THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2021-0214

TransFarmations, Inc.

V.

THE TOWN OF AMHERST

APPEAL PURSUANT TO RULE 7 FROM AN ORDER OF THE HILLSBOROUGH NORTH SUPERIOR COURT

BRIEF FOR TRANSFARMATIONS, INC.

TransFarmations, Inc.

Brendan Avery O'Donnell, Esq.
NH Bar No. 268037
John J. Ratigan, Esq.
NH Bar No. 4849
Donahue, Tucker & Ciandella, PLLC
16 Acadia Lane
Exeter, NH 03833
(603)778-0686
jratigan@dtclawyers.com
bodonnell@dtclawyers.com

To be argued by Brendan O'Donnell.

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   Preserved at: Brief Appendix at 144, 197-99.

Constitutional Provisions, Statutes, Ordinances, Rules, or Regulations

676:4 Board's Procedures 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:
…
(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.

676:12 Building Permits to be Withheld in Certain Cases. –
I. The building inspector shall not issue any building permit within the 120 days prior to the annual or special town or village district meeting if:

(a) Application for such permit is made after the first legal notice of proposed changes in the building code or zoning ordinance has been posted pursuant to the provisions of RSA 675:7; and

(b) The proposed changes in the building code or the zoning ordinance would, if adopted, justify refusal of such permit.

II. After final action has been taken on the proposed changes in the building code or zoning ordinance, the building inspector shall issue or refuse to issue a permit which has been held in abeyance under this section pursuant to a final action under this section.
…
VI. The provisions of paragraph I shall not apply to any plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) prior to the first legal notice of a proposed change in a building code or zoning ordinance or any amendment thereto. No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment. The provisions of this paragraph shall also apply to proposals submitted to a planning board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the planning board within 12 months of the end of the design review process.

677:15 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.
…
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.
…
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.

Statement of the Case:[1]

This appeal concerns two decisions of the Town of Amherst (the "Town") Planning Board regarding TransFarmations, Inc.'s ("TransFarmations" or the "Applicant") applications for a CUP to develop an approximately 120-acre property known as the Jacobson Farm (the "Property").[2]

On August 5, 2019, TransFarmations submitted an application for a CUP (the "First CUP Application"), seeking to develop the Property under the Town's Integrated Innovated Housing Ordinance ("IIHO Ordinance"). As relevant here, Town of Amherst Zoning Ordinance Section 3.18(C)(1)(c) requires applicants for CUPs to demonstrate that there 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."

The Planning Board held a hearing on December 4, 2019, at which time some Board members orally indicated they had concern regarding the lack of a traffic study and possibly regarding runoff. The Planning Board ultimately denied TransFarmations' First CUP Application in a written decision that stated without explanation that TransFarmations had not met its burden of proof under Section 3.18(C)(1)(c) that there would be no significant adverse impact.[3] However, the Planning Board invited TransFarmations to reapply for a CUP with more information.[4]

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[1] TransFarmations' Notice of Appeal will be cited as "NOA at #"
[2] NOA at 5.
[3] NOA at 7.
[4] NOA at 7.

On December 13, 2019, TransFarmations submitted a revised CUP application (the "Revised CUP Application") to the Board. The Revised CUP Application included significant changes, including changes specifically designed to address any perceived concerns regarding runoff and traffic. The Revised CUP Application additionally included a traffic study and a groundwater study.

The Planning Board held a hearing on the Revised CUP Application on July 23, 2020, to determine whether the Revised CUP Application was materially different than the First CUP Application. See Fisher v. Dover, 120 N.H. 187, 190 (1980) (ruling that land use boards may consider subsequent applications if there is a "material change of circumstances"); CBDA Development, LLC v. Town of Thornton, 168 N.H. 715, 724 (2016) (ruling that the Fisher v. Dover doctrine does not preclude consideration of a subsequent application that was "explicitly or implicitly invited" when the application "has been modified to address the board's concerns about the initial application"). The Planning Board ultimately determined that the Revised CUP Application was not materially different from the First CUP Application and declined to accept the Revised CUP Application.

TransFarmations timely appealed each of the Planning Board's decisions to the Superior Court. The Superior Court consolidated the appeals and held a bench trial on the December 17, 2020. The Superior Court issued an order on February 12, 2021, denying TransFarmations' appeals. TransFarmations timely moved for reconsideration, which the Superior Court denied on April 22, 2021. This appeal followed.

Statement of Facts

A. The First CUP Application

The Property consists of two parcels totaling approximately 120 acres located along Christian Hill Road in Amherst, New Hampshire. On August 5, 2019, the Applicant filed the First CUP Application with the Planning Board, seeking approval under the Town's IIHO Ordinance. The purpose of the IIHO was to promote innovative, integrated housing by allowing increased residential density for qualifying plans.

