May 16,2021

Dear Select Board,

We, the undersigned, are writing to ask the Select Board to appeal the Housing Appeals Board's decision to approve the Stevens Road and Woodward Hill Road subdivision plan put forth by Ron and Melissa Shattuck.

We disagree with the HAB order that finds that all five of the Planning Board reasons for denial meet the standard of being unsupported by the record or legally erroneous. And we believe that the HAB's arbitrary complete dismissal of the Planning Board's use of the Master Plan as a valid basis for part of its decision making, provides grounds for a successful appeal. Additionally, by reversing the Planning Board decision instead of remanding the decision, the HAB is usurping all control for local land use decisions. If this subdivision plan were remanded instead of approved, the Planning Board would at least be able to work with the applicants to mitigate the impact this development inflicts upon the neighborhood and the Old County Road South Historic District.

As the attached letter from Amy Manzelli makes clear, the HAB has over-stepped its authority and this decision must be vigorously appealed or Francestown's (and other New Hampshire towns') local decision making and cherished rural character are significantly endangered.

Thank you for consideration,

(57 Concerned Residents)

BCM Environmental & Land Law, PLLC
Solutions for Northern New England

May 14, 2021

Town of Francestown Selectboard

Re: Encouragement to Appeal Recent HAB Reversal of Francestown Planning Board

Dear Chair Kunhardt and Esteemed Members of the Selectboard,

I write on behalf of my clients to encourage you to appeal the recent decision of the new Housing Appeals Board (HAB) reversing the decision of the Francestown Planning Board to deny subdivision approval in Case #20-SD-03, and to instead approve a plan set with no conditions. This HAB decision, which I believe may be the first decision of the HAB, sets a dangerous precedent: that the HAB can approve plans denied by municipal boards, never mind that the HAB was wrong that the Planning Board's decision should be reversed in the first place. The new law was not intended to function so that the HAB would be rendering its own decisions on applications. This decision should be challenged.

The key statutory language at issue is set forth in new RSA 679. In particular, in 679:5, I: "It shall be the duty of the [HAB] and it shall have power and authority to hear and affirm, reverse, or modify, in whole or in part" and in RSA 679:9, II: "The board shall not reverse or modify a decision except for errors of law or . . . that said decision is unreasonable. (Emphasis added). The emphasized language is nearly identical to that which has long-governed appeals of Planning Board decisions. RSA 677:15, V says: "The court may reverse or affirm, wholly or partly, or may modify . . . when there is an error of law or . . . that said decision is unreasonable." (Emphasis added.)

Given the similarity in language chosen by lawmakers, new RSA 679 should be interpreted as RSA 677:15, V has been, which the HAB seems to admit in its recent decision.

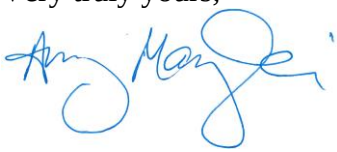
Pursuant to RSA 677:15, the Planning Board's factual determinations must be treated as "prima facie lawful and reasonable." *Summa Humma Enterprises, LLC v. Town of Tilton*, 151 N.H. 75, 79 (2004). Instead, the Court must evaluate the record and decision to "determine whether there is evidence upon which [the Planning Board's factual findings] could have been reasonably based." *Id*. (citation omitted). If an appeal raises questions of law, those questions are reviewed *de novo*. *See Appeal of St. Joseph Hosp.*, 152 N.H. 741, 744 (2005). The appellant "bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable." *Summa*, at 79.

All of this underlies the well-established and nearly universally accepted premise of New Hampshire law that an appellate body reviewing a board decision does not do so a super-board, redoing the decision-making process. Rather, appellate review is limited to making sure the decision is amply supported in the board's record and by the law. If it is, the decision is affirmed.

If it is not, even in part, the decision is remanded. It has not been my experience that, pursuant to RSA 677:15, a reviewing court would ever approve an application that a board had wrongfully denied.

In this case, the HAB seems to have acted as a super-board, judging the merits of the application and approving it substantively, rather than solely determining whether the Board acted correctly or not, and if they determined the Board did not act correctly, remanding the matter to the Board. That, along with other issues, sets a dangerous precedent for the power of local Zoning Boards, Planning Boards, and even Selectboards on the occasions of rendering certain sewer or other decisions. If the HAB has the power to simply redecide applications and approve or deny them as it sees fit, what power will the local Boards be left with?

Very truly yours,



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