State of New Hampshire
Supreme Court

NO. 2013-0524

2014 TERM

FEBRUARY SESSION

Carlos Paz, &a.

v.

Town of Hampstead Planning Board

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

BRIEF OF ABUTTERS, CARLOS PAZ &a.

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QUESTIONS PRESENTED

I. Was the Hampstead Planning Board correct in voting on whether Depot Development's second application for a site plan was materially changed from the first, and was the superior court in error when it held that the material changes standard was irrelevant to this case?

Preserved: *Minutes of Hampstead Planning Board* (Oct. 15, 2012), CERT.RECORD at 494; *Letter from Attorney Scott Hogan to Planning Board* (Nov. 5, 2012), CERT.RECORD at 607-08; *Minutes of Hampstead Planning Board* (Nov 5, 2012), CERT.RECORD at 601; PETITIONERS' MEMORANDUM OF LAW (Apr. 10, 2013), *Addn*. at 50; PETITIONERS' MOTION FOR RECONSIDERATION (June 21, 2013), *Addn*. at 66; NOTICE OF APPEAL, question I (Aug. 12, 2013).

II. The Planning Board should have limited its review of Depot Development's resubmitted site plan application to only whether its scale and scope had been materially scaled down, and upon that review should have found that it had not. Did the Planning Board and the Superior Court err in approving the site plan when its scale and scope grew rather than shrank?

Preserved: *Minutes of Hampstead Planning Board* (Oct. 15, 2012), CERT.RECORD at 495; *Letter from Attorney Scott Hogan to Planning Board* (Nov. 5, 2012), CERT.RECORD at 607-08; *Minutes of Hampstead Planning Board* (Nov 5, 2012), CERT.RECORD at 601; PETITIONERS' MEMORANDUM OF LAW (Apr. 10, 2013), *Addn*. at 50; PETITIONERS' MOTION FOR RECONSIDERATION (June 21, 2013), *Addn*. at 66; *Trn.* at 38; (discussion between court and developer's attorney); NOTICE OF APPEAL, question II (Aug. 12, 2013).

STATEMENT OF FACTS

This is an appeal by eleven abutters[1] of a decision of the Hampstead Planning Board approving a commercial development in their rural residential neighborhood. Depot Development, LLC, wishes to construct a convenience store, gas station, drive-through doughnut stop, and a retail outlet at the intersection of Main Street/Route 121 and Derry/Depot Road in Hampstead, New Hampshire. A nearly identical development was denied a decade ago.

I. Rural Neighborhood, Lot, and Intersection

On the northwest quadrant of the intersection are two houses on a hill. On the northeast, there are two others. On the southeast is Ordway Park, uniquely landscaped as prescribed by its donor and preserved by an endowment fund. CERT.RECORD at 82A-83 (photos), 172; 2002 CERT.RECORD at 174. Just south of the Park are several homes. CERT.RECORD at 84-84 (photos). Across from them stands an old church and its fellowship hall, which now houses a lawyer's office. These are all zoned residential.

The southwest quadrant, owned by Depot Development, is the only lot in the vicinity zoned commercial. CERT.RECORD at 26, 78; 2002 CERT.RECORD at 174, 599-600. Once upon a time there was a railroad station, which burned down a hundred years ago and was finally demolished in the 1980s; the lot has been empty since. CERT.RECORD at 259. The railroad right-of-way runs behind the church, and is now the Rockingham Recreational Trail. CERT.RECORD at 153.

The four corners are and have long been rural as can be seen in satellite and topographic views of the area, CERT.RECORD at 17; 2002 CERT.RECORD at 517, and in photographs

[1]The appellants are: Shirley Paz, Carlos Paz, Erin Bennett, Chad Bennett, Cynthia Neale, Timothy Neale, Janet Rabideau, Gary Cyr, Todd Becker, Lauren Becker, and Kirk Bradford.

submitted by the developer. CERT.RECORD at 247-249, 392-393; *see addendum* at 18-23.

The intersection is "a standard four-leg intersection with stop sign control"and "circular flashing red indications" "on the Derry Road and Deport Road approaches." "[C]ircular flashing yellow indications face the NH121 approaches." CERT.RECORD at 286.

