

State of New Hampshire
Supreme Court

NO. 2020-0001

2020 TERM

JUNE SESSION

Robert McDonald & Kathleen McDonald

v.

Town of Raymond

Planning Board & Zoning Board of Adjustment

RULE 7 APPEAL OF FINAL DECISION OF THE
ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFFS/APPELLANTS
ROBERT & KATHLEEN McDONALD

June 3, 2020

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QUESTION PRESENTED

Did the Raymond Planning Board err in finding that the applicant proved “unnecessary hardship” when granting waivers from town road standards, and did the court err in affirming that finding?

Preserved: PLANNING BOARD MINUTES (Aug. 3, 2017) at 541, @72; PLANNING BOARD MINUTES (Jan. 11, 2018) at 944-45, @109; PLANNING BOARD MINUTES (Mar. 15, 2018) at 1054, @120; PETITION FOR CERTIORARI (Nov. 19, 2018), *Appx.* at 3; APPELLANT’S MEMO OF LAW (Sept. 10, 2019), *Appx.* at 38; MOTION FOR RECONSIDERATION (Nov. 18, 2019), *Appx.* at 78; *Trn.* at 65 & *passim*.

STATEMENT OF THE CASE

This is an appeal from a site plan approval by the Raymond Planning Board of a condominiumized building cluster proposed by developer Mardan Investment Group, LLC in Raymond, New Hampshire. Kathleen and Robert McDonald are abutters, and appealed the Planning Board's action.¹

An "Overview Plan"² of the parcel is contained in the addendum to this brief at page [37](#).

I. Proceedings at the Raymond Planning Board

In April 2016, and again in September, the developer³ participated in a conceptual consultation with the Raymond Planning Board to exchange ideas for development of its land.⁴ This was followed in March 2017 with a proposed site plan.⁵ In April, the Raymond Planning Board held the first of a dozen site plan review meetings on the project.⁶

¹Due to the voluminous record, and numerous references to it, citations to the record are contained in footnotes.

Citations to the Planning Board certified record include the name of the document and its date, and the pin-cite to the page in the certified record if appropriate. The symbol @ indicates the tab number behind which the document appears in the certified record.

Documents in the Superior Court record are included in the appendix, and are cited thereto. The transcript of the Superior Court hearing on September 30, 2019, is cited as "Trn."

²OVERVIEW PLAN (Dec. 19, 2017), @110, *Addendum* at [37](#).

³The developer is not named, but the record indicates three men appeared, "Keith Martel, on behalf of Sterling Homes, Doug Mcguire from the Duby Group, and, Keith Copiello, Long Beach Development Associates." PLANNING BOARD MINUTES (Apr. 17, 2016) at 9, @2.

⁴PLANNING BOARD MINUTES (Apr. 17, 2016) at 9-12, @2; PLANNING BOARD MINUTES (Sept. 1, 2016) at 20-26, @3.

⁵SITE PLAN APPLICATION (Mar. 27, 2017) at 70, @8.

⁶PLANNING BOARD MINUTES (Apr. 20, 2017), @19; PLANNING BOARD MINUTES (June 15, 2017), @53; PLANNING BOARD MINUTES (June 29, 2017), @62; PLANNING BOARD MINUTES (Aug. 3, 2017), @72; PLANNING BOARD MINUTES (Sept. 21, 2017), @92; PLANNING BOARD MINUTES (Nov. 2, 2017), @102; PLANNING BOARD MINUTES (Jan. 11, 2018), @109; PLANNING BOARD MINUTES (Mar. 15, 2018), @120; PLANNING BOARD

(continued...)

A. Waivers Initially Denied

Raymond's site plan regulations contain a variety of road design and construction standards. A preliminary meta-provision directs that "all roadways," whether "public or private ... shall meet the design and construction regulations for streets and roads."⁷ The regulations also classify roads according to the volume of traffic, and specify a 50-foot right-of-way. Additional provisions contain a variety of exacting technical standards, including radius of curves, distance of straight road between curves, abruptness of grade changes, and types of curbing and drainage piping.⁸

In May 2017, the developer requested waivers from the meta-provision, the road-regulation requirement, and several engineering standards.⁹

After deliberation, in September 2017 the Planning Board took two votes, and unanimously denied both the meta-waiver and the 50-foot right-of-

⁶(...continued)

MINUTES (May 3, 2018), @124; PLANNING BOARD MINUTES (June 21, 2018), @134; PLANNING BOARD MINUTES (Sept. 20, 2018), @144; PLANNING BOARD MINUTES (Oct. 18, 2018), @146.

⁷SUBDIVISION REGULATIONS §5.6.A.8., @150 ("Regardless of street ownership (public or private) all roadways shall meet the design and construction regulations for streets and roads").

Although there is no subdivision in this case, the Subdivision Regulations are implicated because the Raymond Zoning Ordinance provides that in the zone in which the parcel lies, "[a]ll multi-family developments must comply with ... the Raymond Subdivision Regulations." 2017 RAYMOND ZONING ORDINANCE §6.5.3, Super.Ct. Exh. 3, *Appx.* at 96.

In addition, Raymond's site plan regulations require that "[t]he Planning Board shall require site plans to be submitted [for] [t]he construction of any new multi-family dwellings." SITE PLAN REVIEW REGULATIONS §3.001.03, @149. The site plan regulations also require that "[a]ll ... multi-family residential site plans shall conform to all local ... regulations and guidelines including ... Town of Raymond Subdivision Regulations." SITE PLAN REVIEW REGULATIONS §4.001, @149.

⁸SUBDIVISION REGULATIONS §5.6.C.1, @150 ("[m]inimum right of way widths ... are given in the design matrix"); SUBDIVISION REGULATIONS §5.6.D, @150 (specific dimensional right of way design standards and design matrix).

⁹LETTER FROM KNA (June 30, 2017) at 312-31, @43; LETTER FROM KNA (May 26, 2017) at 299-302, @42; PLANNING BOARD MINUTES (Apr. 20, 2017) at 157, 171, @19.

way waiver.¹⁰

B. Planning Board Reverses, Granting Meta-Waiver

In October, Mardan responded by submitting four alternative design concepts.¹¹ While complying with the road standards, the alternatives were conspicuously unattractive, and the Planning Board “recognize[d] the fact that these are poison pills.”¹²

In January 2018, Mardan returned to the Planning Board with its original proposal, slightly modified, with the rights-of-way for the internal roads renamed “access strip.”¹³ The Planning Board went into private consultation with its lawyer,¹⁴ and in a dramatic reversal, voted to grant the waivers: the proposed “access strip” need not meet basic town road standards.¹⁵

The reasons Mardan offered for seeking the meta-waiver were that Raymond’s road regulations were antiquated,¹⁶ conformity with them would encourage traffic faster than 15 miles per hour, and the roads would otherwise meet widely accepted standards promulgated by the American Association of State Highway Transportation Officials (AASHTO).¹⁷

The Planning Board’s discussion, in advance of its vote granting the

¹⁰PLANNING BOARD MINUTES (Sept. 21, 2017) at 667, @92.

¹¹LETTER FROM KNA (Oct. 18, 2017) at 748, @99.

¹²PLANNING BOARD MINUTES (Nov. 2, 2017) at 782, 787, @102.

¹³LETTER FROM HOGAN (Jan. 11, 2018) at 956, @110; *see* OVERVIEW PLAN (Dec. 19, 2017), @110, *Addendum* at [37](#).

¹⁴PLANNING BOARD MINUTES (Jan. 11, 2018) at 941, @109.

¹⁵PLANNING BOARD MINUTES (Jan. 11, 2018) at 946, @109; PLANNING BOARD MINUTES (Mar. 15, 2018) at 1053, @120.

¹⁶*Trn.* at 35-37.

