THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2021-476

APPEAL OF CHICHESTER COMMONS

Appeal by Petition Pursuant To RSA 541:6
from the
New Hampshire Housing Appeals Board

BRIEF OF APPELLANT
CHICHESTER COMMONS, LLC

March 28, 2022

CHICHESTER COMMONS, LLC

By its attorneys,

John L. Arnold (Bar #19517)
Orr & Reno, P.A.
45 South Main St.
Concord, NH 03301
(603) 223-9172
jarnold@orr-reno.com

Oral Argument: John L. Arnold

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I. QUESTIONS PRESENTED

1. Do principles of *stare decisis* obligate the Planning Board to either (a) approve a density waiver to allow 24 elderly housing units or (b) articulate a rational explanation based on changed circumstances for denying such waiver, where the Planning Board previously granted the Appellant a density waiver to allow 41 elderly housing units based on the conceptual design at the outset of the project? See Certified Record of Appeal ("HAB C.R.")[1] pp. 171-173.

2. Did the Housing Appeals Board err in ruling that there were sufficient grounds to deny Appellant's density waiver to allow 24 elderly housing units, where the reasons for denial were not based on any changed circumstances since the 2015 approval of 41 elderly housing units? See id.

3. Did the Housing Appeals Board err in ruling that the Planning Board was not bound by its prior rulings because the Appellant's project had changed, where the only changes to the project made it more compliant with zoning requirements and reduced the scope of the necessary zoning relief? See id. at 173.

4. Did the density waiver for 41 elderly housing units granted by the Planning Board in 2015 expire some time prior to Appellant's 2020 application, where no expiration date was provided in the waiver, local zoning ordinance, or state statute? See id. at 173-174.

[1] The Housing Appeals Board filed a "Certified Record of Appeal" consisting of the pleadings and orders from the Housing Appeals Board ("HAB C.R.") and a separate copy of the "Certified Record of the Town of Chichester Planning Board," consisting of the record from the Planning Board ("PB C.R.").

II. TEXT OF APPLICABLE ORDINANCES

CHICHESTER, NEW HAMPSHIRE ZONING ORDINANCE

Section 2.04(F)(VIII)(11)(b) (2015 Version):

> The lot shall have a minimum of two (2) acres for the first two family dwelling unit with an additional ½ acre for each additional family dwelling unit.

Section 2.04(E)(VIII)(11)(II)(b) (2020 Version):

> The lot shall have a minimum of two and one half (2.5) contiguous acres for the first two family dwelling unit with an additional .5 acre for each additional family dwelling unit. Additionally, each single-family dwelling lot shall contain one (1) contiguous buildable acre. Developments of two or more units shall contain one contiguous buildable acre for the first unit and an additional one half (.5) contiguous acre for each additional unit.

Section 2.04(E)(X)(6) (2020 Version) and Section 2.04(F)(XIII) (2015 Version)[2]

> Waivers: The purpose of granting waivers from the provisions of this section is to recognize that strict conformance to these regulations as presented may not be necessary or practical in all cases and circumstances. Therefore, the Planning Board may waive particular requirements set forth in this section where the Planning Board finds that a development is better served by not adhering strictly to the provisions of this section and where the applicant demonstrates that granting a waiver would: Not be detrimental to the public safety, health or welfare, or cause injury or damage to other property or fail to promote public interest; Not vary the intent of the Town of Chichester Master Plan; Substantially ensure that the goals, objectives,

[2] The Section references changed between the 2015 and 2020 versions of the Zoning Ordinance, but the text remained the same.

standards, and requirements of this section are not compromised; Be reasonable and appropriate due to the scale and size of the proposed project; and/or Protect natural features that would otherwise be impacted.

III. STATEMENT OF THE CASE AND FACTS

This case arises out of the Housing Appeals Board's ruling that the Chichester Planning Board properly denied Appellant's 2020 request for a density waiver for 24 elderly housing units, even though the Planning Board granted Appellant a density waiver for 41 elderly housing units based on the project's conceptual design in 2015. In reliance on the 2015 density waiver, Appellant invested several hundred thousand dollars, and extensive time and effort, to design and engineer the project. The final design resulted in a dramatic ***reduction*** in density, yet the Planning Board reversed itself and ruled that 24 elderly housing units would be too much. The Housing Appeals Board erred in ruling that (i) principles of *stare decisis* do not apply to Planning Boards; (ii) the Planning Board stated sufficient grounds to deny the 2020 waiver request; and (iii) the 2015 waiver had expired.

2015 Conceptual Design

Appellant's project commenced in 2015. See PB C.R. 248. The conceptual design proposed a mixed-use development at 114 Dover Road in Chichester (the "Property"). It consisted of an elderly housing building with 41 units, and a separate 10,000 square foot retail building. See PB C.R. 250, 258. These new buildings would be in addition to the existing retail building already on the Property. Id. In 2015, the Property was 2.369 acres, and a maximum of two (2) housing units were allowed by zoning. See 2015 Zoning Ordinance p. 15, §2.04(F)(VIII)(11)(b); PB C.R. 251. Appellant's conceptual design proposed 39 units more than allowed, and

under the applicable density regulations, the development would have required 22 acres of land. See id.

Appellant applied to the Planning Board for several zoning waivers, including density, based on the conceptual design in 2015.[3] See PB C.R. 248. Appellant submitted the waiver application prior to, and independently from, a site plan application. See PB C.R. 250. The Appellant advised the Planning Board that the project would not be feasible without the waivers, and that Appellant would not proceed with the intensive work to finalize the design unless the waivers were granted. Id. Appellant's specific waiver requests were to allow:

1) Construction of a building with 13,500 square feet of gross floor area where a maximum of 5,000 square feet is permitted (elderly housing building);
2) Construction of a 41-unit, multi-family structure on 2.369 acres, where 22 acres is required;
3) Construction of a building with a maximum height of 45 feet, where a maximum of 35 feet is permitted (elderly housing building); and
4) Construction of a building with a footprint of 10,000 square feet where a maximum of 5,000 square feet is permitted (separate retail building).

See PB C.R. 251.

[3] Normally, deviations from zoning requirements would require variances from the Zoning Board of Adjustment; however, the Chichester Planning Board has been delegated authority pursuant to innovative land use control provisions under RSA 674:21(g), to waive the zoning requirements at issue in this appeal. See 2015 Zoning Ordinance §2.04(F)(XIII); 2020 Zoning Ordinance §2.04(E)(X)(6).

2015 Waiver Approval

The Zoning Ordinance set forth five criteria to obtain a waiver: (1) the waiver will not be detrimental to the public safety, health or welfare, or cause injury or damage to other property or fail to promote public interest; (2) the waiver will not vary the intent of the Town of Chichester Master Plan; (3) the waiver will substantially ensure that the goals, objectives, standards, and requirements of this section are not compromised; (4) the waiver is reasonable and appropriate due to the scale and size of the proposed project; and (5) the waiver will protect natural features that would otherwise be impacted. See 2015 Zoning Ordinance §2.04(F)(XIII).

In 2015, the Planning Board granted all of Appellant's waiver requests. See PB C.R. 271. In doing so, Board members set forth the following rationale:

- "[T]he Master Plan supports the project and that the size of the project is consistent with the intent of the Master Plan."
- "[T]he Master Plan supports the development along with the location of the proposal. It fits a need of the community."
- "[T]he requirement of 22 acres for the 41 units is extreme and would be a waste of land."
- "[T]here is not an unlimited supply of sites for this type of development and that the proposal fits the area and need of the community."
- "[A]ll towns are given a duty to provide elderly housing."
- "[T]he project provides a significant buffer and will fit with the design of the district."

- "[T]here are many efficiencies provided by the development."

See PB C.R. 269-270. There were no construction timelines, deadlines or expiration dates imposed in the 2015 waivers, by the local zoning ordinance or by state statute. See PB C.R. 271. The Planning Board imposed only two (2) conditions of approval: (1) that the housing be restricted to at least one occupant age 55 or older; and (2) that the septic system comply with the New Hampshire Department of Environmental Services ("DES") requirements. Id.

After obtaining the 2015 waivers, Appellant worked to finalize the financing for the project, and at the last moment, the lender (New Hampshire Housing Financing Authority) advised Appellant that funding for elderly housing had been exhausted, but that it could finance workforce housing. See HAB C.R. 4. Accordingly, Appellant submitted a new proposal for 14 (and ultimately 13) workforce housing units in place of the 41 elderly housing units.[4] Id. The Planning Board granted a ***separate*** density waiver and a site plan approval for the workforce housing project in 2018. See PB C.R. 212, 52-53. However, shortly thereafter, the New Hampshire Housing Financing Authority advised Appellant that funding for workforce housing had been exhausted, but that it could now finance the elderly housing units. See HAB C.R. 4. Accordingly, Appellant reverted to the elderly housing design. Id.

