STATE OF NEW HAMPSHIRE
SUPREME COURT

2018 TERM

CASE NO. 2017-0595

Trustees of Dartmouth College,
Plaintiff,
v.
Town of Hanover,
Defendant.

BRIEF OF APPELLANT TRUSTEES OF DARTMOUTH COLLEGE

RULE 7 APPEAL FROM FINAL ORDER OF
GRAFTON COUNTY SUPERIOR COURT

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Oral Argument Requested. Mr. Felmly will argue.

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QUESTIONS PRESENTED FOR REVIEW

1. This Court has concluded that municipal regulations, including planning board regulations, must be "sufficiently clear, definite, and certain" so that an average person after reading them will understand when one is violating their provisions. Dartmouth applied to the Town of Hanover Planning Board to construct an indoor practice facility ("IPF") in the Town's Institutional or "I" zoning district. The Board found that the IPF satisfied all of the Town's Site Plan Regulations and Zoning Ordinances, but it nevertheless denied Dartmouth's application based on two "General Considerations" of the Site Plan Regulations, concluding that the IPF "[n]egatively impacts abutters" and did "not relate to the harmonious and aesthetically pleasing development of the town and its environs." The Superior Court recognized that the General Considerations relied on by the Board might initially be considered to be vague, ambiguous, or lacking the specificity necessary to satisfy statutory and constitutional requirements, yet it upheld the Board by finding that Dartmouth could have looked to the "observable character" of, and to the Zoning Ordinance applicable to, one abutting district, while ignoring the zoning district in which the IPF was to be constructed. Did the Superior Court err as a matter of law in affirming the Board's decision?

Preserved in Dartmouth's Request for Findings and Rulings at paragraphs 11-37; Memorandum of Law at pages 1-17; Tr. of Super. Ct. Hearing at page 22; and Final Order of Grafton County Superior Court (Bornstein, J.) at pages 4-10, 13-15.

2. This Court has held that site plan review is "limited," and that a planning board may not "deny a particular use simply because it does not feel that the proposed use is an appropriate use of land." Here, neither the Board nor the Superior Court identified a single Site Plan Regulation, Zoning Ordinance, or proposed condition that Dartmouth failed or refused to meet. By relying on only the two "General Considerations" as the basis for denial, the Board engaged in *ad hoc* decision-making that reflected members' personal beliefs that the IPF's size, impact, and aesthetics rendered it an inappropriate use of Dartmouth's land. In affirming this denial, the Superior Court found that the Board's decision was not *ad hoc* decision-making because of alleged evidence in the record that shadows caused by the IPF would "block a significant amount of natural light." But the Board itself rejected shadows as a basis for its denial, and the evidence on which the Court relied was inaccurate. Did the Superior Court err as a matter of law in affirming the Board's decision?

Preserved in Dartmouth's Request for Findings and Rulings at paragraphs 12-37; Memorandum of Law at 1-17; Tr. of Super. Ct. Hearing at pages 18-19; and Final Order of Grafton County Superior Court Order (Bornstein, J.) at pages 11-13.

STATEMENT OF THE CASE

This appeal arises from a proposal by Dartmouth College to construct an Indoor Practice Facility (the "IPF") on a 41-acre site known as the Chase Field athletic complex (the "Athletic Complex"). The IPF is permitted as a matter of right in Hanover's Institutional or "I" zoning

district (the "I-District"). Dartmouth's site plan application (the "Application") met all the General and Specific Requirements of the Hanover Site Plan Regulations (the "SPRs"). Dartmouth also made a number of changes to the project to accommodate concerns of the neighbors and the Town of Hanover Planning Board (the "Board"). The Town's Planning and Zoning staff recommended that the Board approve the Application subject to a number of conditions, all of which Dartmouth agreed to meet. Nevertheless, the Board voted 4-1 to deny the Application (with the Chair voting to approve).

The Board offered no facts to support its denial. Instead, it based that denial on the General Considerations of the SPRs as referred to in its Notice of Action dated December 16, 2016. That Notice states that the Application:

> 1) Does not conform with the Hanover Master Plan (As cited in Article IX A 2 b of the Site Plan Review Regulations);
> 2) Negatively impacts abutters, neighborhood and others, town services, and fiscal health (As cited in Article IX A 2 c Site Plan Review Regulations); and
> 3) Does not relate to the harmonious and aesthetically pleasing development of the town and its environs (As cited in Article IX A 2 h Site Plan Review Regulations).[1]

A. 555.[2]

On appeal to the Superior Court, Dartmouth argued that as applied, the General Considerations were too vague, ambiguous, and undefined to serve as the basis for the Board's

[1] These sections of the General Considerations more specifically read as follows: "2. General Considerations: In its review of the final site plan, the Planning Board shall assess. . .b. Conformance with the Hanover Master Plan and local ordinances; c. The likely impact upon abutters, neighborhood and others, public infrastructure, town services and fiscal health, and natural and cultural resources on the property and abutting properties; . . . h. The relationship of the project to the harmonious and aesthetically pleasing development of the town and its environs." A. 12, SPRs art. IX(A)(2)(b), (c), and (h) (collectively, the "General Considerations").

[2] Citations to the Appendix will be indicated as "A." Citations to the Addendum will be indicated as "Add." Unless otherwise provided, citations to the Addendum are to the Final Order of the Grafton County Superior Court (Bornstein, J.).

denial. The Town took no position on the appeal, conceding that if the appeal were granted, Dartmouth would be entitled to the "Builder's Remedy." A. 120–21.

The Superior Court's Order recognized that for the Board to permissibly deny Dartmouth's Application based on the General Considerations, those considerations must have been "framed in terms sufficiently clear, definite, and certain, so that an average man after reading [them] will understand when he is violating [their] provisions." Add. 44 (citing *Town of Freedom v. Gillespie*, 120 N.H. 576, 580 (1980)). The court further acknowledged that, without reference to some objective standard, the Board's decision would be "a matter of arbitrary and subjective judgment." Add. 45 (citing *Webster v. Town of Candia*, 146 N.H. 430, 441 (2001)).

Although conceding that the General Considerations "may on first impression be thought to be a matter of arbitrary and subjective judgment," the Superior Court upheld the Board's decision, concluding that Dartmouth could have uncovered the "clear meaning" of the General Considerations relied upon to deny its Application. Add. 45–46. The court concluded that Dartmouth could have ascertained how the project might impact abutters, or how it would relate to the "harmonious and aesthetically pleasing development of the town and its environs," by looking to the "observable character" of the adjoining neighborhood and to the Hanover Zoning Ordinance (the "HZO") applicable to that adjoining district. *Id.* The Superior Court made no mention of how the IPF would be inconsistent with that "observable character" if 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. *See* Add. 37.

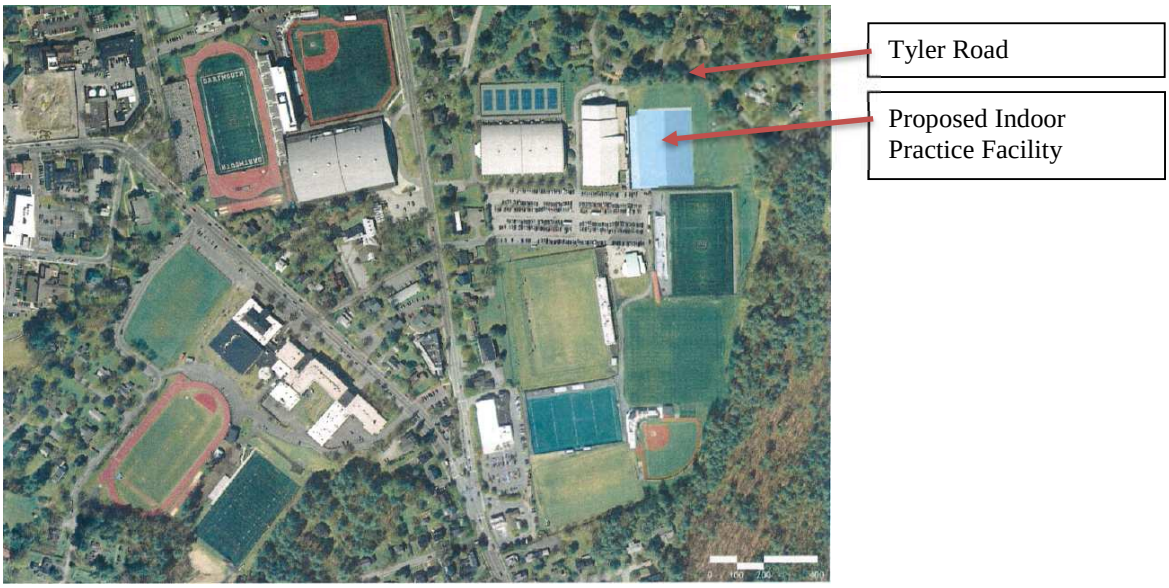
The Superior Court also found that shadows allegedly cast by the IPF would support the Board's denial. The proposition that the IPF would cast shadows on five neighboring homes had

been noted and rejected by the Board as grounds for denying the Application. However, the Superior Court adopted a recused Board member's erroneous interpretation of data provided in a detailed shadow study submitted by Dartmouth to find what it considered to be objective evidence that the IPF would block sunlight by casting shadows on those homes. Although the recused Board member's presentation claimed that the IPF cast a separate shadow on abutting homes, that interpretation had no basis in fact. Dartmouth's study showed that any fleeting shadows projected to be cast by the IPF would overlap with, and would be indistinguishable from, shadows cast by existing trees and neighboring homes.

This appeal followed.

STATEMENT OF THE FACTS

Dartmouth's 41-acre Athletic Complex along South Park Street in Hanover consists of Leverone Field House, a 91,800 square foot facility built in 1965; Thompson Ice Arena, built in 1975 and capable of seating 3,500 spectators; and Boss Tennis Center, which was built in 2000. In front of Thompson Arena and Boss Tennis Center is a large parking lot. A. 452. On the South side of the parking lot is Gordon Pavilion, a locker room facility used by the teams that practice or play their games at the Athletic Complex. *Id.* Lying to the East and South of the parking lot are four flood-lit fields: Scully-Fahey Field (lacrosse), Burnham Field (soccer), Chase Astroturf Field (field hockey), and Blackman Fields, a general practice area for team sports. *Id.*



The IPF

As this photograph indicates, the location proposed for the IPF is immediately to the East of Boss Tennis Center. Similar in size to other facilities in the Athletic Complex, the IPF would be a 69,860 square foot building, with a 56,000 square foot synthetic turf field, and 13,830 square feet of support space (restrooms and meeting rooms). Add. 37. The roofline of the building (the mid-point of the roof from the East, North, and West elevations) measures 59 feet, 2 and ½ inches, and 46 feet, 6 and ½ inches from the South elevations. A. 452. The IPF would provide indoor practice facilities for Dartmouth's sports teams. There would be no public attendance or spectator use. The principal opposition to Dartmouth's Application came from neighbors in an adjoining neighborhood, particularly those with homes on or near Tyler Road, which lies to the North and East of the Athletic Complex and runs along the border between Hanover's I-District and the Single Residence-2 or "SR-2" district (the "SR-District").

Hanover Zoning Ordinance: Institutional District

The Town of Hanover created the I-District in 1976. The HZO states that the objective of the I-District is as follows:

> The chief present land use in this district, and the use that can be expected in the future, is institutional. This use has certain peculiar needs that best can be met by identifying it as a special district. In addition to the normal institutional uses in this area, certain complementary and support facilities are desirable as special exceptions. Because of the specialized nature of these institutions, these support and complementary land uses involve a selective list of residential commercial and public uses which are desirable in such a district providing the necessary safeguards are incorporated. *It is the intent of this provision to permit or allow institutions to use their land for uses related to the purposes of the institutions*.

A. 50, HZO § 405.6(A) (emphasis added). Permitted uses include: "Education," "Recreation, outdoor," and "[u]se accessory to permitted use." *Id*. at § 405.6(B). The minimum lot size in the I-District is 60,000 square feet. *Id*. at § 405.6(C)(1).

In recognition of the fact that land use in the I-District should be managed so that its impacts are reasonable and can coexist with uses in other zoning districts, Hanover enacted more stringent height limitations and setback requirements for buildings in the I-District adjacent to a residential zoning district. *Id*. at § 405.6(C)(2) and (3). No building may be constructed within 75 feet of a residential zoning district boundary. *Id*. at § 405.6(C)(2). Buildings within 150 feet of a residential zone may not be more than 35 feet in height, and those set back 150 feet from that zone may be 60 feet in height. *Id*. at § 405.6(C)(3); *see also* HZO § 505.1(B)(2) (describing method of calculating height for building in I-District). With respect to the IPF, the Hanover Zoning Administrator notified the Board that the IPF would be fully compliant with the HZO, including the height restrictions, setback requirements, and building-to-lot size ratio limitations. A. 165, 166, 253–54, 365.

