THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2022 TERM

No. 2022-0182

James A. Beal, et al.

v.

Iron Horse Properties, LLC

Rule 10 Appeal from the Housing Appeals Board

BRIEF OF APPELLEE IRON HORSE PROPERTIES, LLC

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QUESTIONS PRESENTED

I. The Housing Appeals Board neither improperly substituted its judgment for that of the Portsmouth ZBA nor otherwise erred when it found that Iron Horse's development plan as approved by the Planning Board was not a successive variance application barred by *Fisher v. Dover*.

II. The Housing Appeals Board's determination that the Planning Board's grant of a wetlands conditional use permit to Iron Horse was not unlawful or unreasonable was itself not unjust or unreasonable.

STATEMENT OF THE CASE AND FACTS

On April 15, 2021, with written decision dated April 20, 2021, the City of Portsmouth Planning Board ("Planning Board") granted site plan approval for Appellee Iron Horse Properties, LLC's ("Iron Horse") residential development of 105 Bartlett Street ("Proposed Development"). HAB's Certified Record of Appeal ("HABCR"), pp. 112-14. The Planning Board also approved a Wetlands conditional use permit ("Wetlands CUP") under Section 10.1017 of the Portsmouth Zoning Ordinance ("Zoning Ordinance"), and a conditional use permit for shared parking. *Id*., at 112. The Planning Board's approval followed: (1) multiple meetings regarding rezoning the land to residential, including an onsite meeting with the neighbors; (2) multiple meetings with the City's Technical Advisory Committee before its recommendation of approval; and (3) multiple meetings and a site walk with the Portsmouth Conservation Commission before its recommendation of approval.

The Proposed Development includes three multifamily residential buildings containing 152 dwelling units. *Id.* at 118. It features many public improvements including 58.1% open space on the development lot, improvements to the wetlands buffer, the contribution of 47,703 square feet of land to the City's North Mill Pond Greenway, and a half-acre public park along the greenway. *Id.* at 119-22.

The Proposed Development site has a history of railroad and industrial use. *Id.* at 117-20. The only improvements still in use are an industrial building, now converted to a brewery, doggy daycare, and paved parking. *Id.* The paved parking extends to within twenty feet of North Mill Pond and untreated stormwater flows directly from the paved parking into the pond. *Id.* The site includes derelict railroad structures that pose a safety hazard and are a blight to the North Mill Pond vista. *Id.* The 100-foot tidal wetland buffer is almost entirely disturbed by past railroad use, has been neglected and fallen into disrepair, and is now overgrown with invasive species. *Id.* This portion of the site has a history of debris dumping, homeless encampments, and crime. *Id.*

Following the Planning Board's approvals, Appellants, a group of anti-development Portsmouth residents, filed a nine-count appeal with the Portsmouth Zoning Board of Adjustment ("ZBA"), challenging the grants of approval. *Id.* at 38-49. Appellants' allegations included that: (1) Iron Horse violated a prior ZBA decision denying its request for a variance from the building height restriction to build an extra story on the project; (2) the Planning Board erred in granting the Wetlands CUP because Iron Horse purportedly failed to satisfy the enumerated criteria in the Zoning Ordinance; and (3) Iron Horse engaged in "architectural sleight of hand" by raising the property grade to increase the height of the proposed buildings beyond the 50 feet permitted under the Zoning Ordinance. *Id.*

Iron Horse moved to dismiss the Wetlands CUP issue from Appellants' ZBA appeal for lack of subject matter jurisdiction, *id.* at 58-64, because appeals over a planning board's administration of conditional use permits and other innovative land use controls must proceed directly to the superior court or the Housing Appeals Board ("HAB") pursuant to RSA 676:5, III. Iron Horse highlighted two dispositive facts for the ZBA in response to Appellants' other allegations. 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. *Id*. at 68-70. Thus, Iron Horse did not regrade the property in response to, or as an end-run around, the ZBA's variance decision. Additionally, building height is measured from the "average grade plane" to the top of the building. Zoning Ordinance §10.1530 (definitions of "building height" and "grade plane"). When measured in conformity with the Zoning Ordinance, each of the proposed buildings is less than 50 feet in height. *Id.* at 70.

At the instruction of the City Attorney, rather than actually deciding whether it had jurisdiction over the Wetlands CUP issue, the ZBA merely assumed that it had subject matter jurisdiction over the Wetlands CUP issue.[1] *Id.* at 76, 78-79. The ZBA then eschewed consideration of Appellants' individual claims of Planning Board error and considered "the totality of Appellants' counts" as its basis to reverse the Planning Board's grants of approval in a single motion. Appendix A to Appellants' Brief ("AppA"), p. 10 n. 19). One ZBA member expressed that his decision to

[1] The City Attorney advised the ZBA that if it did not resolve the legal issues involved in the matter, including jurisdiction, "the legal issues will move to a more appropriate forum for their resolution, the court system." *Id.* at 78-79.

overturn the Planning Board's approvals was based on his dislike for the project and the prospect of creating additional housing in Portsmouth for outsiders. He stated:

> There are enough places to live for the people of the City to live here; it's people who don't live here, who aren't here, who wish they were who are sensing a shortage of housing. I don't think there's a shortage of housing.

