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Court Update

CBDA DEVELOPMENT, LLC V. TOWN OF THORNTON

One Bite At the Apple Applies to Planning Board Decisions
New Hampshire Supreme Court, No. 2014-0775, 4/7/2016

In 2012, the Thornton Planning Board denied CBDA's site plan application for a recreational campground. In 2013, CBDA submitted another application, and, although the second application addressed some of the board's concerns from the first site plan, not all issues had been resolved. Therefore, the board determined, under the *Fisher* doctrine, that it could not consider the subsequent application because it did not materially differ in nature and degree from the first application.

The planning board was citing the doctrine set forth in the case of *Fisher v. Dover*, 120 N.H. 187 (1980), where the Court held that a board of adjustment cannot lawfully reach the merits of a subsequent application unless there is a material change in circumstances affecting the merits of the application or the application is for a use that materially differs in nature and degree from the prior application. This so-called "one bite at the apple" rule is intended to preserve the finality of zoning board decisions, protect the integrity of the zoning plan, and prevent an undue burden on other property owners.

Here, the Court answered a long-awaited question: whether this doctrine applies to successive site plan applications before planning boards. The Court determined that the policy rationales of *Fisher* applied equally to zoning boards and planning boards. Planning boards, like zoning boards, engage in quasi-judicial decision-making when hearing and deciding on applications; therefore, the need for finality and certainty of the administrative decision is the same. In addition, because planning boards have the ability to attach conditions to site plan approvals, planning board decisions similarly affect the development of municipalities. Thus, the community does rely on the planning board to uphold the integrity of the zoning plan. Furthermore, the fact that planning boards are required by statute to consider "completed" applications does not prohibit application of the *Fisher* doctrine. RSA 676:4, I(b) imposes a procedural requirement that planning boards to specify by regulation what constitutes a "complete" before it will consider the merits of an application. On the other hand, the question of material change in circumstances or in nature and degree of use is a fact-sensitive inquiry that

As a final matter, the Court upheld the planning board's determination that CBDA's modified application was not materially different than its first. Although CBDA had addressed some of the board's concerns, the subsequent application did not resolve one of the board's principal reasons for denial: the permanency and immobility of the homes in the proposed park. Therefore, the record supported the board's refusal to consider CBDA's second application.

Click Here to View the Court's Decision! (http://www.nhmunicipal.org/Resources/ViewDocument/654)

Practice Pointer: This means that before accepting a subsequent application, the planning board, like the zoning board, must determine whether there has been a material change in circumstances affecting the merits of the application or the application is for a use that materially differs in nature and degree from the prior application.

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THE SUPREME COURT OF NEW HAMPSHIRE

Grafton
No. 2014-0775

CBDA DEVELOPMENT, LLC

v.

TOWN OF THORNTON

Argued: September 16, 2015
Opinion Issued: April 7, 2016

Cronin, Bisson & Zalinsky, P.C., of Manchester (John G. Cronin and Daniel D. Muller, Jr. on the brief, and Mr. Cronin orally), for the plaintiff.

Drummond Woodsum, of Manchester (Matthew R. Serge on the brief and orally), for the defendant.

BASSETT, J. The plaintiff, CBDA Development, LLC (CBDA), appeals an order of the Superior Court (MacLeod, J.) affirming a decision of the Planning Board (Board) of the defendant, Town of Thornton (Town), not to consider CBDA's second site plan application for a proposed recreational campground. Applying the subsequent application doctrine set forth in Fisher v. City of Dover, 120 N.H. 187 (1980), the Board decided that it could not consider CBDA's second application because it did not materially differ in nature and degree from CBDA's initial application. CBDA argues that the trial court erred when it: (1) upheld the Board's decision to apply the Fisher doctrine to applications before a planning board; and (2) found that the Board reasonably

concluded that CBDA's second application did not materially differ from its first application. We affirm.

Fisher involved a challenge to a zoning board's grant of a second variance application. Fisher, 120 N.H. at 188-89. In Fisher, the applicant conceded that in its second application it sought a variance that "was substantially the same as the variance previously requested and ultimately denied by the [zoning] board." Id. at 188. We held that unless "a material change of circumstances affecting the merits of the application" has occurred or the application is "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." Id. at 190. Otherwise, we explained, "there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened, and an undue burden would be placed on property owners seeking to uphold the zoning plan." Id. at 188. Thus, we concluded that the zoning board erred as a matter of law when it reviewed and approved the subsequent application "without first finding either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied by the board." Id. at 191. We have never held that Fisher applies to successive site plan applications before a planning board.

