STATE OF NEW HAMPSHIRE

SUPREME COURT
NO. 2021-0214

TRANSFARMATIONS, INC.

v.

TOWN OF AMHERST & a.

BRIEF OF DEFENDANT

Town of Amherst

APPEAL FROM DECISION OF
THE HILLSBOROUGH COUNTY SUPERIOR
COURT - NORTHERN DISTRICT

Case #216-2019-CV-01149 and Case #216-2020-CV-00583

Counsel For the Defendant
Town of Amherst
Christopher B. Drescher, Esq.
NH Bar Id. No. 264845
Cronin, Bisson, & Zalinsky, P.C.
722 Chestnut Street
Manchester, NH 03104
Tel: (603) 624-4333
Fax: (603) 623-5626

To be argued by:
Christopher B. Drescher, Esq

DEFENDANT-APPELLEE'S BRIEF
TABLE OF CONTENTS

Item	*Page*
Table of Cases listed alphabetically	1
Table of Statutes and other authorities	2
Constitutional Provisions, Ordinances, Rules, (verbatim)	13
Statement of the Case	14
Statement of Facts	15
Summary of Town's Argument	23
Argument	25
Conclusion	50
Request for Oral Argument	51
Certificate of Service	51
Certificate of Word Count	52

TABLE OF CASES (IN ALPHABETICAL ORDER)

Citation	*Page(s)*
CBDA Development, LLC, v. Town of Thornton, 168 NH 715 (2016)	*passim*
Durant v. Town of Dunbarton, 121 NH 352 (1981)	30
Fisher v. Dover, 120 NH 187 (1980)	*passim*
K & P, Inc., v. Town of Plaistow, 133 NH 283 (1990)	35-36
Morgenstern v. Town of Rye, 147 NH 558 (2002)	47-48
Motorsports Holdings, Inc., v. Town of Tamworth, 160 NH 95 (2010)	27
Olszak v. Town of New Hampton, 139 NH 723 (1995)	31

Property Portfolio Group, LLC, v. Town of Derry, 163 NH 754 (2012)	25
Route 12 Books & Video, v. Town of Troy, 149 NH 569 (2003)	26, 28, 36
Trustees of Dartmouth College v. Town of Hanover, 171 NH 497 (2018)	32-33

TABLE OF STATUTES AND OTHER AUTHORITIES

Statutes - Verbatim		
Citation	***Text***	***Page(s)***
NH RSA 676:4 (Board's Procedure on Plats)	I. The procedures to be followed by the planning board when considering or acting upon a plat or application submitted to it for approval under this title shall be as set forth in the board's subdivision regulations, subject to the following requirements: (a) An application for approval filed with the planning board under this title, other than an application for subdivision approval, shall be subject to the minimum requirements set forth in this section and shall be governed by the procedures set forth in the subdivision regulations, unless the planning board by regulation specifies other procedures for that type of application. (b) The planning board shall specify by regulation what constitutes a completed application sufficient to invoke jurisdiction to obtain approval. A completed application means that sufficient information is included or submitted to allow the board to proceed with consideration and to make an informed decision. A completed application sufficient to invoke jurisdiction of the board shall be submitted to and accepted by the board only at a public meeting of the board, with notice as provided in subparagraph (d). An application shall not be considered incomplete solely because it is dependent upon the submission of an application to or the issuance of permits or	26

	approvals from other state or federal governmental bodies; however, the planning board may condition approval upon the receipt of such permits or approvals in accordance with subparagraph (I). The applicant shall file the application with the board or its agent at least 21 days prior to the meeting at which the application will be accepted, provided that the planning board may specify a shorter period of time in its rules of procedure. The application shall include the names and addresses of the applicant, all holders of conservation, preservation, or agricultural preservation restrictions as defined in RSA 477:45, and all abutters as indicated in the town records for incorporated towns or county records for unincorporated towns or unorganized places not more than 5 days before the day of filing. Abutters shall also be identified on any plat submitted to the board. The application shall also include the name and business address of every engineer, architect, land surveyor, or soil scientist whose professional seal appears on any plat submitted to the board. (c) (1) The board shall, at the next regular meeting or within 30 days following the delivery of the application, for which notice can be given in accordance with the requirements of subparagraph (b), determine if a submitted application is complete according to the board's regulation and shall vote upon its acceptance. Upon determination by the board that a submitted application is incomplete according to the board's regulations, the board shall notify the applicant of the determination in accordance with RSA 676:3, which shall describe the information, procedure, or other requirement necessary for the application to be complete. Upon determination by the board that a submitted application is complete according to the board's regulations, the board shall begin formal consideration and shall act to approve, conditionally approve as provided in subparagraph (I), or disapprove within 65 days, subject to extension or	

	waiver as provided in subparagraph (f). In the case of a determination by the board that the application is a development of regional impact requiring notice in accordance with RSA 36:57, III, the board shall have an additional 30 days to act to approve, conditionally approve, as provided in subparagraph (I), or disapprove. Upon failure of the board to approve, conditionally approve, or disapprove the application, the selectmen or city council shall, upon request of the applicant, immediately issue an order directing the board to act on the application within 30 days. If the planning board does not act on the application within that 30-day time period, then within 40 days of the issuance of the order, the selectmen or city council shall certify on the applicant's application that the plat is approved pursuant to this paragraph, unless within those 40 days the selectmen or city council has identified in writing some specific subdivision regulation or zoning or other ordinance provision with which the application does not comply. Such a certification, citing this paragraph, shall constitute final approval for all purposes including filing and recording under RSA 674:37 and 676:18, and court review under RSA 677:15. (2) Failure of the selectmen or city council to issue an order to the planning board under subparagraph (1), or to certify approval of the plat upon the planning board's failure to comply with the order, shall constitute grounds for the superior court, upon petition of the applicant, to issue an order approving the application if the court determines that the proposal complies with existing subdivision regulations and zoning or other ordinances. If the court determines that the failure of the selectmen or the city council to act was not justified, the court may order the municipality to pay the applicant's reasonable costs, including attorney's fees, incurred in securing such order. (d) (1) Notice to the applicant, holders of conservation,	

	preservation, or agricultural preservation restrictions, abutters, and the public shall be given as follows: The planning board shall notify the abutters, the applicant, holders of conservation, preservation, or agricultural preservation restrictions, and every engineer, architect, land surveyor, or soil scientist whose professional seal appears on any plat submitted to the board by verified mail, as defined in RSA 21:53, of the date upon which the application will be formally submitted to the board. Notice shall be mailed at least 10 days prior to submission. Notice to the general public shall also be given at the same time by posting or publication as required by the subdivision regulations. The notice shall include a general description of the proposal which is the subject of the application and shall identify the applicant and the location of the proposal. For any public hearing on the application, the same notice as required for notice of submission of the application shall be given. If notice of public hearing has been included in the notice of submission or any prior notice, additional notice of that hearing is not required nor shall additional notice be required of an adjourned session of a hearing with proper notice if the date, time, and place of the adjourned session was made known at the prior hearing. All costs of notice, whether mailed, posted, or published, shall be paid in advance by the applicant. Failure to pay such costs shall constitute valid grounds for the planning board to terminate further consideration and to disapprove the plat without a public hearing. (2) For those proposals in which any structure or proposed building site will be within 500 feet of the top of the bank of any lake, pond, river, or stream, the planning board shall also notify the department of environmental services by first class mail at the same time that notice is provided to abutters, cost to be paid in advance by the applicant consistent with subparagraph (d)(1). The sole purpose of notification to the department shall be to provide information to the department for dam hazard classification. This requirement shall not confer upon the department the	

