THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Appeal of Chichester Commons, LLC

CASE NO. 2021-0476

Brief of the Appellee, Town of Chichester

ON APPEAL FROM DECISION OF
THE NEW HAMPSHIRE HOUSING APPEALS BOARD

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Appellant's arguments in support of its position regarding the continued application of the 2015 waiver to its 2020 proposal are properly before this Court, where Appellant was notified of the Planning Board's decision requiring a new waiver application, and Appellant failed to timely request a rehearing or appeal the Planning Board's decision?

2. Whether the Housing Appeals Board properly determined, based on a preponderance of the evidence, that the Planning Board's decision denying Appellant's 2020 waiver request, after prior waivers for different projects were approved in 2015 and 2018, and after numerous changes in circumstances since 2015, was lawful and reasonable?

3. Whether the Housing Appeals Board properly determined that Appellant's 2015 waiver does not continue to remain valid in perpetuity?

STATEMENT OF THE CASE

This matter arises out of a decision of the Chichester Planning Board ("PB"), denying a 2020 waiver request submitted by Appellant as part of its proposal to develop a three-story, residential apartment building with 24 one-bedroom units for elderly housing within the Commercial Village Zoning District.

Prior to submitting its 2020 waiver request, Appellant had previously applied for a different elderly housing project in 2015, that unlike the 2020 proposal, also included a retail component. Despite receiving approval of its waiver requests in 2015, Appellant never commenced development. Rather, in 2018, Appellant submitted a new application for a different proposal seeking to develop workforce housing. Again, despite obtaining a waiver (and despite the 2018 proposal reaching the final stages and a site plan recorded), Appellant never commenced development.

In 2020, Appellant submitted an "amended" application transitioning back to elderly housing, and framing its request as an amendment to its prior application. Appellant was informed by the PB that its 2020 application was a new project, and a new application (with new waiver requests) must be filed. Appellant did not challenge or appeal the PB's decision, and subsequently filed a new 2020 application and waiver request.

In considering Appellant's 2020 application, the PB discussed numerous changes in the Town since 2015, the general health, safety, and welfare concerns raised by Appellant's proposal, and the inconsistencies between Appellant's proposal and the stated goals of the Commercial

Village Zoning District and master plan. The PB ultimately denied Appellant's request for a waiver.

Appellant appealed the PB's decision to the Housing Appeals Board ("HAB"), arguing that the PB was required to adhere to Appellant's 2015 waiver and the PB's denial was unreasonable.

The HAB properly rejected Appellant's arguments. Appellant did not properly challenge the PB's determination that a new waiver was needed, and, regardless, the PB was not required to adhere to the 2015 waiver. The doctrine of *stare decisis* is not applicable, and the subsequent application doctrine applies to previously denied applications—not prior approvals. Moreover, Appellant's 2020 proposal is different from its 2015 proposal, and there have been numerous changes that occurred in the five years since Appellant's 2015 request.

The HAB properly determined, based on a preponderance of the evidence, that the PB's decision to deny Appellant's 2020 waiver request was reasonable and lawful.

STATEMENT OF THE FACTS

Property Background

Appellant owns the subject property, consisting of two separate lots totaling 5.5 acres located within the Town's Commercial Village (CV) Zoning District (the "Property"). *CR*[1] *1*. The Property is further identified as 114 and 114A Dover Road, Chichester, New Hampshire, and depicted on tax Map 4 and Lots 161A and 161. *CR 1*. A commercial strip mall currently sits on a portion of the Property. *CR 66*. Beginning in 2015, Appellant has submitted multiple distinct proposals to the Town seeking development of the Property.

2015 Application – Elderly Housing and Retail

In 2015, Appellant proposed a multi-unit development for "older persons" housing as defined in RSA 354-A:15. *CR 250*. As an initial step in the 2015 development proposal, Appellant appeared before the PB on March 5, 2015 for a preliminary site plan review. *CR 261*. During the preliminary review, Appellant explained the proposal would require the PB to waive certain provisions of the Town's Zoning Ordinance as part of the project. *CR 261*.

On March 19, 2015, Appellant submitted a waiver request to the Town seeking "to waive certain requirements of the Chichester Zoning Ordinance." *CR 250*. Specifically, Appellant sought, among others, the following waiver:

> WAIVER 2: a Waiver is requested from Article II, Section 2.04(F); District CV: Commercial Village; Sub-section

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[1] "CR" refers to the Certified Record of the Town of Chichester Planning Board filed with the HAB. The CR was submitted to this Court by the HAB on February 22, 2022.

> (VIII), Paragraph 11(b) of the Chichester Zoning Ordinance to permit: The development of a 41 unit multi-family structure on 2.369 acres, where 22 is required.

CR 251. According to the 2015 version of the Town's Zoning Ordinance in effect at the time, multi-family developments were permitted within the Commercial Village Zoning District subject to the following condition (among others):

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

2015 Chichester Zoning Ordinance ("2015 CZO") § 2.04(F)(VIII)(11)(b).[2] The applicable zoning ordinance Appellant sought a waiver from in 2015 (*2015 CZO § 2.04(F)(VIII)(11)(b)*) did not contain any language regarding minimum "contiguous buildable acre" requirements per unit. *Id.* The zoning ordinance at issue in 2015 also did not mandate the need for a Conditional Use Permit ("CUP") as part of a multi-family use development. *Id*.

As Appellant represented to the Town at the time, its waiver request was the first step in its 2015 proposed "development of the property with elderly (55+) housing and a 10,000 square foot retail building" and if Appellant's waivers were granted a "formal application for site review" would follow. *CR 263*. Appellant's explanation, at the time, that its 2015 waiver request was part of its 2015 proposed development was consistent with the 2015 CZO, which stated waivers can be granted if the PB finds,

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[2]See Addendum to Appellee's Brief at 77. Also Available at https://www.chichesternh.org/sites/g/files/vyhlif2946/f/uploads/2015_zoning_ordinance.pdf.

among other factors, "**a development**" is better served by not adhering strictly" to the ordinance, and the waiver is "reasonable and appropriate due to the scale and size of **the proposed project**." *2015 CZO § 2.04(F)(XIII)* (emphasis added). The "development" and "proposed project" associated with Appellant's 2015 waiver request was Appellant's 2015 proposal to develop the Property with elderly housing and retail.

