TITLE LXIV
PLANNING AND ZONING

Chapter 679
HOUSING APPEALS BOARD

Section 679:1

679:1 Board Established. – There is hereby established a housing appeals board, hereinafter referred to as the board, which shall be composed of 3 members who shall individually and collectively be learned and experienced in questions of land use law or housing development or both. At least one member shall be an attorney licensed to practice law in the state of New Hampshire, and at least one member shall be either a professional engineer or land surveyor. The members of the board shall be full-time employees and shall not engage in any other employment, appointments, or duties during their terms that is in conflict with their duties as members of the board.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:2

679:2 Appointment; Term; Chair. – The members of the board shall be appointed by the supreme court and commissioned by the governor for a term of 5 years and until their successors are appointed and qualified; provided, however, that any vacancy on the board shall be filled for the unexpired term. The initial members of the board shall serve staggered terms of 3, 4, and 5 years. The supreme court shall designate one member as chair to serve in that capacity for the duration of his or her term.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:3

679:3 Removal. – Any member may be removed by the same authority for inefficiency, neglect of duty, or malfeasance in office; but, before removal, the member shall be furnished with a copy of the charges and have an opportunity to be heard in defense.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:4

679:4 Compensation. – Each member of the board shall receive the annual salary prescribed by RSA 94:1-a and reasonable expenses, including transportation, subject to the approval of the governor and council.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:5

679:5 Authority; Duties. –

I. It shall be the duty of the board and it shall have power and authority to hear and affirm, reverse, or modify, in whole or in part, appeals of final decisions of municipal boards, committees, and commissions regarding questions of housing and housing development. This includes, but is not limited to:

(a) Planning board decisions on subdivisions or site plans.
(b) Board of adjustment decisions on variances, special exceptions, administrative appeals, and ordinance administration.
(c) The use of innovative land use controls.
(d) Growth management controls and interim growth management controls.
(e) Decisions of historic district commissions, heritage commissions, and conservation commissions.
(f) Other municipal permits and fees applicable to housing and housing developments.
(g) Matters subject to the board's authority may include mixed-use combinations of residential and nonresidential uses. Such different uses may occur on separate properties, provided such properties are all part of a common scheme of development.
II. In exercising its authority under this chapter, the board shall have the power to award all remedies available to the superior courts in similar cases, including permission to develop the proposed housing.
III. Relative to RSA 674:58 through RSA 674:61, the board shall have the power and authority to hear and determine appeals of decisions of local land use boards regarding proposals for workforce housing, including but not limited to whether the municipality's land use ordinances and regulations provide a reasonable and realistic opportunity for the development of workforce housing; whether the local land use board has imposed conditions of approval that render the proposal economically unviable; and whether a denial by a local land use board was unreasonable or unlawful.
IV. After local remedies have been exhausted, appeals may be brought before the board by an applicant to the municipal board, committee, or commission, or by any other aggrieved or injured party who can demonstrate legal standing to appeal pursuant to RSA 677:4 or RSA 677:15. The municipality shall be a party to the action. If the applicant is not the party initiating the action before the board, then the applicant shall automatically be an intervenor. The board shall grant intervenor status to abutters and to any other aggrieved or injured party who can demonstrate legal standing to appeal pursuant to RSA 677:4 or RSA 677:15.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:6

679:6 Timing of Appeals and Board Proceedings. –
I. Appeals shall be filed with the board within 30 days of the final decision of a municipal board, committee, or commission. At the same time an appeal is filed with the board, the applicant shall notify the municipal board, committee, or commission of such appeal.
II. The municipal board, committee, or commission shall within 30 days of receipt of such notice submit to the board a certified record of its proceedings on the matter subject to the appeal.
III. The board shall hold a hearing on the merits within 90 days of its receipt of a notice of appeal.
IV. The board shall make a decision on an appeal within 60 days after conducting a hearing on the merits.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:7

679:7 Jurisdiction; Court Appeals. –
I. In matters within its authority the board shall have concurrent, appellate jurisdiction with the superior court. 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, but shall not abrogate any party's right to appeal decisions of the board to the supreme court; as such, the board shall retain jurisdiction of any matter originally brought before it. At any time during an appeal to the board, if the board determines that it does not have jurisdiction to hear the appeal, the appellant shall have 30 days to file an appeal with the superior court.
II. In an appeal of a local decision on housing or housing development, any claim that is within the board's authority under RSA 679:5 and that has previously been or is subsequently included in an appeal in superior court by another party to the decision or by any other aggrieved or injured party who can demonstrate legal standing to appeal pursuant to RSA 677:4 or RSA 677:15 shall automatically be stayed by the court to provide the party with standing the opportunity to intervene in the matter before the board. If intervenor status is granted,

the stay of the court action regarding those claims shall continue during the pendency of the appeal to the board. After the board has decided the appeal, the court shall dismiss the matter before it to the extent the matter has been resolved by the board. Any claim included in an appeal to superior court that is not within the board's authority shall not be subject to automatic stay by the court.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:8

679:8 Quorum; Disqualification; Temporary Members. –
I. In all matters a majority of the board shall constitute a quorum to transact business.
II. No member of the board shall represent a party or testify as an expert witness or render any professional service for any party or interest before the board, and any member having an interest in the subject matter shall be disqualified to act therein.
III. If, in the event of a disqualification or temporary disability of a member or members of the board, it shall become necessary to do so, the board, subject to the approval of the supreme court, shall appoint such number of temporary board members as shall be necessary to meet the requirements herein imposed. Such temporary board members shall serve with respect to such matter until the same has been fully disposed of before the board.
IV. Temporary board members shall have the same qualifications as regular board members in whose place they are acting.
V. A temporary board member shall be compensated at the rate of $75 for each day devoted to the work of the board and shall be reimbursed the necessary and reasonable expenses incurred by him or her in the performance of his or her duties.
VI. In the event of a vacancy on the board, the appellant may elect to continue the proceedings while awaiting the appointment of a successor board member.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:9

679:9 Hearing Procedure; Standard of Review. –
I. Appeals to the board shall be consistent with appeals to the superior court pursuant to RSA 677:4 through RSA 677:16. Appeals shall be on the certified record, and except in such cases as justice may warrant, in the sole discretion of the board, no additional evidence will be introduced. Consistent with the contested case provisions of RSA 541-A, the rules of evidence shall not strictly apply. In addition to the provisions of RSA 91-A, the board shall record the proceedings of any hearing before it and shall make such recording available to the public for inspection and recording from the date of the hearing to a date which is 15 working days after the board has made a final decision on the matter which is the subject of the hearing, or, if an appeal is made from such decision, the date upon which the matter has been finally adjudicated, whichever date is later.
II. The board shall not reverse or modify a decision except for errors of law or if the board is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:10

679:10 Representation by Nonattorneys. – Nonattorneys, including professional engineers, architects, and land surveyors, may represent any party before the board. Nothing in this section shall prevent the board from denying representation by any individual it deems to be improper, inappropriate, or unable to adequately represent the interests of the applicant to the municipal board, committee, or commission.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:11

679:11 Board Meetings. – The board's deliberative processes in adjudicatory proceedings held pursuant to RSA 541-A shall be exempt from the public meeting and notice provisions of RSA 91-A. Decisions and orders in adjudicatory proceedings shall be publicly available, but only after they have been reduced to writing, signed by a quorum of the board, and served upon the parties, and shall set forth the board's rulings of law and findings of fact in support of its decisions. Discussions and actions by the board concerning procedural, administrative, legal, and internal matters shall be exempt from the meeting and notice provisions of RSA 91-A:2.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:12