	status of an abutter. Failure by the municipality to notify the department shall not be considered a defect of notice. (e) Except as provided in this section, no application may be denied or approved without a public hearing on the application. At the hearing, any applicant, abutter, holder of conservation, preservation, or agricultural preservation restriction, or any person with a direct interest in the matter may testify in person or in writing. Other persons may testify as permitted by the subdivision regulations or the board at each hearing. Public hearings shall not be required, unless specified by the subdivision regulations, when the board is considering or acting upon: (1) Minor lot line adjustments or boundary agreements which do not create buildable lots, except that notice to abutters and holders of conservation, preservation, or agricultural preservation restrictions shall be given prior to approval of the application in accordance with subparagraph (d) and any abutter or holder of conservation, preservation, or agricultural preservation restrictions may be heard on the application upon request; or (2) Disapprovals of applications based upon failure of the applicant to supply information required by the regulations, including identification of abutters or holders of conservation, preservation, or agricultural preservation restrictions; or failure to meet reasonable deadlines established by the board; or failure to pay costs of notice or other fees required by the board. (f) The planning board may apply to the selectmen or city council for an extension not to exceed an additional 90 days before acting to approve or disapprove an application. The applicant may waive the requirement for planning board action within the time periods specified in subparagraph © and consent to such extension as may be mutually agreeable. (g) Reasonable fees in addition to fees for notice under	

	subparagraph (d) may be imposed by the board to cover its administrative expenses and costs of special investigative studies, review of documents and other matters which may be required by particular applications. (h) In case of disapproval of any application submitted to the planning board, the ground for such disapproval shall be adequately stated upon the records of the planning board. (I) A planning board may grant conditional approval of a plat or application, which approval shall become final without further public hearing, upon certification to the board by its designee or based upon evidence submitted by the applicant of satisfactory compliance with the conditions imposed. Such conditions may include a statement notifying the applicant that an approval is conditioned upon the receipt of state or federal permits relating to a project, however, a planning board may not refuse to process an application solely for lack of said permits. Final approval of a plat or application may occur in the foregoing manner only when the conditions are: (1) Minor plan changes whether or not imposed by the board as a result of a public hearing, compliance with which is administrative and which does not involve discretionary judgment; or (2) Conditions which are in themselves administrative and which involve no discretionary judgment on the part of the board; or (3) Conditions with regard to the applicant's possession of permits and approvals granted by other boards or agencies or approvals granted by other boards or agencies, including state and federal permits. All conditions not specified within this subparagraph as minor, administrative, or relating to issuance of other approvals shall require a hearing, and notice as provided in subparagraph I(d), except that additional notice shall not be	

	required of an adjourned session of a hearing with proper notice if the date, time, and place of the adjourned session were made known at the prior hearing. II. A planning board may provide for preliminary review of applications and plats by specific regulations subject to the following: (a) Preliminary Conceptual Consultation Phase. The regulations shall define the limits of preliminary conceptual consultation which shall be directed at review of the basic concept of the proposal and suggestions which might be of assistance in resolving problems with meeting requirements during final consideration. Such consultation shall not bind either the applicant or the board and statements made by planning board members shall not be the basis for disqualifying said members or invalidating any action taken. The board and the applicant may discuss proposals in conceptual form only and in general terms such as desirability of types of development and proposals under the master plan. Such discussion may occur without the necessity of giving formal public notice as required under subparagraph I(d), but such discussions may occur only at formal meetings of the board. (b) Design review phase. The board or its designee may engage in nonbinding discussions with the applicant beyond conceptual and general discussions which involve more specific design and engineering details; provided, however, that the design review phase may proceed only after identification of and notice to abutters, holders of conservation, preservation, or agricultural preservation restrictions, and the general public as required by subparagraph I(d). The board may establish reasonable rules of procedure relating to the design review process, including submission requirements. At a public meeting, the board may determine that the design review process of an application has ended and shall inform the applicant in	

	writing within 10 days of such determination. Statements made by planning board members shall not be the basis for disqualifying said members or invalidating any action taken. (c) Preliminary review shall be separate and apart from formal consideration under paragraph I, and the time limits for acting under subparagraph I(c) shall not apply until formal application is submitted under subparagraph I(b). III. A planning board may, by adopting regulations, provide for an expedited review and approval for proposals involving minor subdivisions which create not more than 3 lots for building development purposes or for proposals which do not involve creation of lots for building development purposes. Such expedited review may allow submission and approval at one or more board meetings, but no application may be approved without the full notice to the abutters, holders of conservation, preservation, or agricultural preservation restrictions, and public required under subparagraph I(d). A hearing, with notice as provided in subparagraph I(d), shall be held if requested by the applicant, abutters, or holders of conservation, preservation, or agricultural preservation restrictions any time prior to approval or disapproval or if the planning board determines to hold a hearing. IV. Jurisdiction of the courts to review procedural aspects of planning board decisions and actions shall be limited to consideration of compliance with applicable provisions of the constitution, statutes and regulations. The procedural requirements specified in this section are intended to provide fair and reasonable treatment for all parties and persons. The planning board's procedures shall not be subjected to strict scrutiny for technical compliance. Procedural defects shall result in the reversal of a planning board's actions by judicial action only when such defects create serious impairment of opportunity for notice and participation.	

NH RSA 676:15 (Court Review)	I. Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable. Such petition shall be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. This paragraph shall not apply to planning board decisions appealable to the board of adjustment pursuant to RSA 676:5, III. The 30-day time period shall be counted in calendar days beginning with the date following the date upon which the planning board voted to approve or disapprove the application, in accordance with RSA 21:35. I-a. (a) If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section. If any party appeals any part of the planning board's decision to the superior court before all matters appealed to the board of adjustment have been resolved, the court shall stay the appeal until resolution of such matters. After the final resolution of all such matters appealed to the board of adjustment, any aggrieved party may appeal to the superior court, by petition, any or all matters concerning the subdivision or site plan decided by the planning board or the board of adjustment. The petition shall be presented to the superior court within 30 days after the board of adjustment's denial of a motion for rehearing under RSA 677:3, subject	25

	to the provisions of paragraph I. (b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III. II. Upon presentation of such petition, the court may allow a certiorari order directed to the planning board to review such decision and shall prescribe therein the time within which return thereto shall be made and served upon the petitioner's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the order shall stay proceedings upon the decision appealed from. The planning board shall not be required to return the original papers acted upon by it; but it shall be sufficient to return certified or sworn copies thereof, or of such portions thereof as may be called for by such order. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified. III. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with the referee's findings of fact and conclusion of	

	law, which shall constitute a part of the proceedings upon which the determination of the court shall be made. IV. The court shall give any hearing under this section priority on the court calendar. V. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable. Costs shall not be allowed against the municipality unless it shall appear to the court that the planning board acted in bad faith or with malice in making the decision appealed from.	

