STATE OF NEW HAMPSHIRE

SUPREME COURT

NO. 2021-0570

APPEAL OF TOWN OF AMHERST

BRIEF OF APPELLANT

Town of Amherst

APPEAL FROM DECISION OF
New Hampshire Housing Appeals Board

CASE NO. PBA-2021-08

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QUESTIONS FOR REVIEW

1. Did the Housing Appeals Board (the "HAB") err in vacating and remanding the Amherst Planning Board's (the "Board") denial of the

Applicant's Subdivision Application (the "SUBDIVISION APPLICATION") by holding that the Board unreasonably denied the SUBDIVISION APPLICATION based on Applicant's continued and uncontroverted failure to comply with the so-called elderly housing law (42 U.S.C. § 3607 (b)(2)(B) and (C); NH RSA 354-A:15)?

2. Did the HAB err in vacating and remanding the Board's denial of the Applicant's SUBDIVISION APPLICATION by incorrectly holding the Town of Amherst's (the "Town") Planned Residential Development ordinance, Section 4.17, has no bearing on the final determination as to density at the SUBDIVISION APPLICATION phase?

3. Did the HAB err in vacating and remanding the Board's denial of the Applicant's SUBDIVISION APPLICATION by improperly interpreting the Town's *Integrated Innovative Housing Ordinance* (the "IIHO"), Section 4.16 (*now repealed*), as lacking adequate standards for "rural character," despite the fact that the IIHO refers to the Town's Subdivision regulations, Section 201.2, that include a list of factors to consider that pertain to "rural character?"

4. Did the HAB err in vacating and remanding the Board's denial of the Applicant's SUBDIVISION APPLICATION by substituting its views for the Board's, thereby exceeding its authorized scope of review, which is not whether the HAB would find as the Board did, but rather whether the evidence reasonably supports the Board's findings? *See* Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992).

STATEMENT OF THE CASE

By way of a Notice of Decision issued on April 13, 2021, the Town of Amherst (Planning Board) *denied* a Subdivision Application filed by Migrela Realty Trust II and GAM Realty Trust for a proposed 49 unit Planned Residential Development under the now repealed Integrated Innovated Housing Ordinance.

The Applicant timely appealed the Town's denial to the Housing Appeals Board (the "HAB") on April 29, 2021.

After a Hearing before the HAB, and Hearing Memoranda were submitted by both parties, the HAB found in favor of the Applicant holding that the requirement of maintaining 'rural aesthetic' was not offended and

VACATED the Board's decision and REMANDED the matter back to the Board to engage in a collaborative discussion regarding the rules of the proposed age-restricted housing.

The Appellant filed a timely *Motion for Reconsideration* raising several factual errors and flawed legal conclusions made by the HAB, such as that the Board's denial was not based on how many age-restricted units were planned but rather the denial was based on the Applicant's continued failure to correctly adhere to the plain language of the federal and state age-restricted housing laws.

The Appellee then Answered the aforementioned *Motion for Reconsideration* with a brief but timely response, which was followed by a second Order from the HAB DENYING the aforementioned Motion.

The Appellant then filed a timely Rule 10 appeal to this Honorable Court on or about January 11, 2022, which was accepted by this Honorable Court by way of an Order issued on February 17, 2022.

STATEMENT OF FACTS

This case involves an appeal by the plaintiff, Migrela Realty Trust II, *et. al*. (the "*Applicant,*" *Migrela*, or "*Appellee*"), who was denied a

Subdivision Application, on April 13, 2021, (*Certified Record ("CR") at 1772*) by the Appellant, Town of Amherst Planning Board (the "*Town,*" the "*Board," or "Appellant"*). That application was the second step of a two-step process for obtaining higher than normal housing densities under the Town's Zoning Ordinance Section 4.16, known as the *Innovative Integrated Housing Ordinance* ("IIHO").

The first step, per Section 3.18.C.1.b, of the Town's Zoning Ordinance required a *Conditional Use Permit* ("CUP") proposal under the now repealed IIHO for an increased density cap of units. CR at 284.

Section 4.16 (A), of the IIHO states, "the IIHO is to provide for and facilitate alternative approaches to development within the Town of Amherst, as provided in NH RSA 674:21 while ***protecting and preserving the rural aesthetic of the Town***." App. II at 16. (*emphasis added*).

The Applicant's IIHO proposal was based, in part, by providing for fourteen (14) units of age-restricted 65+ housing ("*housing for older persons (HOP)," "age-restricted," or "elderly housing*"). CR at 1206 (Lines 339-40) (*the Town legislated the more restrictive age of 65+, as opposed to 62+, per its Ordinance*).