Pre-submission Meetings and Proceedings Before the Board

Between December 2015 and the end of February 2016, and before submission of the Application to the Board, Dartmouth representatives held six meetings with neighbors to discuss the concept of the IPF, walk the proposed site on the Athletic Complex, discuss screening

strategies, landscaping plans, and exterior building design. A. 260. Dartmouth submitted the Application to the Board in March 2016, including materials that responded to every Site Characteristic requirement, General Requirement, and Specific Requirement of the SPRs.[3]

Beginning in June and extending into December 2016, Dartmouth participated in twelve public meetings and two site visits with the Board. Dartmouth revised and resubmitted the Application five times in response to concerns raised by the Board, neighbors, and the public. As revised, the site plan:

- Enhanced plantings and site landscaping features with $200,000 of additional vegetation specially calibrated to the specific and varying objectives of a few abutting neighbors. A. 410 (explaining Dartmouth's efforts to accommodate planting requests for multiple neighbors).

- Reduced the size of windows, and installed automatic shades and window glazing to reduce light overspill. A. 349 (reducing window size to cut off natural light—normally a desirable feature); A. 323 (translucent glazing instead of glass); A. 366, 441 (automatic smart shading that blocked light transmission after sunset).

- Further adjusted the roof line to lower the profile. A. 305, 309, 342, 349 (showing evolution from pitched roofline, to curved roof line, to invisible hip roof with a 20-foot lower end gable).

- Added public walking and bike paths throughout the Athletic Complex, and dogwood plantings along the walkway at the edge of the IPF. A. 275, 409-10.

- Enclosed cooling machinery at the Thompson Arena, a building not under review by the Board, to reduce noise from that building as a courtesy to concerned neighbors. A. 447-48, 493.

- Altered regular trash and recycling removal so that no vehicles accessed either the IPF or the Boss Tennis Center in the morning hours. A. 415-16.

[3] *See* A. 164. These included SPRs: art. IX(A)(1) (topography, minimization, and landscaping), A. 409; art. IX(A)(3)(a) (excess grading, safety), A. 412; art. IX(A)(3)(b) (soot, smoke and particulates and noise), *Id.*; art. IX(B)(1) ("Requirements for Trash Container Rooms or Enclosures"), A. 415; art. IX (B)(2)("Requirements for Exterior Lighting and Signs"), A. 417–19; art. IX(B)(3)("Landscaping and Screening Requirements"), A. 419-24; art. IX(B)(4) ("Coordination of Streets, Parking, Loading and Safety"), A. 427–28, 437–39; art. IX(B)(5) ("Stormwater Management Standards"), A. 167–253, 355–56, 357–59, 429–30; art. IX(B)(7) (provisions for snow storage and removal), A. 431.

- Rerouted subsurface utility lines to prevent disruption of forest embankment on Dartmouth land across from Tyler Road neighbors. A. 410.

- Addressed SPR art. IX. B (8) ("Upgrading Off-Site Public Facilities") by pledging to repair and replace several hundred feet of storm water piping along Chase Road, a nearby road, at a cost of $200,000, without condition of project approval, and even though there was no evidence or Board finding that the IPF would overburden off-site public facilities. A. 411.

Opposition Led by Recused Planning Board Member Kelly Dent

At each public meeting of the Board on the IPF, Board Vice-Chair Kelly Dent (who was also an abutter living in the Tyler Road neighborhood), recused herself and then participated in the meetings as "a representative for the Tyler Road neighborhood," voicing her strong opposition to the project. A. 261. Ms. Dent also communicated her opposition to Board members by email and formal presentations. *See, e.g.*, A. 367.

During her first presentation on June 21, 2016, she argued that the Board "has a legal obligation to protect our neighborhood and deny the application in this location," and the IPF would "extremely and permanently impact the character of our neighborhood." A. 261. She concluded her presentation by referring Board members to the three General Considerations, and advised the Board that "[y]ou can approve a project ONLY if these General Considerations are met." A. 262 (emphasis in original). The Board's eventual denial of the Application mirrored the General Considerations Ms. Dent put forward at this meeting. A. 555.

A focus of Ms. Dent's attack was that the IPF would cast shadows on five homes near Tyler Road, including her home. A. 370–75. Although the SPRs do not contain any specific provisions or requirements concerning the loss of sunlight or shadows,[4] to address these

[4] The SPRs do not use the term "shadows" anywhere. The word "shade" is mentioned three times. *See* A. 14, art. IX(B)(3)(a) ("landscaping… provides shade…"); *Id*. art. IX(B)(3)(b)(1) ("use deciduous trees to provide summer shade and allow winter sun; and use deciduous vines on fences, trellises and arbors to provide summer shade…") (in reference to parking lot plantings).

concerns, Dartmouth studied, and then presented its findings about the potential impact of shadows cast by the IPF on these five homes to the Board. A. 363. On August 30, 2016, after an initial presentation in June and another in early August, Dartmouth presented an updated animated shadow study.[5] *Id.* The animations showed the impact (in fact, the lack of impact) the IPF would have on sunlight available to neighboring homes on the 21st day of each month from June to December. *Id.* The study accounted for the existing trees on the border between the IPF site and Tyler Road. *Id.* However, it did not include existing trees on the properties of the five neighboring homes, thus likely overstating any impact from shadows cast by the IPF or the bordering trees. Dartmouth representative John Scherding demonstrated that the impact of the IPF was "negligible," except perhaps in December "where there was maybe an hour at the end of the day where the shadow may creep across the property line but not fall on a house." A. 351. Mr. Scherding also made clear that "shadows from the building were heavily intermixed with shadows from the existing trees" and that it was "rare to see a shadow from the new building where there was not a shadow before." A. 363.

At the September 20, 2016 meeting, Ms. Dent made a presentation entitled "Review of IPF Shadow Study." A. 370–75. Ms. Dent did no independent study; instead, she simply interpreted the Dartmouth study. A. 370–75. Although recognizing that "[t]he presence of foliage obscures the impact of the IPF on shadows" (A. 371 (as shown in Dartmouth's study)), her presentation ignored that fact, and attributed *all of the shadows cast on neighboring homes*

[5] The Court may access Dartmouth's shadow study by clicking here: https://www.dropbox.com/sh/cypekpg7khd0edl/AABHlptKplmEoXVf-CQFYlAUa?dl=0. The location of the five homes that the Intervenors contend were affected by shadows is noted in the site plan map set out in the Addendum. Add. 52; *see also* A. 452. In this link, the Court will find seven separate animations, which represent the seven months Dartmouth studied. These animations were presented to the Board, then made available to the public on the video hosting website, *Vimeo*. Since the *Vimeo* hyperlink expired, Dartmouth is now hosting these same animations on *Dropbox* so as to ensure they remain accessible via a non-expiring hyperlink.

solely to the IPF, referring in every instance to homes in the "shadow of the IPF." A. 372. Based on that assumption, she claimed that "[t]he impact of the shadows on residents of neighboring homes … is significant." A. 367. Ms. Dent again urged the Board to rely on the General Considerations, concluding they "empower [the Board] to deny this application." A. 369. None of the Board members asked Ms. Dent questions about that presentation at that meeting, and the issue of shadows was not discussed again until the meeting at which the Application was denied.

Planning Board Staff Recommendation

Prior to the December Board hearing, the Town's Planning and Zoning Staff prepared a 12-page report, (i) commenting that at the October 25, 2016 meeting "[t]he standards in Article IX were carefully considered…. to identify outstanding information needed to determine conformance to the standards in the Site Plan Regulations"; (ii) setting out "only relevant sections" of the standards for the IPF site plan"; and (iii) recommending that the IPF site plan be approved subject to 21 conditions, each of which Dartmouth agreed to meet. A. 478 –88.

December 13, 2016 Planning Board Hearing

The Board met to act on the Application on December 13, 2016. A. 496–554. Ms. Dent once again recused herself, but remained in attendance. A. 499. The Board first reviewed each of the 21 conditions proposed by its staff to ensure they were understood. A. 506–525. Thereafter, Board member Carter moved that the IPF site plan be approved. A. 525. Each member then spoke on the motion.

Like the Town's planning and zoning staff, the Board did not identify a SPR Site Characteristics requirement, General Requirement, or Specific Requirement that the Application failed to meet, and in fact, three of the five Board members affirmatively acknowledged that the

IPF could not be denied on that basis. Board member Nancy Carter, who voted against the IPF, stated:

> The IPF does conform to the letter of the law in the Institutional zone, concerning its height, setbacks, lot coverage, and so forth. Dartmouth has, for the vast bulk of this application, complied with countless details of the site plan review, successfully. Sometimes working with staff and other citizens to alter details of the original design to make it a better project. The neighbors have cited things, such as blocked views, shadows cast on their homes, the general darkening of the neighborhood, noise from both the existing portions of the Chase field complex and the IPF as proposed. Housing values and security, landscaping, which does not adequately block a 72-foot building. However, our site plan regulations are not sufficiently developed on these topics at this time to deny the IPF.

A. 526–27. Board Chair Judith Esmay, the lone vote to approve the IPF, observed:

> I may wish the IPF was not necessary, or that it were a quarter of its proposed size, or that it could be located where no one would see it or be offended by it, but I am unable to find anything in the statute, the Hanover zoning ordinance, or our own site plan regulations, that will permit me to disallow it. The project meets every requirement of law. It is a permitted use, in the zone within which it is located, not requiring a variance or even special exception. It complies with every dimensional requirement imposed by our ordinance, which includes a buffer zone for precisely this situation, a college building on a property abutting a residential neighborhood.

A. 530–31. Board Member Sim similarly concluded:

> [S]o this Board uses the zoning ordinance as its yard stick to measure all the applications. And, in that regard, this building meets the requirements of the zoning ordinance … [T]his application before us right now has to be judged on the merits of the zoning ordinance as currently written. And, again, it's my view that this structure, as proposed, meets the zoning ordinance.

A. 536–37. Mr. Sim went on to identify only three concerns raised by abutters: Property values, sound, and shadows. A. 539. He nevertheless found that neither sound nor property values were issues, and in regard to shadows, he said:

> [T]he question is how much more shading on top of existing shading [from the trees bordering the site and Tyler Road], will the building create, and is it excessive? And I don't know how we can measure that.

A. 543. Board members Mayor and Criswell did not mention shadows, shading, or any other objective criteria in their "no" votes. Mr. Mayor stated the IPF "looms as an affront" to the neighborhood, while Mr. Criswell stated, without explanation, that the "crux of the matter has been the scale and proximity of the buildings to the neighborhood and how those things, in turn, affect the character." A. 546–47.

After discussion among Board members, the Chair called for a vote on the motion to approve. The Chair voted to approve; members Carter, Sim, Mayor, and Criswell voted to deny. A. 550. Robert Houseman, the Director of Planning and Zoning, stated that there needed to be a motion to disapprove with "an explanation of why by state law." A. 550–51. Board member Sim so moved:

> [The IPF site plan] be rejected because the *Board members have felt* that, in the context of the vision of the town and the respect that we give to neighborhoods, and the – as encapsulated in our master plan, and in the context of a [sic] very specifics in [sic] site plan, referring to both the aesthetic and harmonious development in the town, more so protection of the neighboring residents from 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. 552–53 (emphasis added). There was no discussion on the motion. Members Sim, Carter, Mayor, and Criswell voted in favor, and the Chair opposed it. A. 552.

SUMMARY OF ARGUMENT

Dartmouth's Application satisfied all of the requirements of the HZO and the objective criteria of the SPRs and received the support of the Town's Planning and Zoning Staff. Despite this, the Board denied the Application by a 4-1 vote (with the Chair in favor). In the Superior Court, the Town took no position on the Board's decision, and in fact, conceded that Dartmouth

would be entitled to the "Builder's Remedy," if it prevailed in this appeal. As explained below, the Superior Court's decision to uphold the Board's denial is not supported by the evidence and constitutes legal error.

None of the Board members voting against the IPF offered any objective reason for doing so. Instead, their vote cited the General Considerations as promoted by their recused Vice-Chair Ms. Dent, including concerns of "impact on neighbors," and whether the building was "harmonious and aesthetically pleasing." Lest there be any doubt that their decision was based on personal and subjective feelings, Board members expressly stated that the SPRs were not "sufficiently developed" to deny the Application based on the complaints of neighbors, that they did not know how they could "measure" those concerns, and that there was no "data point" to do so. They thus conceded that their decision, what one member called "the most difficult case we have had to review" in his seven years on the Board, simply came down to a "very personal judgment" about what Board members felt. A. 532.

