STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket Number 2017-00008

SAN-KEN HOMES, INC.,

APPELLANT,

V.

NEW HAMPSHIRE ATTORNEY GENERAL, CONSUMER PROTECTION AND ANTITRUST BUREAU,

APPELLEE.

RULE 7 APPEAL OF FINAL DECISION OF THE HILLSBOROUGH SUPERIOR COURT SOUTHERN DISTRICT

BRIEF OF APPELLANT, SAN-KEN HOMES, INC.

Attorneys for the Appellant:
Bernstein, Shur, Sawyer & Nelson, P.A.

Michael A. Klass, Esq., #18947
mklass@bernsteinshur.com
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, NH 03105
603-623-8700

Oral Argument by: Michael A. Klass, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

TEXT OF RELEVANT STATUTES

RSA 76:17, Appellant's Appendix ("App.") at 1.

RSA 151:4, App. at 2.

RSA 356-A et seq., App at 4.

RSA 365:21, App. at 22.

RSA 541 et seq., App. at 23.

RSA 672 et seq., App. at 28.

RSA 674 (selected provisions), App. at 33.

RSA 675:6 et seq., App. at 47.

N.H. Admin. Rules, Jus 1300 et seq., App. at 48.

QUESTIONS PRESENTED ON APPEAL

1. Whether the trial court erred in applying a "clear preponderance" standard of review (thereby conferring substantial deference to the Bureau) as opposed to reviewing the Bureau's underlying decision "as justice may require" consistent with the language of RSA 356-A:14?

   Appellant's Trial Memorandum (Feb. 29, 2016) at 6-7; App. at 88.

2. Whether the trial court erred in determining that San-Ken was a successor subdivider whose subdivision lots required registration or exemption under RSA 356-A, notwithstanding that San-Ken purchased only nine lots at foreclosure sale?

   Appellant's Trial Memorandum (Feb. 29, 2016) at 10-13, App. at 92.

3. Whether the trial court erred in determining that the Bureau was authorized under RSA 356-A to require San-Ken to complete certain subdivision infrastructure improvements above and beyond what was required by the local planning board?

   Appellant's Trial Memorandum (Feb. 29, 2016) at 13-15, App. at 95.

4. Whether the trial court erred in impermissibly expanding the jurisdiction of the Bureau into matters explicitly reserved by statute for local planning boards, in contravention of established law and practice and in a manner that would result in severe and unintended consequences?

   Appellant's Trial Memorandum (Feb. 29, 2016) at 14-15, App. at 95.

STATEMENT OF THE CASE AND FACTS

This is an appeal objecting to certain efforts of the New Hampshire Office of the Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"), by which the Bureau has unreasonably and unlawfully taken the position of a super planning board. Appellant San-Ken Homes, Inc. ("San-Ken" or "Appellant") appeals a conditional Certificate of Exemption issued by the Bureau, under RSA 356-A (the Land Sales Full Disclosure Act

and herein generally referenced as the "Act"),[1] concerning nine lots within a sixteen-lot subdivision ("Subdivision") located in the Town of New Ipswich ("Town"). Appellant contends that the trial court erred when it determined that San-Ken was a successor subdivider merely by purchasing nine lots in the Subdivision at foreclosure sale. Thus, San-Ken should not have been required to register those nine lots with the Bureau at the onset. Appellant also contends that the Bureau lacks the statutory authority to require San-Ken to make certain road improvements beyond those approved by the Town. In demanding that San-Ken improve the Subdivision's private road beyond what was required by the Town of New Ipswich Planning Board ("Planning Board"), the Bureau unlawfully acted outside of its limited jurisdiction and into matters that are exclusively reserved by state statute for local planning boards. Because the Bureau acted outside of its jurisdiction, its requirement that San-Ken further improve the Subdivision's road is unreasonable, unlawful, and should be removed as a condition of exemption under the Act.

The Subdivision and its Amendment

By deed recorded with the Hillsborough County Registry of Deeds ("Registry") on December 5, 2005, the Subdivision's developer (an entity unrelated to Appellant)—112 Chestnut Street, LLC ("112 Chestnut")—took title to certain property located in New Ipswich that now comprises the Subdivision. Certified Record ("CR") at 69. At the same time, 112 Chestnut granted a mortgage to TD Banknorth, N.A. encumbering title to such property. CR

[1] Generally stated, the Act imposes conveyancing restrictions upon subdivisions greater than fifteen lots pending satisfactory review by the Bureau into the developer. Before a subdivider may convey such land, he or she must provide the Bureau with various information concerning the proposed financing, development plan, and related advertisements in order to provide assurances to prospective purchasers. See N.H. Admin. Rules, Jus 1300 et seq. Subdivisions smaller than or equal to fifty lots in size may request an exemption from registration under the Act, as opposed to full registration, pursuant to RSA 356-A:3.

at 469, 488. Thereafter, 112 Chestnut obtained various state and local land use permits, including from the Planning Board, allowing for the development of the property into the Subdivision, which consisted of a total of 16 lots. CR at 588-589, 634-647.

The Subdivision was accepted and approved by the Planning Board on June 7, 2006. CR at 474. The Subdivision contains a single private roadway known as Old Beaver Road ("Private Road"), which provides access from the Subdivision's lots to the adjacent public way. CR at 111. Under cover letter dated August 11, 2006, 112 Chestnut applied with the Bureau for Exemption from Registration pursuant to RSA 356-A:3, II. CR at 463. The Bureau issued a Certificate of Exemption concerning the Subdivision dated October 27, 2006, and such certificate was recorded with the Registry on November 1, 2006 at Book 7762, Page 2345. CR at 674-675.

Thereafter, 112 Chestnut constructed the Private Road but did not install a second topcourse of asphalt on the road's surface. CR at 5. That said, in its current form, the Road exceeds DOT minimum standards in width and paving and provides safe access to the Subdivision's lot owners. CR at 5. During its ownership of the Subdivision, 112 Chestnut conveyed seven of the lots within the Subdivision to third parties. CR at 4. Before San-Ken's involvement in the matter, the Town discharged a portion of the bond that 112 Chestnut posted to secure the performance of the Road and then allowed the remaining security to expire. CR at 2, 5.

Upon default of the conditions set forth in 112 Chestnut's mortgage, its mortgagee foreclosed on the remaining portion of the Subdivision by foreclosure sale held on May 13, 2014. CR at 65, 67. By Foreclosure Deed recorded with the Registry on June 19, 2014 at Book 8668, Page 996, San-Ken purchased its nine lots within the Subdivision. CR at 61.

After its application for a building permit was denied by the Town, CR at 42, San-Ken sought to modify the Subdivision conditions to accept the Road as it existed. CR at 186-189. The modification included certain repairs and maintenance required by the Planning Board. Id. On September 17, 2014, at a duly noticed and well-attended public hearing, the Planning Board agreed with San-Ken and amended the Subdivision by modifying its prior conditions of approval ("Subdivision Amendment"). CR at 186-189. In part, the Subdivision Amendment stated that:

> 2. The existing road constructed within the subdivision (with one course of asphalt), is satisfactory as a private road, with no second asphalt course required, subject to the following improvements to be performed within 90 days from the date of this approval by and at the expense of the owner of the 9 remaining unimproved lots in the subdivision (presently San-Ken Homes, Inc.):
>
> -fix cracks by cleaning and filling
> - seal coat the entire road
> - repair all potholes
>
> * * * *
>
> 4. No further security will be required by the Planning Board for any future road or infrastructure improvements.

CR at 189. Notably, despite the attendance of neighboring land owners at the September 17, 2014 public hearing, and importantly, no court appeal was taken of the Subdivision Amendment, and San-Ken timely satisfied all conditions of the Subdivision Amendment. CR at 27. As such, at that time: (1) the Private Road was complete and fully compliant in the eyes of the Town by and through the Planning Board; (2) no further bonding related to the Road was required; and (3) having not been appealed, the Subdivision Amendment was a final and binding decision of the Planning Board. CR at 27, 189.

Registration Under the Act

Notwithstanding the above, the Bureau required Appellant to apply for registration (or exemption) under the Act, as to its nine lots, under the theory that San-Ken was a successor subdivider. CR at 426-428. Under protest, but in an attempt to free its nine lots from the conveyancing restrictions of the Act, on November 20, 2014 San-Ken filed its application for exemption with the Bureau, pursuant to RSA 356-A:3. CR at 217, 217, 254-263, 386. As the application process unfolded, the Bureau informed San-Ken that a condition of approval would be that San-Ken was required to modify the Subdivision beyond what was required by the Town by installing and paying all costs for a topcoat on the Private Road ("Road Improvement"). CR at 812. While San-Ken was willing to pay for its proportional share of a topcoat upgrade, it objected to being forced to pay for the upgrades that should have been borne by the other lot owners in proportion to each owner's interest in the Subdivision. CR at 11. The Bureau's position unreasonably mandates that San-Ken bear all of the upgrade costs, notwithstanding that it does not own all of the Subdivision's lots.