The pertinent facts are as follows. In 2012, CBDA submitted a site plan application to the Board to develop a parcel of land in the Town. The application proposed a campground with approximately 250 campsites, each of which would house a "park model" recreational vehicle with two parking spaces. As described by the Board, the proposed park models were "basically . . . mobile home[s]" that were "meant to be permanent." (Quotations omitted.) CBDA would sell the park models to campers with one-year leases for each campsite, renewable for up to 60 years. The park models required professional removal and could remain on the campsites year-round; nonetheless, the campground would be closed to visitors for several months during the winter and spring. The campground would not accommodate campers who did not own park models.

The Board held several public hearings on the application, during which it expressed concerns about the apparently permanent nature of the proposed campground as evidenced by the mandatory use of park models on each site, the long-term lease agreements, the year-round storage of park models on campsites, and the need for professional removal of the park models. The Board ultimately denied CBDA's application, noting that "the two basic reasons" for the denial were that the campground was "not . . . open to the general public" and that "the initial application presented park model units with a greater amount of permanency than what is intended in the Thornton Campground Regulations and State statutes." In particular, the Board focused

upon the permanence and lack of easy portability of the park model structures, noting that, because the park models required professional removal, they were more similar to permanent dwellings than to campsites. It also emphasized its view that a "campground," as defined in the Town regulations and state statutes, must be a facility where visitors can come and go on a temporary basis. (Quotation omitted.) CBDA's subsequent administrative appeals were denied, and we affirmed.

In 2013, CBDA submitted a second site plan application for the same property. The application proposed a "267 site campground, with associated access roads, onsite septic systems with site hook-ups, community wells and [a] public water system with site hook-ups." The Board held public hearings, during which, citing the Fisher doctrine, it questioned CBDA about the differences between the two applications. The Board noted that it could not consider the merits of CBDA's second application unless "at a minimum the new application [had] changed in such a way that it addresse[d] the reasons for denial [of] the initial application." CBDA explained that, in response to the concerns raised by the Board during CBDA's initial application process, the second application proposed "more campsites, no requirement for a park model to be on every site, no requirement for the park model to be purchased on site from the developer, no long[-]term lease agreement," and "smaller [camp]sites for pop-ups and tents." CBDA also stated that the new application was designed to "capture as much of the transient business" from the public as possible, rather than focusing on use by long-term tenants. When asked whether "the recreational vehicles [would] be stationary on site for the season," CBDA responded that the vehicles could be stored on the campsites when unoccupied, and that there would be "no maximum length of stay."

After comparing CBDA's second application with its prior application, the Board decided that, although the second application addressed the issue of public access to the campground, it did not resolve the Board's concern about the permanent nature of the park models on the campsites. The Board unanimously agreed that it could not review CBDA's second application because the new application did not materially differ in nature and degree from the initial application. See Fisher, 120 N.H. at 190.

CBDA appealed the Board's decision to the trial court by way of writ of certiorari. See DHB v. Town of Pembroke, 152 N.H. 314, 318 (2005) (allowing appellate review by writ of certiorari of planning board's decision not to accept an application). CBDA argued that the Board erred when it refused to consider CBDA's second application "under the subsequent application doctrine" because that doctrine "was created in the context of zoning board appeals" and was not applicable to planning board decisions. Alternatively, CBDA argued that, even if the subsequent application doctrine applied to applications before a planning board, the Board acted unreasonably when it concluded that CBDA's second application did not materially differ from the initial application.

The trial court affirmed the Board's decision to apply the subsequent application doctrine to CBDA's second application, observing that the policy goals of Fisher — the finality of proceedings, upholding the integrity of the zoning plan, and protecting the interests of those who rely upon the zoning plan, see Fisher, 120 N.H. at 190 — "are as relevant and critical in the planning board context as they are in zoning board appeals." The trial court also ruled that the Board "reasonably found that [CBDA's] subsequent application was not materially different" from its original application because the subsequent application "did not adequately address [the Board's] explicit concern about the permanency of the campsites in its proposal." This appeal followed.

I

On appeal, CBDA first argues that the subsequent application doctrine does not apply in the planning board context. CBDA argues that the policy rationales underlying our decision in Fisher reflect the particular context of zoning board appeals, and that there are meaningful differences between the zoning and planning contexts. CBDA also argues that, because a planning board is statutorily required to "define through regulation the conditions under which it will accept an application," planning boards can achieve finality in proceedings by adopting regulations that define a "complete application" as one "which satisfies a standard akin to the subsequent application doctrine." Therefore, CBDA argues, the subsequent application doctrine is not needed in this context. The Town counters that the principles underlying our decision in Fisher — particularly that of finality — apply with equal force to planning board decisions, and, therefore, the subsequent application doctrine should apply in this context. The Town also argues that the fact "[t]hat an application is technically complete for regulatory purposes . . . does not affect the applicability of the Fisher doctrine." We agree with the Town.