The Superior Court set out the proper standards for review of arbitrary and subjective planning board regulations and decisions namely, that planning board regulations must be "sufficiently clear, definite and certain, so that an average man after reading [them] will understand when he is violating [their] provisions," and that a planning board's decision "may not deny approval on an *ad hoc* basis because of vague concerns" and "must be based on more than the mere personal opinion of its members." Add. 42, 44, 47. Yet the court then misapplied those standards in finding an objective basis to save the Board's decision.

First, relying on this Court's decisions in *Webster v. Candia* and *Deering v. Tibbetts*, the Superior Court concluded that Dartmouth could have known that the IPF would violate the SPRs by looking to the "observable character" of the adjoining neighborhood (the SR-District) and by

reading the HZO, which referred to the SR-District as providing for "one-family dwelling units as is typical in many New England villages." The court's analysis ignored the fact that there was nothing sufficiently unique or distinct about the single-family homes in the SR-District to support the "observable character" test. Likewise, the court failed to recognize that the HZO specifically addresses the situation present in this case, where a building in the I-District (where the IPF would actually be located) abutted the SR-District. The HZO provides for more rigorous setbacks and height restrictions designed to mitigate or eliminate impact on the abutting residential neighborhood. The court also failed to recognize that the HZO would have permitted a similar building within the adjoining SR-District. And most important, the court erred by failing to look at the existing buildings in the I-District. Had it done so, it could only have concluded that since *the current buildings*—which have existed for decades, and which the court described as "similar in size to the proposed facility"—were not considered to have been inconsistent with the character of the SR-District, no average person could reasonably have concluded that the IPF would be.

Second, the court attempted to save the Board's decision by looking to evidence in the record as a basis for its decision, namely that the IPF would cast shadows on five homes in the adjoining SR-District. But the Board did not rely upon—and in fact expressly rejected—the impact of shadows as grounds for its denial. And even if the Board had relied on that evidence, that evidence provided no objective basis for the denial. The evidence credited by the court (but not by the Board itself) was a fundamentally flawed presentation by the Board's recused Vice-Chair, who simply misinterpreted or misrepresented Dartmouth's shadow study. Dartmouth's study showed that any shadows cast by the IPF were indistinguishable from shadows already cast by existing trees. Although recognizing that fact (an inconvenient fact for the Intervenors),

Ms. Dent's presentation erroneously attributed all shadows cast on abutting homes to the IPF, rather than the existing trees, when in fact, the Dartmouth shadow study clearly evidences that neighboring homes experienced no distinguishable shadow effect from the IPF at all. As a result, her presentation was grossly inaccurate, and the Superior Court's reliance on it as a basis to uphold the Board's arbitrary and subjective decision was legally erroneous.

Although the Superior Court failed to take the Board at its word that it based its decision on personal feelings, this Court should do so. There were no objective grounds for the Board's denial. Accordingly, the decision of the Superior Court should be reversed, and Dartmouth should be granted the "Builder's Remedy," allowing construction of the IPF.

STANDARD OF REVIEW

This Court will uphold decisions of the Superior Court regarding planning board appeals "unless its decision is not supported by the evidence or is legally erroneous." *Webster*, 146 N.H. at 433. The Superior Court is obligated to treat the factual findings of a planning board as *prima facie* lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law. *Bayson Prop., Inc. v. City of Lebanon*, 150 N.H. 167, 170 (2003). "Site plan review, however, is limited. It does not give the planning board the authority to deny a particular use simply because it does not feel that the proposed use is an appropriate use of the land. Whether the use is appropriate is a zoning question." *Summa Humma Enter. v. Town of Tilton*, 151 N.H. 75, 78 (2004). The Superior Court "may reverse or affirm, wholly or partly, or may modify planning board decisions 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." *Ltd. Edition Prop. v. Town of Hebron*, 162 N.H. 488, 490–91 (2011).

ARGUMENT

I. The Planning Board's Reliance on the Two General Considerations Was Error, as was the Superior Court's Conclusion that Those Considerations Were "Sufficiently Clear, Definite, and Certain" Under this Court's "Average Person" Test.

The Board failed to identify any specific or objective basis for its final vote on the IPF Application. It moved that the IPF:

> [B]e rejected because the *Board members have felt* that, in the context of the vision of the town and the respect that we give to neighborhoods, and the – as encapsulated in our master plan, and in the context of a [sic] very specifics in [sic] site plan, referring to both the aesthetic and harmonious development in the town, more so protection of the neighboring residents from 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. 552–53. The Board also failed to explain *why* the IPF impacted neighbors or was not harmonious or aesthetically pleasing with the town and its environs, or *how* the IPF failed to satisfy the General Considerations. Because the Board failed to provide any factual basis for its vote, there are no factual findings to which this Court should defer, and no standard capable of objective determination that can be supplied to provide definition to the Board's vote, or the regulations on which it relied. The Superior Court recognized that planning board regulations must be "sufficiently clear, definite, and certain, so that an average man after reading [them] will understand when he is violating [their] provisions." Add. 44 (citing *Gillespie*, 120 N.H. at 580). The court also conceded that the General Considerations used by the Board to deny Dartmouth's application might "on first impression be thought to be a matter of arbitrary and subjective judgment," unless some objective standard supplied the average person a definition of their terms. Add. 45 (citing *Webster*, 146 N.H. at 437).

The Superior Court found that objective standard by first looking to the "observable character of the district to which" the General Considerations applied. Add. 46 (*citing Webster*,

146 N.H. at 437; *Deering v. Tibbetts*, 105 N.H. 481, 485–86 (1964)). But in doing so, the Court misconstrued the "observable character" test and misapplied *Tibbetts*. This Court adopted that test in connection with clearly identified districts of historic character not applicable here. The Superior Court also misapplied the test because it looked *only* to the character of the abutting SR-District, instead of looking to the I-District, where the IPF would be constructed. No "average person" could possibly understand that the IPF was not "harmonious or aesthetically pleasing" or would likely negatively "impact abutters" based on the character of the I-District—or even of the abutting SR-District—given that buildings similar in size and purpose to the IPF had existed in the I-District and abutted the SR-District for decades. This reliance solely on the abutting SR-District without considering the I-District was an error of law.

Likewise, the Superior Court erred in supplying meaning to the General Considerations by looking to the HZO and special conditions applicable to the SR-District. The General Considerations refer to "the harmonious and aesthetically pleasing development of the town and its environs." Despite that, the court limited its analysis to one district of the Town, ignoring all other districts, including the I-District, to which the General Considerations were being applied. With respect to that District, Hanover had specifically adopted—and Dartmouth had fully complied with—ordinances designed to address the impact on, and harmoniousness of, I-District construction on abutting residential districts by establishing height and set-back requirements. The Superior Court ignored those portions of the HZO, focusing instead only on the portion of the HZO applicable to the SR-District. But even if reference to the SR-District portion of the HZO was appropriate, those ordinances would permit construction of a building similar in purpose to the IPF in the SR-District.

Because the Superior Court's attempt to provide clarity to the vague General Considerations was flawed, and because the two General Considerations cited by the Planning Board lack sufficiently clear standards as applied to the IPF, the Board's stated reasons for denial were general and based on their personal opinions.

A. The *Tibbetts* "Observable Character" Test.

In *Tibbetts*, this Court upheld a decision of the Deering selectmen to deny an application to construct a "pre-built home" within a quarter-mile of the Town common, on the grounds that the design and construction of the home would "impair the atmosphere of the Town." 105 N.H. at 483. The Court described the Town commons as follows:

> [The town] point[s] out that as early as 1784 the common was a matter of concern to the inhabitants of the town (XI Town Papers of N. H. 494), the [sic] that it is today a center upon and about which cluster the meetinghouse of the Community Church, the town hall and the town library. Photographs of these buildings as well as of the adjoining dwelling of the plaintiff. . .show them to be structures typical of early New Hampshire architecture, so situated about the common as to create a dignified and harmonious center.

Id. at 483–84. In considering whether a denial based on the "atmosphere of the Town" was so vague as to "furnish no valid standard," the *Tibbetts* court determined that this language "takes clear meaning from the observable character of the district to which it applies"—which, in that case, was the Town common. *Id*. The *Tibbetts* court found that character sufficiently clear that an "examination of *the photographs which are exhibits in the case* make it apparent that the 'atmosphere' is a standard of objective determination." *Id*. at 484 (citing Robert M. Anderson, *Architectural Controls*, 12 SYRACUSE L. REV. 26, 45 (1960) (emphasis added)).

The "observable character" test articulated in *Tibbetts* was adopted with reference to well-defined historic neighborhoods in which the "character" of the environs were highly

distinctive and clearly evident from photographs or from simple "physical observation."[6] The *Tibbetts* court supported the test by referencing cases addressing historic districts in Rhode Island, *Hayes v. Smith*, 167 A. 2d 546 (R.I. 1961) (an addition to a Congregational Church in the historic district of South Kingstown); Massachusetts, *Opinion of the Justices*, 128 N.E.2d 557 (Mass. 1955) and *Opinion of the Justices*, 128 N.E. 2d 563 (Mass. 1955) (the constitutionality of the creation of the historic districts in Nantucket and on Beacon Hill); and Louisiana, *New Orleans v. Levy*, 64 So. 2d 798 (La. 1953) (the historic district of the French Quarter in New Orleans.).[7] Moreover, the distinctive architecture of historic districts was the subject of the Anderson article, which the *Tibbetts* court relied upon as the authority for the test. *Tibbetts*, 105 N.H. at 484. Thus, for the "observable character of a district" to give "clear meaning" to a facially vague standard such as "harmonious and aesthetically pleasing" or "likely impact," the characteristics subject to observation must be discernible, distinct, and clear. If, as Yogi Berra is reported to have said, "you can observe a lot just by looking," the "observable character" must be plain to the average person either by photographs or by observation. *Id*. at 486. Here, as discussed below, nothing in the character of the I-District, or the abutting SR-District, would put a reasonable person on notice that the IPF would be inconsistent with the character of those districts. *Tibbetts* does not support the Superior Court's holding.

[6] Webster defines "observable" as "deserving of observation: Noteworthy," "Remarkable, Detectable, Noticeable," capable of being observed; discernible." Webster's 3rd International Dictionary, Merriam Webster, at 1558 (2002).

[7] Apart from *Tibbetts*, this Court has never applied the "observable character" test. However, in *Berube v. Manchester*, No. 00-E-441, 2001 WL 34013573, at *1 (2001) the Superior Court (Lynn, J.) applied the test to uphold a decision of the Manchester Planning Board which denied an application to construct a 5,400 square foot dental office where the surrounding "buildings consist mostly of large Victorian era homes." *Id*. The court found the Board's rejection based on structures that "are not visually or functionally related to adjoining properties," not to be arbitrary or subjective because that standard was given definition by comparing the building "against the Victorian character of the adjoining neighborhood." *Id*. at *4. As in *Tibbetts*, and unlike here, the surrounding neighborhood had clear definition.

B. The Superior Court Misapplied this Court's Decision in *Tibbetts* by Improperly Focusing Solely on the "Observable Character" of the Abutting SR-District While Ignoring the I-District in Which the IPF was to be Constructed.

The Superior Court erred in three respects in its attempt to provide clarity to the General Considerations through the *Tibbetts* "observable character" test. *First*, the Court failed to look at (and in fact, ignored) the "observable character of the district," in which the IPF was to be built. Indeed, the I-District abuts not only the SR-District, but several other districts. After all, the reference in the General Considerations to the "harmonious and aesthetically pleasing development" measures those terms in connection with the "development of the *town and its environs*." A. 12, SPR art. IX(A)(2)(h) (emphasis added). Yet the court did not evaluate any neighborhood other than the SR-District when assessing observable character.

The "average person" applying the "observable character" test by physical observation, or by photographs (as in *Tibbetts)* to the I-District, would have concluded that the IPF was consistent with the character of that District and the site in which the IPF was to be built. Filled with athletic facilities, the IPF was permitted in the I-District and fully consistent with the existing facilities and overall layout of the Athletic Complex. Even the Superior Court accepted this inescapable observation, describing the site as already having "a relatively large parking lot, several outdoor athletic fields and tennis courts, and two indoor sports facilities *similar in size to the proposed facility*." Add. 37 (emphasis added). Thus, if Dartmouth had looked for "clear meaning" by physically observing the existing construction in the I-District it had every reason to conclude that the IPF would be aesthetically pleasing in relation to, or harmonious with, the "observable character" of *that* district. A simple aerial photograph proves that point. *Supra* p.5.

