's IPF is a private recreational use appended to a private college, to which that private college can limit access to its students. The appellant acknowledges, as it must, that the phrase "governmental" in Section 405.8 of the Zoning Ordinance modifies the terms "education" and "recreation". See appellant's brief at Page 23 ("construction by the government"). Therefore, the "purpose" of a hypothetical school or recreation facility constructed with public funds is markedly different, even in the absurd scenario where a town of roughly 11,260 residents (as of the 2010 Census) and an annual budget of about $26.4-$28.4 million dollars[11] would spend $17.5 million dollars[12] to construct something like the proposed IPF. Obviously, the "[g]overnmental" education and recreation facilities contemplated by Section 405.8 and which would be located in

---

11 See https://www.hanovernh.org/sites/hanovernh/files/uploads/ms636.pdf

12 See http://www.vnews.com/Hanover-Board-Considers-Dartmouth-Practice-Facility-2672886

neighborhoods like Tyler and Chase Roads would be appropriately-scaled neighborhood public schools and public parks that otherwise meet the special exception criteria. The fact that the Town might be able to locate some sort of public educational or recreational facility in the SR District if it can meet the special exception criteria, and such facilities are allowed of right in the I District, does not by any means suggest that the proposed IPF is on the edge of the applicant's property is "harmonious and aesthetically pleasing" without adverse impacts on abutters and abutting properties. The Planning Board, the Trial Court, and this Court had and have the appellant's actual site plan in front of them, not some hypothetical or conjectural plan.

II. THE CERTIFIED RECORD SUPPORTS AFFIRMANCE OF THE DENIAL OF SITE PLAN APPROVAL

The balance of the appellant's brief is focused on re-arguing a factual dispute between the intervenors and the applicant regarding the extent to which the IPF would block sunlight to the homes in the Tyler and Chase Road neighborhood. In essence, the appellant argues that the Trial Court erred when it mentioned the potential for blockage of light, i.e., an adverse "impact" on the "abutters, neighborhood and others" and a failure to relate to the "harmonious and aesthetically pleasing development of the town", as reasons why the Planning Board voted to deny site plan approval. Add. 47. The appellant suggests that this was error through a strained and selective reading of the transcript. The Trial Court properly and permissibly found that the Planning Board had sufficient evidence before it to deny site plan approval. This was a factual finding by the Planning Board, which is prima facie lawful and reasonable. See, e.g., Summa Humma Enterprises, LLC v. Town of Tilton, 151 N.H. 75, 79 (2004). At the same time, the appellant has not addressed or challenged the other reasons for denial which are readily ascertainable from the Certified Record.

A. The Planning Board Had Sufficient Evidence of Shadowing and Light Blockage Before It.

Blocking a significant amount of sunlight negatively impacts abutters, and is therefore inconsistent with the harmonious and aesthetically pleasing development of the town and its environs. There was ample evidence in the Certified Record before the Trial Court that sunlight would be blocked, and that homes would be in the proposed IPF's shadow, such that they would suffer as much as a 10% loss of total daylight hours. Moreover, the statements of the individual Board members who voted against the project prior to the vote makes it clear that they all did, in fact, consider the loss of light as an adverse impact that prevented the site plan from complying with Sections IX(A)(2)(c) and (h).

The Planning Board's decision-making process was thorough, deliberate and based on the evidence before it. In coming to their decision on December 13, 2016, they took into account their own knowledge resulting from their familiarity with the part of town involved, which this Court has held that a land use board is free to do. See, e.g., Nestor v. Town of Meredith, 138 NH 632, 636 (1994) (citing Vannah v. Town of Bedford, 111 N.H. 105, 108 (1971)).

The Board is entitled to rely on its own judgment, experience and personal knowledge of the character of the impacted residential neighborhood and the physical characteristics of the site in determining whether the Petitioner's proposed site plan meets the criteria of the Regulations, so long as the record contains facts supporting the Board's decision. This personal knowledge was gained through their general familiarity with the area as residents of Hanover, and was enhanced by an extensive site plan review process at which the applicant was given every opportunity to meet its burdens under the Zoning Ordinance and Site Plan Review Regulations.

