THE STATE OF NEW HAMPSHIRE

SUPREME COURT

DOCKET NO. 2022-0182

IRON HORSE PROPERTIES, LLC

Plaintiff-Appellee

v.

CITY OF PORTSMOUTH

Defendant-Appellant

and

JAMES A. BEAL et al.

Intervenor-Appellants

INTERVENOR-APPELLANTS' REPLY BRIEF

Appeal pursuant to Rule 10 from a decision of the Housing Appeals Board dated January 26, 2022, reversing a decision of the Portsmouth Zoning Board of Adjustment

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Dated: December 2, 2022

Mr. MacCallum will argue.

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ARGUMENT

I. The Developers' Plan Fails to Meet the Requirements for the Issuance of a Wetlands Conditional Use Permit.

Concerning the issue of whether the subject wetlands conditional use permit in this case was properly issued, little needs to be added to what the citizen opponents have already said in their opening brief. The developers doggedly continue to argue for a "balancing" approach, whereby the supposed benefits of their proposed project to the wetlands are to be weighed against its detriments. However, the Zoning Ordinance did all of the balancing that needs to be done, and the simple fact of the matter is that the developers' plan fails to meet at least two of the six mandatory criteria set forth in section 10.1017.50 of the Ordinance. Nothing that the developers have said in their brief has dislodged that simple fact.

The only new argument that the developers have raised in their brief is their contention that the Planning Board was required to take their proposed site plan "as-is" and could not consider alternatives. Citing Malachy Glen Assocs., Inc. v. Town of Chichester, 155 N.H. 102 (2007), the developers argue that "when a land-use board undertakes a feasibility analysis, it 'must look at the project as proposed,' and may not weigh the utility of alternate uses[.]" (Appellee's Brief at 10.)

This is a strange argument, indeed, to be making in a situation where the land use board is charged with the responsibility of determining whether the proposal being tendered by the developers is "the alternative with the least adverse impact to" the wetlands buffer, Zoning Ordinance § 10.1017.50(5), and whether there is "no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use".

Zoning Ordinance § 10.1017.50(2). How is the Planning Board or other land use board to determine whether the developers' plan is "the alternative with the least adverse impact to" the environment and whether there is "no alternative location outside the wetland buffer that is feasible," without considering those other alternatives? The developers' argument makes no sense.

Furthermore, the Malachy case itself says that comparisons must be made and that alternatives must be considered. In their brief, the developers have selected a single line of that decision and have quoted it out of context. (Specifically, the line quoted by the developers refers to alternative uses of the property, not to the location or configuration of the buildings thereon. The Malachy case said that if a given use is permitted by the ordinance, the land use board members may not consider other alternative uses as a basis for denying approval, even though they may believe those uses to be more attractive.) However, this does not apply to dimensional requirements. As to the latter, alternatives must necessarily be taken into account. In Malachy, this Court said: "The applicant must show that there are no reasonably feasible alternative methods available to implement the proposed use." 155 N.H. at 108 (emphasis added). "We also consider whether an area variance is required to avoid an undue financial burden on the landowner, which includes examination of the relative expense of alternative methods." Id. (emphasis added). "Under this factor, the ZBA may consider the feasibility of a scaled down version of the proposed use * * * *." Id. (emphasis added). The developers' contention that the Malachy case precluded consideration of alternative dimensions and locations of proposed buildings is utter nonsense.

Additionally, the Malachy case presented a much different fact situation from that herein and is distinguishable from the instant case in numerous respects. Perhaps most tellingly, in Malachy the developer presented expert testimony averring that its project would not harm the wetlands buffer, and that testimony was uncontradicted. No contrary evidence was presented by the town or by any abutters or other members of the community. "[T]he ZBA had before it 'credible and uncontroverted evidence' from the plaintiff's consultant 'that this project will not injure the wetlands.'" 155 N.H. at 106. "[T]he plaintiff's expert submitted a letter stating that the various detention ponds will work to ensure that the nearby wetland is not adversely affected." Id. "There was uncontroverted evidence that the project will not harm the wetlands, no abutters came forward against the project, and the project is an otherwise permitted use in the district." Id. at 109.

