THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2018-0495

Denis Girard, et al.

v.

Town of Plymouth and the Plymouth Planning Board

# TOWN OF PLYMOUTH'S AND THE TOWN OF PLYMOUTH PLANNING BOARD'S MEMORANDUM OF LAW IN LIEU OF BRIEF PURSUANT TO SUPREME COURT RULE 16(4)(b)f

## STATEMENT OF THE CASE

This appeal arises from an Order of the Superior Court (MacLeod, J.), which affirmed the Town of Plymouth Planning Board's ("Board") June 15, 2017 denial of Denis Girard's and Florence Leduc's ("Petitioners") and William and Elizabeth Batchelder's ("Intervenors") subdivision plan. See Certified Record, hereinafter "C.R." at 126-127. The Petitioners and the Intervenors (collectively the "Applicants"), through their agent, Tom Hahn of FORECO, LLC, sought to subdivide a 249-acre parent parcel into one 50-acre parcel and one 199-acre parcel to effect a stipulation previously approved by the Grafton County Probate Court ("Probate Court"). C.R. at 1-13. The Applicants' subdivision plan proposed to construct a new driveway to access the 199-acre parcel ("the Driveway"). C.R. at 13, 38-39.

The Board devoted 6 public meetings to this application, beginning with an October 18, 2012 conceptual review of the proposed subdivision. C.R. at 19-20. The Applicants submitted their subdivision application on

November 30, 2016. The Board conducted public hearings on the application on February 16, 2017, April 20, 2017, May 18, 2017 and June 15, 2017. The Board also took a site walk of the property on May 10, 2017. During this process, the Petitioners' wetlands scientist, Deborah Hinds, prepared a letter ("Hinds Letter), which stated simply: "This is not an area that is suitable for the construction of a driveway." C.R. at 91. During the February hearing, a resident, who had originally been retained by the Petitioners to delineate wetlands on the Property, and an abutter both expressed concern that the Driveway would be located in wetlands. C.R. at 39.

Based upon the Board's site walk and the Hinds Letter, the Board determined that the proposed Driveway was located in wetlands. C.R. at 126. Pursuant to Plymouth Subdivision Regulations ("Regulations"), Article VIII, B, which authorizes the Board to impose requirements on a subdivider to preserve and protect wetlands, the Board requested that the Applicants modify the proposed subdivision such that the 199-acre lot could be accessed without construction in wetlands, and the Board provided three alternative locations for the Driveway. C.R. at 127.

The Petitioners refused to modify their subdivision application, and the Board denied the application on June 15, 2017. C.R. at 127. The Petitioners appealed to the Superior Court, primarily arguing that the Board lacked authority to deny the subdivision, and that the evidence didn't support the Board's decision. The Superior Court affirmed the Board's denial by written order on June 5, 2018 (hereinafter "June Order"), and denied the Petitioners' motion for reconsideration on August 9, 2018, finding that the Board's decision was not unjust or unreasonable. In affirming the Board's

decision, the Superior Court specifically referenced that the Petitioners' own expert opined that the Driveway would cause construction in wetlands. The Petitioners subsequently filed this appeal.

## STANDARD OF REVIEW

"Superior Court review of planning board decisions is limited." CBDA Development, LLC v. Thornton, 168 N.H. 715, 720 (2016). The Superior Court treats the factual findings of the Board as prima facie lawful and reasonable and cannot set aside the Board's decision absent errors of law or unless the Superior Court is persuaded, by the balance of the probabilities, on the evidence before it, that the Board's decision was unreasonable. Id. at 720-24; RSA 677:15. The appealing party bears the burden of persuasion. CBDA Development, 168 N.H. at 720. The function of the Superior Court is not to determine whether it agrees with the Board's decision, but to determine whether there is evidence upon which the Board's findings could have been reasonably based. Id.

The Supreme Court's review of the Superior Court's decision is equally deferential. Id. The Supreme Court will uphold the Superior Court's decision on appeal unless the decision is unsupported by the evidence or legally erroneous. Id.

## ARGUMENT

### I. The Regulations authorize the Board to require a subdivision applicant to relocate proposed roadways from wetlands areas to non-wetlands areas to preserve and protect the wetlands.