Ultimately, the Town granted Appellant's 2015 waiver request. *CR 271*. During consideration, PB members emphasized "a duty to provide elderly housing," and indicated, at the time in 2015, Appellant's 2015 proposal "fits a need of the community" to provide elderly housing. *CR 269*. Appellant and area residents also commented that the "retail building is reasonable" (*CR 270*), and the inclusion of retail with the project "is in keeping with the character of the businesses along the Dover Road Corridor." *CR 266*. PB members likewise commented the proposal, including retail, "fit[s] the design of the [Commercial Village Zoning] District." *CR 269*. PB members also noted that the waivers were granted as part of Appellant's 2015 proposal. *CR 271* (". . . the above waivers are granted on the basis of the project as a whole.").

Despite the PB granting Appellant's 2015 waiver requests, Appellant failed to submit a formal, final site plan or commence any development of the 2015 project.

2018 Application – Workforce Housing

In 2018, Appellant proposed a new development for the Property. *CR 151*. In its 2018 proposal, Appellant sought to develop a 14-apartment

unit affordable housing complex.[3] *CR 151*. As with its 2015 proposal, as an initial step in the 2018 affordable housing development proposal, Appellant submitted a waiver request to the PB seeking to waive certain provisions of the Town's zoning ordinance. *CR 151*. Appellant explained, in its 2018 submissions, that, although his 2018 request was similar to the request in 2015, it was submitting a new waiver request as part of the 2018 proposed project. *CR 151, 209*. In fact, Appellant specifically identified the waivers granted in 2015, and stated "the waivers being requested with this [2018] application mirror those previously granted," including a waiver from "Section 2.04F: VIII-11(b) – to permit development of a **<u>14 unit multi-family</u>** structure on 2.369 acres, where **<u>8 acres</u>** is required." *CR 151* (emphasis in original).

As it did in 2015, in 2018 Appellant explained it needed the 2018 waivers to develop the 2018 proposed project, its waiver request was the first step in the development process, and "granting of the waivers does not constitute a full and final approval of its intended development." *CR 152*. During discussions in 2018, PB members emphasized the new proposal moved "the Town closer to fulfilling the amount of affordable housing units" needed. *CR 213*.

On July 12, 2018, the Town granted Appellant's density waiver request and approved "the development of a 14-unit multi family structure on 5.549 acres where 8 acres is required." *CR 212*. After Appellant's waiver was granted, Appellant took steps to finalize the site plan,

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[3] Separate from its development proposal, in 2018 Appellant also sought, and was granted permission, to lease the Property to a golf cart company for the purpose of displaying and storing golf carts at the Property. *CR 201, 203*.

culminating in Appellant satisfying all Town requirements to commence development. *CR 194* (notifying Appellant it "has met all requirements . . . and the [2018] Chichester Commons Housing project is permitted . . ."). Appellant's 2018 waivers and site plan approvals were also recorded with the Merrimack County Registry of Deeds. *CR 35*.

Despite obtaining final approval from the Town, and despite the fact the site plan approval was recorded, Appellant failed to commence any development of the 2018 project.

2020 Application – Elderly Housing Only

In 2020, Appellant again proposed a new development for the Property. *CR 5.* Appellant's 2020 proposal transitioned away from affordable housing, and, instead, proposed a three-story, residential apartment building with 24 one-bedroom units for elderly housing. *CR 34*. Unlike its 2015 proposal, Appellant's 2020 proposal did not include any retail within the Commercial Village Zoning District. *CR 34*. Also, in the 5 years since Appellant submitted its 2015 proposal, the Town had subsequently approved a different elderly housing project submitted by a different developer. *CR 67-68*.

Initially, Appellant attempted to submit its 2020 site plan application as an "amendment to approved site plan," and requested approval of an amended site plan proposing "(24) one bedroom 55+ apartments in lieu of previous 13 unit approved project." *CR 5.*

After Appellant submitted its 2020 application, the Town received comments from the Central New Hampshire Regional Planning Commission on November 9, 2020 notifying the Town that Appellant's

application did not satisfy the applicable CUP zoning ordinance. *CR 111*.[4] Specifically, Appellant had not provided a CUP application with corresponding waivers seeking a waiver from the density and contiguous acreage requirements under the Town's zoning ordinance. *CR 111*.

Appellant's original 2020 application came before the PB on December 3, 2020. *CR 55*. At the December 3, 2020 hearing, PB members voiced their concern with Appellant's attempt to submit its proposal as an "amended" application. Minutes indicate PB members notified Appellant of the following:

- [PB members were] not in favor of using the application that stated "amendment" as it will create confusion in the future. [PB members'] opinion is that this is very clearly a new application;

- [PB members have] concerns about the application and did not want to see anything with the word amendment on it; and

- The 2020 application "is not an amendment and is a new fresh application."

CR 55. Ultimately, the PB unanimously approved a motion "to find that the application is not complete due to the alteration of the application/ plans/waivers stating amendment on them and [Appellant] may reapply without prejudice." *CR 55.* Appellant's representative acknowledged the

[4] As discussed *infra* on page 16, the applicable zoning ordinance changed between 2015 and 2020. Unlike the 2015 ordinance, the 2020 version of the ordinance required an applicant to satisfy both a contiguous acreage *and* a buildable acreage requirement. The changed ordinance also required a waiver be obtained as one step in CUP process. Compare *2020 CZO § 2.04(E)(VIII)(11)(II)(b)* and *§ 2.04(E)(VIII)(11)(I)(5) (Add. p. 100)* with *2015 CZO § 2.04(F)(VIII)(11)(b)* (*Add. p. 77*).

PB's decision requiring a new application, indicated he was disappointed with the PB's decision, and indicated he would resubmit a new application. *CR 55*.

On December 7, 2020 the Town sent a follow-up letter to Appellant notifying Appellant that the PB had "voted to deem your application incomplete . . . [because] the application and [site] plan incorrectly described the proposal as an "amended site plan." *CR 48*. In response to the Town's position, Appellant submitted a new application and waiver request on December 3, 2020. *CR 31-47*. Appellant never appealed or challenged the PB's decision that a new CUP and waiver application was required as part of its 2020 proposal. Appellant's December 3, 2020 application was not a "final design" of Appellant's 2015 or 2018 proposals. Rather it was a new "Site Plan Review Application" for a new project. *CR 31*.

In its new application, Appellant requested, among others,[5] the following waiver:

> WAIVER 2: A Waiver is requested from Article II, Section 2.04(E)(VIII)(11)(II)(b) of the Chichester Zoning Ordinance to permit: The development of a 24-unit multi-family structure on 5.5 acres, when 13 acres is required.