The intersection has "sight distances issues," CERT.RECORD at 93, and because of traffic volume, it operates at a very poor "level of service"; the State gave it an "F" on a scale of A-through-F. CERT.RECORD at 263, 274; 2002 CERT.RECORD at 143. The Department of Transportation identified numerous problems with the intersection, recognized the proposed development will exacerbate them, and suggested several "intersection mitigation" solutions. CERT.RECORD at 526-27. The county planning commission has recommended the intersection be "signalized." But it has not been improved. CERT.RECORD at 77. Police records indicate 46 accidents at the intersection between 2004 and 2012. CERT.RECORD at 592, 603.

II. 2001 Proposal by Depot Development

In July 2001, Depot Development proposed to install on the southwest quadrant a proposed building comprising "a 2,400 square foot convenience store with a gasoline station, a 1,000 square foot [Dunkin' Donuts] restaurant with a drive-through window, 1,000 square feet of retail space and a second story with 2,000 square feet of office space." 2002 CERT.RECORD at 142, 13. The footprint of the building would be 4,400 square feet, 2002 CERT.RECORD at 153, 504, and the overall retail space 6,440 square feet, 2002 CERT.RECORD at 164; CERT.RECORD at 261, resulting in a structure three to four times larger than surrounding residences. 2002 CERT.RECORD at 164.

The hours of operation would be 5:30AM or 6:00AM to 10:00PM, seven days per week. 2002 CERT.RECORD at 96, 163, with the gas and diesel pumps "only … open when the

convenience store is open." 2002 CERT.RECORD at 111. There would be a canopy over the eight pumps.

The overall height of the building cannot be accurately discerned, *see* 2002 CERT.RECORD at 153, but an artist's rendering shows a long building with a steep gable. 2002 CERT.RECORD at 555. It would have a "barn style" facade facing Route 121, with an eight-vehicle queue at the back and a drive-through window-speaker on the side. 2002 CERT.RECORD at 142, 504, 663. There would be a 32 square-foot internally-lit advertising sign at the corner, 2002 CERT.RECORD at 153, and down-facing parking lot lights. There would be two wide driveways, one on each side of the corner. 2002 CERT.RECORD at 118, 663.

Upon concerns of increased congestion, the developer's traffic study asserted this type of development mainly captures existing traffic, 2002 CERT.RECORD at 120, 236, and that using the upstairs for retail would have negligible impact on traffic. CERT.RECORD at 456. Although the developer initially indicated that "deceleration lanes … will be required," it later argued against them, and its plan called for no improvement of the intersection. 2002 CERT.RECORD at 143.

III. 2002 Denial of Site Plan by Planning Board and Superior Court

Depot Development submitted its original proposal to build on the site in 2001. Numerous abutters and neighbors who attended the 19 Planning Board hearings and technical sessions voiced concerns about traffic, sprawl, diminution of their properties' values, commercialization of the intersection, and the overall size of the project. 2002 CERT.RECORD at 86, 98, 145, 263.

In June 2002 the Hampstead Planning Board voted 3-2 against Depot Development's site plan, 2002 CERT.RECORD at 164-65, *Addn.* at 24-25, and a few days later issued its written

order listing its four reasons for denial:

> 1. The proposed building, sign, and structures are significantly larger than existing structures in the surrounding area.
>
>   As such, the site would not meet the standard "Conformance of the buildings and all related signs and structures to the properties of the aesthetic character of the area" in the Site Plan Review Regulations of the Town of Hampstead.
>
> 2. The nature of the intended businesses, specifically the combination of an 8 pump gasoline station, convenience store and a Dunkin' Donuts with drive-up window, would overpower the residential character of the area.
>
> 3. Approval of the Site Plan would bring about diminution of the value of surrounding properties. The addition of a commercial use in the midst of a residential area is considered to contribute "economic or external obsolescence" to surrounding property.
>
> 4. Approval of the Site Plan in its current scale and scope would create effects detrimental to the abutters, the neighborhood, and the environment of the Town of Hampstead.

