

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD



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Case Name: James Logan v. Town of Candia
Case Number: PBA-2022-28

ORDER

This matter concerns an appeal by James Logan (“Applicant”) of a denial of an application for a conditional use permit by the Town of Candia (“Town”) Planning Board (“Planning Board”) concerning a proposed 39-unit elderly housing development in Candia.

FACTS

The Applicant owns a 97.76-acre parcel of unimproved land on the north side of New Boston Road in Candia, identified on the Town’s assessing records as Tax Map 406, Lot 97 (“Property”). Certified Record (“CR”) at pp. 1, 4. The Property is located in the Town’s Residential (R) Zoning District, which requires a minimum of three acres per lot. See Town of Candia Zoning Ordinance (“Ordinance”), Section 6.02. The Property has 1,196 feet of frontage on New Boston Road (CR Plan sheet 3 of 28, CR 20), which is described as a local roadway running in an east-west alignment between Currier Road and Old Deerfield Road. CR 37.

On March 17, 2021, the Applicant presented a concept to the Planning Board for an informational meeting concerning a 39-unit, elderly housing project to be developed on the Property. CR 202. At such time, the Applicant identified that the project would require a waiver from the Ordinance’s frontage requirement, which requires a minimum of 200 feet of frontage on a so-called Arterial Street as defined by the Town of Candia’s Zoning Ordinance. CR 203.

On July 5, 2022, the Applicant filed an application with the Planning Board for major site plan/subdivision review, CR 4, along with an application for a conditional use permit (“CUP”) to allow for Elderly Residential Housing development on the Property. CR 20. Such applications included engineered site plans (consisting of 28 sheets) and a transportation impact assessment. In connection with its CUP application, the Applicant sought three

waivers,¹ including a waiver from Section 5.06.06 of the Ordinance, regarding frontage on a so-called Arterial Street.² In support of this waiver request, the Applicant's engineer wrote that:

elderly housing developments are low traffic generators and the traffic that is generated is usually off-peak, midday traffic. In addition to this, the site is less than 3/4 of a mile away from Route 43, one of the three arterial streets in town. Finally, it is our understanding that at one time the Town's transfer station was located on New Boston Road. Since the road was capable of supporting the traffic to the transfer station it should be more than adequate to support the traffic to the proposed 39-unit elderly housing development. This is also supported by the attached traffic analysis.

CR 24.

At its meeting held on August 17, 2022, the Planning Board found the CUP application complete and opened the public hearing on such application. CR 120. The public hearing was continued to the Planning Board's meeting on October 19, 2022, at the conclusion of which deliberations commenced, beginning with the waiver requests. CR 345. The record reflects the following during deliberations by the Planning Board members:

- Member Pouliot commented that while there was a reason to do it this way; there was no hardship. CR 350.
- Member Komisarek felt that it would affect abutting property values. CR 343, CR 351.
- Member Lindsey made a motion to deny the waiver request for the arterial road requirement because it is not on an arterial road. CR 355.

The motion to deny passed by a 5 to 2 margin. CR 356. Reasons provided by each member at the meeting include:

- Chair Cartier found that the request was: "not what the best intentions of the...Master Plan is..." CR 356.
- Vice Chair Chalbeck: "You can't tell me its not an arterial road...Everybody travels that road whether you like it or not." CR 357
- Member Brock: "...I think that would be an adverse effect to those that live, even if they're a thousand feet away from it..." CR 357 "...I'm not sure the real reason why the Zoning called for an arterial street. But...that's where they wanted it...And so that's

¹ During the course of the review process, the Applicant withdrew a road length waiver request. CR 227. The third waiver request sought to construct two-story dwellings and was ultimately approved by the Planning Board. CR 361.