CR 130.[6]

[5] In its appeal to the HAB (and this Court) Appellant has only raised an issue with the Town's denial of its waiver request number 2. Appellant's 2020 waiver requests numbers 1, 3, 4, and 5 were not before the HAB and are not before this Court.

[6] As noted by Appellant in its February 22, 2021 submission to the Town, Appellant's December 3, 2020 application for a waiver erroneously referenced a prior version of the CZO. *CR 36, 130*.

Since Appellant's 2015 application, the Town had amended the relevant provisions of its Zoning Ordinance. Specifically, under the 2020 Zoning Ordinance, unlike the 2015 CZO, all proposed multi-family uses require a CUP, and a waiver is granted as part of a CUP. *2020 Chichester Zoning Ordinance ("2020 CZO") § 2.04(E)(VIII)(11)*.[7] Additionally, the 2020 CZO requires satisfaction of the following density and acreage conditions:

> 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**, . . . developments of two or more units shall contain one contiguous buildable acre for the first unit and an additional one half (.5) contiguous for each additional unit.

2020 CZO § 2.04(E)(VIII)(11)(II)(b) (emphasis added). Unlike the 2015 CZO, under the 2020 CZO, an application for a multi-family housing development must satisfy both a contiguous acreage *and* a buildable acreage requirement.

After submitting its 2020 application and waiver request, Appellant's proposal came before the PB.

Planning Board Consideration of 2020 Application

The PB first considered Appellant's 2020 CUP application and waiver request at its January 7, 2021 meeting. *CR 59*. PB members reviewed the Town's waiver standards and commented that they "did not feel that the density of this project fit[s] with the master plan for the Town."

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[7] See Addendum to Appellee's Brief at p. 100. Also Available at https://www.chichesternh.org/sites/g/files/vyhlif2946/f/pages/2020_chichester_zoning_ordinance_final.pdf.

CR 59. Members also raised concerns with the potential precedent granting the waiver may set for future requests for density waivers. *CR 60*. Ultimately, the matter was tabled until the following PB meeting to allow Appellant an opportunity to provide more information to satisfy its burden under the waiver criteria. *CR 60*.

The PB again considered Appellant's 2020 CUP application and waiver request at its February 4, 2021 meeting. *CR 64-69*. PB members again raised concerns with the precedent granting Appellant's density waiver may set and commented that the density in the proposal is directly contradictory to the Town's master plan. *CR 67*. Members also disagreed with Appellant that there have been no changes since Appellant's prior applications. Specifically, PB members explained prior waivers (including Appellant's 2015 waiver containing a retail component) were granted as part of past proposals to encourage buildout of the Commercial Village Zoning District. *CR 67* (at the time the "PB was being encouraged to build up the commercial zone.") *CR 67*. However, given recent development in the Town, encouragement of development outside of the applicable density requirements was no longer needed. *CR 67*. As stated by Member Williams:

> Between then and now we have had a couple of significant changes. Then [in 2018] we were being encouraged to provide workforce housing. This project is no longer workforce housing and is now 55 and older and <u>since [2015] we have already approved another 55 and older development</u>...

CR 67 (emphasis added)*; see also CR 68* (Member Brehm stating 2015 "was a different time, and since then we have already added a 55+

community and now we are not getting the workforce housing.”). Appellant’s 2020 proposal also eliminated the retail component of its 2015 proposal – which is contrary to the stated goals of the Commercial Village Zoning District. *See Add. p. 95*, *2020 CZO § 2.04(E)(III)*(stating goal of Commercial Village Zone is to “create[] an attractive center for service, retail, and commercial opportunities.”) (emphasis added).

In addition, concerns regarding increased vehicle traffic and the ability to adequately provide municipal services were raised by the Town’s Fire Chief–noting that “this will impact the Town.” *CR 67-68* (*see also* comments from PB members reiterating the Fire Chief’s concerns, stating “it will be a big impact on the Town with 48 cars going in [and] out on RT 4 . . . It’s going to impact Fire, Police, and response times and the general service to the Town.”). Member Williams indicated he was prepared to deny the density waiver request under:

> criteria number 3 compromise the goals, objectives, standards, and requirements of the Commercial Village District and number 4 which is not reasonable or appropriate due to the scale and size of the project.

CR 68. In light of the PB’s concerns, Appellant requested the PB continue its consideration of the density waiver until its March 2021 meeting. *CR 69*. The PB granted Appellant’s request and tabled discussion of the density waiver. *CR 69*.

The PB again considered Appellant’s 2020 CUP application and density waiver request at its March 4, 2021 meeting. *CR 70-102*.

At the March 4, 2021 meeting, Member Bouchard commented “that the amount of people on that lot is just I think there’s it’s too much. So, I

think it is a safety issue." *CR 80*. Similarly, Member Healy stated "there is going to be a strain. Strain put on the fire department." *CR 81*. PB members' concerns regarding a strain on municipal services were based, in part, on information received from the Fire Chief discussing the possible impacts of Appellant's proposal. *CR 80*.[8]

PB members also discussed whether Appellant's proposal was in line with the Town's Master Plan. Since 2015, the Town has adopted a 2020 Master Plan, and as Member Brehm stated "no one says this fit[s] into the realm of the [2020] master plan." *CR 81*. Member Houle expanded on that point, stating:

> [I]t does not fit really into the master plan . . . what I heard from lots of people about all this project from the beginning was, this was not what they wanted to see . . . this is exactly what they didn't want to see was this kind of building . . . the little village feel like the heritage heights. That's the kind of thing the elderly people were interested in, in our town. And that is what they were looking for.

CR 82. Removing the retail component from the proposal moved the project further away from the village style development originally envisioned by the Town, through its master plan, as part of the Commercial Village Zone. *Add. p. 95*, *2020 CZO § 2.04(E)(III)*.

The PB further discussed whether the waiver request was "reasonable and appropriate due to the scale and size of the proposed

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[8] The PB's comments referenced information received from the Fire Chief in a letter dated February 3, 2021. *CR 80*. A copy of that letter, is included herein at *Add. p. 120*. In the letter, the Fire Chief mirrors the statement he previously made at the February 3, 2021 PB meeting – specifically that he expects the proposal to impact the Fire Department. *Add. p. 120*; *CR 67*.

project." *Add. p. 103, 2020 CZO § 2.04(E)(X)(6); CR 82-83.* As discussed throughout the process, the PB raised a concern with the significant amount of density in light of the applicable zoning restrictions, the potential safety and municipal service issues raised previously, and the effect the proposal would have on the aesthetics and stated goals of the Commercial Village Zone. Member Humphrey stated:

> I'm having a hard time wrapping my head around the number of units proposed on the acreage and unused acreage available, and how it's supposed to even remotely fit in with our zoning . . . this might be one of the most . . .extreme variants from variations from our current zoning.

