

TOWN OF AMHERST
Planning Board

July 23, 2020

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In attendance: Arnie Rosenblatt - Chair, Cynthia Dokmo – Vice Chair, Michael Dell Orfano, Dwight Brew-Selectman Ex-Officio, Marilyn Peterman, Bill Stoughton, Brian Coogan, Tracie Adams (Alternate), Chris Yates (Alternate), and Christy Houpis (Alternate).

Staff present: Nic Strong, Community Development Director; Natasha Kypfer, Town Planner; and Kristan Patenaude, Minute Taker.

Arnie Rosenblatt called the meeting to order at 7:02 p.m., with the following statement. As Chair of the Amherst Planning Board, I find that due to the State of Emergency declared by the Governor as a result of the COVID-19 pandemic and in accordance with the Governor's Emergency Order #12 pursuant to Executive Order 2020-04, as extended by Executive Orders 2020-05, 2020-08, 2020-09, 2020-10, 2020-14, and 2020-15 this public body is authorized to meet electronically.

Please note that there is no physical location to observe and listen contemporaneously to this meeting, which was authorized pursuant to the Governor's Emergency Order.

However, in accordance with the Emergency Order, I am confirming that we are:

Providing public access to the meeting by telephone, with additional access possibilities by video or other electronic means:

We are utilizing Zoom for this electronic meeting.

All members of the Board have the ability to communicate contemporaneously during this meeting through this platform, and the public has access to contemporaneously listen and, if necessary, participate in this meeting through dialing the following phone #312-626-6799 and password 821 0119 2126, or by clicking on the following website address: <https://zoom.us/j/82101192126> that was included in the public notice of this meeting.

Providing public notice of the necessary information for accessing the meeting:

We previously gave notice to the public of the necessary information for accessing the meeting, including how to access the meeting using Zoom or telephonically. Instructions have also been provided on the website of the Planning Board at: www.amherstnh.gov.

Providing a mechanism for the public to alert the public body during the meeting if there are problems with access: If anybody has a problem, please call 603-341-5290.

Adjourning the meeting if the public is unable to access the meeting:

In the event the public is unable to access the meeting, the meeting will be adjourned and rescheduled.

Please note that all votes that are taken during this meeting shall be done by roll call vote.

Let's start the meeting by taking a roll call attendance. When each member states their presence, please also state whether there is anyone in the room with you during this meeting, which is required under the Right-to- Know law.

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Roll call attendance: Chris Yates; Bill Stoughton; Dwight Brew; Cynthia Dokmo; Marilyn Peterman; Mike Dell Orfano; Tracie Adams; Brian Coogan; Christy Houpis; Arnie Rosenblatt; all alone and present.

PUBLIC HEARING:

Continued from July 7, 2020

- 1. CASE #: PZ12398-030320 – Robert H. Jacobson Revocable Trust, Laurie Stevens Trustee (Owner) & TransFarmations, Inc. (Applicant), 17 Christian Hill Road, PIN #s: Tax Map 005-148-000 & 005-100-000 – Submission of Application/Public Hearing/Conditional Use Permit. To depict a Planned Residential Development per the Integrated Innovative Housing Ordinance (IIHO). Zoned Residential Rural.**

This hearing will be limited in scope to only the issue of whether the application and plan submitted in the above noted CASE #PZ12398-030320 is sufficiently different from the first application in the same matter to avoid preclusion of the Planning Board's review under the Fisher v. Dover and CBDA Development, LLC, v. Town of Thornton holdings. The Planning Board will entertain evidence from the applicant in support of that claim and also hear any opposing views. Following the testimony, the Planning Board will close the public hearing and deliberate. No further discussion of the merits of the application will take place.

Arnie Rosenblatt read and opened the case. He explained that this hearing is solely to determine if the current application and its plans are sufficiently different from the initial application, with respect to the proposal that was denied by the Board. He asked that the Board and public limit their comments to the question at hand.

Arnie Rosenblatt explained that, if the Board decides the application is not sufficiently different, this application's process ends here. If the Board decides the application is sufficiently different, the application will move forward to future hearings where the merit of the application can be further debated.

Arnie Rosenblatt explained the process for this hearing. The applicant will present his position, the Board will ask questions and make comments, the public will ask questions and make comments, the Board will make any additional comments and then deliberate. There will be no time limit for public comment, but Arnie Rosenblatt did ask that the public and Board try to make their comments concise and to the issue at hand.

Tracie Adams recused herself from this case.

Carter Scott, of TransFarmations, Inc., Ken Clinton, of Meridian Land Services, and John Ratigan, the applicant's attorney, joined the meeting.

Carter Scott shared his screen to present to the Board what he considered the substantial differences between the first and second applications. He explained that the original Conditional Use Permit (CUP) proposed a total of 64 units, where this CUP proposes a total of 60 units. This

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proposal calls for the tiny houses to be removed, as they seemed to have the most public resistance. The new application proposes 26 workforce housing units along Christian Hill Road that will be designed to look like typical, single-family homes. He noted that the Town's recent Housing Needs Assessment pointed to a deficit in the number of workforce housing units in town. These units will be deed restricted on the price, with a limit for 25 years. Carter Scott went on to say that he may need to call these units by a different name, as they were not being established under the workforce housing statute.