2020 Final Design

In 2020, the Appellant finalized the design of the elderly housing project. Id. It significantly reduced the size and scale of the project, and

[4] Due to the greater intensity of use with workforce housing, DES septic system requirements permitted fewer units on the land area.

more closely conformed with all zoning requirements, including density. Id. Specifically, the changes:

- Reduced the number of elderly housing units from 41 (consisting of 46 bedrooms) to 24 single-bedroom units.[5] See PB C.R. 250, 31.
- Reduced the building footprint from 13,500 sf. to 7,548 sf. See PB C.R. 251, 34.
- Merged adjacent properties to increase the lot size from 2.369 acres to 5.5 acres (with 3.5-acre land condo unit for the elderly housing development). See PB C.R. 308, 251, 34.
- Eliminated the additional 10,000 sf. retail building. See PB C.R. 251, 258, 306 (Appendix B).
- Reduced building height from 45' to 35'. See PB C.R. 251, 129.

As a result, the density for the project decreased from approximately 17 units/acre, to approximately 7 units/acre (based on the 3.5-acre land condo unit area), and two of the prior waivers were no longer needed (for building height and retail building area). See HAB C.R. 152. The following table summarizes the differences between the 2015 concept and the 2020 final design:

	Land Area	**Max Units Allowed**	**Proposed Units**	**Overall Density**	**# of New Buildings**	**Total New Building Area**	**Building Height**
2015 Concept	2.369 acres	2	41	17.3 units/acre	2	23,500 s.f.	45'
2020 Final Design	3.5 acres	4	24	6.6 units/acre	1	7,548 s.f.	35'

[5] 24 elderly housing units is the maximum permitted pursuant to DES septic system requirements.

2020 Waiver Denial

Appellant filed the present site plan application in 2020. See PB C.R. 31. Unrepresented by counsel at the time, and in the interest of completeness, Appellant included a new density waiver request in his application, but never conceded that the 2015 approval lapsed, and continued to argue its applicability to the Planning Board. See PB C.R. 66-67, 76, 131. The written justification for the 2020 waiver request made the same arguments based on the same evidence, and was nearly verbatim to the request submitted in 2015. Compare PB C.R. 34-40 with PB C.R. 250-257. The waiver criteria under the Zoning Ordinance remained the same as in 2015. See 2015 Zoning Ordinance §2.04(F)(XIII); 2020 Zoning Ordinance §2.04(E)(X)(6). Despite this, and even though the final design resulted in a significant reduction in size and scale of the project, the Planning Board denied the density waiver on the grounds that the request was not "reasonable and appropriate due to the scale and size of the proposed project," under the fourth waiver criteria. See PB C.R. 49.

The Planning Board completely disregarded the fact that it had granted Appellant several waivers to allow much greater size and scale, including a waiver to allow more than twice the density at issue:

- "This is not the same project and the Board has to decide what is best for the Town now."
- "Mr. Williams stated that he was not on the Board in 2015 so he is not going to guess why they approved it."
- "Mr. Humphrey stated that he does not see how the previous waivers impact this project."

- "Dr. Mara stated that he believes what happened before does not matter."

See PB C.R. 67. The Planning Board offered no rational basis to explain why the conceptual design was reasonable in size and scale, but the final design, which cut density by more than half, would be too much. The Appellant appealed the Planning Board's decision to the Housing Appeals Board, and the Housing Appeals Board erroneously affirmed the Planning Board's decision. See HAB C.R. 150, 193.

IV. SUMMARY OF THE ARGUMENT

The Housing Appeals Board erred in ruling that the doctrine of *stare decisis* does not apply to Planning Board decisions. In reviewing Appellant's waiver requests, the Planning Board acted in a quasi-judicial capacity, and was bound by basic principles of fairness and finality. The Planning Board must either (a) adhere to its 2015 finding that 41 elderly housing units would be reasonable in size and scale, or (b) articulate a material change in circumstances to explain why 24 elderly housing units would be too much.

The Planning Board's stated concerns with the proposed 24-unit density were entirely unsupported by the record, and were not based on any changed circumstances since 2015. The Planning Board's 2020 denial amounted to arbitrary decision making, yielding unpredictable results and imposing significant hardship on the Appellant, who invested considerable time and expense in this project based on the reasonable belief that up to 41 elderly housing units would be allowed.

Finally, the Housing Appeals Board erred in ruling that the 2015 waiver expired, and that Appellant's arguments to the contrary are untimely. The Housing Appeals Board should be reversed because (1) the doctrine of *stare decisis* applies to Planning Board decisions; (2) the Planning Board failed to articulate a rational explanation for rendering inconsistent decisions in 2015 and 2020; and (3) the 2015 waiver has not expired.

V. ARGUMENT

a. Standard of Review

Pursuant to RSA 541:13, "[T]he burden of proof shall be upon the party seeking to set aside any order or decision of the [Housing Appeals Board] to show that the same is clearly unreasonable or unlawful, and all findings of the [Housing Appeals Board] upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable. The Supreme Court reviews questions of law, and the trial court's application of the law to the facts, de novo. See Merriam Farm, Inc v. Town of Surry, 168 N.H. 197, 125 (2015); Forster v. Town of Henniker, 167 N.H. 745, 759 (2015).

The Housing Appeals Board 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 persuaded by the balance of probabilities, on the evidence before it, that the Planning Board decision is unreasonable. See RSA 679:9, II; RSA 677:15, V. The appealing party bears the burden of proof. Trustees of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 505 (2018). A

Planning Board decision "must be based on more than the mere personal opinion ... of its members." See Condos E. Corp. v. Town of Conway, 132 N.H. 431, 438 (1989). "Although the members of a planning board are entitled to rely, in part, on their own judgments and experiences, the board, as a whole, may not deny approval on an ad hoc basis because of vague concerns." Trustees of Dartmouth Coll., 171 N.H. at 508 (internal quotations omitted).

b. The Doctrine of *Stare decisis* Requires the Planning Board to Grant a Density Waiver

The Housing Appeals Board erred in ruling that the doctrine of *stare decisis* does not require the Planning Board to grant the subject density waiver, because (i) the doctrine of *stare decisis* applies to planning board decisions; and (ii) the Planning Board failed to articulate a rational explanation for reaching a different result.

i. The Doctrine of *Stare decisis* Applies to Planning Board Decisions

The doctrine of *stare decisis* is the legal principal that decisions in previous cases bind a tribunal to reach the same conclusion in subsequent matters. See Union Leader Corp. v. Town of Salem, 173 N.H. 345, 351–52 (2020). "*Stare decisis* demands respect in a society governed by the rule of law, for when governing standards are open to revisions in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." Kalil v. Town of Dummer Zoning Bd. of Adjustment, 159 N.H. 725, 731 (2010) (internal quotations omitted).

> *Stare decisis* is the essence of judicial self-restraint. Judges are not at liberty to follow

> prior decisions that are well-reasoned and discard those that are not. Indeed, principled application of *stare decisis* requires a court to adhere even to poorly reasoned precedent in the absence of some special reason over and above the belief that a prior case was wrongly decided.

State v. Quintero, 162 N.H. 526, 539 (2011) (internal quotations omitted).

This Court has yet to rule that the doctrine of *stare decisis* applies to municipal boards. See Dartmouth Corp. of Alpha Delta v. Town of Hanover, 169 N.H. 743, 752 (2017) (assuming without deciding that the doctrine of *stare decisis* applies to Zoning Board of Adjustment decisions). However, Planning Boards act in a quasi-judicial capacity when reviewing land use applications, and are therefore bound by basic principles of fairness and finality, which are the underpinnings of the doctrine. See Winslow v. Town of Holderness Plan. Bd., 125 N.H. 262, 267 (1984); see also RSA 676:4, IV ("The procedural requirements specified in this section [Planning Board's Procedures on Plats] are intended to provide fair and reasonable treatment for all parties and persons.").

This Court has, and other authorities within and outside of the State, have, recognized that a Planning Board may not reverse its prior decision in subsequent proceedings on a project, absent a material change in circumstances. See Batakis v. Town of Belmont, 135 N.H. 595 (1992); Harris Pond Development Corp. v. Town of Merrimack, Docket No. 87-E-00525 (Hillsborough County Super. Ct., Mar. 23, 1988) (available at HAB C.R. 159); 4 Rathkopf's The Law of Zoning and Planning § 68:2 (4th ed.) (finality doctrines of res judicata, collateral estoppel and *stare decisis* have considerable application in matters before administrative tribunals such as

boards of appeal); 4 Rathkopf's The Law of Zoning and Planning § 68:3 (4th ed.) ("Absent any material change in plans or conditions, a board cannot change its mind on a subsequent application for substantially the same relief."); Olson v. Scheyer, 67 A.D.3d 914, 915 (N.Y App. Div. 2009) (where a board faces an application that is substantially similar to a prior application, the board may not reach a different result without providing a rational explanation).

In Batakis v. Town of Belmont, 135 N.H. 595 (1992), a developer sought to construct a mobile home park. In a non-binding consultation, the Planning Board granted a "conditional preliminary site plan approval." Id. at 596. The developer then retained an engineer, finalized the design, and presented it to the Planning Board. Id. However, the Planning Board denied final approval. Id. at 596-597. The Court reversed the Planning Board's denial, holding that even though the preliminary approval was non-binding by statute (RSA 676:4, II(a)), "the board must act reasonably in both preliminary and formal stages of review." Id. at 598. Absent evidence of "unknown or intervening circumstances," it was unreasonable to deny the final design after granting the preliminary approval. Id. at 598-599.