CR 83. Member Williams reiterated the point that unlike the 2018 proposal, Appellant's 2020 proposal increased the units and removed the workforce housing, stating:

> [the 2018] projects involving either the 14 unit or 13 unit workforce housing. That resonated with me, because we got the benefit of the having workforce housing. And that was a big issue. . . I thought 13 or 14 units on that lot was pushing it. I think 24 clearly exceeds it. . . . There's a lot of activity going on that lot . . . you're completely forgetting the fact that there [is also] a strip mall in there as well. So it's a lot of activity on a very small parcel of land, and I do think it is unreasonable and inappropriate due to the scale and size of the proposed property.

CR 83. Member Humphrey provided his thoughts on the proposal, focusing on the intent of the goal of the Commercial Village Zone to provide a commercial village district aesthetic, stating "just circle back to the 13 acres . . . that's not to develop 13 acres but to keep some amount of open space and care in keeping with the rural character of Chichester. . .this

is the commercial village district . . ." *CR 84*. Member Brehm highlighted comments from residents of the Town had changes since 2015, stating:

> [Since 2015,] we did a lot of polling with the citizens of this town and the subject of density came up a lot. And we made a major effort not to rezone the town, or redistrict the town in such a way that the density would greatly increase too quickly, because the request of the citizens of this town was to keep the rural character. . . [and] we had envisioned that [the village district] would get a lot of little businesses.. .[and] because of the dynamics of Route 4 and how it's changed since 2015 . . . that is why this board is also looking at it differently than they looked at it in 2015.

CR 85.

After completing its discussion of the proposed waiver, the PB unanimously passed a motion denying Appellant's density waiver request as part of its CUP application based on Appellant's failure to satisfy the applicable 2020 CZO waiver criteria. *CR 87*. On March 8, 2021 Appellant was provided a notice of denial from the Town, stating:

> The waiver request for section 2.04.e.viii.11.b.i to permit a 24-unit multi-family development on 5.5 acres where 13 acres should be required was DENIED due to the Board finding that criterion number four, that the request was "reasonable and appropriate due to the scale and size of the proposed project," was not met. Because the waiver has been denied, the overall project is also denied.

CR 49.

<u>HAB's Decision Affirming the PB's Denial</u>

On March 15, 2021, Appellant filed its appeal with the HAB. After a hearing and submissions by the parties, the HAB issued an Order properly affirming the PB's decision to deny Appellant's waiver.

As the HAB correctly determined in its order, Appellant was informed at the December 3, 2020 PB hearing that its application was considered a new CUP application and not an amendment to any prior application. *Add. p. 47*. Although Appellant was aggrieved by the PB's December 3, 2020, Appellant failed to appeal that decision to the HAB or Superior Court within 30 days, and Appellant's arguments regarding the continuation of the 2015 waiver were not properly before the HAB. *Id*.

The HAB further correctly determined that, even in examining Appellant's waiver arguments, the doctrine of *stare decisis* does not bind the PB to approve a different waiver, submitted under a different version of the zoning ordinance, and based on different facts, five years after the PB approved a waiver as part of one of Appellant's prior proposals to the PB. *Add. p. 50*. The HAB commented that, not only does Appellant's argument discount evidence of changes in the Town since 2015, holding that a waiver continues into the future with no expiration date is bad policy. *Add. p. 51-52.*

The HAB also properly determined, in viewing the evidence and testimony before the PB, the PB's decision to deny Appellant's waiver was reasonable, and appropriately based on the record before the PB. *Add. p. 51-52*. The HAB correctly viewed Appellant's 2020 application as a new application, that should be examined as a separate and distinct request, rather than a continuation of a 2015 conceptual design proposal.

After the HAB denied Appellant's request for rehearing, Appellant filed this appeal.

SUMMARY OF THE ARGUMENT

Appellant did not timely raise its waiver continuation arguments to the HAB or Superior Court, and the arguments were not properly before the HAB. Both this Court's precedent and RSA 677:15 mandated that, as an aggrieved party, Appellant was required to seek reconsideration of (and ultimately appeal) the PB's determination that new waivers were required. Because Appellant did not do so, its waiver continuation arguments are not properly before this Court.

The doctrine of *stare decisis* is inapplicable to this matter. *Stare decisis* is the concept that prior legal rulings or concepts should be followed by subsequent courts, and this Court has never held it applies in the context of planning board decisions. Appellant's attempt to use *stare decisis* to establish a non-expiring vested right in its 2015 waiver is inconsistent with this Court's prior holdings and bad policy.

Appellant's discussion of the subsequent application doctrine is also unavailing, as the doctrine applies to prior denied applications, not prior approvals. Applying the subsequent application doctrine to the facts here is inconsistent with planning board duties, goals, and practices. Moreover, the subsequent application doctrine would not require the PB to adhere to the 2015 waiver because Appellant's 2020 application is not "substantially the same" as its 2015 application, and there have been changes in circumstances or conditions since 2015.

The PB's decision to deny Appellant's 2020 waiver request was lawful, reasonable, and supported by evidence in the record.

ARGUMENT

I. Standard of Review.

This Court's "review in zoning cases is limited." *Harrington v. Town of Warner*, 152 N.H. 74, 77 (2005). RSA 541:13 imposes upon a party appealing a HAB decision the burden of showing that the order "is clearly unreasonable or unlawful." The HAB's finding "shall be deemed to be *prima facie* lawful and reasonable; and the order [] 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, that such order is unjust or unreasonable." *Id*.

Decision of the PB likewise are presumed valid, and the PB's "findings are deemed *prima facie* lawful and reasonable." *CBDA Dev. v. Town of Thornton*, 168 N.H. 715, 724 (2016). Reviewing courts do not "substitute [their] judgment for that of the [planning] board." *Cherry v. Town of Hampton Falls*, 150 N.H. 720, 724 (2004). The court's role "is not to determine whether it agrees with the planning board's findings, but to determine whether there is evidence upon which they could have been reasonably based." *Summa Humma Enters., LLC v. Town of Tilton*, 151 N.H. 75, 79 (2004). "Where <u>shome</u> evidence in the record supports the [PB]'s decision, the [HAB and courts] <u>must</u> afford deference to the [PB]." *Farrar v. City of Keene,* 158 N.H. 684, 690 (2009) (emphasis added). Appellant has "the burden of demonstrating reversible error." *Gallo v. Traina*, 166 N.H. 737, 740 (2014).

