

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

Case No. 2021-476

APPEAL OF CHICHESTER COMMONS

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**REPLY BRIEF OF APPELLANT,  
CHICHESTER COMMONS, LLC**

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## ARGUMENT

Although the Town submits numerous arguments, factual allegations and theories to attempt to justify the Planning Board's denial, most are entirely irrelevant to the issues at hand and only serve to confuse the matter.

### **I. The Town's Vested Rights Argument is Misplaced.**

The Town incorrectly asserts that Appellant's *stare decisis* argument seeks to establish a "non-expiring vested right in the 2015 waiver." See Town's Br. p. 23. And, its accompanying analysis of statutory vesting of site plan approvals confuses the issue. See id. at 30-31. Vesting is a legal concept that protects an approved development from subsequent changes in the law when certain levels of construction are undertaken within certain timeframes. See RSA 647:39. Appellant is not seeking any protection from changes in laws. To the contrary, Appellant merely seeks consistency in the Planning Board's application of its waiver criteria and density restrictions to the project.

Furthermore, as an alternative to its *stare decisis* argument, Appellant asserts that the 2015 waiver continues to apply, but has never claimed that it continues perpetually. Appellant clearly stated both to the Planning Board and to the Housing Appeals Board that because the waiver contained no expiration date, and because the local regulations and state law imposed none, it must continue for a reasonable period of time. See HAB C.R. 173; PB C.R. 75. The delay of approximately five (5) years between the initial concept and final design was reasonable under the circumstances, given the funding process and unforeseen difficulties with

the New Hampshire Housing Finance Authority in financing the development.<sup>1</sup>

**II. The Town's Effort to Justify Denial of the Density Waiver on Changes to the Project Undermine its Own Position.**

The Town attempts to use the changes to the project's design to circumvent the subsequent application doctrine, and to distinguish Harris Pond Development Corp. v. Town of Merrimack, Docket No. 87-E-00525 (Hillsborough County Super. Ct., Mar. 23, 1988) and Batakis v. Town of Belmont, 135 N.H. 595 (1992). See Town's Brief p. 32 n. 11, 35-36. The Town's argument seems to be that had Appellant's final design mirrored the 2015 concept, the Planning Board would have been compelled to adhere to its prior ruling that the size and scale of the project was reasonable and appropriate under waiver criteria #4. It is impossible to reconcile the Town's positions. It is seeking to justify its present denial on the grounds that Appellant reduced the size and scale of the project, while at the same time claiming the project is too big. The Town's attempt to penalize Appellant for reducing the size of the project is particularly puzzling because the reduction in the number of units was necessitated to comply with State septic system requirements, which was an express condition of the 2015 approval. See Appellant's Br. p. 14, n. 5.

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<sup>1</sup> The process for financing affordable elderly housing through the New Hampshire Housing Finance Authority is lengthy and cumbersome. Applications must be submitted prior to a single annual deadline and are reviewed all together. See PB C.R. 78. In the first round of applications following the 2015 waiver, only one project (not Appellant's) was awarded financing. Id. NHHFA's guidance to change the housing from elderly to workforce, and then back to elderly, necessitated re-design of the development, and re-application for funding. Id. The delay was not attributable to any inaction by Appellant.

### **III. The Town's Effort to Identify Changed Circumstances Fails.**

The Town posits several changed circumstances since 2015 to justify the Planning Board's inconsistent results. However, many were not even identified by the Housing Appeals Board, and none withstand even superficial review.

First, the Town argues that elderly housing is no longer needed because another elderly housing project has been built. See Town's Brief p. 36 (1). This argument is flawed because the other elderly housing development was approved prior to the 2015 waiver, and therefore does not constitute a changed circumstance. See HAB C.R. 108.

Second, the Town argues that Appellant obtained approval for a separate workforce housing development in 2018, and that the 2020 application no longer meets the Town's need for workforce housing. See Town's Brief p. 36 (2). However, the 2015 application proposed elderly housing, and did not satisfy any need for workforce housing either.

Third, the Town argues that the elimination of the additional retail building undermines the goals of the zoning district. See Town's Brief p. 36 (3). This argument turns the Planning Board's decision on its head. The Planning Board stated that the size and scale of the development was too big, and even used the existing retail building as a justification for that conclusion. See HAB C.R. 155.

Fourth, the Town argues that the dynamics of Route 4 have changed and that residents do not want increased density. See Town's Brief p. 36 (4). The Chair's claim that the dynamics of Route 4 have changed was based solely his erroneous belief that traffic counts on Route 4 had

increased since 2015. See PB C.R. 85. As set forth at page 27 of Appellant's Brief, traffic counts have actually decreased. And, his claim that residents oppose increased density is belied by the fact that no residents opposed the waiver. See Appellant's Br. p. 30.

Fifth, the Town argues that the development will impact fire protection services. See Town's Brief p. 36 (5). Any new development will impact municipal services. That is not the issue. As set forth at pages 27-29 of Appellant's Brief, the Fire Chief did not testify the department could not handle the increased demand, and the impact on fire services was not the basis for the Planning Board's denial in any event.<sup>2</sup>

Sixth, the Town again argues that citizens generally oppose increased density. See Town's Brief p. 36 (6). As noted above, not a single member of the public opposed Appellant's waiver request at any of the three (3) public hearings on the application. See PB C.R. 57, 63, 70. By contrast, several members of the public did oppose the 2015 waiver. See PB C.R. 270.

Seventh, the Town argues that changes to the Master Plan emphasize preservation of rural and agricultural areas. See Town's Brief p. 36 (7). This is not a changed circumstance – those goals were equally reflected in the prior version of the Master Plan applicable in 2015. Moreover, consistency with the Master Plan is a separate waiver criteria (criteria #3), and was not the basis for the denial. In fact, when deliberating criteria #3,

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<sup>2</sup> The Town submitted a letter from the Fire Chief as Addendum 6 to its Brief. This letter was not part of the certified record, and not properly before this Court. However, it is consistent with the Chief's oral testimony at the hearing, which was that he cannot say that the development will pose an undue burden on municipal services. See PB C.R. 67.

three Planning Board members opined that the request *is* consistent with the Master Plan, and none of the other Planning Board members disagreed. See PB C.R. 81-82. And, as set forth at page 30 of Appellant’s Brief, it is disingenuous to suggest that the property at issue here is rural or could be used for agricultural purposes such that the development detracts from the Master Plan’s goals – allowing more density here preserves the larger more rural tracts in Town.

Finally, the Town argues that the zoning ordinance has been amended since 2015 to require a conditional use permit for multi-family housing and to add a buildable acreage requirement. See Town’s Brief pp. 36-37 (8). Although Appellant does not dispute these zoning amendments, the Town’s reliance on them to justify the denial is misplaced, as they have no bearing on whether the size and scale of the project is unreasonable, particularly when compared to the 2015 concept.

### **Conclusion**

The Town argues that it should be free to ignore its 2015 findings, and review Appellant’s 2020 application in a vacuum. Principles of fairness and equity reflected in the doctrines of *stare decisis*, the subsequent application doctrine, and analogous cases from this Court demand otherwise. The Planning Board failed to articulate any rational basis to deny Appellant’s density waiver, and therefore, should be reversed.

### **RULE 16(11) CERTIFICATION**

I certify that the foregoing reply brief complies with the word limitation of 3,000 words and that it contains 1,359 words.



Respectfully submitted,

CHICHESTER COMMONS, LLC

By Its Attorneys,

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Date: May 27, 2022

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**CERTIFICATE OF SERVICE**

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

/s/ John L. Arnold