On January 4, 2019, the Applicant was awarded a CUP for an increased density cap of "up to 54" units. CR at 284. As the first step of the two-step process, the CUP approval was 'permission' of sorts to prepare an application with a proposed density in excess of that which is allowed under zoning, up to the specified number.

For the second step of the process, at issue in this appeal, the Applicant proposed a *Subdivision & Non-Residential Site Plan* for an 'up to' 54-Unit condominium style development, which the Town voted to accept the Subdivision Application as complete on November 4, 2020. CR at 1202.

During the review of the Subdivision Application, the Applicant revised its requested density downward to meet the requirements of various town and state requirements. For example, the Applicant reduced its request to 52 units (*CR at 1556 (lines 61-67)*) in order to comply with storm water/wetland buffer requirements, and then reduced it again to 49 units (*CR at 1776 (lines 73-74)*) in an attempt to address concerns about the rural appearance of the proposed development.

The Planning Board expressed concerns about the Applicant's compliance with state and federal elderly housing requirements throughout

the application review process. At the time the Subdivision Application was first filed, there were no elderly housing provisions in the proposed condominium documents or anything relative to enforcement of such provisions. CR at 1419 (lines 227-29).

Elderly housing concerns were raised by abutters' counsel at the November 4, 2020, meeting. CR at 1209 (line 436-44). Attorney Daniel Muller submitted a letter arguing that the proposed application was not consistent with the federal law regarding a "housing community." CR at 1157. Board Member Brew also asked at this meeting if persons under 65+ would be allowed to live in the housing units and whether 65+ housing units would always be 65+ because of deed restrictions. CR at 1208 (lines 414).

The Chair noted at the December 16, 2020, meeting that the Board was awaiting counsel's advice on elderly housing issues. CR at (line 419-21).

At the meeting of January 20, 2021, the Applicant was questioned on whether all units needed to be 65+, and whether all occupants of a dwelling unit needed to be 65+. CR at 1420 (lines 207-15). The Applicant's representative stated he would look into the issue, id., and further stated that

there would be rules and regulations to keep the restricted housing within the correct age bracket. CR at 1421 (line 225).

A single page document, *Enforcement and Admin of Housing for Older Persons Covenants* was received on February 24, 2021, that discussed surveys of age compliance but referenced non-existent sections of condominium documents. CR at 1440. The first set of condominium documents themselves had no language addressing restrictions applicable to 55+ (or 65+) units. CR at 827. The Applicant was questioned extensively on these changes. *See generally the minutes of March 3, 2021,* CR at 1556 (lines 146-47, 198-203, 254-56, and 309).

In connection with the March 3, 2021, meeting the Applicant switched the entire development to 55+, with 10 units restricted to 65+. CR at 1556 (lines 74-77).

The Chair made clear that the Board had <u>not</u> directed the Applicant to make any change to 55+ housing, but had raised concerns to the Applicant about whether the project, as proposed, complied with applicable federal and state elderly housing laws. CR at 1562 (line 320-27).

An initial *Motion to Continue* the application failed, CR at 1564 (line 393), and was followed by a *Motion to Deny* the application, which was proposed and seconded, but was withdrawn after the Applicant stated they wanted counsel to be available to address some of the issues raised. CR at 1564 (line 412). A second *Motion to Continue* passed to allow counsel to participate. CR at 1566 (line 485).

At the final meeting on April 7, 2021, the Applicant, again, altered the elderly housing mix for his plan back to a mix of 14 65+ age-restricted units and 35 unrestricted units. CR at 1776 (lines 62-80).

It was at the April 7 meeting that the Applicant provided condominium documents (*CR at 1776 (lines 66-67)*) addressing the age-restricted units. CR at 1637. In particular, it provided a draft entitled "*DECLARATION OF COVENANTS, EASEMENTS, AND RESTRICTIONS"* (*the "Declaration"*), wherein Section 6 addressed elderly housing restrictions. Id.

Despite the Declaration's proclamation that it intends to comply with applicable law, it ignored the requirements of federal and state law by continuing to incorrectly apply the 55+ standards of said law to those of the 65+ units actually proposed. Id. Applying the 55+ standard to that of 65+,

violates federal and state law in that each 65+ housing unit must be occupied "***solely***" by persons 65+ or older. NH RSA 354-A:15.