2002 CERT.RECORD at 3-4, *Addn.* at 26-27.

The developer appealed to the Rockingham Superior Court, which after taking a view, *Trn.* at 31, upheld the Planning Board's decision in 2003. The court (*John M. Lewis*, J.) noted its deference to the Board, reviewed the evidence, and quoted the Board's four grounds of rejection. In particular, the court emphasized the that fourth reason given by the Board – the scale and scope of the project overwhelmed the neighborhood – was supported by the record, and sustained the Planning Board's rejection of the site plan on that basis. ORDER (Mar. 31, 2003), *Addn.* at 28.

IV. 2012 Re-Proposal by Depot Development

A decade later Depot Development returned to the Hampstead Planning Board for the same project on the same site.

Its 2012 proposal was to build a 2,400 square-foot convenience store, with a 1,245 square-foot drive-up Dunkin' Donuts window, a gas station, and an 1,200 square-foot unspecified retail space. The building's footprint would be 4,837 square feet, CERT.RECORD at 121, 167, larger than the first proposal. The building would be 28 feet high, CERT.RECORD at 497, with the second storey containing utilities rather than office space. CERT.RECORD at 152. The developer conceded that the altered use of the upstairs would have negligible affect on traffic and parking. CERT.RECORD at 424, 597. The gas station would have eight pumps, CERT.RECORD at 151, same as the first proposal.

The hours of operation would be 5:00AM to 11:00PM, with gas pumps open 24-hours, CERT.RECORD at 225, 266, much longer than the first proposal. The outdoor window-speaker would have a queue for ten cars, CERT.RECORD at 151, 262, two cars greater than the first proposal.

The facade would "resemble a Boston and Maine train station and the canopy over the gasoline pumps will have the same railroad canopy design." CERT.RECORD at 151. The building's orientation would be angled 45 degrees so that it faces more southerly. CERT.RECORD at 472, 262.

There would still be two wide driveways, although the Derry Road entrance would be moved slightly westward to accommodate the diagonal orientation. CERT.RECORD at 396, 472. There would be 15-foot light poles, CERT.RECORD at 151, and "an oversized sign" on the corner. CERT.RECORD at 225, 250, 262, 395, 479. The second proposal called for no intersection

improvements.

While there is some evidence that traffic volume lessened over the decade due to the slack economy, CERT.RECORD at 263, accident statistics have remained constant. CERT. RECORD at 274-393. Realtors opined that values of surrounding properties might or might not lose value. CERT.RECORD at 77, 93, 265-66, 296-98, 498, 566.

In the intervening decade the character of the lot, the intersection, the park, and the surrounding neighborhood generally saw little change.

V. 2012 Approval of Re-Proposed Site Plan by Planning Board and Superior Court

Numerous members of the community appeared at seven Planning Board hearings in 2012, raising the same concerns they had a decade earlier. CERT.RECORD at 77-78, 104, 154-55, 271, 396-400, 409, 489, 494-95. They argued the proposal puts "a strip mall in the midst of a residential neighborhood," CERT.RECORD at 556, that the use was the same as previously proposed, that the negative impact was the same, and that only minor details had changed. *See, e.g.,* CERT.RECORD at 597, 607. The developer emphasized the changed details.

In October 2012, pursuant to *Fisher v. City of Dover*, 120 N.H. 187, 191 (1980), but over objections from the developer that no such finding was necessary, the Planning Board voted that the "project was materially different from the 2002 proposal." CERT.RECORD at 495, *Addn.* at 36. At its November 2012 meeting, the Planning Board discussed the proposal and approved it. CERT.RECORD at 591-600, 601, *Addn.* at 37.

The eleven abutters appealed to the Rockingham Superior Court, which heard offers of proof. *Trn., passim.* The developer, the abutters, and the town filed memoranda of law. The court (*N. William Delker*, J.) reviewed the evidence and noted its deference to the Planning Board. ORDER (June 10, 2013), *Addn.* at 38. The court noted the developer's contention that the *Fisher*

material changes standard does not apply to Planning Boards, but found the developer had nonetheless addressed concerns regarding the 2001 proposal by "removing the second floor … and altering its appearance." *Id.* at 38, 45.