679:12 Rules and Regulations. – The board may adopt rules under RSA 541-A necessary for carrying out its functions including but not limited to rules of procedure to be followed in hearings conducted by it not inconsistent with the provisions of this chapter.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:13

679:13 Administration of Oaths, Subpoenas, Etc.; Fees. – The board shall have authority to administer oaths and to compel the attendance of witnesses to proceedings before it. The board shall have the power to subpoena and subpoena duces tecum. Witnesses compelled to appear shall be paid the same fee and mileage that are paid to witnesses in the superior court of the state. A subpoena or subpoena duces tecum of the board may be served by any person designated in the subpoena or subpoena duces tecum to serve it. Any testimony given by a person duly sworn shall be subject to the pains and penalties of perjury. All applications or petitions to the board for which no filing fee has been otherwise specified by statute shall be accompanied by a $250 filing fee. Costs and attorney's fees may be taxed as in the superior court.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:14

679:14 Notice. – The board shall serve notice in writing of the time, place, and cause of any hearing upon all parties at least 20 days prior to the date of the hearing.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:15

679:15 Appeal. – Decisions of the board may be appealed to the supreme court by any party in accordance with the provisions of RSA 541 as from time to time amended.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:16

679:16 Enforcement of Decisions. – After a decision of the board becomes final, the board shall, at the request of any party, file a certified abstract thereof in the Merrimack county superior court. The clerk of said court shall forthwith enter judgment thereon and such judgment may be enforced as with any final judgment of the superior court.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:17

679:17 Staff. – The board shall have such clerical, administrative, and technical staff as may be necessary within the limits of the appropriation made therefor.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:18

679:18 Office. – The board shall be provided with an office in Concord in which its records, documents, and books shall be kept, and with a suitable room in which it may hold hearings.

Source. 2019, 346:260, eff. July 1, 2020.

Section 679:19

679:19 Neglect to Comply With Board's Orders. – Neglect or failure on the part of any municipality to comply with such orders shall be deemed willful neglect of duty, and it shall be subject to the penalties and damages provided by law in such cases.

Source. 2019, 346:260, eff. July 1, 2020.

THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD

Governor Gallen State Office Park
Johnson Hall, 107 Pleasant Street
Concord, New Hampshire 03301
Telephone: (603) 271-1198
TTY/TDD Relay: (800) 735-2964
Visit us at https://hab.nh.gov

Case Name: **Gary B. Michaud, Trustee v. Town of Auburn**
Case Number: **ZBA-2021-24**

ORDER

The matter under review by the Housing Appeals Board ("Board") is a decision by the Town of Auburn ("Town") Zoning Board of Adjustment ("ZBA") denying the administrative appeal of Gary B. Michaud, Trustee of the Gary B. Michaud Living Trust (the "Applicant") of a Town of Auburn Board of Selectmen ("Selectmen") decision denying his application to restore involuntarily merged lots.

FACTS:

The Applicant owns certain real property improved with a single-family home located at 145 Appletree Road in Auburn and also known as Tax Map 17, Lot 45 on the Town's assessing records ("Michaud Property"). Certified Record ("CR") 6, 9, 13. The Michaud Property is located in the Town's Residential One (R-1) zoning district. CR 10, 23. The land comprising the Michaud Property was previously part of a larger 1961 subdivision of land by New England Mortgage Investment Corporation ("NEMIC") as shown on Plan # 03106 ("Sun Valley Plan") recorded with the Rockingham County Registry of Deeds ("Registry"). CR 15. Specifically, the Michaud Property is shown as Lot 55 and Lot 56 on the Sun Valley Plan. CR 15.

By deed recorded with the Registry on June 16, 1962 at Book 1629, Page 347 ("Korsack Deed"), the Michaud Property was conveyed by NEMIC to John and Michael Korsack (together, the "Korsacks"). CR 11. The Korsack Deed's first paragraph identifies the parties to the conveyance and concludes by referring to "the following tract or parcel of land." CR 11. The deed description then refers to "[t]hat tract or parcel of land . . . shown as Lots #55 and #56 on [the Sun Valley Plan]. . . ." CR 11. The property description continues to describe the perimeter around the two abutting lots and does not contain individual descriptions of the perimeter of each lot. CR 11. The deed does refer to "said lots" with reference to easement rights to use the adjacent streets. CR 11.

The Sun Valley Plan shows Lot 55 as consisting of 22,500 square feet (approximately .52 acres) with 150 feet of frontage. CR 15. It shows Lot 56 as a corner lot consisting of 31,650 square feet (approximately .73 acres) with a total of 338 feet of frontage. CR 15. The Town's assessing records currently refer to the Michaud Property as Map No. 17, Lot No. 45. CR 13. Lots 55 and 56 were taxed as a single lot as early as 1962 (CR 98) and appear as a single lot on the Town's 1969 Tax Map. CR 82.

In 1976, the Korsacks applied for a variance from the ZBA from Article 4, Section 5.02 of the zoning ordinance.[1] CR 16-19. On their application, the Korsacks proposed the variance to: "[o]btain permit to build one house on this site, so that this land can be sold." CR 18. The variance application described the concerned property, in part, as "Lot 45 Map p. 17" on "Appletree Rd (Corner Lot)". The application further referred to the description of the concerned property as 1¼ acre, with 590 feet of frontage. CR 18. Finally, the application packet included a hand drawn sketch, which shows the perimeter of Lots 55 and 56 as described in the Korsack Deed with no internal lot lines. CR 19. The notice for the public hearing reads: "[v]ariance to Article 4 Section 5.02 to obtain a permit to build one house on an undersized lot at 55 Appletree Road so the land can be sold. . . ." CR 17. By Notice of Decision dated March 11, 1976, the ZBA granted the Korsacks' variance application. CR 16. On April 14, 1976, approval to construct a septic system was issued by New Hampshire Water Supply and Pollution Control for a two-bedroom house on Lots 55 and 56. CR 20. Thereafter, on April 20, 1976, the Town issued a building permit for a two-bedroom home on the Michaud Property. CR 21. That same day (April 20, 1976), the Korsacks conveyed the Michaud Property to Wayne and Sharon Davis. CR 6, 13. The single-family home that was ultimately constructed on the Michaud Property was positioned entirely upon the land that comprised Lot 56.[2] CR 9.

Wayne and Sharon Davis then conveyed the property to the Applicant in 1984.[3] CR 6, 13. There is no indication in the Certified Record that the deed descriptions in the deeds from

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[1] At the time of the 1976 variance application, Section 5.02 of the zoning ordinance (the table of dimensional requirements) required a minimum lot size of 2 acres in the R-1 zoning district. This is apparent from the Town's zoning ordinance as amended in 1973. The 1973 ordinance was not included in the original certified record but was submitted by the Town at the Board's request (over the Town's objection) on February 11, 2022.

[2] The Town asserts that because it was not raised in its Motion for Rehearing, the Applicant cannot argue on appeal that there is no merger due to the location of the house on the Michaud Property. Trial Brief of Town of Auburn at Page 7. However, the location of the house is shown on a plan contained within the Certified Record, CR 9, and, thus, such evidence is properly within the Board's review. RSA 677:10. Moreover, there is no evidence in the Certified Record that suggests that the Michaud Property improvements are not all contained within Lot 56.