Constitutional Provisions, Ordinances, Rules, (verbatim)

Ordinances - Text		
Citation	***Text***	***Page(s)***
AZO Section: 3.18(C)(1)(c)	***C. STANDARDS APPLICABLE TO ALL CONDITIONAL USE PERMITS***. 1. Conditions for Conditional Use Permits. Before the Planning Board considers the approval of an application for a Conditional Use Permit, the applicant shall prove to the satisfaction of the Planning Board that all the following conditions have been met: ... c. That there will be no significant adverse impacts resulting from the proposed use upon the public health, safety, and general welfare of the neighborhood and the Town of Amherst. ...	*passim*

STATEMENT OF THE CASE

TransFarmations, Inc., (the "Applicant," the "Appellant," and/or the "Petitioner"), submitted a Conditional Use Permit ("CUP") application to the Town of Amherst Planning Board (the "Board" and/or the "Appellee") on August 5, 2019, seeking to develop a property known as "Jacobson Farm" (the "property" or "project"), which consists of 2 lots, totaling 130 acres, and is located at 17 Christian Hill Road, Amherst, New Hampshire 03031, known as Tax Map 005, Lot 100, and Tax Map 005, Lot 148. Certified Record ("CR" and/or the "Record") I, Vol. 1, at 18, *et seq*. The property is appropriately zoned Residential/Rural ("RR"). Id. at 19.

This matter consists of two appeals. The first CUP application was denied on December 4, 2019, and the Notice of Decision was issued on December 5, 2019. The Petitioner appealed and the matter was stayed to afford the opportunity for the Petitioner to file a subsequent application. The second application was denied on July 23, 2020, and the Notice of Decision was issued on July 27, 2020. The Petitioner appealed and the matters were consolidated.

The Trial Court (*Anderson, J.*), after hearing oral arguments, considering written memoranda of law, and reviewing the Record

consisting of two separate records and totaling 6 volumes[1] AFFIRMED by way of an Order (the "Order") both denials by the Board. Notice of Appeal ("NOA") PG. 0005.

STATEMENT OF FACTS

TransFarmations I:

The Board's substantive review of the application for the first CUP began in May of 2019. Meridian Land Services, Inc., on behalf of the Developer, submitted its application by transmittal letter dated August 5, 2019. CR I, Vol. 1, at 18. Meridian noted that "[a]lthough there may be a few deficiencies relative to the completeness of some of our content when compared to the full requirements, we feel that the application package is substantially complete and suitable for the board to accept for consideration." Id. From the outset, the Petitioner made the choice to proceed for consideration by the Board with an admittedly deficient application.

The first of the two within matters was decided on December 4, 2019, wherein the Board denied the first application because the Applicant failed to meet its burden per Section 3.18 (C)(1)(c) of the Amherst Zoning Ordinance ("AZO"), which includes the overall standards applicable to all

---

1 The Certified Record consists of TransFarmations I (2 volumes), and TransFarmations II (4 volumes).

CUPs, including CUP applications under the (*now repealed*) *Integrated Innovative Housing Ordinance*[2] (the "IIHO"). CR I, Vol. 2, at 351. The second application, discussed further below, was also denied by the Board because the Applicant failed to establish that the subsequent application was "materially different than the first application." CR II, Vol. 4, at 885.

The original application, despite being quite lengthy, did not fully address its potential impact on the community and particularly its neighborhood. CR I, Vol. 1, at 22-62. Concerns as to the impact this proposed project would have on traffic and safety began at the outset during the first public hearing on October 16, 2019. CR I, Vol. 1, at 169-71.

Most relevant are the discussions at the December 4, 2019, public hearing relative to the first application. CR I, Vol. 2, at 271, *et seq*. After hearing the presentation from the Applicant, Board Chairman Mike Dell Orfano "stated that he needed to move the discussion along," and began addressing the application against Section 3.18 (C)(1)(c), which requires applicants to prove that "[t]here will be no significant adverse impact resulting from the proposed use upon the public health, safety, and general welfare of the neighborhood and the Town of Amherst." CR I, Vol. 2, at

---

[2] Town of Amherst Development Regulations Part 5: Integrated Innovative Housing Ordinance (*now repealed*). Referred to throughout the Record but its text is not cited nor relevant to this appeal.

278.

In the course of addressing Section 3.18 (C)(1)(c), the Applicant stated, *inter alia*, that "[f]or the upcoming traffic study, a consultant is being considered to work jointly with this proposal...". CR I, Vol. 2, at 278. The Petitioner *volunteered* the traffic study likely because of the numerous traffic concerns raised during the previous public hearing. *See* CR I, Vol. 1, at 169-71.

The Board then heard several members of the public express concerns about the project focused primarily on the impact the project would have on traffic. CR I, Vol. 2, at 279-83.

Member Rosenblatt did not believe that the Applicant met its burden of Section 3.18 (C)(1)(c) regarding the absence of 'adverse impact' (CR I, Vol. 2, at 285) and planned to vote 'no,' and member Houpis[3] concurred citing to specific concerns, such as "pitch of the proposed road, increased drainage, runoff, grazing, traffic volume, financial viability, and a lack of Amherst specific data." Id. Member Rosenblatt noted on the record that he was voting 'no' for his own reasons that differed from Houpis' comments despite their mutual concurrence relative to Section 3.18 (C)(1)(c). CR I, Vol. 2, at 286. Notably, member Hart also went on record stating that he

---

[3] Christy Houpis was not a voting member and the Trial Court acknowledged as much.

would vote 'no' (Id.) for reasons articulated earlier, which included his concerns relative to Section 3.18 (C)(1)(c), in that, there was no traffic study yet performed. CR I, Vol. 2, at 284 (*citing* to Hart's earlier statements). The concern being that traffic would add to an already congested intersection despite the fact that member Hart believed the project would be "perfect" somewhere else in town. CR I, Vol. 2, at 277.

The Record is wrought with citizen testimony and comments addressing concerns relative to traffic, safety, population, school over-crowding, hydrological issues, sight distances, electrical power loads, the negative effects on the land that the project could have if it failed, wetland and aquifer concerns, *etc*. Id. at 279-283.

Indeed, the Record is far from "void" on specifics relative to the Board's concerns with the project in light of Section 3.18 (C)(1)(c) as the Petitioner has alleged. Pet.'s Brief at 12.

Ultimately, the Board denied the first CUP by a vote of 2 in favor of the application and 4 opposed. CR I, Vol. 2, at 286. Member Dell Orfano stated that the Applicant "can reapply for a CUP with more information." Id. Notably, that statement, which is heavily relied on by the Petitioner, was not a direct invitation nor did that statement mention any requirement for a traffic study. Id. A Notice of Decision was issued on December 5,

2019, citing the Applicant's failure to satisfy Section 3.18 (C)(1)(c) as the reason for denial. Id.

TransFarmations II:

The Applicant then submitted a revised CUP application on December 13, 2019, and the public hearing was held on July 23, 2020. NOA PG. 0008. The hearing was limited in scope to determine whether the revised application satisfied the subsequent application doctrine of Fisher v. Dover[4] and CBDA Development, LLC, v. Town of Thornton[5]. CR II, Vol. 4, at 860. The Applicant presented what it considered to be the differences between the two applications. Id.