In order to allow San-Ken to move forward with the development and sale of its lots despite the Bureau's condition requiring San-Ken to further improve the Road, San-Ken and the Bureau entered into a Road Escrow Agreement whereby San-Ken agreed to provide the Bureau with a performance bond in the amount of $50,106.00 for the purposes of securing the Road Improvement as demanded by the Bureau. CR at 73-74, 812-820. This compromise was intended to allow San-Ken to seek judicial relief on the disputed issues, while providing reasonable assurances to the Bureau that the Road Improvement would take place if the Bureau's legal position was ultimately upheld. CR at 691, 812-814. By Certificate of

Exemption dated May 1, 2015 and recorded with the Registry that same day, the Bureau exempted San-Ken's nine lots under RSA 356-A. CR at 77. This appeal followed.

Appeal to the Trial Court

After the appeal was commenced with the trial court, certain neighbors who participated in the Subdivision Amendment public hearings, but who chose not to appeal, sought to intervene in this case. App. at 78. The neighbor's Motion to Intervene was denied by this Court (Garfunkel, J.) under Notice dated November 25, 2015. Id. A hearing on the merits was then held on March 3, 2016, with an Order issued dated June 21, 2016 ("June 21, 2016 Order")

In the June 21, 2016 Order, the trial court (Ignatius, J.) acknowledged that the standard of review for an appeal filed under the Act is not fully set forth in the statute, which states that "[a]ny person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require." June 21, 2016 Order at 7 (quoting RSA 356-A:14, I). Ultimately, however, the trial court found that the standard of review applicable in an appeal under the Act required substantial deference to the Bureau and further held that the court would "not overturn the Bureau's determination unless a clear preponderance of the evidence demonstrates the order is unjust or unreasonable." June 21, 2016 Order at 8.

After ruling on the applicable standard of review, the trial court moved to the issue of the Bureau's determination that San-Ken was a "successor subdivider" under the Act. In this context, the trial court observed that the Act does not establish a threshold number of units that make a buyer a successor subdivider. Id. at 6. Moreover, upon questioning, the Bureau

admitted that under its interpretation of the Act, "an owner of two lots, and conceivable even one lot, could be considered a successor subdivider." Id. The trial court also observed that there were "no statutory provisions or administrative rules establishing when a purchaser is a successor subdivider." Id. Notwithstanding such findings, the trial court ruled in favor of the Bureau and determined that San-Ken failed to demonstrate by a clear preponderance of the evidence that the Bureau's determination was unjust or unreasonable. Id. at 9.

Finally, the trial court addressed the Bureau's condition of approval that required San-Ken to make infrastructure improvements beyond what was required by the Planning Board. On this issue, the trial court found no authority that would authorize the Bureau to require the Road Improvement. Id. at 9. The trial court further acknowledged the lack of evidence that the Bureau had ever before attempted to impose infrastructure requirements beyond those required by the local municipality. Id. at 10. As such, the trial court found by a clear preponderance that the Bureau's Road Improvement requirement was unjust and unreasonable and reversed such requirement. Id.

On July 5, 2016, the Bureau moved for partial reconsideration of the trial court's June 21, 2016 Order, seeking reconsideration as to the trial court's Road Improvement finding. App. at 128. In its request for partial reconsideration, the Bureau argued in part that the Act confers concurrent jurisdiction to the Attorney General over subdivision control in the state of New Hampshire and that the Bureau was authorized to require additional infrastructure to "protect purchasers." App. at 130. Notably, the particular purchasers that the Bureau is focused on in this case are not prospective buyers of subdivision lots, but rather the seven existing owners who purchased lots from 112 Chestnut. App. at 132-133. The trial court agreed with the Bureau that the existence of prior purchasers justified the Road Improvement

condition and granted its motion for partial reconsideration, thereby upholding the road improvement condition imposed by the Bureau. October 14, 2016 Order at 4-5.[2]

This appeal followed, by virtue of the Notice of Appeal filed on January 6, 2017.

SUMMARY OF ARGUMENT

The trial court erred when it applied the incorrect legal standard. San-Ken filed this appeal pursuant to RSA 356-A:14, which requires a trial court to rule "as justice may require." While case law on the matter is sparse, such phrase is used by courts in other contexts, which provides guidance in the case at bar, and establishes that the use of the phrase is intended to confer discretion on the trial court without benefit to either party. Rather than rule on this appeal "as justice may require," the trial court deferred to the Bureau and erroneously applies a "clear preponderance" standard of review that applies in appeals under RSA 541. Had the legislature wished for RSA 541's legal standard to apply in context of RSA 356-A, it would have stated as such (as it has done in other administrative schemes).

The trial court further erred in extending deference to the Bureau's interpretation of the Act and its rules. As this is a matter of statutory construction, this Court will apply a *de novo* review standard. Moreover, the Bureau's interpretation of the Act in this case, which seeks to protect existing buyers, is contrary to the purpose of the Act which is to protect prospective homeowners. Finally, the Bureau's interpretation does not warrant deference as it was articulated for the first time as part of this litigation.

The trial court also erred in finding Appellant to be a successor subdivider under the Act. San-Ken purchased only nine lots at a foreclosure sale, after the developer had already

---

[2] Appellant subsequently filed a motion for reconsideration to clarify its obligations with respect to the required road improvements. The trial court (Ignatius, J.) ruled in favor of such motion and the issues raised therein are not relevant to the instant appeal. See December 9, 2016 Order; App. at 148.

conveyed seven lots to third parties. As such, San-Ken does not "stand in the same relation" of the developer and should not be deemed a successor subdivider. Neither the Act nor the Bureau's rules provide guidance on when a purchase of lots will be deemed to be a successor subdivider. As such, the Bureau is forced to apply this provision on an ad-hoc basis in a manner that does not provide reasonable notice. Moreover, given that San-Ken only had rights to nine lots, it could not "offer or convey" more than 15 lots. As such, San-Ken is exempted from registration under the at pursuant to RSA 356-A:3, I(a).

The trial court erred in upholding the Bureau's Road Improvement condition and in finding that the Act establishes an exclusive but concurrent regulatory scheme that allows both planning boards and the Bureau to regulate subdivision infrastructure. The Bureau lacked statutory authority to require the Road Improvement. The general principal of "protecting purchasers" does not justify the Bureau's demand for additional subdivision road improvements. Rather, through Title LXIV, the legislature has enacted a comprehensive and detailed regulatory scheme by which local land use boards govern planning and zoning. RSA 674 specifically delegates the exclusive power to regulate subdivisions to local planning boards.

Well-established canons of statutory interpretation further support Appellant's interpretation of the Act. The trial court's error is further evident when the Act is viewed in context and in a manner that avoids needless contradiction with other statutes. Moreover, because Title LXIV establishes a detailed statutory scheme, it controls over the Act's mere general reference. Not only does the Bureau's suggested interpretation of the Act result in absurd results, it also renders the statute unconstitutional and impermissibly vague.

Finally, the potential consequences of the Bureau's interpretation are real and far-reaching. In an established system that currently provides finality and stability, the Bureau seeks to effectively interject a new, two-prong regulatory scheme. Applicants will be forced to answer to both planning boards and the Bureau as to subdivision approvals. Nothing in the Act accounts for a setup as theoretically exists under the Bureau's interpretation of the Act, which would lead to absurd and unjust results. The legislature cannot have intended such market and regulatory chaos.

In light of the above, the trial court erred in upholding the Bureau's determination that San-Ken is a so-called successor subdivider and that it could impose the Road Improvement as a condition of registration under the Act. As such, the trial court's decisions on appeal should be reversed and remanded.

ARGUMENT

I. Standard of Review.

As the issues raised in this appeal involve the interpretation of statutes, this Court applies a de novo standard of review. Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114, 116 (2005).

> [This Court is] the final arbiters of the legislature's intent as expressed in the words of the statute considered as a whole. . . . We first examine the language of the statute, and, where possible, ascribe the plain and ordinary meanings to the words used. . . . When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature might have said or add language that the legislature did not see fit to include.