As explained above, the I-District was established to "permit or allow institutions to use their land for uses related to the purposes of the institutions." A. 50, HZO § 405.6 (A). In

Hanover, the I-District includes not only athletic facilities, but permits a number of other uses, including government and recreational, parking, hospitals, medical centers and warehouses. *Id*. If the practical application of the "observable character" test allows an average person to conclude that he or she is violating the regulation by looking around, or by looking at photographs, that person could be expected to look around at the buildings in the I-District, as well as the other districts adjacent to the site on which the IPF was to be constructed. The Superior Court ignored the I-District entirely—and clear photographic evidence of the buildings therein or in other adjacent zones—focusing only on the abutting SR-District. And here, the site on which the IPF was to be constructed has contained similarly-sized buildings that abutted the SR-District for decades, and is the self-evident location for the IPF to be constructed.

Second, even if it were appropriate to look at only one abutting district or set of homeowners, the average person could not have concluded that the "observable character" of the adjoining SR-District prohibited construction of the IPF due to "impact," "aesthetics," or "harmony." How could someone reasonably conclude that the IPF would be inconsistent with the observable character of the SR-District if the existing athletic buildings in the I-District—one of which directly abuts the SR-District and Tyler Road—were in harmony with, or did not unduly impact, the SR-District? If the current buildings on the site where the IPF was to be constructed are in harmony with, or did not impact, what the Superior Court saw as an adjoining "New England village[]," there is no basis on which the average person could conclude that the IPF would be out of harmony, aesthetically displeasing, or impact that alleged character.

Third, the Superior Court stated that Dartmouth "could have physically observed the character of th[e] [Tyler Road] neighborhood" and by doing so "reasonably ascertain how the project may 'impact' the 'abutters, neighborhood and others' or how it would relate to the

'harmonious and aesthetically pleasing development of the town and its environs.'" Add. 46. But nothing in the character of that neighborhood either by physical observation, or by examining photographs of the site and adjacent neighborhood, would permit, let alone compel, such a determination. Unlike the historic district town common in Deering (with its "dignified and harmonious center") or the unique historic neighborhoods of the cases from other jurisdictions cited in *Tibbetts* for the "observable character" test, the adjoining residential neighborhood of Tyler Road has no discernible or distinctive character. *See Tibbetts*, 105 N.H. at 484.

The Superior Court's decision placed emphasis on the "New England villages" language in the SR-District portion of the HZO, suggesting that the SR-District had some distinct or historic character. Yet the HZO refers only to a district providing for "one-family dwelling units *as is typical* in many New England villages." A. 54, HZO § 405.8 (emphasis added).[8] The Tyler Road neighborhood is simply a collection of single family homes. Suffice it to say that the Tyler Road neighborhood is not the Orford ridge, Hopkinton center, Strawberry Banke, the green in Amherst, the Deering town common, or even a grouping of white clapboard homes. Nothing about that neighborhood—particularly when one considers the current buildings in the I-District—provides any unique "observable character" that could provide clear meaning to the General Considerations or to the Board's decision based on those considerations. For these reasons, the "observable character" test provides no objective basis for the Board's reliance on the General Considerations and no support for the Superior Court's decision.

[8] At the hearing before the Superior Court, counsel for the Intervenors did not claim some special character to the SR-District, stating only that it includes a "typical New England style housing neighborhood" of "residential housing." A. 137.

C. The Hanover Zoning Ordinance Applicable to the SR-District Does Not Provide Definition to the General Considerations Relied on by the Board.

In addition to its reliance on the "observable character" test adopted in *Tibbetts*, the Superior Court referenced the special exceptions set out in the SR-District portion of the HZO as providing clarity or guidance to an average person about the General Considerations. *See* Add. 46 (finding that Dartmouth "could have referred to the description of the SR district in the town's ordinances for guidance."). Although not expressly referencing *Webster*, in citing to the SR-District portion of the HZO, the Superior Court appears to have relied on that case (and other cases it cited), for the proposition that a vague regulation may be given definition by reference to extrinsic sources.[9] In fact, the Superior Court's reference to the special exceptions in the SR-District portion of the HZO undermines its conclusion.

The special exceptions in the SR-District include "government uses limited to education and recreation." A. 54, HZO § 405.8. It would be reasonable for the "average person" to understand that if construction by the government of an educational/recreation facility (a facility serving the same purpose as the IPF) is permitted in the SR-District, that same construction should be permitted in the I-District, which specifically permits it *by right* without special exception. In other words, if an education/recreational facility in the SR-District is not inconsistent with the "New England villages" concept, a similar facility in the abutting I-District likewise cannot be inconsistent or out of harmony with that concept. Thus, as applied by the Superior Court, the General Considerations remain vague and arbitrary.

[9] Although the Superior Court cited *Webster* for the "observable character" test (based on *Webster*'s citation to *Tibbetts*), the *Webster* court did not base its decision on that test. Instead, in *Webster*, this Court found that a vague regulation restricting the cutting of trees in a manner inconsistent with "scenic beauty" was given the necessary specificity when considered in reference to the statute and warrant article under which the regulation was adopted. *Webster*, 146 N.H. at 436.

Even more important, in this case, the SR-District portion of the HZO referenced by the Superior Court sets out precise guidance to the average person planning construction in the I-District on a site abutting the SR-District. And that guidance is directly contrary to the result posited by the court. Specifically, the I-District portion of the HZO contains restrictions on the maximum height of a building when that building is "within 150 feet of a residential district," such as the SR-District. *See* A. 50, HZO § 405.6 C(2) and (3). These more stringent requirements do not apply where I-District construction abuts other districts. The imposition of these more rigorous height and set back restrictions is designed to minimize the impact on abutting properties to the SR-District. These requirements necessarily address aesthetic considerations such as shadows potentially created by building height—the other allegedly "objective and discernible" standard applied by the Superior Court. Thus, contrary to the Superior Court's conclusion that the SR-District portion of the HZO provides *implicit* guidance or definition to the average person, the I-District portion of the HZO actually provides *explicit* instruction for dealing with the adjoining SR neighborhood. If anything, by reading all of these ordinances, the average person would conclude that the IPF could be built on the very site in the I-District proposed by Dartmouth. This is particularly true since the IPF meets all of the height and setback requirements in the I-District, including those specific to the portion adjoining the SR-District, and is, by the Superior Court's own description, "similar in size" to the other indoor sports facilities on the site.

In sum, the abutting Tyler Road neighborhood has no distinctive character that would allow the application of the *Tibbetts* test. But even if it did, the Superior Court misapplied the test by failing to observe (or account for) the location in which the IPF was to be built, or to consider how the existing buildings in the I-District could be consistent with the character of the

abutting zone, but the IPF would not be. Likewise, neither the SR-District portion of the HZO—nor the I-District portion of the HZO—provides any guidance to allow Dartmouth to determine that the IPF would violate the General Considerations and, in fact, support the opposite conclusion. As a result, as applied by the Board, the General Considerations not only may on first impression be thought to be a matter of arbitrary and subjective judgment" (Add. 45), but upon further consideration prove to be so. The Superior Court's affirmation of the Planning Board's denial should therefore be reversed.

II. The Planning Board Erred by Relying on General Considerations to Deny Dartmouth's Application Based on Personal Feelings and *Ad Hoc* Decision-Making. In an Effort to Rationalize that Decision, the Court Adopted Reasoning that the Board Specifically Rejected and Went on to Misinterpret Evidence From Which it Claimed the Board Could Have Concluded that the IPF "Would Block an Unreasonable Amount of Sunlight From Reaching Abutting Homes." This was Clear Error.

The Superior Court recognized that the determination of whether a planning board decision was based on impermissible *ad hoc* reasoning is made by applying the well-established rule that "[t]he board's decision must be based on more than personal opinions of its members." Add. 47. This rule of law is longstanding and embedded in numerous decisions of this Court. *Ltd. Editions Prop., Inc.*, 162 N.H. at 497; *Derry Sr. Dev., LLC v. Town of Derry*, 157 N.H. 441, 451 (2008); *Condos E. Corp. v. Town of Conway*, 132 N.H. 431, 438 (1989); *Durant v. Town of Dunbarton*, 121 N.H. 352, 357 (1981). The cases demonstrate that absent an objective basis for a planning board decision, it would be so arbitrary as to be unconstitutional.

The Superior Court correctly identified the legal and constitutional standards requiring the court to strike down planning board decisions based on personal opinions or "vague concerns." However, the court erred in attempting to identify objective or discernible reasons or factual findings when none were stated by the Board, and then misinterpreted the factual evidence it used to support its decision.

A. The Board Did Not Base Its Decision to Deny the IPF Site Application on Blockage of Sunlight From the IPF and the Superior Court's Finding to That Effect is Unsustainable.

At the heart of the Superior Court's decision was its determination that the Board did not rely on mere personal opinion or feelings, because:

> [T]he *proposed facility* would block a significant amount of sunlight from reaching abutting homes. As blocking a significant amount of sunlight is objectively both a negative impact upon abutters and inconsistent with the harmonious and aesthetically pleasing development of the environs of the proposed facility, the Board could have further reasonably concluded that the petitioner's application did not satisfy Provisions C & H.

Add. 49 (emphasis added) (internal quotation marks omitted). This conclusion was based on the Superior Court's finding that "there is evidence in the record to support the conclusion that the proposed sports facility would block a significant amount of natural light from reaching abutting homes." Add. 48. In making these findings, the Superior Court relied on Ms. Dent's interpretation of the video animations prepared by Dartmouth. Those animations used sophisticated software to depict the shadow impact of the IPF, as well as the shadow impact of adjacent trees and neighboring homes, on five homes located on Tyler Road and other homes.[10] *See* Add. 47; *supra* n. 5. By contrast, Ms. Dent did no independent study at all.

The Superior Court's conclusion constitutes legal error for two reasons: *First*, the Board's denial did not rely on the impact of shadows on neighboring homes and in fact, rejected shadows as a basis for the denial. *Second*, nothing in the evidence cited by the Superior Court, namely Ms. Dent's presentation, supports the conclusion that the IPF "would block a significant amount of natural light from reaching abutting homes." Add. 48.

[10] There was no evidence that the IPF would cast shadows on any other home in the adjoining SR-District.

First, although the Superior Court stated that "the four board members who voted to deny the petitioner's application were *particularly concerned* that the proposed facility would block an unreasonable amount of sunlight," the record proves otherwise. Add. 47 (emphasis added). Indeed, only two of the four Board members voting to deny the IPF application even mentioned that issue. The two who did expressly indicated that they did not—and could not—base their decision on shadows, and thus were forced to fall back on personal feelings and beliefs. This is amply demonstrated by a review of their own statements at the December 13, 2016 meeting.

Although Board member Carter stated that neighbors had cited shadows being "cast on homes" or "general darkening of the neighborhood," she did not base her decision to deny on those factors, stating instead that "[o]ur own site plan regulations are not sufficiently developed on these topics at this time to deny the IPF." A. 526–27. Instead, she erroneously based her vote on her interpretation of the Town's Master Plan (a point the Intervenors now concede) and on unspecified or unexplained references to "harmonious" and "aesthetically pleasing" in the General Considerations. A. 138 (counsel for Intervenors acknowledging that the Master Plan was not a legitimate basis for denying approval of the IPF); A. 528. Using those factors, she concluded (without elaboration) that the IPF is in "stark contrast" to other sites which have been developed in the I-District, but ignored the fact that the IPF would be located as part of a previously established Athletic Complex of similarly configured buildings. A. 528.

Board Member Sim voted to deny, but his expressed rationale also rejected the impact of shadows as a basis for his decision. Although he mentioned neighbors' complaints about the "absence of light as a result of shading," Sim stated that any potential impact from shading by the building *could not be determined*:

> What we also have to recognize is that there is some shading probably already caused by the existing trees, which are already

> quite tall and will continue to grow, I hope, in some respects for many years to come.… So the question is, how much more shading on top of the existing shading, will the building create, and is it excessive. *And I don't know how we can measure that.*

A. 542–43 (emphasis added). As will be discussed below, Sim had it right. The shadows from existing trees create virtually all the shadows cast on the homes at issue, and the shadow cast by the IPF during an insignificant portion of a small number of days in early winter is superimposed on existing tree shadows. Sim did not base his decision on shadows, as the Superior Court implied, or on any objective or discernible basis or factor. Instead, he confirmed that his vote was a matter of personal feelings, drawn from the vague language of the General Considerations:

> [T]here'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 judgement* as to whether or not we think that this building, in fact, meets that standard. 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. 545–46 (emphasis added). But denial on a "very personal judgment" is what planning board members may not do. *See Ltd. Editions Prop., Inc.*, 162 N.H. at 497 ("Although a planning board is entitled to rely in part on its own judgment and experience in acting upon applications, the board may not deny approval on an *ad hoc* basis because of vague concerns. The board's decision must be based upon more than the mere personal opinion of its members.") (quoting *Derry Sr. Dev. LLC*, 157 N.H. at 451).

