

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

**In Case No. 2013-0524, Carlos Paz & a. v. Town of Hampstead, the court on May 21, 2014, issued the following order:**

Having considered the briefs, reply memorandum, and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The plaintiffs, eleven abutters to a proposed site development, appeal the superior court's order affirming the decision of the Town of Hampstead Planning Board (board) to approve the site plan application of the intervenor, Depot Development Company, LLC. The plaintiffs argue that the standard set forth in Fisher v. City of Dover, 120 N.H. 187 (1980), applies to planning board applications, and that the intervenor's application failed to satisfy the Fisher standard.

Superior court review of planning board decisions is limited. Upton v. Town of Hopkinton, 157 N.H. 115, 118 (2008). The superior court must treat the factual findings of the planning board as prima facie lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law. Id. The appealing party bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable. Id. The review by the superior court is not to determine whether it agrees with the planning board's findings, but to determine whether there is evidence upon which they could have been reasonably based. Id. Our review of the superior court's decision is equally deferential. Id. We will uphold the decision on appeal unless it is unsupported by the evidence or legally erroneous. Id.

Fisher was a zoning case challenging the granting of a second application for a variance that the applicant "conceded was substantially the same as the variance previously requested and ultimately denied by the [zoning] board." Fisher, 120 N.H. at 188. In Fisher, we stated 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." Fisher, 120 N.H. at 190. "The determination of whether a subsequent application is for a use that materially differs in nature and degree from its predecessor, like the determination of whether changed circumstances exist, must be made, in the first instance, by the board of adjustment." Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529, 536 (2009) (quotations and citations omitted).



We have never held that Fisher applies to successive site plan applications before a planning board. Nevertheless, the record in this case shows that after the plaintiffs raised this concern with the board, the board determined that the current proposal submitted in 2012 is materially different from the prior proposal submitted in 2001. This determination is a question of fact, see Fisher, 120 N.H. at 190, and on appeal the board's factual findings are deemed prima facie lawful and reasonable, see Upton v. Town of Hopkinton, 157 N.H. at 118.

The plaintiffs argue that the board's findings are unreasonable because the proposed development is "functionally identical" to the prior proposal and "nearly indistinguishable" in design. The intervenor counters that, among other things: (a) the prior plan was for a two-story building of approximately 6,400 square feet of retail space, whereas the current plan is for a 4,837 square foot, single-story building; (b) the exterior was redesigned to replicate the appearance of a railroad depot building, in keeping with the historical use of a nearby site; (c) the building was reoriented on the site to reduce the impact on the residential area; and (d) there are fewer parking spaces compared to the previous plan. In addition, the intervenor presented evidence that the overall traffic flow through the nearby intersection has decreased since 2001.

The plaintiffs challenge the accuracy of the intervenor's traffic study and describe the changes in the architecture and orientation of the proposed structure as merely "cosmetic" and "inconsequential." The superior court's role is not to determine whether it agrees with the board's findings, but whether there is evidence upon which they could have been reasonably based. Upton v. Town of Hopkinton, 157 N.H. at 118. Assuming, without deciding, that Fisher applies in this context, we cannot conclude that the superior court's decision upholding the board's finding that the current proposal is materially different from the previous one was either unsupported by the evidence or legally erroneous. Id.

We agree with the intervenor that the issue of whether the current proposal complies with the town's master plan and site plan regulations, having not been briefed, is deemed waived. See Brunelle v. Bank of N.Y. Mellon, 161 N.H. 64, 69 (2010).

Affirmed.

Dalianis, C.J., and Hicks, Conboy, Lynn, and Bassett, JJ., concurred.

**Eileen Fox,  
Clerk**