Carter Scott explained that another substantial difference is that of the road layout for the project. The new application looks to avoid the previously requested five waivers for roads. The road layout will also reduce the number of linear feet of roads on the property from 1,200 to 800. The proposed road grades will also be reduced to fit with the town's maximum; the first application had the road with a 9.5% grade, which was questioned by the DPW and Fire Department. The redesign proposes a 2% negative pitch away from the road and a maximum of 8% grade to meet the regulations. Carter Scott explained that the number of units being proposed to be built along the roadway has also been reduced from 37 to 29.

Carter Scott explained that Pennichuck Water conducted a pump test on site and it was determined that running public water to the area would not be economically feasible. Weston & Sampson Engineers, Inc., conducted a groundwater supply assessment on site and found that the property can support 60 units through private wells.

Carter Scott stated that the location of the units and design of the site have changed, and thus this is a substantially different application. In order to reduce the frontage of the homes on site, there were six frontage homes previously, there will now only be one access point on Christian Hill Road, across from the existing farmhouse. A traffic study conducted by Stephen G Pernaw & Co., showed that the proposed Jacobson and Clearview developments together would not significantly alter traffic in Amherst on an overall basis.

Carter Scott explained that Eversource examined the power on site and found that the high voltage line in front of the site on Christian Hill Road has plenty of capacity for the 60 units. He added that, in response to comments from the Conservation Commission, all of the units have been moved from Parcel 5-100, out of the wetland buffers. The units will also have deed restrictions to prohibit the use of chemical fertilizers and pesticides. He stated that the land adjacent to the Great Meadow and the cemetery is proposed to be deeded to the town, along with the 20' vegetated buffer.

Arnie Rosenblatt explained that the Board would now ask any questions that they may have for the applicant.

Bill Stoughton did not have any questions but stated he would have comments when the time came.

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In response to a question from Christy Houpis, regarding the road waivers from the previous application concerning emergency vehicle access to the site, Carter Scott stated that the concerns were addressed directly with the Fire Chief and that further review will take place if the application continues through the process. Carter Scott explained that one of the main differences with the proposed roads in this application is a change in the road grade at the intersection with Christian Hill Road from a 1-2% grade, to a -2% grade. There may be waivers needed, but this is not foreseen at this time, as the roads are being designed to comply with all town regulations.

Christy Houpis noted that the number of workforce housing units proposed is being increased from 17, in the original application, to 26. These units, while being affordable, are not being sought under the workforce regulation compliance and, thus, this is the same in both the first and second applications. Carter Scott agreed with Christy Houpis. He explained that the Director of NRPC stated that the units can be called “workforce” or something different, if need be. The units will meet the price point and will have a 25 year deed restriction. There will not be additional density sought from these workforce units.

In response to a question from Christy Houpis, regarding the difference in hydrology between the two applications, Carter Scott explained that using the site’s water supply instead of a public water supply is a substantial difference.

In response to a question from Christy Houpis, Carter Scott explained that the number of proposed units on the site’s hill has been reduced from 37 to 29 in this application. The total number of units has been reduced from 64 to 60.

In response to a question from Christy Houpis, regarding the total number of bedrooms being proposed in this application from the last, due to the removal of only the tiny houses, Carter Scott explained that he didn’t have the number of bedrooms proposed in this application in front of him. Christy Houpis stated that the numbers of bedrooms did not seem substantively different and would be the same or greater than the first application.

In response to a question from Christy Houpis, Carter Scott explained that Ken Clinton looped DPW Director, Eric Hahn, in on the traffic study and that it was revised based on his input. The substantial difference on this item, is that a traffic study is being submitted with this application, where one was not in the previous application.

Christy Houpis stated that there were concerns originally regarding traffic in terms of which day of the week the traffic study was conducted on, and if it took into account sports seasons or pedestrian traffic. Ken Clinton explained that these items would be part of a CUP hearing for this application; however, having a study submitted at all for this application makes it substantially different. Christy Houpis stated that he was not trying to get into the CUP criteria but simply the issues that led to the rejection of the first application, and, while there is a traffic report now, he isn’t sure the items in it are substantially different from what has been mentioned in the past. The

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concerns that were raised for the first application are the same with the second and don't appear to have been addressed.

Dwight Brew thanked the applicant for his presentation. Dwight Brew said that he had spent a lot of time looking at the data from the first application and this application, and also the associated minutes. He stated that he had no questions at this time.

Cynthia Dokmo had no questions.

Chris Yates had no questions at this time.

Mike Dell Orfano clarified that, as explained in Attorney Ratigan's letter, the application will not be invoking the workforce housing ordinance, but will voluntarily be creating deed restricted housing at rates as prescribed in the workforce housing ordinance. Carter Scott agreed with this.

Mike Dell Orfano noted that this application is voluntarily proposing to offer the town 26 workforce housing units, roughly a 50% increase over the first application. Carter Scott agreed and noted that the 26 workforce units are about 43.3% of the total development.

In response to a question from Mike Dell Orfano, Carter Scott noted that these workforce units will be deed restricted.

In response to a question from Mike Dell Orfano, Carter Scott stated that the ski slope on the property will be cleared in phases, thus mitigating the water runoff into the farmland and road.