The Order cites comments made by non-voting member Houpis wherein he addressed that the number of bedrooms that had not changed substantially and that the traffic study did not address the concerns relative to traffic. CR II, Vol. 4, at 862. Member Coogan commented that "the sites for development remain the same," acknowledging that while some "modification[s]" were made to the road, the overall acreage for the houses, nonetheless, remained the same. CR II, Vol. 4, at 864.

Next, several members of the public spoke against the project citing

---

[4] 120 N.H. 187 (1980)

[5] 168 N.H. 715 (2016)

concerns over traffic and safety, as well as, that the subsequent application was not substantially different from the first. Id. at 865-67. When public comment was closed member Stoughton made several comments relative to whether the subsequent application 1) was materially different from the first, and 2) addressed the Board's concerns expressed while vetting the first CUP application. Id. at 869. Member Stoughton did acknowledge that there were some changes made, however, correctly noted that the changes were not 'materially different' because the density (*i.e. the proposed population of the project*) had not changed. Id.

Member Stoughton further commented that, after reviewing the traffic study, the traffic study demonstrated an "adverse effect from the traffic projected for the revised application." Id. Specifically, that "[t]able 3[6] of that study summarizes the effect on the Foundry Street/Boston Post Road intersection...[and]...the effect of the proposed development on the eastbound traffic, none of which relates to the other development included in the study...[and, moreover,]...the study shows that building the proposed development triples the delay, results in a traffic volume exceeding intersection capacity, and doubles the number of cars queued during the morning" Id. at 870.

---

6 CR II, Vol. 3, at 490.

The ultimate conclusion being that the traffic study did not alleviate the Board's concerns relative to traffic and safety *but rather corroborated said concerns*. The Trial Court also picked up on this point citing "how the study confirmed the Board's concern that traffic volume would increase" and further echoed the same comments made by member Stoughton. NOA PG. 0019.

Indeed, during the hearings relative to the first application, long time Amherst Police Officer, Amherst resident, and Crossing Guard at the Foundry Street/Boston Post Road intersection, Sally Long, publicly commented on how dangerous said intersection already is in its current state. CR I, Vol. 2, at 280.

Member Coogan then commented that "he does not believe the new application is materially different...[o]ne reason is the amount of physical property being disrupted for the development is relatively the same for the same for the number of units being proposed...[t]herefore the number of residents that would occupy [the units] appears to be relatively the same...[and]...[t]hat was the basis for why he would not recommend this [project]." CR II, Vol. 4, at 872.

As the Order points out, several other Board members shared the same concerns relative to *density*, in that, there was no significant

difference between what was originally presented and what was subsequently proposed. NOA PG. 0009.

Specifically, member Yates stated that despite some differences between the two applications he was 'stuck on density' and noted that the "proposed density of the site has been the issue for the community" and that said concerns do "not appear to have been addressed in this new application." CR II, Vol. 4, at 873.

Member Dokmo further echoed these concerns stating that she is in favor of affordable housing but the new application does not differ from the first substantially because "she did not hear the applicant address the total number of bedrooms proposed or the amount of the site proposed to be disturbed." Id.

Member Brew stated that he views the subsequent application issue in two ways, "[1)] are the plans sufficiently different, and, [2)] have the previous concerns been addressed." Id. Further, Brew acknowledged that there are changes between the two plans but that said differences were not "sufficiently different from the first application...[and] he does not see that the concerns voiced last time were addressed in [the second] application, even with the additional supplied data." Id.

As the Trial Court noted, member Houpis then "echoed the concerns

of other Board members, explaining that he considered the following issues: (1) whether the road changes addressed emergency vehicle access; (2) that the second application was not utilizing workforce housing ordinance provisions; (3) that switching from public water supply to private wells did not address the hydrological issues; (4) that the traffic study verified problems at certain intersections; (5) whether the removal of four units materially changed the number of bedrooms; and (6) farming issues...[concluding]...that there were no "relevant substantive changes and material differences."" NOA PG. 0009 (*citing* to CR II, Vol. 4, at 873-74).

Ultimately, the Board voted (4-2-0) that the Applicant had not "carried its burden of proving that [the] second application is materially different from the first." CR II, Vol. 4, at 876. The Notice of the decision was issued on July 27, 2020. CR II, Vol. 4, at 885.

Summary of Argument

The Planning Board's denial of the first CUP was sufficiently stated in its Notice of Decision and supported by substantial evidence and testimony supplied in the Record. The Board understands the statutory requirement in stating the reasons for the denial, which they did, and the Trial Court properly acknowledged as much. The Record supports the conclusion that the Board fully and adequately stated its reasons for its

denial, such that, the Trial Court was able to perform a meaningful appellate review. In doing so, the Trial Court examined the Record as a whole, and not in isolation, and, therefore, any reliance on non-voting members' comments were appropriate and, furthermore, were not the sole basis for the Trial Court's decision. Finally, the Board's decision was neither arbitrary nor discriminatory because the Board has not required traffic studies prior to the Site Plan Review phase in 'other' applications. The Trial Court was correct in not giving any weight to allegations by the Petitioner relative to other CUP applications because the other CUPs involved different land, facts, and circumstances that were never before the Trial Court.

The subsequent CUP application was not materially different from the first and the Trial Court correctly affirmed the Board's denial of the second CUP on the grounds of Fisher v. Dover, 120 NH 187 (1980). The subsequent application was not 'invited' nor was it materially different with respect to density and traffic concerns. The Petitioner contends that the traffic study they provided was done at the Town's request but that simply is not true. The Petitioner did provide a traffic study, presumably in response to the Board's previously discussed concerns relative to traffic and safety, however, the traffic study only served to validate the Board's concerns. Finally, the Board did not engage in ad hoc reasoning but rather

sound decision making which is evidenced by the Record.

Argument

I. Standard of Review:

RSA 677:15, V, governs the Court's review of the Planning Board's decision. Under RSA 677:15, the Court's review is limited. Property Portfolio Group v. Town of Derry, 163 N.H. 754, 757 (2012). The Court must treat the Planning Board's factual findings as prima facie lawful and reasonable, and cannot set aside its decision unless the appealing party shows that the decision is unreasonable or legally erroneous. Id.

Furthermore, the Court "...is not to determine whether it agrees with a planning board's findings, but rather whether there is evidence upon which they could have been reasonably based." Id. "It is the petitioner's burden to demonstrate, by the balance of probabilities, that the board's decision was unreasonable....[w]e, in turn, will uphold the [T]rial [C]ourt's order unless it is unsupported by the record or legally erroneous..., looking to whether a reasonable person could have reached the same decision as did the [T]rial [C]ourt based upon the same evidence...". Id. at 757-58.

II. The Planning Board's denial of the first CUP was sufficiently stated in its Notice of Decision and supported by substantial evidence and testimony supplied in the Certified Record.

The Petitioner first argues that the Board failed to adequately state its reasons for denial and, thus, prevented the Trial Court from performing a meaningful review. Petitioner incorrectly states the Board made "no findings of fact, and that the Board's unsupported conclusion that Section 3.18 (C)(1)(c) had not been met is unreasonable and erroneous as a matter of law." Pet.'s Brief at 21.

A. The Board understood the statutory requirement for stating the reasons supporting their denial, which they did, and the Trial Court properly acknowledged as much.

