THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

TOWN OF WARNER
ZONING BOARD OF ADJUSTMENT
APPLICATION NO. ZO 2025-5

In the Matter of the Special Exception Application of
Concord Area Trust for Community Housing ("CATCH")
Tax Map 35, Lot 4-3

MOTION FOR REHEARING

NOW COMES Concord Area Trust for Community Housing ("CATCH" or the "Applicant"), by and through its attorneys, Cleveland, Waters, and Bass, P.A., and respectfully moves, pursuant to RSA 677:2 and the Town of Warner Zoning Ordinance (the "Ordinance"), for a rehearing of the June 25, 2025 decision of the Town of Warner Zoning Board of Adjustment (the "Board") denying the Applicant's application for special exception in connection with the real property located on Route 103 (Tax Map and Lot 35-4-3; the "Property"). In support thereof, the Applicant states as follows:

BACKGROUND

1. The Property consists of a 13.8± acre, undeveloped lot on Route 103 in the Warner Intervale (INT) Overlay District, part of the Commercial (C-1) District. The surrounding lots are primarily commercial uses near the intersection between Route 103 and Interstate 89. On or about May 22, 2025, the Applicant submitted an application (the "Application") to the Board for a special exception to allow it to construct a 34-unit multi-family workforce housing project on the Property (the "Proposal").[1]

[1] The Applicant also submitted an application for variance which was withdrawn. The Applicant had previously sought approval for a 48-unit workforce housing development (the "Prior Application"), which had been denied. All materials and discussion regarding the details of the Property and Proposal provided in connection with the Application and/or the Prior Application are hereby incorporated by reference.

2. The Application followed the Prior Application in which the Board denied a larger version of the Proposal for, *inter alia*, being too large, too tall, and too close to the road. The current Proposal attempted to address those concerns by reducing the number of units, reducing the height, and moving the building farther from the Road. Nevertheless, the Board still denied the Application.

3. Article XVII, Section E(1) of the Ordinance provides that a special exception must be granted when four conditions are met. There is no dispute that conditions (a) or (d) were met. Instead, the Board's decision rested entirely on conditions (b) and (c). As discussed herein, however, the Board's decision is in error.

Discussion

I. The Board applied an incorrect legal analysis to Article XVII, Section E(1)(b).

4. A special exception can be granted if, "the requested use is essential or desirable to the public convenience or welfare". See Ordinance, §XVII(E)(1)(b). The Board's decision on June 25, 2025, however, found that "the proposed development is not essential or desirable…" See Notice of Decision. In other words, the Board's finding is not consistent with the requirements of the Ordinance. The Applicant does not need to demonstrate that the "proposed development" is essential or desirable, only the "requested use". This is a narrower requirement.

5. The terms "requested use" and "proposed development" are not interchangeable synonyms. The Ordinance, for example, defines a "Principal Use" as "the main or primary purpose for which a structure or lot is designed, arranged, or intended, or for which it may be used, occupied, or maintained". See Ordinance, Art. III (Principal Use). See also Ordinance, Art. III (Accessory Use). In other words, the "use" is equivalent to the "purpose". The Table of Uses in the Ordinance lists several uses such as "one-family detached dwelling", "multi-family workforce

housing", "hotels and motels", or "Professional and business offices and services". See Ordinance, Table 1. The use, or purpose, must be distinguished from the means of achieving that purpose, such as the specific details of the proposed development.

6. In other words, the use in this case is "multi-family workforce housing". The question appropriately before the Board is whether "multi-family workforce housing was essential or desirable on the Property". Any consideration of other aspects of the Proposal beyond the use was beyond the Board's purview and authority. For example, when members of the Board commented that they did not like the appearance of the proposed building, this has nothing to do with whether the use (*i.e.*, multi-family workforce housing) is essential or desirable.[2] A similar looking hotel or office building could be built on the Property as a matter of right without any zoning approval. See Ordinance, Table 1. Whether the Board found that any specific aspect of the building to be essential or desirable is entirely immaterial to Article XVII, Section E(1)(b).