Superior court review of planning board decisions is limited. Upton v. Town of Hopkinton, 157 N.H. 115, 118 (2008). 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. Upton, 157 N.H. at 118. We will uphold the decision on appeal unless it is unsupported by the evidence or legally erroneous. Id.

Although we have never held that the Fisher doctrine applies to successive site plan applications before a planning board, we agree with the trial court's observation that the policy rationales underlying our decision in Fisher "are as relevant . . . in the planning board context as they are in zoning board appeals." See Fisher, 120 N.H. at 188-90. First, finality is essential to

planning board proceedings. Administrative finality "prevents repetitive duplicative applications for the same relief, thereby conserving the resources of the administrative agency and of interested third parties that may intervene." Johnston Ambulatory Surg. Assoc. v. Nolan, 755 A.2d 799, 810 (R.I. 2000); see also Appeal of Town of Seabrook, 163 N.H. 635, 655 (2012) (observing that the subsequent application doctrine is a "similar doctrine" to administrative finality). It also "limits arbitrary and capricious administrative decision-making, while still preserving the ability of an agency to revisit earlier decisions when circumstances have changed." Johnston, 755 A.2d at 810.

Just as zoning boards act in a quasi-judicial capacity when interpreting a zoning ordinance and determining whether to grant a variance, see Taber v. Town of Westmoreland, 140 N.H. 613, 616 (1996), planning boards act in a quasi-judicial manner when approving or denying a site plan application, see Winslow v. Holderness Planning Board, 125 N.H. 262, 267 (1984) (referring to certain actions of a planning board as quasi-judicial). See also Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544 (1979) (noting that "[t]he interests of the parties and the type of issues presented in a site plan review do not differ substantially from those present in the granting of a special exception or a variance" before a zoning board). Thus, allowing applicants to continue submitting substantially similar site plan applications would, just as in zoning board appeals, result in uncertainty about the administrative decision. Accordingly, we conclude that finality is no less important in the planning context than in the zoning context. Cf. Johnston, 755 A.2d at 810 (observing that there "is no inherent reason that the rule [of administrative finality] should not be generally applicable to most areas of administrative regulation").

Moreover, the fact that planning boards must accept for review any "completed" application does not preclude the application of Fisher in the planning board context. As CBDA correctly observes, planning boards are required by statute to "specify by regulation what constitutes a completed application sufficient to invoke jurisdiction to obtain approval." RSA 676:4, I(b) (Supp. 2015). However, determining whether an application is "complete" is an administrative task by which a planning board ensures only that the applicant has provided "sufficient information . . . to allow the board to proceed with consideration and to make an informed decision" as to whether the proposed development satisfies basic requirements. Id.; see Accurate Transp., Inc. v. Town of Derry, 168 N.H. 108, 115 (2015) ("According to the plain language of RSA 676:4, I . . . accepting jurisdiction of a site plan application is merely a procedural prerequisite to a planning board's consideration of the merits of an application." (emphasis added)). In making that determination, the Board here utilizes a "Site Plan Review Checklist," which includes such items as the name of the site plan and whether the site plan includes provisions for snow removal.

In contrast, whether a subsequent site plan application materially differs from a prior application involving the same property is a fact-sensitive inquiry

that cannot easily be condensed into a simple checklist. See Fisher, 120 N.H. at 190-91 ("The determination of whether changed circumstances exist is a question of fact which necessitates a consideration of the circumstances which existed at the time of the prior denial." (quotation omitted)). Thus, as the trial court observed:

> The fact that planning boards are required by statute to consider "completed" applications does not supersede the interests of finality and judicial efficiency embodied by the Fisher doctrine. Indeed, it would be a waste of administrative resources for the planning board to repetitiously reconsider an application it had previously denied simply because each time the application submitted contains all materials to be considered "complete" under the planning board's regulations.

As to the two remaining rationales underlying our decision in Fisher — upholding the integrity of the zoning plan and protecting the interests of those relying upon the plan — CBDA argues that, because site plan review "does not concern whether a use is appropriate for a particular parcel of land," subsequent site plan applications do not constitute a threat to the zoning plan. We disagree.

Although site plan review "does not give the planning board the authority to deny a particular use simply because it does not feel that the proposed use is an appropriate use of the land," Summa Humma Enters. v. Town of Tilton, 151 N.H. 75, 78 (2004) (quotation omitted), we have recognized that site plan review is not merely a "mechanical exercise" of implementing the "specific limitations imposed by ordinances and statutes." Id. at 79. Rather, the planning board has the authority to impose conditions upon site plans that are reasonably related to land use goals and other considerations within its purview, including assuring that sites "will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety, or prosperity of abutting property owners or the general public." Id. at 78 (quotation omitted). For instance, in Summa Humma, the plaintiff argued that the planning board lacked the authority to deny a proposal to construct a 90-foot flagpole because there was no controlling statute or zoning ordinance regulating the height of flagpoles. Id. We disagreed, holding that, because the planning board had concluded that a flagpole of no more than 50 feet in height was necessary for the "safe and attractive development" of the site, the planning board had the authority to limit the height of the proposed flagpole. Id. at 78-79 (quotation omitted).