Board member Mayor voted to reject the application and made no reference to shadows, shading, or any other objective or discernible criteria for his rejection. Instead, although complimenting Dartmouth for the time and effort it had devoted to the project, he stated: "[T]he building itself, in the location as proposed, looms as an affront to the adjacent neighborhood." A. 546. How can a building that is in precise compliance with all municipal height, setback,

size, and location requirements, including those expressly designed to minimize the impact on abutters, meets every site-related condition requested or imposed by the Town's planning department, and is adjacent to similarly constructed athletic facilities be an "affront" to the adjoining neighborhood? Mr. Mayor offered no explanation, nor did the Superior Court even attempt to uphold the Board on this basis.

Finally, Board member Criswell similarly voted to deny the application without any reference to shading or shadows. His expression of reasons was terse and inexplicable:

> 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. 546–47. There is no reasonable basis for the Superior Court to have equated this statement as an objective or discernible finding by Mr. Criswell of shadow impact. His concern expressed as to "scale and proximity" flies in the face of the complete compliance of the IPF with the zoning requirements, including the special protections of height limitation and setback specifically enacted by the Town and applied to the size and proximity of the building for the benefit of the adjoining residential zone.

The Superior Court is simply mistaken that the Board relied on the alleged impact of shadows or blockage of sunlight as a basis for denying the Application, as the Board's own statements demonstrate. Not only do none of the Board members voting "no" base their decision on the blockage of sunlight from the IPF, but any fair review of their expressed reasons shows the members recognized that either the SPRs did not permit shadowing to be applied as a reason to deny, or that the issue of the shadow caused by the building could not be discerned. In fact, the entire record and the statements of the Board members rest on their personal *feelings* of "affront," "stark contrast," or undefined concerns about "scale and proximity." A. 528, A. 546-

47. This is the clear case where a Board has violated the core requirement to base its decision on objective factors, not personal feelings or vague concerns.

B. The Superior Court Erroneously Relied Upon Inaccurate and Unsupported Claims that the IPF Cast Shadows on Abutting Homes.

Standing alone, the Superior Court's error attributing a basis for the Board's decision that the Board clearly rejected requires reversal. But this error is compounded by the fact that the entire body of evidence as to shadows or shading that the court relied upon is factually inaccurate. The Superior Court found that "there was evidence in the record" that the IPF would "block a significant amount of natural light." Add. 48. The factual evidence before the Board was a video presentation that Dartmouth submitted. But that study showed nothing of the kind, and the Superior Court's conclusion is based on the Intervenors' misreading or misinterpretation of that study.

Ms. Dent claimed that the height of the building would project shadows into the adjoining neighborhood and thereby affect five homes (out of 145 in the adjoining neighborhood) by a reduction in available sunlight. A. 373. This would mostly occur at the end of the afternoon, particularly during the days surrounding the winter solstice in December. *Id*. The Superior Court adopted this claim, ultimately finding, in reference to a table that Ms. Dent provided, that: "According to this table, the *facility* would block over an hour of mostly afternoon sunlight from reaching certain homes during some months of the year." Add. 48 (emphasis added). The court also cited that presentation in finding that "residents of neighboring homes will lose a significant portion of direct sunlight when days are shortest' and in some cases 'more than 10% of direct sunlight will be lost.'" *Id*.

The court's factual assumption is simply wrong. The Dartmouth study actually shows that the building does not generate any significant shadow on the five homes. The study

prepared and presented by Dartmouth is a video animation showing the sunlight cast into the area of the neighborhood, presented in a time lapse manner from pre-dawn hours until darkness in the evening. The animation shows the position of several homes, including Ms. Dent's home on Chase Road, depicting the shadows which fall on the properties caused by other neighboring homes, trees bordering the property, and, at the end of the day, how IPF shadow *overlaps* with the shadows already cast by trees and neighboring homes. In its simplest sense, and as clearly recognized by Board member Sim, the limited shadow cast by the IPF for a short period of time on a few days each year converges with existing tree shadows. As a result, the impact of any shadow from the IPF cannot be separated from shadows cast by existing trees. Any period of time where the building could add shadow over a home is duplicative; it is not darkened further or more extensively by the IPF shadow in any significant way. In sum, there is no impact on homes of shadows cast by the IPF. Moreover, as shown in the Statement of Facts, Dartmouth's study actually overstated any impact the IPF might have on neighboring homes by not accounting for trees located on the property of those homes and that also cast shadows. The statement of Dartmouth's representative that "it is rare to see an area with a shadow from the new building where there was not a shadow before" was never disputed or contested. A. 363. The Board members' rejection of shadows as a basis for denial was consistent with this evidence.

Ms. Dent's presentation interpreted Dartmouth's animations in an effort to show the number of minutes of shading claimed to be caused by the IPF.[11] She asserted that the IPF cast shadows on several of the dates on which data was presented in the Dartmouth study. More specifically, she claimed that there was shadow on September 21 on one of the five Tyler Road

[11] Ms. Dent set out her methodology for reviewing Dartmouth's shadow study animations, explaining that she used "shift+right arrow to advance a frame" and "shift+left arrow to retreat a frame" in an effort to review the animations in slow motion. A. 371. Nothing about this methodology, however, results in an ability to distinguish IPF shadow from tree shadow when the two converge.

homes (Dodd) and claims there are some minutes of late afternoon shadow cast on the five homes on October 21, November 21, and December 21. In fact, the animations show that none of the five homes experienced shadows caused solely by the IPF on those dates. The animations demonstrate that the homes experience a short period of end of the day shadow during several of the dates just prior to sunset, when IPF shadow converges or overlaps shadows caused by existing trees. Moreover, the animations show that the houses had been in tree shadows for much of the day during the dates in question and prior to any even arguable impact from the IPF.

When she made her presentation to the Board in September 2016, Ms. Dent admitted (as earlier noted by Dartmouth) that "the presence of foliage on trees obscures the impact of the IPF." A. 371. As a remedy for that inconvenient fact, she assigned every minute of the combined shadow *solely to the IPF*. All of Ms. Dent's interpretations, which the Superior Court plainly chose to adopt, reference the "shadow of the IPF." A. 372–75. By making this assumption and conclusion, the Dent presentation ignores the reality that the homes would be in shadow for all the minutes she assigns regardless of whether the IPF was constructed. *Supra* n.5. As a result, the entire presentation is fundamentally flawed and grossly inaccurate.

The material effect of combining any late afternoon IPF shadow with already existing tree shadow is also fundamental to the erroneous ruling of the Superior Court. As noted, the evidence presented by Dartmouth that the shadow from the IPF could not be separated from shadows cast by trees located between the site and the Tyler Road homes was never refuted. Instead, Ms. Dent's presentation simply assumed that since one could not separate the tree shadow from the IPF shadow, every shadow was caused by the IPF. Since that assumption is wrong, the Superior Court's reliance on Ms. Dent's presentation is equally flawed.

The unfairness and inaccuracy of Ms. Dent's interpretation is exemplified by examining the actual shadows that impact her property. Rather than a substantial reduction of sunlight (10% or so as claimed by Ms. Dent), the animation actually shows the following when applied to Ms. Dent's former property on December 21st, the only date in the study where she even claims that any IPF shadow touches the property:

- Sunlight first strikes Ms. Dent's home at approximately 7:36 AM.
- The home is in shadow from trees and/or adjoining homes between 7:36 AM-3:15 PM.
- Shadow cast by the IPF converges with the tree shadow on the home at 3:15 PM.
- From 3:15 PM to 4:05 PM tree and IPF shadows overlap on the home. The respective contributions of tree and IPF shadows cannot be segregated.
- 4:05 PM marks the end of direct sunlight on Ms. Dent's home.
- Sunset 4:15 PM.[12]

The IPF shadow and tree shadows converge and superimpose at 3:15 PM. Prior to that time all shadow is from trees or other homes, which put Ms. Dent's home in shadow for more than 85% of the day on December 21st.

The Superior Court's findings thus provide no reasonable basis to uphold the denial of the project based on the rationale it provided. The Board did not base its decision on shadows or blockage of sunlight and several members rejected that notion as a basis for the decision. The entire interpretation of shadows on which the Superior Court based its finding was inaccurate. In fact, the IPF does not place the five homes in question in shadow.

CONCLUSION

This is the case that proves the rule that decisions based upon personal feelings, vague concerns, or criteria that no applicant could discern or know from regulations, other sources, or observations are outside the realm of proper deference to the judgment and decisions of planning

[12] Screenshots from the animation are provided in the Addendum showing the sunlight and shadow cast upon Ms. Dent's home at 9:45 AM, 2:24 PM, and 3:15 PM. Add. 53–55; *see also* A. 452.

boards. Here, there is no need to speculate as to whether a planning board rested its decision on personal judgment or feelings. The Board stated this on the record and there was no basis for the Superior Court to disregard this dispositive evidence.

The Superior Court established a new rule requiring an applicant to know or assume that a building sited and surrounded by comparable structures and fully compliant with zoning requirements (including those designed to mitigate the impact on abutting districts) could be denied based on subjective considerations such as whether a building is "harmonious or aesthetically pleasing." Any fair observation of this neighborhood would tell the "average" applicant that this project is properly sited and located. "If the planning board could deny uses it thought inappropriate, there would be no point in having zoning, for it would provide no protection to the landowner. If the use is permitted by the zoning ordinance, it cannot be barred by the site review process unless the use would create unusual public safety, health or welfare concerns." 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 30.09, at 556 (4th Ed.) In this case, no such concerns were stated. This is so for good reason; there are none.

The effects of this denial, if left to stand, will disrupt decades of planning decisions and seriously undercut orderly development in this State. The sweep of the Superior Court ruling affects all projects, large and small, disrupting the careful planning and assessment of both applicants and municipalities. It will not be lost on those willing to invest their resources to create sound development that they can no longer reliably assume the planning process will be shielded from personal agenda, bias, or subjective beliefs of members of the planning board even where the project complies with all zoning and planning regulations of a municipality. No developer of a hospital, educational facility, commercial structure, or residential development

will be able to rely in their planning, engineering, and financing of a proposed project on its conformity with the existing zoning ordinances, planning board regulations, and the observable nature of the environs.

For these reasons, Dartmouth respectfully requests this Court reverse the decision of the Superior Court affirming the denial by the Board and, consistent with the position of the Town, provide Dartmouth the Builder's Remedy, approving the project and enabling its construction.

The Superior Court Order is in writing and is appended hereto.

Respectfully submitted,

Dated March 9, 2018

TRUSTEES OF DARTMOUTH COLLEGE

By its attorneys,

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REQUEST FOR ORAL ARGUMENT

Oral argument requested. Mr. Felmly will argue.

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, I served the foregoing BRIEF FOR APPELLANT TRUSTEES OF DARTMOUTH COLLEGE by mailing two copies thereof by email and first class mail, postage prepaid, to each of the following counsel of record:

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STATE OF NEW HAMPSHIRE
SUPREME COURT

2018 TERM

CASE NO. 2017-0595

Trustees of Dartmouth College,
Plaintiff,
v.
Town of Hanover,
Defendant.

ADDENDUM TO BRIEF OF APPELLANT TRUSTEES OF DARTMOUTH COLLEGE

RULE 7 APPEAL FROM FINAL ORDER OF
GRAFTON COUNTY SUPERIOR COURT

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Oral Argument Requested. Mr. Felmly will argue.

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THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

Docket No. 215-2017-CV-00006

Trustees of Dartmouth College

v.

Town of Hanover

ORDER

The petitioner, the Trustees of Dartmouth College, appeals a December 16, 2016, decision of the Town of Hanover Planning Board (the "Board"), denying site plan approval for the construction of an indoor sports facility. On March 9, 2017, the Court granted a petition to intervene filed by several individuals (collectively the "intervenors") that own land abutting the site of the proposed facility. (Index # 6.) The Court held a hearing on the petitioner's appeal on August 9, 2017. Based on the record, the parties' arguments, and the applicable law, the Court finds and rules as follows.