In the instant case, by contrast, there was massive public opposition to the project and more than ample testimony by knowledgeable abutters and other residents, who forcefully asserted that the developers' project would have a disastrous effect on the marine and animal life and vegetation in and around the North Mill Pond. Much of that testimony was presented live at public hearings, but it was also presented via literally dozens of letters and e-mail messages from concerned citizens, including at least one or two engineers and scientists. (I CR 1, at pp. 11-12; I CR 4; I CR 8; II CR 14, at pp. 76-83.)

The chief relevance of the Malachy case to the instant controversy is that it makes clear that cost and economics are pertinent to the issue of the feasibility of a given project. However, this rule offers the developers no

comfort in this case. They never contended that erection of their proposed buildings outside of the 100' wetlands buffer would render their project economically infeasible until they raised that issue for the first time on appeal in the Housing Appeals Board.

As the parties seeking a wetlands conditional use permit and site plan approval, they bore the burden of proof on that issue. Malachy, 155 N.H. at 108 ("If the proposed project could be constructed such that an area variance would not be required, the burden is on the applicant to show that these alternatives are cost-prohibitive."). They never raised that contention in the Portsmouth Conservation Commission, the Planning Board, or in the ZBA. Even when being specifically cross-examined concerning the issue by a member of the Planning Board, they admitted (or, at least, failed to deny) that it would be feasible for them to erect their buildings within the boundaries of the site yet outside the 100' wetlands buffer. Whereas in Malachy the denial of the requested variance would likely have scuttled the project altogether, the closest that the developers herein ever came to arguing that the project was economically infeasible was to say that the project would not be as profitable to them if they were required to shrink their buildings and locate them outside the wetlands buffer.

Further, they never introduced any economic data to attempt to show that their project would be cost-prohibitive if they were forced to place their buildings outside the 100' buffer, and they never raised that argument until the case reached the Housing Appeals Board. Having been raised for the first time on appeal, that argument is waived. Robinson v. Town of Hudson, 154 N.H. 563, 567-68 (2006); Blagbrough Family Realty Trust v.

Town of Wilton, 153 N.H. 234, 238-39 (2006); Cherry v. Town of Hampton Falls, 150 N.H. 720, 725 (2004).

II. The Housing Appeals Board Improperly Substituted Its Judgment for That of the Zoning Board of Adjustment.

The developers have raised a potpourri of arguments to refute the notion that the Housing Appeals Board overstepped its authority and improperly substituted its judgment for that of the ZBA. However, none of these arguments has any merit.

A. Whether right or wrong, the ZBA's prior, January 22, 2020 decision and its methodology for measuring building height is binding on the developers, for they did not appeal that decision.

In light of the developers' present contentions concerning the methodology for measuring building height, it is curious that they applied for a height variance in January 2020 in the first place. Why did they find it necessary to apply for a height variance for their first plan, but not their second, given the fact that the redesigned buildings reached almost as high into the sky as the ones under the first? The developers have never come up with a satisfactory answer to that question.

The developers claim that they did not do an "end run" around the ZBA's original ruling denying their application for a height variance, and they deny that they engaged in "architectural sleight of hand" as a means of circumventing that ruling. (Appellee's Brief at 6, 13-14.) They claim that they fully disclosed their intention to regrade the property in the original

plan which they submitted in conjunction with their first application for a variance in January 2020.[1] (Id.)

But if this is true, then, not having appealed the ZBA's January 22, 2020 decision denying their variance application, the developers are bound by that ruling--whether right or wrong--under the doctrines of res judicata and collateral estoppel, not to mention this Court's holdings in Fisher v. City of Dover, 120 N.H. 187 (1980), and the case which the developers themselves cite, CBDA Dev., LLC v. Town of Thornton, 168 N.H. 715 (2016). Not having appealed that decision, the developers are foreclosed from arguing that the ZBA used an incorrect method of measuring the heights of the proposed buildings by measuring them from the original ground level, rather than from the so-called "regraded level."