7. Because the Board's findings were not limited to the proposed use itself, the Board's decision is inconsistent with the applicable standard laid out in the Ordinance. As such, a rehearing is appropriate. Moreover, even if these terms were interchangeable, the underlying reasons for the Board's findings are erroneous, as discussed below.

A. The fact that the Property is in the commercial district is not a valid legal reason to deny the special exception.

8. The first reason the Board found that the Proposal was not essential or desirable is that the Property is in the commercial zone and the Board preferred to have "revenue generating commercial activity" on the Property. The Board, however, cannot pick and choose which permitted uses it may allow on the Property.

[2] The Applicant recognizes that these comments were, in some cases, targeted at Article XVII, Section E(1)(c), which is addressed separately, below.

9. The Ordinance expressly permits multi-family workforce housing in the C-1 District by special exception. See Ordinance, Table 1. By stating that properties in the C-1 District must be used for commercial purposes and not any other purpose identified in the Ordinance, the Board is effectively overriding the vote of the Town and usurping the legislative role to rewrite the Ordinance.

10. For example, the C-1 District provides that a public library, museum, or historical association is permitted in the C-1 District as of right. These, however, would not be "revenue generating commercial activity". The Board could not prohibit an owner of the Property from building a museum simply because it would rather see the Property be put to commercial use. Neither can the Board use that preference for a commercial use as a basis to deny a use allowed by special exception.

11. The Board's sole consideration of an application must be limited to whether the specific use satisfies the elements of the Ordinance. See Raymond , Tr. of J&R Realty Tr. v. Town of Plaistow, 176 N.H. 111, 118 (2023). See also Malachy Glen Assocs., Inc. v. Town of Chichester, 155 N.H. 102, 108 (2007) ("the ZBA must look at the project as proposed by the applicant, and may not weigh the utility of alternate uses in its consideration of the variance application").

12. Simply put, the Board may not "reserve" the Property for commercial uses, nor can it force the Applicant to only use the Property for a commercial use. The Board's finding that this Property can only be used for revenue generating commercial uses, regardless of the provisions of the Ordinance, would amount to an unconstitutional regulatory taking requiring the Town to compensate the Applicant.

B. The Warner Housing Survey is not binding upon the Board or enforceable upon the Applicant

13. The Board also found that the Warner Housing Survey identified large apartment buildings as the least desirable option for housing in Warner. As a preliminary matter, as described, this finding is immaterial. The Ordinance requires the proposed use to be essential or desirable. It does not require the proposed use to be the "most desirable". Simply because other forms of workforce housing may be more desirable does not make large apartment buildings completely undesirable.

14. Even if large apartment buildings were undesirable, that is not the end of the consideration for the Application. The Application must be approved if the proposed use is either desirable *or* essential. In other words, an essential use must be approved even if a sample of the Town's population does not want it.

15. New Hampshire state law requires every municipality, Warner included, to adopt zoning ordinances which "provide reasonable and realistic opportunities for the development of workforce housing, including rental multi-family housing." RSA 674:59, I. This law specifically provides that it is not enough to merely allow workforce housing if the requirements "render workforce housing developments economically unviable." See RSA 674:59, II.

16. Some Board members mentioned they would prefer to see smaller apartment buildings, like three- or four-family workforce housing developments in Warner. The fact that these are not common indicates that they may not be economically viable. As discussed in the connection with the Application and Prior Application, the Applicant determined that it could not afford to build workforce housing, with the income limitations inherent thereto, at the scale of a

24-unit development.[3] The Applicant is a non-profit entity dedicated to building and operating affordable housing. The Applicant benefits from extensive expertise and economies of scale. If the Applicant cannot feasibly build a four-unit workforce housing building in Warner, it is likely that nobody can. The Board's concerns that there are not enough small workforce housing developments supports this conclusion. If the Board's position is that workforce housing developments will not be permitted unless they are small enough that they are not economically viable, this is a violation of RSA 674:59.