Mike Dell Orfano asked about the impervious surface onsite with a 30% reduction in the length of the road. Carter Scott noted that this application proposed a 30% reduction in the amount of impervious surface located on the town-owned road on site. Mike Dell Orfano stated that the relevance of this was how much effect that reduction would have to improve the hydrogeological conditions of the site. Carter Scott explained that, when looking at the roads on site, it appears that there is less impervious surface and, thus, less total runoff. This will be calculated at a later timeframe in the application process.

In response to a question from Mike Dell Orfano, Carter Scott noted that the move towards private wells on site was mostly based on cost expense. Carter Scott noted that by the time the extension was paid for and with the 30% federal tax on top, the amount was close to \$1million. He stated that it was more economical to do one well at a time at \$7,000. Mike Dell Orfano asked if the cost savings was going towards the workforce housing. Carter Scott stated that the application will not get credit towards doing public infrastructure on site. There are now going to be fewer units and no public water supply.

Mike Dell Orfano noted that the reduction in the number of roofs proposed in this application should thus reduce the amount of impervious surfaces on site. He suggested that, should the

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application move forward, the applicant should highlight the relevance of this on the hydrogeology.

Brian Coogan asked Carter Scott what he had used as criteria to establish whether this application was materially or substantially different. Carter Scott explained that he decided what was significantly different about the two applications when looking at the effect of items on public health, safety and welfare. If any of the changes made addressed concerns brought up by the first application, he also considered those substantially different. Carter Scott noted that the changed number of units, location of buildings, roadways, water supply, etc. all indicate significant differences.

In response to a question from Brian Coogan, regarding the difference in the amount of land on site being developed, Carter Scott noted that there is a significant area not being used for roadways on site in the new application due to the reduction in road length. There is also a reduction in the number of curb cuts along Christian Hill Road, in order to keep the rural feel. Carter Scott explained that the number of units have been constricted and moved down the site, thus, he believes that the amount of land being used is substantially less in this application. Brian Coogan stated that the sites for development remain the same. He acknowledged the modification to the shape and path of the road but stated that the acreage for houses in large part stayed the same. Carter Scott stated that the development had come further down the property and the disturbed area was less.

Brian Coogan asked why Carter Scott was not using the Town's workforce housing ordinance. Carter Scott stated that he would not be invoking the workforce ordinance because the extra density isn't needed for this project. He noted that the project gets bonuses for single floor and one-bedroom homes, so he doesn't need to go through the cumbersome paperwork in order to provide workforce housing to the town, as the extra density isn't needed.

In response to a question from Marilyn Peterman, Carter Scott explained that the change to private wells on site should reduce the number of hydrants on site. A cistern or two is likely going to be needed. He will continue to work with the Fire Chief on this item, but there will not be hydrants provided along Christian Hill Road as part of this proposal.

In response to a question from Marilyn Peterman about the road related waiver requests with the first application, Ken Clinton explained that the town has design standards for its roads. By proposing a -2% road grade at the intersection of the new road with Christian Hill, any water running from the property will not run onto the public road, thus avoiding erosion or icing issues. The previous application had this road grade at 1%. Ken Clinton pointed out that the road standards require an 8% grade for the road, while it is not uncommon to see 10% road grades if the topography of the lot dictates it. He stated that the platform at the intersection had been lengthened to avoid sliding out into Christian Hill Road. There had also been a K-value waiver request, dealing with the design of the vertical curves on the road, with the first design and not the second. Ken Clinton went on to say that the second proposed location for the road eliminated

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all the previous waiver requests. He noted that he could not guarantee that there wouldn't be any road waivers requested in the future, but the number of them will be significantly different based on the new placement of the road in this application. Ken Clinton stated that the reduction in road length is also a benefit in creating less road to maintain.

In response to a question from Marilyn Peterman regarding whether or not the proposed workforce housing met the ordinance criteria, Carter Scott explained that the application will meet two of the criteria for the workforce ordinance: price point, as set by the HUD for the Nashua regional area, and deed restriction.

Arnie Rosenblatt thanked Carter Scott for his presentation. He noted that in the first application farming was described in detail and he wondered what the second application proposed in this regard. Carter Scott stated that there seemed to be resistance to the farming elements of the first application, so this application doesn't seek approval for the farming aspects of the site. He noted that Amherst allows farming by right and so he would not be seeking approval to do those things. Carter Scott stated that this project is now considered a sustainable community, instead of an agrihood. Arnie Rosenblatt clarified that the design would still conceptually involve agriculture but Carter Scott was not pointing to this as one of the differences between the two applications. Carter Scott stated that the second application involved larger lots because of the septic system and well locations and there would be farmland easements for the sites.

John Ratigan noted that the Board Chairman, during the first application, had reminded everyone that traffic studies are normally addressed during the site plan review. The applicant has submitted this now, as part of the second application, as a way to alleviate questions from the Board. He believes there is plenty of information presented for the Board to judge this application to be materially different than the first.

Public Comment:

Tony Yakovakis, 22 Eaton Road, stated that he doesn't believe removing 4 units in total is a large difference between the applications. He stated that, in terms of the proposed workforce units, the ordinance is not being used in its entirety, and thus the units should not be called "workforce." He also noted that the workforce ordinance on the books has not yet been used by developers. He questioned if the town will still see deficiencies in its workforce unit numbers if that type of unit is added. He believes there could be issues with putting all of the units on private wells on the aquifer. He also explained that the total amount of land being developed on site will be the same as the previous application, even if work on the ski hill is phased.