[3] Technically, the Applicant derives title to the Michaud Property as surviving joint tenant. CR 2.

the Korsacks to the Davises and from the Davises to the Applicant materially differ from the description in the Korsack Deed, introduced above.

On April 8, 2021, the Applicant filed an Application for Restoration of Involuntarily Merged Lots Pursuant to RSA 674:39-aa, CR 4, which was initially heard at the Selectmen's May 10, 2021 meeting. CR 26. The Selectmen tabled the request to consult with Town Counsel. CR 27. The application was taken up again on August 30, 2021 when the Selectmen cited to the 1976 variance application and found that Lots 55 and 56 were merged by the conduct of the Applicant's predecessor-in-title, and not by the Town, reasoning that "[t]he lot size cannot be used in its totality for one benefit and not be applied for another." CR 34-35.

On September 29, 2021, as amended on September 30, 2021, the Applicant filed an administrative appeal with the ZBA, appealing the Selectmen's decision. CR 38. On October 26, 2021, the ZBA held a public hearing on the matter and ultimately voted 5-0 to uphold the decision of the Selectmen ("ZBA Decision"). The ZBA reasoned that the actions of the prior owners in 1976 rose to level of merger by conduct. CR 86-92. The Applicant filed a request for rehearing with the ZBA under cover letter dated November 12, 2021. CR 94. On November 16, 2021, the ZBA considered and denied the Applicant's request for rehearing. CR 110.

On December 13, 2021, the Applicant filed this appeal with the Housing Appeals Board. A prehearing conference was held on February 1, 2022, and a hearing on the merits was held on February 15, 2022. This decision follows.

LEGAL STANDARD:

The Housing Appeals Board review of any Zoning Board of Adjustment decision is limited. It will consider the Zoning Board's factual findings prima facie, lawful, and reasonable. Those findings will not be set aside unless, by a balance of the probabilities upon the evidence before it, the Housing Appeals Board finds that the Zoning Board decision was unlawful or unreasonable. RSA 679:9. See Lone Pine Hunters Club v. Town of Hollis, 149 N.H. 668 (2003) and Saturley v. Town of Hollis Zoning Board of Adjustment, 129 N.H. 757 (1987). The party seeking to set aside a Zoning Board decision bears the burden of proof to show that the order or decision was unlawful or unreasonable. RSA 677:6.

DISCUSSION:

On appeal, the Applicant asserts that the ZBA Decision erred in finding that Lots 55 and 56 were merged by conduct. More specifically, the Applicant suggests that Lots 55 and 56 could not be voluntarily merged in 1976, as part of the variance application, because those lots were involuntarily merged by the Town before then. Moreover, the Applicant looks to provisions within the 1967 zoning ordinance concerning pre-existing lots to argue that the 1976 variance was unnecessary in the first place. Ultimately, the Applicant asserts that the ZBA did not meet its burden to prove voluntary merger.

The Town responds by asserting that the appellate standard of review falls upon the Applicant, not the Town. The Town further states that the ZBA Decision was lawful as the record contains adequate evidence to support a finding that Lots 55 and 56 were merged in either 1962 when NEMIC conveyed the Michaud Property via the Korsack Deed or in 1976 upon the filing of the variance application, issuance of the septic permit, and the application and issuance of the building permit.

I. RSA 674:39-aa

As this is an application of RSA 674:39-aa, governing the Restoration of Involuntarily Merged Lots, an introduction to the statute is necessary. Enacted in 2011, in general terms, RSA 674:39-aa requires that, at the request of the landowner to the local governing body, certain involuntarily merged lots must be restored to their premerger status as long as

> [n]o owner in the chain of title voluntarily merged his or her lots. If any owner in the chain of title voluntarily merged his or her lots, then all subsequent owners shall be estopped from requesting restoration. The municipality shall have the burden of proof to show that any previous owner voluntarily merged his or her lots.

RSA 674:39-aa, II(b). RSA 674:39-aa, I defines "involuntary merger" as "lots merged by municipal action for zoning, assessing, or taxation purposes without the consent of the owner." Conversely, "voluntary merger" means "a merger under RSA 674:39-a, or any overt action or conduct that indicates an owner regarded said lots as merged such as, but not limited to, abandoning a lot line." Id. The heart of this case is whether the record supports the ZBA Decision in finding that the conduct of the Applicant's predecessors-in-title constituted overt action that indicates they regarded Lots 55 and 56 as merged.

II. Overt Action or Conduct

The Applicant asserts that the ZBA failed to satisfy its burden to establish voluntary merger by failing to find that the lots at issue were merged by the Town prior to the filing of the 1976 variance application. Additionally, the Applicant contends that the Town should have investigated the 1967 zoning ordinance, with respect to rights of prior existing lots. The Town, in turn, states that the Certified Record supports the ZBA Decision and that the appellate standard of review falls upon the Applicant, and not upon the Town.

As noted previously, RSA 674:39-aa, II(b) imposes the burden of proof upon the Town to show that any previous owner voluntarily merged his or her lots. However, the imposition of that burden does not alter the appellate standard of review. The New Hampshire Supreme Court specifically addressed this issue in Roberts v. Town of Windham, 165 N.H. 186 (2013). In Roberts, the Court distinguished the concept of a party's burden of proof and an appellate standard of review and noted "[t]hat a party bears the burden of proof at trial does not dictate the standard of review applied on appeal." Id. at 191. Ultimately, the Court did not interpret "the plain language of RSA 674:39–aa, II(b) to alter the deferential standard of review applicable in zoning cases under RSA 677:6." Id. That said, this case revolves around whether the evidence in the Certified Record was sufficient to satisfy the Town's burden to show "any overt action or conduct that indicates an owner regarded" Lots 55 and 56 as merged.

The Applicant argues that Lots 55 and 56 were involuntarily merged by the Town prior to the filing of the 1976 variance, as demonstrated by the 1962 Tax Warrant and the 1969 Tax Map. Thus, the Applicant reasons that voluntary merger (for zoning purposes) was not possible as the applicant at the time was simply relying upon town assessing records. However, as an initial point, the 1962 Tax Warrant and the 1969 Tax Map, indicating that Lots 55 and 56 were merged are not dispositive on the issue of merger. The state of local assessing records are not determinative to zoning issues. See Hill v. Town of Chester, 146 N.H. 291, 294 (2001) ("[T]he method by which a town taxes its land is not dispositive in determining zoning questions."). Moreover, the Town's assessing records from the 1960s do not change the fact that, in the 1976 variance application, the Applicant's predecessor affirmatively included and relied upon the area of both lots and sketched the property using the perimeter of the lots without including their shared internal lot line. CR 18-19. Finally, representations made in applications may be relied upon in merger analyses, regardless of the origin of the form. Cf. Town of Newbury v. Landrigan,

165 N.H. 236, 241 (2013), as amended (Feb. 6, 2014) (rejecting an argument that reliance upon representations made in a town-drafted building permit application form would be unreasonable and unconscionable). Even if the Town involuntarily merged Lots 55 and 56 for assessing purposes, there is nothing in RSA 673:39-aa or case law prohibiting a property owner from merging lots for zoning purposes thereafter by conduct, essentially ratifying the tax maps.