II. **<u>Appellant's Arguments in Support of the Continued Application of the 2015 Waiver Were Not Properly Before the HAB and Are Not Properly Before This Court</u>.**

Throughout its brief, Appellant's arguments focus solely on the applicability of its 2015 waiver to its 2020 application. Appellant raises several arguments in support of its position that the PB must adhere to the 2015 waiver. Specifically, Appellant argues the PB must follow the 2015 waiver because of (1) the *stare decisis* doctrine (*Appellant's Brief, pp. 18-24*), (2) a lack of changes in circumstances between 2015 and 2020 (*Appellant's Brief, pp. 24-33*), and (3) the non-expiration of the 2015 waiver (*Appellant's Brief, pp. 33-34*).

However, as the HAB correctly noted, Appellant did not timely raise its waiver continuation arguments to the HAB or Superior Court, and the arguments were not properly before the HAB. *Add. p. 51*.

This Court has stated when a planning board determines an application is incomplete, the superior court has jurisdiction to review the planning board's decision via a petition for writ of certiorari. *DHB, Inc. v. Town of Pembroke*, 152 N.H. 314, 318 (2005). In *DHB, Inc.* the Court explained, when allegations arise that the planning board incorrectly denied an application as incomplete, "a petition for writ of certiorari must apply; otherwise, an applicant could be kept in legal limbo, as a planning board could exercise an unchallenged veto . . . by simply refusing to accept it." *Id*. *See also* RSA 679:5, VI.

Accordingly, an applicant must seek reconsideration and certiorari review of a planning board's decision determining an application is incomplete in order to exhaust the remedies available to him and perfect an

appeal. *See Hannigan v. City of Concord*, 144 N.H. 68, 73 (1999) (on appeal the petitioner argued it should not have been required to apply for a special exception as the City instructed. In refusing to consider the issue, this Court held appellant "voluntarily filed an application . . .[and] did not challenge the position of the [City] requiring a special exception, and did not appeal the decision of the [] planning board concerning the special exception. Accordingly, that argument is deemed waived."). The purpose of this requirement is "to give the local authorities an opportunity to correct any error . . . or to remedy any unreasonable hardship imposed." *See McQuillin Municipal Corporations Vol. 8A (3rd Ed)*, § 25:307.

Appellant's original 2020 application came before the PB on December 3, 2020. *CR 55*. At the December 3, 2020 PB meeting, Appellant was informed his proposal needed to be submitted as a new application that included a new waiver request under the 2020 CZO. *CR 55*. After a discussion, the PB voted to deny the submitted application as incomplete, and informed Appellant a new CUP application and waiver request was required. *CR 55*. Rather than request reconsideration of (or appeal) that decision, Appellant submitted a new application and new waiver request to the PB. To the extent Appellant disagreed with the PB's determination that its application was incomplete, the PB was not bound by the 2015 waiver, and a new waiver was needed, Appellant needed to request a rehearing with the PB and, ultimately, appeal the decision via certiorari.

Moreover, the applicable zoning ordinance states "any appeal from the Planning Board decision shall be filed in accordance with RSA 677:15." *2020 CZO § 2.04(E)(I); Add. p. 94.* RSA 677:15, I requires the appeal of

"any decision of the plaining board" to be made to the Superior Court within 30 days of the written decision (unless the issue is appealable to the Zoning Board of Adjustment).[9] (emphasis added). Here, a written notice of the Town's decision requiring Appellant to submit a new waiver request was sent to Appellant on December 7, 2020. *CR 48*. Appellant failed to appeal the PB's determination that a new waiver application was needed within 30 days as required by RSA 677:15, I.

Accordingly, because Appellant failed to request reconsideration or properly appeal the PB's December 3, 2020 decision, the questions of whether Appellant's 2020 proposal required a new waiver application, or whether the PB must adhere to the 2015 waiver, were not properly before the HAB and are not properly before this Court.

III. The HAB's Order Correctly Affirmed the PB's Decision Denying Appellant's Waiver Request.

The crux of Appellant's brief focuses on arguing that, despite submitting a new application 5 years after a previous waiver was granted

[9] Ordinarily, a planning board's decision regarding the application or interpretation of a zoning ordinance is appealable to the Zoning Board of Adjustment under RSA 676:5, III. However, if a town has delegate jurisdiction of an "innovative land use control" through its zoning ordinance to the planning board, "any decisions or determination" of the planning board regarding the innovative land use control is appealable to the superior court as outlined in RSA 677:15. *See* RSA 676:5, III. As noted above, the RSA 677:15 process requires a petition within 30 days of "any" planning board decision. Here, it is undisputed the zoning ordinance at issue was an "innovative land use control" as defined in RSA 674:21 and referenced in RSA 676:5, III. *See 2020 CZO § 2.04(E)(X)(7); Add. p. 103; see also Appellant's Brief, p. 11 n. 3*.

(and a change in the applicable zoning ordinance and after a 2018 proposal was finalized and recorded), the PB was required to adhere to the 2015 waiver. *Appellant's Brief, pp. 18-34*. Appellant's arguments are flawed for a variety of reasons. First, the doctrine of *stare decisis* is inapplicable to this matter. Second, Appellant's attempt to foist the subsequent-application doctrine onto the PB is without merit, and, alternatively, the 2020 application proposes a substantially different project and there have been significant changes since Appellant's 2015 waiver was granted. Finally, the 2015 waiver does not continue to apply without any expiration, and Appellant's assertion to the contrary is unsupported by law and is bad policy.

A. *Stare decisis* Doctrine Does Not Apply.

As this Court has explained, the doctrine of *stare decisis* is the concept that prior legal rulings or concepts should be followed by subsequent courts. *See Jacobs v. Dir., N.H. DMV*, 149 N.H. 502, 504 (2003) ("the doctrine of *stare decisis* demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will . . .") (emphasis added). Accordingly, when undertaking a *stare decisis* analysis, this Court focuses on a particular legal rule or concept, not the factual outcome of a prior case. *See State v. Quintero*, 162 N.H. 526, 532-33 (2011) (overview of *stare decisis* standards used to determine whether precedent should be overruled.).