HABCR**,** p. 8; *see also*, *July 20, 2021*, *Hearing Video Recording*, at approx. 3:14, *available at*, https://www.youtube.com/watch?v=v5cCWdSwxQo.

Another ZBA member labored under the mistaken belief that Iron Horse had resubmitted a variance application. HABCR**,** p. 8-9. He voted to reverse the Planning Board's grant of approvals because he believed that not enough had changed since the original submission. *Id*.; *see also July 20, 2021*, *Hearing Video Recording*, at approx. 2:56. When the Acting ZBA Chair attempted to explain the difference between the previous variance application and the current Planning Board appeal, the distinction was irrelevant to the ZBA member. HABCR**,** p. 8-9. He trivialized the distinction as a "new and improved box of cereal" but the same stuff in a different package. *Id.*; *see also July 20, 2021*, *Hearing Video Recording*, at approx. 2:58.

Iron Horse appealed all nine counts of Appellants' ZBA appeal to the HAB. HABCR, pp. 1-34. The parties agreed that the HAB should consider the merits of the Planning Board's decision to approve the Wetlands CUP instead of just the challenge to the ZBA's jurisdiction.[2] *Id*. at 472-73. Iron Horse moved to shift the burden of proof onto Appellants because under RSA 676:5, III, Appellants, not Iron Horse, should have

[2] After achieving additional delay by arguing otherwise, Appellants now concede that the ZBA lacked jurisdiction over those questions pertaining to the Wetlands CUP. Brief for Intervenor-Appellants ("Appellants' Brief), p. 15 n 2.

appealed the Wetlands CUP approval from the Planning Board to the HAB. HABCR, pp. 276-79. After extensive briefing, motion practice, and a hearing, the HAB issued a decision reversing the ZBA and affirming the Planning Board's grants of approval. AppA.

The HAB found, irrespective of the burden of proof, that the Planning Board had not acted "illegally or unreasonably" in granting development approvals to Iron Horse. *Id.* at 6, 10 n. 19. The HAB also found that the ZBA's approach to the appeal was "suspect" and found that "bias towards [Iron Horse's] project unrelated to the appeal requests" likely resulted in the summary reversal of the Planning Board without significant discussion. *Id*. at 10 n. 18.

Appellants moved for rehearing of the HAB Decision pursuant to RSA 541:4. Attachment B to Appellants' Brief ("AppB"). Appellants urged the HAB that it had substituted its judgment for that of the ZBA and erroneously concluded that Iron Horse's application was not a successive variance application, and therefore was not barred by *Fisher v. Dover*, 120 N.H. 187 (1980). AppB, pp. 1-3. Appellants argued that the HAB erred when it found that the Planning Board's determination that Iron Horse's plan did not violate the Zoning Ordinance's building height provisions was not unreasonable or unlawful. *Id.* at 3-4. Appellants also sought reconsideration of the HAB's ruling that the Planning Board's approval of the Wetlands CUP was neither unlawful nor unreasonable. *Id.* at 4-6. The HAB denied the motion for rehearing and this appeal followed. Appendix C to Appellants' Brief.

SUMMARY OF ARGUMENT

The HAB's determination that Iron Horse's site plan application, including two applications for conditional use permits, was not a successive variance application barred by *Fisher v. Dover* was not unjust or unreasonable. Iron Horse's site plan application did not include a second

variance application. Instead, the site plan application was modified to comply with the Zoning Ordinance, including the manner in which building height is measured, and, as found by the HAB, Iron Horse also complied with the ZBA's prior variance denial.

To the extent that Appellants' claim could be construed as alleging that Iron Horse's development plan should have been barred by the subsequent application doctrine, although such an argument is not identified in Appellants' brief, this argument also fails. While Iron Horse's January 2020 variance application was denied by the ZBA, the site plan, including two conditional use permits, approved by the Planning Board did not include a request for a variance. Thus, the development plan was not barred by the subsequent application doctrine because: (1) the original plan was materially modified so that Iron Horse was not seeking the same relief; and (2) the site plan and conditional use permits were approved by a different decision-maker, the Planning Board instead of the ZBA.

The HAB's finding that the Planning Board's approval of the Wetlands' CUP was not unreasonable or unlawful was supported by the evidence and itself was not unjust or unreasonable. The final design satisfied the Wetlands CUP criteria and was rightly approved by the Planning Board. The HAB correctly made a factual finding that the Conservation Commission, the City's environmental planner, and the City's planning department supported Iron Horse receiving a Wetlands CUP. After finding that the ZBA lacked subject matter jurisdiction over the Wetlands CUP, a position that Appellants contested until the matter reached this Court, the HAB correctly found that "the Planning Board [did not] act illegally or unreasonably in making its wetlands CUP decision, thus, the ZBA decision reversing the Planning Board's grant of the wetland buffer CUP was unreasonable."