NH RSA 676:4, I (h), states "[i]n case of disapproval of any application submitted to the planning board, the ground for such disapproval shall be adequately stated upon the records of the planning board." Id. The Trial Court aptly cited to Route 12 Books & Video v. Town of Troy, 149 NH 569, 574 (2003), where this Honorable Court stated that "a denial letter combined with the minutes of a [P]lanning [B]oard meeting can satisfy" NH RSA 676:4, I (h). Route 12 Books & Video v. Town of Troy, at 574. Furthermore, that the Board should "fully discuss the reasons for disapproving an application in the [B]oard meeting minutes." Motorsports Holdings, LLC v. Town of Tamworth, 160 NH 95, 103 (2016).

The evidence that we have identified at length in the Statement of Facts amply supports the conclusion that the Board satisfied the standards for explaining its denial. By the time Board heard and denied the first CUP it had hours of testimony, numerous hearings vetting evidence on every issue, both pro and con, statements and input from the Applicant, experts, and the public. The Record for the first CUP is robust consisting of two Volumes containing 417 pages. CR I, Vol. 1 and 2.

Here, the Petitioner concedes that the Board issued its required written denial letter but claims that the Record fails to state the reasons for the denial in a manner the Applicant can understand. Pet.'s Brief at 22. We disagree, and so did the Trial Court (NOA PG. 0011), as discussed further below.

<u>B. The Board fully and adequately stated the reasons for its denial.</u>

As the Petitioner points out in its Brief, the December 5, 2019, Notice of Decision states, in full, "[t]he [A]pplicant did not meet their burden of proof for Section [3.18(C)(1)(c)] that there would be no significant adverse impact resulting from the proposed use upon the public health, safety, and general welfare of the neighborhood and the Town of Amherst." NOA PG. 0011; CR I, Vol. 2, at 343-43. The Petitioner goes on

to say that the "written decision contained no explanation of any kind regarding how the application would have no significant adverse impact on public health, safety, or general welfare[,]" and then asserts that the minutes of December 4, 2019, offer no further explanation to the same. Pet.'s Brief at 23.

First, the written Notice of Decision is adequate complying with the statute and precedent, in that, the "denial letter combined with the minutes" satisfies the statutory requirement. Route 12 Books & Video v. Town of Troy, at 574. The written denial letter only needs to state that the CUP is denied and the grounds upon which the denial is based, here being the Petitioner's failure to meets its burden pursuant to 3.18(C)(1)(c).

Second, the *explanation* that the Petitioner seems unable to find, but the Trial Court did, can be found by simply reading the meeting minutes, as well as, the Record as a whole. Indeed, one need not 'scour' the Record as the Petitioner claims but rather - read it.

As the Trial Court noted, several members of the public expressed their concerns relative to traffic. NOA PG. 0011; CR I, Vol. 2, at 279-83. Among those public members is Sally Long, who has spent years as a Crossing Guard, thus an expert on the traffic already prevalent at a key

intersection, expressed her own concerns relative to traffic. CR I, Vol. 2, at 283.

The Petitioner opines that member Hart "stated simply he had "concerns" about "the traffic study not yet being complete." Pet.'s Brief at 23. It is true that Hart made such a statement preceding the denial vote (CR I, Vol. 2, at 284), but it was undeniably the concerns about the likely traffic itself that prompted the need for a study. Hart then referred back to his previous statements when he voted to deny the CUP. Id. at 286. Therefore, when members of the Board spoke after Hart's comments they had the benefit of both public testimony and Hart's comments relative to traffic concerns. As such, this is one example, of many, where a Board member is "articulat[ing] a reasonable basis for denial." NOA PG. 0012 (Footnote 5 (*citing* to CBDA Development, LLC, v. Town of Thornton, 168 NH 715, 720, (2016))).

Houpis, a non-voting member, expressed numerous concerns discussed in the Statement of Facts section above and cited in the Order. NOA PG. 0012. The Trial Court aptly noted that despite Houpis' non-voting status his comments are, nonetheless, part of the Record. Id. Houpis was within his right to participate in the discussion as a non-voting member

and, even if he were not, he is still a taxpaying citizen of the Town and, as such, his comments have, as the Trial Court stated, "some value." Id.

The Petitioner, here and in its previous Pleadings, spent considerable time attacking the lack of elaboration on the part of members Rosenblatt and Harris, who stated that the Petitioner failed to meet their burden but did not, according to the Petitioner, further articulate the reasoning behind their decision. NOA PG. 0012-13; Pet.'s Brief at 23-24. The Trial Court, to some degree, acknowledged as much and even went so far as to state that "in a perfect world, [they] would have explained their belief...in greater detail." NOA PG. 0013. The Trial Court goes on to state that the "Court cannot read the Board's minutes in isolation and "[i]f any of the [B]oard's reasons for denial support its decision, then the plaintiff's appeal must fail."" NOA PG. 0013 (*citing* to Durant v. Town of Dunbarton, 121 NH 352, 354 (1981)). Furthermore, the Trial Court notes the 'broad' nature of 3.18 (C)(1)(c), and cites to the many concerns "articulated by the public and the Board members on the [R]ecord" as all being relative to the broad standard mandated by 3.18 (C)(1)(c). NOA PG. 0013.

Therefore, the Trial Court correctly held that, given the breadth of commentary from both the public and other Board members, there was sufficient evidence in the Record for Rosenblatt and Harris to base their

respective decisions. NOA PG. 0013-14 (citing to Olszak v. Town of New Hampton, 139 NH 723, 727 (1995) ("Evidence of the thought process of members of the [Board] is irrelevant to the issue").

Finally, the Petitioner incorrectly characterizes the Board's decision denying the first CUP was based on a "lack of a traffic study." Pet.'s Brief at 24. The Board's concern was due to the creation of potential traffic problems that would be caused by the project itself - not that there was a lack of a study. This is evidenced by the numerous individuals that expressed concerns over potential traffic as noted in the Order. NOA PG. 0011. Member Hart mentioned the traffic study as an item for discussion in order to provide information to address the various concerns. Furthermore, for the Petitioner to claim that the Board's decision lacked an articulated factual basis is misleading in the face of pages of minutes with a robust dialogue, involving many taxpayers/abutters, as well as, Board members voicing some very specific concerns relative to traffic on the Record. CR I, Vol. 2, at 279-86.

C. The Board's Record is sufficient for a meaningful appellate review.

The Petitioner then turns its attention to the Record itself as being "bereft of any explanation for why the [Board] believed Section 3.18

(C)(1)(c) had not been met" resulting in the impossibility of a meaningful review by the Trial Court. Pet.'s Brief at 25.

The Trial Court did acknowledge that the "Board's minutes are not quite as clear as one might hope." NOA Pg. 0014. Nevertheless, the Trial Court determined the Record was sufficient under the relevant legal standard of review, which limits the Court's review to "whether there is evidence upon which the Board's decision could have been reasonably based, and whether the Board sufficiently articulated its reasoning on the [R]ecord." Id.

The Trial Court further notes that when "examining the ***entire*** [R]ecord of the Board's minutes, the Court has identified several statements by Board members and the public related to the potential adverse impact of the proposed use on health, safety, and general welfare[,]" therein supporting the Board's denial. Id. (emphasis added).