Id. (internal citations omitted). "We do not examine a particular statutory provision in isolation, but read it in concert with all associated sections." Sanborn Reg'l Sch. Dist. v. Budget Comm. of Sanborn Reg'l Sch. Dist., 150 N.H. 241, 242 (2003). "When interpreting

two statutes which deal with a similar subject matter, we . . . . construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statute." Id. (quoting Pennelli v. Town of Pelham, 148 N.H. 365, 366 (2002)). If two statutory provisions conflict, the specific statute controls over the more general one. Id. (citing Appeal of Plantier, 126 N.H. 500, 510 (1985)).

II. The Trial Court Erred in Conferring Substantial Deference to the Bureau and in Requiring Appellant to Provide a Clear Preponderance of Evidence Demonstrating that the Bureau's Actions were Unjust or Unreasonable.

To begin, the trial court erred when it applied RSA 541's standard of review in context of an appeal filed under the Act. San-Ken lodged its appeal with the trial court pursuant to RSA 356-A:14, I, which states that "[a]ny person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require." Section 14 of the Act further requires that a copy of the underlying record must be transmitted to the superior court (RSA 356-A:14, III) and allows the record to be supplemented with additional evidence upon leave from the court. RSA 356-A:14, IV. The Act's plain language empowers the trial court with the authority to rule on any appeal "as justice may require." Notably, however, the Act does not provide that the reviewing court show substantial deference to the Bureau, and the Act does not require that an appellant satisfy a "clear preponderance" standard of review. In applying standards that are not provided for in the Act, the trial court erred as a matter of law.

This inquiry is complicated by the fact that minimal case law exists interpreting the Act and that no case law exists interpreting RSA 356-A:14's legal standard. That said, the phrase "as justice may require" (or variants thereof) is used by courts in other judicial

settings, which provides guidance in the instant matter. In context of RSA 76:17 (regarding tax abatements), the phrase "as justice requires" "has been held to confer jurisdiction upon the superior court to issue equitable orders . . ." Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233, 236 (1972). "[T]he phrase 'as the court may deem just' in RSA 525:3 [concerning allowance of costs] has been held to authorize the superior court to exercise reasonable discretion in deciding as a question of fact whether justice required the granting of a motion for costs where they are allowable." Id. (citing Medico v. Almasy, 108 N.H. 324 (1967)). See also LSP Ass'n v. Town of Gilford, 142 N.H. 369, 373 (1997) (referring to the phrase as conferring "broad discretion and equitable powers upon the superior court to abate taxes."). The phrase was touched upon in context of RSA 281:14, regarding the allocation of costs incurred by workman's compensation employee action against a third party. See Del Rio v. N. Blower Co., 574 F.2d 23, 28 (1st Cir. 1978). There, the First Circuit looked to the words "as justice may require" to confirm that the court's duty was to simply act fairly in its duty to apportion costs. Id. New York state courts have interpreted the phrase more directly, which is also instructive.

> The phrase "as justice requires" means "that there are no 'as matter of law' requirements one way or the other as to those matters which are to be dealt with in the discretion of the courts, on all the facts" . . . . It grants the court a broad discretion, but not one unrelated to the facts . . . . What it grants is a judicial discretion, which though it "is a phrase of great latitude * * * never means the arbitrary will of the judge" . . . . Rather, it vests in the court "a discretion which is not to be exercised arbitrarily, and which is subject to review in the Court of Appeals, but only as to whether or not it has been abused and not on its merits" . . . .

Matter of Estate of Greatsinger, 67 N.Y.2d 177, 181 (1986) (internal citations omitted) (analyzing the phrase in context of an award of attorneys' fees resulting from a New York will contest) (emphasis added).

None of these cases suggest that a court charged with ruling on the basis of justice should defer to one party over the other. Rather, the common thread is that discretion lies with the court. In this case, rather than make a decision as "justice may require," the trial court erred when it applied the standard of review applicable in administrative appeals governed by RSA 541. See June 21, 2016 Order at 7-8 (citing Appeal of Stetson, 138 N.H. 293, 295 (1994)).[3] See also RSA 541:13 (stating in part that (1) the burden of proof is on the party appealing a decision of the commission; (2) all findings of the commission are deemed lawful and reasonable; (3) and requiring affirmance unless the court is satisfied by a clear preponderance of the evidence that such order is unjust or unreasonable).

Moreover, the framework of the Act is inconsistent with RSA 541's general framework. For one, RSA 541 includes procedural elements that are simply not part of the Act. The most telling difference is the fact that RSA 541 requires an appealing party to file a motion for rehearing with the "commission" as a prerequisite for a direct appeal to the this Court. See RSA 541:3, 6. See also In re Walsh (New Hampshire Bd. of Tax & Land Appeals), 156 N.H. 347, 351 (2007) ("In an administrative appeal pursuant to RSA chapter 541, the appealing party must first file a motion for rehearing setting forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.") (quoting Appeal of Coffey, 144 N.H. 531, 533 (1999)). Rather than require a rehearing request followed by an appeal to this Court, the Act allows direct appeals to the trial court by an aggrieved party. Another difference between the Act and RSA 541 is that

---

[3] Stetson involved an appeal of a Department of Labor Compensation Appeals Board decision to this Court regarding the denial of workers' compensation benefits. 138 N.H. at 294-295 (citing RSA 541:13).

additional evidence is prohibited on appeal in most cases pursuant to RSA 541:14, whereas it may be introduced before the trial court upon leave pursuant to RSA 356-A:14, IV.

Certainly, had the legislature intended RSA 541 and its legal standards and procedures to apply to the Act, it would have stated as such, as it has done in other instances where the legislature has specifically cross-referenced RSA 541 within an administrative scheme. See, e.g., RSA 151:4, VII (regarding licenses issued by the department of health and human services); RSA 365:21 (regarding the procedure for rehearings and appeals in context of public utilities). In the Act, however, the legislature chose to empower the trial courts to act on the basis of justice and omitted any references to RSA 541. It is a well-established that courts will not "consider what the legislature might have said or add language that the legislature did not see fit to include." Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114, 116 (2005). Moreover, where the legislature has specifically cross-referenced RSA 541 in certain administrative appeals, its decision not to reference RSA 541 in context of the Act is telling and demonstrates that RSA 541 was not intended to apply in the instant matter. See State v. Etienne, 163 N.H. 57, 73 (2011) (stating that "the expression of one thing in a statute implies the exclusion of another," which "is strengthened where a thing is provided in one part of the statute and omitted in another.").

Finally, the Bureau deserves no deference in its interpretation of the Act or its rules in this case. For one, as discussed above, this appeal involves statutory construction which is reviewed on appeal *de novo*. Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114, 116 (2005). Second, deference in this case is not warranted given that its interpretation is contrary to the language of the statute and the purpose of the Act. See Appeal of Old Dutch Mustard Co., Inc., 166 N.H. 501, 506 (2014). Here, and as argued by the Bureau in its trial

memorandum, the purpose of the Act's application process is to require registration of a subdivider before allowing the sale of lots, which is personal to the seller and for the benefit of future buyers. See App. at 106-111. In other words, the focus of any application under the Act is prospective. That the purpose of the Act is prospective is evident in a 2016 news release issues by the Bureau, which stated in part:

> The Consumer Protection Bureau of the Attorney General's Office registers most condominium developments and real estate subdivisions ***in an effort to protect prospective buyers***. The Bureau thoroughly reviews financing, development plan, and sales advertisements as well as consumer disclosures to try to ensure that subdividers have the financial and logistical capability to follow through on their promises to home buyers. The Land Sales Full Disclosure Act protects consumers by requiring subdividers to disclose information ***to prospective home buyers*** about the costs and timeline for promised capital improvements, such as streets or drainage systems. The Act also provides consumers with the guaranteed right to rescind their purchase contract within five days. ***The Bureau's jurisdiction does not extend to disputes involving existing homeowners or condominium associations.***

News Release, February 11, 2016, https://www.doj.nh.gov/media-center/press-releases/2016/20160211-land-sales-disclosure.htm (last visited June 13, 2017) (emphasis added).[4] In this case, the stated basis for the Road Improvement is to protect the interest of certain existing homeowners. Because the Bureau's interpretation here is contrary to the purpose of the Act, which is to protect prospective homeowners, deference is not justified. Similarly, courts will not defer to an agency where the interpretation is plainly incorrect, as is the case here. Appeal of Levesque, 136 N.H. 211, 213 (1992). Finally, the record is absent of any provisions of the Act, the related rules, or any other evidence indicating that the Bureau has ever before taken the position that it may require an applicant to modify a subdivision

[4] This release is further notable for the fact that it acknowledges that the Bureau's jurisdiction does not extend to disputes involving existing homeowners. This statement is directly contrary to the position that the Bureau takes in this case where the agency justifies the Road Improvement condition on the basis of the existing homeowners.

approval for the benefit of existing homeowners as part of its authority under the Act. See June 21, 2016 Order at 10. As the Bureau's position appears to have developed in concert with the instant litigation, deference to such position is not appropriate. Cf. Sullivan v. Colvin, No. 14-CV-06-JL, 2015 WL 1097404, at *2 (D.N.H. Mar. 11, 2015) (noting that First Circuit courts "give no special 'deference' to the interpretation that an agency gives its rules solely in the context of litigation.).