Relying on *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007), the HAB properly rejected Appellants' argument that the Wetlands CUP criteria had not been satisfied because another a smaller building could be built outside the wetlands buffer area. The HAB recognized that Appellants' argument ignores 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…." *Id.*, 155 N.H. at 108. As articulated by the HAB:

> The Intervenors would like the Housing Appeals Board to focus on the idea that a smaller project could be built as a basis for reversal of the Planning Board's approval of the wetlands buffer and shared parking CUPs. The Certified Record reflects adjustments made by the Applicant to the plan, but, more importantly, this "desire" by the ZBA does not mandate a wholesale reduction in project size. *See, Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007). The Housing Appeals Board does not believe that the Planning Board acted illegally or unreasonably in making its wetlands CUP decision, thus, the ZBA decision reversing the Planning Board's grant of the wetland buffer CUP was unreasonable.

AppA, p. 6.

The HAB's decision was not an error of law, unjust, or unreasonable. *See* RSA 541:13. Moreover, there was record evidence in support of the HAB's decision.

ARGUMENT

I. The Housing Appeals Board did not err when it found that the development plan approved by the Planning Board was not a successive variance application barred by *Fisher v. Dover*.

A. Standard of Review.

The Housing Appeals Board's decision "shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear

preponderance of the evidence before it, that such order is unjust or unreasonable." RSA 541:13. The Housing Appeals Board's findings "upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable …." *Id.*

B. The HAB correctly found that Iron Horse's site plan application was not barred by *Fisher v. City of Dover* as a successive variance application.

Appellants urge this Court that the HAB substituted its judgment for that of the ZBA and erred when it found that Iron Horse's site plan application was not a successive variance application barred by *Fisher v. City of Dover*, 120 N.H. 187 (1980). Appellants' argument is unavailing because *Fisher* applies only when an applicant submits successive variance applications that are not materially different. *Fisher,* 120 N.H. at 188-89. Appellants do not, and cannot, claim that Iron Horse's site plan application included a second variance request.

Although not mentioned in Appellants' brief, Iron Horse's development plan also was not barred by the subsequent application doctrine. In *CBDA Dev., LLC v. Town of Thornton*, 168 N.H. 715 (2016), this Court extended the rationale of *Fisher*, gave the doctrine a name, and held that "the *subsequent application doctrine* set forth in *Fisher* applies in the planning board context." *Id.* at 723 (italics added). Accordingly, in *CBDA Dev., LLC,* this Court affirmed the trial court's approval of a planning board determination that it was not required to review a successive site plan application that was not materially different for a previously rejected site plan application. *Id.*

Critically, as the name "subsequent application doctrine" implies, *Fisher* and *CBDA Dev., LLC* only preclude consideration of a subsequent application seeking the same relief that is not materially different from the first application. *See CBDA Dev., LLC*, 168 N.H. at 721. In *CBDA Dev.,*

LLC, this Court analogized the subsequent application doctrine to administrative finality and stated: "Administrative finality prevents repetitive duplicative applications for the same relief, thereby conserving the resources of the administrative agency and of interested third parties that may intervene." *Id.* at 721 (quotation and citations omitted). Thus, *Fisher* precluded a successive variance application after a first variance application was denied. *Fisher,* 120 N.H. at 188-89. In *CBDA Dev., LLC*, a successive site plan application was barred because it was not materially different from a previously denied site plan application.

It is indisputable that Iron Horse did not submit a successive application **for the same relief**. *See CBDA Dev., LLC*, 168 N.H. at 721. After the ZBA denied Iron Horse's multiple variance requests in January 2020, Iron Horse abided by the ZBA's decisions and never submitted a second variance application.[3] Instead, Iron Horse materially modified certain aspects of the project to ensure compliance with the Zoning Ordinance in its site plan application. Since the criteria for a variance[4] significantly differ from the criteria for compliance with the Zoning Ordinance,[5] the site plan application did not seek the same relief as had

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[3] When the HAB found that Appellants' argument that Iron Horse's site plan application was a successive variance application was unreasonable and unsupported by the evidence, it also found as a fact that Iron Horse complied with the prior variance denial. AppA, p. 4 n 4. This factual finding is deemed "prima facie lawful and reasonable." *See* RSA 541:13.

[4] A variance requires satisfaction of the following five-part test: "(A) The variance will not be contrary to the public interest; (B) The spirit of the ordinance is observed; (C) Substantial justice is done; (D) The values of surrounding properties are not diminished; and (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship." RSA 674:33, I(a)(2).

[5] The CD4-W district in which Iron Horse's development is located imposes a building height limit of 50 feet. *See* Ordinance, Map 10.5A21.B, §10.5A43.30. "Building height" is measured from the grade plane to the top of the proposed building. See *id*. at §10.1530. Thus, Iron Horse was

been requested in the variance application. Moreover, because Iron Horse's only variance application was presented to the ZBA and the site plan application was presented to the Planning Board – two different land use boards – there is an independent basis for the inapplicability of the subsequent application doctrine. Consequently, the HAB's ruling was not unjust or unreasonable.

Appellants remaining arguments about the HAB's rejection of the ZBA's arguments regarding building height are equally unavailing. Appellants' claim that Iron Horse engaged in "architectural sleight of hand" by raising the property grade after the ZBA denied its January 2020 variance request for an extra story on the Proposed Development, Appellants' Brief, p. 31-32, is unequivocally false. Iron Horse did not regrade the property in response to the ZBA's variance decision or as part of some end-run around the ZBA decision.

