

**THE STATE OF NEW HAMPSHIRE
SUPREME COURT**

CASE NO. 2021-0570

APPEAL OF TOWN OF AMHERST

**Appeal from Decision of
New Hampshire Housing Appeals Board
Case No. PBA-2021-08**

BRIEF OF APPELEE

**Migrela Realty Trust II
GAM Realty Trust**

Counsel for the Appellee
Migrela Realty Trust II
GAM Realty Trust

Gerald R. Prunier, NH Bar No. 2067
Prunier & Prolman, P.A.
20 Trafalgar Square, Suite 100
Nashua, NH 03063
Telephone No. (603) 883-8900
FAX No. (603) 883-7959
Email: gprunier@prunierlaw.com

TABLE OF CONTENTS

Table of Contents	2
Table of Authorities	3
Statement of the Case	4
Legal Standards	5
Summary of Argument	6
Issues for Review	6
Statement of Facts	7
Argument	9
Conclusion and Relief Sought	16
Request for Oral Argument	17
Certificate of Service	18
Certificate of Word Count	18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>Deer Hill Arms 11 Limited Partnership v. Planning Commission of the City of Danbury, 686 A. 2nd 974 (Conn. 1996); 239 Conn. 617 (1990)</u>	11
<u>Durant v. Town of Dunbarton, 121 N.H. 352, 357 (1981)</u>	5
<u>Girard v. Town of Plymouth, 172 N.H. 576 (2019)</u>	5, 16
 <u>Statutes</u>	
<u>N.H. RSA 677:15</u>	5
<u>N.H. RSA 354-A:15</u>	6, 9, 10
<u>N.H. RSA 356-B:14</u>	10
 <u>Ordinances and Rules</u>	
<u>Amherst Zoning Ordinance, Section 3.18 (Conditional Use Permit)</u>	7, 11, 16
<u>Amherst Zoning Ordinance, Section 4.16 (Integrated Innovative Housing Ordinance)</u>	4, 7, 15
<u>Amherst Zoning Ordinance, Section 4.17 (Planned Residential Development)</u>	6, 11, 14, 15

STATEMENT OF THE CASE

The Appellee attempted to subdivide its real estate located in Amherst, New Hampshire beginning with the Amherst Planning Board (“APB”) meeting on August 15, 2018. CR at 92. The purpose of the first plan was to obtain a Conditional Use Permit (“CUP”) so that the Appellee would know how many units they could have for their plan to submit under the Integrated Innovative Housing Ordinance (“IIHO”). Article IV, Section 4.16C of the Amherst Zoning Ordinance (AZO). On January 2, 2019, the Amherst Planning Board approved the CUP with up to 54 units. CR at 282.

The IIHO allowed for increased densities as allowed under Article IV, Section 4.16E. The Appellee submitted a density worksheet to the APB which is exhibited at CR at 109. Based upon the evidence submitted by the Appellee to the APB, it granted a density of “up to 54” units. CR at 282.

In considering the CUP, the APB had to consider IIHO’s Purpose which states that “rural aesthetic” had to be considered. The minutes of the APB of January 2, 2019 recite at CR at 280-282 the consideration of the APB on the character of the area that was to be maintained. At the time that the APB made their decision on the CUP, they had before them the Heritage Commission’s report at CP-126-129 and the Amherst Conservation Commission’s report.

The question as to elderly housing and the number of units dedicated thereto was never decided but had to be considered for the increased density. As conditions on the subdivision kept being imposed, the subdivision plan had to change to accommodate the changes required by APB. These requests caused the Appellee to eliminate units. The condominium documents had to wait until there was a firm or final plan which is the usual custom. The Staff Report for the April 7, 2021 meeting,

clearly states that the condominium documents had been submitted, that they have been forwarded to legal counsel, the fee to review of the documents had been paid, and they are awaiting legal review that may suggest changes. CR at 1762.

The New Hampshire Housing Appeals Board (“HAB”) did not subject its views for those of the APB. The HAB views are based upon the Certified Record and the facts therein.

After two (2) years of APB meetings, the APB denied the Appellee’s plan on April 7, 2021. A timely appeal was taken to HAB which issued an order that the plan be returned to APB for further consideration. A timely appeal was taken by the Appellee to this Honorable Court.

The issues appealed were concerning findings and rulings made by the HAB regarding elderly housing, rural character, density, and these were no substitution of HAB's views for those of the APB except for those that were unreasonable by the APB.