The Applicant also suggests that the Town had an obligation to investigate the Town's 1967 zoning ordinance, reasoning that its terms made the 1976 variance request unnecessary, as a matter of law, and, thus, could not be the cause of merger. However, an analysis of the 1967 zoning ordinance is unnecessary. Whether or not a variance was needed in 1976 does not change the fact that the Applicant's predecessors openly and actively filed for, and received, zoning relief that was understood at that time as needed in order to build upon the property. The question is not whether a variance was needed; but, rather, whether applying for and receiving one, along with receiving the septic approval and applying for and receiving the building permit, was overt action that constituted voluntary merger of Lots 55 and 56.

The Applicant contrasts this appeal from reported case law in which courts have found instances of voluntary lot merger by conduct. The Applicant correctly points out that there are no physical improvements built across (or immediately adjacent to) the common lot line and access to one lot is not across another, as was the case in Roberts. 165 N.H. at 192-93. Likewise, the Applicant notes that there are no plans recorded with the registry that depict Lots 55 and 56 as a single lot and no testimony that the Applicant believes its property to be a single lot, as was the case in Town of Newbury v. Landrigan, 165 N.H. 236, 240-41 (2013), as amended (Feb. 6, 2014). However, Roberts and Landrigan do not stand for the proposition that voluntary merger is only possible through physical improvements and/or recorded plans. Rather, and pursuant to the plain language of RSA 674:39-aa, voluntary merge means "*any* overt action or conduct that indicates an owner regarded said lots as merged . . . ." (Emphasis added.) The action or conduct at issue, then, varies from case to case. Reviewing courts will look at the totality of the circumstances to determine if the evidence supports a finding of voluntary merger. See Roberts v. Town of Windham, 165 N.H. 186, 193 (2013) (stating that superior court was not required to analyze each use in isolation).

Both parties also cite Robillard v. Town of Hudson Zoning Bd. of Adjustment., 120 N.H. 477 (1980), which is instructive in this case given its particular fact pattern. The property owner

in Robillard owned two adjacent lots, each of which met the zoning requirements for a single-family home, but were too small to allow for a duplex. Id. at 478. A building permit was issued in 1967 for a duplex on the understanding that a combination of the two lots was necessary for such use. Id. The duplex was then constructed entirely within the confines of one of the lots but the lots were never formally consolidated. Id. at 478-79. Later, the town's zoning was amended to increase area and frontage requirements, meaning that the duplex was now a preexisting, non-conforming use on the two lots. Id. at 478. The property was then sold twice over the next several years and in each conveyance, the deed separately described the two lots and the lots were separately assessed by the town. Id. at 479. The eventual property owner sought a variance to build a single-family house on the vacant lot, which was denied on the basis of the 1967 consolidation understanding.

The Supreme Court reversed the superior court and upheld the denial of the variance request. Id. at 479. The Court reasoned that the prior owner "treated [the two lots] as a single parcel of land for purposes of obtaining the 1967 building permit." Id. at 479–80. The Court continued, "when [the prior owner] acted upon the permit to build a duplex house on the combined lots, he effectively erased the individual lot lines. The lots became one 'zoning lot' for zoning purposes." Id. In the same way that the owner in Robillard relied on the area of two lots to obtain a building permit, the prior owners of the Michaud Property relied on both Lots 55 and 56 in connection with their variance application, which was necessary to obtain a building permit and convey the property. It was not unreasonable for the ZBA to rely on such conduct as evidence that the Applicant's predecessors regarded Lots 55 and 56 as merged.

While existing case law on voluntary merger exists, as discussed above, it is notable that the phrase "any overt action or conduct," as used in RSA 674:39-aa, is not expressly defined in statue or in relevant case law.[4] As such, dictionary definitions provide additional guidance. See Working Stiff Partners, LLC v. City of Portsmouth, 172 N.H. 611, 617 (2019) ("When a term is not defined in a statute or ordinance, we look to its common usage, using the dictionary for guidance."). Black's Law Dictionary (11th ed. 2019) defines the following terms:

Overt - Open and observable; not concealed or secret.

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[4] The phrase "overt act" is used in certain criminal contexts, but those are not helpful in this case. See, e.g., State v. Papillon, 173 N.H. 13, 31 (2020) (discussing conspiracy).

Act - Something done or performed, esp. voluntarily; a deed. — Also termed action.

Conduct - Personal behavior, whether by action or inaction, verbal or nonverbal; the manner in which a person behaves; collectively, a person's deeds.

When these definitions are viewed together, the phrase "any overt action or conduct," stated differently, means any open and observable action or inaction or behavior.

Here, the evidence in the record includes the following chain of events that are particular to the Michaud Property:

- The Korsack Deed's metes and bounds property description describes the perimeter around the two abutting Lots 55 and 56 and does not contain individual descriptions of each lot's perimeter. CR 11.

- More importantly, in 1976, the Korsacks affirmatively applied for, and received, an area variance from the ZBA to allow for the issuance of a building permit so that their land could be sold. The variance application described the property at issue as including the area of both Lots 55 and 56, and it included a hand-drawn sketch depicting the perimeter of Lots 55 and 56 *without* an internal lot line. CR 18-19.

- On April 14, 1976, the New Hampshire Water Supply and Pollution Control approved construction of a two-bedroom septic system, referring to both Lots 55 and 56. CR 20.

- On April 20, 1976, after receiving an application filed on behalf of the Applicant's predecessor-in-title, the Town issued a building permit for one two-bedroom home with reference to a lot area that included both lots. CR 21-22.

The totality of this evidence reasonably supports the ZBA Decision.

In light of the above, by a preponderance of the evidence in the certified record, the Housing Appeals Board AFFIRMS the decision of the Town of Auburn Zoning Board of Adjustment.

HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:

Elizabeth Menard

Date: April 8, 2022

Elizabeth Menard, Clerk

THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD

Governor Gallen State Office Park
Johnson Hall, 107 Pleasant Street
Concord, New Hampshire 03301
Telephone: (603) 271-1198
TTY/TDD Relay: (800) 735-2964
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Case Name: **D&G Clearwater, LLC v. City of Laconia**
Case Number: **ZBA-2021-25**

ORDER

The matter under review is a decision by the City of Laconia ("City") Zoning Board of Adjustment ("ZBA") denying an application by D&G Clearwater, LLC ("Applicant") for a special exception to allow its property located at 33 Clearwater Place ("Property") to be used for short-term lodging.

FACTS:

The Applicant purchased the Property in 2019.[1] Certified Record ("CR") at 4. The Property is located in the City's Residential Single-Family (RS) zoning district. CR 1, 6. Short-Term Lodging[2] is allowed in the RS zoning district with a special exception. See City of Laconia Zoning Ordinance ("Ordinance"), § 235-41-M.

On April 22, 2021, the Applicant filed an application with the ZBA for a special exception to use the property for short-term lodging. CR 1. Initially presented at its May 18, 2021 hearing, the ZBA continued the application to June 15, 2021, and again to July 20, 2021. CR 19, 40. At the conclusion of the July 20, 2021 hearing, the ZBA continued the matter to August 16, 2021. CR 94. In a letter dated July 28, 2021, the Applicant requested that the ZBA Chair recuse himself, claiming that certain, unspecified statements made at the July 20, 2021 hearing "make it very obvious that you had made your decision before the hearing was held." CR 108. Due to a lack of a quorum, the August 16, 2021 hearing was continued to September 20, 2021, at

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[1] The record indicates that Gary Melville and Xiao Hong Melville initially purchased the Property in their individual capacities and then transferred title to the Applicant in 2020. CR 4. This fact is immaterial for the purposes of this appeal.