The Applicant instead proposed, that "[e]ach Senior Housing Unit must be occupied by at least one person who is sixty-five (65) years of age or older," which, again, is mistakenly applying the law relative to 55+ housing being applied to that of 65+. (CR at 1637). Put simply, the Applicant's proposal would have allowed some occupants younger than 65+ to occupy an age-restricted unit, in violation of both federal and state law, and further contrary to the Town's Zoning Ordinance.

Lastly, throughout the Certified Record, there are various citizens' comments submitted to the Town expressing concerns that the proposed project does not keep with the rural character of the Town as required by Section 4.16 (A) of its Ordinance because of the density being proposed. (*See generally the public comments of the Meeting Minutes throughout the Certified Record*). For clarity, the discussion between Board members provides a dialog of what "*rural*" means to each Board member with the majority holding that the proposed project, at 49 units, would create a more *urban* environment. (CR at 1786).

The Board moved to deny the Subdivision on April 7, 2021, (*CR at 1785 beginning at line 451*), citing, *inter alia*, that the application does not comply with the elderly housing laws by allowing younger persons to reside in a 65+ restricted housing unit and, furthermore, there was only one condominium association for the entire project when there should have been a separate association for the 65+ individuals. Id. Additionally, the Board took issue with the fact that the condominium documents can be amended by a 67% vote, which would allow voters the possibility of threatening the status of the age-restricted housing by amending it or eliminating it altogether. Id.

Finally, the Board determined that the project as a whole does not preserve the rural aesthetic of the Town pursuant to Section 4.16 (A) of its Ordinance because the project, as proposed, is at 350% of the baseline density and, thus, exceeding the scope of what the Board determined is "somewhat greater density." Id. (*Referencing Section 4.16 (A) of the Ordinance*).

On April 7, 2021, the Town denied the Subdivision application by way of a *Notice of Decision*. Appendix ("App.") I at 5-6. The Applicant timely appealed the Town's denial to the HAB on April 29, 2021. App. I at 1-4.

After a Hearing before the HAB and Hearing Memoranda (*App. I at 9 (Migrela) and App. I at 35 (Town)*) were submitted by both parties the HAB found in favor of the Applicant holding that, relevant here, the requirement of maintaining 'rural aesthetic' was not offended and ordering the Board to engage in a collaborative discussion regarding the rules of the proposed age-restricted housing. App. I at 56-7.

The Appellant filed a timely *Motion for Reconsideration* (*App. I at 58*) raising several factual errors and flawed legal conclusions made by the HAB, such as the Board's denial was not based on how many age-restricted units were planned as the HAB stated in its first Order when, in fact, the denial was based on the Applicant's continued failure to correctly adhere to the plain language of age-restricted housing laws. Id. at 59. Moreover, the HAB misconstrued the logic of citing to *Deer Hill Arms II Limited Partnership v. Planning Commission of the City of Danbury* ("*Deer Hill Arms II*") because it speaks to the need of separate governance for age-restricted housing. Deer Hill Arms II Limited Partnership v. Planning Commission of the City of Danbury, 686 A.2d 974 (Conn. 1996); 239 Conn. 617 (1996); App. I at 60.

The Appellant also raised arguments refuting the HAB's assertion that there is no workable definition of 'rural aesthetic' or 'rural character' as such

standards are addressed by the applicable Subdivision Regulations. App. I at 62. Furthermore, the Appellant argued that the HAB incorrectly concluded that matters relative to rural character should have been addressed at the Conditional Use Permit ("CUP") phase when such matters are normally discussed during the subsequent Subdivision Application phase. Id. at 64. Finally, that the HAB ignored the proper standard of review, which gives deference to the Board that its findings were reasonable and instead injected its own findings after reviewing the Certified Record. Id. at 67.

The Appellee then Answered the aforementioned *Motion for Reconsideration* with a two-sentence response. Id. at 70. Said response was then followed by a second Order from the HAB. Id. at 71. The second Order attempts to rebut the Appellant's *Motion for Reconsideration* by, again, further misunderstanding the purpose and intent of citing to *Deer Hill Arms II* by continuing to compare the fact pattern of the *Deer Hill Arms II* to the present situation when the significance of *Deer Hill Arms II* is its conclusion that there needs to be separate governance for age-restricted housing. Deer Hill Arms II Limited Partnership v. Planning Commission of the City of Danbury, 686 A.2d 974, 980 (Conn. 1996); App. I at 71-2.