LEGAL STANDARDS

The standard of review of a Planning Board decision is governed by N.H. RSA 677:15. It has been held that “The court may reverse or affirm wholly or partly, or may modify the decision brought up for review which there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.” N.H. RSA 677:15, Durant v. Town of Dunbarton, 121 N.H. 352, 357 (1981); Girard v. Town of Plymouth, 172 N.H. 576 (2019).

SUMMARY OF ARGUMENT

The HAB did not err in vacating and remanding the APB decision. The Appellee continued to make changes to its subdivision plan to comply with the wishes of the APB, but maintaining the restrictions and amenities imposed by Section 4.16E as to the incentives for density.

The HAB recognized that the density granted by the CUP was necessary in order to be able to design and engineer a subdivision plan. A CUP is not a “use”, but a “cap” to be used in the design phase of the subdivision.

The HAB correctly recognized that until the APB approved a plan, condominium documents would be difficult to draft, and that the approval of the condominium documents are usually made a condition of approval.

The HAB made the correct decision. There were no errors of law and the findings of fact were reasonable.

ISSUES FOR REVIEW

- A. The Housing Appeals Board (“HAB”) did not err in vacating and remanding the Amherst Planning Board’s (“APB”) denial of the Appellee’s Subdivision Application because of issues with the condominium documents regarding the Elderly. N.H. RSA 354-A:15.
- B. The HAB did not err in vacating and remanding the Appellee’s Subdivision Application because of the APB wrongful interpretation of Section 4.17 and its bearing on density.

- C. The HAB did not err in vacating and remanding the APB denial of the Appellee's subdivision because it wrongfully interpreted "rural character".
- D. The HAB did not err in vacating and remanding APB's denial of Appellee's subdivision because it is supported by the evidence.

STATEMENT OF FACTS

The Appellee is the owner of a thirty acre parcel of land (the "Property") on Hollis Road, a/k/a Route 122, Amherst, New Hampshire. The Plaintiffs seek to develop the Property into elderly housing. After discussion with the Planning Staff and the Planning Board of the Town of Amherst (the "Board"), the Plaintiffs proposed to build an elderly/mixed development under Section 4.16* Integrated Innovative Housing Ordinance (IIHO) of the Amherst Zoning Ordinance which has now been repealed.

Under Section 4.16, the IIHO allows for a multiple use of housing types (Section 4.16B11) and allows for incentives to the developer (Section 4.16E). The number of housing types allowed is determined by a Conditional Use Permit (CUP) as determined in Section 3.18 of the Amherst Zoning Ordinance. At the Amherst Planning Board meeting on January 2, 2019, the Board considered the documentary evidence presented by the Plaintiffs' engineer and granted a Conditional Use Permit to develop the Property for up to 54 units with conditions. (CR at Page 284).

Now that the Appellee knew how many housing units that could be developed, it proceeded to engineer the necessary plans for approval of the development. The presentations before the Amherst Planning Board began on August 15, 2018 (CR at 92) and continued to April 7, 2021. CR at 1776-1789.

- C. The HAB did not err in vacating and remanding the APB denial of the Appellee's subdivision because it wrongfully interpreted "rural character".
- D. The HAB did not err in vacating and remanding APB's denial of Appellee's subdivision because it is supported by the evidence.

STATEMENT OF FACTS

The Appellee is the owner of a thirty acre parcel of land (the "Property") on Hollis Road, a/k/a Route 122, Amherst, New Hampshire. The Plaintiffs seek to develop the Property into elderly housing. After discussion with the Planning Staff and the Planning Board of the Town of Amherst (the "Board"), the Plaintiffs proposed to build an elderly/mixed development under Section 4.16* Integrated Innovative Housing Ordinance (IIHO) of the Amherst Zoning Ordinance which has now been repealed.

Under Section 4.16, the IIHO allows for a multiple use of housing types (Sect.4.16B11) and allows for incentives to the developer (Sect.4.16E). The number of housing types allowed is determined by a Conditional Use Permit (CUP) as determined in Sect.3.18 of the Amherst Zoning Ordinance. At the Amherst Planning Board meeting on January 2, 2019, the Board considered the documentary evidence presented by the Plaintiffs' engineer and granted a Conditional Use Permit to develop the Property for up to 54 units with conditions. (CR at Page 284).

Now that the Appellee knew how many housing units that could be developed, it proceeded to engineer the necessary plans for approval of the development. The presentations before the Amherst Planning Board began on August 15, 2018 (CR at 92) and continued to April 7, 2021. CR at 1776-1789.