² Article III of the Ordinance defines an "Arterial Street" as "Route 27 from the Hooksett town line to the Raymond town line; Route 43 (Deerfield Road) from the intersection of Business Route 101 to the Deerfield town line; Business Route 101 from the intersection of Brown Road to the intersection of Route 27."

why I denied it.” CR 358

- Member Lindsey: “Our regulations state these kind of developments...are supposed to be on an arterial road. This one is not...” CR 358
- Member Komisarek: “I thought it made sense...being right off...43...I thought the use was a good use.” CR 358-359
- Member Pouliot: “...I think it does not create an unreasonable hardship, and because of the road condition and the increased traffic, and it not being an actual arterial road, I think the three-quarters of a mile does make a difference.” CR 359-360
- Member Bedard: “...what really persuaded me was hearing everybody talk about the adverse impact...It was voted by the town, and we represent what people want.” CR 360

The Planning Board subsequently granted the Applicant’s waiver request to allow two-story structures, citing the fact that it was an industry standard. CR 360. The CUP application itself was then denied based on the fact that the arterial road frontage requirement waiver was denied. CR 366.³

On October 24, 2022, the Planning Board issued its notice of decision, which included the following written reasons for denial:

- The waiver request from Section 5.06.06 was denied as it did not meet the criteria for unreasonable hardship nor would it be consistent with the spirit and intent of the ordinance under Section 5.04.10 of the Ordinance.
- The proposed development would not “compl[i]ment and harmonize with the rural character of the Town of Candia” as required Under Section 5.05.04 of the Ordinance.
- The proposed development would have “an adverse impact upon adjacent property” under the requirements of Section 5.05.05 of the Ordinance.

CR 117-18.

On November 18, 2022, the Applicant filed its appeal of such decision with the Housing Appeals Board (“Board”). Count I of the Applicant’s complaint consists of a statutory appeal alleging that the denials of the arterial road waiver and the CUP were unlawful and unreasonable. Count II of the complaint consists of a request for declaratory judgment that the Ordinance’s arterial road frontage should be declared invalid as it violates the equal protection

³ After a motion was made to deny the CUP, but before such motion was acted upon, the Applicant attempted to withdraw the application, CR 363, which generated some discussion between the Planning Board and the Applicant as the request came while a motion was pending. CR 365. Ultimately, the Applicant deferred to the vote of the Planning Board. CR 366.

provisions of both the federal and New Hampshire constitutions. The Town moved to dismiss Count II arguing that the Board lacks subject matter jurisdiction to issue declaratory judgment. On January 12, 2023, a prehearing conference was held. A hearing on the merits was held on February 9, 2023, at which time the Board also heard arguments on the motion to dismiss. This decision follows.

LEGAL STANDARDS

The legal standards for review of a Planning Board decision under RSA 677:15 are well established. “The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when 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.” RSA 677:15, V; Durant v. Town of Dunbarton, 121 N.H. 352, 357 (1981). The burden of establishing that a determination of a Planning Board was unlawful or unreasonable lies with the appealing party. K & P, Inc. v. Town of Plaistow, 133 N.H. 283, 292 (1990). See also, RSA 679:9.

DISCUSSION

I. Legal Framework of the CUP

To begin, a summary of the relevant zoning ordinance provisions is helpful to understand the regulatory framework in play. Elderly Housing is permitted on the Property by CUP, subject to the provisions of Sections 5.04, 5.05, and 5.06 of the Ordinance. See Ordinance Section 5.02 (Table of Use Regulations). The allowed density in an elderly housing project is a function of its proximity to the intersection of NH 27 and NH 43, which is referred to as “Four Corners” in the Ordinance. See Ordinance § 5.06(7). As the Property is located within two miles of Four Corners, CR 225, it is entitled to one dwelling unit per two buildable acres, resulting in a total of 39 proposed dwelling units. CR, Plan 2 of 28.

Section 5.04 of the Ordinance governs CUPs in general, and it authorizes the Planning Board to waive CUP provisions when the Planning Board determines “in its sole discretion 1) that requiring compliance with the particular provision for the granting of a CUP would create an unreasonable hardship and 2) that the application would be consistent with the spirit and intent of this ordinance.” Ordinance, § 5.04(10).

Section 5.05 of the Ordinance identifies six CUP review criteria that must be satisfied

for the Planning Board to issue a CUP for elderly housing. They include the following:

1. The proposed development shall be consistent with the general purpose, goals and objectives of the Town of Candia Master Plan.
2. The proposed development shall be consistent with all applicable provisions of the Town's Zoning Ordinance and the Planning Board's Site Plan and Subdivision Regulations.

* * * *

4. The design and site layout of the proposed development shall compliment and harmonize with the rural character of the Town of Candia and shall maximize the privacy of dwelling units and preserve the natural character of the land.
5. The size and scale of the proposed development shall not have an adverse impact upon adjacent property nor diminish the capacity and safety of adjacent streets in terms of, traffic conditions, utility placement, and other areas related to public health, safety and general welfare.