Tim Kachmar, 15 Mack Hill Road, stated that he doesn't believe the removal of the 4 tiny houses in this proposal is materially different. He is concerned that there was no mention of the total number of bedrooms during the presentation. He questioned if additional density bonuses were not being sought because the number of bedrooms was staying the same, or possibly increasing. Tim Kachmar stated that only four bedrooms would have been eliminated by removal of the four tiny homes. He believes critical information was missing from the presentation. He thought that the Board should be cautious about the workforce housing because there was nothing holding the

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applicant to actually doing it. He also believes that the overall square footage of the units would be useful information to help determine if the application is materially different.

Tom Quinn, 30 Christian Hill Road, stated that the Planning Board has two court cases under which to address this issue: Fisher v. Dover and CBDA Development, LLC, v. Town of Thornton. The Board must judge if the applications are materially different based on: the overall reason that the application was denied in the first place, and the reasons why it was denied. He explained that the issues with the first application revolved around a development of this size in this proposed location. He believes that the additions to this application of a water study and traffic report are inconsequential. He stated that the firm that completed the water supply study for the project was recently on social media talking about the local drought conditions. There is nothing about the possibility of what drought conditions would do to this site's water supply in the report, only that under normal conditions it could support the additional 60 homes. Tom Quinn stated that the traffic study only confirms what most already know, that the proposed development will cause traffic issues in the vicinity and make a bad situation worse. He also noted that shortening the roadway length in the development doesn't make a huge difference, if there is the same amount of traffic traveling on it. He believes the number of workforce units being proposed are also immaterial. He explained that none of these alterations have anything to do with the initial reason that the original application was denied.

Kyle F., 54 Ponemah Road, stated that he believes that the applicant, with this second application, has shown a thoughtful response to the public's concerns with the first application. He explained that the new application addresses the concerns about traffic on Christian Hill Road and also shortens the proposed road. These items and the revised placement of the units on site are substantial material changes. He believes the developer has taken a patient, considerate approach with the town, and that the application is different and should move forward.

Kim Casey, 30 Green Road, stated that, based on the information disseminated, it seemed the applicant took the first application and shook up a few pieces. She thought the impact to the community from this application is the same as from the previous application. She believes that any number of houses built on Christian Hill Road would have a negative impact on traffic in the area. Kim Casey did not think that anything in the second application addressed why the original application was denied. She is baffled that the developer does not have the number of bedrooms proposed on hand and explained that this seems like a lack of transparency on his part.

Jim Hendrix, 44 Christian Hill Road, stated that it seems suspicious that the developer does not have the number of bedrooms at hand for this meeting. He explained that, while the four tiny homes were removed from this plan, the developer could have easily added bedrooms to other units, thus actually increasing the impact to the town. He stated that the traffic at the Clark School area is a considerable issue, and that this new application has not addressed this. He believes that the traffic study presented shows a slant towards the developer and he stated that he hopes the Board will engage an objective traffic engineer to review the report.

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Kelly Mullin, 48 Christian Hill Road, stated that she does not believe the fact that the applicant is not requesting road waivers at this time makes this application materially different, because the developer stated that waivers may be needed in the future for this project. She found the discussion about the farming aspect of the proposal troubling and was concerned that the applicant couldn't answer many of the questions raised. Kelly Mullin said there was a lack of regard for what the public feels is best for the community. She doesn't believe that this application has sufficiently addressed the concerns from the community from the previous application. She has concerns regarding people living in and farming the same space.

Carter Scott explained that he doesn't have the number of bedrooms on hand for this meeting, but that this would be addressed in detail at the CUP stage. Arnie Rosenblatt stated that several people had asked about the difference in numbers of bedrooms between the two applications. Carter Scott stated he did not have that information in his materials this evening.

Barbara Williams, 9 Foundry Street, stated that she had submitted a letter to be part of the record and did not feel that there was a substantial, material difference between the two applications. She has concerns about the walkability on Christian Hill Road, a very fast, well-traveled road, if this project is approved. Barbara Williams stated that 60 units could create 120 trips per day, not including deliveries, postal service and support traffic. She believes that any increased traffic in the Village will lead to increased tension at the intersection near Clark School. She noted that the traffic study submitted mentions an 18% increase in traffic at that junction. Barbara Williams believes any increase in traffic to this area will change the entire character of the Village and noted that such pressure from this project and the other project by Wilkins School will put a stranglehold on the character of the town.

Katey Almeida, 25 Christian Hill Road, asked the Board to consider the difference between "substantial changes" and "relevant substantial changes." She doesn't believe that the inclusion of a traffic report in this application is a substantial change. She stated that the new plan showed the road in a different shape, but seems to show units with small parking areas around them, and wonders if this is a bait-and-switch technique by the developer. Katey Almeida questioned if the removal of the tiny houses resulted in other, larger units. She stated that she also doesn't believe that a reduction of 64 units to 60 units, approximately 6%, is a substantial difference. She agreed with Jim Hendrix about having a non-biased review of the traffic report.

Mike Dell Orfano asked if he could ask a further question. Arnie Rosenblatt stated that, as outlined at the beginning of the hearing, it was not time to go back to the Board yet.

Arnie Rosenblatt closed comment from the public.