Municipalities have statutory authority to regulate subdivisions, and to approve or disapprove subdivision plans. See RSA 674:35. The Regulations provide that "[n]o subdivision of land shall be made, and no land in any subdivision shall be transferred or sold, until the Planning Board has

approved a final plat, prepared in accordance with the requirements of these Regulations." Regulations, Art. VIII, A. Among the requirements for obtaining subdivision approval, the Regulations require the applicant to identify all wetlands in the subdivision, and the Regulations authorize the Board to preserve wetland features on the property. Regulations Art. VI, M(12); Art. VIII, B.

Article VI, M(12) of the Regulations requires that the final plat of a major subdivision, minor subdivision, or lot line adjustment shall include, inter alia, "significant natural features such as woods, wetlands, streams, ponds, ledges, mines, scenic views, park, public opens spaces, etc." (Emphasis added.) See also Regulations, Art. III, B (defining "Wetlands"). Plymouth's subdivision plan checklist identifies "wetlands" as amongst the "significant natural features" that shall be depicted on a subdivision plan. C.R. pg. 16, item L. The Regulations also require that the final plat identify the locations of proposed improvements, "including roads, drainage, erosion and sediment control structures." Regulations, Art. VI, M(18).

Article VIII, B of the Regulations expressly authorizes the Board to preserve existing features: "The Board may impose requirements upon the subdivider in order to preserve and protect the existing features, trees, scenic points, views, brooks, streams, rock out-croppings, water bodies, stone walls, boundary markers, other natural resources and historic landmarks."

The Petitioners argue that the Superior Court erred in interpreting Article VIII, B as encompassing wetlands because the phrase wetlands "is not mentioned anywhere in the relevant regulation." See Petitioners' Brief hereinafter "P.Br." at 19.

The Petitioners' argument fails, however, because the Petitioners' argument requires Article VIII, B to be interpreted in isolation, which contravenes this Court's oft-repeated rules of construction.

The interpretation of the Regulations is a question of law, which the Court reviews de novo. Trs. of Dartmouth College v. Town of Hanover, __ N.H. __ at *20 (decided November 6, 2018). The general rules of statutory construction govern the interpretation of subdivision regulations. Id. "Thus, the words and phrases of the regulations should be construed according to the common and approved usage of the language." Id. Regulations should be interpreted in the context of the overall regulatory scheme. See Appeal of Nguyen, 170 N.H. 238, 246 (2017).

Read as a whole, the Regulations plainly authorize the Board to impose requirements upon a subdivider to preserve wetlands. Article VI, M(12) requires an applicant to show on a final plat all "significant natural features," including "wetlands." Article VIII, B provides that the Board may impose requirements to preserve and protect, among other things, existing features, water bodies, and "other natural resources."

The Petitioners next claim that the Article VIII, B is overly broad, which allowed the Board to engage in Ad Hoc Rulemaking. P.Br. at 20-21. "Generally, a municipal ordinance must be framed in terms sufficiently clear, definite, and certain, so that an average man after reading it will understand when he is violating its provisions." Freedom v. Gillespie, 120 N.H. 576, 580 (1980). "An ordinance is not necessarily vague because it does not precisely apprise one of the standards by which an administrative board will make its decision." Id.

Again, Petitioners' argument that Article VIII, B is overbroad is not persuasive because the Petitioners' argument requires sections of the Regulations to be read in isolation, which this Court will not do. As described above, the Regulations, read as a whole, provide that the Board may impose requirements to "preserve and protect" wetlands. See Regulations Art. VI, M(12); Art. VIII, B. The Regulations also require an applicant to show on a final plat the location of proposed driveways and the location of proposed improvements, including roads, drainage, and erosions and sediment control structures. See Regulations, Art. VI, M(7), (18). Read in conjunction with the provisions concerning the identification and protection of wetlands, an applicant can reasonably expect that the Board will impose requirements to minimize the impact that new roads have upon wetlands. See Regulations Art. VI, M(7), (12), (18); Art. VIII, B.

In sum, the Regulations clearly require an applicant to identify all wetlands and all proposed driveways, and the Regulations provide that the Board may impose requirement to preserve and protect those wetlands. Thus, the Regulations are sufficiently clear that an average person, after reading these regulations as a whole, would understand that the Board, in applying the Regulations, would not permit a proposed road to be constructed in wetlands when there are alternative locations that do not impact wetlands.