I. Factual and Procedural Background

On March 1, 2016, the petitioner submitted a site plan application to the Board, seeking approval for the construction of a 69,860 square foot indoor sports facility on a 41-acre parcel owned by Dartmouth College and located in Hanover's "I" or "Institutional" zoning district. (C.R. at 1, 20.) Presently on the parcel are a relatively large parking lot, several outdoor athletic fields and tennis courts, and two indoor sports facilities similar in size to the proposed facility. (Id. at 21–22.) The specific site of the proposed facility is currently a grassy area located on the parcel's north-east corner. Immediately abutting this site to the north-east is a neighborhood of single-family homes

CLERK'S NOTICE DATE
9/21/17
CC: M. Derby; D. Raigment; E. Arnold; N. Lloyd; R. Carey; L. Spector-Morgen

located in Hanover's "SR" or "Single Residence" zoning district. (Id. at 27.)

Between April 5, 2016, and December 13, 2016, the Board held at least sixteen meetings, including a site visit, during which it considered the petitioner's application. (See id. at Tabs 12, 22, 37, 41, 52, 65, 69, 75, 90, 98, 110, 124, 129, 133, 148, 153.) Over that time, the petitioner made several revisions to its proposal to address certain concerns of abutters. (See, e.g., id. at 502, 638–47.) Nevertheless, on December 13, 2016, the Board voted 4-1 to deny the petitioner's application. (Id. at 1878–79.) On December 16, 2016, the Board issued a "Notice of Action" stating:

> Notice is hereby given that the Hanover Planning Board has found that the [petitioner's proposal], as presented:
>
> 1) Does not conform with the Hanover Master Plan (As cited in Article IX A 2 b of the Site Plan Review Regulations);
> 2) Negatively impacts the abutters, neighborhood and others, town services and fiscal health (As cited in Article IX A 2 c Site Plan Review Regulations); and
> 3) Does not relate to the harmonious and aesthetically pleasing development of the town and its environs (As cited in Article IX A 2 h Site Plan Review Regulations).
>
> Therefore, the Hanover Planning Board has DENIED the request of the Trustees of Dartmouth College for construction of a 69,860 sf indoor practice facility . . . .

(Id. at 1952.) The petitioner subsequently appealed to this Court on January 9, 2017.

II. Standard of review

Any person aggrieved by a planning board decision may appeal to the superior court. RSA 677:15, I. "[T]he burden of proof is on the party seeking to set aside the decision of the . . . planning board to show that the decision is unlawful or unreasonable." Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167, 169 (2003); see also RSA 677:6. "Superior court review of planning board decisions is limited." CBDA Dev., LLC v. Town of Thornton, 168 N.H. 715, 720 (2016). "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] decisions absent unreasonableness or an identified error of law." Bayson Properties, Inc., 150 N.H. at 170 (quotations and brackets omitted). "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." Derry Sr. Dev., LLC v. Town of Derry, 157 N.H. 441, 447 (2008). Finally, "[i]f any of the board's reasons for denial support its decision, then the [petitioner]'s appeal must fail." Webster v. Town of Candia, 146 N.H. 430, 441 (2001) (emphasis added, quotation omitted).

III. Discussion

The three regulations cited in the Board's notice are Article IX, A, 2, b ("Provision B"), Article IX, A, 2, c ("Provision C"), and Article IX, A, 2, h ("Provision H"). Article IX of the town's site plan regulations is entitled "Standards and Requirements for Proposed Developments" and states that the "[Board] 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." (App. to Mem. of Law in Supp. of Appeal at 138 [hereinafter "Pet'r's App."].)

Article IX is divided into subsection A, "Site Characteristics, and General Considerations and Requirements," (id.), and subsection B, "Specific Requirements." (Id. at 139.) Subsection A, 2 is entitled "General Considerations" and states that "[i]n its review of the final site plan, the Planning Board shall assess" eleven criteria, including Provisions B, C, and H. (Id.)

Provision B states that the Board shall assess a site plan's "[c]onformance with the Hanover Master Plan and local ordinances." (Id.) Provision C states that the Board

shall assess a proposal's "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." (Id.) Finally, Provision H states that the Board shall assess "[t]he relationship of the project to the harmonious and aesthetically pleasing development of the town and its environs." (Id.)

The petitioner argues that the Board erred in rendering its decision based upon these provisions because they are allegedly "vague, ambiguous, and not proper standards for site plan review under RSA 674:44 or the New Hampshire and U.S. Constitutions." (Mem. of Law in Supp. of Appeal at 1 [hereinafter "Pet'r's Mem."].)

The Court first addresses the petitioner's argument regarding the statutory interplay between RSA 674:44, II and III. (See Pet'r's Mem. at 5–8.) RSA 674:44, II states that "site plan review regulations which the planning board adopts may" relate to eleven certain categories.[1] RSA 674:44, III mandates that "site plan review regulations which the planning board adopts shall," inter alia, "[s]pecify the general standards and requirements with which the proposed development shall comply, including appropriate reference to accepted codes and standards for construction."

The petitioner argues that, because the provisions of Article IX, A, 2 are similar to the categories of RSA 674:44, II, and because RSA 674:44, III requires that a Board adopt regulations specifying the "general standards and requirements" by which it will regulate the RSA 674:44, II categories, the provisions of Article IX, A, 2 "were intended to be permissible objectives for regulations, but they were not intended to be regulations

[1] Several provisions of Article IX, A, 2 closely track the language of some of the RSA 674:44, II categories. Compare, e.g., Provision H (stating that the Planning Board may assess "[t]he relationship of the project to the harmonious and aesthetically pleasing development of the town and its environs"), with RSA 674:44, II(b) (stating that site plan regulations may "[p]rovide for the harmonious and aesthetically pleasing development of the municipality and its environs").

unto themselves." (Pet'r's Mem. at 5.)

RSA 674:44, III(c)'s use of the phrase "general standards," as opposed to "specific standards," to describe the regulations a planning board shall adopt, undermines the petitioner's argument that the law forbids a planning board from relying upon "general considerations" akin to the provisions of Article IX, A, 2. See also Summa Humma Enterprises, LLC v. Town of Tilton, 151 N.H. 75, 76–79 (2004) (finding that a planning board properly "[b]ased" its decision to impose conditions on a site plan application—for a proposal that was not expressly contrary to any specific zoning ordinance—on a statement in the board's regulations setting forth the "purposes served by site plan review" that included the objective "[t]o provide for the harmonious and aesthetically pleasing development of the municipality and its environs"); Durant v. Town of Dunbarton, 121 N.H. 352, 356 (1981) (finding enactment of a subdivision regulation a "permissible exercise" of planning board authority where the regulation was "patterned after the enabling statute and [] very general," and intended "to give the board maximum flexibility to deal with aspects of development that could adversely affect public health and safety"); Patenaude v. Town of Meredith, 118 N.H. 616, 620–21 (1978) (finding that, because RSA 36:21 (the precursor to current RSA 674:36) "empowers planning boards to regulate subdivisions to provide for 'the harmonious development of the municipality and its environs' and for 'open spaces of adequate proportions,'" a planning board did not err in denying a subdivision application, which ostensibly complied with all the town's zoning regulations but did not, in the board's estimation, adequately preserve certain "natural features" or provide suitable open space for future residents of the proposed development).

Although these latter cases address the lawfulness of subdivision regulations, rather than site plan regulations, this distinction is immaterial. Indeed, RSA 674:43 expressly conditions a municipality's authority to adopt site plan regulations upon the adoption of subdivision regulations pursuant to RSA 674:36, and both subdivision and site plan regulations similarly empower municipalities "to assure that sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety, or prosperity of abutting property owners or the general public." Summa Humma Enterprises, 151 N.H. at 78 (quotation omitted). Furthermore, while RSA 674:36 does not contain a provision entirely analogous to RSA 674:44, III(c), as will be discussed in more detail below, both planning board and subdivision regulations must nevertheless be "sufficiently clear, definite, and certain, so that an average man after reading [them] will understand when he is violating [their] provisions." Town of Freedom v. Gillespie, 120 N.H. 576, 580 (1980).

Additionally, the petitioner's reliance on Eddy Plaza Assocs. v. City of Concord, 122 N.H. 416 (1982) is misplaced. In that case, the City of Concord had failed to update its zoning regulations after the legislature enacted RSA 36:19–a, which, under certain relevant circumstances, conditioned a planning board's authority to review site plan applications upon adopting "specific site-plan review regulations." Id. at 419. Nevertheless, the city argued that a preexisting section of its zoning ordinances satisfied RSA 36:19–a's requirements and, therefore, Concord's planning board retained site plan review authority. In rejecting this argument, the New Hampshire Supreme Court examined the cited section of the zoning ordinance and found its provisions inadequate because they were "merely a statement of general principles and

guidelines, from which administrative regulations must still be derived." Id. at 420. Setting aside the questionable applicability of this conclusion to the case at bar given the dissimilar context of Eddy Plaza, the Court does not read this language as rejecting any possibility that general guidelines may form the basis of a lawful site plan review regulation but, rather, that such general guidelines cannot alone satisfy a statutory requirement that a municipality adopt specific site plan review regulations.

Nor is the Court persuaded that Hanover intended the provisions of Article IX, A, 2 not to be regulations. To that point, although Hanover's site plan ordinances contain numerous specific regulations relating to the subject matters of some of the general considerations described in the provisions of Article IX, A, 2 (compare, e.g., Article IX, A, 2, d with Article IX, B, 5), the Court's review of the ordinances reveals no such corresponding specific regulations for Article IX, A, 2, i (stating that the Board shall assess "[t]he provision of open spaces and green spaces of adequate proportions") and only one (Article IX, B, 4, f) addressing Article IX, A, 2, g (stating that the Board shall assess "[t]he adequacy of fire safety, prevention, and control"). Therefore, to accept the petitioner's argument would mean that if a proposal merely complied with Article IX, B, 4, f's requirement to provide "adequate light, air, and access" to emergency vehicles and personnel the Board could not deny an application even if evidence convinced its members that other aspects of the project fell far below the "adequacy of fire safety, prevention, and control" standard of Article IX, A, 2, g. Similarly, the Board could not deny an application even if it clearly did not provide for the "open spaces and green spaces of adequate proportions" required by Article IX, A, 2, i. This would be an absurd result. Consequently, the Court declines to adopt the petitioner's interpretation that the

provisions of Article IX, A, 2 were not intended to be regulations. See State v. Maxfield, 167 N.H. 677, 679 (2015) ("[The Court] construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." (quotation omitted)).

The Court will now address the petitioner's primary argument that Provisions C and H are "vague and ambiguous and necessarily result in a land use board impermissibly deciding a case ad hoc, based upon the personal feelings of Board members and not objective discernible standards." (Pet'r's Mem. at 2.) The petitioner is correct that, "[g]enerally, a municipal ordinance must be framed in terms sufficiently clear, definite, and certain, so that an average man after reading it will understand when he is violating its provisions." Gillespie, 120 N.H. at 580 (1980). An ordinance is not, however, "necessarily vague because it does not precisely apprise an applicant of the standards by which an administrative board will make its decision." Webster v. Town of Candia, 146 N.H. 430, 435 (2001) (emphasis added, brackets and quotation omitted); see also Derry Sand & Gravel, Inc. v. Town of Londonderry, 121 N.H. 501, 505 (1981) ("We will not strike down an ordinance as unconstitutionally vague simply because it does not precisely apprise an applicant of the standards by which the selectmen will make their decision.").

On numerous occasions the New Hampshire Supreme Court has considered whether an ordinance or a statute is void for vagueness under circumstances analogous to those of this case. See, e.g., Webster, 146 N.H. at 435 (finding that RSA 231:158, which states, in part, that "[u]pon a road being designated as a scenic road . . . any [work performed on the road] shall not involve the cutting, damage or removal of trees . . . except with the prior written consent of the planning board," was not void for failure to

apprise an applicant of the standards that the planning board would use to review plans to cut trees because it was implicit, based on the terms of the warrant article designating the road at issue as a scenic road, that the planning board would exercise its discretion "to protect and enhance the scenic beauty of [the town]" (emphasis added));[2] Derry Sand & Gravel, Inc., 121 N.H. at 505 (finding that an ordinance stating that selectmen may issue a dump license for "good cause and sufficient reason" gave adequate guidance where the ordinance's stated goals were to establish the "orderly" and "sanitary" disposal of garbage); Carbonneau v. Town of Rye, 120 N.H. 96, 98 (1980) (finding that a regulation prohibiting "any use or thing which is injurious, noxious or offensive to the neighborhood" provided sufficient guidance); Town of Bethlehem v. Robie, 111 N.H. 186, 187 (1971) (finding that the "standard of what is 'detrimental or injurious' to adjoining property furnishes a sufficient criterion for the guidance of the selectmen and the Board of Adjustment").