Arnie Rosenblatt then stated that it was time for discussion among the Board, and asked if the members wanted to have a discussion or make a motion.

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Mike Dell Orfano stated that he had a question for Carter Scott and, with the Chair's go ahead, he stated that he recalled during one presentation, an illustration of a grid subdivision on that site and asked how many units would be allowed on the site by right, not using the IIHO. Carter Scott explained that Mike Dell Orfano was speaking of an alternative layout proposed as part of the CUP design review application, showing CUP 1 versus CUP 2 in a 41 4-bedroom, single-family home layout.

Because Mike Dell Orfano had raised this issue, Arnie Rosenblatt opened up the hearing for public comment again.

Public Comment:

Tony Yakovakis, 22 Eaton Road, asked if the 41 units were based on the base density and stated that he highly doubts that 41 units could actually be put on this site, with the wetlands and ledge.

Tom Quinn, 30 Christian Hill Road, agreed that the 41 unit number seems to be a scare tactic. He believes that, by right, the site could hold about 30 units, as it is 60 acres in a 2 acre zoning area. He explained that the 41 unit number seems to be coming from the possible 35% bonus density.

Arnie Rosenblatt did not think that the "by right" number of units from the first application had anything to do with the difference between the first and second applications, but did not want to interrupt the question. He said that it sounded more like an argument with respect to the merits of the application. He noted that he did not want to cut off any comment from the public since this issue had been raised and the applicant had a chance to comment.

Kelly Mullin, 48 Christian Hill Road, questioned why the applicant didn't believe it was important to have the number of bedrooms on hand for this meeting to discuss the difference in materiality between applications. She believes that this information was important to have for tonight's meeting, and that the applicant should have done his due diligence and brought this information to put his best foot forward to the public. Arnie Rosenblatt pointed out that Carter Scott had already addressed this comment and noted that he had that information but not with him this evening.

Danielle Pray, 7 Stearns Road, stated that she believes the 41 unit number comes from what could be constructed by right, along with an amount if the citizen petition from March had passed, changing the density to 35%.

Arnie Rosenblatt stated that he was closing the public comment.

Arnie Rosenblatt asked the Board if they wanted to have a discussion or make a motion.

Bill Stoughton stated that he wanted to discuss the matter and listen to what his Planning Board colleagues had to say. Before he could begin, Mike Dell Orfano asked if he could interrupt. Bill Stoughton stated that he preferred to continue with his comments.

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Bill Stoughton thanked the applicant and all interested parties for their helpful input. He stated that he has reviewed both applications for this proposed development, along with the minutes from all subsequent meetings, and the video from the hearing at which the initial application was denied. He also reviewed the letters attached with the application, and has listened carefully to all the presentations and comments in coming to his position. Bill Stoughton stated that he has reviewed the standards set forth in CBDA Development, LLC, v. Town of Thornton and there are two questions: 1) Does the subsequent site plan application materially differ from the prior application involving the same property? 2) Has the subsequent application been modified so as to meaningfully resolve the Board's initial concerns? Bill Stoughton thanked Christy Houpis for his questions this evening, noting that they were trying to get to the answers to these questions.

Bill Stoughton stated that it is important to note what an IIHO CUP application is and is not. An IIHO application is focused on density. The worksheet for this type of application awards potential density bonuses based on various factors. The Planning Board's affirmative decision on the CUP leads to a simple declaration that the applicant can proceed at a density of "up to" a certain number of units for the site. The IIHO CUP application is not a Site Plan Review, in that the review of the application does not focus on the precise layout of units on the land or the details that are reviewed in the subsequent reviews. Bill Stoughton recognizes the changes to the site identified by the applicant. They are certainly important but, in his view, are not material until later in the application process. He stated that this IIHO CUP application is also not a Workforce Housing application. Although the applicant claims the subsequent application increases workforce housing, a workforce housing application was not submitted. No financial details, no information on rate of return, no information on home pricing other than at or below the current affordable housing threshold were given. This application meets only two of the requirements to qualify for workforce housing status. The application also sought no bonus density for workforce housing and, therefore, it is unclear that it could be held to that plan.

Bill Stoughton stated that this, Jacobson II application, is not materially different from the initial application with respect to density. The original application proposed 64 units, or 207% of the base density for the site. This second application proposes 60 units, or 197% of base density for the site. Bill Stoughton did not believe this difference to be material. He noted that the mix of housing proposed is somewhat different, but these differences are not material. In looking at individual density bonus categories, there is no difference at all in bonuses sought for walkability, community space open to the public, open space under restrictive covenant, or redevelopment of existing structures. These categories account for 21 of the 30-34 bonus units sought. In his view, there are only relatively minor changes in the categories for senior housing restrictions, numbers of bedrooms, single floor units, attached vs. detached units, and rental units. While he acknowledges and has considered these differences, in the context of the proposed development, he cannot conclude they are materially different.

Bill Stoughton stated that this application does not address concerns that led to the denial of the original application: namely, safety and traffic issues. The submitted traffic study shows an adverse effect from the traffic projected for the revised application. The applicant provided a traffic study analyzing the effect of traffic from its revised application, coupled with the traffic

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anticipated from another proposed development. Table 3 of that study summarizes the effect on the Foundry Street/Boston Post Road intersection. The traffic study shows the effect of the proposed development on the eastbound traffic, none of which relates to the other development included in the study. The study shows that building the proposed development triples the delay, results in a traffic volume exceeding intersection capacity, and doubles the number of cars queued during the morning. He concludes, therefore, that the revised application does not address the traffic concerns that, in part, led to rejection of the original proposal. Bill Stoughton stated that he looked forward to hearing the other members' comments and noted that if he were to vote now, he would vote that there is no material difference between the two applications.