The First CUP Application[5] proposed to include 64 residential units comprised of various types of housing that the IIHO identified as desirable, including 12 units of senior housing; 17 units of price-restricted affordable workforce housing; 24 units of attached (i.e., multifamily) housing; 20 single floor housing units; 4 zero-bedroom units; and 30 two-bedroom units.[6] The project would also preserve approximately 75% of the Property's land as open space. Many of the homes would be accessed by an internal, 1,200 foot road intersecting with town-owned Christian Hill Road, and Municipal water would be extended to the homes.[7]

The Planning Board held a hearing on the First CUP Application on December 4, 2019.[8] The Applicant presented the plan, noting that a traffic

[5] C.R.I, Vol 1, at 18-62.
[6] C.R.I, Vol 1, at 23, 58; Vol. 2, at 273-74.
[7] C.R.I, Vol 1, at 58.
[8] C.R.I, Vol 2, at 273.

study and hydrological study would be performed.[910] Chair Dell Orfano noted that the Town's ordinance allowed the Planning Board to determine an up-to number of maximum units, but reserved the Planning Board's right to reduce that up-to number once all studies had been completed.[11] Chair Dell Orfano repeatedly stated that, during the CUP phase, the Planning Board sets a not-to-exceed unit number, and that required studies are completed in the site plan review phase, after which the Planning Board can reduce that unit number.[12] A few residents stated various concerns in the public portion, including potential traffic issues.[13]

During the Planning Board's deliberation, the Board discussed whether the First CUP Application complied with Section 3.18(C)(1)(c), which requires applicants for CUPs to demonstrate that there 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." However, the Planning Board's discussion was largely void of any specific reason that the First CUP Application failed to satisfy Section 3.18(C)(1)(c).

Planning Board member Hart stated that he had "concerns regarding item [3.18(C)(1)(c)], due to the traffic study not yet being complete," to which Chair Dell Orfano repeated that the traffic study would be reviewed subsequently.[14] Planning Board member Rosenblatt stated that he did not

[9] C.R.I, Vol 2, at 278-80.
[10] C.R.II, Vol.1, at 140 (groundwater study); Vol. 3, at 459 (traffic study).
[11] C.R.I, Vol 2, at 280.
[12] C.R.I, Vol. 2, at 280, 282.
[13] C.R.I, Vol. 2, at 279-84.
[14] C.R.I, Vol. 2, at 284.

"believe the applicant satisfied the burden" of showing no significant adverse impact, although he did not specifically mention "traffic" or any other potential impact.[15] Planning Board member Harris stated that he "sides with Arnold Rosenblatt," again without any mention of "traffic" or any other potential impact.[16] Planning Board member Coogan who voted against the CUP application never stated his reasons regarding Section 3.18(C)(1)(c) or mentioned the word traffic.[17]

Planning Board alternate Houpis, who was not eligible to vote, stated that the Planning Board "should decline the application and wait until it has the proper tools in place, including impact fees."[18] Mr. Houpis, without elaboration, stated that he concerned with "the pitch of the proposed road, increased drainage, runoff, grazing, traffic volume, financial viability, and a lack of Amherst-specific data."[19] The minutes do not reflect that any member shared Mr. Houpis's concerns, and Rosenblatt went so far as to ask "that the record be clear that he was not voting consistent in any way [with] Houpis' comments, but for his own reasons previously articulated."

Members D'Angelo and Peterman voted to approve the project, and Chair Dell Orfano abstained.[20] Therefore the Planning Board denied the First CUP Application by a 2-4 vote.[21] Following the vote, Chair Dell

[15] C.R.I, Vol. 2, at 285.
[16] C.R.I, Vol. 2, at 286.
[17] C.R.I, Vol. 2, at 284-86.
[18] C.R.I, Vol. 2, at 285.
[19] C.R.I, Vol. 2, at 285.
[20] C.R.I, Vol. 2, at 285-86.
[21] C.R.I, Vol. 2, at 286.

Orfano stated that "the applicant can reapply for a CUP with more information."[22]

The Planning Board issued a written decision that only stated that "The applicant 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."[23] The written decision did not include any explanation, reason, or supporting facts.

TransFarmations timely appealed the Planning Board's denial of the First CUP Application to the Trial Court.

B. The Revised CUP Application:

On December 13, 2019, TransFarmations submitted the Revised CUP application to the Board. The Revised CUP Application included significant changes, including changes specifically designed to address what TransFarmations perceived to be the Planning Board's concerns—traffic and runoff from the road.

These revisions included:[24] (1) reducing the total number of proposed residential units from 64 to 60; (2) increasing the amount of affordable workforce housing from 17 to 26; (3) increasing open space to 82% and donating some land to the Town; (4) relocating proposed homes out of wetlands buffers; (5) reducing the number of units accessed by the proposed road from 37 to 29 to lessen potential impact on the intersection with Christian Hill road; (6) creating a 20' vegetated buffer with plants that

[22] C.R.I, Vol. 2, at 286.
[23] C.R.I, Vol. 2, at 343-44.
[24] C.R.II, Vol. 2, at 315-16; Vol. 4, at 860-61.

increase nitrogen uptake; (7) substantially reducing the length of the internal road from 1,200 feet to 800 feet; (8) reducing the maximum grade of the road from 9.5% to 8%; (9) changing the grade of the road at its intersection with Christian Hill Road from 1% to -2% to prevent runoff onto the Town road; (10) redesigning the internal road to obviate the prior need for five road waivers; (11) adding deed restrictions to prevent chemical fertilizers and pesticides; (12) reducing the total impervious coverage;[25] (13) phasing tree cutting to minimize erosion and water runoff;[26] (14) changing water service from municipal water to private wells.[27]

The Revised CUP Application additionally included a traffic study, which concluded that the project and a second project would not significantly alter traffic on an overall basis, and a groundwater study.[28] In sum, the Revised CUP Application made numerous, substantial changes to the number, type, and location of housing units and the length, grade, and location of the proposed road.[29] These changes were specifically to reduce or obviate potential adverse impact from traffic, runoff, and drainage while preserving additional open space and trees.