In addition to sixteen public hearing on the appellant's site plan application, the Planning Board held two site visits. Int. App. 17, 112-114, 254. The two site visits were held on that corner of the northeast side of the 41-acre parcel on which it proposes to build the IPF. At the June 14, 2016 site visit, Board members compared the height of cherry picker baskets raised to mark the corners and ridges of the roof of the proposed building against the surrounding natural environment and the adjoining neighborhood of one to two story homes in the abutting SR zoning district. Board members walked across the outdoor athletic field which the IPF would replace, along the abutting residential street, Tyler Road, demarcating the boundary between the I and SR districts, and stood in the front yards of neighborhood homes to evaluate the impact of the proposed building on neighborhood homes. The Planning Board observed that Tyler Road runs below the ground level from which the height of Dartmouth's proposed indoor sports building is measured, sometimes by as much as 10' below the proposed building's ground level. Int. App. 82, 112-114, 219-229. Through these careful personal observations, the Planning board members were able to visualize how the IPF in the proposed location would adversely impact the Tyler and Chase Road neighborhood by cutting off the view of open space, as well as the light and air. Id., A. 497-553.

B. The Planning Board Was Justified in Not Crediting the Appellant's Sunlight Animation Video

The appellant primarily faults the Trial Court for not overturning the Planning Board's denial of site plan approval because it allegedly improperly did not credit the appellant's sunlight animation video.

The appellant prepared an animation video to show the Planning Board at the August 30, 2016 public hearing. The video was supposed to show the shadow and daylight blocking impact

of the proposed IPF. The appellant acknowledged that the building's shadow would fall on abutting residential properties, but described it as "negligible". Since Dartmouth's video was brief and set to run at high speed, abutters requested the Planning Board to require Dartmouth to post their shadow animation video online so that the public could try to review it more slowly. Abutters requested that Dartmouth add a clock to the video to which Dartmouth planners said they did not know how to do but would post the video on the Town's website. A. 351-353.

When the video was made available and the intervenors reviewed it, they found several glaring errors that undermined its reliability. For example: (1) the appellant inserted a model representation of foliage for the deciduous/evergreen mix along their property line that is not representative of the actual mix of trees on the bank; (2) the video security settings were set to prevent downloading of the video, which prohibited slow motion or frame by frame review, and (3) the only way to work around the security settings was to perform frame-by-frame analysis by pausing the video, then using shift + right arrow to advance a frame and shift + left arrow to retreat a frame. The intervenors did the best they could in light of the technical restrictions that the appellant placed on their access to the video, and presented their written findings. A. 370-375. The intervenors' analysis showed that the building's height and volume would cast a shadow on neighboring homes from September 21 through March 21. This is the seven months out of the year when the days are at their shortest, and sunlight is at a premium. The intervenors presented evidence that, in December, Hanover gets 9 hours of sunlight per day. Residents of neighboring homes would lose a significant portion of direct sunlight when days are shortest. In some cases, more than one hour of direct sunlight would be lost, which in December is more than 10% of direct sunlight. A. 367-408.

In the context of zoning boards,[13] "it [is] for the ZBA, however, to resolve conflicts in evidence and assess the credibility of the offers of proof." See Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 519 (2011) (citing Continental Paving v. Town of Litchfield, 158 N.H. 570, 575 (2009)). "The interests of the parties and the type of issues presented in a site plan review do not differ substantially from those present in the granting of a special exception or a variance before a zoning board." See CBDA Development, LLC v. Town of Thornton, 168 N.H. 715, 721 (2016) (citing Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544 (1979)). "Where, however, the applicant for site plan review does not provide sufficient information upon which the board can apply the site plan regulations, it is proper for the board to deny the site plan application." See Summa Humma Enterprises, LLC v. Town of Tilton, 151 N.H. 75, 79 (2004) (citing 5 A.H. Rathkopf & D.A. Rathkopf, Rathkopf's The Law of Zoning and Planning § 87:10, at 87-18 to 87-19 (2003)).

It is clear from the Certified Record that the appellant's alleged light study was not accurate, and did not provide sufficient information to satisfy the Planning Board that the intervenors' concerns were unfounded. It was not erroneous for the Trial Court to cite the shadowing as one of the reasons for denial. In essence, as permitted by the standard of review, the Planning Board was within its discretion to believe, credit and accept the intervenors' interpretation, critiques and conclusions from the appellant's light study, and reject those of the appellant.

C. Summary of Additional Evidence to Support Denial of Site Plan Approval

In addition to the two site visits where the Planning Board members made careful observations about how the massive new IPF would impact the Tyler and Chase Road

13 The standard of review for appeals from both are the same. See Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167, 169-170 (2003).

neighborhood, the transcript of the December 13, 2016 hearing at which they took the vote to deny site plan approval reflects significant and thoughtful deliberations on this and other deficiencies in the appellant's proposal.