The certified record shows Iron Horse committed to regrading the property to raise the ground floor of the proposed buildings **before** it applied for a variance for an extra story. The January 2, 2020 variance application to the ZBA seeking an extra story on the buildings plainly identified the plan to regrade the property by stating: "Iron Horse has also graded the first floor of Buildings A, B, and C to raise the elevation of all occupied levels of the building to provide additional flood protection." HABCR, p. 476. Thus, the plan for regrading unequivocally predated the January 2020 variance application because the variance application both identified the plan to raise the grade of the property *and* sought an extra story on the buildings. *Id*. Additionally, Iron Horse respected the variance

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not required to obtain a variance because its site plan does not include a building that exceeds fifty feet in height measuring from the grade plane to the top of the building.

denial by eliminating the extra story sought in the variance application from the modified Proposed Development approved by the Planning Board.

Moreover, Iron Horse's site plan application plainly explained its intention to regrade the property. Iron Horse proposed regrading the property to account for the effects of climate change, raising its elevation by 3.5 to 4.5 feet, and placing part of a parking garage under the regraded plane. HABCR, p. 469. The Grade Plane Exhibit submitted to the Planning Board plainly shows that none of the proposed buildings exceeds its respective maximum grade plane elevation or 50 feet in height. *Id*. As noted above, building height is measured from the average grade plane and not from the original grade. *See* Ordinance, §10.1530. Consequently, unlike the January 2020 variance application that sought relief from the Zoning Ordinance, the site plan application approved by the Planning Board complies with the Zoning Ordinance.

It is equally untrue that the ZBA "[a]pplied this Court's holding in the familiar case of *Fisher v. City of Dover*, 120 N.H. 187 (1980), [and that] the ZBA found as fact that there was no substantial difference between the revised building plan and the one that had been rejected a year earlier." *See* Appellants' Brief, p. 17. During its discussion of the Planning Board appeal, no member of the ZBA cited or made any reference to *Fisher.* The ZBA's written decision neither referred to *Fisher* nor made any reference to a successive variance application. HABCR, p. 81. A single ZBA member labored under the mistaken belief that Iron Horse had resubmitted a variance application, *id.* at 8-9, and ignored the Acting ZBA Chair's attempt to explain the difference between the previous variance application and the then-current Planning Board appeal.[6] *Id.*

[6] The Acting ZBA Chair, who understood the legal significance of the distinction between a successive variance application and a site plan, admonished the mistaken ZBA member for treating the appeal from the

There was no finding, consensus or acknowledgment by a majority of the ZBA as a fact or as a legal conclusion either that *Fisher* applied or that the site plan was a successive variance application. In fact, the HAB correctly found that the ZBA decided the appeal without specific findings or a consensus as to a reason for overturning the Planning Board's decision. The HAB explained its finding as follows:

> In reviewing the Certified Record, in particular: Tab 22, the ZBA summarily reversed the Planning Board's decisions (Counts 1-9) without significant discussion. Likely, this resulted, in part, from some bias toward the Applicant's project unrelated to the appeal requests. At the 20 July 2021 ZBA hearing, Mr. David MacDonald opined:
>
> > …he would support the appeal, noting that the City in the last decade had gone through a surge of developing buildings that the City didn't really need and that consumed services and generated costs for the citizens. He asked how much better off Portsmouth would be if the proposal was approved. He said there were enough places to live for residents that people who didn't live in Portsmouth but wanted to saw [sic] a shortage of housing. He said there was a shortage of natural waterfront and wild species and that the City didn't have to approve giant residential buildings or corrupt shorelines and estuaries to make the planet a better place to live." (CR at Vol., I, Tab 22).
>
> In addition, Mr. James Lee said: "…the Board should just consider the totality of the appeal and say yes or no." (CR at Vol. I, Tab 22). The Housing Appeals Board finds this method of deciding the numerous appeal counts to be suspect, since the focus of the ZBA was on the project itself and not each individual appeal request.

Planning Board as a second variance application: "When this was before us [previously] we were being asked to grant some variances and we looked at it under a different set of criteria, so here we're essentially looking at the criteria that the planning board would have had to judge this particular petition by." *Id.*; s*ee also July 20, 2021 Hearing Video Recording*, at approx. 2:57.

AppA, p. 10.

In sum, the HAB expressly found that, rather than submitting a successive variance application, Iron Horse complied with the ZBA's denial of the prior variance application. AppA, p. 4 n 4. The HAB also properly determined that, per the terms of the Zoning Ordinance and consistent with the manner in which building height was measured in other matters, building height is measured from the average grade plane to the top of the building, and when that is done, all the buildings for the Proposed Development satisfy the height requirement for the CD4-4 Zone. AppA, pp. 7-8. Indeed, Appellants do not challenge the HAB's or the Planning Board's interpretation of the Zoning Ordinance's height limitation. *See* Appellants' Brief, pp. 31-36. The HAB's decision was not an error of law, unjust or unreasonable. *See* RSA 541:13. Consequently, the HAB's decision should be affirmed.

II. The Housing Appeals Board's determination that the Planning Board's grant of a wetlands conditional use permit to Iron Horse was not unlawful or unreasonable was not itself unjust or unreasonable.