¹⁷MARDAN WAIVER REQUEST #1 (Jan. 4, 2018) at 851-53, @108; PLANNING BOARD MINUTES (Jan. 11, 2018) at 938-46, @109.

meta-waiver,¹⁸ was on similar issues.¹⁹

C. Waiver of Road Classification and Requirement of 50' Right-of-Way

Beyond the meta-waiver, the Planning Board considered and granted a waiver from the traffic-volume based road classification, which requires a 50-foot right-of-way.²⁰

The grounds the developer offered, and which the Planning Board discussed preceding its vote,²¹ was that the 50-foot requirement does not apply to similar roads in other towns, it would be inconsistent with the aesthetic design of the site plan, and the roads would otherwise meet AASHTO standards.²²

¹⁸PLANNING BOARD MINUTES (Jan. 11, 2018) at 946, @109 (“Motion: Mr. Wood made a motion to waive from section 5.6A8 of the Town of Raymond subdivision regulation section 6.002.01 that the town site plan regulation requiring all roads regardless of street ownership (public or private) all roadways shall meet the design and construction regulations for streets and roads and acknowledging the *hardship* the current regulations would create a relatively high speed and unsafe road in a dense residential condominium community. Mr. Wentworth seconded the motion. The motion passed...”) (emphasis added). *See also* RSA 674:44, III(e) (“The basis for any waiver granted by the planning board shall be recorded in the minutes of the board.”); *Property Portfolio Group, LLC v. Town of Derry*, 163 N.H. 754 (2012) (Requiring that “underlying rationale of the board’s decision to grant a waiver be adequately reflected in its minutes.”); *Limited Editions Properties, Inc. v. Town of Hebron*, 162 N.H. 488, 493 (2011) (Planning Board specified that decision was for “aesthetic reasons.”).

¹⁹PLANNING BOARD MINUTES (Jan. 11, 2018) at 938-46, @109.

²⁰PLANNING BOARD MINUTES (Jan. 11, 2018) at 946-49, @109; PLANNING BOARD MINUTES (Mar. 15, 2018) at 1048-53, @120.

²¹PLANNING BOARD MINUTES (Mar. 15, 2018) at 1048-53, @120 (“I now move that we reconsider our vote not to waive the 50 foot right of way and that we grant the requested waiver from the 50 foot right of way because the specific circumstances of this subdivision indicate that the waiver will comply with the *spirit and intent* of the regulations.... The vote was unanimous.”). *See* RSA 674:44, III(e) (“The basis for any waiver granted by the planning board shall be recorded in the minutes of the board.”) (emphasis added). Due to the language of Raymond’s Site Plan Regulations, however, the developer must prove unnecessary hardship regardless of compliance with the spirit and intent of the regulations.

²²MARDAN WAIVER REQUEST #2 (Jan. 4, 2018) at 854-57, @108; PLANNING BOARD MINUTES (Jan. 11, 2018) at 946-49, @109; PLANNING BOARD MINUTES (Mar. 15, 2018) at 1048-53, @120.

D. Technical Waivers

Over the course of three meetings in 2018, the Planning Board considered each of 13 technical waivers from dimension and material standards regarding radiuses, curves, grades, curbing, and piping.

The reasons the developer offered included encouraging slower and calmer traffic on roads, consistency with the intent of the plan, following elevation changes and avoiding wetlands, fostering the purpose of Raymond's master plan and zoning ordinance, consistency with similar projects in other towns, and that the roads would otherwise meet AASHTO standards.²³

Regarding the use of plastic rather than concrete drainage piping, and bituminous rather than granite curbing,²⁴ the developer showed the preferred material performed equally but was less expensive, although the savings amounted to \$85,000 over the whole project.²⁵

The issues discussed by the Planning Board preceding its vote reflected the arguments made by the developer, and the waivers were granted.²⁶

²³MARDAN WAIVER REQUESTS #3, #4A, #4B, #5A, #5B, #6A, #6B, #7A, #7B, #7C, #8, #9, #10 (Jan. 4, 2018) at 858-99, @108; PLANNING BOARD MINUTES (Jan. 11, 2018) at 948-49, @109; PLANNING BOARD MINUTES (Mar. 15, 2018) at 1047-55, @120; PLANNING BOARD MINUTES (May 3, 2018) at 1069, @124.

²⁴The curbing waiver was later withdrawn. PLANNING BOARD MINUTES (May 3, 2018) at 1067, @124; *see also* PLANNING BOARD MINUTES (Sept. 20, 2018) at 1243, @144 (vote on sloped curbing); PLANNING BOARD MINUTES (Oct. 18, 2018) at 1264, @146 (vote on straight curbing).

²⁵WAIVER REQUESTS (Jan. 4, 2018) at 886, @108 ("The cost of concrete pipe is approximately \$40,000.00 more than HDPE pipe."); *id* at 895 ("Granite curbing is approximately \$130,000.00, more than three times the cost of bituminous curbing.").

²⁶Regarding waivers 3, 4A, 4B, 5A, 5B, 6A, & 6B: Unnecessary hardship was repeatedly discussed by the Planning Board, but there was no discussion of the spirit and intent of the regulations, and no basis for decision was disclosed in the vote. It thus appears that the basis for the vote was a finding of unnecessary hardship. PLANNING BOARD MINUTES (Mar. 15, 2018) at 1053-55, @120. *See* RSA 674:44, III(e) ("The basis for any waiver granted by the planning board shall be recorded in the minutes of the board."); *Property Portfolio Group, LLC v. Town of Derry*, 163 N.H. 754 (2012) (Requiring that "underlying rationale of the board's

(continued...)

E. Site Plan Approved

In October 2018, the Planning Board approved the site plan, subject to inspections, bonding, and other conditions.²⁷

II. Appeal to Superior Court

The McDonalds appealed²⁸ the decision of the Planning Board to the Rockingham County Superior Court²⁹ on several grounds, including that the developer did not prove unnecessary hardship to the applicant, and therefore

²⁶(...continued)

decision to grant a waiver be adequately reflected in its minutes.”); *Limited Editions Properties, Inc. v. Town of Hebron*, 162 N.H. 488, 493 (2011) (Planning Board specified that decision was for “aesthetic reasons.”). Due to the language of Raymond’s Site Plan Regulations, however, the developer must prove unnecessary hardship regardless.

Regarding waivers 7A, 7B, 7C, & 8: Unnecessary hardship was repeatedly discussed by the Planning Board, and there was just one passing reference to spirit and intent of the regulations, but no basis for decision was disclosed in the vote. It thus appears that the basis for the vote was a finding of unnecessary hardship. PLANNING BOARD MINUTES (Mar. 15, 2018) at 1055-57, @120. *See* RSA 674:44, III(e) (“The basis for any waiver granted by the planning board shall be recorded in the minutes of the board.”); *Property Portfolio Group, LLC v. Town of Derry*, 163 N.H. 754 (2012) (Requiring that “underlying rationale of the board’s decision to grant a waiver be adequately reflected in its minutes.”); *Limited Editions Properties, Inc. v. Town of Hebron*, 162 N.H. 488, 493 (2011) (Planning Board specified that decision was for “aesthetic reasons.”). Due to the language of Raymond’s Site Plan Regulations, however, the developer must prove unnecessary hardship regardless.

Regarding waiver 9, the developer argued both unnecessary hardship and spirit and intent of the regulations, although no basis for decision was disclosed in the vote. PLANNING BOARD MINUTES (May 3, 2018) at 1067-69, @124. The basis for the vote is thus unknown. RSA 674:44, III(e) (“The basis for any waiver granted by the planning board shall be recorded in the minutes of the board.”); *Motorsports Holdings, LLC v. Town of Tamworth*, 160 N.H. 95, 104 (2010) (no basis for decision recorded in Planning Board’s minutes). Due to the language of Raymond’s Site Plan Regulations, however, the developer must prove unnecessary hardship regardless.

²⁷PLANNING BOARD MINUTES (Oct. 18, 2018) at 1261, @146; CONDITIONS OF APPROVAL (Oct. 18, 2018) at 1269, 1273, @147.

²⁸RSA 677:15 (certiorari from Planning Board to Superior Court).