In Trustees of Dartmouth College v. Town of Hanover, 171 NH 497 (2018), this Honorable Court held that the lower Court erred in denying a site plan approval for the construction of an indoor practice facility because the planning board unreasonably ignored expert testimony and adopted the testimony of abutters and, furthermore, engaged in ad hoc decision making based on personal feelings. *See generally* Id.

Here, unlike in Trustees of Dartmouth College, the Board during the first CUP review was not ignoring expert testimony but rather had none to work with because there was no traffic study to address their concerns - yet. Id. at 512; CR I, Vol. 2, at 284. Therefore, the Board could only draw from the testimony of the public[7] and their own judgements and experiences, which they are entitled to do, within reason, and that is exactly what they did here. *See* Trustees of Dartmouth College v. Town of Hanover, 171 NH at 508 ("although the members of a planning board are entitled to rely, in part, on their own judgements and experiences, the board, as a whole, "may not deny approval on an ad hoc basis because of vague concerns.").

Here, the Board was not wrestling with 'vague' concerns but rather had legitimate concerns about the impact that the size and scope of this project would have, relative to traffic and safety, on what is well known as rural road in a residential area. CR I, Vol. 2, at 279-86.

Therefore, the Trial Court was correct in concluding that when examining the Record as a whole there is sufficient evidence to find that the Board adequately stated its grounds for denial of the first CUP and, as such, it was sufficient for a meaningful appellate review. NOA PG. 0014.

---

7 Acknowledging that there was persuasive testimony from a crossing guard intimately familiar with traffic concerns at a key intersection relative to the property at issue.

D. The Trial Court did not err by considering the statements of a non-voting alternate member as being part of the written reasons for the first CUP's denial.

The Petitioner argues that member Houpis' statements relative to an impact fee ordinance were somehow improper. Pet.'s Brief at 27. The Petitioner suggests that voting members might have relied on such statements as the basis for their own vote to deny and, thus, the denial was arbitrary and capricious. Id. at 28.

One flaw in the Petitioner's reasoning is that three of the four members who voted to deny the application stated their opposition before Houpis made the above referenced statements. Member Hart spoke first prior to the motion being made expressing his concerns relative to traffic and safety. CR I, Vol. 2, at 284-85. Members Coogan and Rosenblatt stated their objections prior to Houpis's statements. Id. at 285. Coogan said, "he doesn't understand the project and how there is a benefit to the town to deserve the requested bonuses." Id. Rosenblatt then made several statements relative to the Applicant failing to meet its burden under 3.18 (C)(1)(c) and that he does not "wish to award bonuses in a vacuum." Id.

Then, after Houpis spoke, member Harris stated that he agreed with Rosenblatt. Id. at 286. Next, member Hart stated that his vote to deny was

based on his previously articulated reasons (Id.) - his earlier statements over traffic and safety concerns. Id. at 284-85. No where in the minutes after Houpis' statements does any Board member adopt Houpis' remarks as his or her own reason for the denial. *See generally* Id. at 285-86.

The Petitioner opines that "[b]ecause the Planning Board's written record did not reflect any articulated reasons that Members Hart, Harris, and Coogan voted to deny the First CUP Application, the Trial Court tried to treated (*sic*) some of Houpis's other statements as reasons to support for (*sic*) the Board's decision." Pet.'s Brief at 28. However, as stated above, member Hart (*articulating traffic concerns*), Harris, and Coogan all did raise their objections ***prior*** to Houpis' statements.

Furthermore, there is nothing improper with the Trial Court citing to comments made by Houpis for the same reason there is nothing improper with the Trial Court citing to any of the abutters' comments - all said comments are in the Record and said comments were before the Board prior to their vote denying the first CUP.

As the Trial Court noted, 3.18 (C)(1)(c) is quite broad in scope "and many of the concerns articulated by the public and the Board members on the [R]ecord could reasonably come within its purview." NOA PG. 0013. The Trial Court cited to K & P, Inc., v. Town of Plaistow, 133 NH 283, 291

(1990), where the Court held that regulations pertaining to health and safety are broad and that "since the record reflects that the potential hazards to public health, and welfare were considered by the Board, the court's conclusion that the Board was justified in exercising its "responsibility to ensure that all subdivision plans do not threaten public safety" was proper." Id.

Here, the Trial Court did not fully rely on member Houpis' statements but rather read the Record as a whole, not in isolation, and the Board's denial is adequately supported in said Record. Route 12 Books & Video, 149 NH at 575; NOA PG. at 0013.

E. The Board's denial of the first CUP was neither arbitrary nor discriminatory.

The Petitioner then argues that the Board broke from its 'past practice' wherein it alleges that concerns relative to traffic and safety are usually handled in the non-residential site plan review ("NRSPR") process. Pet.'s Brief at 28. Then the Petitioner improperly cites to two other CUP applications that were approved and no traffic impact analysis had been required until their respective site plan review phase. Id.

The Petitioner attempted to raise this argument with the Trial Court in their *Motion for Reconsideration* and the argument was properly rejected.

See generally NOA PG. 0023-27.

The Petitioner cites to Ex Officio D'Angelo's statements in an email wherein he was expressing concern that the said CUPs received, in his opinion, different treatment. Pet.'s Brief at 29. The Petitioner cites to, and relies on, the following statement by D'Angelo wherein he stated, "I've been wrestling with the outcomes of our last two CUP applications, namely Brook Road and the Jacobson property. It bothers me that the applications received different decisions from the Planning Board. I believe that the Planning Board can fairly be excused of inconsistently applying the IIHO. I am NOT a lawyer, but to me, either both should have been approved or both should have been denied (CR I, Vol. 2, at 356)...to my eye, we are in trouble here because in my humble opinion, we clearly applied the IHO (*sic*) different in these two CUP applications - to the detriment of the Jacobson applicant." Id. at 358.

First, any 'other' applications were separate applications involving different facts, different land, and different circumstances and it is wholly improper to drag those matters before this Court based on a few comments made by member D'Angelo. NOA PG. 0025-26. The Trial Court said it best stating that "[i]t would be unreasonable to conclude that the Board has no discretion to determine, based on the unique circumstances of different

proposals, that additional information is necessary in some circumstances but not in others...[and, furthermore,]...TransFarmations has not cited to any law to support this proposition, nor has the [Trial] Court identified any...[thus], evidence that the Board previously approved CUP applications before traffic studies were completed has little if any value here." Id.

The Petitioner, nonetheless, improperly attempts to 'boot strap' an argument by citing to comments made by members Dell Orfano and D'Angelo relative to previous CUPs. Pet.'s Brief at 30. The Trial Court correctly noted, again, that just because the two aforesaid Board members took issue with the traffic concerns being raised prior to site plan review, that the Board is not required to come to a unanimous decision. NOA PG. 0026. The fact that some members of the Board disagree is not grounds that the Board erred in its decision but rather evidence that the Board considered differing views in reaching its decision - like it is supposed to do. Put simply, a split decision means that the Board did its job and fulfilled its function as a quasi-judicial Board. CBDA Development, LLC, v. Town of Thornton, 168 NH 715, 721 (2016) (acknowledging that "Planning Boards act in quasi-judicial manner when approving or denying a site plan application"). The balance of the voting members disagreed with Dell Orfano and D'Angelo and they were well within their right to do so.