This Court has never held 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,

752 (2017). In *Dartmouth Corporation of Alpha Delta* this court "assumed without deciding" that the principles of *stare decisis* applied to the zoning board of adjustment. *Id*. The issue raised on appeal was whether the zoning board of adjustment's decision in a prior case regarding the interpretation of language in the zoning ordinance, compelled the ZBA to rule in the appellant's favor in the pending case. *Id*. The Court rejected the appellant's arguments, stating the ZBA's prior decision "does not stand for the proposition that a special exception must be obtained . . . under the zoning ordinance and thereby become subject to the "in conjunction with" requirement" of the ordinance. *Id*. at 752-53. Accordingly, in applying principles of *stare decisis* in the case, this Court considered whether the ZBA's prior decision mandated that the ZBA similarly interpret the applicable provision of the zoning ordinance in the case pending before it. *Id*.

The Court's discussion of *stare decisis* in *Dartmouth Corporation of Alpha Delta* did not alter the long-understood purpose of the doctrine – requiring judicial decision makers to honor governing legal standards and rules unless specific requirements are satisfied. *See Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 159 N.H. 725, 731 (2010). The doctrine of *stare decisis* does not compel courts or quasi-judicial bodies to make certain findings or grant new application requests—rather it requires judicial decision makers to follow applicable legal precedent. *See McQuillin Municipal Corporations Vol. 8 (3rd Ed.)*, § 25:179.43 ("precedents are not binding relative to the grant of exceptions or variances; each case is to be determined on its own merits.").

Here, Appellant does not argue the PB failed to follow legal precedent or rules. Rather, Appellant argues the PB was required to adhere to a 2015 waiver because no changes occurred in the 5 years following approval of the 2015 waiver. Appellant's argument is not a "*stare decisis*" argument. To the contrary, it is better understood as an argument that Appellant should be afforded a non-expiring vested right in its 2015 waiver despite a subsequent 2018 waiver request (which was finalized, approved, and recorded), and subsequent changes to the Town. As the HAB correctly noted in its Order, planning board decisions are focused on current circumstances and regulations, and plans are not developed or considered in a vacuum. *Add. pp. 51-52.*

Notably, this Court has stated contemplated conceptual plans, designs, or land use mechanisms are not entitled to vested right status. *Wolfeboro (Planning Bd.) v. Smith*, 131 N.H. 449, 455 (1989) ("a landowner, merely by preparing to engage in a gravel operation and undertaking a few self-serving acts of a very limited nature, cannot be said to have thrown a protective mantel . . . over the entire parcel of land."); *see also Wunderlich v. Webster,* 117 N.H. 283, 285-86 (1977) (a "mere contemplated use is not an actual use of land which is protected by the courts as a vested right"); *see also* RSA 674:33, I-a(a) (variances from zoning ordinances valid if exercised within 2 years from date of approval).[10]

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[10] In its brief, Appellant suggests the equitable principles governing variances are "equally applicable" to the waiver at issue here. *Appellant's Brief, p. 34*, *n. 8*. Had Appellant sought a variance in 2015, the variance would no longer be valid as a matter of law. RSA 674:33, I-a(a).

This reasoning is consistent with other jurisdictions, who have similarly held conditional use permits do not establish vested rights, and are not protected against revocation by a municipal board, where "incurrence of obligations under the permit have been minor, minimal, or relatively insignificant" and consideration is given to "whether actual development has begun or whether the land was physically used for the development contemplated." *McQuillin Municipal Corporations Vol. 8 (3rd Ed.)*, § 25:179.26. In New Hampshire, the Legislature has enacted RSA 674:39 to recognize this concept. Under RSA 674:39, site plan applications submitted to the planning board are provided a 5-year tolling period during which time approved applications are exempt from subsequent ordinance and zoning changes. RSA 674:39, I. However, to utilize the 5-year tolling period, developers must, among other requirements, begin "active and substantial development . . . within 24 months after the date of [site plan] approval." RSA 674:39, I(a).

Here, there is no dispute Appellant did not start active and substantial development of its 2015 project within 24 months of an approved site plan, and the tolling protections that were available to Appellant (had Appellant taken steps to finalize its 2015 application) do not apply. Notably, a separate application and site plan contemplating a different use was submitted, finalized, and recorded in 2018. Appellant had the opportunity to avail itself of the tolling protections in RSA 674:39 by obtaining a finalized site plan in 2015. Had Appellant done so, it would have minimized the risks associated with ordinance and zoning changes in the Town. However, Appellant chose not to.

Accordingly, the doctrine of *stare decisis* is in applicable to this matter, and Appellant's attempt to assert the doctrine in support of its argument that it obtained a vested right in its 2015 waiver is without merit.[11]

B. The *Fisher D*octrine Does Not Compel the Planning Board to Adhere to the 2015 Waiver.

In discussing the subsequent application doctrine, Appellant suggest this Court's reasoning in *Fisher* applies to this case because, although Appellant's 2015 application was approved rather than denied, "the passage of time . . . does not establish a material change in circumstances," and "the purpose of the 2015 waiver was to bring finality to the . . . project." *Appellant's Brief, pp. 23-24.* From this, Appellant argues the PB was required to approve its 2020 waiver application under the *Fisher* doctrine because the 2020 application requests a lower number of housing units than the conceptual design in 2015. Appellant's argument is misguided.

Under *Fisher*:

[11] Appellant relies heavily on this Court's analysis in *Batakis v. Town of Belmont*, 135 N.H. 595 (1992), and the Superior Court case *Harris Pond Development Corp. v. Town of Merrimack*, Docket No. 87-E-00525 (Hillsborough County Super. Ct., Mar. 23, 1988), in support of its *stare decisis* argument. However, in both *Batakis* and *Harris Pond Development Corp.* the local land use boards were considering the exact same application they had recently considered for review as another step in the review process. *See Batakis*, 135 N.H. at 596; *Add. p. 51.* As the HAB noted, *Batakis* and *Harris Pond Development Corp.* are not applicable to this case, where Appellant has submitted three different applications for development (one of which was finalized and recorded) since 2015. *Add. p. 51.*

> It is well settled that a [planning board], having rejected one [] application, may not review a subsequent application absent a material change of circumstances affecting the merits of the application. The rule in *Fisher* is consistent with the majority rule that a new application for administrative relief or development may be considered by a board if there is a substantial change in . . . the circumstances or the conditions relevant to the application.