Mike Dell Orfano explained that he had sent Arnie Rosenblatt and Nic Strong a PDF file to be circulated to the Board and to be published for the record. He stated that it has to do with the concept of materiality and how it might be used in this hearing. He explained that the New Hampshire statutes do not define the term "materially different," and the Board has to grapple with that determination. Mike Dell Orfano stated that some might agree that the only question is how significantly the second application differs from the first; it seems reasonable to also consider the differences in the quality and reliability of the information submitted for the second application, since those were the concerns mentioned by the Board members who voted to deny TransFormations 1. The Board must therefore consider the relevance and reliability of the information submitted as part of the application. Mike Dell Orfano stated that, with respect to those questions, it is important to note that Board members must accept certified study conclusions as reliable information. The NH Supreme Court makes this abundantly clear in its *Trustees of Dartmouth College v. Town of Hanover* findings when it concluded: "*Planning boards cannot rely upon lay opinions and anecdotes refuted by uncontroverted expert evidence.*" The Board can, and regularly relies on, hired at the applicant's expense, subject matter professionals to certify and opine on specific studies' conclusions provided the scope of the validation remains relevant to the application.

Mike Dell Orfano stated that *Dartmouth v Hanover* also addresses another question raised by the denial of TransFormations: under the IIHO, Section 3.18 C.1.C., which states that there would be no significant adverse impacts resulting from the proposed use upon the public health, safety, and general welfare of the neighborhood and the Town of Amherst, was specifically identified as the basis of two nay votes on the TransFormations 1 hearing and those members were not persuaded.

Mike Dell Orfano stated that it was a formal fallacy for the Board to insist that if someone cannot prove a negative, then the opposite must be true. He went on to read an excerpt from RSA 674:44: "*Specify the general standards and requirements with which the proposed development shall comply, including appropriate reference to accepted codes and standards for construction*". He said that the Town's ordinance doesn't offer that definition, leaving it to be an arbitrary decision, which in his opinion was the reason why Transformations 1 was denied. Mike Dell Orfano went on to say that the *Dartmouth v. Hanover* case found that a Planning Board cannot supplant the specific regulations and ordinances that control the site plan review process with their own personal feelings. To claim that something will have an adverse effect, the person

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making that assertion must be able to point to qualifying and quantifying factual information, which was not done in Transfarmations 1.

Mike Dell Orfano said that he would like the letter he was reading from to be circulated to the Board and to the general public, if they'd like, and entered into the record. He stated that he believes that inserting personal, lay opinions about the traffic study and the hydrogeological study is flawed and the Supreme Court agrees with him. He thought that the merits of this case should be based on the fact that the traffic study is offered in this second application and was not in the first. That is a huge capital expense to the applicant and a significant material difference.

Mike Dell Orfano stated that this new application offers the town workforce housing which, under the ordinance or not, would be deed restricted, meets the spirit of the law and is a significant contribution to this town's fair share. He noted that there would be 52% more affordable housing than proposed in the previous application, which, in his opinion, was quite material. He believes that the Board is failing to define what is material. The questions have to be: is the difference relevant, and what the relevance is of what's offered in TransFarmations 2. Mike Dell Orfano thought that the reduction in road area was material because it reduces the hydrogeological effects of road runoff. The reduced number of roofs reduces the impervious surfaces and thus the amount of runoff. He also noted that the reconfigured site leads to more space between the homes and is a much better layout than what was offered in the first application. He believes the proposed development is significantly better than what would have been done just as a grid subdivision, which, in his opinion, would be a travesty. He stated that if he were to vote right now, he would vote that there are material differences and that TransFarmations 2 should be allowed to proceed.

Arnie Rosenblatt thanked Mike Dell Orfano for his comments. He noted that he had received Mike Dell Orfano's letter but does not, as general practice, send emails out to the Board members. Mike Dell Orfano stated that was why he sent it to Nic Strong as well, and asked her to please send it out to everyone. Arnie Rosenblatt asked Mike Dell Orfano if he had read from his letter and if the Board had just heard the substance of the letter. Mike Dell Orfano stated that the Board had heard the substance of the definition of materiality but that he had not read the summary or background of the application, or his comments on Attorney Ratigan's thoughts on what the material changes are and their relevance to the application. He stated that he was happy to give that to the Board but he was also happy to let the Board read the PDF for themselves and internalize it, in order to decide in conversation what they want to do with the information.

Nic Strong asked Arnie Rosenblatt if he wanted her to send the referenced document to the other Board members. Arnie Rosenblatt stated that a member of the Board had asked for a document to be circulated, but the obvious logistical issue is that no one has had the opportunity to absorb it because no one had it prior to the meeting. Arnie Rosenblatt stated that Nic Strong might as well send out the document from Mike Dell Orfano to the other Board members at this time for their review, but that the Board members will have to make their own decision about whether or not they want to take time during this meeting to read it. Mike Dell Orfano stated that, if the Chair would like, he was happy to read the document to everyone and open it to testimony. He

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explained that the minute taker could then use the letter as the testimony. Arnie Rosenblatt thought it would be quicker for the Board to read the letter than to hear it read to them, but the Board needed to make a decision about whether they wanted to do that. He told Nic Strong that, yes, he would like her to email the document to everyone on the Board.