On April 7, 2021, the Amherst Planning Board denied the Appellee's subdivision on the following motion:

I MOVE to deny this application, while appreciating the changes that have been made in the most recent revisions. Those changes did move the development towards one which was more rural by addressing concerns raised at previous meetings: the fact that all of the building fronts were parallel to the street, that the building setbacks were uniform, that the houses were close together. The addition of the open space restrictions is appreciated, along with the applicants' decision to slightly reduce the density to 49 units.

Reasons for denial:

1. The application does not require that all residents of the age restricted units be 62 or older. It requires only that one member of that household be 62 or older. That is the language of the proposed restriction that was provided to the Board.
2. There is a single condominium association for both the senior housing and for the unrestricted housing. While these are federal requirements, the Planning Board in the first instance is responsible for applying the law and must understand it and interpret it. If there are going to be age restricted units mixed with non-age restricted units there must be some separation, whether that be physical, whether that be a separate condominium association, some type of separation. That does not exist here. This is a particular concern in this instance because only 14 out of the 49 units are elderly housing. Fourteen is a minority of the units, so if the over 65 residents wanted to establish separate restrictions, separate amenities, separate lighting requirements or anything else, they do not have the power to do that for themselves. They are at the will of the majority of the unrestricted units. That is not consistent with what the federal law envisioned when it said over 62 units must be occupied solely by over 62 persons.
3. Article V of the condominium documents allows those documents to be amended by the owners with a 67% vote.

4. Having listened to everybody and having seen everything that has been done and taking into account and giving credit for the changes that have been made to the design, the proposed design does not protect and preserve the rural aesthetic the Town has consistently valued, as is required by Section 4.16 A. of the Zoning Ordinance.
 - a. The base zoning for this area of town is residential rural. It requires two acres per building lot. That is the densest residential zoning that Amherst has. That would allow 14 units at this site and that would be only if additional road frontage, buffer, and setback requirements could be met. It could be fewer than 14 units.
 - b. This application now proposes 49 units. That is 350% of the base density: 350%, the way that it was done in this development, and even with the improvements by the applicant, is too much and is probably an insurmountable hurdle for this applicant to overcome and at the same time preserve a rural aesthetic. This development at 350% of the highest normal density otherwise applied in town does not any longer preserve the rural aesthetic of the town. It may be possible to do this with more than units, but it has not been done in this case.

ARGUMENT

1. The Housing Appeals Board (“HAB”) did not err in vacating and remanding the Amherst Planning Board’s (“APB”) denial of the Appellee’s Subdivision Application because of issues with the Condominium documents regarding the Elderly. N.H. RSA 354-A:15.

The Board included in its Motion for Denial various legal related issues that are governed by State law and not the Board. These are listed in 1, 2, and 3 of the reasons for denial.

In the reasons for denial, there was mention that some units would be restricted to age 62 or older. There are no units that are restricted to 62 or older in this subdivision. From the first meeting, the engineer, Chad Brannon, stated that the age restriction would be 55 and older and 65 and older. This is also stated on the final phases called "Overall Site Plan" under Notes #7. CR at 1672. Since there are no units 62 or older, these reasons for denial 1 and 2 do not apply.

As to the units restricted to 55 and older and 65 and older, N.H. RSA 354:A(15) applies and will be complied with. The age restrictions are also governed by the condominium documents . CR at Page 1637.

N.H. RSA 356-B34 regulates any amendments to a condominium. In addition, any changes to an approved site plan must be re-approved by the APB. An approved site plan cannot be changed or modified without the APB's approval. Also, the third reason for denial states Article V (CR at 1609) as allowing the condominium documents to be amended, however, I do not find that right in Article V which is another reason the APB's denial should be overturned.

The HAB found that the denial of Appellee's Subdivision/Site Plan based upon age concerns was clearly unreasonable. HAB Order at Page 7. On the basis for the findings is that the APB never reviewed the final documents which ordinarily are a condition of approval. The Condominium documents were sent to be reviewed by Town Counsel, along with the required fee, but had not been returned to the Board at the time of the meeting. CR at 1762.

The HAB was correct in its findings and rulings regarding the interpretation of Deer Hill Arms II Limited Partnership v. Planning Commission of the City of Danbury, 68 A.2d 974 (Conn. 1996), 239 Conn. 617 (1996).