They are also foreclosed from arguing that their revised site plan of 2021 complied with the Zoning Ordinance's 50' height limit and did not require a variance. The ZBA obviously saw the matter differently and, not having appealed its prior ruling, the developers are bound by its interpretation of the Zoning Ordinance vis-à-vis measurement of building height, whether right or wrong. When the developers came before the ZBA for the second time in the spring of 2021, the only remaining issue was whether the two plans were "materially different." CBDA; Fisher. Because the build-

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1. "In January 2020 when Iron Horse submitted a variance application seeking to construct an extra story on the proposed buildings, it expressly advised the ZBA that it had already committed to regrading the property to raise the ground floor of the proposed buildings. . . . Thus, Iron Horse did not regrade the property in response to, or as an end-run around, the ZBA's variance decision." (Appellee's Brief at 6 (emphasis in original).)

ings in the revised plan were very nearly as tall as those in the original one--within 3-4 feet--the ZBA was well justified in answering that question in the negative and finding that there was no material difference. The Housing Appeals Board had no business setting aside that finding.

B. Contrary to their contentions, the Court's holding in *CBDA Dev., LLC v. Town of Thornton* does not support the developers' position.

The developers argue that the Housing Appeals Board "found that Iron Horse's site plan application was not a successive variance application barred by Fisher v. City of Dover" and that "Fisher applies only when an applicant submits successive variance applications that are not materially different."[2] (Appellee's Brief at 11.) Citing CBDA Dev., LLC v. Town of Thornton, 168 N.H. 715 (2016), they claim that because they never submitted a second variance application--they only submitted a second site plan--the "subsequent application doctrine" does not apply. (Id.)

Preliminarily, it is to be noted that this is another argument that the developers are raising for the first time in this Court on appeal, and therefore it is waived. Robinson v. Town of Hudson, 154 N.H. 563, 567-68 (2006); Blagbrough Family Realty Trust v. Town of Wilton, 153 N.H. 234, 238-39 (2006); Cherry v. Town of Hampton Falls, 150 N.H. 720, 725 (2004). It was not raised in the proceedings before the Planning Board, the ZBA, or the Housing Appeals Board. The CBDA case itself was not even mentioned in their memorandum of law in the HAB or in any prior filing in

2. Actually, the Housing Appeals Board made no such finding. The terms "successive variance application" and "successive application doctrine" are not even mentioned in the HAB's decision, nor is the Fisher case.

the land use boards. Similarly, the terms "successive application doctrine" and "successive variance application" do not appear anywhere in any of their prior filings. Those terms appear for the first time in their brief in this Court. Therefore, their argument is waived. Id.

But in any event, the argument is meritless, anyway. The ZBA had the right, and in fact the obligation, to enforce its own prior ruling, and it was not necessary that the developers have filed a second variance application in order for it to do so. The ZBA was entitled to find, and did find, that one or more of the developers' proposed buildings exceeded the 50' height limit imposed by the Zoning Ordinance and violated section 10.5A43.30 thereof, and its finding was plainly not unreasonable. There was little difference between the proposed buildings that the developers brought forward in 2021 and the ones that the ZBA had rejected a year earlier, and the ZBA was entitled to so find.

In that regard, it is to be remembered that the Zoning Board of Adjustment's review of Planning Board decisions is de novo. Ouellette v. Town of Kingston, 157 N.H. 604, 608-12 (2008). If the ZBA spots a feature in the applicant's site plan which conflicts with one of its own prior decisions, it has the right to enforce its prior decision by disapproving the plan. And, for that matter, it has the authority to correct any other errors or violations of the zoning ordinance which it happens to detect. Id. In this case, the ZBA had the right to determine that the developers' revised site plan both violated the 50' height restriction and conflicted with its (the ZBA's) own prior decision denying a variance from that limit. Id.