Arnie Rosenblatt returned to the Board members for their comments.

Brian Coogan stated that he does not believe the new application is materially different. One reason is that the amount of physical property being disrupted for the development is relatively the same for the number of units being proposed. Therefore, the number of residents that would occupy them appears to be relatively the same. That was the basis for why he would not recommend this.

Marilyn Peterman read from the court case: *Carlos Paz & a. v. Town of Hampstead*:

"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."

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."

She noted that the changes in this court case are not dissimilar to the ones that the applicant presented to the Board. She explained that the new application changed the number of units, in particular the affordable housing units. The road changes from 1,200 to 800 feet, which is a material difference, with grades changing and the elimination of waivers – also a material difference. She noted again the increase in workforce housing from 17 to 26 units as a material difference. Marilyn Peterman went on to say that private onsite wells, instead of public water supply, was a material difference. The reduction of units accessing the new road, from 37 to 29 - a material difference. She noted that the other significant material difference was the provision of a traffic study. She noted that this was not required and whether it answers everybody's questions is immaterial; the fact that it was provided is the material difference. She stated the impact to the community is not usually considered a material difference. Things such as walkability and density, are not usually noted as being material differences in this type of case. She stated those were usually brought up at the CUP and not provided as material differences, as they have not been in other cases. Marilyn Peterman stated that the Dartmouth case was very specific in what the material differences were. She explained that the court upheld for Dartmouth that the

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information provided by the abutters was not germane or had no significant input for the material differences of the application, and the application was upheld. She found that some of the information provided by the applicant certainly provides for material differences. If she had to vote now, she would vote that it was materially different from the first application.

Chris Yates stated that he had reviewed the notes and both packages. He explained that, although there were some changes with the second application, the big thing he was stuck on was the density. He noted that the proposed density of the site has been an issue for the community, regarding that many homes being put in that area, and that this does not appear to have been addressed in this new application. He went on to say that the removal of the four tiny homes did not address the issue and he did not see it as a material change.

Cynthia Dokmo thanked the applicant for the presentation. She stated that she was a big fan of affordable housing and thinks that type of housing enhances the town. She believes that the decision would be easy, if it was based on that. However, she stated that she was here to determine whether the applicant has met his burden to prove that this new application is materially different from the initial application, and she does not think it is. While there are a few less houses being proposed, the units are slightly moved around on the site, and a proposed shorter road, she did not hear the applicant address the total number of bedrooms proposed or the amount of the site proposed to be disturbed. Cynthia Dokmo stated that she would need to hear that missing information and did not think the applicant had met the burden for those reasons.

Dwight Brew stated that he had spent a fair amount of time trying to address how he would determine if this application was sufficiently different from the previous application. He noted that he had decided to look at this in two ways: are the plans sufficiently different, and, have the previous concerns been addressed. Dwight Brew noted that there have certainly been changes between the first and second plans; however, when he reviewed the two plans he does not view the second plan as being sufficiently different from the first application. He also doesn't see that the concerns voiced the last time were addressed in this application, even with the additional supplied data.

Christy Houpis stated that he examined the new application for relevant substantive changes that make a material difference. He noted that he understood that the quality and reliability of third party experts is to be accepted. He also attended the NHMA training session and noted that the Board members' views and knowledge are supposed to be taken into consideration in their decisions. He stated that he was relying on his knowledge and experience to determine if there were relevant, substantive, material changes. Christy Houpis stated that he was hoping to hear differences that would address the issues that caused the first application to be rejected. He stated that he goes through the items and thinks about: the road changes and addressing emergency vehicle access; workforce housing ordinance issues and whether the second application was using the ordinance provisions; hydrogeological issues - going to wells from public water does not address the concerns; traffic study issues - the report verifies that there are problems, especially at certain intersections, but, based on his own knowledge, not feelings, the counts done in December are going to be different than if done in May or September, and that the report

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didn't show him any material differences in regards to traffic; number of bedrooms issue - does the removal of four units make a substantively different number?; or farming issues - the farm is still there and was a substantive concern originally. Christy Houpis stated that when he looks for relevant substantive changes and material differences in these items, he agreed with many of the other Board members, he just does not see them.

Arnie Rosenblatt stated that, before asking the Board for a motion, he had been considering the issue of Mike Dell Orfano's letter and was struggling to decide how to deal with it. He told the Planning Board his concerns. Arnie Rosenblatt stated that Mike Dell Orfano has requested that his letter be added to the record and that the Board to consider it. He noted, however, that in reality nobody saw the letter before the meeting because it was not forwarded to the Board before the meeting and the public has not had an opportunity to see it. He suggested three solutions to this issue: 1) for the letter to be in the record and for people to make a determination; 2) for everyone to take 15 minutes and read it; and 3) which was what Arnie Rosenblatt was opting for because he could not see any alternative, for Mike Dell Orfano to read pertinent portions that he has not already articulated to the Board so that the public has the opportunity to hear it also. He stated that the third option was the only way he could think of for Mike Dell Orfano to have the opportunity to get his views in front of the Board, for the Board to hear those views, and for the public to also have heard his views.