**II. The Regulations do not violate State Law and are not preempted by State Law.**

According to the Petitioners, RSA 674:55 requires municipal regulations that restrict land use on account of wetlands to specifically use the term "wetlands." P.Br. at 22-24. Thus, the Petitioners contend that Article VIII, B violates RSA 674:55 by not including the term "wetlands"

within the Regulations. P.Br. at 23-24. The Petitioners' interpretation of RSA 674:55 contradicts the plain language of the statute. RSA 674:55 provides, in relevant part:

> Wherever the term "wetlands," whether singular or plural, is used in regulations and ordinances adopted pursuant to this chapter, such term shall be given the meaning in RSA 482-A:2, X and the delineation of wetlands for purposes of such regulations and ordinances shall be as prescribed in rules adopted under RSA 482-A.

Contrary to the Petitioners' assertion, RSA 674:55 simply provides that the meaning of "wetlands," as defined in RSA 482-A:2, shall be the meaning of the term "wetlands" as used in regulations and ordinances adopted pursuant to RSA chapter 674. Nothing in the plain language of RSA 674:55 imposes any requirement, other than the meaning of the term wetlands, upon municipal regulation. In other words, RSA 674:55 simply provides a definition; it does not provide or limit municipal authority to enact regulations. RSA 674:55 reinforces this interpretation by specifically providing that the statute does not limit municipal authority to "plan land use and enact regulations based on consideration of environmental characteristics" or to "define and delineate resources or environmental characteristics … in a manner different from the common meaning and delineation of wetlands required herein."

Thus, the only impact that RSA 674:55 has upon the Regulations is that the definition of Wetlands contained in RSA 482-A:2 governs the meaning of the word "wetlands" as the word appears in the Regulations. Contrary to the Petitioners' assertion, RSA 674:55 provides no basis for invalidating the Regulations.

The Petitioners next argue that Article VIII, B is preempted by RSA chapter 482-A because it "frustrates the State of New Hampshire's regulations governing the permitting of development affecting wetlands." P.Br. at 25-28. The Petitioners acknowledge that the purpose of RSA chapter 482-A, as relevant here, is to "protect and preserve" wetlands from "despoliation and unregulated alteration" for the public good and welfare of this state. RSA 482-A:1. Nevertheless, the Petitioners' are effectively arguing that RSA chapter 482-A, the purpose of which is to "protect and preserve" New Hampshire wetlands, is frustrated by the Board requiring, to protect and preserve wetlands, that a new road be relocated from wetland area to non-wetland area. The Petitioners' argument belies common sense and lacks statutory support or legal precedent.

The Superior Court aptly noted that the Petitioners "fail[ed] to cite a specific statute or state regulation that expressly contradicts the court's (and the Board's) interpretation of Article VIII, B." June Order at 7. That has not changed on appeal. The Petitioners have not identified a single specific provision within RSA chapter 482-A (or elsewhere) that prohibits a municipality from regulating development within wetlands.

Instead, the Petitioners argue that Article VIII, B frustrates a "comprehensive regulatory scheme" governing development affecting wetlands. P.Br. at 28-29. In rejecting this argument, the Superior Court correctly noted that this Court has considered challenges to local wetland ordinances and never found them wholly preempted by state law. See June Order at 7 (collecting cases). Indeed, this Court has recognized the power of both the State and municipalities to regulate land use to protect wetlands. See Rowe v. North Hampton, 131 N.H. 424, 430-31 (1989); Cherry v. Town

of Hampton Falls, 150 N.H. 720, 725 (2004). For example, in Cherry, the issue was "whether the installation of a paved roadway in or around certain wetlands on the plaintiffs' proposed subdivision was permitted" under local regulations. Cherry, 150 N.H. at 725. The Court upheld the municipality's denial of the subdivision application, notwithstanding the fact that the applicant had obtained prior approval from the DES Wetlands Board, and ruled that "[a] municipality is not estopped from creating more restrictive rules for wetlands issues than those required by the [DES Wetlands Board]." Id.; see also Rowe, 150 N.H. at 430 (noting that the Court "has on several occasions upheld the constitutionality of a denial of permission to fill in property containing wetlands); cf. Lakeside Lodge v. Town of New London, 158 N.H. 164, 174 (2008) (discussing municipal authority to regulate wetlands).

Furthermore, the Petitioners' argument is based upon the false premise that "the Board believed it had authority under Article VIII, B to deny the Application if it had any effect whatsoever upon wetlands." In other words, the Petitioners argue that Article VIII, B frustrates RSA chapter 482-A because it operates as a "flat-out ban of any development that affects wetlands," which RSA chapter 482-A allows under certain circumstances. P.Br. at 29. The Petitioners misconstrue the Board's decision and Article VIII, B.