17. This conclusion seems also contrary to the actual data in the Warner Housing Survey of 2024. See Warner Housing Survey 2004. One question was "Ideally, what type of housing would you prefer to be living in". See id., Question 4. Most of the respondents stated that they would ideally like to live in a single-family home. Id. Coincidentally, most of the respondents lived in a single-family home. Id., Question 3. A respondent's personal preference for living in a single-family home does not mean that the respondent believes that others should not be able to live in a large apartment building.

18. Question 9, on the other hand, asked about the types of housing needed in Warner - a general question rather than a question of the respondents' personal subjective preferences. This question had no distinction regarding the size of the development or number of units. Nevertheless, the results indicated that over 70% felt that Warner "strongly needs more" or "needs more" moderate- -income housing and 58% felt that Warner needs or strongly needs more low-income housing. See id. Question 9. This indicates that, while people may "ideally" prefer to live in a single-family home, the majority recognize the need to build more low- and moderate-income housing. While the Board may prefer that the affordable housing be built as architecturally pleasing

[3] A previous application in 2022 was granted for a 24-unit development, but this included a mixture of workforce housing units and market-rate housing units which provided greater income and economic viability.

single-family homes, that is not the proposal before the Board. The Board cannot refuse to allow one type of building on the hope that, someday, someone else might propose a different building in a different location – certainly without evidence that such an "ideal" would be economically feasible.

19. Question 4 is also phrased in a theoretical – "ideally" where would you "like" to live. See id., Question 4. It does not, for example, take into account any economic realities. Whether a respondent would ideally like to live in a single-family home does not take into account whether that respondent can afford to do so. Simply because most respondents would ideally like to live in a single-family home does not mean that it is not desirable or essential to have affordable apartments. The Warner Housing Survey did not, for example, ask, "If you were struggling to afford a single-family home in Warner, would you prefer to live in a large apartment building with fixed rental rates, or would you prefer to be forced to move out of town entirely?"

20. Finally, the Warner Housing Survey is not incorporated into the Zoning Ordinance. The individuals who responded are not elected or appointed by the Town to any adjudicative role. Whether approximately four hundred individuals in a town whose population is approximately three thousand want a large apartment building is irrelevant. Constitutionally, a landowner's use of a given piece of property is not subject to popular approval. The Zoning Board must apply the standards of the Ordinance and New Hampshire law, not the subjective preferences of unelected residents.

21. By contrast, the Planning Board, in developing the official Master Plan for the Town, recognized the need for workforce housing. "In particular, there was a strong feeling that affordable housing for both the elderly and the workforce is needed." See Master Plan, Adopted May 16, 2011, page 7. The 2024 Update Draft to Chapter 4 of the Master Plan specifically indicates

that the intent of allowing housing projects in the C-1 and INT overlay district was to allow higher density developments. See 2024 Update (draft), 4-13. "The lack of housing stock and rising prices make it difficult to find an affordable place to live, or even to afford and maintain one's existing housing." See id., 4-1.

22. The Board cannot elevate a voluntary poll of unelected residents to a greater significance than the master plan and enforce those preferences as if they were incorporated into the Ordinance.

C. Whether the proposal is necessary is immaterial

23. The Board found that a 34-unit development was "unnecessary" to meet Warner's needs because there was already an above-average number of reasonably priced rental properties. Whether the use is "necessary" is not the same as essential or desirable. A use may be unnecessary but still desirable. New Hampshire law which, as discussed above, requires Warner to provide "provide reasonable and realistic opportunities for the development of workforce housing, including rental multi-family housing" includes no exception to the effect of "unless there are other reasonably priced apartments currently on the market." See RSA 674:59, I.

24. Apartments that are currently reasonably priced are not the equivalent of workforce housing, which is a category created under New Hampshire law and subject to certain regulations and requirements. Among the benefits of workforce housing is a fixed rental rate that cannot be raised at a landlord's whim. Tenants in a workforce housing development have a certain reliability and predictability to their living expenses that cannot be obtained from conventional housing. Simply because there are apartments that a person could afford does not render workforce housing undesirable or inessential.