In light of the above, the trial court erred in applying a mistaken standard or review. As such, the trial court decisions should be reversed.

III. The Trial Court Erred in Finding San-Ken to be a Successor Subdivider Under RSA 356-A.

In addition to applying an incorrect standard of review, the trial court also erred when it determined that Appellant was a successor subdivider under the Act and was, thus, required to register its nine lots with the Bureau. June 21, 2016 Order at 9-10. RSA 356-A:1, V defines a "subdivider" as

> a person who is an owner of subdivided land or one who offers it for disposition. Any successor of the person referred to in this paragraph who comes to stand in the same relation to the subdivided lands as his predecessor did shall also come within this definition; . . .

Here, the record is clear that (1) San-Ken purchased nine of the Subdivision's lots at foreclosure sale; (2) the other seven lots were sold to bona fide third parties before San-Ken's purchase; and (3) the Subdivision's Road was already constructed prior to San-Ken's purchase without the creation of a Homeowner's Association. CR at 4, 27, 61, 189. As such, San-Ken cannot "stand in the same relation" to the Subdivision, as compared to how 112 Chestnut did. Whereas 112 Chestnut owned the fee interest in the property that is now the Subdivision, and all of the related ownership rights to all lots, San-Ken simply purchased a

portion of those rights at a foreclosure sale. For the purposes of the Act, San-Ken stands in the shoes of 112 Chestnut no more or no less than each of the owners of the other seven lots, and should be treated no differently. As such, San-Ken is not a subdivider subject to the Act.

Moreover, it is important to recall that San-Ken's interest in the Subdivision is limited to nine lots. As such, the plain language of RSA 356-A:3, I(a) exempts those lots from registration under the Act. RSA 356-A:3, I(a) states, in relevant part, that the Act "shall not apply to any offer or disposition of: (a) Subdivided lands if not more than 15 lots, parcels, units or interests are included in such subdivided lands; . . ."[5] In this case, because seven lots within the Subdivision were conveyed to third parties prior to 2014, Appellant is only able to "offer or dispose" their nine lots. As the fifteen-lot threshold is not triggered, the plain language of the Act does not require registration of San-Ken's lots.

The Bureau will likely argue that because the Subdivision was originally sixteen lots, San-Ken must register under the Act, regardless of how many lots they purchased. This position relies upon the Act's expansive definition of the term "subdivided lands." See RSA 356-A:1, VI (defining the terms "subdivision" and "subdivided lands" to mean "any land . . . which is, or has been, or is proposed to be, divided for the purpose of disposition into lots . . . and also include any land whether contiguous or not if said lots . . . are offered as a part of a common promotional plan of advertising and sale; . . ."). However, the Bureau's interpretation does not account for the fact that San-Ken does not own seven of the lots within the Subdivision. Moreover, and more importantly, the Bureau fails to accept that the Act's

---

[5] The Act defines "dispose" or "disposition" as "any sale, contract, assignment, or any other voluntary transfer of a legal or equitable interest in a lot, parcel, unit or interest in subdivided lands, except as security for a debt[.]" RSA 356-A:1, I. "Offer" means any "inducement, solicitation, or attempt to encourage any person or persons to acquire any legal or equitable interest in a lot, parcel, unit or interest in subdivided lands, except as security for a debt[.]" RSA 356-A:1, II.

definition of "subdivided lands" is modified and tempered by the introductory clause ("shall not apply to any offer or disposition") that limits the reach of the statute to lots that are to be offered or disposed. Because San-Ken can only offer or dispose its nine lots, and has no interest in the previously owned lots, the Act's plain language exempts registration in this case.

Had the legislature wished for the Act to apply in instances such as this, where a buyer purchases fifteen or fewer lots of a larger subdivision, the legislature could have simply stated as such. However, the plain language of the Act must not be ignored. To interpret the Act as the Bureau suggests requires the phrase "any offer or disposition of" to be rendered superfluous, which is contrary to accepted canons of statutory interpretation. See Petition of State, 159 N.H. 456, 457 (2009) ("We must give effect to all words in a statute, and presume that the legislature did not enact superfluous or redundant words."). Moreover, San-Ken's interpretation is consistent with the purpose of the Act, as evident through its plain language, which is to investigate the sellers of subdivided lots of a certain number, in the name of consumer protection. Notably, the legislature has determined that 15-lot subdivisions and smaller do not trigger the Act's jurisdiction. See RSA 356-A:3, I(a). In the same way that a nine-lot subdivision would not require registration under the Act, San-Ken's nine-lot purchase should not either.

Furthermore, and as observed by the trial court, the Act and the Bureau's rules do not provide any guidance on when a mere purchaser of lots becomes a so-called successor subdivider in the eyes of the Bureau. See June 21, 2016 Order at p. 6. Theoretically, the Bureau argued upon questioning by the trial court, the owner of single lot could conceivably be considered a successor subdivider and subject to the Act. Id. To think that every buyer of

subdivided lots could be subject to registration under the Act is an unjust result which should be avoided. See Cayten v. New Hampshire Dept. of Environmental Services, 155 N.H. 647, 653 (2007). Moreover, the Bureau's interpretation puts the Attorney General's Office (and not the legislature) in the powerful position of determining whether or not an owner of lots must register their land under the Act, at the Bureau's whimsy and convenience, without regulatory guidance, and without providing owners with reasonable notice of the applicable legal framework. Such an interpretation by the Bureau is unreasonable and it unlawfully pushes the agency outside of the limits of its enabling legislation. See In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250 (2011). In short, the Bureau's interpretation of the Act is unreasonable and unjust and should be rejected. Likewise, the trial court's finding in support of the Bureau should be reversed.

IV. The Trial Court Erred in Upholding the Bureau's Road Improvement Condition as the Bureau Lacks Jurisdiction to Unilaterally Modify the Terms of a Planning Board Subdivision Approval.

Finally, even if San-Ken is deemed to be a "subdivider" under the Act, the Bureau lacks the statutory authority allowing it to require San-Ken to further improve the Road as a condition of exemption. The trial court erred in finding that the Act confers the Bureau with concurrent jurisdiction over subdivision control, such that the Bureau may require infrastructure improvements beyond what is required by a local planning board. See October 14, 2016 Order at 4.

In context of the limited scope of an administrative agency's jurisdiction, it is important to note that the Bureau is an administrative body created by statute and charged with enforcing and administering the provisions of the Act. RSA 356-A:2. As such, the Bureau's power and jurisdiction are limited and special to its enabling statute.

> Administrative agencies are granted only limited and special subject matter jurisdiction. . . . That jurisdiction is dependent entirely upon the statutes vesting [the agency] with power and [the agency] cannot confer jurisdiction upon [itself]. . . . Furthermore, ***a tribunal that exercises a limited and statutory jurisdiction is without jurisdiction to act unless it does so under the precise circumstances and in the manner particularly prescribed by the enabling legislation***.. . . .

In re Campaign for Ratepayers' Rights, 162 N.H. 245, 250 (2011) (quotations and citations omitted) (emphasis added). In other words, the Bureau cannot lawfully step outside of the specific and limited authority delegated to it under RSA 356-A, and its jurisdiction is limited to those circumstances prescribed by the Act. Critically, the Act does not authorize the Bureau to effectively usurp the role of a planning board under the banner of protecting purchasers. State statute is equally clear that the ability to govern subdivision control is vested exclusively in local planning boards. As such, the trial court erred in enabling the Bureau's attempt to exercise jurisdiction over the local planning process.