> Planning boards must be ever mindful of the fact that developers who appear before them will be incurring potentially substantial out-of-pocket expenses in order to complete a project to the satisfaction of a planning board after such a project has received preliminary approval. Therefore, planning boards should not be giving projects preliminary approval arbitrarily on the grounds that they are statutorily free to reject a project for final approval at some later date.

Id. at 598 (internal brackets and quotation marks omitted).

Similarly, in Harris Pond Development Corp. v. Town of Merrimack, Docket No. 87-E-00525 (Hillsborough County Super. Ct., Mar. 23, 1988) (available at HAB C.R. 159), a zoning board granted a density variance to permit 256 residential units where a maximum of 144 would otherwise be allowed. See id. at 2. The Zoning Ordinance provided that variances expire after nine (9) months, if a building permit has not issued. Id. at 3. The project was delayed for reasons beyond the developer's control, and the variance expired. Id. The developer re-applied for the variance, but the Zoning Board denied the subsequent application. Id. at 4-5. On appeal, the Superior Court rejected the Board's justification for the denial because it was not based on any changed circumstances. Id. at 6. "The ZBA, with the same evidence before it, reversed itself in denying the variance and made findings of fact which directly contradicted its previous findings." Id. at 8. Absent any material change in circumstances, the ZBA was bound to follow its prior ruling and grant the variance. Id. at 9.

> Municipal authorities have an affirmative duty to treat individuals they interact with fairly and equally as part of their obligation to protect the public interest and to avoid weakening public confidence in the government.

Id. (citing Irwin Marine, Inc. v. Blizzard, Inc., 126 N.H. 271 (1985)).

These basic principles of fairness and finality are also reflected in the corollary subsequent application doctrine. The subsequent application doctrine provides that where a land use application has been denied, the applicant may not submit a subsequent application absent a "material change of circumstances affecting the merits of the application" such that the application is "materially different from its predecessor." Fisher v. City

of Dover, 120 N.H. 187, 190 (1980). The policy rationale is that without the subsequent application doctrine: "[1] there would be no finality to proceedings…, [2] the integrity of the zoning plan would be threatened, and [3] an undue burden would be placed on property owners seeking to uphold the zoning plan." Id. The fundamental purpose of the doctrine is to limit "arbitrary and capricious administrative decision-making, while still preserving the ability of an agency to revisit earlier decisions ***when circumstances have changed***." CBDA Dev., LLC v. Town of Thornton, 168 N.H. 715, 721 (2016) (emphasis added). While the subsequent application doctrine applies to applications that have been previously *denied*, the doctrine of *stare decisis* serves the same purposes where an application has been previously *approved*.

Here, the present appeal highlights the importance of applying the policies and rationales set forth in Batakis, Harris Pond Dev. Corp., and Fisher. Like the developer in Harris Pond Dev. Corp., Appellant obtained zoning relief to exceed density restrictions, and in reliance on that approval, invested considerable time and expense diligently pursuing a final design. See PB C.R. 68, 271. And like the developer in Harris Pond Dev. Corp., Appellant was delayed for reasons beyond its control. See HAB C.R. 4. Like the Boards in Harris Pond Dev. Corp. and Batakis, the Planning Board here denied Appellant's subsequent application without any material change in circumstances since the prior approval. However, the present appeal is even more compelling than Batakis, because there, the initial decision was merely a preliminary, non-binding conditional approval, whereas here, the 2015 waiver stood on its own as a final, binding decision. Compare RSA 676:4, II(a) with RSA 674:21(g). And, it is even more

compelling than Harris Pond Dev. Corp., because Appellant's subsequent application proposed less than half the density previously approved. See PB C.R. 31, 251. The Housing Appeals Board attempted to distinguish Harris Pond Dev. Corp. on the ground that the time between applications was greater (5 years versus 9 months).[6] See HAB C.R. 193. However, this distinction is flawed, and fundamentally inconsistent with the principles of *stare decisis* because the passage of time, in and of itself, does not establish a material change in circumstances:

> The purpose for imposing a time limitation in the grant of a special permit or variance, it would seem, is to insure that ***in the event conditions have changed*** at the expiration of the period prescribed the board will have the opportunity to reappraise the proposal by the applicant in the light of the then existing facts and circumstances if the latter still desires to proceed. However, ***such a time limitation imposed for its own sake unrelated to the purposes of zoning has no apparent rationale and its strict application as the sole basis for a denial of an extension effects an unreasonable restriction upon the permission previously found to be warranted***.

See 3 Rathkopf's The Law of Zoning and Planning §58:24 (internal quotations omitted) (emphasis added). Further, although the delay in this case was longer than in Harris Pond Dev. Corp., the nine-month period there was dictated by an express expiration date on the first variance. See Harris Pond Dev. Corp., at p. 3, HAB C.R. 161. In this case, no such expiration date existed, and the Appellant diligently pursued the project

[6] The Housing Appeals Board also distinguished Harris Pond Dev. Corp. on the grounds that the two applications were identical, whereas Appellant's 2015 and 2020 applications differed. See HAB C.R. 193. This is discussed in Section V.b.ii.B, below.

throughout the intervening period. See HAB C.R. 173-174.

Further, the policy rationales articulated in Fisher are equally applicable here. First, the purpose of the 2015 waiver was to bring finality to the allowable density for the project, so that Appellant could determine whether the project would be feasible prior to incurring the extensive time and expense of finalizing the design. See PB C.R. 263. Second, the 2015 approval for 41 elderly housing units on 2.369, followed by the 2020 denial of 24 elderly housing units on 3.5 acres, as part of the same project by the same applicant, threatens the integrity of the review process and zoning plan. Finally, the inconsistent results imposed an undue burden on the Appellant, as it expended over $200,000 in personal funds in reliance on the reasonable belief that up to 41 elderly housing units would be permissible. See PB C.R. 78.

In sum, applying the doctrine of *stare decisis* to the Planning Board in this case is necessary to fulfil the fundamental policies of fairness and finality recognized as being essential to quasi-judicial Planning Board functions. The Planning Board's reversal of itself amounts to arbitrary and capricious decision-making, which imposed substantial unjust hardship on Appellant. The Planning Board must either follow its prior findings, or articulate a material change in circumstances to justify reaching a different result.

ii. The Housing Appeals Board Erred in Ruling that the Planning Board Stated Sufficient Grounds to Reach a Different Result in 2020

The Planning Board r failed to articulate any rational explanation for reaching a different result in 2020. In 2015, it unanimously ruled that the

density of 17 units per acre in the conceptual design was reasonable in size and scale. In 2020, the proposed density had been cut by more than half. See HAB C.R. 50. Yet, the Planning Board ruled that it was too much. See PB C.R. 49. The Housing Appeals Board erred in ruling that changes in circumstances and changes in the project justified the inconsistent outcomes. The record reveals that (A) none of the Planning Board's stated concerns were based on changed circumstances; and (B) the minor changes to the project all made it more conforming to zoning requirements.

A. None of the Planning Board's Stated Concerns Were Based on any Changed Circumstances.

The Housing Appeals Board identified three Planning Board concerns to justify denial of the 2020 density waiver: (1) lack of open space within the development for residents; (2) increased traffic; and (3) lack of available municipal resources, such as fire protection. See HAB C.R. 193-194. The Housing Appeals Board did not identify any other specific justification, but stated generally that "Certified Record pages 83-87" evidence other "legitimate concerns." See HAB C.R. 155. However, none of these concerns were supported by the record, or reflect any changed circumstances since 2015 to justify the inconsistent outcomes.

1. Lack of Open Space within Development for Residents

The Housing Appeals Board stated that "various board members expressed concern about the number of units in conjunction with the strip mall located on the front of the property, together with the lack of open space for the people who may live there." See HAB C.R. 155. However, this concern is clearly unreasonable because the 2020 final design provides

drastically more open space for residents than the 2015 concept. Specifically, the Housing Appeals Board ignored the fact that: (1) the referenced strip mall existed at the time of the 2015 application, see PB C.R. 258; (2) the 2020 application ***eliminated*** the additional 10,000 square foot retail building, see id. at 271, 258; (3) the 2020 application ***decreased*** the number of units from 41 to 24 see id. at 260, 34; (4) the 2020 application ***increased*** the land area from 2.369 acres to 3.5 acres, see id.; and (5) the 2020 application ***decreased*** the new building area from 23,500 s.f. to 7,548 sf, see id. at 251, 34. Because the 2020 proposal provides significantly more open space for residents than the 2015 concept, it does not constitute a changed circumstance to justify the Planning Board's denial.