The Board did not suggest that Article VIII, B would operate as a complete bar to development if wetlands are negatively affected. Nor did the Board tell the Petitioners that they could not subdivide their property. Rather, the Board proposed three sensible alternatives through which the Petitioners could subdivide the Property in a manner that did not involve

constructing a road in wetlands, but which still provided each party vehicular access to their respective post-subdivision parcels. Only after the Petitioners refused to modify their subdivision application by relocating the proposed road out of wetlands did the Board deny the Petitioners' application. Hence, the Petitioners' complaint is not that the Regulations bar development affecting wetlands; rather, the Petitioners' complaint stems from their refusal to make minor modifications to their subdivision proposal that would protect and preserve wetlands in the Property. RSA chapter 482-A, the purpose of which is to "protect and preserve" New Hampshire wetlands, is not frustrated, but rather served, by the Board requiring that a proposed road be relocated out of wetlands when there are alternative locations on the property that are not within wetlands.

In sum, the Petitioners have not pointed to a single statute that prohibits a municipal regulation of land use that adversely affects wetlands, and this Court has previously stated that municipalities may enact regulations that are more restrictive of wetlands issues than State regulations. Accordingly, the Superior Court did not err in ruling that Article VIII, B is not preempted by State law.

**III. The Superior Court correctly rejected the Petitioners' myriad evidentiary challenges.**

The Petitioners' claim that "there is no indication in the record that the Board relied upon the Hinds Letter" is not supported by the evidence.[1]

[1] Nor is this argument preserved for appellate review. In their motion for reconsideration, the Petitioners argued that the Superior Court improperly relied upon the Hinds Letter for two reasons: (1) because the Probate Order barred use of the road for development purposes and (2) because the Hinds Letter did not overcome a purported statutory violation. However, the Petitioners did not argue that the Superior Court erred by relying upon the Hinds Letter because

P.Br. at 35. The Board provided the reasons for its denial in a written Notice of Decision. See C.R. at 126-27. Among the reasons provided, the Board stated that: "[t]he Board's concerns with wetlands were raised at the initial presentation (2/16/17) and in each meeting thereafter, to the extent that it requested a synopsis by a Certified Wetland Scientist and a site walk by the Board." C.R. at 126 (Emphasis added). The Board further stated that "[a]fter viewing the proposed and alternative driveways through the wetland areas and reading the synopsis by the Wetland Scientist, the Board encouraged the applicants to select a driveway placement that avoided most of these areas by routing it along higher ground, and presented three alternatives to the proposed driveway …." C.R. at 126 (Emphasis added). Thus, the record is clear that the Board requested the Hinds Letter and subsequently relied upon the Hinds Letter in making its determinations regarding how to locate the proposed driveway.

The Petitioners also challenge the sufficiency of the evidence, arguing that the Hinds Letter does not contradict "uncontested evidence" that DES would have approved the driveway location had the subdivision been granted and that the proposed road "would never impact wetlands." P.Br. at 32-34.

The Board denied the Petitioners' subdivision application because the Petitioners refused to relocate the proposed road from wetlands area to non-wetlands area. If there is evidence upon which the Board's findings could have been reasonably based, the Supreme Court, like the Superior Court, will affirm the Board's decision. See, CBDA Development, 168 N.H. at 720.

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"there is no indication in the record the Board relied upon the Hinds Letter." P.Br. at 35. Because the Petitioners failed to bring this purported error to the attention of the Superior Court, it is not preserved for appellate review. See, Vention Medical Advanced Components, Inc. v. Pappas, 171 N.H. 13, 31 (2018).

Here, the Petitioners' certified Wetlands Scientist, Hinds, walked along the Petitioners' proposed roadway and determined that the area "has several large areas of wetlands and areas of high water table" and "is not an area that is suitable for the construction of a driveway." C.R. at 91. Hinds additionally walked several alternative locations for a roadway, and she opined that one alternative was "a better alternative," and that a second alternative "should be located outside of any wetlands that may be in the field." As the Superior Court correctly noted, "[o]n the basis of this report alone, the Board could reasonably conclude [the proposed driveway] would harm the wetlands at issue, regardless of the driveway's proposed use." June Order at 12.

Additionally, on May 10, 2017 the Board members conducted a site walk and personally walked the proposed roadway, as well as alternative routes. C.R. at 79-80, 86. During a May 18, 2017 hearing, the Board Chairman noted that on the site walk, he observed that the proposed driveway was located on land that was "very wet," while one of the alternative routes was "much dryer." C.R. at 86.