A. The Bureau is not a Super Planning Board and Lacks Statutory Authority to Require The Road Improvement.

As part of this case, the Bureau takes the unique position that it is empowered under the Act to regulate subdivisions that have already been approved (and in this case, approved and modified) by a local planning board. See October 14, 2016 Order at 2 (summarizing the Bureau's exclusive but concurrent jurisdiction argument). See also App. at 130, ¶ 14. Specifically, the Bureau cites to RSA 356-A:3, II and Section 1304.07 of its administrative rules and argues that it has the ability to require additional infrastructure beyond what is approved "in order to 'protect purchasers' under RSA 356-A:, II and its accompanying regulations." Id. at ¶ 13. When the language of the Act is reviewed, however, and when it is considered in the appropriate context, the unreasonableness of the Bureau's argument rings clear.

The Bureau does not argue that the Act confers specific authority upon the Attorney General to modify local subdivision approvals. Rather, the Bureau's statutory argument ultimately relies upon precatory language found in RSA 356-A:3, II, which allows the Bureau to exempt provisions of the Act "in the public interest and for the protection of purchasers[.]" Alongside the aspirational language of the Act cited above, the Bureau also relies upon Section 1304.07 of its own rules, promulgated under the Act. Section 1304.07(a) of the Bureau's rules requires the Bureau to exempt a subdivision if certain conditions are met, including:

> If the streets or roads providing access to the subdivision and to the lots, parcels, units, or interests for which exemption is applied are not complete at the time the application is filed, the subdivider shall post surety acceptable to the town or city as follows:
>
> a. The surety shall be in the full amount of the cost of completing the streets or roads to assure completion to local standards and;
>
> b. The surety shall be in the form prescribed by Jus 1304.14;

By its plain language, this is a bond requirement that is triggered only if a subdivider seeks registration (or exemption) under the Act before the completion of the roads, at which time the Bureau is then authorized to require surety in an amount set by the local municipality. This rule does not authorize the Bureau to require additional road improvements or other infrastructure; rather, the Bureau may only demand a bond in the amount of the cost of the roads that is acceptable to the municipality. This provision does not apply in the instant matter as it is undisputed that San-Ken completed the Road as required by the Town in the Subdivision Amendment prior to filing its application with the Bureau. In fact, the Planning Board specifically determined that no further bond was required, CR at 27, which renders the applicability of Section 1304.07(a) null and void. Given that the Road was completed to local

standards, and no further bond was required by the Town, the Bureau cannot lawfully look to Section 1304.07(a) as a basis for requiring further infrastructure improvements as a condition of exemption under the Act.

B. Title LXIV of the New Hampshire Revised Statutes Specifically Delegates Authority Over Planning and Zoning Issues to Local Land Use Boards, and the Authority to Regulate Subdivisions Lies Within the Exclusive Jurisdiction of Planning Boards.

Not only does the Act fail to empower the Bureau with authority to regulate subdivision control, Title LXIV of the New Hampshire Revised Statutes explicitly delegates subdivisions and related regulations to local planning boards. Thus, in demanding that San-Ken improve the Road beyond what is required by the Subdivision Amendment as approved by the Planning Board, the Bureau has impermissibly veered outside of its jurisdiction and into land use planning matters that are expressly and exclusively delegated by state statute to the Planning Board. RSA 674:35, II specifically delegates the power to regulate subdivisions to local planning boards, stating in part that ***"[t]he planning board of a municipality shall have the authority to regulate the subdivision of land*** . . . . (Emphasis added.) Once subdivision jurisdiction is delegated to the Planning Board, that jurisdiction is exclusive. RSA 674:42.

Case law provides further illustration about the local and exclusive nature of municipal planning and zoning, which highlights how the trial court erred in allowing the Bureau to interject itself into the local planning process in context of the Act. In Green Crow Corp. v. Town of New Ipswich, 157 N.H. 344 (2008), as part of a road layout appeal, this Court provided a comprehensive summary on RSA chapters 672 through 677, and detailed the local planning and zoning process codified within Title LXIV. This Court began by citing the purpose of the statute, including that "***[p]lanning***, zoning ***and related regulations have been***

and should continue to be the responsibility of municipal government[.]" Green Crow, 157 N.H. at 352 (quoting RSA 672:1, I) (emphasis added). "Within this scheme [RSA 672 – 677], the legislature has provided a variety of mechanisms for a municipality to utilize in conducting its land use planning, including controlling growth and managing the impact upon infrastructure." Id. at 353.

> In addition to creating various mechanisms for municipalities to govern local land use under Title LXIV, the legislature has established diverse bodies to effectuate them. . . . Each body is granted different authority and a distinct role in the task of regulating land use development and growth within the respective community. . . . ***The planning board's duties include*** devising the master plan, ***regulating the subdivision of land*** and regulating site plan review. *See* RSA 674:1 (1996) (master plan); RSA 674:35,:36 (Supp.2007) (subdivision regulation); RSA 674:43,:44 (Supp.2007) (site plan). . . .
>
> ***A significant portion of the responsibility and tasks of careful and wise land use planning falls to the planning board.*** . . . [T]he legislature has identified the planning board as the central authority for globally managing municipal land use planning and growth control. See RSA 674:1 (master plan); RSA 674:35,:36 (subdivision regulation); RSA 674:43,:44 (site plan review); RSA 674:21, V(d) (impact fees shall be assessed when planning board approves subdivision plat or site plan or when building permit granted); RSA 674:21, V(j) (exaction for off-site improvements shall be assessed when planning board approves development); RSA 674:21, II (Supp.2007) (even if innovative land use control ordinance provides for administration by board of selectmen or zoning board of adjustment, any proposal shall be reviewed by planning board prior to final consideration). When preparing, revising or amending the master plan, a planning board may review such issues as the "best design methods to prevent sprawl growth in the community and the region." RSA 674:3, I (Supp.2007). Additionally, under RSA 674:1, V, "[t]he planning board may, from time to time, recommend to the local legislative body amendments of the zoning ordinance or zoning map or additions thereto." Finally, RSA 674:1, VI provides that "[i]n general, the planning board may be given such powers by the municipality as may be necessary to enable it to fulfill its functions, promote municipal planning, or carry out the purposes of [Title LXIV]."

Id. at 354–355 (internal citations omitted) (emphasis added). Even more importantly for the instant matter is the Green Crow Court's confirmation as to the exclusive nature of local control over planning and zoning issues.

> Without attempting to identify all aspects of the planning and zoning scheme designed by the legislature under Title LXIV, ***we conclude that it is clear that the legislature intended for municipal land use planning and zoning to occur within the confines of that comprehensive Title, with significant authority resting with the planning board.***

Id. at 355 (emphasis added).

As apparent from the above, by means of Title LXIV, the legislature has enacted a detailed and comprehensive regulatory scheme that confers exclusive jurisdiction over land use matters to local municipalities. Specifically, the Planning Board is delegated significant power over the planning process (including subdivision control) under RSA 674. Notably, and contrary to both the trial court's decision and the Bureau's arguments, nothing herein gives the Bureau any rights to manipulate the local planning process in connection with its consumer protection efforts. The Bureau's position disregards that local planning boards are the exclusive authority on subdivision matters and that the Planning Board has unambiguously determined that the Road is complete and that no bond is required – a decision made prior to San-Ken's application for exemption under the Act. Because the Planning Board is vested with exclusive control over the Subdivision, the Bureau's condition that seeks to supersede the Subdivision Amendment is unreasonable, unjust, and should be held to be an unlawful exercise of its authority.

C. The Trial Court's Error is Further Evident in Light of Well-Established Principles of Statutory Interpretation.

The trial court's error is further revealed in light of traditional canons of statutory interpretation. This Court will not "examine a particular statutory provision in isolation, but read it in concert with all associated sections." Sanborn Reg'l Sch. Dist. v. Budget Comm. of Sanborn Reg'l Sch. Dist., 150 N.H. 241, 242 (2003). Moreover, courts will interpret two related statutes such that they will not contradict with one another and lead to reasonable

results. Id. If two statutory provisions conflict, the specific statute controls over the more general one. Id.

The Court's task here is to interpret the Act in light of the planning and zoning scheme codified in Title LXIV. The Bureau suggests that the Act and the RSA 672 – 677 create a system of exclusive but concurrent jurisdiction over subdivision control, with planning boards authorized to regulate subdivisions for the purpose of planning and the Bureau authorized to regulate subdivisions as needed to protect purchasers. App. at 129. As discussed previously, this position is unreasonable and unlawful in light of the plain language of the Act and of the planning and zoning scheme enacted by the legislature. Moreover, requiring subdivision approvals from two separate authorities would lead to absurd and unjust results contrary to the intent of the legislature. See Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015) ("We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.").