The Planning Board held a hearing on the Revised CUP Application on July 23, 2020.[30] During the Planning Board's deliberations, Member Dell Orfano noted that the Board's prior concerns were the quality and

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[25] C.R.II, Vol. 4, at 863.
[26] C.R.II, Vol. 4, at 863.
[27] C.R.II, Vol. 4, at 864.
[28] C.R.II, Vol. 2, at 316; Vol. 4, at 860.
[29] Compare C.R.I, Vol. 1, at 58 (First CUP Application plan) with C.R.II, Vol. 1, at 5 (Revised CUP Application plan).

reliability of information.[31] Nevertheless, rather than determine whether the Revised CUP Application included the information the Planning Board identified as missing when denying the First CUP Application—a completed traffic study, the Board members largely discussed differences in the "density" of the Revised CUP Application.[32] Notably, not a single Planning Board member had mentioned density when denying the First CUP Application.

For example, Member Stoughton focused on density, stating that he did not think a reduction from 64 units to 60 units was material.[33] Member Coogan simply stated that "the amount of physical property being disrupted for the development is relative the same for the number of units being proposed."[34] Member Yates also focused primarily on the density when looking at materiality.[35] Member Dokmo also focused primarily on density.[36]

With regard to traffic, Member Stoughton and non-voting Member Houpis stated that they disagreed with the conclusion of the traffic study and stated that it did not "address the traffic concerns that, in part, led to rejection of the original proposal." However, the only "traffic concern" that the Planning Board identified when denying the First CUP Application was the lack of a completed traffic study, and no other "concerns" were articulated.

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[31] C.R.II, Vol. 4, at 870.
[32] C.R.II, Vol. 4, at 863.
[33] C.R.II, Vol. 4, at 863.
[34] C.R.II, Vol. 4, at 872.
[35] C.R.II, Vol. 4, at 873.
[36] C.R.II, Vol. 4, at 873.

Ultimately, the Planning Board voted 4-2 that the Revised CUP Application was not materially different.

TransFarmations appealed the Planning Board's decision, and the appeal was consolidated with TransFarmation's appeal of the Planning Board's denial of the First CUP Application.

C. Superior Court Upholds Planning Board Decisions

Following a hearing, the Superior Court affirmed both Planning Board decisions. In doing so, the Superior Court declined to consider evidence that TransFarmations submitted to demonstrate that the Planning Board had acted arbitrarily in denying the First CUP Application, because in two other CUP applications that same year, the Planning Board had not required traffic studies prior to granting CUPs.[37]

This appeal followed.

[37] NOA at 24-26.

Summary of the Argument

The Planning Board failed to fully and adequately state its reasons for denial of the First CUP Application in writing, as required by RSA 676:4. The Planning Board denied the First CUP Application for failure to meet Section 3.18(C)(1)(c), which generally requires that applications not have a significant adverse impact on public health, safety, and general welfare.

Of the four members who voted to deny the First CUP Application for failure on this ground, three did not offer a single fact, reason, or explanation to support their conclusion that the application did not meet Section 3.18(C)(1)(c). The fourth member who voted to deny the First CUP Application stated only that he was concerned the traffic study wasn't yet complete, although the Chair reminded that member that the traffic study would be reviewed in the site plan review stage. Therefore, the Planning Board's written record failed to fully and adequately state the reasons for its denial.

Moreover, the Planning Board's failure to comply with the written record requirement made meaningful appellate review not possible. Planning Board members may not base their decisions on mere personal opinion and vague concerns. See Trustees of Dartmouth College, 171 N.H. 497, 508 (2018). However, because the Planning Board members did not identify how or why they believed the application would have a significant adverse impact on public health, safety, or general welfare, the Planning Board's decision appears to be based on just that—personal opinion and vague concerns.

Because the Planning Board failed to fully and adequately state the reasons for its denial in writing, the Trial Court scoured the record for possible facts that could have supported the Planning Board's decision. In doing so, the Trial Court erroneously relied on the statements of a non-voting member, despite the fact that not a single voting member stated they agreed with that non-voting member. The Trial Court's error was particularly troubling because that non-voting member urged the Planning Board to deny the First CUP Application so that the Town could revise its ordinances, which would be improper.

TransFarmations submitted a Revised CUP Application that included a completed traffic study, a hydrological study, and numerous revisions designed to reduce potential impact from traffic and runoff. The Planning Board refused to accept the Revised CUP Application, stating that it was not materially different under the Fisher v. Dover, 120 N.H. 187 (1980) standard. The Planning Board's decision was not supported by the evidence and legally erroneous.

The Fisher doctrine does not preclude consideration of a subsequent application that was "explicitly or implicitly invited" when the application "has been modified to address the board's concerns about the initial application." CBDA Development, LLC v. Town of Thornton, 168 N.H. 715, 724 (2016). Furthermore, a revised application is materially different if it includes expert studies intended to address a board's concerns. See Morgenstern v. Town of Rye, 147 N.H. 558, 564-65 (2002).

Here, the Planning Board Chair expressly invited a revised application with more information; i.e., a completed traffic study. The Revised CUP Application contained a completed traffic study, a completed

hydrological study, and other revisions intended to address the Planning Board's concerns. Therefore, the Revised CUP Application was materially different under this Court's precedent, and the Planning Board erred by not accepting the Revised CUP Application.

Finally, because the Planning Board failed to fully and adequately articulate the reasons that the First CUP Application would have significant adverse affects on public health, safety, and welfare, the Planning Board's analysis regarding whether the Revised CUP Application was materially different devolved into ad hoc reasoning as to whether the Revised CUP Application satisfied the Planning Board's unarticulated prior concerns.