II. The HAB did not err in vacating and remanding the Appellee's Subdivision Application because of the APB wrongful interpretation of Section 4.17 and its bearing on density.

An issue raised as a reason for denial was density of the housing units and its effect on the rural aesthetics. What the APB forgot was that it was the APB that approved the number of housing units that the Appellee could build. Under the Amherst Zoning Ordinance, specifically Section 4.16B, the Amherst Planning Board must make a determination, in the first instance, as to the number units that can be built on the Property. This determination was made by APB, and it was determined to be "up to 54 units." CR at 284. The Record will reveal that the Amherst Planning Board never reduced the number of units during the planning process. To now say that the number of units that they approved to be built is the reason for denial is unreasonable.

There is no standard for rural aesthetics in the Amherst Zoning Ordinance and, as discussed at the meeting that this area of Route 122 has changed and many similar developments have been approved. As the planning for the development proceeded before the APB, the Appellee could make changes which are reflected in the Record, but at no time did the APB change the number of units allowed by the Conditional Use Permit (the "CUP").

In making its determination of the CUP, the Board must consider the following Section 3.18C of AZO:

- C. STANDARDS APPLICABLE TO ALL CONDITIONAL USE PERMITS.
 - 1. Conditions for Conditional Use Permits.

Before the Planning Board considers the approval of an application for a Conditional Use Permit, the applicant shall prove to the satisfaction of the Planning Board that all the following conditions have been met:

- a. That the property in question is in conformance with the dimensional requirements of the zone, or meets Planning Board standards for the reduction in dimensional requirements, and that the proposed use is consistent with the Amherst Master Plan. (3-10-15)
- b. That the proposal meets the purposes of the ordinance under which the application is proposed.
- c. 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 the Town of Amherst.
- d. 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.
- e. That the proposed use will not adversely affect the ground water resources of Amherst, in particular the Aquifer Conservation District as defined in Section 4-13 of the Amherst Zoning Ordinance.
- f. The applicant shall file a Non-Residential Site Plan Review application in accordance with the "Non-Residential Site Plan Review Regulations" with the Amherst Planning Board.

2. Conditions of Approval.

- a. The Planning Board may attach such conditions to its approval as are reasonable, necessary, and appropriate.
- b. All Conditional Use Permit uses are hereby declared to have special characteristics that shall be considered on a case-by-case basis.

Some of these recommendations were adopted by the Planning board and incorporated in the granting of the CUP approval such as:

- Reuse of stone for stonewalls
- State approval of septic design

A repairing and restoration Plan for stream corridors the Heritage Commission uses the words “rural character” in discussion of the stonewalls and protection of the white pines on the Property. The HAB noted the Heritage Commission’s Report in its decision on Page 9 of its Order:

It is important to note that there is no definition of the concept of “rural character” in the Amherst Zoning Ordinance as planning Regulations. The HAB was specific as to density when it stated, “As part of the 07 April 2021 note “density” was cited as a reason for denial since it could affect “rural aesthetic”. The “density” concern left the station when the CUP for up to 54 units was approved in accordance with the then existing IIHO. See HAB Order at 10.

The HAB correctly found that it “was unreasonable to deny this project based on non-compliance with ‘rural aesthetics’.” See HAB Decision at 11).

III. The HAB did not err in vacating and remanding the Appellee's Subdivision Application because of the APB wrongful interpretation of Section 4.17.

The APB is of the opinion that the CUP granting of "up to 54 units" could be changed by the APB at any time. This position is wrong and was correctly recognized by the HAB. The Appellee needed to know how many units it could have so that it could start engineering its Subdivision Plan. Without knowing how many units you can have, how can you plan your Subdivision? Why even have incentives in the IIHO. See Section 4.16E. The number of units to be allowed need to be determined at the CUP phase because you cannot engineer your plan without having a number of units. The number of units may be reduced as a result of the conditions imposed by the APB on the subdivision plan, such as drainage, the stonewalls, etc. It should be pointed out that the CR does not indicate that the APB at any point told the Appellee to reduce the number of units.

During its consideration of the CUP on January 2, 2019 (see CR at 280-282), the APB had the Heritage Commission's detailed report and the architectural renderings. The APB went into detailed discussion concerning all of the issues of the site, which at the time showed 61 units. The character of the site was discussed and as a result, not only the number of units was determined, but conditions were placed on the CUP that affected the character of the site. CR at 282. The APB discussed the trees on the site, the stream that runs through the site, the stonewalls on the site, etc. The architectural renderings were considered along with the natural features such as trees, the stream, and the trees. CR at 1776-1779.