[2] Section 235-13 of the City's zoning ordinance defines short-term lodging as: "A dwelling unit where transient lodging is provided for compensation for stays of between one and 14 consecutive nights, and where the dwelling unit would normally be considered a residential living unit not associated with regulated commercial activities, such as a hotel, motel, rooming/boarding/lodging house, or bed-and-breakfast."

The record (and the parties' pleadings) reflects use of the phrase "short term rental," or variants thereof, interchangeably with "short-term lodging." There is no dispute over the definition of the use at issue in this case. The Board treats both phrases the same for the purposes of this appeal.

which the ZBA Chair declined the Applicant's request for recusal. CR 181. The ZBA ultimately voted to deny the application by a 4-1 vote ("ZBA Decision"). CR 183. In its Notice of Action, the ZBA's stated basis for denial was that the Applicant's request "would place an increased demand on municipal services and it is a hazard to the neighborhood." CR 191. On October 20, 2021, the Applicant submitted a Motion for Rehearing to the ZBA. CR 192. The rehearing motion was denied by the ZBA on November 15, 2021. CR 249.

On December 15, 2021, the Applicant filed this appeal with the Housing Appeals Board ("Board"). The Board held a prehearing conference in the case on February 10, 2022, and a hearing on the merits on February 24, 2022. This decision follows.

LEGAL STANDARDS:

The Housing Appeals Board review of any Zoning Board of Adjustment decision is limited. It will consider the Zoning Board's factual findings prima facie, lawful, and reasonable. Those findings will not be set aside unless, by a balance of the probabilities upon the evidence before it, the Housing Appeals Board finds that the Zoning Board decision was unlawful or unreasonable. See, RSA 679:9. See also, Lone Pine Hunters Club v. Town of Hollis, 149 N.H. 668 (2003) and Saturley v. Town of Hollis Zoning Board of Adjustment, 129 N.H. 757 (1987). The party seeking to set aside a Zoning Board decision bears the burden of proof to show that the order or decision was unlawful or unreasonable. RSA 677:6.

DISCUSSION:

At the onset, it is worth noting that this appeal does not question whether the use of the Property for short-term lodging can be allowed under the Ordinance. Rather, the City – by and through its local legislative body – answered that question in the affirmative when it amended the Ordinance in 2019 to allow for short-term lodging in specific zoning districts in the City. It is undisputed that the Ordinance allows for short-term lodging on the Property with a special exception. See Ordinance, § 235-41-M.

The short-term lodging regulatory framework applicable to the Property, as adopted by the City, includes two tiers of municipal review. CR 183. The first, on appeal here, requires the issuance of a special exception by the ZBA. If the ZBA grants a special exception application, then the matter moves to the City's Planning Department for an administrative review "to

determine suitability for this use in a particular dwelling unit[.]" Ordinance, § 235-41-M, (2). That review includes, among other things, a joint inspection by the Fire Department and Building Code Enforcement Department to determine the unit's maximum occupancy (based on floor space square footage) and its driveway capacity (as on-street parking is not allowed). Id. at § 235-41-M, (2)(c)(5)-(6). The Ordinance also contains a provision that allows for another inspection based upon safety concerns reported by lodgers or abutters. Id. at § 235-41-M, (2)(c)(7). The owner of a short-term lodging must ensure, among other things: appropriate trash removal; that all vehicle parking is on-site; that occupancy limits are not exceeded; and adherence to the City's noise ordinance. Id. at § 235-41-M, (3). An approved permit must be renewed every two years and may be revoked for noncompliance. Id. at § 235-41-M, (5-6). The City's Planning and Code Director testified that there had been no complaints filed on properties that had received a short-term lodging permit. CR 183.

All that said, the discrete issue in this case is whether the ZBA reasonably denied the Applicant's special exception application. The Applicant argues that the ZBA Decision should be set aside because the ZBA Chair was required to recuse himself from sitting on the matter. The Applicant also contends that the ZBA Decision was unlawful as its reasons for denial were not supported by the record and that the ZBA failed to impose reasonable conditions which would have addressed concerns about the Property for short-term lodging. The City responds by asserting that there was no basis for the ZBA Chair to recuse himself from the underlying application. The City further argues that the Certified Record supports the ZBA's findings and that the ZBA was reasonable in rejecting the proposed conditions.

1. ZBA Chair's Duty to Recuse

The Applicant argues that the ZBA Chair was required to recuse himself because of alleged disparaging statements regarding Massachusetts residents using City homes as short-term rentals, supposedly made prior to the July 20, 2021 ZBA meeting. Such statements, the Applicant suggests, resulted in a tainted ZBA process.

Whether a board member is disqualified from sitting on a particular matter is governed by RSA 673:14, I. That statute, in relevant part, prohibits a member of a zoning board of adjustment from sitting "upon the hearing of any question which the board is to decide in a judicial capacity if that member . . . would be disqualified for any cause to act as a juror upon

the trial of the same matter in any action at law." The so-called "juror standard" is found in RSA 500-A:12, which lists relevant considerations when determining whether a juror is fit to sit on a case. A key element in this inquiry is whether a board member can be indifferent to serve on a particular matter. RSA 500-A:12, II.

However, a detailed analysis into the above legal framework, as applied to this case, is unnecessary. The Applicant was obligated to raise alleged bias "at the earliest possible time." Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167, 171 (2003). The rationale behind this requirement is to allow a zoning board of adjustment to "have a full opportunity to come to sound conclusions and to correct errors in the first instance." Id. (quoting Sanderson v. Town of Candia, 146 N.H. 598, 602 (2001)). While the Applicant sent a general letter to the ZBA dated July 28, 2021, it contained no specific allegations of what might have been said. CR 108. In fact, specific allegations were never articulated to the ZBA. They were first raised on February 9, 2022, when the Applicant sought to expand the Certified Record on appeal. Such request was denied by the Board in its Order dated February 22, 2022. Here, the Applicant (by and through its attorney) had knowledge of the facts upon which it claims bias by the ZBA Chair on July 20, 2021. Those facts were never provided to the ZBA and were not outwardly articulated until more than six months had passed. This timeline prevented the ZBA, and its Chair, from having the opportunity to address the matter and correct any errors in the first instance.

As the issue stands, the Certified Record includes a letter from the Applicant to the ZBA Chair requesting his recusal for alleged general "comments that you articulated at the initial hearing on July 20, 2021 [that made] it very obvious that you had made your decision before the hearing was held." CR 108. The Board finds that such limited evidence is insufficient to warrant disqualification of a board member or reversal of the ZBA Decision.

2. Demand on Municipal Services

Moving to the merits of the appeal, the ZBA Decision denied the Applicant's request for special exception on two grounds, reasoning that "[i]t would place an increased demand on municipal services, and it is a hazard to the neighborhood." CR 191.