The Court finds the terms of Provisions C and H no less vague and devoid of guidance than the statutes and ordinances at issue in the cases cited above. Like in Webster, "[w]hile determination of what is [a proposal's likely impact upon the abutters or the relationship of the project to the harmonious and aesthetically pleasing development of the town and its 'environs'] may on first impression be thought to be a matter of arbitrary and subjective judgment, upon consideration [they] prove[] not to be"

[2] The petitioner argues that "[t]he interpretation of [the] statute [at issue in Webster] is not applicable in this case" because RSA 231:158 vests the Board with "the power to discretionally grant something that was otherwise prohibited by statute" and that, "[b]y contrast, in this case the [B]oard denied something that was expressly permitted by statute" and the town's ordinances. (Pet'r's Post-Hr'g Mem. at 3.) The Court disagrees given that neither RSA 231:158 nor the statutes at issue in this case are self-executing but, rather, require town action to prohibit certain activities that would otherwise be permissible. RSA 231:158, II, for example, only prohibits cutting trees along a scenic road after a town designates a road as a scenic road. Likewise, RSA 674:16, I and RSA 674:43, I only allows a town to prohibit certain land developments contingent upon site plan approval after the town enacts the proper regulations.

because "the language takes clear meaning from the observable character of the district to which it applies." 146 N.H. at 437 (quotation and brackets omitted); see also Deering v. Tibbetts, 105 N.H. 481, 485–86 (1964) (holding, for the same reason, that a zoning ordinance requiring that a building's location "maintain" the "atmosphere" of the town was not impermissibly vague but provided adequate criteria "to guide the selectmen in its administration").

Here, the proposed sports facility abuts a neighborhood of single-family homes located in Hanover's SR district. The petitioner could have physically observed the character of this neighborhood to reasonably ascertain how the proposed project may "impact" the "abutters, neighborhood and others" or how it would relate to the "harmonious and aesthetically pleasing development of the town and its environs." In addition, the petitioner could have referred to the description of the SR district in the town's ordinances for guidance. Section 405.8, A of Hanover's zoning ordinances describes the objectives of the SR district as "provid[ing] for one-family dwelling units as is typical in many New England villages." (Pet'r's App. at 45 (emphasis added).) Furthermore, this section describes the types of uses that will be permitted in the district by special exception as those that will "complement" and "serve" the district's homes. (Id.) These uses include: forestry, agricultural, bed and breakfasts, produce stands, and governmental uses limited to public safety, education, and recreation. (Id.) Considering these facts, Provisions C and H are sufficiently clear, definite, and certain to inform an applicant of what he must establish in order to obtain site plan approval.

The petitioner has also failed to persuade the Court that the Board impermissibly based its decision on personal feelings, as opposed to objective and discernable

standards. (See Pet'r's Mem. at 2–5.) The petitioner is correct that, "[a]lthough a planning board is entitled to rely in part on its own judgment and experience in acting upon applications, the board may not deny approval on an ad hoc basis because of vague concerns" and that "[t]he board's decision must be based upon more than the mere personal opinion of its members." Ltd. Editions Properties, Inc. v. Town of Hebron, 162 N.H. 488, 497 (2011).

In this case, the record reflects that the four Board members who voted to deny the petitioner's application were particularly concerned that the proposed sports facility—which was to be approximately 68 feet tall in some areas, (C.R. at 1347)—would block an unreasonable amount of sunlight from reaching abutting homes. Among her reasons for denying the application, Member Carter cited the worries of abutters, "such as blocked views, shadows cast on their homes [and] general darkening of the neighborhood." (Id. at 1911.) Member Sims stated that "reduced light from shading is [an] issue . . . of great concern," (id. at 1926), finding that "some of the [abutting] houses . . . will now have a lot of . . . sky blocked out by the building." (Id. at 1927.) He further concluded that "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 whole prospect of the building." (Id. at 1927–28.) Member Mayor echoed Member Sims's concerns, stating that "the building itself, in its location as proposed, looms as an affront to the adjacent neighborhood." (Id. at 1930.) Finally, Member Criswell explained that, "[f]or me, the crux of the matter has been the scale and proximity of the building to the neighborhood and how those things, in turn, affect[] the character." (Id. at 1931.)

There is evidence in the record to support the conclusion that the proposed sports facility would block a significant amount of natural light from reaching abutting homes. During a Board meeting on August 30, 2016, a representative from Dartmouth College showed the Board a series of videos based on a study of the facility's predicted shadow impact on abutting homes. (Id. at 1343). The videos depicted an animated bird's eye view of the facility and several abutting house. (Id. at 1571.) Each video showed the shadow of the facility as it would likely appear throughout the day on certain days of an average year, including June 21st, September 21st, October 21st, November 21st, and December 21st. (Id. at 1343.)

On September 20, 2016, a group of abutting homeowners made a presentation to the Board regarding, among other things, the findings of the petitioner's shadow study. (Id. at 1567.) As part of their presentation, the abutters submitted a written report. (Id. at 1567–75.) Included in this report was a table describing the number of minutes of direct sunlight the facility would block from reaching five abutting homes between September 21st and March 21st. (Id. at 1573.) According to this table, the facility would block up to over an hour of mostly afternoon sunlight from reaching certain homes during some months of the year. (Id.) The report concluded that "residents of neighboring homes will lose a significant portion of direct sunlight when days are shortest," and in some cases, "more than 10% of direct sunlight will be lost." (Id. at 1574.)

Additionally, on June 14, 2016, the Board visited the site of the proposed facility. (Id. at 346–348.) During the site visit, balloons and baskets of cherry-pickers were raised to mark the corners and height of the building. (Id. at 346.) To gauge the

building's impact on abutting homes, the Board members stood in the yard of at least one home that was approximately 210 feet from where the facility would be built. (Id. at 348.)

Based on the petitioner's shadow study and their personal observations during the site visit, the Board members could reasonably have concluded that the proposed facility would block a significant amount of sunlight from reaching abutting homes. As blocking a significant amount of sunlight is objectively both a negative "impact upon abutters" and inconsistent with "the harmonious and aesthetically pleasing development of" the "environs" of the proposed facility, the Board could have further reasonably concluded that the petitioner's application did not satisfy Provisions C and H.

Contrary to the petitioner's contention, the Board did not err by basing its decision to a considerable degree on its concerns about the project's impacts on the abutting homes, as opposed to the entire "neighborhood" of the proposed facility. (See Pet'r's Mem. at 10.) First, the petitioner's reliance on Nestor v. Town of Meredith Zoning Bd. of Adjustment, 138 NH 632 (1994) is misplaced. In that case, the New Hampshire Supreme Court rejected an argument that the word "neighborhood" should "be narrowly defined to include only owners or occupants of adjacent property," id. at 636, but, the Court did not suggest that, in considering a proposal's effect on a "neighborhood," a planning board cannot choose to consider and give appropriate weight to a proposal's effects on abutting properties. Moreover, neither Provision C nor Provision H explicitly limits the Board's consideration of the "impact" or "harmon[y]" of a project on or with its surrounding "neighborhood." To the contrary, Provision C expressly states that the Board shall assess the "impact upon abutters," (emphasis added), and Provision H

requires the Board to assess the "relationship of the project to the harmonious and aesthetically pleasing development" of the "environs" of a project.

Nor did the Board err in denying the petitioner's application outright, as opposed to granting the application with conditions. The petitioner argues that although the "Board could have conditioned the Sports Facility Site Plan approval on a host of reasonable changes," (Pet'r's Mem. at 12), by denying the application entirely, the Board has effectively "rewritten the carefully deliberated Zoning Ordinance ad hoc." (Id. at 14.) The record reveals that "the board provided the [petitioner] with ample input and guidance for bringing the application into compliance with the site plan regulations." Bayson Properties, Inc., 150 N.H. at 175; (see, e.g., C.R. at 332 (discussion "about putting the [facility] on the Blackman Fields and moving the Blackman Fields to the [site of the facility]"), 562 (letter to the Board from petitioner's representative explaining the decision not to locate the facility on the Blackman Fields), 1910 (Member Carter stating "my vote will come as no surprise to those of you who sat in the audience while I have asked, on more than one occasion, is this the only site we have"). Therefore, "[t]he fact that the [petitioner was] unwilling to reduce the size of the proposed building, relocate the proposed building or substantially change the layout of its site plan to enable it to meet the concerns of the board, does not establish a rezoning of the property." Bayson Properties, 150 N.H. at 175; see also Star Vector Corp. v. Town of Windham, 146 N.H. 490, 493 (2001) (upholding planning board's decision to deny site plan approval for a gun range, irrespective of whether the application satisfied all specific zoning ordinances, because the board reasonably concluded that the gun range "posed an unacceptable risk to public health and safety" due to "dangers of lead contamination").

Finally, the petitioner argues that "the General Considerations [embodied in Provisions C and H are] a constitutional defect" because "they lack the objective specificity necessary to function as . . . valid regulation[s]." (Pet'r's Mem. at 16.) "This argument is essentially the same as the argument that [Provisions C and H are] void for vagueness, and [the Court] reject[s] it for the same reasons." Webster, 146 N.H. at 440.

IV. Conclusion

For the aforementioned reasons, the Court finds that the petitioner has failed to carry its burden of proving that the Board's denial of the petitioner's site plan application was unlawful or unreasonable. The Board's decision is, therefore, AFFIRMED.

SO ORDERED.

Dated: 9/9/17

Peter H. Bornstein,
Presiding Justice

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C/O REAL ESTATE OFFICE
P.O. BOX 5188
HANOVER, NH 03755-5188