The HAB did not "cherry pick" two minority opinions from (now) former Planning Board members. They were Planning Board members that expressed their view. At the meeting of April 7, 2021, Chad Brannon

expressed the frustration of working with the Planning Board (the new and old) and what he has done working on their plan for over 2 years. CR at 1776 through 1779.

Saying that the Heritage Commission's report is "misplaced" is wrong. The APB reviewed the report and incorporated some of its recommendations in approving the CUP.

As previously stated, the number of units granted at the CUP phase cannot be a "wish list," because you have to know the number of units to engineer the Subdivision Plan. The APB at the CUP phase made a determination that 54 units were in the best interest of the Town. The Appellee carried any burden, if it had any, at the CUP phase that the number of units granted by APB would be in the best interest of the Town. For the APB to deny the Subdivision Plan for being out of "character" was unreasonable and unlawful. The order of the HAB should be upheld as it is reasonably based.

It is important to note that this project was developed under Section 4.16 (IIHO) of the AZO. To try to impose the conditions of Section 4.17 (PRD) on this project is unreasonable.

IV. The HAB did not err in making its decision.

In reviewing the Certified Record, the HAB rightfully and clearly saw the deficiencies in the APB denial of the Appellee's Subdivision Plan. The problem that the present APB had that the majority of the members were not part of the APB that granted the CUP. The lengthy discussion of the January 2, 2019 covered the issues that the APB used to deny the Appellee's Plan. The issues of density and rural character were fully discussed at the January 2, 2019 meeting.

When the issue of “rural character” was discussed at the April 7, 2021 (CR at 1787-1789) meeting, the Certified Record indicates that all the Planning Board members had different thoughts as to what “rural character” means. There is no standard in the Amherst Zoning Ordinance that can be used because there isn’t any. In addition, the numbers of units allowed by the APB are fixed, which is reasonable if you are going to design a subdivision.

The standard of review of a decision of HAB is limited as stated in Girard v. Town of Plymouth 172 N.H. 576, 581 (2019), “Our review is similarly limited. We will reverse a trial court’s decision on appeal only if it is not supported by the evidence or is legally erroneous.” The HAB order is replete with reference to the Certified Record and the Amherst Zoning Ordinance which substantiates its Order.

The HAB detailed how in granting the CUP, the APB, at that time, had to take into consideration the Heritage Commission Report as well as the conditions of 3.18C of the AZO. In granting the CUP, the APB has to consider the “rural character” of the CUP. This also includes the issue of density which was controlled by the CUP.

CONCLUSION AND RELIEF

The HAB made a detailed review of the Certified Record and the sections of the Amherst Zoning Ordinance that applied. The HAB Order points to the sections of the Amherst Zoning Ordinance that apply to this case and that the APB ignored in making its decision to deny. The HAB also shows how the present APB ignored the findings of the previous APB as to the determination of CUP, the rural character of the area and the

density that the Appellee could use. The decision of the HAB was supported by the evidence in the Certified Record and its legal findings.

The Order made by HAB should be upheld.

REQUEST FOR ORAL ARGUMENT

The Appellee requests oral argument to be made by Gerald R. Prunier, Esquire.

Respectfully submitted,

Migrela Realty Trust II, Appellee
GAM Realty Trust, Appellee

By its attorneys,
Prunier & Prolman, P.A.

Dated: July 6, 2022

/s/ Gerald R. Prunier
Gerald R. Prunier, NH Bar No. 2067
Prunier & Prolman, P.A.
20 Trafalgar Square, Suite 100
Nashua, NH 03063
Telephone No. (603) 883-8900
FAX No. (603) 883-7959
Email: gprunier@prunierlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2022, I electronically filed this Brief of Migrela Realty Trust II and GAM Realty Trust, Appellee through the court's electronic filing system to all attorneys and other parties who have entered electronic service contacts in this case as required by the Rules of the New Hampshire Supreme Court.

/s/ Gerald R. Prunier

Gerald R. Prunier, NH Bar No. 2067

CERTIFICATE OF WORD COUNT

I hereby certify that this Brief contains 3,651 words, exclusive of the Cover Page, Table of Contents, Table of Authorities, Signature Block, Certificate of Service and Certificate of Word Count.

/s/ Gerald R. Prunier

Gerald R. Prunier, NH Bar No. 2067