2. Increased Traffic

Next, the Housing Appeals Board cited the Planning Board Chair's comment that the traffic count on Route 4 went from "whatever it was in 2015, to close to 30,000." See HAB 155; PB C.R. 85. The Planning Board Chair made this comment after several public hearings, immediately before the motion to deny the waiver request, depriving Appellant of any meaningful opportunity to address it. See Summa Humma Enterprises, LLC v. Town of Tilton, 151 N.H. 75, 81 (2004) ("[E]specially when, as here, the concerns of the board are wholly speculative, the plaintiff should have been afforded more time to respond. To hold otherwise requires applicants for site plan review to anticipate and answer the whims of each board member in order to ensure that their proposals are approved.") (dissent). Regardless, the Chair's comment was entirely unsubstantiated, and ultimately incorrect. See Condos E. Corp. v. Town of Conway, 132 N.H. 431, 438 (1989)

("[U]nsubstantiated, conclusory opinion[s]" will not be upheld, and the record must contain some "facts supporting the board's decision.").

The Chair's comment acknowledges that he did not know what traffic counts were in 2015. The record contained no evidence of traffic counts in 2015 or 2020. Therefore, any suggestion that traffic counts had increased so dramatically as to justify reversing the 2015 approval would be entirely unsubstantiated. Had Appellant been given an opportunity to respond to the Chair's last-minute comment, it would have pointed to the New Hampshire Department of Transportation's published traffic data that plainly demonstrates traffic counts on this section of Route 4 have ***decreased*** from 17,000 trips per day in 2015 to 14,500 trips per day in 2020. See HAB C.R. 178-180.[7] Thus, traffic does not constitute a changed circumstance warranting the Planning Board's denial.

3. *Availability of municipal resources such as fire protection*

Next, the Housing Appeals Board cited a Planning Board member's apparent concern about the availability of fire protection services. See HAB C.R. 194 (citing PB C.R. 80). However, the stated concern was vague, unsubstantiated, and did not form the basis for the Planning Board's denial in any event. The specific comment was:

> Yes. I commented on this one. And I'm going to stick with the, with the density from the letter with the fire

[7] The Housing Appeals Board refused to consider a summary of these traffic counts submitted as part of Appellant's motion for rehearing because they were not part of the Planning Board's certified record. See Sept. 14, 2021 Order p. 2, n.1. Nonetheless, this Court may take judicial notice of them, as they are public records which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." See State v. Gagnon, 155 N.H. 418, 419–20 (2007).

> department. And no, he wrote the letter, he wrote the letter with an intent. He didn't spell out that there's a danger or there's going to be stuff that's happening, but he wrote the letter that's possible [sic] and he doesn't know how to measure that possibilities [sic] from what I got…

See PB C.R. 80. This comment references a letter from the fire department. However, no such letter is part of the record. The Fire Chief's oral testimony at the public hearing was only that he "cannot say to what extent" the development will impact fire protection services. See PB C.R. 67. This limited testimony does not support a conclusion that municipal services would be inadequate to support the development, and it is even less compelling when compared to the Fire Chief's testimony in 2015. At that time, he articulated a much more acute concern that the development (41 units plus a 10,000 s.f. retail building) would "definitely [cause] immediate impacts to the department due to smoke alarm activations, etc.," resulting in approximately 40 additional calls per year, and representing a 10% increase in call volume. See PB C.R. 269. Despite those concerns, the Planning Board still granted density waiver in 2015. Id. at 271. Thus, the Fire Chief's comments in 2020 cannot explain the inconsistent Planning Board outcomes.

Furthermore, a Planning Board's denial cannot be upheld based on potential concern which did not actually form the basis for the denial. See Trustees of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 505-506 (2018). In Trustees, the Planning Board denied the College's site plan application. Id. at 502. The trial court upheld the denial, on the grounds that the Planning Board could have reasonably concluded that the development

would block sunlight from abutting properties. Id. at 505. This Court reversed because the record of the Planning Board's deliberations demonstrated that the Planning Board did not deny the application on that basis. Id. Although two Planning Board members expressed potential concern with blocking of light, they acknowledged that they had no way to measure the shading to determine whether it would be excessive. Id. at 505-506. And, the other Planning Board members did not express any concern with shading at all. Id. at 506. Thus, the trial court "unreasonably relied upon facts that are not supported by the record of the board's deliberations to justify the board's decision." Id.

Here, a Planning Board member stated a potential concern about fire protection, but as in Trustees, that concern was acknowledged as being immeasurable, and was not the basis for the Planning Board's denial. The Planning Board denied the waiver on the grounds that the size and scale of the density was unreasonable and inappropriate. See PB C.R. 49. The statement about fire protection was made when deliberating an entirely separate waiver criteria (criteria #1 – whether there would be any threat to public safety). The other Planning Board members largely rejected the concern and opined that there would be no threat to public safety. See PB C.R. 80 – 81. Thus, as in Trustees, the potential concern did not form the basis of the denial, and therefore, the Housing Board of Appeals erred in relying on it to uphold the Planning Board's decision.

4. Other General Concerns

The Housing Appeals Board did not identify any other specific changed circumstances, but stated generally that "Certified Record pages 83-87" evidence the Planning Board's "legitimate concerns." See HAB

C.R. 155. The only concerns stated by the Planning Board at pages 83-87 of the Certified Record, other than those addressed above, were two comments by the Planning Board chair at the conclusion of deliberations.

The Chair's first comment was that in connection with a "redistricting" that occurred since 2015, citizen polling indicated a desire to "keep the rural character" of the Town. See PB C.R. 85. The Chair did not identify the source of such "polling," and it was not part of the record. The comment is undermined by the fact that ***no*** members of the public opposed the waiver, either by written submittal, or oral testimony at any of the three (3) public hearings on the application. See PB C.R. 57, 63, 70. Further, it would be unreasonable to conclude that the proposed development would threaten the rural character of the Town in any event. The development would be on a 3.5 acre parcel at the intersection of Route 4 and Main Street, in a heavily developed part of the Town. Allowing it there preserves the larger rural tracts elsewhere in Town, which the Planning Board recognized in 2015. See PB C.R. 256, 270.

Relatedly, the Chair stated that the Commercial Village Zoning District "hasn't turned out as intended" and that "we've actually talked about eliminating" it. See PB C.R. 85. However, the Town has taken no such action, and the zoning that was in effect in 2015 remains largely unchanged, with the same stated purposes and objectives – namely "to provide for a mix of land development opportunities in the vicinity of the Main Street/Horse Corner Road intersection" and to "create a village zone, which promotes a change in the development patterns in the area and creates an attractive center for service, retail, and commercial opportunities." See 2015 Zoning Ordinance p. 11, §2.04(F)(II)-(III); 2020

Zoning Ordinance p. 15, §2.04(E)(II)-(III). In 2015, Planning Board found that "the waiver will substantially ensure that the goals, objectives, standards, and requirements of this section [i.e. the zoning district] are not compromised." See 2015 Zoning Ordinance Section 2.04(F)(XIII) (waiver criteria); P.B. CR 271 (granting waiver). Additionally, members stated that development "fits the area" and "will fit with the design of the [zoning] district." See PB C.R. 269-270. Given that the zoning has remained largely unchanged since 2015, the Chair's comment provides no basis for the denial.

In sum, although the Planning Board stated various concerns with the proposed density, those concerns were all vague, unsubstantiated, and unsupported by the record. None arose from any changed circumstances since 2015. Rather, the Planning Board reversed itself on evidence that was either the same, or more compelling to Appellant's request than in 2015.

B. The Only Changes to the Project Design Made it Dramatically More Conforming

The Housing Appeals Board erred in ruling that the Planning Board could reach a different result because the 2015 and 2020 applications differed. See HAB C.R. 156, 157 n. 8. Although the 2020 final design did differ in some respect from the 2015 concept, all of the changes made the project vastly more consistent with zoning requirements.

"[A] board, having granted an application for certain relief, cannot thereafter deny a property owner's subsequent application for a lesser amount of relief." 4 Rathkopf's The Law of Zoning and Planning § 68:6 (4th ed.); see also Hannaford Bros. Co., LLC v. Town of Rindge, No. 2015-0382, 2016 WL 3748581 (N.H. May 12, 2016). In Hannaford Bros., the

applicant initially obtained site plan approval in 1993 allowing 54% lot coverage for an expansion of the development. The expansion never occurred, and in 2011, it obtained a waiver to allow 57% lot coverage. Id. at *2. Again, the expansion never occurred, and the applicant submitted a revised site plan in 2013 proposing 53% lot coverage. Id. at *1. The Court upheld the 53% lot coverage waiver, noting that the ultimate lot coverage was a ***reduction*** from what the Board previously approved. Id. at *3.

Here, the Appellant sought the 2015 waivers based on a preliminary conceptual design, with full disclosure that extensive design and engineering work was yet to be done. See C.R. 250. Accordingly, it was to be expected that the ultimate design would differ from the concept to some extent. Ultimately, all of the changes resulted in a dramatic reduction in size and scale, and made the project more consistent with all zoning requirements, including density:

	Land Area	**Max Units Allowed**	**Proposed Units**	**Overall Density**	**# of New Buildings**	**Total New Building Area**	**Building Height**
2015 Concept	2.369 acres	2	41	17.3 units/acre	2	23,500 s.f.	45’
2020 Final Design	3.5 acres	4	24	6.6 units/acre	1	7,548 s.f.	35’

See HAB C.R. 50. Notably, the reduction in the number of units from 41 to 24 was necessitated to comply with DES septic system requirements, which was an express condition of the 2015 approval. See PB C.R. 271. Therefore, the Housing Appeals Board erred in ruling that the differences between the conceptual and final designs justify the Planning Board’s

denial.

c. The 2015 Waiver Did not Expire

Even if the Planning Board were not bound to grant Appellant's 2020 waiver request, the 2015 waiver did not expire and continues to apply to the project. The Housing Board of Appeals erred in ruling that the Planning Board determined that 2015 waiver expired at its December 2020 and January 2021 hearings, and that Appellant failed to timely appeal those decisions. See HAB C.R. 157.