Brandt Dev. Co. v. City of Somersworth, 162 N.H. 553, 556 (2011) (emphasis added). The doctrine applies when a prior application has been denied, not granted. When reviewing subsequent applications "the applicant bears the burden to demonstrate a material change in circumstances," and if that burden is satisfied, the local board determines "whether full consideration [of the subsequent application] is therefore required." *Id.* at 556-557. The *Fisher* subsequent application doctrine does not mandate planning boards approve subsequent applications. Rather, the *Fisher* doctrine stands for the opposite proposition – if a material change in circumstances has occurred, the subsequent application can be considered on its merits as a new application.

This Court has never recognized a "reverse-subsequent application doctrine" that would compel local land use boards to adhere to previously granted variances, waivers, or conditional use permits. To the contrary, this Court has "recognized the inherent authority of local land use boards to reverse themselves at any time prior to final decision if the interests of justice so require." *New Hampshire Alpha of SAE Trust v. Town of Hanover*, 172 N.H. 69, 77 (2019).

As noted by the HAB, a central goal of a planning board is to guide development consistent with current circumstances and regulations. *Add. p.*

52; See RSA 674:1, I. Allowing a waiver to continue without expiration that was granted in 2015 as part of a preliminary conceptual presentation, and where no final approvals were obtained by Appellant, cuts against a planning board's goals and is inconsistent with the *Fisher* doctrine's focus on finality. *See CBDA Dev.*, 168 N.H. at 721 ("finality is essential to planning board proceedings."). The emphasis on finality under the subsequent application doctrine is particularly pronounced here, where Appellant is attempting to assert its 2015 waiver after a 2018 waiver was granted, application approved, and site plan recorded. At the time Appellant's 2018 application was approved a different elderly housing development had been permitted, the Town realized a need for workforce housing, was enthusiastic about Appellant's 2018 application, and recognized the 2018 proposal furthered the Town's master plan.

Rather than move forward with its 2018 proposal, Appellant, in 2020, sought to change its development for a third time and transition back to elderly housing. Appellant's back-and-forth process with the PB and refocus on its 2015 waiver has not provided "finality" as suggested by Appellant. To the contrary, the PB engaged in good faith with Appellant to approve a desirable project in 2018 based on the understanding that the 2018 project was finalized. Accordingly, Appellant's attempt to assert *Fisher* as a basis for requiring the PB to approve its 2020 waiver is without merit.

C. Even if the *Fisher* Doctrine Applies, the HAB Correctly Determined the Planning Board's Decision Was Lawful and Reasonable.

If this Court determines the *Fisher* subsequent application doctrine applies to previously granted (as opposed to denied) application, Appellant's argument that the PB failed to articulate a valid basis for reaching a different decision is unavailing.

1. 2020 application is not "substantially the same" as 2015 application.

In examining the subsequent application doctrine, the first question to consider is whether the subsequent application was "substantially the same" as the original application. *Fisher v. Dover*, 120 N.H. 187, 188 (1980); *see Driscoll v. Gheewalla*, 441 A.2d 1023, 1027 (Me. 1982) (citing *Fisher* for the proposition that the subsequent application doctrine applies "only when the subsequent application . . . seeks substantially the same relief as that sought in the previous one.").

Here, Appellant's 2015 application is not "substantially similar" to its 2020 application. Appellant's 2020 application contemplates a different project footprint, different number of units, different density, and different building configuration. *Appellant's Brief, p. 32*. Notably, the 2020 proposal also eliminated the 2015 proposal for retail—which removed an articulated development goal of the Commercial Village Zoning District. *See Add. p. 95*, *2020 CZO § 2.04(E)(III).*

The certified record reflects the PB considered this information and determined Appellant's 2020 application was not "substantially similar" to its 2015 application. *See CR 67* (PB members stating "this is not the same

project [as 2015]" and "this is a brand-new project, the Board prior took the waivers and granted them on their merits at that time.").

Accordingly, because Appellant's 2020 application was not "substantially similar" to its 2015 application, the subsequent application doctrine does not apply.

2. Record contains evidence of a change in circumstances or conditions relevant to the application.

Under the *Fisher* doctrine, if an applicant puts forth a substantially similar application (which, here, the PB correctly noted Appellant did not), the next question is whether "there is a substantial change in the circumstances or the conditions relevant to the application." *CBDA Dev.*, 168 N.H. at 723. Here, the PB articulated a number of substantial changes in circumstances and conditions between 2015 and 2020, including the following:

(1) Subsequent elderly housing developments had been developed since 2015 and additional elderly housing units are no longer needed. *CR 67*;

(2) Appellant sought to develop workforce housing in 2018 (a need of the community) and obtained final approval. *CR 213*. However, Appellant's 2020 proposal transitioned away from workforce housing and no longer met that need. *CR 67*;

(3) At the time the Commercial Village Zoning District was created in 2015, the Town envisioned residential development "would be slowing down, and we would get a lot of little businesses. . ." *CR 85*. Appellant's 2020 proposal eliminated retail (a central goal of the Commercial Village Zone).;

(4) The dynamics of Route 4 have changed since 2015, and the Town made "major efforts not to . . . greatly increase [density] too quickly, because [of] the request of the citizens..." *CR 85*.

(5) The Fire Chief testified the increased density will impact current 2020 operations in the Town. *CR 67;*

(6) Since 2015, the Town conducted Town-wide polling to determine the direction of Town zoning and the master plan. Town residents voiced a strong preference to limit density and promote the Town's rural character. *CR 85*;

(7) Since 2015, the Town has adopted a 2020 Master Plan, that specifically emphasizes, as a goal, to "continue to Promote Chichester's residential areas and rural character and support[] the preservation of Chichester's agricultural and natural resources," including maintaining a "traditional New England character of a smaller village area" within the Town's Commercial Village Zoning District. *2020 Master Plan: Chapter 10 (Existing and Future Land Use), pp. 10.13-10.14*[12]*;* and

(8) Since 2015, the Town amended the zoning ordinance at issue in this matter, resulting in a requirement that more rigorous criteria be satisfied before a CUP and waiver are granted. Unlike the 2020 ordinance, the applicable zoning ordinance Appellant sought a waiver from in 2015

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[12] See Addendum to Appellee's Brief at pp. 117-118. Also available at https://www.chichesternh.org/sites/g/files/vyhlif2946/f/pages/chichester_master_plan_existing_and_future_land_use.pdf. The Master Plan recognizes the potential for multi-family housing within the Commercial-Industrial Multi-Family Zoning District, however that same goal does not apply to the Commercial Village Zoning District—which is the applicable zoning district here. *Add. p. 117, 2020 Master Plan: Chapter 10 (Existing and Future Land Use), p. 10.13.* Under the Master Plan, the Commercial Village Zoning District is designed to promote "uses at a scale that works with Chichester's community character." Specifically, it seeks to promote the ""traditional New England Character" of a smaller village area." *2020 Master Plan: Chapter 10 (Existing and Future Land Use), p. 10.14. Add. p. 118.*

> (*2015 CZO § 2.04(F)(VIII)(11)(b)*) did not contain any language regarding minimum "contiguous buildable acre" requirements per unit, and did not mandate the need for a CUP as part of a multi-family use development.