Having failed to appeal the ZBA's earlier decision, the developers were bound by it. It was for the ZBA to say whether the buildings' revised

design would exceed the 50' height limit. It was also for the ZBA to say whether the 2020 plan and the 2021 plan were "materially different." So, too, was it was for the ZBA to say whether the developers' revised design was a mere subterfuge, calculated to evade the effect of the ZBA's original decision denying the height variance. It did so, and its findings were neither unreasonable nor unlawful. In the final analysis, the buildings depicted in the developers' plan, as revised, exceeded the 50' height limit and therefore could not lawfully be built without a variance, which the ZBA had already refused to grant.

C. There was no mistake, and it was not required that the developers file a second variance application in order for the ZBA to find that there was "no material difference" between the second plan and the first.

The developers deny that the ZBA applied this Court's holding in the case of Fisher v. City of Dover, 120 N.H. 187 (1980), for, they claim, that case was mentioned neither in the ZBA's written decision nor in the board members' discussion of the citizen opponents' appeal at the hearing itself. (Appellee's Brief at 14-15.) They further claim that ZBA member Jim Lee "labored under the mistaken belief that Iron Horse had resubmitted a variance application." (Id.)

These arguments are sheer nonsense. The Fisher case's name and holding are familiar to every land use lawyer and every zoning board of adjustment member in the State of New Hampshire. Mr. Lee and the rest of the members of the Portsmouth ZBA were well aware of that case's holding and its significance, whether or not it was mentioned by name. The citizen opponents' written appeal of the Planning Board's decision to the ZBA specifically flagged the issue. (2 CR 2, at p. 9.) That issue was simple: the

developers' redesigned plan conflicted with one of the ZBA's prior decisions concerning the same property. (Id.) Thus, the holding of Fisher v. City of Dover was in play, whether mentioned by name or not.

Mr. Lee and the other members of the ZBA fully understood the issues, and there was no mistake. They did not treat the developers' revised site plan as a "second application for a variance" or as a "resubmitted" one, although as a practical matter their reversal of the Planning Board's decision may have had the same effect. The better analysis is that they treated it as the occasion to enforce one of their own prior decisions, to ensure Iron Horse's compliance therewith, and to ensure the developers' compliance with the Zoning Ordinance in general. In that regard, once again, their review of the Planning Board's decision was de novo. Ouellette v. Town of Kingston, 157 N.H. 604 (2008). The ZBA certainly had the authority to overturn the Planning Board's decision and disapprove the developers' plan if it contained a zoning violation or if it conflicted with one of the ZBA's own prior decisions.

Ergo, whether a second variance application was filed or whether it wasn't, the issue was the same, as was the outcome under both Fisher and CBDA Dev., LLC v. Town of Thornton, 168 N.H. 715 (2016). The issue: Was the developers' revised plan "materially different" from the earlier one which the ZBA had effectively rejected by refusing to grant a height variance? The ZBA answered that question in the negative, and it was not within the purview of the the Housing Appeals Board's authority to second-guess that determination.

CONCLUSION

For all of the foregoing reasons, the decision of the Housing Appeals Board should be reversed.

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that this brief, excluding the cover page, table of contents, table of authorities, and signature lines and certificate of service, contains less than 3,000 words. According to the "word count" feature in the undersigned counsel's word processing program, the number of words is 2,956.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, Duncan J. MacCallum, Attorney for Intervenor-Appellants in the within appeal, hereby certifies that on this 2nd day of December, 2022, the foregoing Intervenor-Appellants' Reply Brief was served upon all parties by serving counsel for the appellee, Michael D. Ramsdell, Esquire and Brian J. Bouchard, Esquire, and counsel for the City of Portsmouth, Trevor P. McCourt, Esquire, via the Court's electronic case filing system.

/s/ Duncan J. MacCallum
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