The subsequent HAB Order then continues to incorrectly state that there is no specific criteria for determining 'rural character' or 'rural aesthetic' citing to the Town's Master Plan as opposed to the applicable Subdivision Regulations. App. I at 73-75. Finally, the subsequent Order misinterprets the applicable Ordinance by concluding that density is supposed to be determined at the CUP phase and infers that the Board overstepped its discretion as to density and the HAB ultimately denied the Appellant's *Motion for Reconsideration*. Id. at 76.

This Rule 10 appeal followed.

Summary of Argument

The HAB erred in vacating and remanding the Board's decision by holding that the Board unreasonably denied the Appellee's Subdivision Application based on Applicant's continued and uncontroverted failure to comply with the so-called elderly housing law (42 U.S.C. § 3607 (b)(2)(B) and (C); NH RSA 354-A:15).

The HAB also erred by incorrectly holding that the Town of Amherst's Planned Residential Development ordinance, Section 4.17, has no bearing on

the final determination as to density at the Subdivision Application phase. According to the HAB, decisions on density should have been completed at the CUP phase. However, the CUP phase is a step early in the process that focuses on *use* and, while a cap on density may be decided during the CUP phase, final density calculations are still subject to the Subdivision Application phase that occurs subsequent to the CUP phase as per the applicable ordinances. Indeed, the Applicant recognized this on more than one occasion by reducing its requested density to comply with requirements reviewed for the first time at the Subdivision Application stage.

The HAB misinterpreted the IIHO as lacking adequate standards for "rural character," despite the fact that the IIHO refers to the Town's Subdivision Regulations, Section 201.2, which includes a list of factors to consider that pertain to "rural character" and/or "rural aesthetics."

Finally, the HAB erred by substituting its views for the Board's, thereby exceeding its authorized scope of review, which is not whether the HAB would find as the Board did, but rather whether the evidence reasonably supports the Board's findings and in doing so ignored well established case law discussed further below.

Argument

Standard of Review:

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

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

I. The HAB erred in vacating and remanding the Board's denial of the Applicant's Subdivision Application because the denial, in part, was reasonable in light of the Applicant's continued and uncontroverted failure to comply with the elderly housing law.

The HAB misconstrued that the denial relative to the disagreement over elderly housing was based on how many units would be designated as elderly housing. App. I at 51. Issues as to reaching a "consensus on the number of units and the age-restricted units" was not the basis for the denial nor was there any disagreement at the final meeting as to number of age-restricted units. Id.

In fact, the basis for the Planning Board's denial was clearly articulated in the Certified Record because the last version of the Appellee's proposal permitted younger persons to reside within an age-restricted housing unit, despite being previously advised by the Planning Board that such an arrangement is in contravention of federal and state law. CR at 1785.

Federal and state law is clear that *all* residents within the housing unit must be over 62 years of age (*or 65 under Amherst's Ordinance*) in order to be compliant with federal and state elderly housing law. 42 U.S.C. § 3607 (b)(2)(B) and (C); *see also* NH RSA 354-A:15. No party or tribunal disputes

this – not the Town, the Applicant, or the HAB. Nevertheless, the HAB erroneously reversed the Planning Board's denial, which was expressly based on Applicant's failure to comply with these requirements.

Furthermore, the HAB misinterpreted the significance of Deer Hill Arms II Limited Partnership v. Planning Commission of the City of Danbury, 686 A.2d 974 (Conn. 1996), 239 Conn. 617 (1996), by dismissing it as having a different fact pattern from the present case. The HAB also misguidedly opined that state law does not prohibit a mix of age-restricted units and nonrestrictive housing units. App. I at 52 (footnote #4) and 71-2. The issue was not the 'mixing of the units' but rather the proposed plan, as presented, did not have separate governing controls for the age-restricted housing and, furthermore, the Applicant, through counsel, went on the record at the final meeting stating that they "were comfortable with this" arrangement. CR at 1779 (lines 211-14).

The logic of citing to *Deer Hill Arms II* is because it correctly interpreted the federal elderly housing law in that there needs to be separate governance (*i.e. separate condominium rules, etc.*) for the units set aside for people over 62 years of age. *See* Deer Hill Arms II Limited Partnership v.

Planning Commission of the City of Danbury, 686 A.2d at 980 (the Court upheld the validity of a Special Exception but held that "[w]e recognize that a different result would have been reached had the original developer established two separate buildings, one with occupancy restricted to persons fifty-five years of age or older and the other without restriction, ***but with a common condominium association acting as the sole decision maker***.") (*emphasis added*). The HAB incorrectly focused its analysis on the fact pattern of *Deer Hill Arms II* being inapplicable to here because it dealt with separate buildings built at separate times while ignoring the interpretation of the elderly housing law itself. App. I at 71-2.