Thus, as Summa Humma makes clear, planning board decisions — like zoning board decisions — affect the development of municipalities. Indeed, site plan review is designed to ensure that, in "cases where it would not be feasible to set forth in the [zoning] ordinance a set of specific requirements upon which

a building inspector could readily grant or refuse a permit," sites are developed in such a way that they "fit into the area in which they are being constructed without causing drainage, traffic, or lighting problems." Id. at 78 (quotations omitted). Thus, just as community members rely upon zoning boards to uphold the integrity of zoning plans, they may reasonably expect planning boards to make decisions that will not negatively affect their properties.

Finally, we note that nothing in our case law restricts Fisher to zoning board decisions. As we have recognized, "[t]he rule in Fisher is consistent with the majority rule that a new application for administrative relief or development permission may be considered by a board if there is a substantial change in the circumstances or the conditions relevant to the application." Brandt Dev. Co. of N.H. v. City of Somersworth, 162 N.H. 553, 556 (2011) (quotation and ellipsis omitted); see 4 E. Ziegler, Jr., Rathkopf's The Law of Zoning and Planning § 68:9 (2012). Accordingly, we hold that the subsequent application doctrine set forth in Fisher applies in the planning board context. Thus, the trial court did not err when it upheld the Board's decision to apply the subsequent application doctrine to determine whether it could properly consider CBDA's second site plan application.

II

CBDA next argues that its second application was materially different from its prior application, and, consequently, the trial court erred by upholding the Board's decision not to consider the merits of the application. CBDA argues that the Fisher doctrine "does not bar subsequent applications in which the applicant makes an effort to address [the] concerns raised [by the Board] with respect to the initial denied application." The Town counters that the Board properly denied CBDA's subsequent application under the Fisher doctrine because it concluded that the modified application did not sufficiently resolve the Board's concerns about the initial application. We agree with the Town.

Applying the Fisher doctrine in this context, an applicant before a planning board bears the burden of demonstrating that a subsequent application "materially differs in nature and degree from its predecessor." Fisher, 120 N.H. at 190. The determination of whether changed circumstances exist is a question of fact. Id. at 190-91. This determination must be made, in the first instance, by the Board. See Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529, 536 (2009). On appeal, the board's factual findings are deemed prima facie lawful and reasonable. Morgenstern v. Town of Rye, 147 N.H. 558, 565 (2002). We will uphold the trial court's decision unless it is not supported by the evidence or is legally erroneous. Id.

We have held that Fisher does not preclude consideration of a subsequent application — explicitly or implicitly invited by a zoning board —

which has been modified to address the board's concerns about the initial application. Hill-Grant, 159 N.H. at 536. For example, in Morgenstern, we concluded that the trial court erred when it upheld the zoning board of adjustment's (ZBA) conclusion that, under Fisher, it could not consider the plaintiff's second application for a variance. Morgenstern, 147 N.H. at 566. We explained:

> Throughout the litigation in this case, the town has taken the position that it denied the plaintiff's request for a variance because of concerns about the particular proposed structure's impact on the wetlands. Yet, when the plaintiff submitted a new application . . . that allegedly addressed these concerns, the ZBA declined to hear the application on the merits because it concluded that the application did not differ materially from the [original] application.

Id. at 564-65. Thus, we concluded that, "[g]iven the nature of the plaintiff's initial application and the ZBA's reasons for denying the variance," the trial court erred when it upheld the ZBA's refusal to consider the subsequent application because it was submitted "at the town's invitation" and addressed the ZBA's specific concerns "about the proposed structure's impact on the wetlands." Id. at 566.

Similarly, in Hill-Grant we concluded that Fisher did not preclude the consideration of a second application for a variance when the ZBA had expressed that it was willing to consider an application with specific modifications. Hill-Grant, 159 N.H. at 535-37. In that case, the plaintiff sought a permit to build a house at an elevation higher than the zoning ordinance limit of 900 feet. Id. at 531. The ZBA denied the initial request, but stated that, although it would not grant a general variance to build above the proscribed height, if the applicant resubmitted its application with a "specific location" and "certain elevation," the ZBA might grant a variance. Id. at 531, 536 (quotations omitted). We observed that "it is logical to presume that if the ZBA invites submission of a subsequent application modified to meet its concerns, it would find an application so modified to be materially different from its predecessor, thus satisfying Fisher." Id. at 536 (emphasis added). Thus, we concluded that the ZBA could consider the plaintiff's subsequent application to build on its property. Id. at 536-37.