When asked to formulate a motion to disapprove, Board Member Iain Sim volunteered to articulate the denial motion Director Houseman had requested, and stated as follows: "I will make an attempt at this…I will move that this Board reject the application…on construction of the 69,860 square foot indoor practice facility, on the Sunken Garden site, east of Boss Tennis Center, 4 Summer Court, Tax Map 34, Lot 102, in the I-zoning district, and that it be rejected because the Board members have felt that in the context of the vision of the town and the respect we give to neighborhoods, and the – as encapsulated in our master plan, and in the context of a very specifics in site plan, referring to both the aesthetic and harmonious development in the town, more so protection of the neighboring residents from the impact of the facility, we find that the building does not rise to – the proposed , the application, does not rise to meet those requirements." A. 551-552.

Before Iain Sim's summarizing motion, each Board member verbally explained his or her reasoning and stated how he or she would vote on the application.

Board Member Nancy Carter cited that she was going to vote against the application based on "blocked views, shadows cast on their homes, general darkening of the neighborhood". A. 490, 526-527. She asked, among other things, "[i]s this the only site we have? Is this the only location? . . . I will cast my vote based on Article 9 (II)b, (II)c, and (II)h which I consider to be although short in their sentences that they have profound impact. . . ." Id. Ms. Carter further urged the applicant to "take all of your hard work, and I grant that hundreds of [sic]

thousands of hours have gone into this project, and construct this facility elsewhere, within your vast, athletic complexes, within walking distance of your athlete residents." A. 490, 528-529.

Board Member Iain Sim stated that:

> I do not think that the building, as proposed, will be a source of significant light pollution; however, reduced light from shading is another issue, and I can understand it to be a – one of great concern…I don't know how we can measure what has been pointed out to us, which is, that there will be an interruption for some of those residents ***and some of the houses where they used to look across the sunken garden site and see the sky, they will now have a lot of that sky blocked out by the building.*** RSA tells us to guard against such conditions as would involve danger or injury to health, safety or prosperity. So that's one thing that we have to look at. It also says we may include provisions that may lend – may tend to create conditions favorable for health, safety, convenience and prosperity, but I don't know that I can think of any condition that we could apply that would address the issue of shading, other than to say that the building has to be much reduced in height, which I think would be really defeating the prospect of the building… I think prosperity doesn't just mean financial, it means one can think of synonyms such as thriving to be meant here, but I think there is a genuine concern about the potential for this building to affect property values, especially those properties which are very close to the building…I have to fall back, again, on the RSA, and particularly Roman II, subparagraph B, 'Provide for the harmonious and aesthetically pleasing development of the municipality and its environs'. And there's no data point that can be constructed, in my thinking, that will help us actually measure whether it's harmonious and aesthetic. It comes to be a very personal judgment as to whether or not we think this building, in fact, meets that standard. And I have thought very long and I have thought very hard about this, for quite some time now. ***And I have come to the conclusion that I feel that it doesn't meet the standard of being harmonious development and aesthetically*** – an aesthetically pleasing development, so I will vote to reject the motion.

A. 490, 493-494, 542-545. (Emphasis added).

Board Member Michael Mayor spoke after Board Member Iain Sim, who had spoken at length, and incorporated Sim's reasoning, as follows:

> …the building itself, ***in its location as proposed, looms as an affront to the adjacent neighborhood.*** And given what the rest of the Board has already expressed concerns about, I would share their concern and would speak in terms of my responsibility, to protect the neighborhood from loss of value, and I also would vote to reject the application.

A. 494, 546. (Emphasis added). Mr. Mayor therefore articulated his belief that the IPF was in the wrong location, because it "looms" over the adjacent neighborhood.

Finally, Board Member Jon Criswell spoke, having heard the reasoning of all Board members, and stated,

> [w]ell, I'll just say I've done my best to listen throughout this long process to the applicant, to neighborhood, to fellow Board Members. And it's been a lot of information to filter through, a lot of opinion to filter through. I think we can all agree there's going to be an impact, and it's a matter of degree and quality of that impact. For me, the crux of the matter has been the ***scale and proximity of the building to the neighborhood and how those things in turn affects the character***. And I would vote no, as well.

A. 494, 546-547. (Emphasis added).

Prior to this vote, and over the course of no less than sixteen hearings and two site visits, the Planning Board had evidence that the footprint of the proposed 69,860 square IPF would cover an area of 1.6 acres. Int. App. 91, 186, 221. The volume and square footage of the IPF was so vast that 10 of the closest homes to the site could fit inside the proposed building. Int. App. 81. As a metal clad building, the IPF is visually and functionally equivalent to an airplane hangar in design and size, such that it contrasts sharply with the adjacent residential neighborhood of single family homes. A. 323, Int. App. 113, 117, 121, 81-87, 219-247, A. 273. At 3.88 million cubic feet, the intervenors demonstrated and the appellant admitted that the IPF is large enough to fit a Boeing 747 inside. Int. App. 90-92. Contributing to the height impact of the proposed building, which has an average ridge height of 65 feet, is the topography of Tyler Road which in places is 10 feet below the grade of the proposed building on the other side of which homes are sited. Int. App. 82, 111-114, 218-229. The intervenors also presented evidence, in the form of owner's opinions of value, see N.H. R. Evid. 701 and Joslin v. Pine River Development Corp., 116 N.H. 814, 818 (1976), and that of a real estate broker, Int. App. 168-169, that the IPF would have an adverse impact on the value of their properties. Int. App. Int. App. 152, 156-157, 162-163, 173-174, 195, 199-201, 204-205, A. 380-408.