NOA PG. 0026.

As stated above, the Petitioner incorrectly argues that any discussion by the Board relative to the lack of a traffic study was improperly discriminatory because it did not require such traffic studies from other applicants. Pet.'s Brief at 30. However, the Board's concern from the outset was the likely traffic impacts from the project - not the lack of a study. *See generally*, CR I, Vol. 2, at 279-85. Even if the Board's concern had been solely based on the lack of a traffic study the Petitioner ignores the fact the other applications mentioned by Dell Orfano and D'Angelo are different developments that possess different concerns relative to traffic. As such, the Board did not act in a discriminatory manner but rather had a reasoned approach to the specific individual application before it and the Trial Court agreed. NOA PG. 0025-26.

III. The Trial Court correctly affirmed the Planning Board's July 23, 2020, decision to not accept the revised CUP because it was not materially different from the first CUP application.

The Board's decision to not accept the revised CUP application was lawful and appropriate. The Petitioner claims that the Board's decision was unreasonable and erroneous because "(1) the Applicant submitted the Revised CUP Application at the Board's invitation and with the information the Board requested; and (2) alternatively, the Revised CUP Application

was materially different." Pet.'s Brief at 31. The Petitioner then opines that the Board engaged in 'ad hoc' reasoning, again, complaining that the Board's decision was not properly articulated in the first decision. Id.

First, the Board did not 'invite' the Petitioner to reapply with more information. A Board member made the statement that the Applicant "can reapply for a CUP with more information." CR I, Vol. 2, at 286. The aforementioned statement is standard after any kind of a denial advising the Applicant of their rights and was not a 'Board invitation.' Id. Furthermore, the aforementioned statement contains no directive to reapply for another CUP and provide a traffic study. Id. As such, we reject the assertion that the Petitioner was 'invited' back and told to return with a traffic study. The Petitioner was advised of their right to reapply - nothing more. The Petitioner then reapplied, providing a traffic study in an attempt to alleviate the Board's concerns relative to traffic and safety, and for the reasons that follow, the traffic study did not alleviate any concerns but rather validated said concerns.

Second, the subsequent application was not materially different from the first, and the Trial Court agreed. *See generally* NOA PG. 0015-22. For the subsequent application to be materially different from the first the subsequent information presented would have to suggest that the Board's

initial concerns relative to traffic and safety were either proven to be unfounded or had been rectified. However, the submitted traffic study only confirmed the Board's concerns and, moreover, the traffic study failed to propose any kind of solution to alleviate said concerns. NOA PG. 0017 (*citing* to various comments and discussion by the Board relative to the traffic study, CR II, Vol. 4, at 873-74).

A. The Fisher Doctrine:

The leading New Hampshire case on this issue is *Fisher v. Dover*, 120 NH 187 (1980). The 'purpose' of the so called '*Fisher*' rule has been articulated in treatises and judicial decisions alike. As the New Hampshire Supreme Court pointed out in ***Fisher:***

> ***'... When a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition. If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan. ...'. (Emphasis supplied).***

Fisher v. Dover, 120 NH at 190.

The doctrine serves to promote administrative finality by "prevent[ing] repetitive duplicative applications for the same relief, thereby

conserving the resources of the administrative agency and of interested third parties that may intervene." CBDA Development, LLC, v. Town of Thornton, 168 N.H. 715, 721 (2016). A planning board may only consider a successive application for relief after a denial for the same relief if there is a material change in the conditions or circumstances. Id. In some instances, a revised application is not barred by the *Fisher* doctrine if the application "has been modified to address the [B]oard's concerns about the initial application." Id. at 724. In CBDA Development, LLC, the plaintiff attempted to make a case that their application should be not be barred by the *Fisher* doctrine since it submitted a new application attempting to address the Board's previous concerns with the first application. Id. at 719. Specifically, the applicant proposed a camp ground site plan and the Board took issue with the permanent nature for the model units of the proposed plan, as well as, a lack of public access. Id. The Applicant's subsequent application was denied because it did not sufficiently address the issue of the "permanent nature of the park model." Id.

The Court ultimately agreed with the Town in its denial because "*the modified application did not sufficiently resolve the Board's concerns about the initial application*." Id. at 724 (emphasis added).

Here, that is precisely what occurred at the July 23, 2020, meeting relative to the Petitioner's subsequent application. NOA PG. 0017. The Board was concerned about the traffic that the proposed project would cause and distinctly expressed such concerns during the course of vetting the first application. CR I, Vol. 2, at 279-86. Then the Applicant returned with its subsequent application touting a traffic study in the hopes that it would address the Board's concerns. CR II, Vol. 3 and 4, at 459-781. However, the Record clearly indicates that the Board's concerns were not addressed but rather were justified. CR II, Vol. 4, at 873-74. Furthermore, the Trial Court, here, much like the CBDA Development, LLC, Court, agreed with the Town in its conclusion that the traffic study did not address the Board's previous concerns and, thus, the subsequent application possessed no substantial change from the first. CBDA Development, LLC, v. Town of Thornton, 168 N.H. at 724; NOA PG. 0019.

B. The subsequent application was neither 'invited' nor was it materially different to warrant further review:

The Board's determination that the Petitioner did not carry its burden of demonstrating "no significant adverse impacts resulting from the proposed use upon the public health, safety, and general welfare of the neighborhood and the Town of Amherst" was correct and the Trial Court

agreed. NOA PG. 0007 and 0015; CR I, Vol. 2, at 343-44. The Board's specific concerns relative to traffic and safety were adequately articulated, as already discussed above, and the traffic study provided by the Petitioner only confirmed the Board's concerns. NOA PG. 0015. Therefore, the Board need not move forward beyond concluding that the traffic report confirmed their fears relative to traffic and safety. Such a conclusion has been upheld by this Honorable Court in CBDA Development, LLC. *See* CBDA Development, LLC, v. Town of Thornton, 168 N.H. at 725 ("...before accepting a subsequent application under the *Fisher* doctrine, a board must be satisfied that the subsequent application has been modified so as to meaningfully resolve the board's initial concerns....[w]hen a board has identified fundamental issues with an application, those issues must be addressed before the board - as well as the interested community members - should be required to invest additional time and resources into considering the merits of the application.").

The Petitioner then attempts to attack the Record as being limited in its discussion relative to traffic and safety. Pet.'s Brief at 34. However, there was nothing limited about the discussion as it was quite robust with already cited Board member comments and several members of the public expressing their concerns. CR. I, Vol. 2, at 279-86. Indeed, the Petitioner's

contention that only one voting member commented on these concerns (Pet.'s Brief at 34) is simply at odds with the Record. The Trial Court recognized that the public comments are certainly worth consideration (NOA PG. 0006 and 0011) and that "...many of the concerns articulated by the public and the Board members on the record could reasonably come within [the] purview..." of 3.18 (C)(1)(c). NOA PG. 0013.

Despite the Petitioner's assertion that the traffic study concluded there would be no significant "alter[ing] [of] the prevailing traffic conditions in Amherst on an overall basis" (CR II, Vol. 3, at 501), the same paragraph also concedes that the "it is obvious that all new development projects create traffic impacts." Id. The concern is not only Amherst 'overall' but rather the streets and intersections of the rural residential area including the proposed project. The study confirmed that there would be a significant traffic increase at "several intersections during certain times of the day." NOA PG. 0017; CR II, Vol. 3, at 487-88.