* * * *

Section 5.06 of the Ordinance, in turn, identifies 28 CUP standards that must also be satisfied in order for the Planning Board to issue a permit for elderly housing. Section 5.06(6) is relevant for this case and requires that all elderly housing developments shall maintain a minimum of 200 feet of frontage on an Arterial Street as defined by the Town of Candia's Zoning Ordinance.

II. Discussion

The Applicant first contends that the Planning Board's decision to deny the frontage waiver is unlawful on its face as a result of how the motion to deny was styled. In moving to deny the waiver "because it is not on an arterial road," the Applicant contends that the waiver request was denied for the very reason it was sought, contrary to Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 107 (2007) (discussing public interest and spirit of the ordinance in context of a variance request and finding that very reason for the request cannot be used to deny such request). While the Board is aware of no case extending Malachy Glen's holding to requests for waivers, such as the case here, it is unclear why the general proposition would not apply. That said, the October 19, 2022 meeting transcript indicates that, while some members discussed the waiver denial in such absolute terms, the Planning Board also denied the request on the basis that it neither established unreasonable hardship nor that the request

would be consistent with the spirit and intent of the ordinance. See CR 357, 359-60.

The record reflects that the Applicant proffered the following testimony before the Planning Board in support of its position that compliance with the arterial frontage requirement would create an unreasonable hardship:

- Low traffic use; proximity to an Arterial Street (3/4 mile); roadway was previously used as access road to transfer station. CR 24.
- Large lot (important for feasibility purposes); relatively close to Arterial Street; wooded buffer available; recreational opportunities and connection to town; adequate frontage for emergency vehicle access and to prevent overcrowding. CR 263-64.

Upon review of such testimony, the Planning Board found that the Applicant failed to establish that denying the requested waiver would meet the criteria for “unreasonable hardship.” CR 117. On appeal, the Applicant contends that the Planning Board was unlawful in denying its waiver request because, generally stated, the proposed use was reasonable given the Property’s characteristics and that the Property’s frontage along New Boston Road was adequate to ensure emergency access and to prevent overcrowding.

Both parties appear to agree that case law analyzing the hardship standard in context of a planning board waiver is scant, and the Board was unable to locate any recorded cases that shed direct light on the matter.⁴ The Applicant takes the position that hardship in context of a waiver request should mirror that of hardship in a variance context. See RSA 674:33. Thus, the Applicant reasons, the hardship analysis in this case begins by looking to the so-called special conditions of land and then asking whether there is no fair and substantial relationship between the general purpose of a minimum frontage requirement and its application to the Property.⁵ In the Town’s hardship analysis, it does not lean on established variance standards, but, rather, cites Prop. Portfolio Grp., LLC v. Town of Derry, 163 N.H. 754, 759 (2012), in support of the proposition that an applicant must present actual evidence that establishes that a land use regulation imposes an unreasonable hardship. Further, the Town

⁴ That said, the New Hampshire Supreme Court has issued a non-precedential order related to the issue. See McDonald v. Town of Raymond Planning Bd., No. 2020-0001, 2021 N.H. LEXIS 61 (Apr. 16, 2021) (non-precedential order).

⁵ The Applicant takes the position that the purpose is to ensure safe access and prevent overcrowding. However, the plain language of the frontage requirement indicates that it imposes more than a traditional dimensional requirement. In addition to addressing lot access and neighborhood overcrowding, the Ordinance’s limitation of elderly housing development to Arterial Streets appears to limit elderly housing development to particular state roads located in centralized corridors that bisect the Town.

argues that simply taking the position that a proposed development requires a waiver in order to proceed – as the Applicant did here – is insufficient to satisfy its burden of proof.

Regardless of the exact legal framework that would apply, it is undisputed that the Applicant is saddled with the burden of proof to establish that a particular set of facts would warrant a finding of unreasonable hardship. While the Applicant's arguments in this case might demonstrate how the proposed use is reasonable, such evidence does not also support a finding that requiring compliance with the arterial frontage requirement would result in unreasonable hardship. In fact, the record indicates that the Property could support 25 to 30 single family lots on the Property without the waiver.⁶ As the Planning Board found, see CR 350, this Board does not conclude that evidence of reasonable use is the same as evidence of an unreasonable hardship.