²⁹The McDonalds initially appealed portions of the Planning Board decision to the Raymond Zoning Board of Adjustment, regarding issues not addressed here. That matter was also appealed to the superior court. The two superior court appeals were consolidated. ASSENTED TO MOT TO CONSOLIDATE (June 19, 2019), *Appx.* at 26.

approval of the site plan was unlawful.³⁰

The McDonalds first argued that the standard for unnecessary hardship which applies in the context of *variances* is the same as for planning board *waivers* as in this case.³¹

The McDonalds also asserted that if the two standards are distinct, Mardan did not offer evidence of unnecessary hardship to the *applicant*, and therefore the Planning Board acted unlawfully in waiving the road standards.³²

After a non-evidentiary hearing, the court (*N. William Delker, J.*) ruled that unnecessary hardship in the variance context is separate from unnecessary hardship for waivers of planning board regulations,³³ and that for waivers, the “applicant” is the relevant object of the unnecessary hardship determination.³⁴

The court acknowledged that the State waiver statute³⁵ had been amended to allow a variety of proofs. It correctly ruled, however, that Raymond’s waiver regulation³⁶ more restrictively provided that to be granted a waiver, the developer must prove unnecessary hardship to the applicant.³⁷

The court nonetheless found that because there was evidence in the record of the developer’s aesthetic preferences,³⁸ there was a sufficient showing

³⁰PETITION FOR CERTIORARI ¶¶ 4, 12, 13, 14, 20, 23, 27 (Nov. 19, 2018), *Appx.* at 3.

³¹MOTION FOR RECONSIDERATION ¶9 (Nov. 18, 2019), *Appx.* at 78; *Trn.* at 64-65.

³²MOTION FOR RECONSIDERATION ¶11 (Nov. 18, 2019), *Appx.* at 78; *Trn.* at 64-65.

³³ORDER (Nov. 7, 2019) at 22, *Addendum* at [41](#).

³⁴ORDER (Nov. 7, 2019) at 22, *Addendum* at [41](#).

³⁵RSA 674:44, III, *Addendum* at [39](#).

³⁶While Raymond’s Site Plan Review Regulations explicitly incorporate and repeat the waiver statute, it also more restrictively provides that: “Where the Planning Board finds that *unnecessary hardship* may result from strict compliance with these regulations ... the Board may modify or waive these regulations...”. RAYMOND SITE PLAN REVIEW REGULATIONS, §7.009 Waiver, *Addendum* at [38](#) (emphasis added).

³⁷ORDER (Nov. 7, 2019) at 24, *Addendum* at [41](#).

³⁸ORDER (Nov. 7, 2019) at 11, 24-26, 28, *Addendum* at [41](#).

of unnecessary hardship, and therefore the Raymond Planning Board lawfully granted the waivers.³⁹ After their motion for reconsideration was denied,⁴⁰ the McDonalds appealed to this court.

³⁹ORDER (Nov. 7, 2019) at 24-25, *Addendum* at [41](#).

⁴⁰MOTION FOR RECONSIDERATION (Nov. 18, 2019), *Appx.* at 78; CONSOLIDATED OBJECTION TO RECONSIDERATION (Nov. 27, 2019), *Appx.* at 85.

STATEMENT OF THE FACTS

I. Features of the Land

Mardan's 86-acre⁴¹ parcel lies in the southeast corner of Raymond.⁴² Its eastern boundary is along New Hampshire Route 102, with other mostly undeveloped land to its north and west. Its southern boundary is behind Park Place, a street of single-family residences. There the McDonalds' residence abuts, on the corner of Rt. 102 and Park Place. Formerly agricultural, the area contains historical artifacts circa 1750.⁴³

The parcel lies in a hybrid commercial/residential zone, which envisions multi-family housing in the interior, and commercial uses along the highway.⁴⁴

The lot is very wet. Its western third is occupied by Gangee Pond, which drains via a perennial stream running through a steep-sided gorge along the lot's southern boundary. A wetland occupies most of the eastern portion of the parcel, such that the wetland sits between the reserved commercial strip along the highway and any potential residences behind.⁴⁵

The Gangee Pond brook, after joining the outflow of the eastern wetland, together enter the McDonalds' property just behind their house. The resultant stream runs through their property, and discharges via a culvert⁴⁶ under Park Place at the southeastern corner of the McDonalds' property.⁴⁷

⁴¹*Trn.* at 32.

⁴²The parcel is shown on Raymond tax map 11, lot 44, and is known as 41 Chester Rd.

⁴³NH DIV. HIST. RES. (Feb. 8, 2017), @4.

⁴⁴ZONING NOTES (undated), @1; LETTER FROM PANCIOCCO (Oct. 10, 2017), @95.

⁴⁵OVERVIEW PLAN (Dec. 19, 2017), @110, *Addendum* at [37](#).

⁴⁶SUBDIVISION APPLICATION (Mar. 21, 2017) at 45, @7; CONSERVATION COMM. MINUTES (Apr. 12, 2017), @10; LETTER FROM DUBOIS & KING (June 22, 2017) at 408, @56; PLANNING BOARD MINUTES (Sept. 20, 2018) at 1245, @144.

⁴⁷OVERVIEW PLAN (Dec. 19, 2017), Super.Ct. Exh. 1, *Appx.* at 91.

Water then continues under Rt. 102 just south of the McDonalds' house,⁴⁸ to the nearby Exeter River.⁴⁹ Other wetlands⁵⁰ and vernal pools⁵¹ are scattered throughout.⁵²

The topographic elevation of Mardan's property is about 100 feet higher on the west than the east, and the McDonalds' property is situated near the lowest point where the entire area drains.⁵³ Consequently, the McDonalds' primary concerns have included long-term and construction-related activities that impact drainage: alteration of terrain and drainage pathways, impervious surfaces,⁵⁴ housing density, stream crossings, storm water collection, water diversion, and the adequacy of the farthestmost drainage culvert near their home.⁵⁵ The McDonalds were especially concerned about an increase in

⁴⁸LETTER FROM DUBOIS & KING (June 22, 2017) at 408, @56.

⁴⁹PLANNING BOARD MINUTES (Sept. 20, 2018) at 1250, @144; ALTERATION OF TERRAIN PERMIT (Feb. 2017), *Appx.* at 303.

⁵⁰PLANNING BOARD MINUTES (Sept. 1, 2016) at 22, @3; WETLANDS PERMIT APPLICATION (Mar. 21, 2017), @6; ZONING DETERMINATION (Apr. 17, 2017), @13; CONSERVATION COMM. MINUTES (May 24, 2017) at 265-68, @38; EMAIL FROM DES (June 9, 2017), @61; LETTER FROM CONSERVATION COMM. (June 28, 2017), @60; CONSERVATION COMM. MINUTES (July 26, 2017) at 469, @66; LETTER FROM KNA (Sept. 13, 2018), @139; PLANNING BOARD MINUTES (Oct. 18, 2018) at 1260, @146.

⁵¹CONSERVATION COMM. MINUTES (May 24, 2017) at 265-68, @38; LETTER FROM KNA (May 26, 2017) at 308-11, @42; CONSERVATION COMM. MINUTES (June 28, 2017), @59; LETTER FROM CONSERVATION COMM. (June 28, 2017), @60.

⁵²OVERVIEW PLAN (Mar. 6, 2017), @8; OVERVIEW PLAN (Dec. 19, 2017), @110, *Addendum* at [37](#).

⁵³EXISTING CONDITION PLAN (topographic) (Mar. 23, 2017), *Appx.* at 307.

⁵⁴TECH. REV. COMM. (Mar. 28, 2017) at 93, 102-03, @14; ZONING DETERMINATION (Apr. 17, 2017), @13; PLANNING BOARD MINUTES (Apr. 20, 2017) at 169, @19; LETTER FROM DES (July 5, 2017) at 463, @63.