Even if the Trial Court erred focusing as much as it did on the shadowing issue as a basis for denial, which it did not, the Trial Court reached the correct result because there was more than sufficient evidence in the Certified Record before the Planning Board and the Trial Court to deny the appellant's site plan application. The "shadowing" issue contains within it much more than the numeric computation of how much daylight the appellants will take away from the intervenors. The IPF is basically a six-and-a-half story industrial building that will tower and otherwise "loom" over the residential neighborhood, where before useful open space existed. This imposing and incongruous structure represents a significant expansion of the appellant's buildings at the very edge of its campus and its I-zoned property, contrary to Sections IX(A)(2)(c) and (h). It will certainly change the nature, feel and atmosphere of the neighborhood, and does not provide for any meaningful and harmonious transition from the I district to the SR district. While the Trial Court's decision affirming the Planning Board's denial of site plan approval is thorough and well-reasoned, it is well-settled that "[w]hen a trial court reaches the correct result, but on mistaken grounds, this court will sustain the decision if there are valid alternative grounds to support it." See Quinlan v. City of Dover, 136 N.H. 226, 230 (1992) (quoting Lemay v. Rouse, 122 N.H. 349, 352 (1982)); Sprague v. Town of Acworth, 120 N.H. 641, 643-644 (1980).

As noted above and in the Trial Court's decision, Add. 50, the appellant's refusal to mitigate these factors by locating the IPF somewhere else on the property, sinking it into the ground and building part of it underground, and/or cooperating with the intervenors to pursue other less-impacting alternatives, Int. App. 89, 99-100, is a legitimate and sustainable reason for denial. See, e.g., Bayson Properties, supra, 150 N.H. at 175 and Star Vector Corp. v. Town of Windham, supra, 146 N.H. at 493. This is the case even where the proposed use is allowed as

of right and not contrary to any specific provisions of the zoning ordinance. See, e.g., Summa Humma Enterprises, LLC v. Town of Tilton, 151 N.H. 75, 76-79 (2004); Durant v. Town of Dunbarton, 121 N.H. 352, 356 (1981); Patenaude v. Town of Meredith, 118 N.H. 616, 620-621 (1978) (decided under prior law). Add. 40-41.

CONCLUSION

Any fair review of the proceedings below reveals that the Planning Board worked very hard to treat all parties fairly and give this matter thoughtful and thorough consideration. The sixteen hearings, two site visits and 1,952-page Certified Record speak to that fact. The Board members' thoughtful and reasonable consideration of this matter is reflected in the Transcript of the December 13, 2016 hearing. Likewise, the Trial Court properly affirmed the Planning Board's decision because it was squarely based on the evidence set forth in the Certified Record.

For these reasons and those set forth above, the intervenors respectfully request that this Honorable Court affirm the decision of the Grafton County Superior Court, which affirmed the Town of Hanover Planning Board's denial of the appellant's application for site plan review, and grant such other and further relief as is just, equitable and appropriate.

Respectfully submitted,

Jeffrey Doyle, Maureen Doyle, Julie Kim, Francis J. Manasek, Nina Lloyd, David Dent and Kelly Dent
By and through their Attorneys,
CLEVELAND, WATERS AND BASS, PA

Date: April 23, 2018

By: _____

David W. Rayment, NH Bar No. 2110
Mark S. Derby, NH Bar No. 13856
Two Capital Plaza, Fifth Floor
P. O. Box 1137
Concord, NH 03302-1137
(603) 224-7761

ORAL ARGUMENT

David W. Rayment will argue the case for the intervenors and fifteen minutes are requested for this purpose.

_____
David W. Rayment

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply Brief of the Intervenors have been furnished via first-class mail, postage pre-paid, U.S. Mail delivery to William C. Chapman, Esquire, Jeremy D. Eggleton, Esquire, Bruce W. Felmly, Esquire, Wilbur A. Glahn, counsel for the Appellant and Laura A. Spector-Morgan, Esquire, counsel for the Town of Hanover. I further certify that the foregoing Brief of the Intervenor conforms with Supreme Court Rule 16(3).

_____
David W. Rayment