The Bureau's interpretation of the Act also creates uncertainty and potential conflicts between a planning board and the Bureau. As noted previously, and as commented upon by this Court in Green Crow, RSA 672 – 677's statutory scheme provides a comprehensive and detailed framework for local land use planning via local control through planning boards. Contrastingly, the Bureau relies upon the general purpose of the Act to "protect purchasers" as the primary basis for its interpretation. In the event of a conflict between the specifics of Title LXIV and the general purpose of the Act, case law requires that the specific statute control over the more general one. Sanborn Reg'l Sch. Dist. v. Budget Comm. of Sanborn Reg'l Sch. Dist., 150 N.H. 241, 242 (2003). Given that the Bureau relies on a statement of

general purpose within the Act, the detailed scheme set forth in Title LXIV (and specifically within RSA 674) must control.

The Bureau's interpretation of the Act is further flawed in that it requires an unconstitutional reading of the Act. Contra White v. Lee, 124 N.H. 69, 77–78 (1983) ("A statute will not be construed to be unconstitutional, where it is susceptible to a construction rendering it constitutional."). The Bureau's interpretation renders the statute impermissibly vague. "A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." State v. Hynes, 159 N.H. 187, 200 (2009). Neither the Act nor the Bureau's rules inform reasonable purchasers of subdivided lots whether the Bureau will enforce the Act as to those lots and, more importantly, whether the Bureau will demand changes to approved subdivision infrastructure. Moreover, without being tethered to a statute or to a rule the Bureau is forced to review applications under the Act on an ad-hoc basis, which encourages arbitrary enforcement of the Act. "An agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along." Henry v. I.N.S., 74 F.3d 1, 6 (1st Cir. 1996). Here, the Bureau did just that in requiring a modification of a previously approved subdivision as part of an application under the Act, with no authority under the Act nor guidance from its rules.

In light of the above, the trial court's decisions upholding the Bureaus should be reversed.

D. The Consequences of the Bureau's Position are Significant and Far-Reaching.

To be clear, if upheld, the Bureau's reach into local land use matters and subdivision severe implications going forward. Where now an un-appealed subdivision approval is

considered final, if the Bureau's position in this case is allowed to proceed, it will eviscerate such finality and interject uncertainty into the planning and development process. Local planning boards and developers will have to question and guess at whether the Bureau will require subdivision amendments in connection with registration under the Act. Financing will be impacted as lenders will no longer have the same assurances as to their collateral. These drastic consequences cannot be what the legislature intended when it created the comprehensive and detailed zoning and planning enabling act as codified in Title LXIV. Likewise, the legislature cannot have intended for the Act to be used as a back-door means of regulating subdivision control.

The Bureau's position in this case creates a two-prong subdivision approval process where a single prong current exists. Under the Bureau's approach, conflicts are bound to arise between local planning boards and the Bureau, and there is no mechanism in either the Act or Title LXIV that acknowledges such a scheme or that would allow for the resolution of inevitable conflicts. Similarly, there are no notice provisions in the Act benefitting abutters and it is unclear what appeal rights impacted parties might have when the Bureau requires a subdivision modification. These potential consequences are real and are the epitome of an absurd and unjust result that would result from the Bureau's interpretation. See Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015). The legislature cannot have anticipated (let alone intended) the chaos that will ensure if the Attorney General's office is permitted to intrude into local land use matters that are specifically and exclusively reserved for planning boards.

CONCLUSION

For all of these reasons, the trial court erred in ruling in favor of the Bureau in the June 21, 2016 Order and the October 14, 2016 Order. Appellant respectfully requests that this Honorable Court reverse the trial court decisions on appeal and remand the matter with instructions consistent with such reversal.

ORAL ARGUMENT

Appellant requests 15 minutes for oral argument. Attorney Michael A. Klass will argue on Appellant's behalf.

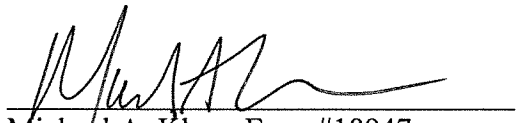
RULE 16(3)(I) CERTIFICATION

I hereby certify that the decisions being appealed are in writing and that copies are appended to this brief.

Respectfully submitted,

San-Ken, Inc.

By their attorneys
Bernstein, Shur, Sawyer & Nelson, P.A.



Michael A. Klass, Esq., #18947
mklass@bernsteinshur.com
Bernstein, Shur, Sawyer & Nelson, P.A.
P.O. Box 1120
Manchester, NH 03105-1120
603-623-8700

Dated: June 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that two true and exact copies of the foregoing Brief of Appellant, San-Ken Homes, Inc. and the accompanying Appendix were mailed this day to John W. Garrigan, by U.S. mail, postage prepaid.

Dated: June 14, 2017

Michael A. Klass, Esq.

COPY OF THE DECISIONS BELOW

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-0281

San-Ken Homes, Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

ORDER

The plaintiff, San-Ken Homes, Inc. ("San-Ken"), on May 29, 2015, appealed an order of the New Hampshire Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"), pursuant to RSA 356-A:14. The appeal asserts that the Bureau lacked authority to require San-Ken to be registered under RSA 356-A, the Land Sales Full Disclosure Act ("Act") and, specifically, lacked authority to require San-Ken to make improvements to Old Beaver Road in the Oakwood Common subdivision in New Ipswich, New Hampshire.

Deirdre Daley and Bernard Satterfield, owners of lots in Oakwood Common, moved to intervene. Their intervention requests were denied on November 25, 2015 (Garfunkel, J.). The parties filed a certified record ("CR") on July 13, 2015, and on March 1, 2016, they each submitted memoranda of law.

The Court conducted a bench trial on March 3, 2016. After consideration of the evidence, the Court finds and rules as follows.

Background and Facts

The parties agree on the relevant facts of the history of Oakwood Common, which is a 16 lot subdivision originally developed by 112 Chestnut Street, LLC ("112"). The New Ipswich Planning Board ("Board") approved the subdivision on June 7, 2006. (CR 198-199.) Among the conditions of approval was that 112 pave Old Beaver Road to Town standards. 112 agreed and established an irrevocable letter of credit to ensure the work would be completed. (CR 592.) On August 11, 2006, 112 applied for a certificate of exemption from the Act, RSA 356-A:3, II. 0 The Bureau granted the exemption on October 27, 2006. (CR 674.) In the application for exemption, 112 committed that the "road servicing the subdivision will be built to town specifications and owned and maintained by the Lot owners..." (CR 474.)

112 constructed Old Beaver Road but did not meet the Town's required paving standards. 112 put on a ½" base course rather than a 2" base course, and no topcoat wear course, when a 1" wear course was required. (CR 37-38.) A report of an engineering firm confirmed the substandard paving and recommended an additional 1½" base course be applied, at an estimated cost of $83,783; at a minimum it recommended an additional 1" should be applied, at an estimated cost of $43,446. (Id.)

By 2010, 112 had developed and sold seven lots but was unable to complete the subdivision or finish the work on Old Beaver Road. TD Banknorth foreclosed on the remaining nine lots. San-Ken, which had no relationship to 112, bought these nine lots as a single parcel for $150,000 and recorded title to the property on June 19, 2014. (CR 61-64.)

San-Ken applied for building permits in July of 2014; the Board of Selectmen denied the request until a road bond was posted or Old Beaver Road was completed to Town standards. (CR 41-42.) At a hearing on August 6, 2014, after San-Ken argued it should not have to pave to the 2006 standards, the Board suggested an option for San-Ken would be to seek modification of the road requirements. A public hearing was scheduled for September 3, 2014, to consider modification of the original subdivision approval. (CR 6-7.)

Four lot owners within Oakwood Common appeared before the Board on September 3, 2014, arguing that San-Ken was now in the position of developer and they had been promised a road that would meet Town specifications. They opposed modification to the original approval; one lot owner estimated that approximately $20,000 of the purchase price of each lot was for road paving. (CR 8-14.) The matter was continued to September 17, 2014.

On September 17, 2014, the Board heard further discussion regarding San-Ken's commitment to form a homeowners association, repair cracks and pot holes and seal coat the road, pay 9/16ths of the cost of a top coat, and reduce its voting strength to eight votes so that it could not unilaterally force decisions on other lot owners. (CR 16.) The Board approved the modified road requirements. (CR 16-18.) San-Ken completed the sealing and pot hole and crack repairs by October 24, 2014. (CR 739.)