⁵⁵TECH. REV. COMM. (Mar. 28, 2017) at 93, 132, @14; LETTER FROM MCDONALD (Apr. 20, 2017), @20; PLANNING BOARD MINUTES (Apr. 20, 2017) at 169, 174-75, @19; CONSERVATION COMM. MINUTES (Apr. 26, 2017) at 221, @32; CONSERVATION COMM. MINUTES (May 24, 2017), @38; LETTER FROM KNA (May 26, 2017) at 283, 296-97, @42; CONSERVATION COMM. MINUTES (June 28, 2017) at 431, @59; PLANNING BOARD MINUTES (May 3, 2018) at 1079-80, @124.

periodic flooding near their property⁵⁶ – a concern shared by the Town⁵⁷ – and potential effects on the continued purity and viability of their drinking water well.⁵⁸

II. Particulars of the Proposed Site Plan

After the 2016 non-binding design consultations with the Planning Board, Mardan proposed what it claimed would be a “walkable neighborhood” with “slow moving traffic.”⁵⁹ The development would comprise 172 two-bedroom units, each with a potential third bedroom loft,⁶⁰ in 43 four-unit buildings,⁶¹ plus a clubhouse.⁶² It would use the public water supply, but it would have private sewage, including over two dozen⁶³ proposed septic systems.⁶⁴ Interior roads, which the developer characterized as a “private driveway,” would be owned by a condominium association.⁶⁵

⁵⁶PLANNING BOARD MINUTES (Sept. 1, 2016) at 24, @3; PLANNING BOARD MINUTES (Apr. 20, 2017) at 169, 175, @19; CONSERVATION COMM. MINUTES (Apr. 26, 2017) at 221, @32; CONSERVATION COMM. MINUTES (May 24, 2017) at 257-58, @38; CONSERVATION COMM. MINUTES (June 14, 2017) at 369, @51.

⁵⁷LETTER FROM DUBOIS & KING ¶28 (Apr. 14, 2017), @12.

⁵⁸*See, e.g.*, PLANNING BOARD MINUTES (Sept. 1, 2016) at 22, @3; PLANNING BOARD MINUTES (Apr. 20, 2017) at 169, @19; PLANNING BOARD MINUTES (Sept. 20, 2018) at 1245, @144.

⁵⁹LETTER FROM PANCIOCCO (Sept. 7, 2017) at 610, @82.

⁶⁰ROOF ELEVATIONS (Feb. 28, 2017) at 29, @5.

⁶¹PLANNING BOARD MINUTES (Sept. 1, 2016) at 21, @3; SITE PLAN APPLICATION (Mar. 27, 2017), @8; PLANNING BOARD MINUTES (Sept. 21, 2017) at 662, @92; PLANNING BOARD MINUTES (Nov. 2, 2017) at 777, @102; *Trm.* at 31-32.

⁶²PLANNING BOARD MINUTES (Sept. 21, 2017) at 662, @92.

⁶³EFFLUENT DISPOSAL PLAN (Apr. 2, 2018), *Appx.* at 308.

⁶⁴TECH.REVIEW.COMM. (Mar. 28, 2017) at 95, @14; PLANNING BOARD MINUTES (Sept. 21, 2017), @92.

⁶⁵PLANNING BOARD MINUTES (Sept. 1, 2016) at 25, @3; PLANNING BOARD MINUTES (Apr. 20, 2017) at 157, @19; LETTER FROM KNA (May 26, 2017) at 286, @42; PLANNING BOARD MINUTES (Sept. 21, 2017) at 658-63, @92; LETTER FROM PANCIOCCO (Dec. 21, 2017) at 807, @106; LETTER FROM PANCIOCCO (Jan. 15, 2018) at 959, @111; *Trm.* at 43.

While Mardan claimed that the proposed bedroom density was unremarkable,⁶⁶ its filings indicated there was much less buildable land than the developer claimed, suggesting that density was beyond that allowed in the zone.⁶⁷ Thus the McDonalds and others noted⁶⁸ that the proposed site plan was too dense for the parcel⁶⁹ given the abundant water, wet groundwater soils,⁷⁰ the volume of septic disposal,⁷¹ areas set aside for wetland loss mitigation,⁷² areas set aside for commercial⁷³ and other uses,⁷⁴ setbacks from the pond,⁷⁵ and extensive

⁶⁶LETTER FROM KNA (May 26, 2017) at 298, @42; LETTER FROM KNA (Oct. 18, 2017), @99; PLANNING BOARD MINUTES (Nov. 2, 2017) at 777, @102; LETTER FROM PANCIOTTO (Jan. 31, 2018) at 976, @114.

⁶⁷ALTERATION OF TERRAIN PERMIT (Feb. 2017), *Appx.* at 303 (showing: 1,541,539 square feet, or 25.38 acres, of disturbance; and 562,882 square feet or 12.92 acres of impervious cover)

⁶⁸PLANNING BOARD MINUTES (Nov. 2, 2017) at 785-86, @102.

⁶⁹PLANNING BOARD MINUTES (Sept. 1, 2016) at 23, @3; PLANNING BOARD MINUTES (Apr. 20, 2017) at 171, @19; LETTER FROM MCDONALD (Jan. 26, 2018) at 963, @112; PLANNING BOARD MINUTES (May 3, 2018) at 1081, @124.

⁷⁰REQUEST FROM DES (Apr. 28, 2017) at 240, @34; CONSERVATION COMM. MINUTES (July 26, 2017) at 469, @66.

⁷¹TECH.REV.COMM (Mar. 28, 2017) at 102-03, @14; LETTER FROM KNA (May 26, 2017) at 304, @42; LETTER FROM KNA (Oct. 18, 2017) at 753-54, @99; LETTER FROM KNA (Nov. 29, 2017), @103; LETTER FROM PANCIOTTO (Jan. 15, 2018) at 960, @111.

⁷²TECH. REV. COMM. (Mar. 28, 2017) at 94, @14; LETTER FROM NORTH COUNTRY SOIL SERV. (May 24, 2017) at 253, @37; CONSERVATION COMM. MINUTES (June 14, 2017) at 367, 373, @51; CONSERVATION COMM. MINUTES (June 28, 2017), @59; PLANNING BOARD MINUTES (Sept. 20, 2018) at 1241, @144.

⁷³PLANNING BOARD MINUTES (Jan. 11, 2018) at 942-43, @109.

⁷⁴TECH. REV. COMM. (Mar. 28, 2017) at 102-03, @14; PLANNING BOARD MINUTES (Nov. 2, 2017) at 786, @102; LETTER FROM KNA (Nov. 29, 2017) at 792, @103; LETTER FROM DUBOIS & KING (Dec. 14, 2017), @105; LETTER FROM HOGAN (Jan. 11, 2018) at 955, @110; PLANNING BOARD MINUTES (Jan. 11, 2018) at 940-42, @109; PLANNING BOARD MINUTES (Mar. 15, 2018) at 1048, @120.

⁷⁵SUBDIVISION APPLICATION (Mar. 21, 2017) at 47, @7; CONSERVATION COMM. MINUTES (May 24, 2017) at 257, 265-68, @38; PLANNING BOARD MINUTES (May 3, 2018) at 1078, @124; LETTER FROM CONSERVATION COMM. (Sept. 12, 2018), @138.

installation of impervious surfaces.⁷⁶

As proposed, the interior roads would be curvy and narrow,⁷⁷ with 15 mile-per-hour speed limits.⁷⁸ Because the development was estimated to generate over 1,100 vehicle trips per day,⁷⁹ it resulted in a road classification that requires a 50-foot right of way.⁸⁰

Because this configuration would otherwise be a potential violation of the ordinance (thus necessitating a variance⁸¹), the developer renamed⁸² the

⁷⁶TECH. REV. COMM. (Mar. 28, 2017) at 102-03, @14.

⁷⁷PLANNING BOARD MINUTES (Sept. 1, 2016) at 25, @3; TECH. REV. COMM. (Mar. 28, 2017) at 94-95, 105, @14; PLANNING BOARD MINUTES (Apr. 20, 2017) at 170, @19; HIGHWAY SAFETY MINUTES (June 14, 2017) at 363, @50; LETTER FROM PANCIOTTO (Sept. 7, 2017) at 611-13, @82; PLANNING BOARD MINUTES (Sept. 21, 2017) at 657, 662, 671-72, @92.

⁷⁸LETTER FROM KNA (May 26, 2017) at 299, @42; HIGHWAY SAFETY MINUTES (June 21, 2017) at 402-03, @54; PLANNING BOARD MINUTES (Sept. 21, 2017) at 657, 660, @92; PERFORMANCE GUARANTEE AGREEMENT (Nov. 26, 2018), @148.