The HAB further confuses the issue by arguing that state law does not prohibit a mix of age-restricted units and nonrestrictive housing units citing to NH RSA 356-B. App. I at 72. Again, the presence of both restricted and unrestricted units within the proposed development was never the issue. Rather, the Applicant's failure was that the age-restricted units required their own governance. Deer Hill Arms II Limited Partnership v. Planning Commission of the City of Danbury, 686 A.2d at 980.

The *Deer Hill Arms II* Court's holding is consistent with how the United States Housing and Urban Development ("HUD") interprets the same federal statute by recognizing that there is a need for a 'community' for elderly housing. App. II at 22. For the purpose of the *Housing for Older Persons Act* ("HOPA"), a "housing community or facility is any dwelling or group of dwelling units governed by a common set of rules, regulations or restrictions. A portion of a single building may not be considered a housing facility or community. Typical examples include: a condominium association; a cooperative; a property governed by homeowners or resident association; a municipally zoned area; a leased property under common private ownership; a manufactured housing community, a mobile home park." App. II at 22.

HUD also defines the terms "housing community" and "facility" as applying "to dwelling units that are in the same location and have some relationship to each other…[t]he dwelling units in a housing community or facility ***must share a common set of rules, policies, and procedures***, that is applied to ***all*** of the dwellings in the community or facility." Id. at 23 (emphasis added). "Further, although there is no required stated minimum

number of dwelling units that must be present for the exemption to apply, there must be a sufficient number of dwelling units to constitute a "community" or "facility" in the common meaning of those terms…[o]ne single family dwelling or a duplex would not qualify as a "housing community or facility." Id.

Here, the Appellant made several attempts to work with the Appellee, to no avail, as the Appellee continued to provide multiple versions of condominium documents that failed to apply the correct legal standard with respect to age-restricted housing and nonrestrictive housing. CR at 1157 (*letter*); CR at 1208 (lines 414); CR at 1209 (line 436-44); CR at 1420 (lines 207-15); CR at 1421 (line 225-30); CR at 1440; CR at 1556 (74-77); *See generally* the minutes of 3/3/2021, CR at 1556 (lines 146-47, 198-203, 254-56, and 309-12); CR at 1562 (line 320-27); CR at 1776 (lines 62-80). Importantly, the Board continued the application so that the counsel could participate in reviewing and responding to the Board's concerns. CR at 1564 (line 412).

Furthermore, the condominium documents, as presented by the Appellee, allowed for amendments to be made to said documents by 2/3 vote

of condominium members. CR at 1617. The age-restricted units comprised 14 of the proposed 49 units, or 29%, a minority incapable of preventing changes to the condominium association. CR at 1637.

Additionally, the Planning Board has a statutory obligation per NH RSA 676:4 (I)(c)(1) to rule on an application within 65 days and since the Appellee consumed that time frame and more by misapplying federal and state elderly housing laws and incorrectly proclaimed on the record that they satisfied the requirements of elderly housing law. Contrary to the HAB's erroneous suggestion, the Board more than met every duty to cooperate it had repeatedly drawing the Applicant's attention to the problems in the application and the applicable law, and properly decided to deny the application. CR at 1779 (lines 211-14).

Finally, the HAB stated in its first Order that the Planning Board never had Town counsel review the condominium documents at issue, which is "[o]rdinarily a condition of site/subdivision approval." App. I at 52. This is incorrect. The record reflects that Town counsel was asked to advise on the elderly housing law. App. III at 1-2; CR at 1377 (*See email relative to scheduling a meeting to discuss the elderly housing law*). The Board, armed

with the legal opinion, reviewed the condominium documents. The Board correctly determined that the Applicant misapplied the law around elderly housing. CR at 1788 (lines 162-64), which neither the Applicant nor the HAB contests. Given the Applicant's clear misunderstanding of the law, the Planning Board was able to determine for themselves that the condominium documents were, to say the least, unlawful without having legal counsel *officially* review said documents.

II. The HAB erred by incorrectly holding the Town's Planned Residential Development ordinance, Section 4.17, has no bearing on the final determination as to density at the Subdivision Application phase.

While the HAB properly implied that density limits were ruled upon at the CUP review (App. I at 53-4) it is only a density cap – the maximum – that is decided at the CUP phase, because there is very little other information required so early in the process. The bulk of the details come later during the Subdivision Application phase, in order for the Planning Board to determine whether it is the 'up to' number of units or some lesser number that is feasible. This is well-evidence by the Applicant's reductions of its proposed

density during the second step Subdivision Application to comply with detailed subdivision requirements.