A. Standard of Review.

The Housing Appeals Board's decision "shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." RSA 541:13. The Housing Appeals Board's findings "upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable …." *Id.*

B. The Standard of Review for the HAB Was Whether the Planning Board's Grant of a Wetlands CUP Was Illegal or Unreasonable and Whether There Was Evidence to Support the Planning Board's Decision.

As found by the HAB, the Planning Board did not err in granting Iron Horse's application for a Wetlands CUP. Appellants essentially ask this Court to read the Wetlands CUP criteria as a blanket prohibition against development in the wetlands buffer. For example, Appellants misleadingly refer to sections 10.1013.40, 10.1014.20, and 10.1016 of the Zoning Ordinance as "creat[ing] a 100' 'no build' wetlands buffer zone around Portsmouth's North Mill Pond generally prohibiting the construction of any new structures within 100' of the highest observable tide line." Appellants' Brief, p. 20. A plain reading of the Zoning Ordinance belies this premise of Appellants' argument.

By its express language, the ordinance provision is a buffer, not a prohibition. None of Zoning Ordinance sections 10.1013.40, 10.1014.20, and 10.1016 prohibits construction in the wetlands buffer. In fact, section 10.1016.10 provides a specific list of "uses, activities and alterations" that are expressly permitted in the wetlands buffer area without a conditional use permit. Moreover, Zoning Ordinance section 10.1016.20 unequivocally provides that other uses, activities, and alterations are permitted with a conditional use permit.

The Zoning Ordinance provides the Planning Board with exclusive authority over conditional uses in Portsmouth's wetlands. Section 10.1017. Section 10.1017.10 states: "[t]he Planning Board is authorized to grant a conditional use permit for any use not specifically permitted in Section 10.1016.10, subject to the procedures and findings set forth herein." As such, the HAB correctly found that the Wetlands CUP application was an innovative land use control pursuant to RSA 674:21, I, that was exclusively

within the Planning Board's jurisdiction and outside the subject matter jurisdiction of the ZBA.[7] AppA, pp. 4-5.

By declaring that the ZBA lacked subject matter jurisdiction over Appellants' issues related to the Wetlands' CUP, the HAB reinstated the Planning Board's grant of approval. "When reviewing a planning board's decision, the HAB must uphold the decision unless there was an error of law or the HAB is persuaded by the balance of probabilities that the decision was unreasonable." *Appeal of Chichester Commons, LLC,* No. 2021-0476, (N.H. September 2, 2022), p. 4 (citing RSA 677:6,:15, V; RSA 679:9, II; RSA 679:9, I ("Appeals to the [HAB] shall be consistent with appeals to the superior court pursuant to RSA 677:4 through RSA 677:16.")). Appellants "bear[] the burden of proving that the decision was unlawful or unreasonable." *Id.* (citing RSA 677:6; RSA 679:9, I).

"The HAB must treat the planning board's factual findings as prima facie lawful and reasonable." *Id.* (citing *Trustees of Dartmouth Coll. v. Town of Hanover*, 171 N.H. 497, 504 (2018); RSA 677:6; RSA 679:9, I). "The HAB's review is not to determine whether it agrees with the planning board's findings, but, rather, whether there is evidence in the record upon which the planning board could have reasonably based its findings." *Id.* (citing *Trustees of Dartmouth Coll.*, 171 N.H. at 504). Therefore, the HAB was required to discern whether the Planning Board's decision was "illegal" or "unreasonable" and whether there was record evidence to support the decision. *Id.* That is the standard the HAB correctly applied. AppA, p. 6. For the following reasons, the HAB's decision was not an error of law, unjust, or unreasonable. *See* RSA 541:13.

[7] As noted above, Appellants now concede that the ZBA lacked jurisdiction over those questions pertaining to the Wetlands CUP. Appellants' Brief, p. 15 n 2.

C. The HAB Correctly Found that the Planning Board's Grant of a Wetlands Conditional Use Permit to Iron Horse Was Reasonable and Supported by Evidence.

Iron Horse participated in an iterative design process, in collaboration with Portsmouth's planning department, that thoughtfully scaled back the wetlands encroachment to balance environmental and developmental needs. The HAB correctly made a factual finding that the Conservation Commission, the City's environmental planner, and the City's planning department supported Iron Horse receiving a Wetlands CUP. AppA, p. 6. The final design satisfied the Wetlands CUP criteria and was rightly approved by the Planning Board. The HAB correctly found that "the Planning Board [did not] act illegally or unreasonably in making its wetlands CUP decision, thus, the ZBA decision reversing the Planning Board's grant of the wetland buffer CUP was unreasonable." *Id.* The HAB's decision was not an error of law, unjust, or unreasonable. *See* RSA 541:13.

The Zoning Ordinance includes a conditional use permit for development in the wetlands buffer. Zoning Ordinance, §§10.1016.10, 10.1017.10. As explained above, the Zoning Ordinance gives the Planning Board exclusive authority to grant a Wetlands CUP. *Id.* at §0.1017.10. The Planning Board may grant a Wetlands CUP upon satisfaction of the following criteria:

> (1) The land is reasonably suited to the use, activity or alteration.
>
> (2) There is no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use, activity or alteration.
>
> (3) There will be no adverse impact on the wetland functional values of the site or surrounding properties;

(4) Alteration of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals;

(5) The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this Section; and

(6) Any area within the vegetated buffer strip will be returned to a natural state to the extent feasible.