With respect to the municipal services finding, the Certified Record contains evidence that, on one occasion, the local police were called when the parking of short-term renters

blocked a neighbor from leaving their driveway. CR 182. There is also testimony that the use of the Property for short-term lodging generated more than its authorized number of weekly trash cans. CR 110, 116. The Applicant contends that, because the Property has been used for short-term lodging since 2014, it could not be said to increase demand on municipal services. The City responds by pointing out that the Property's prior use as a short-term rental was not without issues, as testified to by the abutters and even acknowledged by the Applicant. The Board agrees with the City and is not convinced that the Property's prior use, operating under an outdated version of the zoning ordinance, is determinative. The focus of the pending special exception application is on the future use of the Property under the existing zoning ordinance. Thus, the reasonable interpretation of the Ordinance requires one to compare the Property's demand upon municipal services when it is used both with and without a short-term lodging component.

To that end, a single, past call to the police, which the police did not log (CR 182), cannot reasonably be said to increase demand on municipal services. In fact, the Certified Record reflects there were no noise complaints associated with the Property on file with the City and no complaints or calls to the local police since 2017 (and even then, the documented complaints "seem to be alarms"). CR 171. And, while more trash could, by itself, result in an increased use of services, the Applicant's special exception request provides for the private disposal of trash in a manner that will not result in an increase in trash responsibility on the City. CR 182. The Ordinance does not prohibit an increase in garbage due to the short-term lodging use, only that the use does not increase demand on municipal services. In light of the above, the Certified Record does not support the ZBA's finding that the Applicant's proposed use of the Property for short-term lodging will increase the demand on municipal services.

3. Hazard to the Neighborhood

The ZBA Decision's second basis for denial was that using the Property for short-term lodging "is a hazard[3] to the neighborhood." CR 191. The City cites to the following testimony from neighbors in the Certified Record in support of such finding:

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[3] While the term "hazard" is not a defined term in the Ordinance, see Ordinance, § 235-13, its plain meaning includes an element of danger. See Black's Law Dictionary (11th ed. 2019) (defining "hazard" as

- Problems encountered with the existing short-term rental; megaphones; trespass; tie-dye party; parking obstruction; excessive noise. CR 20, 74.
- Occupancy concerns; noise; trespass; parking issues; tie-dye party; unsafe boats; trash sitting in bins between Saturday check-out and Tuesday pickup. CR 109.
- Objection to short-term rentals in residential neighborhoods. CR 123.

A common theme found within the comments in opposition to the Applicant's request is a degree of general objection to the idea of short-term lodging within the residential neighborhood. See CR 20, 74 (a neighbor contrasting the culture of renters with the quiet neighborhood); CR 109-110 (a neighbor discussing profit associated with short-term rentals); CR 123 (a City resident generally objecting to short-term rentals in residential neighborhoods); CR 236 (a ZBA member noting that he felt the neighborhood was not appropriate for short-term lodging). However, general objections to short-term lodging use on the Property (and any associated commercial element) are not a reasonable basis for denying the Applicant's permit. The City made a collective decision to allow short-term lodging on the Property with a special exception. Any philosophical objections to the Ordinance's permitted uses are not appropriate for the ZBA in context of a particular application, but, rather, should be raised in the legislative context.

That said, the Certified Record reflects specific grievances about the Property's prior use as a short-term rental, which can be grouped into the following categories: excessive parking and occupancy for the size of the Property and its dwelling; excessive trash; excessive noise; trespass; and other misconduct by renters (i.e., rinsing tie-dye in lake and unsafe boating practices).

It is important to note that the above-referenced testimony concerns past use of the Property. However, this is not an enforcement action; the Property's past use is not the emphasis of the special exception criteria at issue on appeal. Again, and as discussed above in context of municipal service demand, the special exception criteria focus on the future use of the Property. See Ordinance, § Section 235-70, (C)(2)(a)(2), (4) (requiring that the requested

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"Danger or peril; esp., a factor contributing to a peril."). Thus, not every possible objection to short-term lodging can be fairly categorized as a hazard. Moreover, the Ordinance's provisions governing short-term lodging special exceptions do not use the word "nuisance," as it does in other instances. See Ordinance, § 235-41, (A)(10) (in context of ADUs). That said, the Board defers to the ZBA on its findings that the concerns identified by the public could constitute "hazards," with the exception of the general testimony that short-term lodging should not be allowed in residential neighborhoods, as discussed below.

use "will not increase demand for municipal services[,]" and "will not create hazards to the health, safety, or general welfare of the public.") (emphasis added).

The Applicant was clear in proposing material conditions that were aimed to address neighborhood complaints. Specifically, the Applicant's proposal includes: (1) compliance with all provisions of Section 235-41-M, which includes, in part, parking and occupancy limitations imposed by the Planning Department,[4] in addition to ensuring adherence to the City's noise ordinance (CR 76); (2) supplementing municipal trash service by removing excess trash on Saturday when guests turnover (CR 182); and (3) installing a fence to prevent accidental trespass and to help reduce noise (CR 76, 182). The ZBA rejected such proposal. However, it did so without evidence that the Applicant's proposed use would, in the language of the Ordinance, "create hazards to the health, safety, or general welfare of the public." Rather, the ZBA denial was based on the past use of the Property. See, e.g., CR 191 (finding that the Property "is a hazard to the neighborhood"); CR 183 (referring to the Property as a "nuisance for a while" and a "nuisance property"). The record lacks credible testimony that future use of the Property as a short-term rental, in the manner proposed by the Applicant, would result in a hazard to the neighborhood.

Furthermore, the Ordinance's special exception criteria do not call for speculation about possible misconduct by future users, and it is unreasonable to attribute hazard to the proposed use if the hazard flows from illicit user misconduct. If future users violate any conditions of approval or the terms of Planning Department permit, the Ordinance is clear that non-compliance can result in revocation. See Ordinance, § 235-41-M, (6). Moreover, should users act in an illegal manner, traditional remedies exist outside of the zoning ordinance.

In light of the above, the Certified Record does not support the ZBA's finding that the Applicant's proposed use of the Property for short-term lodging will create hazards to the health, safety, or general welfare of the public.

While the Board concludes that the ZBA unreasonably denied the Applicant's special exception request, it also recognizes that the issuance of such permit will require reasonable

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[4] The short-term lodging special exception at issue opens the door for the ZBA to consider certain issues that are traditionally answered by the planning board, such as occupancy limits and parking requirements (as they relate to the special exception criteria). Therefore, while it was appropriate for the ZBA to address such issues, there is no evidence that the parking and occupancy limitations, which would be imposed by the Planning Department as part of its review, would be inadequate.

conditions that the ZBA is best positioned to finalize. Such conditions could include those offered by the Applicant to address abutter concerns, in addition to possible other reasonable conditions voted upon by the ZBA.

Based on the foregoing, upon a balancing of the probabilities, the Housing Appeals Board:

1. VACATES the September 20, 2021 decision of the City of Laconia Zoning Board of Adjustment denying D&G Clearwater, LLC's request for special exception to allow short-term lodging on property located at 33 Clearwater Place;
2. REMANDS the matter back to the City of Laconia Zoning Board of Adjustment for action consistent with this Order; and
3. APPROVES the Applicant's requests for findings and rulings which are consistent with this Order; the balance are DENIED.

HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:

Elizabeth Menard

Date: April 22, 2022

Elizabeth Menard, Clerk

THE SUPREME COURT OF NEW HAMPSHIRE

Housing Appeals Board
No. 2021-0476

APPEAL OF CHICHESTER COMMONS, LLC
(New Hampshire Housing Appeals Board)

Argued: June 21, 2022
Opinion Issued: September 2, 2022

Orr & Reno, P.A., of Concord (John L. Arnold on the brief and orally), for the petitioner.