⁷⁹LETTER FROM GPI (Sept. 6, 2017) at 578, @78.

⁸⁰SITE PLAN REVIEW REGULATIONS ¶6.002(01) (Jan. 16, 2014) at 1302, @149 (“Streets, drives and access ways ... in multi-family developments shall be constructed to ... specifications as set forth in the ... Subdivision Regulations”); SUBDIVISION REGULATIONS ¶5.6.D (“Right of Way Design Matrix”) (Jan. 16, 2014) at 1326, @150 (“Minimum ROW Width” 60' and 50' depending upon type of road).

⁸¹LETTER FROM HOGAN (Jan. 11, 2018) at 953-55, @110; PLANNING BOARD MINUTES (Jan. 11, 2018) at 940, @109; PLANNING BOARD MINUTES (Mar. 15, 2018) at 1051, @120; SITE PLAN REVIEW REGULATIONS (Jan. 16, 2014) at 1285, @149; SUBDIVISION REGULATIONS (Jan. 16, 2014) at 1325, @150.

⁸²The developer’s lawyer explained: “[I]f [the road] were ever the subject matter of a petition ... [a]nd of course, that is always possible, ... that’s the reason for the 50-footwide access strip. The choice of access strip was assigned to avoid confusion because it really is just a reservation easement... in the event you had unanimity ... of 172 unit owners [who] in the future ever petitioned the town to take the road over as a public way.” *Trn.* at 34-35.

right-of-way an “access strip.”⁸³ The “access strip”⁸⁴ can be seen on the Overview Plan, *Addendum* at [37](#), as the dashed line generally outlining the roads. It is a paper-only 50-foot swath which cuts through driveways, parking areas and other features,⁸⁵ and allows for no setbacks from the road.⁸⁶

Because Raymond’s road standards discourage curvy narrow roads, however,⁸⁷ the proposed design would necessitate 13 technical waivers involving the radius of curves, the distance of straight road between curves, the abruptness of grade changes, and types of curbing and drainage piping.⁸⁸

Collectively the waivers would result in a substantial deviation from Raymond’s road standards.⁸⁹

The proposed plan would include a gated emergency exit on the westerly side of the development,⁹⁰ requiring a bridge over the Gangee Pond stream gorge.⁹¹ Because the interior roads would not be public, and the

⁸³OVERVIEW PLAN *Addendum* at [37](#) n.1 (“The purpose of this plan is to plot the fifty foot (50’) wide access strip on the previously proposed private roadway network as defined in the ‘Declaration of the Meadows Condominium.’”); LETTER FROM HOGAN (Jan. 11, 2018) at 955, @110; PLANNING BOARD MINUTES (Jan. 11, 2018) at 941, @109; PLANNING BOARD MINUTES (Mar. 15, 2018) at 1048, @120.

⁸⁴The Planning Board may have again re-named the “access strip,” as a “potential future right-of-way easement in favor of the town.” PLANNING BOARD MINUTES (Jan. 11, 2018) at 941, @109; *Trn.* at 15.

⁸⁵PLANNING BOARD MINUTES (Sept. 21, 2017) at 660, @92; LETTER FROM HOGAN (Jan. 11, 2018) at 953, @110.

⁸⁶PLANNING BOARD MINUTES (Sept. 21, 2017) at 660, @92; PLANNING BOARD MINUTES (Jan. 11, 2018) at 940, @109; PLANNING BOARD MINUTES (Mar. 15, 2018) at 1051, @120.

⁸⁷SUBDIVISION REGULATIONS ¶5.6.D (“Right of Way Design Matrix”) (Jan. 16, 2014) at 1327, @150.

⁸⁸MARDAN WAIVER REQUESTS (Jan. 4, 2018) at 850, @108.

⁸⁹PLANNING BOARD MINUTES (Sept. 21, 2017) at 663, @92.

⁹⁰PLANNING BOARD MINUTES (Sept. 1, 2016) at 21, @3; LETTER FROM POLICE DEP’T (June 21, 2017) at 405, @55.

⁹¹SUBDIVISION APPLICATION (Mar. 21, 2017) at 45, @7; CONSERVATION COMM.

(continued...)

secondary exit would be gated, concerns were raised about a school bus stop near the highway,⁹² and connectivity to other areas in Raymond.⁹³

Due to the size of the project, and construction standards which limit to 5 acres the amount of terrain that can be disturbed at one time, construction would occur in eleven or more phases⁹⁴ over seven to ten years.⁹⁵

III. Circumstances of the Applicant

As noted, the McDonalds' central concern was the potential for flooding on their property downhill from the project site. They understood that not only would the phases of construction threaten existing drainage, but also that the project would ultimately create a system of drainage infrastructure which would require continuous maintenance into the future – without recourse to municipal resources. They were thus concerned that if drainage elements were inadequately installed, if excavation were commenced but the project stalled

⁹¹(...continued)
MINUTES (Apr. 12, 2017), @10; CONSERVATION COMM. MINUTES (May 24, 2017) at 257-58, @38; CONSERVATION COMM. MINUTES (June 28, 2017), @59; PLANNING BOARD MINUTES (Sept. 21, 2017), @92; LETTER FROM PANCIOTTO (July 27, 2018), @136.

⁹²TECH. REV. COMM. (Mar. 28, 2017) at 93, 97, @14; PLANNING BOARD MINUTES (June 29, 2017) at 456, @62.

⁹³PLANNING BOARD MINUTES (Sept. 1, 2016) at 26, @3; PLANNING BOARD MINUTES (Sept. 21, 2017), @92.

⁹⁴PLANNING BOARD MINUTES (June 29, 2017) at 456, @62 (developer claims 11 phases); PHASING PLAN (Apr. 2, 2018), *Appx.* at 309 (plan notes describing 13 phases); *see also*, PERFORMANCE GUARANTEE AGREEMENT (Nov. 26, 2018) at 1276, @148; PLANNING BOARD MINUTES (May 3, 2018) at 1080-81, @124; LETTER FROM MCDONALD (Jan. 26, 2018) at 962, @112; LETTER FROM KNA (May 26, 2017) at 285, @42.

⁹⁵PLANNING BOARD MINUTES (June 29, 2017) at 456, @62 (developer suggesting construction timetable, which appears to total seven to ten years).

during its long phasing,⁹⁶ or if perpetual maintenance were not ensured,⁹⁷ their risk of flooding would increase, and their property value would decline.

Moreover, the McDonalds were aware that for Mardan to acquire the waivers it sought, it would have to prove “unnecessary hardship to the applicant.”⁹⁸ The McDonalds understood the phrase to mean that Mardan would need to show that its financial situation would be in jeopardy without the waivers.⁹⁹ Thus the McDonalds believed that any proof of unnecessary hardship would involve evidence of the applicant’s finances – its entity structure, the relative costs of the proposed and alternative site plans, and the applicant’s financing arrangements both during phased construction and later during operation.¹⁰⁰ They believed that because the developer had to prove “unnecessary hardship to the applicant,” the Planning Board had a duty to be concerned with financial matters, that it was shirking by not demanding the information, and that it should be wary of any developer reluctant to disclose supporting financial documentation.¹⁰¹

Consequently, the McDonalds repeatedly sought information about the financial impact of the requested waivers. Mardan refused such disclosure, and the Planning Board declined to compel it. As a result, there was little evidence from which the Planning Board could determine unnecessary hardship to the applicant.

⁹⁶PLANNING BOARD MINUTES (Apr. 20, 2017) at 170, @19; LETTER FROM MCDONALD (Apr. 20, 2017), @20; PLANNING BOARD MINUTES (Aug. 3, 2017) at 541, @72; LETTER FROM HOGAN (Sept. 1, 2017) at 572-74, @77; LETTER FROM HOGAN (Sept. 14, 2017) at 640-42, @90; LETTER FROM MCDONALD (Jan. 26, 2018) at 962, @112.

⁹⁷LETTER FROM MCDONALD (Apr. 20, 2017), @20; LETTER FROM HOGAN (Sept. 14, 2017) at 641, @90; PLANNING BOARD MINUTES (Sept. 21, 2017) at 664, @92.