Id.

Appellants challenge the HAB's decision based on criteria (2) and (5). Appellants' Brief, pp. 26-27. They allege a violation of criterion (2) based on a claim that an alternate location outside the wetlands buffer was feasible for a smaller project that could have been developed outside the wetlands buffer. *Id*. They urge a violation of criterion (5) based on a claim that a scaled-down project, outside the wetlands buffer, would have been the alternative with the least environmental impact. *Id.* Appellants principally rely on an unstamped sketch from a former appellant, James Hewitt[8] (who happens to be an engineer). Hewitt photocopied Iron Horse's not-yet-final Landscape Plan and shrunk the size of the buildings to place them outside of the wetlands buffer. *See* HABCR, p. 52.

The HAB rejected Appellants' claims. AppA, pp. 5-6. After reviewing a voluminous certified record (including endorsements for the Wetlands CUP from Portsmouth's environmental planner and Conservation Commission), the HAB found that the Planning Board "had not acted illegally or unreasonably." *Id.* at 6. The HAB gave proper weight to Appellants' arguments about a smaller project but ultimately found them

[8] Hewitt contested the Proposed Development at the Planning Board, ZBA, and HAB. He is not identified as one of the Appellants to this Appeal, however.

legally and factually flawed. *Id*. The HAB summarized its analysis of Appellants' argument as follows:

> The Intervenors would like the Housing Appeals Board to focus on the idea that a smaller project could be built as a basis for reversal of the Planning Board's approval of the wetlands buffer and shared parking CUPs. The Certified Record reflects adjustments made by the Applicant to the plan, but, more importantly, this "desire" by the ZBA does not mandate a wholesale reduction in project size. *See, Malachy Glen Associates, Inc. v. Town of Chichester*, 155 N.H. 102 (2007). The Housing Appeals Board does not believe that the Planning Board acted illegally or unreasonably in making its wetlands CUP decision, thus, the ZBA decision reversing the Planning Board's grant of the wetland buffer CUP was unreasonable.

Id.

There is evidence in the record to support the HAB's rejection of Appellants' arguments. Appellants' arguments on criterion (2) rely on a misunderstanding or misinterpretation of the law. Criterion (2) provides that "[t]here is no alternative location outside the wetland buffer that is *feasible and reasonable* for the proposed use, activity or alteration." Zoning Ordinance, §10.1017.50 (emphasis added). This property has unique site conditions that narrow the range of possible development. These site conditions were explained to the Planning Board and the HAB as follows:

> The proposed development area has unique site conditions that include close proximity to the North Mill Pond; no build view corridors required by zoning that extend from perpendicular City streets located across the railroad; 15-foot side yard setback due to the adjacent railroad where none is required in the CD-4W district; and a 24-foot municipal sewer easement for large sewer pipe that conveys wastewater flow for the City's west end to the Deer Street pump station. These unique conditions put constraints on the applicant's ability to locate buildings within the developable upland area. The redevelopment is located within a feasible and reasonable manner that pulls the building footprints further back from

> existing condition, locates surface parking away from the pond along the railroad and creates expansive public open space in an urban setting along the North Mill Pond. As described in the Comment Response section above, the applicant has made even further effort to reduce buffer impact and density since the last meeting with the Conservation Commission.

HABCR, pp. 123-24.

Appellants' argument that a smaller project could be built on the property site ignores its unique site conditions and the fact that those special conditions "put constraints on the applicant's ability to locate buildings within the developable upland area." *Id.* Hewitt's sketch is unstamped, does not identify the number of units the smaller project could accommodate, and does not attempt to reconcile the significant cost of developing the property with the available units on a smaller project. *See* HABCR, p. 52. Anyone with an eraser and a pencil can shrink the size of a building to fit outside the wetlands buffer, as Hewitt did. However, it is immaterial whether a different, smaller building of some type can be built outside the wetlands buffer. First, it ignores the purpose and very existence of the Wetlands CUP. It is a buffer, not a bar or a setback. If Portsmouth wanted to bar development in the wetlands buffer, it would not have enacted a conditional use permit that permits development in the wetlands buffer.

Importantly, as referenced by the HAB, Appellants ignore 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*…." *Malachy Glen Assoc.*, 155 N.H. at 108 (emphasis added). The operative question is whether a feasible alternative method is available to implement the project as proposed. *Id.*; *Boccia v. Portsmouth*, 151 N.H. 85, 93 (2004). It is immaterial whether a different, smaller project could be developed on

the property as the "project as proposed" by Iron Horse is the anchor from which feasibility and reasonableness are measured. *See Malachy Glen Assoc.*, 155 N.H. at 108; *Boccia*, 151 N.H. at 93. Therefore, it is of no consequence whether it is theoretically possible to place a smaller building outside the wetlands buffer.