Upton & Hatfield, LLP, of Concord (Nathan C. Midolo on the brief and orally), for the respondent.

DONOVAN, J. The petitioner, Chichester Commons, LLC, appeals an order of the Housing Appeals Board (HAB) affirming a decision of the planning board for the respondent, Town of Chichester (Town), denying the petitioner's request for a waiver of the density requirement set forth in the Town's zoning ordinance. The petitioner argues that the HAB erred by affirming the board's decision because, in 2015, the board granted the petitioner a density waiver for a similar elderly housing project that the petitioner had proposed for the same property. We conclude that the 2015 density waiver does not apply to the current version of the petitioner's proposed elderly housing project and was not binding upon the board. Accordingly, we affirm the HAB's decision.

I. Facts

The HAB found, or the record supports, the following facts. The petitioner owns a parcel of property located in the Town's Commercial Village (CV) District. The property is approximately 5.5 acres and comprises two lots that have been merged. In 2015, before the two lots were merged, the petitioner proposed to build an elderly housing facility on one of the lots — which was 2.369 acres — and a 10,000 square foot retail building on the other lot. At the time, the Town's zoning ordinance required "a minimum of two (2) acres for the first two family dwelling unit[s] with an additional ½ acre for each additional family dwelling unit" located in the CV District. Chichester, N.H., Zoning Ordinance, art. II, § 2.04(F)(VIII)(11)(b) (2008). The ordinance also included an innovative land use control that authorized the board to "waive particular [zoning] requirements" under certain circumstances. Chichester, N.H., Zoning Ordinance, art. II, § 2.04(F)(XIII) (2008); see RSA 674:21, II (Supp. 2021) ("An innovative land use control ordinance may provide for administration [of zoning ordinances] . . . by the planning board . . . .").

Because the petitioner proposed to build the facility on 2.369 acres, whereas the Town's zoning ordinance required twenty-two acres, the petitioner requested a waiver of the density requirement from the board. The petitioner informed the board that, if the waiver were to be granted, the petitioner would then submit a formal site plan for the board's consideration. The board granted the density waiver. However, due to financing issues, the petitioner did not move forward with the project.

In 2018, the petitioner altered the design of the project. In lieu of the elderly housing facility, the petitioner proposed to build a 14-unit affordable housing complex on the 2.369 acre lot. Because the new design also did not conform to the density requirement in the Town's zoning ordinance, the petitioner requested another density waiver from the board. The petitioner also submitted a final site plan for the board's consideration. The board granted the waiver and approved the site plan. The board later granted the petitioner's request to reduce the number of units from fourteen to thirteen. However, the petitioner did not move forward with the 2018 design.

In 2020, the petitioner proposed a third design of the project. Similar to the original 2015 design, the petitioner proposed to build a 24-unit elderly housing facility on the recently-merged 5.5 acre property. The petitioner's new design differed from the 2015 design in that it relocated the placement of the proposed elderly housing facility, required fewer square feet, and excluded the 10,000 square foot retail facility that was proposed in 2015. Because the petitioner proposed to reduce the number of units and build the facility on the entire 5.5 acre property, rather than just the 2.369 acre lot, the new design resulted in a lower density than the 2015 design.

In October 2020, the petitioner filed a request to amend the site plan for the affordable housing facility that the board approved in 2018. Specifically, the petitioner requested approval for "(24) one bedroom 55+ apartments in lieu of [the] previous 13 unit approved project." In December 2020, the board issued an order determining, without prejudice, that the petitioner's request was incomplete because it "incorrectly described the proposal as an 'amended site plan.'" The board explained that it considered the petitioner's proposal to be "a new application" and stated that "the [petitioner's] application form, plans, and notification materials should reflect it as such."

Thereafter, the petitioner filed a site plan application proposing to develop the 24-unit elderly housing facility. The petitioner also requested another waiver of the density requirement "to permit the development of a 24-unit multi-family structure on 5.5 acres." By this time, the Town's zoning ordinance had been amended to require "a minimum of two and one half (2.5) contiguous acres for the first two family dwelling unit[s] with an additional .5 acre for each additional family dwelling unit" as well as "one contiguous buildable acre for the first unit and an additional one half (.5) contiguous acre for each additional unit." Chichester, N.H., Zoning Ordinance, art. II, § 2.04(E)(VIII)(11)(II)(b) (2019). Unlike the prior zoning ordinance, the amended ordinance also required conditional use permits for multi-family housing. Compare Chichester, N.H., Zoning Ordinance, art. II, § 2.04(F)(VIII)(11) (2008), with Chichester, N.H., Zoning Ordinance, art. II, § 2.04(E)(VIII)(11) (2019).

The board discussed the petitioner's request at three meetings, which occurred between January and March 2021. At the meetings, the petitioner argued that the board's grant of the 2015 density waiver compelled it to grant another waiver, given that the new design was less dense than the original 2015 design. The petitioner also argued that the 2015 waiver "was granted without any stated expiration date" and that it "continue[d] to apply" to the 24-unit elderly housing project. The board rejected these arguments and denied the request on the grounds that the petitioner failed to demonstrate that the waiver satisfied one of five waiver requirements: that granting the waiver "[b]e reasonable and appropriate due to the scale and size of the proposed project." Chichester, N.H., Zoning Ordinance, art. II, § 2.04(E)(X)(6) (2019).

The petitioner appealed to the HAB, arguing that: (1) the 2015 waiver did not expire and continued to apply to the petitioner's proposed 24-unit elderly housing facility; and (2) even if the 2015 waiver expired, stare decisis compelled the board to grant the petitioner's request for another density waiver. The HAB rejected both arguments. With respect to the petitioner's argument that the 2015 waiver did not expire, the HAB noted that "municipal planning is a fluid concept based upon current conditions at the time an actual plan is filed with, and reviewed by, a town or city Planning Board." In rejecting the petitioner's stare decisis argument, the HAB concluded that the board was not bound by its prior decisions to grant waivers, in part because "all three projects proposed

by the [petitioner] are different which could reasonably impact the Planning Board's decision." The HAB also determined that the petitioner failed to timely appeal the board's December 2020 decision requiring "a new application" and that, "[b]y itself, this [was] grounds for denial of the requested relief." The petitioner filed a motion for rehearing, which the HAB denied for similar reasons. This appeal followed.

II. Standard of Review

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. See RSA 677:6, :15, V (2016); RSA 679:9, II (Supp. 2021); see also RSA 679:9, I (Supp. 2021) ("Appeals to the [HAB] shall be consistent with appeals to the superior court pursuant to RSA 677:4 through RSA 677:16."). The party seeking to set aside the board's decision bears the burden of proving that the decision was unlawful or unreasonable. RSA 677:6; see RSA 679:9, I. The HAB must treat the planning board's factual findings as prima facie lawful and reasonable. RSA 677:6; see RSA 679:9, I. The HAB's review is not 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. See Trustees of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 504 (2018).

Our review of the HAB's decision is governed by RSA chapter 541. See RSA 679:15 (Supp. 2021) ("Decisions of the [HAB] may be appealed to the supreme court by any party in accordance with the provisions of RSA 541 as from time to time amended."). We will not set aside the HAB's order unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable. See RSA 541:13 (2021). The HAB's factual findings are presumed to be prima facie lawful and reasonable. See id. When reviewing the HAB's findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the HAB's findings are supported by competent evidence in the record. See Appeal of SEA (NH Community College System), 170 N.H. 699, 702 (2018). When, as here, the HAB relied upon the record and made no independent factual findings, our review is limited to determining whether the record supports the HAB's decision.