The court acknowledged the abutters' contention that the second application did not address the four specific reasons for denial of the 2001 proposal, but excused it as "not relevant":

> The Board [in 2001] articulated the following four reasons in support of their denial: (1) the building was too large and not in conformity with the surroundings; (2) the nature of the intended business would overpower the residential character of the area; (3) the project would diminish surrounding property values; and (4) the scale and scope of the project would create a detrimental effect on abutters. However, the Board must consider the facts and arguments raised on the application currently before it, not those addressed during a decade-old proceeding. As noted above, while the overall nature of the project remains the same, many of the details, such as size and appearance of the building, have changed in the ten years since the original application. Therefore, the fact that the Board did not expressly address the precise reasons for denial of Depot's initial application is not relevant.

ORDER (June 10, 2013), *Addn.* at 38, 48. Reconsideration was denied and the abutters appealed.

SUMMARY OF ARGUMENT

Doctrines of repose are important for any decision-making body, and should apply to non-legislative planning board actions. As such, when a developer proposes a new site plan subsequent to one that was already rejected, it must prove a material change of circumstances affecting the merits of the proposed use. Because Depot Development failed that here, this Court should reverse.

To the extent the Planning Board invited Depot Development to resubmit a plan of smaller scale and scope, its second proposal was more expansive than its first. Thus, it did not address the Planning Board's concerns, cannot be considered materially changed, and should not have been approved.

ARGUMENT

I. Doctrines of Repose Apply to Re-Application for Planning Board Site Plan Review

Repetitive litigation is bad for decision-making boards of all types, so doctrines of repose apply in judicial and non-judicial bodies. "Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue … and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979). It avoids "vexatious litigation and conflicting judgments." *Boucher v. Bailey*, 117 N.H. 590, 592 (1977).

These doctrines of finality exists on a continuum – legislative bodies may freely reconsider the same issue again and again, whereas judicial bodies apply strict principles of *res judicata* and collateral estoppel. It is recognized that administrative boards – and the public they serve – are between these extremes; they cannot be burdened with unending relitigation, but also need to respond to changing circumstances. *See generally* Stewart Sterk & Kimberly Brunelle, *Zoning Finality: Reconceptualizing Res Judicata Doctrine in Land Use Cases*, 63 FLA. L. REV. 1139 (2011); *see also, United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966) (applying res judicata to administrative agency acting in judicial capacity); *Cook v. Sullivan*, 149 N.H. 774, 777 (2003) (same).

Reflecting this middle ground, this Court has repeated that "[i]n New Hampshire, successive variance proposals must demonstrate either (1) material changes in the proposed use of the land, or (2) material changes in the circumstances affecting the merits of the application." *Brandt Development Co v. Somersworth*, 162 N.H. 553, 556 (2011).

> If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan.

Fisher v. Dover, 120 N.H. 187, 190 (1980). Whether the material changes standard applies is a question of law for this Court. *Id*. at 190-91.

The "material changes" standard has been applied in various regulatory contexts. *See, e.g., Appeal of Parkland Medical Center*, 158 N.H. 67, 72 (2008) (application for certificate of need from state health care facility review board); *In re Town of Nottingham*, 153 N.H. 539, 565 (2006) (application for state groundwater extraction permit); *Bois v. City of Manchester*, 113 N.H. 339 (1973) (application for zoning variance).

Although this Court has not yet held that the material changes doctrine applies to planning boards, *see Beck v. Town of Auburn*, 121 N.H. 996, 998 (1981) (declining to reach issue), in dicta it has indicated application beyond merely variances. In *Bois v. Manchester*, 113 N.H. 339 (1973), for example, this Court wrote that "[a]n application seeking a permit for a use which materially differs in nature and degree from a use applied for in prior proceedings … is entitled to consideration *by those charged with the administration* of zoning ordinances." *Id.* at 341 (emphasis added). In *Brandt v. Somersworth*, 162 N.H. 553, 556 (2011), this Court wrote that if there is a substantial change a board may consider "a new application for administrative relief or *development permission*." *Id*. (emphasis added).