When Appellant first submitted an application for the present 24-unit elderly housing development in 2020, it styled the application as an "amendment to approved site plan; proposed (24) one bedroom 55+ apartments in lieu of previous 13 unit approved project." See PB C.R. 5. In other words, Appellant sought to amend the 2018 workforce housing site plan approval. At its December 2020 hearing, the Planning Board ruled that the application should not be styled as an amendment to the 2018 workforce housing site plan approval, and that it should be submitted as a new site plan application. See PB C.R. 55. Appellant did not dispute that. The Planning Board did not, however, address the continued application of the separate 2015 density waiver for the elderly housing project. The 2015 waiver was not even mentioned at the December 2020 hearing, and at the January 2021 hearing, the Planning Board Chair acknowledged that he "did not recall a 41 unit ever being approved." See PB C.R. 59. Accordingly, the requirement for a new application rather than an amendment the 2018 approval cannot be construed as a ruling that the 2015 waiver has expired. As such, the Housing Appeals Board erred in ruling that Appellant is time-barred from arguing that it continues to apply.

On the merits of the claim, there is no basis to conclude that the 2015 density waiver expired. Absent a stated expiration date in an approval, or a regulation or state statute imposing one, the approval does not expire. See 3 Rathkopf's The Law of Zoning and Planning §58:24 (4th ed.). "The whole purpose of a variance[8] is to enable a landowner to make reasonable use of his property, a right that should not be lost through failure to exercise it so long as circumstances remain the same." Id. Further, "Where one mistakenly applies for a variance, neither the grant nor denial thereof has an effect upon a vested nonconforming use, or upon the manner of use or construction specifically permitted as of right." Id.; see also Stephen Bartlett & a. v. City of Manchester, 164 N.H. 641 (2013) (as a threshold matter when reviewing any variance application, the Board must first determine whether a variance is even necessary).

Here, the 2015 density waiver contained no expiration date, and none was imposed by the Zoning Ordinance or by state statute. Cf. RSA 674:33, I-a (variances expire if not exercised within 2 years). Appellant's resubmittal of the waiver request in 2020, in the interest completeness and without legal counsel, does not concede that the 2015 waiver has lapsed. Thus, the 2015 waiver has not expired and the Planning Board may not deny Appellant's project on the basis of excessive density.

VI. CONCLUSION

In 2015, at the outset of this project, the Planning Board granted Appellant a waiver to allow 41 elderly housing units on what was then 2.369 acres, finding that the size and scale of the project was reasonable

[8] Although a "waiver" rather than a "variance" is at issue here, the equitable principles are equally applicable.

and appropriate. In reasonable reliance on that approval, Appellant spent considerable time and expense designing, engineering, permitting and financing the project. The final design resulted in a dramatic reduction in size and scale, with less than half the density initially approved. The Planning Board's denial of the final design on the basis that the reduced density would be too much, was unreasonable and unsupported by the evidence. It's failure to articulate any rational explanation based on changed circumstances for reversing its 2015 findings and rulings constitutes arbitrary, unpredictable and fundamentally unfair decision-making. The Housing Appeals Board erred in upholding the Planning Board's denial, and should be reversed.

VII. ORAL ARGUMENT

Appellant requests fifteen minutes for oral argument to be given by John L. Arnold.

VIII. RULE 16(3)(I) CERTIFICATION

I certify that the appealed decisions, the Housing Appeals Board Decision (Order #2021-016), Issued July 13, 2021, and the Housing Appeals Board Decision (Order #2021-030), Issued September 14, 2021, are in writing and are appended to the brief as pages 38 through 59.

IX. RULE 16(11) CERTIFICATION

I certify that the foregoing brief complies with the word limitation of 9,500 words and that it contains 6,975 words.

Respectfully Submitted,

CHICHESTER COMMONS, LLC

By its Attorneys,

ORR & RENO, P.A.

Dated: March 28, 2022 By: */s/ John L. Arnold*______________

John L. Arnold (#19517)
45 S. Main St.
Concord, NH 03301
Tel: (603) 223-9172
jarnold@orr-reno.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of the Appellant has been forwarded, this day, upon all parties via the Supreme Court's electronic filing File and Serve system.

__*/s/ John L. Arnold*___________

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ADDENDUM

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THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD
Governor Hugh J. Gallen State Office Park

Johnson Hall, Room 201
107 Pleasant Street
Concord, NH 03301
Telephone: (603) 271-1198
TDD Access: Relay NH 1-800-735-2964
Email: clerk@hab.nh.gov
Visit us at https://hab.nh.gov

CASE NAME: Chichester Commons, LLC v. Town of Chichester
CASE No.: PBA-2021-03

ORDER

The matter under appeal is focused on a site plan review application filed by the Applicant on 03 December 2020. (Certified Record (CR) at 31). That application proposes to use a 5.549-acre tract of land to construct a 24-unit, one-bedroom, 55-and-older apartment building. The property is located in the Commercial Village ("CV") District in the Town of Chichester ("Town"). In accordance with the Town's Zoning Regulations, the Applicant needed a Conditional Use Permit ("CUP") and waivers in order to satisfy the Town's density and contiguous acreage requirements under the Town's Zoning Ordinance. (CR at 111).

FACTS:

In order to appropriately frame some of the arguments and positions of the parties, it is important to briefly recite the factual history of this proposed project. On 19 March 2015, the Applicant prepared an application for waiver of innovative land-use provisions in conjunction with a proposed 41-unit, 55-and-older housing complex upon the property. At that time, the property was approximately 2.3-acres in area. Ordinarily, zoning waivers or variances would be requested from the Town of Chichester Zoning Board; however, under the Innovative Land Use regulations in force at the time, that authority was vested with the Town of Chichester Planning Board.[1] At the 02 April 2015 Town of Chichester Planning Board meeting, the four (4) requested waivers were granted and allowed the following:

[1] The Town of Chichester created the CV Zoning District pursuant to its authority under RSA 674:21. Under the Innovative Land Use control provisions, the Town of Chichester Planning Board—not the Chichester Zoning Board of Adjustment—has the authority to grant waivers or exceptions to the Zoning Ordinance in this zoning district.

a) Construction of a building with 13,550-square-feet of gross floor area where a maximum of 5,000 square feet is permitted;
b) To permit the development of a 41-unit, multi-family structure on 2.369 acres, where 22 acres are required;
c) To permit the development of a building with a maximum height of 45 feet where the building cannot exceed 35 feet from the foundation at ground level to the highest point of the building; and,
d) To permit construction of a building with a footprint of 10,000 square feet where a maximum of 5,000 square feet is permitted.

It must be noted that these waivers were requested and approved in advance of any formal site plan being filed for the proposed development. Apparently, because of financing issues, the 41-unit plan never moved forward.

Based upon the availability of potential financing, the Applicant again approached the Town of Chichester Planning Board in 2018. On 30 May 2018, the Applicant filed a site plan review application requesting approval to construct 14 units of affordable housing, along with the eight (8) retail units which were already approved and in place on the property. The request was for ten (10), one-bedroom, and four (4), two-bedroom rental units. This affordable housing request also required similar Zoning Ordinance waivers, which were allowed to be granted by the Town of Chichester Planning Board under the Innovative Land Use rules. Those particular waivers were granted and allowed the following:

a) Construction of a housing building with a footprint of 9,995 square feet where a maximum of 5,000 square feet is permitted;
b) Development of a 14-unit, multi-family structure on 2.369 acres where a minimum of eight (8) acres is required;
c) Development of a building with a maximum height of 29 feet in the front and 39 feet in the rear, where a building cannot exceed 35 feet from its foundation at ground level to the highest point of the building.

Unlike the waivers granted in 2015, the affordable housing project also required two (2) additional waivers:

a) To permit the continued existence of the commercial retail building with the potential expansion of a footprint of approximately 10,000 square feet where a maximum of 5,000 square feet is permitted; and
b) To permit the continued commercial parking at the mall with a total of 39 parking spaces where a minimum of 50 parking spaces is required.

After review by the Town of Chichester Planning Board, the requested waivers and the Affordable Housing Site Plan were conditionally approved in September of 2018. Similar to the 41-unit, 55-and-older project for which waivers were granted, the 2018 project did not proceed further. This brings us to 2020.

On 29 October 2020, the Applicant submitted to the Chichester Planning Board an "Amendment to Approved Site Plan" seeking to amend the conditionally-approved 2018 plan. This proposal was for 24, one-bedroom, 55-and-older apartments, contrasted from the 14 affordable housing units proposed under the 2018 plan.