MAP 34 LOT 101
SANDRA R. ALLEN, TRUSTEE
SANDRA R. ALLEN TRUST
48 RIVER ROAD
HANOVER, NH 03755-6612

MAP 34 LOT 115-1
NARISSA A. & JERRY W. JR. TAYLOR
4 WESTBORO WOODS LN
WEST LEBANON, NH 03784

MAP 34 LOT 116
DARTMOUTH COLLEGE
C/O REAL ESTATE OFFICE
P.O. BOX 5188
HANOVER, NH 03755-5188

MAP 34 LOT 117
DARTMOUTH COLLEGE
C/O REAL ESTATE OFFICE
P.O. BOX 5188
HANOVER, NH 03755-5188

MAP 34 LOT 118
DARTMOUTH COLLEGE
C/O REAL ESTATE OFFICE
P.O. BOX 5188
HANOVER, NH 03755-5188

MAP 34 LOT 119
DARTMOUTH COLLEGE
C/O REAL ESTATE OFFICE
P.O. BOX 5188
HANOVER, NH 03755-5188

MAP 34 LOT 91
JEFFREY W. & MOUREEN W. DOYLE
8 TYLER ROAD
HANOVER, NH 03755

MAP 34 LOT 88
RICHARD A. JOSEPH &
MARGARET KUNDTZ
5 TYLER ROAD
HANOVER, NH 03755

MAP 35 LOT 2
DAVID V. & KELLY M. DENT
8 CHASE ROAD
HANOVER, NH 03755

MAP 35 LOT 3
NINA W. LLOYD, TRUSTEE
NINA W. LLOYD REVOCABLE TRUST
9 TYLER ROAD
HANOVER, NH 03755

MAP 35 LOT 4
JOHN C. & PATRICIA B. DODDS
11 TYLER ROAD
HANOVER, NH 03755

MAP 35 LOT 5
JOSHUA M. & JULIE KIM
11 CONANT ROAD
HANOVER, NH 03755

MAP 35 LOT 10
JOHANN & VALERIA WIENS
12 CONANT ROAD
HANOVER, NH 03755

MAP 35 LOT 11
JOHN R. & ANNE G. CHAMBERLIN
14 CONANT ROAD
HANOVER, NH 03755

MAP 35 LOT 20
JONATHAN S. SKINNER
MARTHA A. MCLAFFERTY
18 CONANT ROAD
HANOVER, NH 03755

MAP 35 LOT 19
DANIEL P. & CAROL LYNN H. O'DEA
39 RAYTON ROAD
HANOVER, NH 03755

MAP 35 LOT 18
CHRISTOPHER KUBIK &
SCOTT A. PAUW
42 RAYTON ROAD
HANOVER, NH 03755

MAP 1 LOT 30
UNITED STATES OF AMERICA
P.O. BOX 908
MARTINSBURG, WV 25401

MAP 24 LOT 5
ALEXANDRA SIVRIDI-TSELEPIDAKIS
DIMITRIOS TSELEPIDAKIS
10 CARTER STREET
HANOVER, NH 03755

MAP 24 LOT 4
WALID NASRALLAH
C/O C & C KISH
8 CURRIER PLACE
HANOVER, NH 03755

MAP 24 LOT 3
BRUCE A. & MARTHA E. LORDEN
6 CARTER STREET
HANOVER, NH 03755

MAP 24 LOT 2
ELIZABETH A. DERRICK, TRUSTEE
ELIZABETH A. DERRICK, TRUST
4 CARTER STREET
HANOVER, NH 03755

MAP 24 LOT 1
AILEEN A. CHALTAIN
2 CARTER STREET
HANOVER, NH 03755

MAP 23 LOT 156
DOUGLAS DEAETT
1 BRIDGMAN ROAD
HANOVER, NH 03755

MAP 23 LOT 155
DESIGN GROUP PROPERTIES LLC.
10 ALLAN STREET
HANOVER, NH 03755

MAP 34 LOT 110
HANOVER CONSUMERS CO-OP SOCIETY
P.O. BOX 633
HANOVER, NH 03755

MAP 34 LOT 109
BLACKACRE, INC.
41 SOUTH PARK STREET
HANOVER, NH 03755

MAP 34 LOT 108
UGR PROPERTIES, LLC
7 STAGE COACH ROAD
LEBANON, NH 03766

MAP 34 LOT 107
MARILYN AND BRYANT TRUST
BRYANT D. & MARILYN DENK
5 HOVEY LANE
HANOVER, NH 03755

MAP 34 LOT 106
PILONDECKER, LLC
35 SOUTH PARK STREET
HANOVER, NH 03755

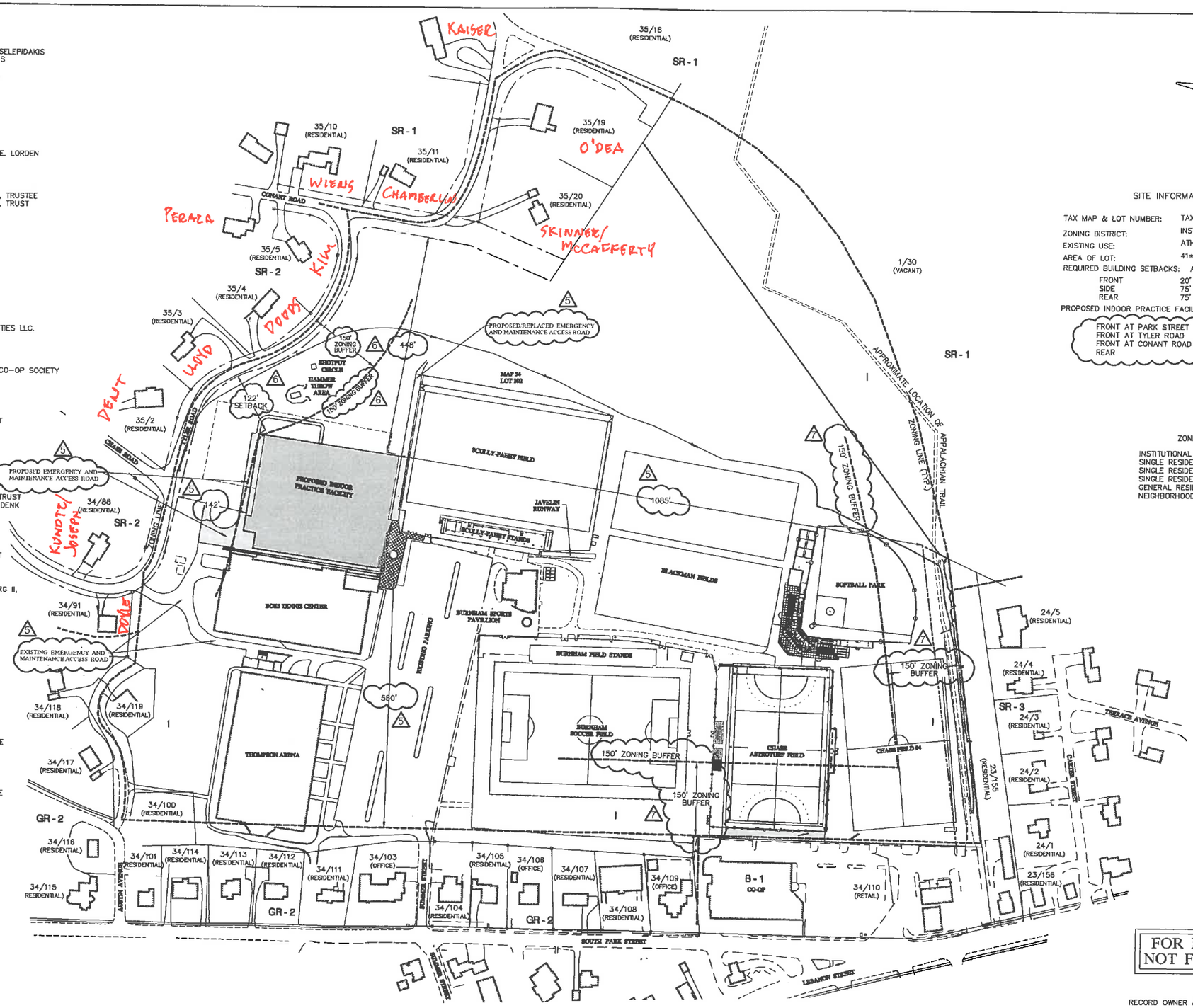
MAP 34 LOT 105
RICHARD N. CLATTENBURG II,
REVOCABLE TRUST
1067 CADY HILL ROAD
PERKINSVILLE, VT 05151

MAP 34 LOT 104
NGS RENTALS INC.
1 SUMMER CT
HANOVER, NH 03755

MAP 34 LOT 103
RCP PROPERTY LLC
10 DRESDEN ROAD
HANOVER, NH 03755

MAP 34 LOT 111
DARTMOUTH COLLEGE
C/O REAL ESTATE OFFICE
P.O. BOX 5188
HANOVER, NH 03755

MAP 34 LOT 112
DARTMOUTH COLLEGE
C/O REAL ESTATE OFFICE
P.O. BOX 5188
HANOVER, NH 03755



SITE INFORMATION

TAX MAP & LOT NUMBER:	TAX MAP 34 LOT 102
ZONING DISTRICT:	INSTITUTIONAL (I)
EXISTING USE:	ATHLETIC FACILITIES
AREA OF LOT:	41± ACRES
REQUIRED BUILDING SETBACKS:	ADJOINING RESIDENTIAL DISTRICTS
FRONT	20'
SIDE	75'
REAR	75'

PROPOSED INDOOR PRACTICE FACILITY SETBACKS:

FRONT AT PARK STREET	560'
FRONT AT TYLER ROAD	122'
FRONT AT CONANT ROAD	448'
REAR	1085'

ZONING LEGEND:

INSTITUTIONAL	I
SINGLE RESIDENCE ONE	SR-1
SINGLE RESIDENCE TWO	SR-2
SINGLE RESIDENCE THREE	SR-3
GENERAL RESIDENCE TWO	GR-2
NEIGHBORHOOD BUSINESS	B-1

FOR PERMITTING ONLY
NOT FOR CONSTRUCTION

RECORD OWNER & APPLICANT: DARTMOUTH COLLEGE
C/O REAL ESTATE OFFICE
P.O. BOX 5188
HANOVER, NH 03755

0 100' 200' 300' 400' 500'

REVISION NO.	DATE	DESCRIPTION	MADE BY	CHECKED BY	APPROVED BY
7	11/23/16	STAFF REVIEW COMMENTS	CRM	RJF	RJF
6	09/01/16	ADDED 150' ZONING BUFFER	CRM	RJF	RJF
5	08/25/16	PLANNING BOARD COMMENTS	CRM	RJF	RJF
4	08/02/16	REVISIONS TO REFLECT ARCHITECTURAL CHANGES	CRM	RJF	RJF
3	07/14/16	COORD. SET FOR BUBBLED REVISIONS PER TOWN REQUEST	CRM	RJF	RJF
2	06/28/16	STAFF REVIEW COMMENTS	CRM	RJF	RJF
1	03/21/16	STAFF REVIEW COMMENTS	CRM	PAB	RJF

OVERALL SITE PLAN FOR

DARTMOUTH COLLEGE - INDOOR PRACTICE FACILITY

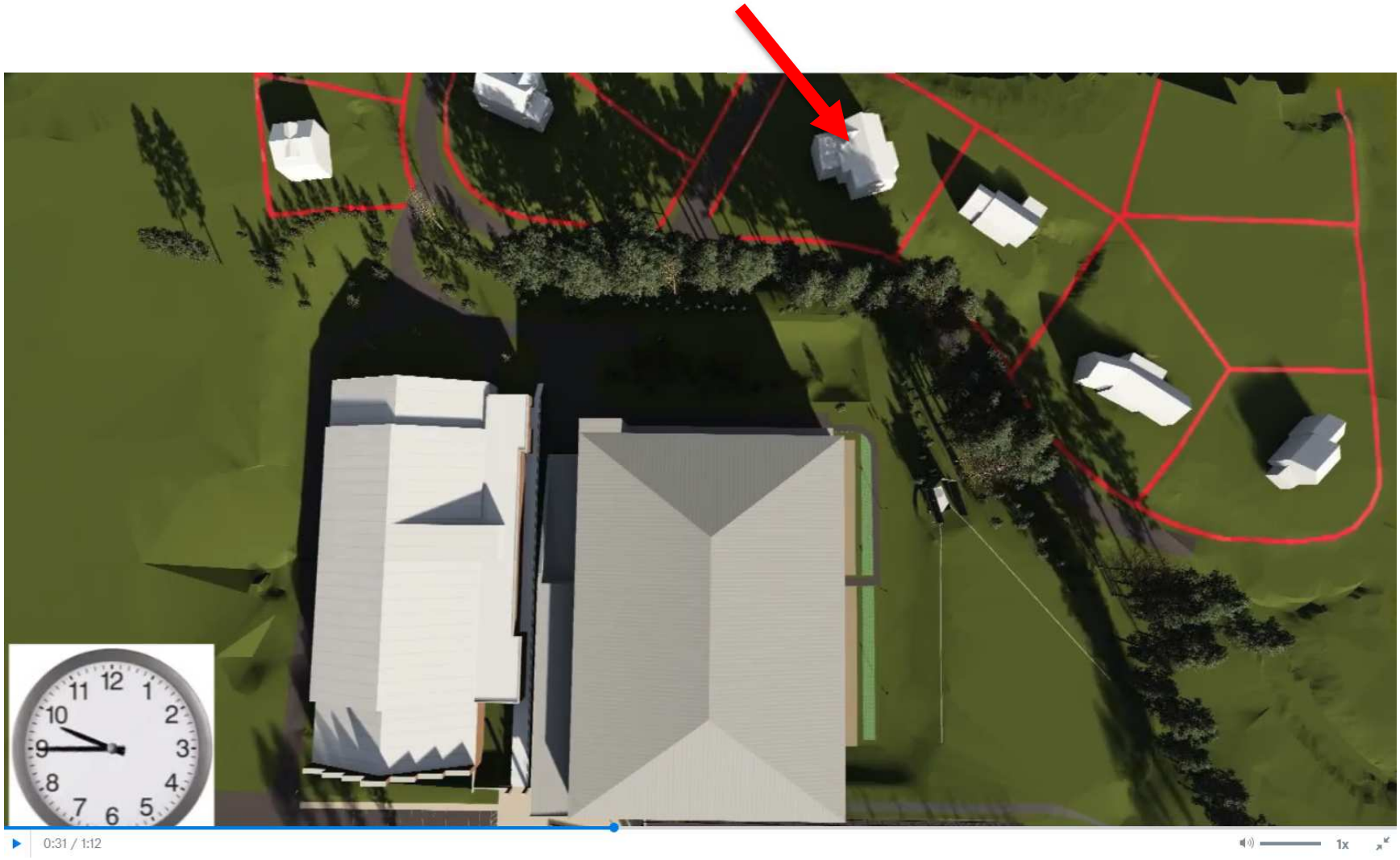
HANOVER, NEW HAMPSHIRE

PATHWAYS CONSULTING, LLC
240 MECHANIC STREET, SUITE 100
LEBANON, NEW HAMPSHIRE 03766
(603) 448-2200

SCALE:	1"= AS SHOWN
DESIGNED BY:	
DRAWN BY:	ESB
CHECKED BY:	RWR
DATE:	03/01/16
PROJ. NO.	11570

SHEET 2 OF 25

Kelly Dent Home on December 21, at 9:45 a.m.



Kelly Dent Home on December 21, at 2:24 p.m.

Kelly Dent Home on December 21, at 3:15 p.m.