Here the Hampstead Planning Board was not acting in its legislative role of, for instance, drafting a new zoning ordinance. RSA 674:1. Rather it was determining whether to approve a site plan according to the criteria in the site-plan review statute, RSA 674:43; RSA 674:44, II, a quasi-judicial act similar to determining whether to approve a variance. RSA 674:33. The same repose considerations should therefore apply.

The developer conceded that there must be some difference between initial and subsequent site-plan proposals, but could enunciate nothing conceptually distinct from the

material changes standard. *Trn*. at 43-44. The court characterized its attempt as "semantic." *Id*; ORDER (June 10, 2013), *Addn.* at 45.

Accordingly the Planning Board was correct in voting on the matter, and the superior court erred in deeming the material changes standard "not relevant."

II. Depot Development Did Not Prove "Material Changes"

For a subsequent development proposal to be sufficiently different from one earlier denied, the developer "must demonstrate either (1) material changes in the proposed use of the land, or (2) material changes in the circumstances affecting the merits of the application." *Brandt v. Somersworth*, 162 N.H. at 556. Whether changes are material is a question of fact for this Court. *Fisher v. Dover*, 120 N.H. at 190-91.

Material changes include a variation of the proposed use, *Bois v. Manchester*, 113 N.H. 339, 341-43 (1973) (first proposal was for a lodging house; second was for a residential youth rehabilitation center), mutation of the underlying substantive law, *Brandt v. Somersworth*, 162 N.H. at 553 (standard for granting variance underwent significant development between two proposals), transition of the neighborhood, *see, e.g., Fopeano v. Murdock*, 22 Misc. 2d 426, 428, 198 N.Y.S.2d 377 (Sup. Ct. 1960) (in five years neighborhood altered from commercial to industrial); *In re JLD Properties of St. Albans, LLC*, 30 A.3d 641, 649 (Vt. 2011) (between proposals vicinity had transformed from rural to commercial), or modification of the development's effect on the neighborhood. *See, e.g., Pequinot v. Allen Cnty. Bd. of Zoning Appeals*, 446 N.E.2d 1021 (Ind. App. 1983) (manufacturing process which produces less pollution); *Morehouse v. Town of Horicon Planning Bd.*, 85 A.D.2d 769, 445 N.Y.S.2d 290 (1981) (commitment by developer to reduce nighttime business hours).

In this case, because there is no claim of different use, Depot Development must prove

a change "in the circumstances affecting the merits of the application," and the change must be material. Here however, the circumstances have not changed.

The condition and use of the neighborhood, the intersection, and the lot have been stable in the intervening decade. The proposed convenience store, gas station, and drive-through are nearly indistinguishable from the first application. Although the first proposal would use the upstairs space for retail while the second would use it for utilities, that affects neither traffic, parking, nor the height of the building. The second proposal has an equal number of gas pumps, the same lighting, and only a slightly altered driveway. The footprint of the second proposal is actually bigger, the hours of operation greater, the queue line longer, and the advertising sign larger. The second proposal is functionally identical to the first. Also identical is its effect on the neighborhood, the abutters, Ordway Park, traffic congestion, the value of surrounding properties, and the efficiency of the intersection. The promoter of the project told planning board members "they were taking a fresh look at the project presented 10 years ago." CERT.RECORD at 151. The only changes noticeable to neighbors and passers-by would be the angle-orientation of the building, and the architecture of its facade and awning. These are at most cosmetic or "inconsequential," *Brandt v. Somersworth*, 162 N.H. at 556, and do not affect the merits of the application.

Accordingly Depot Development did not prove material changes in its re-proposal, and this Court should reverse.

III. Depot Development Did Not Reduce the Size and Scope of its Second Proposal

This Court has several times held that when a regulatory board in its initial rejection invites a developer to re-submit the application to specifically address problems perceived by the board, and the developer re-submits with changes addressed to those problems, the re-submission satisfies the material changes requirement of *Fisher*.