On November 20, 2014, San-Ken approached the Bureau to obtain a certificate of exemption from the Act, pursuant to RSA 356-A:3, II and N.H. Admin. Rules, Jus 1304.07. (CR 254-332.) Exemption would allow San-Ken to market the nine lots. The Bureau required, as a condition of obtaining a certificate of exemption, that San-Ken

repair and pave the road to the Town's original specifications. The Bureau concluded that San-Ken was a "successor subdivider" under the Act and as such was responsible for completion of the amenities provided in the 2006 Declaration of Subdivision. The paved road was not only a Town requirement, it was an amenity promised to all purchasers under the subdivision documents. (CR 426-428.)

San-Ken disagreed with the Bureau's interpretation that registration or exemption from registration was required but, in order to be able to market the lots, it sought a certificate of exemption "without prejudice and while reserving all rights and defenses." (Ex. 6A, letter of January 29, 2015.) On April 21, 2015, San-Ken obtained a bond in the amount of $50,106, payable to the Bureau, to guarantee application of 1½" of pavement to Old Beaver Road. (CR 812-821.) The Bureau issued the certificate of exemption on May 1, 2015. (CR 77.)

Land Sales Full Disclosure Act and Authority of the Bureau

Although San-Ken's regulatory status and the authority of the Bureau is in dispute, the parties do not disagree on most of the essential provisions and interpretation of the Act. The Act is designed to protect purchasers of subdivided residential lots by requiring developers of subdivisions to be registered under RSA 356-A before lots are offered for sale.

RSA 356-A:4, I requires registration of any subdivision prior to lots being offered for sale, unless the subdivided land is exempted from registration by RSA 356-A:3. RSA 356-A:3, I exempts from registration subdivided lands if there are not more than 15 lots. If Oakwood Common had originally been designed as a nine lot subdivision,

therefore, the Act would not have applied. If a development is built in phases, however, each phase must be registered, even if a particular phase comprises fewer than 16 lots.

RSA 356-A:3, II authorizes the Bureau the discretion to "exempt from any of the provisions of this chapter any subdivision or any lots, parcels, units or interests in a subdivision if it finds that the enforcement of all of the provisions of the chapter with respect to such subdivision, lots, parcels, units or interests is not necessary in the public interest and for the protection of purchasers by reason of the small amount involved or in the limited character of the offering, or because such property, in the discretion of the [Bureau], is otherwise adequately regulated by federal, state, county, municipal, or town statutes or ordinances . . ."

A subdivider is "a person who is an owner of subdivided land or one who offers it for disposition. Any successor of the person referred to in this paragraph who comes to stand in the same relation to the subdivided lands as his predecessor did shall also come within this definition; provided, however, the term "subdivider" shall not include any homeowners association which is not controlled by a subdivider." RSA 356-A:1, V. When a new developer takes over a project, then, it must register as a "successor subdivider" and is responsible for the terms approved by the Bureau before any sales are offered.

The Bureau takes the position that San-Ken is not simply an owner of nine lots and is also not a developer of a new nine lot subdivision. Rather, San-Ken, according to the Bureau, is a successor subdivider of Oakwood Common and must be registered or exempted and abide by all terms of the certificate before lots are offered for sale. The Bureau argues it must impose successor subdivider status on San-Ken in order to

protect the interests of the lot owners who purchased from 112 under the Declaration of Covenants, which committed to a paved road. It argues the certificate of exemption granted to 112 does not run with the land and cannot be extended to San-Ken, as the purpose of the Act is to protect consumers by preventing false, deceptive or misleading offers to sell divided lands, and evaluating the financial and business plan details of the developer. A successor developer certificate requires new disclosures and Bureau scrutiny. See, RSA 356-A:5 (Application for Registration), RSA 356-A:6 (Public Offering Statement), and RSA 356-A:7 (Inquiry and Examination).

The Act does not establish a threshold number of units that make a buyer a successor subdivider. Upon questioning at trial, the Bureau argued an owner of two lots, and conceivably even one lot, could be considered a successor subdivider. The Bureau also stated there could be situations in which there are multiple successor subdividers, if more than one entity purchased lots with the intention of resale. When asked whether a person who purchases two lots, one for himself and one for resale to a family member, could be a successor subdivider, the Bureau stated that was possible. Then again, the Bureau stated there could be instances in which a buyer purchases one or more lots with the intention of resale without triggering a successor subdivider registration requirement and that there are no statutory provisions or administrative rules establishing when a purchaser is a successor subdivider.

San-Ken argues the successor subdivider provisions do not apply to a purchaser in its position, in that San-Ken does not "stand in the same relation to the subdivided lands as his predecessor did." See RSA 356-A:1, V. San-Ken argues it has no relationship to the original developer, has never held itself out to be the developer of the

subdivision, and had no notice or any way of knowing that purchase at foreclosure would carry with it an obligation to complete the development. San-Ken asserts it only sought registration in order to market the lots. It argues the Bureau has no authority to require registration or exemption from registration, and has no jurisdiction to countermand the 2014 determination of the Board modifying the paving requirements. If the Board found the modified terms for Old Beaver Road acceptable, the Bureau is without authority to demand otherwise, according to San-Ken.

Standard of Review

The standard of review for this administrative appeal is not fully set forth in statute. RSA 356-A:14, I states "[a]ny person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require." San-Ken urges a standard of broad discretion to achieve a fair and equitable result, relying on tax abatement cases that construed RSA 76:17 ("as justice requires")[1], a First Circuit workers compensation case that construed RSA 281:14 ("as justice may require")[2] and a will contest under New York law ("as justice requires")[3].

The Bureau urges instead that the Court apply the standard of review used in workers compensation and board of registration in medicine administrative appeals.[4] These cases held that New Hampshire courts "will not overturn agency decision or orders, absent an error of law, 'unless the court is satisfied by a clear preponderance of

[1] Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233 (1972); LSP Ass'n v. Town of Gilford, 142 N.H. 369 (1997).
[2] Del Rio v. N. Blower Co., 574 F. 2d 23 (1st Cir. 1978).
[3] Matter of Estate of Greatsinger, 67 N.Y. 2d 177 (1986).
[4] Appeal of Dell, 140 N.H. 484 (1995); Appeal of Stetson, 138 N.H. 293 (1994).

the evidence before it, that such order is unjust or unreasonable.'" Stetson, 138 N.H. at 295 (citation omitted). The Bureau further argues the agency, charged with the statute's administration and construction, is entitled to substantial deference. New Hampshire Retirement System v. Sununu, 126 N.H. 104, 108 (1985).

The Court finds the standard of review in this instance to be that advocated by the Bureau. The Court will grant the agency substantial but not absolute deference. Appeal of Weaver, 150 N.H. 254, 256 (2003). The Court will not overturn the agency's determination unless a clear preponderance of the evidence demonstrates the order is unjust or unreasonable. Stetson, 138 N.H. at 295.

Analysis

1. San-Ken's Regulatory Status

San-Ken purchased nine of the original 16 lots in a single transaction, for development and resale to individual purchasers. All lots would be subject to the original Declaration of Covenants and individual owners would be members of the homeowners association as set forth in those Covenants. The Board granted San-Ken's request to modify the original approval, holding San-Ken to certain improvements to Old Beaver Road. This demonstrates that the Board considered San-Ken to bear some relationship to the future build out of Oakwood Common.

The Court does not necessarily agree with the Bureau regarding all instances in which a purchaser would be considered a successor subdivider. For example, it is hard to envision how or why purchase of a single lot for resale would trigger registration under the Act. San-Ken's purchase of 9 of the 16 lots, application to the Selectmen for building permits, negotiations with the Board for some improvements to Old Beaver

Road, and commitment to create a homeowners association, however, are sufficient to demonstrate that San-Ken has come "to stand in the same relation to the subdivided lands as his predecessor did." San-Ken has failed to demonstrate by a clear preponderance of the evidence that the Bureau's determination that San-Ken is a successor subdivider was unjust or unreasonable. Requiring registration or exemption from registration under the Act, therefore, was just and reasonable.

2. Bureau's Road Improvement Condition

When granting the certificate of exemption from registration, the Bureau required Old Beaver Road be improved to the specifications the Town imposed on 112 in 2006, and not to the modified specifications the Town imposed on San-Ken in 2014. The Bureau argues it must impose the original standard in order to protect the initial lot owners who relied on the representations in the Declaration of Covenants regarding road construction.