Accordingly, before accepting a subsequent application under the Fisher doctrine, a board must be satisfied that the subsequent application has been modified so as to meaningfully resolve the board's initial concerns. When a board has identified fundamental issues with an application, those issues must be addressed before the board — as well as the interested community members — should be required to invest additional time and resources into considering the merits of the application. An administrative board "should not be required to reconsider an application based on the occurrence of an inconsequential

change, when the board inevitably will reject the application for the same reasons as the initial denial." Brandt, 162 N.H. at 556 (quotation omitted).

Here, the Board reasonably concluded that CBDA's modified application was not "materially different" from CBDA's initial site plan application. Although the Board identified two primary reasons for its denial of the initial application — that the campground was "not . . . open to the general public" and "the initial application presented park model units with a greater amount of permanency than what is intended in the Thornton Campground Regulations and State statutes" — it is clear from the record that the Board's principal concern was the permanency and relative immobility of the proposed park model units. When denying the initial application, the Board noted that the park models were more similar to permanent dwellings than to campsites, and emphasized that a "traditional campground" was occupied on a temporary basis. (Quotation omitted.) When reviewing CBDA's subsequent application, the Board expressed continued concerns about the permanency of the proposed campground. In particular, the Board noted that whether the park model units would be able "to stay year round" was "a critical issue relative to the initial application." The Board also cited CBDA's statement that, despite the changes contained in the new application, 219 campsites could still be occupied by park models, and observed that, given this fact, and because park models "are not generally set up for temporary use," the "temporary occupancy of the campsites ha[d] not been addressed in the second application." The Board noted that if CBDA had prohibited the use of park models on the campsites or limited the time that each campsite could be occupied by a park model, CBDA's proposal would have been materially different because it would have resolved its concern about the permanency of the campsites.

Although under CBDA's second application, it was only possible — rather than certain — that 219 campsites would be occupied by park models, the Board was not, for that reason, required to conclude that the second application was materially different from the first. As CBDA acknowledges on appeal, "the public's preferences will dictate the camping units present on the site as well as [the] length[] of stay during the time when the campground is open." Thus, the principal issue of concern to the Board was not resolved.

Accordingly, we conclude that the record supports the Board's refusal to consider CBDA's second application and that the trial court did not err by affirming the Board's decision. Although CBDA identifies other arguments in its brief, because these issues were not raised in the notice of appeal, the issues were not properly preserved and are deemed waived. See Dupont v. N.H. Real Estate Comm'n, 157 N.H. 658, 662 (2008).

Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, and LYNN, JJ., concurred.

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Court Update

GREEN V. SAU #55

Electronic Records Must be Produced Electronically
New Hampshire Supreme Court No. 2015-0274, 4/19/2016

This case began when the plaintiff, a member of the school board, made a Right-to-Know Law request for various records from the School Administrative Unit. These records apparently existed in electronic form. The SAU responded that the board member could come in the "see" the documents, and so the board member instead requested that the records be sent electronically. The plaintiff then further stated she would take the records in paper or electronic form. The SAU adhered to its current offer to allow her to see the records at the business office. At the trial court level, the judge determined that the Right-to-Know Law did not require electronic documents to be produced electronically, interpreting RSA 91-A:4, V as giving public bodies and agencies an option to do so, rather than a mandate.

On appeal, the issue was whether governmental records, which exist electronically, must be provided electronically in response to a Right-to-Know Law request. At the center of the appeal was RSA 91-A:4, V and its use of the word "may." The plaintiff argued that the first sentence of the statute gives two options for disclosure: provide original records *or* copy records to electronic format. Furthermore, she argued that the second sentence of RSA 91-A:4, V meant that a hard-copy could be produced only if copying the requested documents to electronic media is not "reasonably practical" or if a different method of receipt is requested.

On the other hand, the SAU argued that the use of the word "may" rather than "shall" means that it was their discretion whether to produce the records electronically. They further argued that the law puts no affirmative production duty on public bodies, but rather requires only that records be made available for inspection and copying.

The Court found both interpretations to be reasonable, rendering the statute ambiguous. Therefore, to interpret these provisions of RSA 91-A, the Court looked to the purpose of the law and the broad construction of it, holding in favor of the plaintiff. The Court said there was no evidence that the paper records the SAU offered to make available were not the "original records," or that sending them electronically was not "reasonably practical." The Court also noted that many records are maintained electronically, and requiring electronic production in these circumstances was not only generally more efficient and cost-effective, but also "ensures the greatest degree of openness and the greatest amount of public access to the decisions made by the public officials," thus furthering the purpose of the law.