Arnie Rosenblatt noted that a hand was up from the public, but reminded everyone that no additional public comments will be taken.

Nic Strong stated that Natasha Kypfer, Town Planner, was in attendance and had put Mike Dell Orfano's letter on the town website. Mike Dell Orfano stated that the public does have access to it. Arnie Rosenblatt acknowledged this statement. Arnie Rosenblatt explained the Board has the choice to look at it now or have Mike Dell Orfano read it. He went around the Board to see what the preference would be.

Brian Coogan stated that he was fine with reading the letter himself.

Marilyn Peterman stated that it didn't matter.

Chris Yates stated he could read it.

Cynthia Dokmo stated that she could read it.

Dwight Brew explained that, per the Right to Know law, he believes that if the Board is going to consider this memo in their deliberations the public has a right to see it, noting that one attendee has called in on the phone. He stated that the situation was a mess that shouldn't repeat itself and that Mike Dell Orfano should read the memo aloud.

Arnie Rosenblatt agreed and asked Mike Dell Orfano to tell the Board any portions of the letter that he would like to enumerate on, other than what he had already provided. Mike Dell Orfano

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stated that he was happy to read the entire letter. Arnie Rosenblatt stated that Mike Dell Orfano had asked to have the letter presented to the Board, and that the public has not, realistically, even though it was just put on the website, had a chance to see it. Arnie Rosenblatt noted that Mike Dell Orfano had indicated that he had already provided the substance of the document. Arnie Rosenblatt asked Mike Dell Orfano to move forward in the most efficient way, because Arnie Rosenblatt wanted to ensure that Mike Dell Orfano had the opportunity to present whatever position he believed was appropriate, with the public also having an opportunity to hear.

Mike Dell Orfano thought it was important that the public see the letter; that it not only be in the minutes, but also on the website. He stated that the public has no further input in this discussion, only Board members, so he wasn't sure if reading it to the public at this point was material. He stated that what was important was that the Board have an opportunity to see the positions on the different legal cases about material information and to grapple with the relevance and reliability issues that he thought had been skimmed over in this discussion. He stated that he was happy to have the Board read the letter, and he would like to make sure it was included in the public record, so that the applicant and the members of the public have an opportunity to see it as well.

Christy Houpis asked, if the letter was read, would the Board be obligated to accept public comment again. Arnie Rosenblatt stated that he frankly did not know because he had never encountered anything quite like this. He stated that he had closed public discussion, was entertaining comments from the Board, and that Mike Dell Orfano's letter would be considered part of that comment and discussion. As such, Arnie Rosenblatt stated that he would not be allowing comments from the public. He stated that he was not comfortable with the Board reading a document that the public observing the meeting was not also seeing. He believed it was appropriate for the public to see and hear everything that the Board was relying on.

Marilyn Peterman asked Mike Dell Orfano to read his letter.

Mike Dell Orfano read the letter into the record. (*Please find a copy of the document attached to these minutes.*)

Arnie Rosenblatt stated, for the benefit of the Board and the public, that in the future while he is Chair, he will ask any member of the Board not to provide written statements immediately prior to a meeting, and to verbally articulate their position during the meeting. He stated that he had done what he did tonight to ensure that there was no question that everyone had the opportunity to be heard and that all positions were heard. Arnie Rosenblatt stated that this was not something he had ever seen before with the Board and he did not think it was an efficient or fair way for the Board and the public to spend its time. He stated that he appreciated and respected the comments that Mike Dell Orfano had made, although he disagreed with many of them, especially with regard to the first application.

Arnie Rosenblatt stated that, unless there were any other comments from the Board, he would entertain a motion.

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Mike Dell Orfano moved to accept the changes as material in TransFarmations 2 over TransFarmations 1. Marilyn Peterman seconded.

Roll call: Mike Dell Orfano – aye; Brian Coogan – nay; Marilyn Peterman – aye; Cynthia Dokmo – nay; Dwight Brew – nay; and Bill Stoughton – nay. 2-4-0; motion defeated.

Arnie Rosenblatt thanked Carter Scott and his team for their presentation of the application and the public for their comments.

Cynthia Dokmo moved that the applicant has not carried its burden of proving that second application is materially different from the first. Dwight Brew seconded.

Roll call: Mike Dell Orfano – nay; Brian Coogan – aye; Cynthia Dokmo – aye; Dwight Brew – aye; Bill Stoughton – aye, and Marilyn Peterman - nay. 4-2-0; motion carried.

Nic Strong stated that the Board will next meet on August 5, 2020. This meeting will include the continued hearing for Arboleda Realty, a CUP wetland hearing for a property on Stearns Road, a compliance hearing for Aroma Joe's, and a hearing for a storage facility on Pine Road.

Marilyn Peterman moved to adjourn the meeting at 9:32pm. Mike Dell Orfano seconded.

Roll call: Brian Coogan – aye; Cynthia Dokmo – aye; Mike Dell Orfano – aye; Dwight Brew – aye; Bill Stoughton – aye; Marilyn Peterman – aye. Motion carried unanimously.

Respectfully submitted,
Kristan Patenaude

Minutes approved as amended: August 19, 2020