⁹⁸SITE PLAN REVIEW REGULATIONS (Jan. 16, 2014) at 1318, @149.

⁹⁹PLANNING BOARD MINUTES (Aug. 3, 2017) at 541, @72.

¹⁰⁰PLANNING BOARD MINUTES (Aug. 3, 2017) at 541, @72.

¹⁰¹LETTER FROM HOGAN (Sept. 14, 2017) at 640-42, @90.

A. No Evidence of Applicant’s Entity Structure During Construction or Operation

Mardan Investment Group appears to be a limited liability corporation because it uses “LLC” in its name, and is related in some fashion to “Sterling Homes,”¹⁰² but little more is known about the developer’s ownership or entity structure. The McDonalds requested such information,¹⁰³ but the developer asserted it was “irrelevant,”¹⁰⁴ and the Planning Board did not request it.

Hence, the McDonalds conducted their own investigation, and found that the purported LLC was not registered with the New Hampshire Secretary of State.¹⁰⁵ Later the applicant addressed the deficiency,¹⁰⁶ but did not offer any information about the people behind the entity, or any further information about it.

Given that absence, the McDonalds offered newspaper accounts of Mardan’s allegedly disreputable actions involving projects in other towns,¹⁰⁷ which the developer dismissed as inaccurate.¹⁰⁸

While it was clear that the ultimate ownership structure will be a condominium,¹⁰⁹ Mardan offered no evidence regarding organizational arrangements to ensure future infrastructure maintenance.

¹⁰²CONSOLIDATED TRIAL MEMO (Sept. 10, 2019) at 2, *Appx.* at 50; ROOF ELEVATIONS (Feb. 28, 2017) at 29, @5 (labeled as having been prepared for “Sterling Homes”).

¹⁰³LETTER FROM MCDONALD (Apr. 4, 2017), @20; PLANNING BOARD MINUTES (Apr. 20, 2017) at 169-79, @19; CONSOLIDATED TRIAL MEMO OF LAW (Sept. 10, 2019) at 6, *Appx.* at 50.

¹⁰⁴LETTER FROM PANCIOTTO (Jan. 31, 2018) at 975, @114.

¹⁰⁵LETTER FROM MCDONALD (Apr. 4, 2017), @20.

¹⁰⁶LETTER FROM CRAVEN (Apr. 24, 2017), @30.

¹⁰⁷PLANNING BOARD MINUTES (Aug. 3, 2017) at 541, @72; LETTER FROM HOGAN (Sept. 14, 2017) at 640-41, @90; LETTER FROM MCDONALD (Jan. 26, 2018) at 964-71, @112.

¹⁰⁸LETTER FROM PANCIOTTO (Jan. 31, 2018) at 976, @114.

¹⁰⁹PLANNING BOARD MINUTES (Sept. 21, 2017) at 658, @92; LETTER FROM PANCIOTTO (Sept. 20, 2018) at 1194-1238, @143.

B. No Evidence of Applicant's Financial Qualifications For Construction or Operation

The McDonalds sought information about financial qualification of the developer, and what its financing arrangements were, in order to allow the Planning Board to determine whether Mardan had the ability to both complete the project and operate the product, with the waivers as compared to without them.¹¹⁰ The developer refused,¹¹¹ saying that it “will not be producing financial reports or other information relative to the applicant to the Town during this process.”¹¹²

Mardan claimed that financial qualification was not the business of the Planning Board because, in time, other authorities would test their financial strength: bonding agencies¹¹³ for purposes of performance bonds,¹¹⁴ and the Attorney General¹¹⁵ for purposes of condominium organization. It thus rejected that the Planning Board had authority to request or demand financial information.¹¹⁶

Consequently, there is no evidence in the record regarding the developer's financing arrangements – whether it has the capital to complete the site plan, and whether it has the ability to operate it if completed.¹¹⁷

¹¹⁰PLANNING BOARD MINUTES (Apr. 20, 2017) at 170, @19; PLANNING BOARD MINUTES (Aug. 3, 2017) at 541, @72; LETTER FROM HOGAN (Sept. 1, 2017) at 571-74, @77; CONSOLIDATED TRIAL MEMO OF LAW (Sept. 10, 2019) at 6, *Appx.* at 50.

¹¹¹LETTER FROM PANCIOTTO (Sept. 7, 2017) at 623, @84; PLANNING BOARD MINUTES (May 3, 2018) at 1079-80, @124.

¹¹²LETTER FROM PANCIOTTO (Sept. 7, 2017) at 623, @84.

¹¹³LETTER FROM PANCIOTTO (Sept. 7, 2017) at 623, @84.

¹¹⁴PERFORMANCE GUARANTEE AGREEMENT (Nov. 26, 2018), @148.

¹¹⁵PLANNING BOARD MINUTES (Sept. 21, 2017) at 661, @92.

¹¹⁶LETTER FROM PANCIOTTO (Sept. 7, 2017) at 623, @84.

¹¹⁷Attached to a draft condominium declaration in the record is an undated “Annual Operating Expense and Reserve Budget,” which is also labeled “draft.” It contains some

(continued...)

C. No Evidence of Applicant's Costs to Build and Maintain Proposed and Alternative Plans

In comparing various design alternatives, Mardan's general argument was that its preferred design was no more or less expensive, and that its preferred proposal was favored for non-financial reasons.¹¹⁸

The McDonalds thus requested information regarding cost estimates for the developer's proposed and alternative plans.¹¹⁹ They requested budgets for land acquisition, permitting, site improvement, and site plan construction.¹²⁰ Mardan refused,¹²¹ resulting in negligible evidence regarding comparative project cost.¹²²

¹¹⁷(...continued)
numbers, but insufficient data to discern anything meaningful to this appeal. DRAFT CONDO INSTRUMENTS (Sept. 20, 2018) at 1238, @143.

¹¹⁸PLANNING BOARD MINUTES (Nov. 2, 2017) at 777, @102.

¹¹⁹PLANNING BOARD MINUTES (Aug. 3, 2017) at 541, @72; LETTER FROM HOGAN (Sept. 1, 2017) at 572-74, @77; PLANNING BOARD MINUTES (Sept. 21, 2017) at 664, @92; PLANNING BOARD MINUTES (Nov. 2, 2017) at 785, @102; CONSOLIDATED TRIAL MEMO OF LAW (Sept. 10, 2019) at 6, *Appx.* at 50.

¹²⁰PLANNING BOARD MINUTES (Apr. 20, 2017) at 170, @19; PLANNING BOARD MINUTES (Aug. 3, 2017) at 541, @72; LETTER FROM HOGAN (Sept. 1, 2017) at 572-74, @77.

¹²¹LETTER FROM PANCIOTTO (Sept. 7, 2017), @84.

¹²²The developer did assert that two of its waivers, regarding material composition of drainage pipe and curbing, were sought to save money. PLANNING BOARD MINUTES (Aug. 3, 2017) at 542, @72; LETTER FROM HOGAN (Sept. 14, 2017) at 640, @90; WAIVER REQUESTS (Jan. 4, 2018) at 886, 895-96, @108. However, the cost savings from these two items totaled less than \$85,000. WAIVER REQUESTS (Jan. 4, 2018) at 886, @108 ("The cost of concrete pipe is approximately \$40,000.00 more than HDPE pipe."); *id* at 895 ("Granite curbing is approximately \$130,000.00, more than three times the cost of bituminous curbing.").

IV. Applicant Promoted Its Design Choices As Aesthetic, Not Financial

In arguing for waivers, Mardan extolled its design choices as aesthetic:

[The developer] chose this design because it was attractive. He's been in this business a very long time. And based on market studies, this is what was revealed is something that was reasonably affordable, very much needed. It's clustered together. He could wind the roads around, except for the two access points, around the wetlands and avoid them. And it's a nice little community. In fact, each little cul-de-sac is almost like its own separate neighborhood. But he chose this design after getting feedback from the Planning Board.¹²³

Mardan also offered two policy articles which explained – while devoid of economic or financial data – that walkable neighborhoods with slow traffic are healthy and attractive.¹²⁴

The developer explicitly denied that “somehow these waivers have anything to do with any bearing on economics.”¹²⁵

Yet Mardan also asserted that compliance with technical road standards would result in a “less marketable product” that it “won't be able to sell.”¹²⁶ The developer claimed it would be “unattractive to the marketplace” with “a lower price point”¹²⁷ and “lower assessed values.”¹²⁸ There is, however, no data in the record to support these assertions.