Again, at the CUP phase it was determined that there would be an 'up to' number of units, which the very phrase 'up to' signifies a discretionary ceiling or a 'wish list.' CR at 284.

The purpose clause of section 4.17 (A) of the Amherst Zoning Ordinance (AZO) allows for "somewhat greater density" that would otherwise not be allowed and, furthermore, Section 4.17 (E)(2) states that the Planning Board "*shall* determine the mix of housing types, number of dwelling units and structures, and the number of bedrooms for each dwelling unit …. [t]hese shall be determined at the **Final Review**…," which occurs after the CUP phase. App. II at 18-9 (emphasis added).

Section 4.17 (A) also states that "[t]he Board shall determine whether the proposed [project], namely, the site plan or layout and *number*, type, and design of the proposed housing is suitable to the neighborhood within which is to be located…". App. II at 18-9 (emphasis added). Therefore, as per the

AZO, the final density and type of housing is to be determined *after* the CUP process. App. II at 18-9.

As such, any "density" concerns had not "left the station when the CUP for up to 54 units approved," as the HAB opines, and therefore "rural aesthetics" was still a legitimate concern left to be addressed by the Board. App. I at 55 (footnote #9).

III. The HAB erred by concluding that the IIHO, Section 4.16, lacks adequate standards for "rural character," because the IIHO refers to the Town's Subdivision Regulations, Section 201.2, which include a list of factors to consider that pertain to "rural character."

The HAB incorrectly claims that there is no "good definition" of "rural aesthetic" or "rural character" contained in Section 4.16 (A) and 4.17 (A) of the AZO. App. II at 16-8. The Amherst Subdivision Regulations, Section 201.2, require that "rural character" and other related objectives be considered by the Board at Subdivision Review. App. II at 21.

Section 201.2 contains a 'laundry list' of factors for the Planning Board to consider. App. II at 21. Indeed, "Rural Character" in Subdivision Regulation Section 201.2 states the Objective is to "***maintain rural***

character, preserving farmland, forests, grassland, wetlands and maintaining rural viewscapes." Id. Notably, Section 4.16 (B)(4) of the AZO mandates that all IIHO projects are subject to Subdivision Regulations and Non-Residential Site Plan Review standards. App. II at 16.

The HAB cites to *Working Stiff Partners, LLC, v. City of Portsmouth*, where the New Hampshire Supreme Court held that a "municipal ordinance must be framed in terms sufficiently clear, definite, and certain, so that an average [person] after reading it will understand if [one] is violating its provisions." Working Stiff Partners, LLC, v. City of Portsmouth, 172 N.H. 611, 623 (2019); App. I at 56.

The HAB leans on *Working Stiff Partners, LLC*, to justify its claim that "rural aesthetics" or "rural character" is undefined in the AZO or that "[w]hile perfect clarity is not required, some guidance is needed." *Working Stiff Partners, LLC, v. City of Portsmouth*, 172 N.H. at 623; App. I at 56.

However, as stated above, the purpose of "Rural Character," as stated in the Subdivision Regulation is to "***maintain rural character, preserving farmland, forests, grassland, wetlands and maintaining rural viewscapes."*** App. II at 16. These terms are "sufficiently clear, definite, and certain, so that

an average [person] after reading it will understand if [one] is violating its provisions." *Working Stiff Partners, LLC, v. City of Portsmouth*, at 623.

The majority of the Planning Board found that the 49 units ultimately proposed did not meet the Town's rural character requirements and that finding is sufficient to justify a denial. *See generally* the discussion at CR 1785-89.

Reading the Certified Record in isolation, rather than a whole, the HAB 'cherry picks' two minority opinions from (*now*) former Planning Board members (App. I at 55) and the HAB relies on a report by the Heritage Commission to make the claim that 'rural aesthetics/character' was discussed and sufficiently addressed at the CUP phase. App. I at 54; *See also* footnote #6 App. I at 54 (referencing CR at 128, CR at 349-50).

The HAB's reliance on this Heritage Commission report is misplaced. The Heritage Commission, aptly pointed out as being advisory only (App. I at 54), is tasked by NH RSA 674:44-a with "proper recognition, use, and protection of resources, tangible or intangible, ***primarily man-made***, that are valued for their ***historic, cultural, aesthetic, or community*** significance

within their natural, built, or cultural contexts." Id. (*emphasis added*). Significant are the words "man-made" and valued for "historic, cultural or aesthetic" reasons. Id. (*emphasis added*).