At the 03 December 2020 Town of Chichester Planning Board meeting, members expressed concern about the Applicant proposing a 24-unit project as an amendment to the 2018 project, which was previously approved. Apparently, contemporaneous with the 03 December 2020 meeting, the Applicant filed a new "Site Plan Review" application dated 03 December 2020, proposing 24, one-bedroom, 55-and-older apartments, removing the request to amend. (CR at 53). At the 07 January 2021 meeting of the Town of Chichester Planning Board, the Applicant stated "…this is a new application for a 24-unit, one-bedroom, over-55 housing." (CR at 58). At that meeting, the Applicant presented his five (5) waiver requests to the Planning Board. The Applicant pointed out that similar waiver requests were granted for the proposed 41 units which were discussed in 2015; however, no actual site plan was presented or approved in 2015.

The Planning Board then proceeded to review the five (5) criteria for each of the five (5) necessary waivers being requested by the Applicant. At the 07 January 2021 meeting, two out of the five requested waivers were granted (waivers number 1 and 3) and one was denied (waiver number 5); waivers number 2 and number 4 were tabled. (CR at 59-61)

Waiver number 2 was a request for relief: "…from Article II, Section 2.04(F); District CV: Commercial Village; Sub-section (VIII), Paragraph II(b) of the Chichester Zoning Ordinance to permit:…" the development of a 24-unit, multi-family structure on 5.5 acres, where 13 acres is required.

At the Thursday, 04 March 2021 meeting, waiver request number 2 was denied based on the fourth criterion. Specifically, the project was not "reasonable or appropriate" due to the scale and size of the proposed project. (CR at 83-87). Since waiver request number 2 was denied, the project itself was denied.

LEGAL STANDARDS:

The Housing Appeals Board review of any planning board decision is limited and will consider the Planning Board's factual findings prima facie, lawful, and reasonable. Those findings will not be set aside unless, by a balance of a probabilities upon the evidence before it, the Housing Appeals Board finds the Planning Board decision unlawful or unreasonable. *See,* RSA 679:9, II. *See also*, *Lone Pine Hunters Club v. Town of Hollis,* 149 N.H. 668 (2003) and *Saturley v. Town of Hollis, Zoning Board of Adjustment*, 129 N.H. 757 (1987). The party seeking to set aside a Planning Board decision bears the burden of proof to show that the order or decision was unlawful or unreasonable. RSA 677:15.

DISCUSSION:

Before focusing on the Planning Board's waiver denial, the Housing Appeals Board will review the question of whether *stare decisis* compels the Planning Board to grant the needed

density waiver for the 24-unit application submitted in 2020.[2] The Applicant argues that *stare decisis* compels the Town of Chichester Planning Board to adhere to precedent; in this instance, the prior grant of similar waivers to the two (2), prior projects brought to the Planning Board.

The facts show that density waivers were granted in 2015 for 41, 55-and-older housing units, and in 2018 for 14 affordable housing units. However, the density waiver was denied in the Applicant's 2020 application for the 24, 55-and-older units.

The waiver criteria are outlined in the Zoning Ordinance and each waiver request must meet the five (5) criteria. In the 2015 and 2018 waiver requests, all five (5) criteria were found to be satisfied which meant granting the waivers would:

1) Not be detrimental to the public safety, health, or welfare, or cause injury or damage to other property, or fail to promote the public interest;
2) Not vary the intent of the Town of Chichester Master Plan;
3) Not substantially compromise the goals, objectives, standards, and requirements of the CV District;
4) Be reasonable and appropriate due to the scale and size of the proposed project; and,
5) Protect natural features that would otherwise be impacted.

However, in the 2020 waiver application, criterion number four (4) was not proven to the satisfaction of the Planning Board for the second requested waiver (density). Specifically "…would the project be reasonable and appropriate due to the scale and size of the proposed project; and/or protect natural features that would otherwise be impacted." (CR at 86).

The basic doctrine of *stare decisis* encourages a tribunal to reach the same result in a subsequent matter which is substantially identical to a former matter. *Union Leader Corp. v.*

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[2] Conceptually, *stare decisis* is similar to res judicata which binds a judicial body to its prior decision in a given case. The Housing Appeals Board determines that res judicata does not apply, since each application was separate and distinct even though the waiver provisions were needed on all three (3) applications. Therefore, the Housing Appeals Board will focus on the Applicant's *stare decisis* argument.

Town of Salem, 173 N.H. 345 (2020). The predicate for this rule is to create predictability in cases brought before legal tribunals. The concept can be looked at in two ways: a) vertical *stare decisis*; and b) horizontal *stare decisis*.

Vertical *stare decisis* essentially requires a lower tribunal to observe higher tribunal's rulings based upon similar facts. In other words, this would require a lower court in New Hampshire to observe the rulings advanced by the New Hampshire Supreme Court.

Horizontal *stare decisis* essentially means that the tribunal itself will follow its prior holdings in an effort to be consistent and not arbitrary or unpredictable. *See, Kalil v. Town of Dummer Zoning Board of Adjustment,* 159 N.H. 725, 730 (2010). Notwithstanding these rules, the Supreme Court of New Hampshire has never held that the doctrine of *stare decisis* applies to local Planning Board or Zoning Board of Adjustment decisions. *See*, *Dartmouth Corporation of Alpha Delta v. Town of Hanover,* 169 N.H. 743, 751 (2017).

A continuation of this analysis focuses on a "material change" in the application submitted to the tribunal. Typically, if the relief being requested is substantially the same, the board needs to provide a reasonable explanation for reaching a different result.[3] In this instance, the Certified Record reflects board concerns regarding the fourth criterion needed for the waiver request number 2. At its 04 March 2021 meeting, various board members expressed concern about the number of units in conjunction with the strip mall located on the front of the property, together with the lack of open space for the people who may live there. In addition, Member Brehm commented that some time had passed since granting of the prior waivers, and the local conditions were now different from what was reviewed and considered in years past. This included the traffic counts on Route 4, which is one of the main roads through Chichester. Certified Record pages 83-87 clearly reflect these legitimate concerns.

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[3] The basic doctrine of the Subsequent Applications Doctrine is to <u>disallow</u> subsequent applications for the same relief, unless there has been a material change in the proposed use of the land, or material changes in the law or circumstances affecting the merits of the application. *See, Fisher v. City of Dover*, 120 N.H. 187 (1980). While *Fisher* was a Zoning case, the New Hampshire Supreme Court in *CBDA Development, LLC v. Town of Thornton,* 168 N.H. 715, 720 (2016), applied the same doctrine to Planning Board applications. The question arises as to whether this doctrine can be applied to applications that were <u>granted</u> by a board as well as those that have been <u>denied</u>. In this case, the request would be to reinstate a waiver previously <u>granted</u>.

Thus, factors that previously did not exist or were considered less important to the Planning Board now had a direct, material impact on the 2020 project. In addition, all three projects proposed by the Applicant are different which could reasonably impact the Planning Board's decision. Therefore, the Housing Appeals Board does not find, by a preponderance of the evidence, that *stare decisis* binds the Town of Chichester Planning Board to its 2015 and 2018 waiver approvals.

Along with advancing the concept of *stare decisis,* the Applicant also argues that the waivers obtained in 2015, specifically the density waiver, should not expire. The Applicant suggests that there was no expiration date imposed by the terms of the waiver approval in 2015, nor are there any specific statutes which trigger expiration.[4] In response, the Town suggests that the Applicant did not commence "active and substantial development" within five (5) years, pursuant to RSA 674:39. The Housing Appeals Board does not believe that either argument has merit. The waiver granted in 2015 was not accompanied by a formal site plan application; thus, to conclude that someone could "commence work" and vest any "waiver rights" within five (5) years is untenable.[5] Suggesting that the waiver continues ad infinitum until such time as the Applicant prepares a plan identical to the one considered but not prepared or submitted in 2015 is also unreasonable since municipal planning is a fluid concept based upon current conditions at the time an actual plan is filed with, and reviewed by, a town or city Planning Board.

It is important to acknowledge the waiver disposition in the context of the evidence viewed and evaluated by the Planning Board. As such, the Housing Appeals Board treats the Planning Board's decision as *prima facie,* reasonable, and lawful, unless, upon the balance of the probabilities, the evidence before it suggests otherwise. RSA 679:9, II.

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[4] Although this is not a classic zoning case, RSA 674:3, I-a provides that variances expire if they are not used within two (2) years. It is important to recall that the requested waivers are waivers of the zoning ordinance even though they are being considered and granted or denied by the Town of Chichester Planning Board.

[5] Quite frankly, the consensus by the Planning Board when the 2015 waivers were granted is more akin to a conceptual discussion, which is not binding on either the Applicant or the Planning Board. See, RSA 676:4, II(a).

At the 07 January 2021 Town of Chichester Planning Board meeting, and at the 04 March 2021 hearing, the five (5) waiver criteria requests needed for the 24-unit, elderly housing project were discussed. Requested waivers number 1 and number 3 were granted at that meeting. Waiver number 2, requesting development of a 24-unit multi-family structure on 5.5 acres where a minimum of 13 acres is required was tabled to the next Planning Board meeting. Similarly, waiver number 4 requesting a CUP to allow multi-family use in the CV District was tabled until the next Planning Board meeting. Waiver request number 5 was denied on 07 January 2021, but later it appears it became moot because of the Applicant's compliance.[6] (CR at 66).