Click Here to View the Court's Decision. (http://www.nhmunicipal.org/Resources/ViewDocument/662)

Practice Pointer: The Court's interpretation solidifies what many municipalities are already doing. When records exist electronically, the individual requests to receive them electronically, and it is reasonable practical to do so (e.g., the records can be emailed), the municipality must send them electronically. However, this case does not appear to require municipalities to create electronic copies of records that do not already exist electronically (e.g., only exist on paper).

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THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham
No. 2015-0274

DONNA M. GREEN

v.

SCHOOL ADMINISTRATIVE UNIT #55 & a.

Argued: January 7, 2016
Opinion Issued: April 19, 2016

Douglas, Leonard & Garvey, P.C., of Concord (Richard J. Lehmann on the brief and orally), for the plaintiff.

Drummond Woodsum & MacMahon, of Manchester (Matthew R. Serge and Anna B. Cole on the brief, and Mr. Serge orally), for the defendants.

BASSETT, J. The plaintiff, Donna M. Green, appeals a decision of the Superior Court (Anderson, J.) entering judgment in favor of the defendants — School Administrative Unit #55 (SAU), Timberlane Regional School District, Nancy Steenson, and Earl F. Metzler, II — and concluding that the plaintiff was not entitled to receive electronic copies of documents that she had requested from the defendants. We reverse.

The following facts are undisputed or are otherwise supported by the record. The plaintiff is a member of the Timberlane Regional School Board. On

January 21, 2015, she requested budget-related documents from the SAU for herself and the school board. In response, Steenson, the chair of the school board, requested that the plaintiff make a motion for the documents on behalf of the school board.

On January 23, the plaintiff informed the SAU that her document request was made pursuant to the Right-to-Know Law. See generally RSA ch. 91-A (2013 & Supp. 2015). On January 26, the SAU responded that the plaintiff could make an appointment to "see the documents" that she had requested. The plaintiff replied, "in that case, give me the file electronically and we will all save money and time"; in response to this communication, the SAU stated that it had already responded to the plaintiff's request. The plaintiff then noted that her "request is for an electronic file . . . or a paper report, whichever suits the district," and she declined to make an appointment to view the documents. The plaintiff explained that "[a]ll of the documents requested could have been emailed or copied in the time it has taken to answer these excuses for not providing [them]. . . . This isn't that difficult." In response, the SAU stated that the documents that she requested were immediately "available for public inspection."

On January 27 and January 29, the plaintiff again requested the documents in electronic format. The SAU refused to provide the documents in electronic format, again noting that the paper documents were available for inspection. This response by the SAU was consistent with its written policy governing Right-to-Know requests, which states, in pertinent part, that "[m]aterials and/[or] documentation produced to fulfill a Right to Know request shall be subject to a charge [of] $.50 per page" and that "only hardcopies will be produced; no electronic copies will be provided."

On February 3, the plaintiff filed a complaint in superior court alleging that the defendants violated RSA 91-A:4 (2013) by not producing the requested documents in electronic format. The plaintiff requested that the trial court order the SAU to "immediately provide an electronic file [of the requested documents] in a mutually agreeable format." In response, the defendants filed a motion to dismiss in which they argued that they were not obligated to provide the requested documents in electronic format and that they complied with the Right-to-Know Law by making the paper documents available for inspection.

Following a hearing, the trial court concluded that the plaintiff was not entitled to electronic copies of the requested documents. Although the trial court noted that there "may be a strong policy argument to be made" for requiring public entities to produce documents in electronic format, the trial court explained that RSA 91-A:4, V states "in fairly plain language" that "it is the choice of the public entity whether to produce documents in electronic or conventional format." Because the trial court found that the statute provided

the SAU with discretion as to whether to provide the documents in electronic format, it entered judgment in favor of the defendants. The plaintiff filed a motion for reconsideration, which was denied. This appeal followed.

On appeal, the plaintiff argues that, under RSA 91-A:4, V, she was entitled to receive the requested documents in electronic format, and, therefore, the trial court's decision to the contrary was error. Although the defendants do not dispute that the requested documents are governmental records that are maintained in electronic format, they argue that the trial court correctly determined that, under RSA 91-A:4, V, they are not required to provide the records to the plaintiff in electronic format.

Resolving this issue requires us to interpret the Right-to-Know Law; therefore, our review is de novo. See Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 703 (2010). "The ordinary rules of statutory construction apply to our review of the Right-to-Know Law." CaremarkPCS Health v. N.H. Dep't of Admin. Servs., 167 N.H. 583, 587 (2015) (quotation omitted). "Thus, we are the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole." Id. (quotation omitted). "When examining the language of a statute, we ascribe the plain and ordinary meaning to the words used." Id. (quotation omitted). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. (quotation omitted). "We also interpret a statute in the context of the overall statutory scheme and not in isolation." Id. (quotation omitted).