Therefore, stone walls are properly within Heritage Commission's purview, structures to be rehabilitated are within its purview; however, hiking trails that do not exist yet are not within their purview. Id. Matters such as density concerns, architectural elevations, and square-footage of units of an as-yet to be built Subdivision are not an analysis that the Heritage Commission is charged with. Id.

Even if such topics are within the purview of the Heritage Commission, 'rural aesthetics/character' is the aggregate of all traits and characteristics which make a location non-urban, country-like, and with a lower density. The Heritage Commission's function is to protect and preserve the historic and cultural nature of *already built* structures. NH RSA 674:44-a.

As stated above, concerns of maintaining 'rural character' were not met nor were they supposed to be formally addressed by the Applicant during

the CUP phase. The ordinance that must be followed to request and obtain a CUP is Section 3.18 of the AZO and nowhere did it require a determination be made as to "rural character" or "rural aesthetic."[1] App. II at 14-5. The purpose of the CUP itself is to allow "permitted uses" that are "subject to the satisfaction of the requirements and standards set forth…[in the AZO], in addition to all other requirements and standards of this ordinance." Id.

Here, the Applicant sought a cluster housing development with a mix of non-age and age-restricted housing with an upper limit on density. CR at 284. In the Applicant's CUP proposal, it requested "up to 54 units," but the CUP was nothing more than a grant of *use* permission, which may allow for "up to 54 units" that are subject to Subdivision approval as per AZO Section 3.18 (1)(f). App. II at 15. The unit number, at the CUP phase, is a 'wish list' and the details relative to units are worked out later, once a Subdivision Application has been filed and acted upon.

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[1] In 2022, Section 3.18 of the AZO was amended to require a consideration of 'rural character' as part of a CUP application, however, consideration of 'rural character' was not a requirement of Section 3.18 at the time of the within application.

The HAB in its second Order opines that "[u]nder the IIHO, the unit number is not a "wish list" nor subject to unfettered Planning Board discretion." App. I at 76. The HAB's misunderstands that the Board is not attempting to argue that it has unfettered discretion but rather that the unit number was still subject to change during the Subdivision Application phase where far more detailed information relative to the project is available unlike the CUP phase.

The HAB cites the approval of prongs 1, 3, and 4 of the CUP criteria as evidence that "rural character" was met. App. I at 52-3. There was no explicit language in this section of the ordinance requiring the Board to consider the rural nature of the project in its deliberations. Id. Indeed, for the HAB to hold as such is an overreach because none of the conditions discussed 'rural aesthetics/character' and the HAB misconstrues this ***conditional*** *use permitting* phase for that of a Subdivision Application phase. Id. Section 3.18 of the AZO is unambiguous in that the *density* must be consistent with the proposed *use* that is under consideration at this early CUP stage:

i. **CUP prong #1**: That the property in question is in conformance with the dimensional requirements of the zone or meets the Planning Board standards for the reduction in dimensional requirements, and that the ***proposed use*** is consistent with the Amherst Master Plan. AZO, Section 3.18; App. II at 14-5. (*emphasis added*).

ii. **CUP prong #3**: That there will be no significant adverse impacts resulting from the ***proposed use*** upon the *public health, safety, and general welfare* of the neighborhood and Town of Amherst. Id. (*emphasis added*).

iii. **CUP prong #4**: That the ***proposed use*** will not be more objectionable to nearby properties by reason of noise, fumes, vibration, or inappropriate lighting than any use of the property permitted under the existing zoning district ordinances. Id. (*emphasis added*).

While the aforementioned CUP factors may relate in some peripheral way to 'rural aesthetics/character' in the aggregate, they were not the focus of discussion at the CUP approval phase because 'rural aesthetics/character' are relative to the Subdivision Application phase as per Subdivision Regulations 201.2, which, again, occurs *after* the CUP phase.

Furthermore, the Applicant must also comply with the standards and requirements of Section 4.17 (Planned Residential Development "PRD") after

the CUP approval process. App. II at 18-20. Section 4.17 specifically points out that the objective of the PRD is designed to not increase the Town's population to a marked degree and to maintain the Town's rural aesthetic. Id. Thus, indicating that the discussion relative to density is designed to occur subsequent to the approval of a conditional *use* permit hence such determinations cannot be made at the CUP phase.

"Rural character" is the first objective of Amherst Subdivision Regulation 201.2 (D). App. II at 21. The Subdivision standards and objectives are required to be met at the *Subdivision* phase, once an application and all the required details, maps, and other documentation have been submitted. Id. As such, it is the Subdivision stage where the Planning Board receives many of the materials required in order for it to properly analyze all aspects of the project and to ascertain that all standards are met.