In sum, the Board had evidence from the Petitioners' own certified wetlands scientist, along with the Board's personal observations, that the proposed driveway was located within wetlands, while alternative routes would have a lesser impact on wetlands. This evidence, which the Board cited in its Notice of Decision, C.R. at 126, supports the Board's denial of the Petitioners' subdivision application on the grounds that the Petitioners refused to relocate the proposed driveway from wetlands area to non-wetlands area.

This evidence is sufficient to support the Board's determination notwithstanding the Petitioners' purported "uncontested evidence" that development would be limited to a "woods road" and would never impact wetlands. P.Br. at 11. In fact, the "evidence" that the Petitioners' rely upon is argument from their counsel at the April 20, 2017 Board meeting that the "historic" use of the property has been for harvesting lumber, that harvesting lumber in the winter "has no effect upon wetlands whatsoever," and that the likelihood of this use continuing in the future is "very, very high." P.Br. at 11; April 20, 2017 Tr. at 19-20. However, the Board did not need to credit the Petitioners' self-serving speculation regarding how other parties may use their property in the future (to say nothing about how successive owners will use the property) and statements, which are not supported by expert testimony or scientific evidence, that logging does not affect wetlands if the ground is frozen. See, Lone Pine Hunters' Club, Inc. v. Town of Hollis, 149 N.H. 668, 671 (2003) (stating that it is the proper function of the factfinder to resolve conflicting evidence).[2]

Accordingly, the Petitioners have failed to carry their burden of demonstrating that the Board's decision was unreasonable or unsupported by the evidence.

## IV. The Superior Court correctly rejected the Petitioners' complaints of improper procedure and bias.

[2] The Petitioners also make much of the Probate Court's approval of the Applicants' Settlement Stipulation. The Petitioners point to the fact that the stipulation provided that access to one parcel would "be in the form of a 'woods road.'" However, this Order did not define "woods road," it did not purport to limit or restrict any parties' ability to develop or use the subdivided parcels, and it did not purport to bind any successive owners of the properties. Further, the Probate Court's order expressly referenced the need for subdivision approval.

The Petitioners argue that the Board's discussion of the Petitioners' application at a June 1, 2017 work session, without notice, is a violation of RSA 676:4 "that necessitates reversing the Board's ultimate denial of the application on June 15, 2017." P.Br. at 38. As the Superior Court correctly ruled, to the extent the Board's discussion on June 1 constituted a hearing on the Petitioners' application, the Petitioners have not demonstrated that they were not afforded sufficient fair and reasonable treatment. June Order at 10.

RSA 676:4, I(d)(1) provides that the Board shall notify the applicant of the date for "any public hearing on the application." The intent of the procedural requirements is to "provide fair and reasonable treatment for all parties and person." RSA 676:4, IV. Thus, the Board's procedures "shall not be subjected to strict scrutiny for technical compliance." Id. Courts shall reverse a Board's actions "only when such defects create serious impairment of opportunity for notice and participation." Id.

Here, the Superior Court did not unsustainably exercise its discretion in determining that any failure to notify the Petitioners that their application would be discussed at the June 1, 2017 hearing did not amount to "serious impairment of opportunity for notice and participation" on the Petitioners' application. Id.; June Order at 10-11. The Superior Court reasonably concluded that there was no serious impairment because the substance of the Board's discussion had been raised at the various prior meetings on the application, for which the parties had notice and opportunity to participate. Additionally, while the Board "reached no material conclusions" and had "generally informal" discussion at the June 1 work session, the Board did not make any decisions until the June 15 meeting, for which the Petitioners did receive notice and an opportunity to participate. June Order at 10.

Accordingly, considering the totality of Board's review of the Petitioners' application, the Petitioners' opportunity for notice and participation in this process was not seriously impaired. The Petitioners had notice and an opportunity to participate throughout the Board's review of their application, with the exception of a single informal discussion, at which no material conclusions were reached.

## CONCLUSION

For the foregoing reasons, the Town of Plymouth and the Plymouth Planning Board respectfully request that this Honorable Court affirm the judgment below.

Respectfully submitted,

TOWN OF PLYMOUTH AND
PLYMOUTH PLANNING BOARD
By its attorneys,

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February 6, 2019 By:/s/ John J. Ratigan

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## CERTIFICATION

I hereby certify that two (2) copies of the foregoing were mailed this 6th day of February, 2019 to William B. Pribis, Esquire, counsel of record for the Petitioners and via the Court's electronic filing system.

/s/ John J. Ratigan
John J. Ratigan, Esquire