As the HAB correctly determined, the changes discussed by the PB constitute a lawful and reasonable basis to deny Appellant's waiver. *Add. p. 49*. Notably, this Court has previously held, in the context of the subsequent application doctrine, when an applicable statute or rule (such as an ordinance) has changed, there "have been material changes since the prior application [because] the [ordinance] itself has been modified." *Appeal of Town of Seabrook*, 163 N.H. 635, 655 (2012).

Accordingly, the PB's reliance on these concerns, as well as corresponding evidence based on circumstances at the time the application was submitted in 2020, constituted a lawful, reasonable basis to deny Appellant's application. *See Farrar*, 158 N.H. at 690 ("where some evidence in the record supports [a planning board's] decision . . . [courts] must afford deference . . .").

D. Appellant's 2015 Waiver Does Not Continue in Perpetuity.

In its brief, Appellant argues, even if the PB is not bound by the 2015 waiver, the 2015 waiver still applies because it has no expiration date and Appellant was granted an undefined vested right in the waiver. *Appellant's Brief, pp. 33-34*. Appellant's argument is without merit for similar reasons as its other arguments.

As previously noted, to the extend Appellant argues the "equitable principles" of a variance suggest the PB is bound by the 2015 waiver, a

variance granted in 2015 would no longer be valid. RSA 674:33, I-a(a). Had Appellant been granted a variance by the ZBA in 2015, and had Appellant not acted on its variance within two years (and instead submitted a different variance in 2018 for a different project), its 2015 variance would unquestionable be invalid. Simply put, Appellant's attempt to argue its waiver remains valid, based on equitable variance principal, is unpersuasive in light of the fact a variance would not be valid in this scenario.

Moreover, Appellant's argument on this point is bad policy. As the HAB correctly noted, planning board decisions are focused on current circumstances and regulations, and plans are not developed or considered in a vacuum. *Add. p. 52.* Appellant's 2015 application was never considered final, and was "more akin conceptual discussion, which is not binding . . ." *Add. p. 50*; *see also CR 269* (Appellant's representative explaining during the 2015 process that "the final design and size of the building will be dictated by the size of the [septic] system that can be designed upon the lot."). Appellant's argument is further inconsistent with this Court's emphasis on finality of local board decisions, and prior holdings that contemplated uses are not afforded vested rights. *CBDA Dev.*, 168 N.H. at 721; *Wolfeboro (Planning Bd.)*, 131 N.H. at 455.

In addition, the applicable zoning ordinance and meeting minutes clarify Appellant's 2015 waiver was one aspect of its 2015 project, and not an independent land use mechanism. The 2015 ordinance explains waivers are appropriate only if the PB finds, "a development" is better served by not adhering to strict requirements, and the waiver is reasonable and appropriate given the scope of "the proposed project." *2015 CZO § 2.04(F)(XIII).* The "development" and "proposed project" associated with

Appellant's 2015 waiver request was Appellant's 2015 proposed project. This fact is reflected in the 2015 minutes. *CR 271* (". . . the above waivers are granted on the basis of the project as a whole.")

Accordingly, Appellant's alternative argument that the 2015 waiver continues to apply even if the PB was not bound by the 2015 waiver is without merit.

IV. Appellant Does Not Allege the Record Lacks Evidence Supporting the Planning Board's Denial, and the Planning Board's Denial was Lawful and Reasonable.

As discussed above, Appellant's brief focuses on arguing the 2015 waiver continues to apply, and the PB was bound by the 2015 waiver under the doctrine of *stare decisis* and the subsequent application doctrine. However, Appellant does not argue (and did not argue to the HAB), that the PB's basis for denying its application were unreasonable or unlawful when viewed independently. Stated another way, if the Court determines the *stare decisis* and subsequent application doctrines do not apply,[13] then Appellant has not challenged the reasonableness of the PB's basis for denying the waiver. The certified record is replete with evidence demonstrating the PB's decision to deny Appellant's waiver was lawful and reasonable.

From the start of Appellant's 2020 application, the PB raised concerns with the density of the project. *CR 59*. The Town's Fire Chief

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[13] Or the Court determines the *Fisher* doctrine applies, put that evidence exists in the record that the PB determined (1) the 2020 proposal was not "substantially similar" to the 2015 proposal, or that (2) there has been a "change in circumstances or conditions" since 2015.

specifically testified that the increased density will impact the Town. *CR 67*. Further comments were made that the proposal would increase traffic and impact the Town's municipal services. CR 81. PB members also emphasized that the proposal does not fit into the goals of the 2020 master plan, the proposal does not further the "village feel" of the Commercial Village District Zone, and does not promote the rural village character aesthetic of the zoning district. *CR 82*.

The New Hampshire Supreme Court has specially held that the reduction of density and "preventing overcrowding may be a legitimate purpose of a zoning ordinance . . . [and] a municipality may prohibit two-family dwellings and cluster developments to prevent overcrowding of, and undue concentration of population . . ." *Perreault v. Town of New Hampton*, 171 N.H. 183, 188 (2018); *see also* RSA 674:17, I(e) (listing "prevent[ing] the overcrowding of land" as a statutory purpose of zoning ordinances).

For these reasons, Appellant has not challenged the PB's underlying reasoning in support of its decision, and the PB's decision to deny Appellant's waiver was lawful and reasonable.

CONCLUSION

For the reasons stated above, the Court should affirm the HAB's Order.

REQUEST FOR ORAL ARGUMENT

The Town requests 15 minutes for oral argument, to be presented by Nathan C. Midolo.

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

I hereby certify that the within brief complies with Sup. Ct. R. 26 (7) and contains 9409 words, excluding the cover page, Table of Contents, Table of Authorities, Statutes, Rules, and Addendum.

Respectfully submitted,
Town of Chichester

By its Attorneys,
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Date: May 12, 2022

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing Brief and Appendix of the Appellee has been forwarded, this day, upon all parties via the Supreme Court's electronic filing File and Serve system.

/s/ Nathan C. Midolo
Nathan C. Midolo