In addition to the foregoing, the decision requiring "new" waivers was made at the 30 December 2020 Planning Board hearing, and later affirmed at the 07 January 2021 Planning Board hearing, where each specific waiver request was discussed and several voted upon and some tabled. At that point, the Planning Board had rejected the Applicant's argument that the 2015 or 2018 waiver requests were still valid and binding on the Planning Board. Under RSA 677:15, the Applicant was clearly aggrieved by the Planning Board's decision and failed to appeal that decision to the Superior Court or this Board within the required 30-day appeal window. By itself, this is grounds for denial of the requested relief.

Absent a request to reinstate the exact waivers for essentially the same plan within a reasonable period of time after the grant of the 2015 waivers (assuming there was a 2015 plan),[7] the prior waivers are no longer binding on the Planning Board.[8] To hold otherwise is not consistent with good planning, since subdivision and site plans are not developed, nor

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[6] At the 04 February 2021 meeting, there was a hearing on waiver number 2 for density, but it was again tabled until the next Planning Board meeting. Waiver number 4 was not discussed or referenced at that meeting. Apparently, there was never any action taken on waiver number 4, specifically, multi-family use in the CV District. However, based upon the denial of waiver number 2, the 24-unit project was effectively denied.

[7] The factual predicate of this case is unusual to say the least. Ordinarily, when waivers are approved, a plan proceeds to fruition, unlike the facts of *Fisher v. Dover*, *supra,* where a denial—not an approval—was appealed. (See note [3] above).

[8] In *Harris Pond Development Corporation v. Town of Merrimack*, Hillsborough, SS., Docket No.: 87-E-00525 (1988), (attached), the Superior Court found that the Zoning Board of Adjustment's denial of the exact same variance previously granted was error. While the court felt that passage of time alone did not constitute a material change of circumstance, the time between the first granted variance and the later denial was only nine (9) months. Again, this case involved a request for the exact same variance, unlike the present case before the Housing Appeals Board.

considered, in a vacuum. Planning Board decisions need to be based on current circumstances and regulations, both of which are material to any planning decision; to do otherwise disregards the Planning Board's mandate.

By a preponderance of the evidence reflected in the Certified Record, the Housing Appeals Board AFFIRMS the decision of the Town of Chichester Planning Board without prejudice to the Applicant filing a modified plan for future consideration.[9]

HOUSING APPEALS BOARD
SO ORDERED:

Date: July 13, 2021

[9] The Housing Appeals Board does not find that the Subsequent Applications Doctrine would apply to a revised plan since the 2020 plan was never fully reviewed by the Planning Board. Once waiver number 2 was denied, consideration of the Applicant's plan ceased. (CR at 49).

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

HILLSBOROUGH, SS.

JANUARY TERM 1988

Harris Pond Development Corporation

v.

Town of Merrimack

87-E-00525

ORDER

This is an appeal from a decision of the Merrimack Zoning Board of Adjustment (ZBA) in which the ZBA denied the plaintiffs' second petition for variance to permit 256 residential condominium units to be constructed on a 65-acre parcel currently zoned industrial.

The plaintiff Harris Pond Development Corporation (Harris Pond) has an option to purchase a 65-acre parcel which abuts Harris Pond I, an existing Planned Unit Development (PUD) off the Daniel Webster Highway in Merrimack, New Hampshire. Harris Pond I presently has 144 residential condominium units. The owner of the 65-acre parcel is Southwood Corporation, a wholly owned subsidiary of the Pennichuck Corporation. Originally, zoning was such that Harris Pond could have included the full 400 units they had desired on Harris Pond I. However, at the hearing it was learned that a change in the zoning ordinance lowered the approved number of units on Harris Pond I

to 280 and that the subsequent eminent domain taking for the Nashua-Hudson Circumferential Highway eliminated 136 units bringing the Harris Pond I project down to 144 units. Plaintiff acquired the option on Southwood's adjoining land so that they could develop that land as Harris Pond II.

On July 24, 1986 the first hearing was held by the ZBA during which the plaintiffs provided extensive and detailed evidence as to why they should be granted a variance to place 256 cluster residential units (Harris Pond II), on the subject parcel which was zoned industrial. The ZBA in a 4-1 decision granted the use variance, subject to certain conditions. Two of the conditions of the variance were that road access to the units would be through Harris Pond I and that the sewer and water lines would also be extended through Harris Pond I. It should also be noted that prior to being zoned industrial, the land had enjoyed a residential zoning.

Harris Pond, in reliance on this variance, expended approximately $250,000 in planning, architecture, engineering and related work on Harris Pond II. In follow-up to the variance, Harris Pond held a preliminary meeting with the Merrimack Planning Board on October 14, 1986 to commence the Site Plan Review process. At that meeting, the Planning Board expressed its concerns over the exact location of the proposed taking by the State for the Circumferential Highway which would abut the southern border of the project. The State had not yet determined the precise line of taking and the Planning Board

stated that it would require this information before proceeding further in order to assure that no residential units would be subject to the eminent domain proceeding. There was evidence that six of the units in Harris Pond I had been taken.

Thereafter Harris Pond made several attempts to obtain a commitment by the State as to the precise line of taking but the State could not yet provide the information as required by the Planning Board. On April 6, 1987 counsel for Harris Pond contacted the ZBA, explained the circumstances, and requested that the ZBA not apply Section 7.06 of their zoning ordinance to Harris Pond which would, in the ZBA's interpretation, require reapplication for a new variance for the project on April 24, 1987, nine months after the granting of the July 24, 1986 variance.

Section 7.06 of the Merrimack Zoning Ordinance provides as follows:

> "If after a permit has been authorized by the Board such permit is not lifted from the office of the Building Inspector within a period of nine (9) months from the date of the authorization then such authorization shall be null and void and no permit shall be issued thereunder."

The ZBA and Charles Watson, the Merrimack Planning Director and Zoning Administrator, contend that this language requires plaintiff, who unavoidably could not obtain Planning Board approval within nine months so as to enable him to "lift" the building permits and break ground on the project, to reapply for a new variance and once again prove the five factors to be

considered in granting a variance. The Court notes that Section 7.06 never mentions the term "variance" but uses the language of "after a permit has been authorized" which leads one to believe the section may be addressing building permits for such small projects as a single family home or addition, versus a 256-unit residential condominium development. A large project would inevitably entail months of cooperation with the Planning Board before receiving the appropriate approvals to enable the developer to "lift" the building permits. Charles Watson, the Town's Planner, conceded that a project similar in size to Harris Pond II could reasonably take more than nine months before the final Planning Board approval, which could allow the permit to be "pulled." Thus, inasmuch as a PUD requires Site Plan approval before a building permit can issue, the ordinance, as existing, creates an ambiguity. Does Section 7.06 apply both to the person who gets, for instance, a variance on a side-setback to build a garden shed as to the PUD developer who must engage in a Site Plan process after ZBA approval? One has nine months to "pull" the permit without further administrative proceedings. The second has nine months in which to "pull" the permit, but also in which the Town claims he must obtain all other permits.

The ZBA required the plaintiffs to reapply for a variance and scheduled a new ZBA hearing on April 23, 1987. The plaintiffs submitted veritably tho identical evidence which it submitted at the July 24, 1986 hearing. The ZBA agreed that the

plan had not changed at all since July 24, 1986. The ZBA expressed the same concerns set forth by the Planning Board that the State could conceivably take part of the site. Plaintiffs countered with the fact that they were only requesting a use variance, and that the exact location of the highway was not paticularly relevant on the issue of "use." The granting of the variance would not give Harris Pond the right to begin building. Harris Pond still had to obtain the Planning Board's Site Plan approval which was clearly conditional upon the State's final determination as to the precise line of taking along the southern border of the project.

At the second hearing, a residential owner in Harris Pond I expressed concern over whether the traffic from the project would be routed through Harris Pond I or Manchester Street. There was evidence that if Manchester Street was used for purposes other than emergency access it would require upgrading. The Court notes that at the July 24, 1986 hearing this issue had been resolved by the ZBA through conditioning the variance on obtaining regular access through Harris Pond I. The ZBA members further discussed unsubstantiated newspaper articles which claimed that Harris Pond was still selling units in Phase I that could eventually be taken by the State.

Nothing had changed between the first ZBA determination granting plaintiff's variance and the second determination which denied the requested variance -- other than the passage of some nine months.

The evidence in support of the variance was the same at both hearings; there was no change in surrounding lands; there was no change in the parcel at issue; there was no change in surrounding uses. The planning issues of growth, preservation of industrial land and suitability of the site as expressed by defendant's witnesses existed <u>before</u> the July 24, 1986 ZBA hearing. No evidence exists that the scope or nature of the Harris Pond II project has changed. It is the identical project presented under the identical circumstances. Only the variance result differed.