Argument:

I. **Standard of Review**:

When reviewing a planning board decision, the trial 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 the board's decision is unreasonable." Girard v. Town of Plymouth, 172 N.H. 576, 581 (2019) (cleaned up); RSA 677:15. Although the trial court must treat the planning board's factual findings as prima facie lawful and reasonable, the trial court may set aside the planning board's decision if it is unreasonable or based on errors of law. Girard, 172 N.H. at 581. The appealing party bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable or unlawful. Id.

This Court may reverse the trial court's decision if it is not supported by the evidence or is legally erroneous. Id.

II. The Planning Board's denial of the First CUP Application was not adequately stated in writing.

The Planning Board failed to fully and adequately state the reasons for its denial of the First CUP Application in writing, which prevented meaningful review by the Trial Court. The Planning Board made no findings of fact, and 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.

A. Planning boards are required by statute to fully and adequately state the reasons for denial in a written record sufficient to enable appellate review.

Planning boards are required by statute to state the reasons for denying an application in writing. RSA 676:4, I(h) provides in full: "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." This Court has held that "[t]he purpose of this requirement is to insure that the developer receives written reasons for the disapproval, and that a record of the Board's reasoning exists so that the decision may be reviewed on appeal." K&P, Inc. v. Plaistow, 133 N.H. 283, 290 (1990). Thus, planning boards should "fully discuss the reasons for disapproving an application in the board meeting minutes." Motorsports Holdings v. Town of Tamworth, 160 N.H. 95, 103 (2010) (cleaned up). "Ultimately, whether planning board records adequately state the ground for disapproval in accord with RSA 676:4, I(j) depends upon the particular case." Id. (cleaned up).

Therefore, RSA 676:4, I(h) requires that: (1) the Planning Board's denial must be in a written record; and (2) the Planning Board's reasons for denial in that written reasons must be "fully" and "adequately stated" such that an applicant understands the reasons for disapproval and that those decisions may be reviewed on appeal.

For purposes of the written record requirement, this Court has found that the requirement may be satisfied with a written denial letter combined with written minutes of a planning board's meeting. See, e.g., K&P, 133 N.H. at 290. TransFarmations does not dispute that the Planning Board issued a written decision and that there are minutes of the Planning Board's December 4, 2019 hearing. However, that written record fails to fully and adequately stated the reasons for the Planning Board's denial, such that an applicant understands the reasons for disapproval and that those decisions may be reviewed on appeal.

For purposes of whether the reasons for a denial are fully and adequately stated on a written record, a board must be clear on how they are applying an ordinance and how specifically an application fails to meet an ordinance's requirements. See, e.g., Motorsports Holdings, 160 N.H. at 104-05 (ruling that a planning board had not adequately stated its reasons for denial where the minutes did not specify which ordinance criteria were satisfied, how the board had applied those criteria, or which portions of the application violated the ordinance).

B. The Planning Board failed to fully and adequately state the reasons for its denial of the First CUP Application:

Here, the Planning Board's written decision provided in full: "The applicant 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."[38] The Planning Board's written decision contained no explanation of any kind regarding how the application would have a significant adverse impact on public health, safety, or general welfare.

Nor do the minutes of the Planning Board's December 4, 2019 hearing fully and adequately explain how the application failed to meet Section 3.18(C)(1)(c). Here, there were five members on the Planning Board who voted. Members Hart, Harris, and Rosenblatt voted to deny the First CUP Application, while Members D'Angelo and Peterman voted to approve the application. Chairman Orfano and Alternate Member Houpis did not vote.

Member Hart stated simply that he had "concerns" about "the traffic study not yet being complete."[39] Member Rosenblatt stated only he did not believe the applicant satisfied its burden "with regard to lack of adverse impact," without elaborating in any what type or nature of adverse impacts he was concerned about.[40] Member Harris stated only that he sided with Rosenblatt, meaning his answer was equally vague and unclear as Rosenblatt's answer.[41] Planning Board member Coogan also voted against the First CUP Application, but he never stated his reasons or mentioned the word traffic. Taken together, the written record of the Board's decision only indicates that the four members who voted against the First CUP

[38] NOA at 7.
[39] NOA at 11.
[40] NOA at 12.
[41] NOA at 12.

Application believed the Applicant had not satisfied Section 3.18(C)(1)(c) because a traffic study had not been completed and because of unidentified potential other "adverse impacts."

The Trial Court attempts to shoehorn in additional reasons be noting that non-voting alternate member Houpis stated he had concerns regarding Section 3.18(C)(1)(c) because of "the pitch of the proposed road, increased drainage, runoff, grazing, traffic volume, financial viability, and a lack of Amherst-specific data." However, Rosenblatt specifically stated on the record that he was not voting consistent with alternate member Houpis's statements, but rather based on Rosenblatt's own articulated reasons—for which no specific reasons are articulated in the minutes.[42]

Therefore, the sum of the written record simply identifies that the Board denied the First CUP Application for failure to demonstrate lack of adverse impacts under Section 3.18(C)(1)(c), but the only specific reason or purported adverse impact articulated or referenced in the minutes by those who voted to deny the First CUP Application was the lack of a traffic study. Similarly, other than noting that a traffic study had not been completed, the Planning Board did not make <u>any</u> factual findings. That meager written record does not constitute having "fully" and "adequately stated" reasons for denial, and therefore it does not satisfy the requirements of RSA 676:4, I(h).

C. <u>The Planning Board's written record was not sufficient to enable meaningful appellate review</u>:

[42] NOA at 12.