A review of the Applicant's other waiver request, which was ultimately granted by the Planning Board, CR 362, is notable for comparison. In seeking a waiver from Section 5.06(14) of the Ordinance, to permit two-story housing styles, the Applicant specifically connected its waiver request with the hardship that it would incur if such waiver was not granted. See CR 24-25; 341 (identifying limited marketability of the project with no measurable gain to the Town or public). Conversely, in the arterial frontage waiver request, the record shows a focus on reasonable use but contains insufficient testimony of how denying the waiver would result in unreasonable hardship.

The Town further contends that it would experience a hardship if the waiver was granted. It is unclear where such alleged hardship on the Town falls within the waiver analysis, if at all. Regardless, and assuming that hardship on the Town is a relevant consideration in this context, the Board is not convinced that the alleged roadway inadequacies support the denial of the frontage waiver. For one, the record reveals that the proposed elderly housing project would generate less traffic than what is allowed without a waiver. Whereas the Property could support 25-30 single-family lots, the proposed development generates the equivalent traffic of 15 single-family lots. CR 274. Moreover, in pointing to construction traffic as a basis for denial, it is unclear what, if any, development would be permitted in the area of the Property.

⁶ While the record does not contain engineered plans depicting a conventional subdivision layout, the record contains anecdotal testimony that the Property would support a subdivision of approximately 15 to 25 units, CR 121, and a reference by the Applicant that the Property could support 25 to 30 single-family lots. CR 275.

Finally, the Applicant has offered to contribute a sizeable amount (\$430,000) to New Boston Road improvements. In light of the above, the Board concludes that the alleged hardship on the Town is inadequate to justify denying the arterial frontage waiver.

Nonetheless, because the Board concludes that the record does not support a finding of unreasonable hardship, as discussed previously, the Board finds that the Applicant has not satisfied its burden of proof on appeal to demonstrate that the Planning Board was unreasonable or unlawful in denying the waiver application on the basis of hardship. Having concluded that the Planning Board's decision was not unreasonable or unlawful on the basis of its hardship finding, the Board need not determine whether the Planning Board erred in denying the waiver request on the basis of the spirit and intent of the Ordinance.

III. Motion to Dismiss

Having concluded that the Applicant failed to satisfy its burden of proof to show that the Planning Board's decision was unreasonable or unlawful, the Board turns to the issues raised in Count II of the complaint. As previously noted, the Town has moved to dismiss Count II on jurisdictional grounds, arguing that the Board lacks subject matter jurisdiction over requests for declaratory judgment. The Applicant objects, noting that the Board has concurrent appellate jurisdiction with superior courts, along with the power to grant the same remedies, and, as such, RSA 679 suggests that the Board may decide whether the underlying regulation is valid as part of a challenge to a final decision of a local land use board.

The Board is specifically empowered with authority over appeals of decisions from planning boards, RSA 679:5, I(a), and the use of innovative land use controls. RSA 679:5, I(c). Moreover, RSA 679:5, II expressly confers the Board with the power to award all remedies available to the superior courts in similar cases, including permission to develop proposed housing, when exercising its authority. (Emphasis added.) As declaratory relief is an established broad remedy, see Beaudoin v. State, 113 N.H. 559, 562 (1973), it follows that such remedy falls within the Board's jurisdictional umbrella. To require a bifurcated process would also conflict with RSA 679:7, I, which states that "an election by any party to bring an action before the board shall be deemed a waiver of any right to bring an action in the superior court[.]" The Board concludes that the plain language of RSA 679 does not reflect a legislative intent to carve out constitutional arguments from the Board's jurisdiction. Finally, and practically, to effectively

require concurrent, piecemeal litigation before the Board and before the superior court in order to resolve related arguments flowing from a single land use decision is inconsistent with the legislative purpose behind the Board to create an alternate process to litigating such matters in superior court. In light of the above, the Board concludes that it has jurisdiction over Count II of the complaint and the constitutional claims raised therein.

In light of such finding, the Board shall schedule a status conference to confer with the parties about whether additional testimony is required to make a final determination upon the issues raised in Count II of the Applicant's complaint.

**HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:**

Elizabeth Menard

Elizabeth Menard, Clerk

Date: April 10, 2023