25. Moreover, as discussed above, the 2024 draft update to the Master Plan prepared by the Planning Board recognizes that there is a lack of affordable housing stock. See 2024 Update (draft), 4-1. This indicates that the "reasonably priced apartments" referenced by the Board are not satisfying the need for affordable housing. There are several reasons apartments may be undesirable despite the purportedly reasonable rental rates. The apartments may not be in a desirable condition or not in a desirable location, for example. Whatever the reason, however, despite those apartments, the Planning Board has determined that there is still a need for more affordable housing in Warner and New Hampshire law provides that workforce housing, specifically, must be permitted in a reasonable and economically viable way, regardless of whether there is reasonably-priced housing available.

26. Likewise, the "rising prices" recognized by the Planning Board suggests that, while those apartments may be reasonably priced now, they may not remain reasonably priced. Unlike the Proposal, those landlords would be free to raise rent as much as they wanted once a tenant's initial lease expired. This consistency makes workforce housing desirable even if it is "unnecessary".

D. A lack of economic impact is not an element for a special exception.

27. In order to qualify for a variance, an applicant must show that the value of the surrounding properties will not be diminished. See RSA 674:33, I(a)(2)(E). This Application, however, is not for a variance. Article XVII, Section E(1) contains no similar provision or requirement.

28. The Board does not specify the economic impact referenced in the Notice of Decision. At the hearings, however, members frequently referenced data that the local school district spent approximately $30,000 per student. Therefore, those members opined, the Proposal

would create a negative impact on the Town by introducing new students to the school district without a sufficiently large property tax to offset those costs.

29. This argument is flawed. First, it fundamentally misunderstands the calculation of the per-pupil cost of the school district. The school district's budget is set at a fixed number – it does not rise and fall every time a new student arrives or moves out of town. While that budget, divided by the number of students, may amount to approximately $30,000 per student, that does not mean that each additional student will increase the budget by $30,000. Each new student *reduces* the per-pupil cost by reducing the marginal impact of each fixed cost.

30. As an example, if the cost of plowing the parking lot is $200 per snowstorm, and there are 10 students, then the school district spends $2 per student every snowstorm on plowing. This does not, however, mean that if a new student arrives, the cost of plowing the parking lot suddenly becomes $202. Certainly, there could be a point where there were enough new students to require a larger parking lot, but this is a much more complicated transaction. The simple fact is that the per-pupil cost of the school district's budget does not mean that each new pupil increases the budget by $30,000.

31. Even if each new student did increase the school district budget by $30,000, however, the Board cannot prohibit a residential development simply because the cost of educating possible students is not completely offset by the corresponding property taxes. The tax rate in Warner in 2024 was $30.89 per $1,000. This would mean that a single-family residence with a single child would need to have a market value of approximately one million dollars ($1,000,000) to offset that $30,000 school budget increase. To offset the risk that a family has two children, the Board's logic would prohibit any single-family residence from being built in Warner if the market

value were less than two million dollars. A minimum house price of two million dollars is certainly not essential or desirable and certainly does not provide the affordable housing needed in Warner.

II. The application of Article XVII, Section E(1)(c) is likewise flawed.

32. The other material element of a special exception is that "the requested use will not impair the integrity or character of the district or adjoining districts, nor be detrimental to the health, morals or welfare.". See Ordinance, §XVII(E)(1)(c). As discussed above, this specifically relates to the "use" of the property, not to specific design choices in the overall proposal. A land use board may not deny an application "based upon their personal feelings". See Trs. of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 512 (2018) (ruling that the aesthetic impact of a proposed sports facility on the nearby residential neighborhood was not a permissible reason to deny site plan review). Nor may a land use board rely upon *ad hoc* decision making based on vague concerns. See Derry Sr. Dev., LLC v. Town of Derry, 157 N.H. 441, 451 (2008) (reversing the denial of site plan approval for an independent adult community development). The Board's decision must be "based upon more than the mere personal opinion of its members". See Richmond Co. v. City of Concord, 149 N.H. 312, 316 (2003). In this case, as discussed below, the basis for the Board's findings are flawed.