The purpose of the written record requirement is that "the developer receives written reasons for the disapproval, and that a record of the Board's reasoning exists so that the decision may be reviewed on appeal." K&P, Inc., 133 N.H. at 290 (emphasis added). Here, the Planning Board's record was bereft of any explanation for why the Planning Board believed Section 3.18(C)(1)(c) had not been met, and that failure made it impossible for the Trial Court to meaningfully determine whether the Planning Board's decision was unreasonable or erroneous as a matter of law.

In Trustees of Dartmouth College, this Court recently had the opportunity to clarify that the decisions of a planning board must be supported by facts that the board actually relied upon. Trustees of Dartmouth College, 171 N.H. at 508. Planning boards "must" base their decisions "upon more than the mere personal opinions of its members." Id. (quotation omitted). Furthermore, although planning board members may rely "in part" on their own judgments and experience, a planning board as a whole "may not deny approval on an ad hoc basis because of vague concerns." Id. (quotation omitted).

This standard, combined with the requirement of RSA 676:4, I(h), means that the written record of a planning board decision must fully and adequately state the reasons for denial such that a reviewing court can determine that the board did not base its decision upon mere personal opinions and vague concerns. The written record in this case clearly fails to meet that standard.

Member Rosenblatt stated that he did not believe the applicant satisfied its burden "with regard to lack of adverse impact," without any explanation. Because Member Rosenblatt did not offer any explanation, a

reviewing court could never tell whether Member Rosenblatt's determination was inappropriately based on his personal feelings and vague concerns or whether it was based on some objective evidence. In other words, the written record was insufficient to enable review on appeal. See K&P, Inc., 133 N.H. at 290; Trustees of Dartmouth College, 171 N.H. at 511 (reasoning that the record did not demonstrate that the planning board relied upon property value impact when denying a site plan application because "while one board member referenced property values as a factor in his decision, the other board members either rejected or did not mention this rationale as a basis for denying the site plan application" (emphasis added)) . Similarly, the written record does not reflect any reason that Members Harris and Coogan voted that the First CUP Application did not satisfy Section 3.18(C)(1)(c), making it appear that their votes were also based on personal feelings and vague concerns. Member Hart did state that he had "concerns" about "the traffic study not yet being complete," but he offered no further explanation.

In sum, the written record of the Planning Board's decision did not fully and adequately state the reasons for the Board's denial such that the decision could be reviewed. Therefore, the Trial Court erred when it scoured the written record for facts that might indicate the First CUP Application had not satisfied Section 3.18(C)(1)(c) when the written record did not demonstrate that the voting members actually relied upon any of those facts. See Trustees of Dartmouth College, 171 N.H. at 511.[43]

[43] The requirement that a decision be in writing and fully and adequately state the reasons for denial had significant additional unfair consequences in this case. As described in further detail below, the Board invited the Applicant to resubmit its application "with more information."[43] However, because the Board had not explicitly articulated its reasons for denial, the Applicant

D. Trial Court erred by relying upon the statements of a non-voting alternate member as being written reasons for the Planning Board's denial

The Planning Board was required to base its decision on the ordinances that were in effect at the time of the application. See RSA 676:12, VI (providing that zoning ordinance amendments do not apply retroactively to any plat or application that has already been the subject of notice by the planning board prior to the first legal notice of that amendment).

Alternate member Houpis suggested that the Board "wait until it has the proper tools in place, including impact fees," which was a reference to the fact that the Town did not currently have an impact fee ordinance in place.[44] To the extent that the Board denied the First CUP Application based on a desire to stall until a zoning ordinance amendment could be enacted, the Board's decision was improper and erroneous as a matter of law.

Under normal circumstances, an inappropriate factual consideration being discussed in a hearing would not be an issue if the members articulated proper facts or reasons upon which to deny an application. In other words, there would be no reason to believe the member's decision was based upon an improper reason.

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could only guess as to what specific "adverse impacts" had not been demonstrated and what additional "information" was required. Even though the Applicant submitted a Revised CUP Application that contained numerous substantive revisions, as well as expert traffic and hydrological studies, the Planning Board failure to identify concrete reasons for denial allowed the Board to use ad hoc reasoning based on the Board's prior vague concerns to create new concerns or reasons for denial from whole cloth.

[44] C.R.I, Vol. 2, at 285.

However, the failure of the Planning Board to fully and adequately articulate its reasons for denial make Alternate Member Houpis's statements particularly troubling. Because 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 some of Houpis's other statements as reasons to support for the Board's decision.[45] Trial Court had no way of discerning whether a Board member who did not state their reasons on the record based there vote on proper or improper reasons. Therefore, it was error for the Trial Court to rely upon alternate Member Houpis's statements as demonstrating that the written record fully and adequately stated the Board's reasons for denial because Member Houpis's statements contained legally improper considerations, no voting Member stated that they agreed with or shared Member Houpis's concerns, and one voting Member explicitly stated that he did not agree with Member Houpis.

E. The Planning Board's denial of the First CUP Application was arbitrary and discriminatory.

The Planning Board's regular, past practice was to grant CUPs under the IIHO and then to address any concerns regarding traffic impact subsequently in non-residential site plan review.[46] By conducting its process in this manner, the Planning Board ensured that any traffic impact analysis was based on the actual number of units approved in the CUP. The Planning Board recognized that this had been its regular practice, and

[45] NOA at 12.
[46] Non-residential site plan review is often referenced as "NRSPR" in the certified record.

consistent with its regular practice, the Planning Board granted two other CUPs in the same year that it denied the Petitioner's CUP application. Each time, the Planning Board did not require a traffic impact analysis prior to granting the CUP and recognized that the issue of traffic impact would be addressed in site plan review.