Accordingly, it appears the applicant primarily promoted its design choices as aesthetic rather than financial.

¹²³*Trn.* at 32 (statement by developer's representative).

¹²⁴Rogers, Gardner & Carlson, *Walking Builds Community Cohesion*, CARSEY INSTITUTE (Winter 2014) at 839-44, @108; Bakos, *Designing Healthier Communities in New Hampshire*, NEW HAMPSHIRE TOWN & CITY (Mar./Apr. 2017) at 845-49, @108.

¹²⁵PLANNING BOARD MINUTES (Nov. 2, 2017) at 777, @102.

¹²⁶PLANNING BOARD MINUTES (Jan. 11, 2018) at 949, @109.

¹²⁷PLANNING BOARD MINUTES (Nov. 2, 2017) at 779, @102.

¹²⁸MARDAN WAIVER REQUEST (Jan. 4, 2018) at 877, @108; PLANNING BOARD MINUTES (Nov. 2, 2017) at 777-79, @102.

SUMMARY OF ARGUMENT

The McDonalds first suggest that the Planning Board and Superior Court should have applied the standard of unnecessary hardship employed in the variance context.

They then argue in the alternative that “hardship to the applicant” must include proof of financial hardship, for which no evidence was offered. They point out that without financial information, the Planning Board unlawfully granted the waivers because it could not – and did not – perform its duty to determine unnecessary hardship to the applicant.

The McDonalds thus request this court reverse and remand to the Planning Board.

ARGUMENT

I. The Developer Did Not Prove Unnecessary Hardship Regarding the Land

Regarding variances, the ZBA may grant a variance from the zoning ordinance when “[l]iteral enforcement of the provisions of the ordinance would result in an unnecessary hardship.” RSA 674:33, I(a)(2)(E). The variance statute defines unnecessary hardship as “owing to special conditions of the *property*.” RSA 674:33, I(b)(1) (emphasis added).

In the variance context, when applying the unnecessary hardship test, this court appears to have interchangeably regarded the hardship as applying to the “owner” and the “applicant,” but – in conformance with the actual language of the statute – has focused its analysis on the conditions of the land.

In *Carbonneau v. Town of Exeter*, 119 N.H. 259 (1979), the court indicated both “hardship to the owner,” *id.* at 262, and also “hardship to the applicant.” *Id.* at 262. However, the court made clear that a “variance by definition is granted with respect to a piece of property and not with respect to the personal needs, preferences, and circumstances of a property owner,” *id.* at 262 (quotation omitted), and that “it is not uniqueness of the plight of the owner, but uniqueness of the land causing the plight that is the criterion for unnecessary hardship.” *Id.* at 262 (quotation omitted).¹²⁹

Likewise, in *Olszak v. Town of New Hampton*, 139 N.H. 723 (1995), the court indicated both “hardship to the owner,” *id.* at 724, and “hardship to the applicant.” *Id.* at 725. However, the court clearly focused its analysis on the property: “The uniqueness of the land, not the plight of the owner, determines whether a hardship exists.” *Id.* at 726. The court noted that “it is not enough

¹²⁹While the standards for unnecessary hardship in the variance context has shifted since some variance cases were decided, *see Simplex Technologies, Inc. v. Town of Newington*, 145 N.H. 727, 730 (2001) (abrogating *Grey Rocks Land Trust v. Town of Hebron*, 136 N.H. 239, 243 (1992) and *Governor’s Island Club v. Gilford*, 124 N.H. 126, 130 (1983)), that shift does not change the analysis here.

that application of the ordinance may cause the landowner to suffer some financial loss.” *Id.* at 726.

Similarly, in *Rowe v. Town of North Hampton*, 131 N.H. 424 (1989), the court indicated “hardship to the applicant,” *id.* at 427, but clearly stated, “[t]he uniqueness of the land, not the plight of the owner, determines whether a hardship exists.” *Id.* at 428. Moreover, the court wrote that whether a use is “economically viable” or provides “economic value” “is not determinative in deciding whether a hardship exists.” *Id.* at 429. *See also Harrington v. Town of Warner*, 152 N.H. 74, 80 (2005) (variances not normally about the applicant’s finances).

Carbonneau, Olszak, and Rowe, show that for variances, regardless of the terms used, the variance analysis is focused on the condition of the land; financial circumstances of the owner are normally not relevant.

The waiver statute, and also Raymond’s site plan regulations, specifically direct that the unnecessary hardship focus on the *applicant*. They provide that “[t]he planning board may only grant a waiver if ... [s]trict conformity would pose an unnecessary hardship to the applicant.” RSA 674:44, III(e)(1), *Addendum* at [39](#); RAYMOND SITE PLAN REVIEW REGULATIONS, §7.009, *Addendum* at [38](#).

However, because the variance cases often use words indicating the object of the hardship is the applicant, but the analysis remains focused on the property, it appears that the variance standard applies equally to waivers. Accordingly, the focus of the analysis in waiver cases should be on the land.

Here, there was no showing of any unnecessary hardship concerning the land. Rather, the focus was on creating a “walkable neighborhood” with “slow moving traffic.” Such matters are focused on the aesthetics of the site plan, and not on the condition of the land. By failing to analyze the condition of the land, the Planning Board applied an unlawful standard, and should be reversed.

II. The Developer Did Not Prove Unnecessary Hardship to the Applicant

Alternatively, this court may find that there is a distinction between variances – which require unnecessary hardship “owing to special conditions of the *property*,” RSA 674:33, I(b)(1) (emphasis added) – and waivers from site plan regulations – which require proof of “an unnecessary hardship to the *applicant*.” RSA 674:44, III(e)(1) (emphasis added), *Addendum* at [39](#); RAYMOND SITE PLAN REVIEW REGULATIONS, §7.009(02), *Addendum* at [38](#).

If that is the case, this court should also reverse and remand, because the Planning Board did not consider the financial impact on the applicant.

A. “To The Applicant” Requires a Financial Analysis

If there is such a distinction, then the language in the differing statutes must be honored. *See Property Portfolio Group, LLC v. Town of Derry*, 163 N.H. 754, 758–59 (2012) (“[W]e decline to read into RSA 674:44, III(e) a requirement which the legislature itself did not see fit to include.”). The waiver statute and regulation do not list as their object the land, the project, or the application; they say unnecessary hardship “to the applicant.”¹³⁰

The word “applicant” means “one who applies.” WEBSTER’S THIRD

¹³⁰The developer argues the phrase has a shifting meaning, suggesting “hardship to the applicant ... [is] usually an economic benefit, but sometimes the constraints of the land.” *Trn.* at 48. The developer variously asserted that “hardship to the applicant” sometimes applies to the features of the land, LETTER FROM PANCIOCCO (Sept. 7, 2017) at 623, @84 (“The planning process is about the land.... It is not about the landowner.”), sometimes to the particulars of the proposed site plan, LETTER FROM PANCIOCCO (Sept. 7, 2017) at 611, @82 (“The applicant requests the Board waive [the 50' right-of-way] requirement because it imposes an unnecessary hardship on the applicant and the project.”); LETTER FROM PANCIOCCO (Jan. 31, 2018) at 975, @114 (“This process is about the Applicant’s proposed use of its land.”), and sometimes to the circumstances of the applicant. LETTER FROM PANCIOCCO (Sept. 7, 2017) at 611, @82 (“The applicant requests the Board waive [the 50' right-of-way] requirement because it imposes an unnecessary hardship on the applicant and the project.”); PLANNING BOARD MINUTES (Sept. 21, 2017) at 657, @92 (“[I]n this context the hardship is to the applicant.”).