Counsel for defendant has endeavored valiantly and well to present a justification for the Town's actions; unfortunately, the Court can find little reasonable, let alone just or rational explanation for the abject dichotemy in the ZBA rulings. Simply stated, two plus two equaled four on July 24, 1986. On April 23, 1987 it equaled five.

The findings of the ZBA are categorized within the five factors required to be proven before the granting of a variance, those being: (1) no diminution in value of surrounding properties would be suffered; (2) granting the permit would be of benefit to the public interest; (3) denial of the permit would result in unnecessary hardship to the owner seeking it; (4) granting the permit would do substantial justice; and (5) the use must not be contrary to the spirit of the ordinance.

At the first hearing the ZBA found (1) to be proven in that the project would increase the tax base; at the second

hearing they found the same but because the proposed residential use is contiguous to other residential use.

The ZBA found (2) to be proven at the first hearing because the proposed use allows the land to be used for its best use. At the second hearing the ZBA stated (2) was not proven, giving reasons which were contrary to the first and which were for the consideration of the Planning Board at site plan review.

Factor (3) was found to be proven at the first hearing in that the ZBA found that the property could not be used for industrial purposes because of poor access (which is through a residential PUD). At the second hearing the ZBA found the opposite and stated that the land could reasonably and properly be used for industrial purposes.

The ZBA determined that factor (4) was proven at the first hearing since the residential units would be able to get sewer, water and drainage through Harris Pond I. However, once again at the second hearing the ZBA rejected this stating that the town would be losing industrially zoned land which is necessary for balanced residential/commercial/industrial growth according to the Master Plan.

Lastly the ZBA found (5) proven at the first hearing reasoning that the proposed project abuts another PUD zone. At the second meeting they held that the use contemplated by the plaintiffs would usurp, without good cause, land meant for another purpose as previously determined by the town.

The ZBA, with the same evidence before it, reversed itself in denying the variance and made findings of fact which directly contradicted its previous findings.

Our Supreme Court has held that when a material change of circumstances affecting the merits of the application for variance 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 should not reconsider an application for a variance. Fisher v. City of Dover, 120 N.H. 187, 190 (1980). The Fisher case dealt with the granting of a second application for variance after the first application had been denied. The Court stated that if the law was 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. Fisher at 190.

There is a similar consideration in the case at bar. The public and the plaintiffs are entitled to some degree of finality to the proceedings before the ZBA absent a material change of circumstances. In particular, in the case at bar, a large PUD was planned. Such a project requires large expenditures of funds to initiate and follow-through. It appears that defendant would require plaintiff to proceed with Site Plan Review (required of these large projects), at the risk of having the previous administrative underpinnings removed at the developer's peril. Thus the issue of finality is of particular importance.

Municipal authorities have an affirmative duty to treat individuals they interact with fairly and equally as part of their obligation to protect the public interest and to avoid weakening public confidence in the government. Irwin Marine, Inc. v. Blizzard, Inc., 126 N.H. 271 (1985). In that case, involving municipal bidding, the Court held that it was appropriate to set aside the sale, since even absent a competitive bidding statute, the city should have given the abutter fair notice as to the second round of bids, as part of its duty to treat all bidders fairly. Irwin Marine, Inc., at 276. When municipal authorities reverse themselves in the manner at bar, and thereby impose great financial burden on the parties before them, without some material change of circumstances that would merit such a reversal, such reversals create the Irwin Marine issues.

This Court is persuaded that the Town of Merrimack ZBA erred in denying the second request for a variance under the circumstances of this case. The ZBA did not find, nor could it find, any material change in circumstances. Fisher v. City of Dover, supra; Application of 200 West 79th St. Co. v. Galvin, 335 N.Y.S.2d 715, 71 Misc.2d 190 (1970).

In the absence of a material change relative to the project, either external or internal, the doctrine of collateral estoppel and estoppel would also preclude the Town from denying the variance. The Court recognizes that there are circumstances

where material changes can lead a municipality to deny a variance on a reapplication. This case does not present those circumstances. The only change which has taken place is the spending of a quarter-million dollars by plaintiff -- an expenditure characterized by defendant during trial as a "business risk." The Court does not find that business risk, under New Hampshire law, encompasses risk of unjust and unreasonable municipal actions. Irwin Marine, supra.

Administrative res judicata and collateral estoppel do not prevent a municipality from correcting variances for which there is new evidence. The doctrine does, however, protect variance applicants from arbitrary hardships.

> "[W]hen a zoning hearing has granted a variance, and that variance has expired, it may not deny a second application for the same variance, absent findings, based on relevant new evidence, that the variance is no longer warranted.
> Davies v. Zoning Hearing Board of Ross Township, 435 A.2d 276 (Pa. 1981).

The Court, in reviewing all the circumstances of the case at bar, can come to no other conclusion than that the ZBA acted unreasonably and did not apply the appropriate legal standards in reviewing the plaintiffs' variance for the project entitled Harris Pond II. Therefore, pursuant to RSA 677:6 the Court vacates the board's denial of the plaintiffs' application for variance.

The Court expresses its opinion that testimony from members of the ZBA would have been illuminating in this case.

Nevertheless, the testimony of Nelson Disco, Chairman of the Planning Board, and Charles Watson, Planning Director and Zoning Administrator, (none of whom participated in or provided testimony at either ZBA hearing), was still of benefit to the Court in reaching its decision in this case. This testimony particularly assisted the Court as to the issue of whether costs and attorneys fees should be assessed against the Town of Merrimack pursuant to RSA 677:14. In light of this testimony the Court finds that the ZBA did not act with malice or gross negligence. The Court finds that the denial was unreasonable, unjust and unlawful.

As to the parties' proposed findings of fact and rulings of law, the Court makes the following rulings, which of course, should be viewed in the context of the entire order.

The Court GRANTS Plaintiff's Nos. 1 - 19, 21 - 23, and DENIES 20 and 24.

The Court also GRANTS Defendant's Nos. 1 - 8, 9(a) - (e), 10 - 34, but finds that all such information existed prior to 1st ZBA ruling,* and DENIES Nos. 9(f), 35 and 38 - 46. As to 36 and 37, the request is neither denied or granted. SEE DECREE as to reliance on municipal determination.

* and did not change between the 1st and 2d ZBA rulings.

DATED: 3/23/88

Philip P. Mangones, Presiding Justice

THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD
Governor Hugh J. Gallen State Office Park

Johnson Hall, Room 201
107 Pleasant Street
Concord, NH 03301
Telephone: (603) 271-1198
TDD Access: Relay NH 1-800-735-2964
Email: clerk@hab.nh.gov
Visit us at https://hab.nh.gov

CASE NAME: Chichester Commons, LLC v. Town of Chichester
CASE No.: PBA-2021-03

ORDER

After review of the Applicant's *Motion for Rehearing* and the Defendant's response to the same, the Housing Appeals Board rules as follows:

On 13 July 2021, the Housing Appeals Board upheld the Town of Chichester (the "Town") Planning Board's denial of certain waivers needed by the Applicant (Chichester Commons, LLC) to proceed with its proposed 24-unit elderly housing project. As the Housing Appeals Board outlined, there is no requirement under New Hampshire zoning and planning law requiring stare decisis be applied to future applications involving the same property.

While the Housing Appeals Board cited an older Superior Court case, *Harris Pond Development Corporation v. Town of Merrimack*, Hillsborough, SS., Docket No.: 87-E-00525 (1988), that case must be carefully considered. The Applicant's request in *Harris Pond* was for the exact same relief and was brought back to the Zoning Board of Adjustment less than a year from original approval. Thus, for good cause, the Court was justified in its order reinstating the variance.

Here, significant time had passed from original approval to a new request. As the Housing Appeals Board pointed out, time can be a material element since planning considerations must be considered in conjunction with current local conditions—not those which may have previously existed. And consideration by a planning or zoning board can be affected by current conditions. Change in conditions is not restricted to traffic (which the Planning Board in this case did consider), (CR at 85), but included other concerns such as

available open space and adequate facilities for elderly persons, (CR at 84), especially in light of the commercial development on the same parcel of land, (CR at 85), and availability of municipal resources such as fire protection. (CR at 80). These factors are within the Planning Board's purview to consider in rendering a decision and must be respected by the Housing Appeals Board absent clear evidence to the contrary.[1] *See,* RSA 679:9, II.

Correctly, the Town Planning Board approached the Applicant's project as a new project and they were entitled to apply current conditions and knowledge of the community in making their decision. Taken together, the Applicant's request to rehear this matter constitutes a repetition of its prior arguments and does not warrant a rehearing. Therefore, the Applicant's *Motion for Rehearing* is DENIED.

The Housing Appeals Board Decision Order dated 13 July 2021 (Order #2021-016) suspended by its Interim Order dated 09 August 2021 is "UNSUSPENDED" and REINSTATED forthwith.

HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:

Date: September 14, 2021

Elizabeth Menard, Clerk

[1] The Housing Appeals Board notes that the Applicant included in its motion a "Traffic Memorandum" prepared by Stephen G. Pernaw, Professional Engineer, dated 06 August 2020, but signed 06 August 2021. Regardless of the date issue, this report was not part of the case Certified Record, thus, will not be considered by the Housing Appeals Board. *See,* RSA 679:9, I.