Ex-Officio Planning Board Member D'Angelo stated in an e-mail that "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 two applications received different decisions from the Planning Board. I believe the Planning Board can fairly be accused 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."[47] Member D'Angelo reiterated that "to my eye, we are in trouble here because in my humble opinion, we clearly applied the IHO different in these two CUP applications—to the detriment of the Jacobson applicant."[48]

Member D'Angelo went on to explain the merits of what happened in the Brook Road CUP decision.[49] Notably, he identified that Brook Road added 38 units which "is likely to double or triple the traffic" at "one of the most dangerous intersections in Amherst."[50] Despite this, the Planning Board didn't require a traffic study and instead stated "we'll look at the traffic study when we get it and see what the risks are."[51]

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[47] C.R.I, Vol. 2, at 356.
[48] C.R.I, Vol. 2, at 358.
[49] C.R.I, Vol. 2, at 357.
[50] C.R.I, Vol. 2, at 357.
[51] C.R.I, Vol. 2, at 357.

Member D'Angelo also pointed out that applicants cannot get traffic studies that accurately address the impact of the number of approved units prior to getting a CUP that specifies the number of approved units.[52] In other words, this statement is consistent with the Planning Board's prior conduct of approving CUP's without traffic studies and then addressing the issue of traffic during site plan review once the precise number of units was determined in the CUP.

Member Dell Orfano also sent a memorandum to the Planning Board in advance of the Planning Board's hearing on the Petitioner's Revised CUP Application. Member Dell Orfano specifically noted that "Historically, impact studies had been submitted as part of the site review process . . . ."[53] By implication, the Planning Board was treating the Petitioner differently than other prior applicants by requiring traffic impact analysis prior to granting a CUP and prior to site plan review.

Additionally, the Applicant submitted evidence to the Trial Court demonstrating that the Planning Board treated two prior applicants differently than the Applicant: the Planning Board's November 20, 2019 minutes, approving the Brook Road CUP and noted that traffic concerns would be addressed during non-residential site plan review; and Planning Board's January 2, 2019 minutes, at which Planning Board approved Carlson Manor CUP and noted that traffic concerns would be addressed at a later stage.

Taken together, the Planning Board acted unlawful or unreasonably by arbitrarily denying the First CUP Application for lack of a traffic study

[52] C.R.I, Vol. 2, at 356.
[53] C.R.II, Vol. 4, at 844.

when it did not require such study prior to site plan review for other CUP applicants.

III. The Planning Board decision not to accept the Revised CUP Application was unreasonable or erroneous as a matter of law.

The Planning Board decision not to accept the Revised CUP Application was unreasonable or erroneous as a matter of law 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. Furthermore, the Planning Board's decision was unreasonable or erroneous as a matter of law because its decision was based on ad hoc reasoning and standards that the Planning Board failed to articulate in its written decision on the First CUP Application.

A. The Fisher Doctrine:

The Fisher doctrine generally provides that land use boards may consider a subsequent application if there is a "material change of circumstances," i.e., the application "materially differs in nature and degree from its predecessor." Fisher v. Dover, 120 N.H. 187, 190 (1980). However, the Fisher doctrine does not preclude consideration of a subsequent application that was "explicitly or implicitly invited" when the application "has been modified to address the board's concerns about the initial application." CBDA Development, LLC v. Town of Thornton, 168 N.H. 715, 724 (2016); see also Morgenstern v. Town of Rye, 147 N.H. 558, 564-65 (2002) (ruling that a revised variance application that included expert studies intended to address the zoning board's concerns constituted a

materially changed application). In other words, when a land use board asks for specific information and the applicant submits a revised application that includes that information, the land use board must accept that revised application and hear it on the merits.

Conversely, a revised application that makes only inconsequential changes such that "the board inevitably will reject the application for the same reasons as the initial denial" does not constitute a materially changed application. CBDA Development, 168 N.H. at 725 (emphasis added). Put differently, an application that allegedly addresses perceived concerns is not materially changed only when the application's denial is certain. For example, in CBDA Development, both the original and the revised application suffered from the fatal flaw that the use (permanent campgrounds not open to the public) was not permitted under local ordinances.

B. The Revised CUP Application was invited by the Planning Board and was materially different:

The Planning Board denied the Petitioner's first CUP application based on its determination that the Petitioner did not carry its burden of showing 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." Order at 3. Although the Planning Board's specific concerns were not articulated in a written record, the Court found that the Planning Board's denial was due "in large part" to "concerns about traffic." Order at 35, 7-8, 13. Therefore, the proper inquiry is whether the revised CUP application included the information requested by the Planning Board

to address its concerns at a threshold level and thus would not "inevitably" be denied.