Appellants' arguments on criterion (5) fare no better. Implicit in the requirement of providing the "least adverse impact" is the inapplicability of criterion (5) when there is no adverse impact on the wetlands. The Planning Board correctly found that the Proposed Development will not have an adverse impact on the wetlands. The Planning Board expressly referenced some of the improvements to the wetlands buffer, including: "the removal of existing impervious surfaces and buildings, construction of 3 stormwater outlets, repaving of an existing access drive and parking lot, construction of a linear waterfront trail and community space, and construction of three new buildings which will result in a net overall reduction in impervious surfaces of 28,385 square feet …." HABCR, p. 112. Other improvements to the wetlands area identified in a report submitted by Iron Horse's expert and considered by both the Planning Board and the HAB include removing invasive species; improving stormwater management; and removing paved roadways, parking areas, and blighted buildings that are all currently located within the wetlands buffer. *Id*. at 118-20. Moreover, the Proposed Development encroaches less on the wetlands buffer than the structures currently on the property. *Id.* at 119-20.

The HAB correctly noted further evidence in the record that many administrative officials from Portsmouth considered Iron Horse's application for a Wetlands CUP and endorsed its issuance. For example, the HAB and the Planning Board each had before it the opinion of the City's Environmental Planner that the wetlands would benefit from the

Proposed Development. The City's environmental expert reported on the Wetlands CUP criteria as follows:

1. *The land is reasonably suited to the use activity or alteration.* This project is located in an area along the North Mill Pond that has not been maintained and has not been accessible to the public. While public access was not allowed by the former owner there were numerous camps a large amount of trash and other debris and a mix of invasive and opportunistic vegetation. Also there was an active business with alarge gravel parking area, a number of abandoned buildings and a site access road paved to the bank of the pond with no stormwater treatment throughout the site. It is reasonable for this area to be redeveloped and the project is consistent with City Zoning for this location.

2. *There is no alternative location outside the wetland buffer that is feasible and reasonable for the proposed use, activity or alteration.* The location has been selected as it is an unused railroad area which has not been maintained. **The applicant** sees this area as ready for redevelopment and has provided a feasible approach for that development and **has been able to demonstrate a reduction of impacts in the 100' wetland buffer.**

3. *There will be no adverse impact on the wetland functional values of the site or surrounding properties.* The buildings are no closer to the edge of wetland than existing buildings and **the design has been modified to reduce the amount of building area in the wetland buffer. The amount of pavement and other impervious surfaces has been reduced by over ½ an acre in this proposal, stormwater treatment has been added to the design, the public is being brought onto the site with a proposed porous pavement trail and an extensive invasive species removal and native planting program has been proposed.** The project provides community space that will allow people to walk along the pond on a safe accessible trail. Since the last meeting with the Conservation Commission building volume has been reduced in the 100 foot buffer parking has been pulled back from within the 100 foot buffer, and a more complete planting plan has been provided. **Overall this plan reduces the deteriorated buildings and site conditions as well as the quantity of invasive**

species, and the proposal will enhance the area generally given its current condition. This design is an improvement from the current site conditions as it reduces impervious surfaces, provides community access, treats stormwater, and reduces the amount of invasive species.

4. *Alteration of the natural vegetative state or managed woodland will occur only to the extent necessary to achieve construction goals.* The proposed project will be impacting some natural vegetation on the site especially in the footprint of the new buildings. The applicant has provided an invasive species removal approach and extensive planting plan for the entire site that includes the removal of invasives provides theopportunity for re-establishment of existing native vegetation and planting of new native vegetation.

5. *The proposal is the alternative with the least adverse impact to areas and environments under the jurisdiction of this section.* **The applicant has worked to enhance the site** and overall impacts from the project. **Impervious surfaces have been reduced with each subsequent revision of this project to a total reduction of 28,792 square feet from what exists on the site today. The applicant has made the site resilient to climate change by elevating the structures above the floodplain provided an extensive native planting plan and detailed and effective stormwater treatment plan and has provided community space to invite the public onto and through the site.**

6. *Any area within the vegetated buffer strip will be returned to a natural state to the extent feasible.* The applicant provided a landscape plan which includes plantings around the proposed building and within the 100' tidal wetland buffer. **The use of native trees and plantings within the 100 foot buffer and removal of invasive species on this site along with a protected 15' vegetated buffer will provide an enhancement to the buffer of the North Mill Pond.**

Recommendation: Staff believes this application represents a reduction in impacts to the tidal buffer zone and provides public access through a location that has been left to deteriorate. The applicant has complied

> with section 10.1017.24 which requests the removal of impervious surface in the buffer to below what exists. Staff recommends approval of this application as presented.

HABCR, pp. 156-57 (bold added).

After the Conservation Commission recommended approval of the Proposed Development, the City Planning Director wrote a memorandum to the Planning Board in which she reiterated the recommendation of the City's Environmental Planner and explained many of the public benefits of the Proposed Development. HABCR, pp. 433-42. The Planning Board and the HAB considered the following:

> Planning Department staff recommended approval of the application as the application represents a net reduction in impacts to the tidal buffer zone and provides public access through a location that has been left to deteriorate. The staff also found that the applicant has complied with the requirements of section 10.1017.24.
>
> The Conservation Commission reviewed the wetland conditional use permit application at the February 10, 2021 meeting and voted 6 to 1 to recommend approval with two stipulations:
>
> 1. That the bike/ped path be porous pavement and include an operation andmaintenance plan which includes no salting or sanding
>
> 2. That the site use only dark sky friendly lighting.
>
> The applicant has submitted revised plans addressing the recommended ConservationCommission stipulations to the satisfaction of the Planning Department.