The IIHO, Section 4.16, *et seq.*, never defined 'rural aesthetic' because its purpose was to allow for housing diversity and density while still protecting rural aesthetic. App. II at 16. The IIHO and the PRD were permitted in *ALL* zoning districts. The AZO has established districts with

different lot sizes, frontages, and setbacks deemed appropriate for the area of Town where they lay.

Thus, during the review of an IIHO development it is the underlying district that renders and commands different densities and it is the Applicant who has to convince the Planning Board that the proposal is in the best interest of the Town through the Subdivision phase. Here the Applicant failed to meet said burden.

The Planning Board, in its duly appointed function, vetted the materials and came to a well-reasoned decision to deny the application and its decision is entitled to a degree of rectitude and deference pursuant to decades of well-established case law. *See* Durant v. Town of Dunbarton, 121 N.H. 352, 354 (1981) (holding that "[i]f any of the [B]oard's reasons for denial support its decision, then the plaintiff's appeal must fail.).

The Board's decision was neither unlawful or unreasonable and for the HAB to vacate and reverse its decision flies in the face of the well-articulated standard of review outlined by this Honorable Court holding that the HAB should have treated the Planning Board's factual findings as prima facie

lawful and reasonable, and cannot set aside its decision unless the appealing party shows that the decision is unreasonable or legally erroneous. Property Portfolio Group v. Town of Derry, 163 N.H. 754, 757 (2012).

Here, the Planning Board determined that the Appellee's proposed plan did not conform to the 'Rural Character' requirements of Subdivision Regulation Section 201.2 and deference should have been afforded to the Planning Board's reasonable and lawful decision. *See* Property Portfolio Group v. Town of Derry, at 757 (holding that the Court "is not to determine whether it agrees with a planning board's findings, but rather whether there is evidence upon which they could have been reasonably based.").

IV. The HAB erred by substituting its views for the Board's, thereby exceeding its authorized scope of review.

Finally, the standard of review is not whether the HAB would find as the Planning Board did, but rather whether the evidence reasonably supports the Planning Board's findings. Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992).

Here, proper deference was not given the Planning Board's decision but rather the HAB reviewed the Certified Record and came to its own conclusion and disregarded the Planning Board's well-reasoned findings.

There was nothing unlawful or unreasonable in the Planning Board's decision-making as there was ample discussion and evidence in the eight (8) volumes and five (5) years' worth of material to demonstrate that the Planning Board's denial was based on facts and said facts' application to the ordinance, state law, and federal law.

The HAB's enabling legislation specifies that its jurisdiction is concurrent with the Superior Courts per NH RSA 679:7 (I). The hearing procedures used by the HAB "shall be consistent with appeals to the Superior Court. . .". Id. The remedies available to the HAB include "all remedies available to the superior courts in similar cases. . .". NH RSA 679:5 (II). As such, the HAB should have applied the same legal standard followed by the Superior Court as discussed above. Property Portfolio Group v. Town of Derry, 163 N.H. 754, 757 (2012); Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992).

CONCLUSION AND RELIEF SOUGHT

The Appellee has not demonstrated to the HAB, by a balance of probabilities, that it was unlawful or unreasonable for the Planning Board, based on the Certified Record, to deny the Subdivision Application for reasons stated herein. The evidence in the Record supports the decision of the Planning Board and is consistent with generally applicable principles in the IIHO, as well as, the applicable case law. Furthermore, the Board's reasonable decision is adequately supported by the Certified Record.

We respectfully ask that the Honorable Court to VACATE and REVERSE the decision of the New Hampshire Housing Appeals Board.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted,

Defendant-Appellee,

TOWN OF AMHERST
(PLANNING BOARD)
By Its Attorneys,
Cronin Bisson & Zalinsky P.C.

Date: ***June 13, 2022*** By: ***/s/ Christopher B. Drescher***

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CERTIFICATE OF SERVICE

I hereby certify that on ***June 13, 2022,*** I electronically filed this Brief of the Appellant, Town of Amherst (Planning Board) as required by the Rules of the Supreme Court. I am electronically sending this document through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contact (email addresses).

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

Christopher B. Drescher, Esq.

CERTIFICATE OF WORD COUNT

I hereby certify that this Brief contains ***6651*** words, exclusive of the cover page, table of contents, table of authorities, signature block, certificate of service and certificate of word count.

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

Christopher B. Drescher, Esq.