The Planning Board's written record regarding the so-called traffic concerns during the December 4, 2019 hearing was limited. Planning Board member Hart stated that he had "concerns regarding item [3.18(C)(1)(c)], due to the traffic study not yet being complete."[54] Planning Board member Rosenblatt stated that he did not "believe the applicant satisfied the burden" of showing no significant adverse impact, although he did not specifically mention "traffic."[55] Planning Board member Harris stated that he "sides with Arnold Rosenblatt," again without any mention of "traffic."[56] Planning Board member Coogan who voted against the CUP application never stated his reasons or mentioned the word traffic.[57] Members D'Angelo and Peterman stated that they would approve the CUP.[58] Chairman Dell Orfano also noted that a traffic study would ultimately be completed, and that the result of the traffic study may be that the Planning Board "will roll back the number up-to units."[59] Non-voting alternate member Houpis stated that he had "concerns . . . with the pitch of the proposed road, increased drainage, runoff, grazing, traffic volume, financial viability, and a lack of Amherst-specific data."[60] Alternate Houpis further stated that he hoped if the Planning Board approved the

[54] C.R.I, Vol. 2, at 284 (emphasis added).
[55] C.R.I, Vol. 2, at 285.
[56] C.R.I, Vol. 2, at 286.
[57] C.R.I, Vol. 2, at 284-86.
[58] C.R.I, Vol. 2, at 285-86.
[59] C.R.I, Vol. 2, at 284-85.
[60] C.R.I, Vol. 2, at 285.

application that it would be "conditional upon" receiving "studies completed by third parties."[61]

In sum, only one voting member and one non-voting member even mentioned traffic as an issue of concern. Of those, member Hart stated that his concerns were due the lack of a completed traffic study, while alternate Houpis expressed general concerns regarding the proposed access road, "traffic volume," and "lack of Amherst-specific data" that could be addressed by "studies completed by third parties." That is the totality of the written record regarding the Planning Board's discussion of and decision regarding the perceived failure of Petitioner to demonstrate no significant adverse impact related to traffic.

The Petitioner's revised CUP application was materially different because it contained all of the information that the Planning Board specifically requested to address the Planning Board's expressed concerns regarding traffic. As described above, the only concerns articulated by Planning Board members were the lack of a traffic study, and the only concern from alternate members were lack of Amherst-specific data and "traffic volume," and the desire for the CUP to be conditioned on third party studies.

As requested, the Petitioner added a comprehensive Traffic Impact and Site Access Study prepared by expert Stephan G. Pernaw & Company, Inc. That expert concluded that the combined impact of the Petitioner's proposal and a separate 66-unit proposal "will not significantly alter the prevailing traffic conditions in Amherst on an overall basis."[62]

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[61] C.R.I, Vol. 2, at 285.
[62] C.R.II, Vol. 3, at 501.

Even if the Planning Board had somehow requested more than just a traffic study, the Applicant made numerous changes to the application to address traffic concerns and other potential concerns that were mentioned but never substantively discussed by the Planning Board, including the internal road, drainage, runoff, traffic volume. These revisions include: completing a traffic study, completing a hydrological study, reducing the total number of proposed residential units, increasing the proportion of units devoted to workforce housing and reducing proportion of residential units, relocating proposed homes out of wetlands buffers, created a vegetated buffer, substantially reducing the length of the access road, reducing the total impervious coverage, redesigning the internal road to obviate the need for road waivers, raising the grade of the internal road to prevent runoff onto Town roads, deed restrictions regarding chemical fertilizers and pesticides, and phased tree cutting to minimize erosion from water runoff.

MATERIAL CHANGES BETWEEN FIRST CUP APPLICATION AND Revised CUP APPLICATION		
	First CUP Application	**Revised CUP Application**
Traffic Study	No	Yes
Hydrological Study	No	Yes
Number of proposed residential units	64	60
Quantity of affordable workforce housing	17	26

Location of proposed homes	5 homes located within wetlands buffer	0 homes located within wetlands buffer[63]
Homes accessed by proposed road	37	29
Land donated to Town	No	Yes
Vegetated buffer	None	20' vegetated buffer
Road access length	1,200 feet	800 feet
Road Grade	Max 9.5%	Max 8%
Road grade at intersection with Town Road	1% sloping toward Town Road	2% sloping ***away*** from Town Road
Road waivers required	Five road waivers required	Zero road waivers required
Deed restrictions regarding chemical fertilizer and pesticides	No	Yes, to protect runoff
Phased Tree Cutting	No	Yes, to preserve large trees and minimize erosion from water runoff
Water Supply	Municipal	Private Well
Confirmation of Electric Capacity	No	Yes

[63] C.R.I, Vol. 2, at 316.

In sum, the Planning Board's minimal written record articulated only the lack of a traffic impact analysis and Amherst-specific traffic data as specific concern, and the Petitioner completed and submitted the very study the Planning Board requested and made other revisions designed to lessen potential traffic impact and potential drainage and runoff issues.[64] This is all that Fisher and CBDA Development require—a revised application that addresses the deficiencies identified at the time of the prior denial.

For example, in Morgenstern, the zoning board of adjustment initially denied an application "because of concerns about a proposed structures impact on wetlands." 147 N.H. at 566. The applicant subsequently submitted a new application "that allegedly addressed these concerns" by including an engineering study and varying the structure of the building. Id. However, the zoning board declined to hear the application stating that it was not materially different from the prior application. Id. This Court determined that providing additional information requested by the zoning board and making changes designed to address the zoning board's concerns constituted a material change. Id.

Here, the Planning Board denied the First CUP Application for lack of a completed traffic study and possibly because of vague "traffic" or "runoff" concerns. Thus, the Revised CUP Application was materially different because contained a completed traffic study, a completed hydrological study, and numerous changes designed to lessen potential traffic impact and potential drainage and runoff issues.

[64] Furthermore, because the proposed use involved an allowable use—housing under IHHO, the revised application did not involve a proposed use that would inevitably be denied. Cf. CBDA Development at 725-26.

Therefore, the Planning Board acted unreasonably or unlawfully when it determined that the Petitioner's revised CUP application was not materially different.