The Bureau's purpose is no doubt well-meaning and an attempt to meet its mandate to protect purchasers of subdivided lands under the Act. The Court finds no authority, however, for the Bureau to disregard and countermand the Board's modification of the original road standards. The Bureau argues that the actions of the Town frustrated purposes of the Act and thus are preempted, citing Forster v. Town of Henniker, 167 N.H. 745 (2015). Forster, however, addresses whether a municipal ordinance is impliedly preempted when it conflicts with a statutory scheme, which is not the situation in the instant case. To the contrary, the Bureau insists on enforcing the local ordinance regarding road paving specifications despite the Board's vote to modify the road requirements.

Neither party presented case law squarely on point and the Court is not aware of other cases in which the Bureau has disregarded a municipal determination and imposed a requirement that the municipality no longer seeks to impose. The Bureau has presented no persuasive basis for its proposition that it has the authority to impose a condition that the Board voted not to impose. The Court finds by a clear preponderance of the evidence that the imposition of the 2006 road specifications as a condition of granting an exemption from registration to be unjust and unreasonable. That term of the certificate of exemption is invalid. The road improvements shall be as required by the Board in 2014, namely, to fix cracks, repair pot holes and apply a 1/2 " seal coat, all of which appear to have been completed by October 24, 2014. The bond held by the Bureau for further road paving shall be returned to San-Ken.

3. Conclusion

The Court AFFIRMS the Bureau's determination that San-Ken is a successor subdivider. The Court REVERSES the request that the 2006 road specifications be met. The certificate of exemption shall be modified consistent with this order.

So ordered.

June 21, 2016

AMY L. IGNATIUS
Presiding Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-0281

San-Ken Homes, Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

ORDER

The plaintiff, San-Ken Homes, Inc. ("San-Ken"), on May 29, 2015, appealed an order of the New Hampshire Attorney General, Consumer Protection and Antitrust Bureau ("Bureau"), pursuant to RSA 356-A:14, asserting that the Bureau lacked authority to require San-Ken to be registered under RSA 356-A, the Land Sales Full Disclosure Act ("Act") and, specifically, lacked authority to require San-Ken to make improvements to Old Beaver Road in the Oakwood Common subdivision in New Ipswich, New Hampshire. After a bench trial on March 3, 2016, the Court found the Bureau had the authority to require San-Ken to be registered as a successor subdivider but did not have the authority to require San-Ken to complete the road to the specifications initially required by the Town of New Ipswich as part of its 2006 subdivision approval.[1] See Order dated June 21, 2016.

Positions of the Parties

The Bureau, on July 5, 2016, moved for partial reconsideration, arguing the Court misconstrued the Bureau's argument regarding the purpose and authority of the Bureau

[1] In 2014, the New Ipswich Planning Board modified the road specifications imposed on the original developer, substituting lesser construction and paving requirements for San-Ken.

to require San-Ken to meet the initial road specifications imposed by the Planning Board. San-Ken objected, on July 14, 2016. The Court heard arguments of the parties on August 9, 2016. After consideration, the Court finds and rules as follows.

The Bureau argues the Court apparently misunderstood its position when it concluded the Bureau sought to impose its judgment regarding road completion, despite the Planning Board's 2014 vote to modify the road specifications. The Bureau asserts its position is not to substitute its own standards for road construction or impose its views in contravention of the municipality's vote. Rather, it seeks to enforce the consumer protection laws related to subdivision of lands pursuant to RSA 356-A and protect purchasers who relied on the approved subdivision documents. The Bureau argues it has an obligation to enforce the original subdivision documents' commitments, on which those initial purchasers relied, even if the Planning Board no longer chooses to impose that level of road construction.

The Bureau argues the exclusive jurisdiction in municipalities to regulate subdivisions, pursuant to RSA 674:35 and 674:36, and the exclusive jurisdiction in the Bureau to enforce the consumer protection provisions of the Land Sales Full Disclosure Act, RSA 356-A, "taken together . . . create a scheme of concurrent regulatory jurisdiction over subdivisions in this state." Motion for Partial Reconsideration at 14. Ultimately, according to the Bureau, the Court's order is unfair to purchasers who relied on the approved subdivision documents. Further, the Court's order will allow developers to subvert consumer protections by promising certain amenities to the Bureau during the regulatory process, as well as early purchasers, and then seeking modification from municipal authorities to escape from those early promises.

San-Ken disagrees, arguing the Court rightly rejected the Bureau's efforts to substitute its judgement for that of the municipality and impose terms the municipality no longer mandated. Because there was no fact or law that had been overlooked or misapprehended, the motion to partially reconsider should be denied. Further, the Bureau should not be allowed to argue any damage the decision might have on the Bureau's ability to enforce consumer protections or to protect purchasers from unscrupulous developers, as those arguments could have been, but were not, raised previously.

San-Ken reiterates its position that the Bureau has overreached in its authority and its concept of "concurrent jurisdiction" is not supported by law, specifically RSA 674:35,II and 674:42. Finally, as to fairness, San-Ken argues it is not responsible for the failures of the initial developer and when the Planning Board agreed to modify the road conditions in 2014, the purchasers filed no appeal despite being fully aware of the decision.

Analysis

"A motion for reconsideration is designed to bring to the trial court's attention points of law or fact that the Court has overlooked or misapprehended." Farris v. Daigle, 139 N.H. 453, 455 (1995) (citing Super. Ct. R. 59-A (1)); see also Webster v. Town of Candia, 146 N.H. 430, 444 (2001). Whether to entertain a motion for reconsideration is in the sound discretion of the trial court. See Webster, 146 N.H at 444 ("We will uphold a trial court's decision on a motion for reconsideration absent an abuse of discretion."); Smith v. Shepard, 144 N.H. 262, 265 (1999) (explaining that "the trial court had the discretion to [ ] not consider the issue").

The Court did not fully appreciate the Bureau's arguments on the law and thus GRANTS partial reconsideration. The bulk of the June 21, 2016, order addressed San-Ken's regulatory status as successor subdivider and the appropriate standard of review under this unusual set of circumstances. The Court has now considered more fully the Bureau's arguments regarding its authority to enforce the subdivision documents under which the original 7 purchasers bought lots. It is undisputed that those 7 purchasers have not received the level of road construction and paving they were promised in the original subdivision documents, for which one purchaser estimates they paid approximately $20,000 per lot.

Upon reconsideration, the Court finds the Bureau is within its authority under RSA 356-A to require the successor subdivider San-Ken to complete Old Beaver Road to the original specifications, even if the municipality no longer cares to impose such standards. Its duty to enforce the consumer protection provisions under the approved Declaration of Subdivision is independent of the municipality's decision to modify the road construction and paving requirements.

If there were no purchasers from the initial developer, the analysis might be different. In this case, however, 7 of the 16 lots were sold under clear provisions regarding the level of construction and paving being conveyed, representing a significant value. The Court agrees that its June 21, 2016, order would be unfair to those purchasers and could undermine the authority of the Bureau to enforce consumer protections in future cases. While it is true that the purchasers could have, and perhaps should have, appealed the Planning Board's 2014 modification, that failure to appeal does not obviate the authority of the Bureau to enforce the subdivision commitments

made during the regulatory process.

Finally, the Court disagrees with San-Ken's statement that the Bureau failed to raise the potential for its diminished capacity to protect consumers if the Court did not hold San-Ken to the 2006 road requirements. Although the phrasing was not entirely similar, the issue was identified during trial.

Because the Court did not fully understand the Bureau's arguments on the law, the motion for partial reconsideration is GRANTED. San-Ken, as successor subdivider, shall complete the road to the 2006 specifications, as set forth in the approved Declaration of Subdivision.

So ordered.

October 14, 2016

AMY L. IGNATIUS
Presiding Justice

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
226-2015-CV-0281

San-Ken Homes, Inc.

v.

New Hampshire Attorney General,
Consumer Protection and Antitrust Bureau

ORDER

The petitioner, San-Ken Homes, Inc. ("San-Ken") seeks reconsideration of the Court's October 14, 2016 order, for the limited purpose of clarifying the road improvements sought by the New Hampshire Attorney General in this case involving a successor subdivider of land in New Ipswich, New Hampshire.

The petitioner is correct in noting that the court mistakenly ordered that Old Beaver Road be brought to the 2006 Road Specifications. In fact the court intended to require road improvements to meet the Escrow Agreement specifications set forth in the trial record.

The court therefore GRANTS the petitioner's motion to reconsider for the purpose of this clarification. In all other respects, the October 14, 2016 order remains unchanged.

So ordered.

December 9, 2016

AMY L. IGNATIUS
Presiding Justice