Id. at 439-40.

The Proposed Development satisfied the criteria for a Wetlands CUP under Section 10.1017.10 of the Zoning Ordinance, and the HAB correctly determined that the Planning Board did not act "illegally or unreasonably"

in granting a Wetlands CUP to Iron Horse. AppA, p. 6. The Wetlands CUP criteria are not ambiguous, and Portsmouth's own administrative experts determined that the project complies with each criterion. As this Court has articulated, it is not the province of the Court to act as a super Planning Board and substitute its judgment for that of the Planning Board and the City's officials. *Rochester City Council v. Rochester Zoning Bd. of Adjustment*, 171 N.H. 271, 275 (2018).

D. The HAB Did Not Apply a Standard Different from the Six Criteria in the Zoning Ordinance When Reviewing the Wetlands CUP.

Appellants urge this Court that the HAB applied an incorrect standard in reviewing the Wetlands CUP issue based on a single sentence fragment wherein the HAB stated that "the final design [of the Proposed Development] is not unreasonable based on the facts considered by the Planning Board." AppA, p. 6. Placed in the proper context of the entire HAB ruling, this sentence reflects the burden of proof and is not a revision to the Wetlands CUP criteria. The Appellants argument completely ignores that the HAB also made the following, more comprehensive determination:

> After a full review of the Certified Record, the Housing Appeals Board has found, by a balance of probabilities, that the ZBA erred in its findings and that the Planning Board's decisions, including the CUPs, were appropriate. (*See*, RSA 679:9). **This is so regardless of which side had the "burden of proof" on Counts 4 and 5 of the zoning petition discussed at Pages 5-8, *supra.*** Thus, though the burden of proof issue was raised at the request of the Applicant, the Housing Appeals Board finds, in this case, that issue to be moot.

AppA, p. 10 n 19 (emphasis added). Since the HAB found that the Planning Board's decisions regarding the Wetlands CUP were appropriate, "regardless of which side had the 'burden of proof,'" its commentary on the burden proof issue raised by Iron Horse did not affect its decision.

Appellants' reliance on a single phrase in the Decision that merely reflected the proper, but less favorable burden of proof to Appellants, also ignores the totality of the HAB's discussion on the Wetlands CUP issues. Before concluding that the Planning Board's decision was appropriate under either burden of proof, the HAB acknowledged that "[t]he Certified Record contains the specific factors evaluated by the Planning Board in making its wetland buffer CUP decision." AppA, p. 5. The HAB recognized that the City's Environmental Planner and its Conservation Commission had recommended approval to the Planning Board. *Id.* at 6. The HAB evaluated the Intervenors' argument that a smaller project could be built outside the wetlands buffer. *Id.* The HAB considered the impact of Iron Horse's iterative designs on striking the appropriate balance between development and wetlands protection. *Id*. After considering the totality of information and applicable standards, the HAB concluded that the Planning Board had "not acted illegally or unreasonably." *Id.* Similarly, the HAB rejected the ZBA's focus on other, smaller designs for both the Wetlands and Parking CUPs before concluding that "the Planning Board properly and fairly reviewed the CUP criteria in granting the shared parking CUP in this location." *Id.* In order words, the Planning Board did not err.

In sum, after the HAB reviewed the information considered by the Planning Board, the Appellants' arguments concerning alternative locations, and the design modifications Iron Horse made as part of an iterative design process with Portsmouth, it correctly concluded that the Planning Board's finding that Iron Horse had satisfied the criteria for the Wetlands CUP was not unlawful or unreasonable. The appeal was not subject to a *de novo* standard. *See* RSA 677:15. Thus, the HAB had no obligation to parse through the Wetlands CUP criteria and specifically opine on each criterion in affirming the Planning Board's grant of approval.

The HAB only had to determine whether the Planning Board acted illegally or unreasonably. *Id*. The Board properly concluded that the Planning Board's decision was not illegal or unreasonable, regardless of which side carried the burden of proof.

CONCLUSION

For the foregoing reasons, the HAB's decision that Appellants challenge was not unreasonable or unjust. The HAB's findings were supported by the evidence and legally correct. The HAB's decision should be affirmed.

ORAL ARGUMENT

Iron Horse requests 15 minutes for oral argument before the Court. Oral argument may be helpful to the Court in deciding this appeal. A greater amount of time for oral argument is unnecessary.

CERTIFICATE OF COMPLIANCE

This brief complies with Supreme Court Rule 16(11) because it contains 7,813 words, excluding the table of contents and table of citations. Counsel relied on the word count of the computer used to produce the brief.

Respectfully submitted,

IRON HORSE PROPERTIES, LLC

By its counsel,

Dated: November 10, 2022

By: /s/ Michael D. Ramsdell

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CERTIFICATE OF SERVICE

On this 10th day of November, 2022, this brief was forwarded to all counsel of record through the Court's electronic filing system.

/s/ Michael D. Ramsdell_____
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