C. The Planning Board's refusal to accept the Revised CUP Application was based on ad hoc reasoning and impossible, unknowable standards:

The failure of the Planning Board to fully and adequately state its reasons for denying the First CUP Application created an impossible standard for the Applicant to meet with respect to revising the Revised CUP Application to meet the Board's concerns.

Here, the Planning Board denied the First CUP Application after finding that the Applicant had not carried its burden or demonstrating that the proposal would have no "significant adverse impact" on "public health, safety, and general welfare" because the Petitioner had not yet completed a traffic study. However, the Planning Board's written record did not include a single other reference as to the Planning Board's belief as to how the Petitioner had not met its burden, or as to how the CUP application had a "significant adverse impact" because of perceived traffic concerns. Nor did the Planning Board's written record identify whether or to what extent a reduction in the number of units would eliminate the vague allegation of "significant adverse impact." But see C.R. 1, Vol. II at 284-85 (stating that if the traffic study proved there was an issue, "the Board would roll back the number of up-to units, without recourse to the applicant."). Nor did the Planning Board articulate in any way how the First CUP Application could potentially have affected health, safety, or welfare through runoff or drainage issues. Similarly, although the Trial Court claimed that the lack of

a traffic study "was just one aspect of the Board's broader concerns about traffic and safety-related issues," the Trial Court was unable to articulate specific additional reason that the First CUP Application could potentially have affected health, safety, or welfare.

Thus, when the Applicant submitted the Revised CUP Application with the accompanying traffic study and hydrological study, and with the numerous changes to reduce potential traffic and hydrological concerns, the Revised CUP Application was materially different and it was not "inevitable" that the Planning Board would reject the application for the same reasons as the First CUP Application. See CBDA Dev., 168 N.H. at 725; Morgenstern, 147 N.H. at 566.

However, rather than deciding whether the Revised CUP Application was materially different than the First CUP Application, the Planning Board decided to review whether the members thought the application and the traffic study "alleviated" their initial, undefined concerns. In other words, the Planning Board members were effectively reviewing whether the Revised CUP Application on the merits demonstrated that there could be no adverse impacts on health, safety, or welfare based on traffic. Other members raised concerns about "density" that had those members and the Planning Board had never previously identified.

It is important for the Court to consider the practical consequences of allowing this type of ad hoc review. The Trial Court's decision effectively ruled that the Planning Board can properly reject a revised application that contains all of information that the Planning Board requested based on the Planning Board's review of whether the Planning

Board agrees with the information provided and using a standard that has never been articulated. In other words, the Planning Board could have rejected any revised application because the Planning Board did not specifically identify what "traffic" concerns needed to addressed or how those concerns could be addressed. That impossible standard shows how impractical this interpretation of the Fisher doctrine is.

Rather, the Planning Board should have accepted the revised CUP application because it contained all of the information the Planning Board requested. Then, the Planning Board and the Petitioner could have addressed the import of the traffic study, identified the Planning Board's precise concerns regarding traffic impact, and worked to find a "number of up-to units" that satisfied the Planning Board's concerns.[65] This is the type of collaborative process that planning board review should entail—give and take between planning board applicant to find an acceptable level of use. This is also precisely what typically happens at site plan review, where the Town typically considers traffic impact studies and modifies the number of units to ensure no significant adverse traffic impacts, and where the Town historically (including twice in 2019) addressed potential traffic impact issues.

Instead, the Planning Board here turned the process into an impossible sham—citing vague concerns but withholding all information that could enable the applicant to conclusively demonstrate that the revised application addressed those concerns.[66]

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[65] C.R.I, Vol. 2, at 284-85.

[66] If the issue is the number of units (which the Planning Board has never explicitly stated), there has to be an allowable number of up-to units that would be approved and satisfy the Planning Board's vague concerns over substantial adverse traffic impact. See, e.g., Burrows v. Keene, 121

Conclusion

For the foregoing reasons, TransFarmations respectfully requests that this Honorable Court reverse the Planning Board's decision in the First CUP Appeal and grant TransFarmations the conditional use permit. TransFarmations additionally requests that this Honorable Court reverse the Planning Board's decision not to accept the Revised CUP Application and remand this matter to the Planning Board with instructions to hear the Revised CUP Application on the merits.

Respectfully submitted,

TransFarmations, Inc.
By its attorneys,

DONAHUE, TUCKER &
CIANDELLA, PLLC

Date: October 25, 2021

By: /s/ Brendan Avery O'Donnell

Brendan Avery O'Donnell, Esq.
NH Bar: 268037
John J. Ratigan, Esq.
NH Bar: 4849
16 Acadia Lane

N.H. 590 (1981) (land use regulations that remove any reasonable use of property constitute inverse condemnation). Where a use is allowed under the terms of the local ordinances, the Planning Board shouldn't be able to use their vague concerns and the "material change" standard to evade working with the applicant to find a level of use (i.e., a number of units) that satisfies the no significant adverse impact standard.

Exeter, NH 03833
(603)778-0686
bodonnell@dtclawyers.com
jratigan@dtclawyers.com

Certification of Compliance

This brief complies with the word limit set forth in Supreme Court Rule 16(11), containing 7993 words (exclusive of the cover page, tables, and certifications).

/s/ Brendan Avery O'Donnell
Brendan Avery O'Donnell, Esquire

Certificate of Service

I hereby certify that on October 25, 2021 that a copy of the foregoing was forwarded to opposing counsel via the Supreme Court's electronic filing system.

/s/ Brendan Avery O'Donnell
Brendan Avery O'Donnell, Esquire