A. The impact on the Town is not the material standard.

33. The Board found that "[t]he character of the Town will be negatively impacted by placing a large and boxy 34-unit apartment building prominently at the entrance to the village in a small town that promotes rural character and its natural environment." This standard is flawed for two reasons.

34. First, the question is whether the "integrity or character of the district or adjoining districts" will be impaired – not the character of the Town as a whole. See Ordinance,

§XVII(E)(1)(c). The Board's applied standard imposes a greater burden on the Applicant than was adopted as part of the Ordinance and is legally erroneous.

35. There are certainly rural parts of Warner where the Proposal would undoubtedly change the character of the area. But the Property is not situated in those areas. The area of the Property looks like this:

While certainly scenic, the adjacent uses are certainly not the eighteenth-century rural aesthetic that was frequently mentioned by the Board. The question is not whether the use will impact the character of the Town, but whether the use will impact the character of the district that already enjoys this aesthetic character:

36. By comparison, the nearby Residential Village District allows multi-family workforce housing as of right. This use could be built in that district without any zoning approval. It is not reasonable to find that the appearance of the Proposal would impact the Town if placed in the district pictured above, when it would be allowed without any design review in other, more rural or historically appearing areas of Town. This Proposal is allowed, as of right in some areas of Town. There can be no doubt that it would have less of an impact on the Town in this area than in other areas.

37. Second, as discussed above, the question is whether the "use" – multifamily workforce housing - will impair the character of the district, not whether the specific design of the building will impact the character of the district. A zoning board is not empowered as an architectural design review committee. The Board cannot grant or deny a special exception for a given use based on whether the design of that use appears "boxy".

38. By comparison, whether a requested variance would alter the essential character of a neighborhood is an element to a variance application – part of the analysis of the "public interest" prong. See Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011). This is an extremely similar standard to that adopted by Article XVII, Section E(1)(c). The Board could not deny a variance for a single-family home because they disliked its appearance, style, or the color of the paint. Nor can the Board deny this special exception on the basis of subjective appearance. The question must be whether a multi-family workforce housing development will impact the integrity or character of the district – not whether a boxy building will impact the integrity or character of the district.

39. For example, at the hearing on the Application, comments were made that the Proposal "looked like a motel". This cannot be grounds for denying the Application because a

motel is a permitted use in the district, as of right. See Ordinance, Table 1. In other words, a large boxy building can be built on this Property as of right without necessity for any approval from the Zoning Board – so long as it was used solely for transient residential purposes rather than for long-term residential tenants. See id. The Board's decision must be whether using that boxy building for workforce housing would impact the character of the district.

40. Put another way, the Applicant (or a third-party who purchased the Property) could build a hotel on the Property (subject to all other site plan review regulations with the Planning Board and other permits required by the State) without any input from the Zoning Board. That hotel would not be subject to any design requirements – it could legally be painted an ugly, garish color. Once that hypothetical hotel were built, the owner or a subsequent owner could then apply for a special exception to convert the building to a multi-family workforce housing. The Board could not force the applicant to tear down the building and build a new one. Instead, the Board's decision would be limited to whether using that existing building as workforce housing instead of as a hotel would negatively impact the character of the district. The Board's findings that the appearance of the Proposal would negatively impact the Town is not the correct legal standard or reasonably supported by the evidence, given the location of the Property.

B. The large footprint of the building and parking lot is likewise immaterial.

41. The Board's finding that the large footprint of the building and parking lot would create an undesirable runoff issue is also immaterial. These conditions are not tied to the proposed use. These conditions are inherent in any large building that would be developed on the Property. The Applicant, or another owner, could build a large hotel, office building, or retail establishment on the Property as of right without any zoning approval. See Ordinance, Table 1. These hypothetical buildings could be as large (or larger) than the Proposal. This building would be

served by a parking lot. The use of multi-family workforce housing would have no greater impact on the abutting wetland and river than a large hotel or a large office building.