In *Morgenstern v. Town of Rye*, 147 N.H. 558 (2002), the zoning board denied a variance based on a wetlands issue. This Court reported:

> "The minutes from the 1993 and 1995 ZBA hearings do not suggest that the ZBA would never grant a variance to construct a house on the plaintiff's lot. Indeed, in its pleadings … the town essentially invited the plaintiff to file a new variance application.… It was in response to this invitation that the plaintiff submitted the 1998 variance application. Unlike the defendant in *Fisher v. Dover*, the plaintiff did not merely resubmit substantially the same application for a variance, but, at the town's invitation, submitted a new proposal in an effort to meet the town's concerns.

Morgenstern, 147 N.H. at 566. Likewise, in *Hill-Grant Living Trust v. Kearsarge Lighting Precinct*, 159 N.H. 529 (2009), the zoning board denied a variance to build at an elevation higher than deemed appropriate by the ordinance. In its denial, this Court reported that "the ZBA was willing to consider other, less ambitious plans for the plaintiff's property," *Hill-Grant*, 159 N.H. at 535 (quotations omitted), and that when the applicant re-submitted a plan at a lower elevation, it was a material change such that the board could entertain its proposal. *See also, In re Town of Nottingham*, 153 N.H. 539, 566 (2006) (water company's new application for groundwater extraction permit "supplemented its prior one in response to comments made by DES").

The *Morgenstern* issue arises here.

As noted, the Planning Board listed four reasons for its 2002 rejection of the site plan,

the last of which was cited by the superior court for upholding the denial. The fourth reason the Planning Board gave, and on which the court relied, was:

> 4. Approval of the Site Plan in its *current* scale and scope would create effects detrimental to the abutters, the neighborhood, and the environment of the Town of Hampstead.

2002 CERT.RECORD at 3-4 (emphasis added).

The word "current" suggests the Planning Board may have been inviting Depot Development to someday resubmit a proposal with a reduced "scale and scope" that would create less "detrimental" harm to "the abutters, the neighborhood, and the environment of the Town of Hampstead." If Depot Development accepted the invitation, the Planning Board would be "willing to consider other, less ambitious plans for [its] property."

To satisfy *Fisher* and *Morgenstern,* the scale and scope would have to be smaller, and have a less detrimental effect.

Depot Development's second proposal, however, is not smaller in any regard that matters to the "the abutters, the neighborhood, and the environment of the Town of Hampstead," or to site-plan review, which is concerned with infrastructure and exterior elements. RSA 674:44, II. To the contrary, it is bigger in its negative impact. Depot Development conceded that its only claim to a smaller scale and scope was changes to the use of the second storey through the rearrangement of the interior walls, which will have negligible effect on any matter on which the Planning Board based its 2002 rejection. Everything that is "detrimental" to the abutters and the ordinance is either the same or larger than the first proposal.

The Planning Board should have limited its review of Depot Development's resubmitted site plan application to only whether its scale and scope had been materially scaled down, and upon that review should have found that it had not. Accordingly this Court should reverse.

CONCLUSION

Because doctrines of repose are important for any decision-making body, including non-legislative planning board actions, this Court should apply the material changes standard to them. Under that standard, because Depot Development did not prove material changes in circumstances affecting the merits of its proposed use, this Court should reverse. In addition, to the extent the Planning Board in its initial rejection invited re-submission of a proposal smaller in scale and scope, Depot Developments's second proposal is either equal to or larger than its first, and on that grounds as well this Court should reverse.

Respectfully submitted,

Carlos Paz & others
By their Attorney,

Law Office of Joshua L. Gordon

Dated: February 14, 2014

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Counsel for the appellees request Attorney Joshua L. Gordon be allowed 15 minutes for oral argument because the issues raised in this case have not been decided in New Hampshire, because among planning boards it is unclear whether the material changes standard enunciated in variance cases applies to re-submitted site plans that come before them, and because the development of the intersection at issue here will indelibly affect the quality of life in Hampstead, New Hampshire.

I hereby certify that the decision being appealed is addended to this brief. I further certify that on February 14, 2014, copies of the foregoing will be forwarded to Barbara F. Loughman, Esq.; and to David W. Rayment, Esq.

Dated: February 14, 2014

Joshua L. Gordon, Esq.

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