NEW INTERNATIONAL DICTIONARY 105 (Unabridged Ed. 2002)¹³¹; *Schmidt v. City of Minot*, 883 N.W.2d 909, 915 (N.D. 2016) (“A plain, ordinary, and commonly understood meaning of ‘applicant’ is ‘one who applies.’”) (quoting Merriam-Webster’s Collegiate Dictionary 60 (11th ed.2005)); see *New England Brickmaster, Inc. v. Town of Salem*, 133 N.H. 655, 660 (1990) (allowing levy for improvements against site plan “applicant”); *Schmidt v. City of Minot*, 883 N.W.2d 909, 915 (N.D. 2016) (“[W]e construe the term applicant to mean the entity applying for a variance.”). The word is defined in numerous New Hampshire statutes, and everywhere connotes a person or entity applying. See e.g., RSA 489:2 (“‘Applicant’ means the person who initiates the application process for an integrated land development permit.”); RSA 12-K:2 (“‘Applicant’ means a carrier or any person... who submits a[n] ... application.”); RSA 106-F:2 (“‘Applicant’ means any person who makes application...”); RSA 141-G:8 (“‘Applicant’ means a person who applies...”); RSA 287-D:1 (“‘Applicant’ means an individual applying ...”); RSA 328-H:2 (“‘Applicant’ means a person who has submitted ... an application.”); RSA 328-B:2 (“‘Applicant’ means a person who has submitted ... an application.”); RSA 399-D:1 (“‘Applicant’ means a person who applies...”); RSA 399-G:1 (“‘Applicant’ means a person who applies...”); RSA 415-D:3 (“‘Applicant’ means ... the person who seeks... benefits.”).

The “applicant” refers to financial impact because the phrase “one who applies” is both individualized and directed to the person. “Applicant” does not connote the person’s property, nor the proposed project; nor is it as personal as, for instance, the person’s health. See, e.g., *In re Murray*, 821 N.W.2d 331, 336 (Minn. 2012) (“[G]iven Murray’s passage of another state’s bar examination,

¹³¹ “[O]ne who applies for something: one who makes a ... formal request especially for something of benefit to himself.”

her many years of practicing law, her demonstrated knowledge of the law, and her professional accomplishment, we conclude that it would be an extreme, and unnecessary, hardship to require Murray to now enroll in, and graduate from, an ABA-accredited law school.”). In *Auger v. Town of Strafford*, 156 N.H. 64, 67 (2007), this court accordingly equated “unnecessary hardship to the applicant” with “hardship ... to the owner,” and “hardship to Graystone,” who was the owner.

It must be presumed that the drafters used the word “applicant” meaningfully. *Appeal of Town of Belmont*, 172 N.H. 61, 67 (2019) (“the manifest intent of the legislature is to align [New Hampshire statute] with the federal law”). “Applicant” is readily distinguished from both the aesthetics of the project, *Auger*, 156 N.H. at 67 (waivers are not for the purpose of allowing the Planning Board to choose the most attractive design), and from “special conditions of the property.” RSA 674:33, I(b)(1); *Harrington*, 152 N.H. at 74; *Olszak*, 139 N.H. at 723; *Rowe*, 131 N.H. at 424; *Carbonneau*, 119 N.H. at 259. Thus, if “unnecessary hardship to the applicant” does not mean the impact on the developer’s financial circumstances, it would have little meaning.

Moreover, the use of the term “applicant” is reasonable, due to the possibility that an otherwise fair regulation might from time to time place an undue burden on a particular applicant. *See, e.g., Property Portfolio Group, LLC v. Town of Derry*, 163 N.H. 754 (2012) (allowing waiver of setbacks for dumpster to fit between buildings); *In re New Hampshire Dep’t of Transportation*, 152 N.H. 565 (2005) (denying waiver of maximum number of driveways).

In addition, the Raymond Planning Board understood the word’s meaning was “probably financial.”¹³²

¹³²PLANNING BOARD MINUTES (Sept. 21, 2017) at 667, @92 (“With regard to unnecessary hardship the perspective is probably financial.”).

Accordingly, if the unnecessary hardship test from the variance context is not used for waivers, then when considering waivers, the Planning Board must evaluate the applicant's financial circumstances. It is not sufficient to claim, as Mardan did here, that bonding agencies or the Attorney General might someday review the developer's finances; they will not be analyzing unnecessary hardship, and the Planning Board's waiver determination will be long concluded by then.

B. Developer Offered No Financial Evidence

To be granted a waiver, the developer¹³³ must offer actual evidence, beyond mere assertions. *Auger*, 156 N.H. at 67 (Planning Board “had no evidence before it that the ... road configuration would cause any hardship ... much less ‘undue hardship.’”); *id* at 71 (Planning Board’s waiver “in error absent evidence of undue hardship”).

The McDonalds sought financial information for the Planning Board's consideration of Mardan's waiver requests, but were refused. That the project requires so much phasing over so many years suggests the developer may lack the means to complete it, yet the Planning Board did not demand any comparison of financial qualification with or without the waivers. The result is that there is little financial evidence in the record, and no financial analysis.

Rather, the developer conceded, and even advocated,¹³⁴ that its design choices were aesthetic, and *not* financial. Yet waivers are not for the purpose of the Planning Board to choose the most attractive design. *Auger*, 156 N.H. at 67.

To the extent Mardan or its attorney asserted that its preferred design would be most marketable,¹³⁵ it offered opinion, but no data. And because the

¹³³*Trn.* at 45.

¹³⁴OBJECTION TO MOTION RECONSIDERATION (Nov. 27, 2019) at 3, *Appx.* at 85.

¹³⁵*See* ORDER (Nov. 7, 2019) at 25, 27-28, *Addendum* at [41](#).

developer conceded it would eventually submit financial information to bonding agencies and the Attorney General, it cannot claim that gathering and presenting it to the Planning Board would be unduly burdensome.

Consequently, the Planning Board had no evidence on which to base its unnecessary hardship determination, and was therefore “legally erroneous” in both making the determination and in granting the waivers.¹³⁶ RSA 677:15, I; *Summa Humma Enterprises, LLC v. Town of Tilton*, 151 N.H. 75, 79 (2004). This court should thus reverse, vacate the waivers, and remand. *Auger*, 156 N.H. at 71.

CONCLUSION

If this court determines that waivers are to be evaluated the same as variances, the developer here did not show any unnecessary hardship with respect to the land, and this court should reverse.

If due to dissimilarity of the language this court determines that the unnecessary hardship analyses for variances and waivers are distinct, then the term “applicant” as the object of unnecessary hardship in the waiver context must have some meaning. By process of elimination, that meaning involves financial considerations.

Here, however, the developer asserted only aesthetic preferences, and made no attempt to show that it has the comparative wherewithal to build, complete, and operate the project it proposed, with or without waivers. Accordingly, the Planning Board unlawfully granted the waivers, and this court should reverse.

¹³⁶Regarding waiver #2 concerning the road classification and the 50' right-of-way, the Planning Board made the additional error of basing its decision on its judgment that “the waiver will properly carry out the spirit and intent of the regulations” – a consideration insufficient pursuant to Raymond’s Site Plan Review Regulations.

REQUEST FOR ORAL ARGUMENT

Because the issue raised in this appeal is of concern to all land owners and developers in New Hampshire, and is a novel issue in this jurisdiction, this court should entertain oral argument.

Respectfully submitted,

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Dated: June 3, 2020

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CERTIFICATIONS

I hereby certify that the decision being appealed is addended to this brief. I further certify that this brief contains no more than 9,052 words, exclusive of those portions which are exempted.

I further certify that on June 3, 2020, copies of the foregoing will be forwarded to Laura Spector-Morgan, Esq.; Sharon Cuddy Somers, Esq.; and to Patricia M. Panciocco, Esq.

Dated: June 3, 2020

Joshua L. Gordon, Esq.

ADDENDUM

1. Overview Plan (Dec. 19, 2017). [37](#)
2. Raymond Site Plan Review Regulations, §7.009. [38](#)
3. RSA 674:44. [39](#)
4. Superior Court Order (Nov. 7, 2019). [41](#)