Because the "purpose of the Right-to-Know Law is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people," we "resolve questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." Id. (quotations omitted); see Prof'l Firefighters of N.H., 159 N.H. at 705; see also N.H. CONST. pt. I, art. 8. "As a result, we broadly construe provisions favoring disclosure and interpret the exemptions restrictively." CaremarkPCS Health, 167 N.H. at 587 (quotation omitted).

RSA 91-A:4, V provides, in pertinent part, that:

> In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different

> method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1.

(Emphases added.) RSA 91-A:4, IV, in turn, provides, in relevant part, that:

> Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release. . . . If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency.

The plaintiff argues that, although RSA 91-A:4, V uses the word "may," the statute "clearly indicates that the governmental unit is not given unfettered discretion to produce information in any way it chooses." Cf. City of Rochester v. Corpening, 153 N.H. 571, 574 (2006) ("The general rule of statutory construction is that the word 'may' makes enforcement of a statute permissive and that the word 'shall' requires mandatory enforcement." (quotation omitted)). According to the plaintiff, the first sentence of RSA 91-A:4, V provides the defendants not with the option of producing "a paper printout of electronic records," but rather with a choice of whether to provide either the "original records," or to, instead, "copy governmental records requested to electronic media using standard or common file formats." (Quotations omitted.) The plaintiff contends that the "original records" in this case reside on a computer in the SAU, and, therefore, the defendants were required to produce the documents in electronic form — either by providing the original documents or by copying them to electronic media using standard or common file formats.

The plaintiff further argues that the second sentence of RSA 91-A:4, V "makes it clear that the authority to produce a hard-copy form of an electronically stored document arises only . . . if copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method." (Quotation omitted.) According to her, neither precondition is met because the trial court did not determine whether copying to electronic media is not reasonably practicable, and she eventually sought the records only in electronic format.

In response, the defendants argue that the plaintiff misreads RSA 91-A:4, V. The defendants contend that, because RSA 91-A:4, V uses the word

"may" as opposed to "shall," the statute simply gives public bodies the option of producing governmental records in electronic format. See City of Rochester, 153 N.H. at 574 (explaining the difference between the words "may" and "shall"). For support, the defendants contrast this statute with statutes in other states concerning the public's access to governmental records, which, unlike RSA 91-A:4, V, explicitly require the disclosure of governmental records in the format requested. See, e.g., Neb. Rev. Stat. § 84-712(3)(a) (2014) (providing that public records "may be obtained in any form designated by the requester in which the public record is maintained or produced, including, but not limited to, printouts, electronic data, discs, tapes, and photocopies"); Vt. Stat. Ann. tit. 1, § 316(i) (2015) ("If an agency maintains public records in an electronic format, nonexempt public records shall be available for copying in either the standard electronic format or the standard paper format, as designated by the party requesting the records.").

The defendants also assert that the reference to RSA 91-A:4, IV in RSA 91-A:4, V establishes that public bodies are required only to make governmental records available for inspection and copying, and that there is no affirmative duty to provide copies of records to requesting parties. See RSA 91-A:4, IV ("Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release."). Thus, because the defendants made the paper documents available to the plaintiff for inspection and copying, they argue that they fulfilled their statutory obligations. See Gallagher v. Town of Windham, 121 N.H. 156, 159 (1981) (concluding, under prior version of RSA 91-A:4, that there is no "absolute duty on towns or agencies to provide copies of public records to citizens" because the statute contemplates only "that public records be made available to individual members of the public for their inspection and reproduction").

After reviewing the parties' arguments, we find that both proffered interpretations of RSA 91-A:4, V are reasonable. Accordingly, we conclude that the statute is ambiguous. See Appeal of Old Dutch Mustard Co., 166 N.H. 501, 507 (2014). "Under such circumstances, we turn to the legislative history to aid in our interpretation of the meaning of the statutory language." Id.; see United States v. Howe, 167 N.H. 143, 148-49 (2014) (turning to legislative history because parties' proffered constructions of statute were both reasonable). Here, however, the legislative history of RSA 91-A:4, V provides little guidance regarding the specific issue before us. We, therefore, look to the purpose of the Right-to-Know Law, which is to "increas[e] public access to all public documents and governmental proceedings, and to provide the utmost information to the public about what its government is up to." Prof'l Firefighters of N.H., 159 N.H. at 705 (quotation and citations omitted).