III. Analysis

The petitioner first argues that "the 2015 waiver did not expire" and that it "continues to apply" to the proposed 24-unit elderly housing facility. We disagree. To resolve the petitioner's appeal, we must interpret the language of the Town's zoning ordinance. Similar to statutory interpretation, we construe the words and phrases of an ordinance according to the common and approved

usage of the language. Town of Carroll v. Rines, 164 N.H. 523, 526 (2013). When the language of an ordinance is plain and unambiguous, we need not look beyond the ordinance itself for further indications of legislative intent. Id.

As an initial matter, the Town argues that the petitioner's argument that the 2015 waiver continues to apply to the petitioner's proposed project is untimely. We need not address the timeliness of the petitioner's argument because, even if it is timely, it fails on its merits. Assuming, without deciding, that "the 2015 waiver did not expire," we conclude that the 2015 waiver does not apply to the current version of the petitioner's proposed project.

When the 2015 waiver was granted, the Town's zoning ordinance provided:

> [T]he [board] may waive particular requirements set forth in this section where the [board] finds that a development is better served by not adhering strictly to the provisions of this section and where the applicant demonstrates that granting a waiver would: [1] Not be detrimental to the public safety, health or welfare, or cause injury or damage to other property or fail to promote public interest; [2] Not vary the intent of the Town of Chichester Master Plan; [3] Substantially ensure that the goals, objectives, standards, and requirements of this section are not compromised; [4] Be reasonable and appropriate due to the scale and size of the proposed project; and/or [5] Protect natural features that would otherwise be impacted.

Chichester, N.H., Zoning Ordinance, art. II, § 2.04(F)(XIII) (2008) (emphasis added). Although the Town has relocated this provision within the ordinance, its language has not changed since the board granted the 2015 waiver. See Chichester, N.H., Zoning Ordinance, art. II, § 2.04(E)(X)(6) (2019).

Based upon the common and approved usage of the language of this provision, see Rines, 164 N.H. at 526, we conclude that the 2015 waiver applies only to "the proposed project" that the board considered when it granted the waiver. Chichester, N.H., Zoning Ordinance, art. II, § 2.04(F)(XIII) (2008). We further conclude that the petitioner's proposed 24-unit elderly housing facility is not "the proposed project" that the board considered in 2015. The 2015 waiver permitted the development of "up to 41 units on 2.369 acres," whereas the petitioner now proposes to build a "twenty four – one bedroom 55 plus apartment building" on 5.5 acres.

Since the board granted the 2015 waiver, the petitioner has not only reduced the number of units, but also decreased the square footage of the proposed facility from 13,500 square feet to 7,548 square feet and expanded

the size of the property from 2.369 acres to 5.5 acres. In addition, the current proposal places the facility in a different location on the property and omits the 10,000 square foot retail facility that was originally proposed in 2015. Accordingly, although a less intensive proposal, the 2020 application contemplates a different project footprint and different building configuration and eliminates the 2015 proposal for retail, which removed a feature that furthered an articulated development goal of the CV district. See Chichester, N.H., Zoning Ordinance, art. II, § 2.04(F)(III) (2008). Although the petitioner proposes to use the property for the same purpose — namely, for the development of an elderly housing facility — and although the current proposal requires less density than the 2015 proposal, the record demonstrates that the current proposal is not "the proposed project" that the board considered in 2015, and, thus, the 2015 waiver does not apply to it.

Our conclusion that the 2015 waiver does not apply to the current version of the petitioner's proposal is further supported by the language of the five factors set forth in the ordinance's waiver provision. See Chichester, N.H., Zoning Ordinance, art. II, § 2.04(F)(XIII) (2008). These factors require the board to consider, among other things, the potential impact of the proposed development on, inter alia, public health, safety and welfare, or other properties — an analysis that depends, at least in part, upon the current conditions surrounding the proposed development. See id. Thus, when evaluating a waiver, the board is required to assess the current impact of the development on the community. The board's role is not to compare the quality of two different proposals submitted at different points in time or to determine the degree of change to the surrounding community since the last proposal was submitted. Because the petitioner's current proposal is not the same as its 2015 proposal, the Town's ordinance required that the board consider the potential impact of the current proposal on the Town in light of any change in circumstances since the 2015 waiver was granted. See id. Accordingly, we conclude that the 2015 waiver does not apply to the 2020 proposal.

The petitioner next argues that, even if the 2015 waiver does not apply to the petitioner's proposed project, stare decisis compelled the board to grant the petitioner's 2020 request for another density waiver. We are unpersuaded. Again, because the petitioner's proposal for the 24-unit elderly housing facility was not "the proposed project" that the board considered in 2015, the board was required to consider the petitioner's 2020 waiver request on its own merits, apart from the 2015 waiver. See 8 Eugene McQuillin, The Law of Municipal Corporations § 25:232, at 1177-78 (3d ed. 2020) ("In general, precedents are not binding relative to the grant of exceptions or variances; each case is to be determined on its own merits."); cf. Heller v. Zoning Board of Adjustment of Phila., 171 A.2d 44, 46 (Pa. 1961) ("Allowing only for exceptional circumstances not apparent here, we hold that each case and each application [for a variance] must be dealt with anew and apart."); Board of Zoning Appeals of Alexandria v. Fowler, 114 S.E.2d 753, 757-58 (Va. 1960) ("[I]n determining whether a

variance for a particular piece of property shall be granted the Board must consider each case on its own particular facts or merits."). Although the board was required to provide the applicant with written reasons for its decision, see RSA 676:3, I, it was not, contrary to the petitioner's argument, required "to articulate [a] rational explanation for reaching a different result in 2020."

We also reject the petitioner's argument that the subsequent-application doctrine articulated in Fisher v. City of Dover, 120 N.H. 187 (1980), applies here. Fisher involved a challenge to a ZBA's approval of a variance for a proposal that was substantially identical to one it had previously denied. Fisher, 120 N.H. at 188. The plaintiff in that case was an abutter who opposed the project and objected to the ZBA's consideration of essentially the same proposal submitted by the same developer. Id. We held that "[w]hen a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of the petition." Id. at 190. We therefore concluded that the zoning board erred by reaching the merits of the second application "without first finding either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied by the board." Id. at 191.

Contrary to the petitioner's argument, the subsequent-application doctrine does not compel boards to grant successive waivers of zoning requirements. Assuming, without deciding, that the doctrine applies to waivers — as opposed to variances — we have never held that the doctrine applies when the board has previously granted an application. Rather, the doctrine prevents boards from considering the merits of applications that they have previously denied absent a finding of a material change in circumstances or a material difference in nature and degree between the second application and the prior one. See id. We decline to extend Fisher and its progeny to the facts and circumstances of this case.

We therefore conclude that the 2015 waiver does not apply to the current version of the petitioner's project and did not compel the board to grant the petitioner's 2020 request for another density waiver. To the extent that the petitioner challenges the HAB's decision affirming the board's denial independent of the 2015 waiver, that argument is undeveloped, and we decline to address it. See State v. Blackmer, 149 N.H. 47, 49 (2003) ("[W]e confine our review to only those issues that [have been] fully briefed.").

Affirmed.

HICKS and HANTZ MARCONI, JJ., concurred.