42. As discussed at the hearings on the Application, the Proposal would require approval from the Warner Planning Board and the New Hampshire Department of Environmental Services ("DES"). The DES permit process in particular would require investigation into and appropriate accommodation for the wetlands and any endangered species in the area. Approval from DES creates a presumption that the construction is safe and adequate for any environmental concerns. See Derry Sr. Dev., LLC v. Town of Derry, 157 N.H. 441, 449 (2008).

43. This Proposal cannot be constructed without DES approval.[4] If the Applicant is able to obtain DES approval, then concerns about wetlands and endangered species are superseded and presumptively moot. If the Proposal does not obtain DES approval, then it cannot be built and there would be no impact to the wetlands or endangered species anyway. In short, this concern is entirely addressed by the DES permitting process. A municipality cannot use zoning to supersede a state regulatory scheme. See North Country Environmental Services, Inc. v. Town of Bethlehem, 150 N.H. 606, 611-12 (2004).

44. This regulatory scheme also makes it essentially impossible for the Board to make a finding as to whether the wetlands or wildlife will be impacted because the essential facts of that issue have yet to be determined. Until the investigation and requirements of the DES permit are finalized, the nature of the construction and what protections may be necessary are unknown. Put another way, the DES permit process may require the Applicant to take affirmative steps to protect impacted wildlife. Until those steps are determined, it is impossible to say whether wildlife would

[4] The Board could certainly condition its special exception upon DES approval, but this is unnecessary as DES approval is required in either case.

be impacted. If DES determines, on the other hand, that the Proposal does not require any wildlife protections, a zoning board cannot supersede that state regulatory scheme.

C. The nearby wetlands and state highway would not impact the welfare of the residents

45. The Board found that the welfare of residents (presumably residents of the Property, not of the Town) would be compromised by being sandwiched between a wetland and state highway. As with the Board's determination that this Property should be reserved solely for commercial use, this finding effectively rewrites the Ordinance to rezone not only the Property but the entire INT District. With perhaps one exception, all of the Properties in the INT District are adjacent to either a river or the state highway Route 103 – and most of them are adjacent to both. By stating that the proximity to wetlands and Route 103 disqualifies a lot from being used for multi-family workforce housing, then this effectively disqualifies the entire INT District, rewriting the Zoning Ordinance that determined that the INT District was appropriate for multi-family workforce housing. The Board does not have the authority to rezone this District.

46. As to the underlying concern, the Notice of Decision did not specify the specific harm envisioned, but discussion at the hearing indicates that the primary concern is that children living on the Property would drown in the nearby Warner River, or run across the street and be hit by cars. There was no evidence that residents at this Property would be any less likely to supervise their children than other residents in Warner, nor is there any evidence that there is a large problem with drownings or children being hit by vehicles in Warner. In short, there is no reason why this Property would have any unusual risk.

47. A large portion of the nearby village residential district is located between Route 103 and the Warner River. Many lots in that area are smaller than the Property and residential buildings in those areas are closer to both the Warner River and Route 103. There has been no

noted risk or pattern of drownings or children being hit by vehicles from those residential properties sandwiched between Warner River and Route 103. It cannot be reasonably said that potential residents of this Proposal would be less likely to supervise or more likely to endanger their children. This finding is not supported by evidence and is legally erroneous.

CONCLUSION

48. As discussed herein, the Board's decision applies erroneous legal standards and analyses, and makes factual findings that are not reasonably supported by the evidence. For the reasons discussed in the Application and in the hearings thereon (including the hearings on the Prior Application) the Board should have granted the special exception.

WHEREFORE, CATCH respectfully requests that the Board:

A. Grant the foregoing motion and schedule a rehearing on the variance application; and

B. Upon rehearing, grant the variance.

Respectfully submitted,

CONCORD AREA TRUST FOR COMMUNITY HOUSING

By its attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Dated: July 24, 2025

By: */s/ Jeffrey C. Christensen*
Jeffrey C. Christensen, Esq. (NH Bar #265308)
Two Capital Plaza
Two Capital Plaza, 5th Floor
Concord, NH 03301
(603) 224-7761