The Petitioner then lists what it contends are all the 'material changes' between the first application *vs*. the subsequent application, which can be found at Pet.'s Brief at 35-36. However, this point attempts to distract from the main concern for the Board being traffic and density, in that, very little changed relative to density and, thus, there would still be a

significant population increase, which logically leads to the traffic and safety concerns.

As discussed above in the *Statement of Facts* section, the Order cites to comments made by non-voting member Houpis addressing the number of bedrooms had not changed substantially and that the traffic study did not address his concerns. CR II, Vol. 4, at 862. Member Coogan commented that "the sites for development remain the same," despite conceding to *some* "modification[s]" made to the road, the overall acreage for the houses remained the same. CR II, Vol. 4, at 864.

Several members of the public spoke against the project citing concerns over traffic and safety, as well as, the subsequent application's failure to differ from the first. Id. at 865-67.

Then there was member Stoughton's comments relative to whether the subsequent application was materially different from the first, and did it address the Board's concerns expressed from the first application. Id. at 869. Acknowledging some changes, Stoughton correctly noted that the changes were not 'materially different' because the density (*i.e. the proposed population of the project*) had not changed. Id.

Member Stoughton dug into the traffic study itself and noted that it confirmed an "adverse effect from the traffic projected for the revised application." Id. Citing to "[t]able 3[8] of that study[, which,] summarizes the effect on the Foundry Street/Boston Post Road intersection...[and]...the effect of the proposed development on the eastbound traffic, none of which relates to the other development included in the study...[and, moreover,]...the study shows that building the proposed development triples the delay, results in a traffic volume exceeding intersection capacity, and doubles the number of cars queued during the morning" Id. at 870.

Therefore, the revised application failed to address the deficiencies of the first application, further confirmed said deficiencies, and the Trial Court understood as much. NOA PG. 0019-20.

The Petitioner cites to Morgenstern as an example where a Zoning Board of Adjustment ("ZBA") denied an application based on concerns that a proposed structure may negatively impact wetlands. Morgenstern v. Town of Rye, 147 NH 558, 566 (2002). In Morgenstern, the first application was denied and, in response to the ZBA's concerns, the Applicant submitted a subsequent application with engineering studies to address said concerns. Id. at 566. The ZBA denied the subsequent

---

[8] CR II, Vol. 3, at 490.

application as not being materially different and this Honorable Court disagreed stating:

> ***"It is clear from the superior court's order that it concluded that it was unnecessary to consider whether engineering studies and the variations on the building structure constituted material changes to the plaintiff's application. Given the nature of the plaintiff's initial application and the ZBA's reasons for denying the variance, this was error."***

Id.

The situation here is distinguishable from Morgenstern because there the Trial Court "concluded it was unnecessary to consider whether engineering studies...constituted a material change[]." Id. Here, the Board did consider the traffic study that was provided by the Petitioner. The issue was not that the Petitioner provided a traffic study - or not - but rather that the report itself confirmed, after consideration by the Board, that the traffic was a concern at the first application and confirmed to be a concern under the second application. NOA PG. 0017-18; *See generally* CR II, Vol. 4, at 870-74. The traffic concerns were not "vague" as the Petitioner attempts to suggest; indeed, they were articulated in the hearings relative to the first application and confirmed by the Petitioner's own expert report during the vetting of the subsequent application. The Petitioner keeps making the incorrect distinction that the first application was denied "for lack of a completed traffic study." Pet.'s Brief at 37. Again, the first application was

denied over concerns relative to traffic and safety (NOA PG. 0017) not for lack of a study and, after reviewing the study provided by the Petitioner, it confirmed that the concerns over traffic were justified. Id.

Therefore, in light of the traffic study confirming the Board's concerns relative to traffic, coupled with the fact that the Petitioner did not alter the proposed project population in any significant manner under the subsequent application (*more people equals more traffic*), the Board acted reasonably and lawfully in denying the revised application as not being materially different.

C. The Board's refusal to accept the subsequent application was not based on ad hoc reasoning but rather sound logic evidenced by the Record.

Once again, the Petition attacks the "failure of the [Board] to fully and adequately state its reasons for denying the First CUP" and in doing so "created an impossible standard for the Applicant to meet with respect to revising the Revised CUP Application to meet the Board's concerns." Pet.'s Brief at 38. As has already been stated, the Board did sufficiently articulate its reasons for denying the first CUP and the Trial Court agreed. NOA PG. 0015.

Also, again, the Petitioner incorrectly states that the first CUP was denied for the Applicant's failure to meet its burden because "the Petitioner had not yet completed a traffic study." Pet's Brief at 38. Once more, the first CUP was denied over concerns of traffic and the traffic report provided as part of the second CUP confirmed the Board's concerns. NOA PG. 0015.

The Petitioner then, again, attacks the Record belaboring their point that the Board never explained how the Petitioner failed to meet its burden, or how the CUP had a significant adverse impact on traffic. Pet.'s Brief at 38.

One only need read the Record, as has been cited throughout this Brief, to see there are very specific concerns as to the traffic and safety that would be generated by a project of this size - cited by several members of the public and the Board. CR I, Vol. 2, 279-85. The concerns were then confirmed by the traffic study provided to the Board and the "[R]ecord demonstrates that the Board members articulated a reasonable basis for denial." NOA PG. 0012 (footnote 5 (*citing* to CBDA Development, LLC,168 NH at 720)).

CONCLUSION AND RELIEF SOUGHT

The Petitioner has not demonstrated, by a balance of probabilities, that it was unlawful or unreasonable for the Planning Board, based on the record, to deny either CUP for reasons stated herein. The evidence in the Record supports the decision of the Planning Board and is consistent with generally applicable principles in the AZO, Statutes, and the case law. We respectfully ask that the Honorable Court AFFIRM the decisions of the Superior Court.

REQUEST FOR ORAL ARGUMENT

The defendant town requests oral argument to be made by Christopher B. Drescher, Esq.

Respectfully submitted,

Defendant-Appellee,

TOWN OF AMHERST
(PLANNING BOARD)
By Its Attorneys,
Cronin, Bisson, & Zalinsky, PC

Date: ***November 24, 2021***

By: ***/s/ Christopher B. Drescher***
Christopher B. Drescher, Esq.
NH Bar No. 264845
722 Chestnut Street, NH
Manchester, NH 03104
(603) 624-4333 - tel.

CERTIFICATE OF SERVICE

I hereby certify that on ***November 24, 2021,*** I electronically filed this Brief of the Defendant-Appellee, Town of Amherst (Planning Board) as required by the Rules of the Supreme Court. I am electronically sending this document through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contact (email addresses).

By ***/s/ Christopher B. Drescher***
Christopher B. Drescher, Esq.

CERTIFICATE OF WORD COUNT

I hereby certify that this Brief contains ***8,162*** words, exclusive of the cover page, table of contents, table of authorities, signature block, certificate of service and certificate of word count.

By ***/s/ Christopher B. Drescher***
Christopher B. Drescher, Esq.