In light of the purpose of the Right-to-Know Law, and our broad construction of it, we conclude that the trial court erred when it determined that the plaintiff was not entitled to the requested documents in electronic format. Although the SAU notified the plaintiff that the documents that she requested were available for inspection, there is no evidence in the record that the paper documents made available constituted "original records" as contemplated by RSA 91-A:4, V. Moreover, there is no evidence that it was "not reasonably practicable" to copy the requested documents "to electronic media using standard or common file formats." RSA 91-A:4, V. Further, although the plaintiff initially requested the documents in either paper or electronic format, she later modified that request — including the request set forth in the complaint that she filed in the trial court — seeking the documents in only electronic format. We also note that the defendants have not argued that, in order to produce the requested documents in electronic format, they would be required to compile or assemble the documents into a new format. See RSA 91-A:4, VII ("Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency."); see also Hawkins v. N.H. Dep't of Health and Human Services, 147 N.H. 376, 379 (2001) (explaining that, under a prior version of the Right-to-Know Law, the public body was not required to create a new document in response to a request under RSA chapter 91-A). Nor have the defendants argued that the requested documents contained confidential information. See RSA 91-A:4, V (stating that confidential information shall not be provided). Under these circumstances, we cannot conclude that the defendants fulfilled their statutory obligations.

Accordingly, we conclude that the plaintiff was entitled to the requested documents in electronic format. The trial court's decision to the contrary was, therefore, in error.

We observe that requiring the defendants to produce the requested documents in electronic format advances the purpose of the Right-to-Know Law, which is to improve public access to governmental records and "provide the utmost information to the public about what [the] government is up to." Prof'l Firefighters of N.H., 159 N.H. at 705 (quotation omitted). Given that the "overwhelming majority of information" today "is created and stored electronically," U.S. ex rel. Carter v. Bridgepoint Educ., Inc., 305 F.R.D. 225, 237 n.23 (S.D. Cal. 2015) (quotation omitted), we agree with the plaintiff that the "[d]issemination of public, non-confidential information in commonly used [electronic] formats ensures the greatest degree of openness and the greatest amount of public access to the decisions made by the public officials." See Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 318 (S.D.N.Y. 2003) (explaining that, unlike paper evidence, electronic evidence "can be searched automatically, key words can be run . . . , and the production can be made in electronic form obviating the need for mass photocopying").

Furthermore, producing electronic documents is often more efficient and cost-effective than producing them in paper form. See Mechling v. City of Monroe, 222 P.3d 808, 817 (Wash. Ct. App. 2009) ("Providing electronic records can be cheaper and easier for [a public body] than paper records." (quotation omitted)). We recognized this reality over 40 years ago in Menge v. Manchester, 113 N.H. 533 (1973), in which we held that, under a prior version of the Right-to-Know Law, the plaintiff was entitled to the production of certain computerized tapes of field record cards from the defendants. Menge, 113 N.H. at 535-38. As we stated in Menge:

> The ease and minimal cost of the [computerized] tape reproduction as compared to the expense and labor involved in abstracting the information from the field cards are a common sense argument in favor of the former. . . . Taking into account the practical realities of the situation, we believe it not only possible, but in accord with our law and what seems to be its basic philosophy, to so construe the statute as to permit plaintiff to have the reproduced tapes at his expense.

Id. at 538 (quotation omitted). It is worth noting that when we decided Menge, personal computers, laptops, tablets, smartphones, and other forms of modern technology did not exist. Cf. Bancorp Services v. Sun Life Assur. Co. of Canada, 687 F.3d 1266, 1277 (Fed. Cir. 2012) (observing that "[m]odern computer technology offers immense capabilities and a broad range of utilities"). In the intervening 43 years, advances in storing, copying, transferring, and analyzing computerized data have facilitated the public's access to "the utmost information . . . about what its government is up to," Prof'l Firefighters of N.H., 159 N.H. at 705 (quotation omitted). See John B. v. Goetz, 879 F. Supp. 2d 787, 877 (M.D. Tenn. 2010) ("Electronically stored information, if kept in electronic form . . . can be very inexpensive to search through and sort using simple, readily available technologies . . . . The cost of copying and transporting electronically stored information is virtually nil." (quotation and emphasis omitted)).

In sum, under all the circumstances, we conclude that the plaintiff is entitled to the requested documents in electronic format. We note, however, that if the legislature disagrees with our statutory interpretation, it is "free to amend the statute as it sees fit." Forster v. Town of Henniker, 167 N.H. 745, 753 (2015). Finally, any issues raised in the notice of appeal that were not briefed are deemed waived. See Waterfield v. Meredith Corp., 161 N.H. 707, 713 (2011).

Reversed.

DALIANIS, C.J., and HICKS, CONBOY, and LYNN, JJ., concurred.