THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2019 – 0121

Torromeo Industries, Inc.

v.

The State of New Hampshire
Department of Transportation

BRIEF OF APPELLEE TORROMEO INDUSTRIES, INC.

RULE 7 APPEAL FROM FINAL ORDER OF
ROCKINGHAM SUPERIOR COURT

Torromeo Industries, Inc.
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QUESTION PRESENTED[1]

1. Were there sufficient alternate grounds upon which the Trial Court could have found that the value of the residential portion of the Appellee's property was unchanged in value before and after the taking?

[1]Questions presented for review are restated in accordance with N.H. Sup. Ct. RULE 16 (4) (a).

TABLE OF LAW

STATUTES

N.H. RSA 498-A:27.

Any party, condemnee or condemnor aggrieved by the amount of compensation awarded by the board may, within 20 days after the filing of the report of the board, and not afterwards (unless for good cause shown the superior court extends such time), file in the superior court a petition to have the damages reassessed, and the court shall assess the damages by jury, or by trial without jury if jury trial is waived, and award costs to the prevailing party. The trial in such case shall be de novo. If the sum of estimated just compensation paid to the condemnee pursuant to RSA 498-A:11 exceeds the amount of final judgment, the court shall enter judgment against the condemnee for the amount so paid to him in excess of final judgment.

N.H. RSA 674:35 (I).

A municipality may by ordinance or resolution authorize the planning board to require preliminary review of subdivisions, and to approve or disapprove, in its discretion, plats, and to approve or disapprove plans showing the extent to which and the manner in which streets within subdivisions shall be graded and improved and to which streets water, sewer, and other utility mains, piping, connections, or facilities within subdivisions shall be installed. A municipality may by ordinance or resolution transfer authority to approve or disapprove plans showing the extent to which and the manner in which streets within subdivisions shall be graded and improved from the planning board to the governing body.

N.H. RSA 677:15.

I. Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable. Such petition shall be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. This paragraph shall not apply to planning board decisions appealable to the board of adjustment pursuant to RSA 676:5, III. The 30-day time period shall be counted in calendar days beginning with the date following the date upon which the planning board voted to approve or disapprove the application, in accordance with RSA 21:35.

I-a.

(a) If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section. If any party appeals any part of the planning board's decision to the superior court before all matters appealed to the board of adjustment have been resolved, the court shall stay the appeal until resolution of such matters. After the final resolution of all such matters appealed to the board of adjustment, any aggrieved party may appeal to the superior court, by petition, any or all matters concerning the subdivision or site plan decided by the planning board or the board of adjustment. The petition shall be presented to the superior court within 30 days after the board of adjustment's

denial of a motion for rehearing under RSA 677:3, subject to the provisions of paragraph I.

(b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III.

II. Upon presentation of such petition, the court may allow a certiorari order directed to the planning board to review such decision and shall prescribe therein the time within which return thereto shall be made and served upon the petitioner's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the order shall stay proceedings upon the decision appealed from. The planning board shall not be required to return the original papers acted upon by it; but it shall be sufficient to return certified or sworn copies thereof, or of such portions thereof as may be called for by such order. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

III. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with the referee's findings of fact and conclusion of law, which

shall constitute a part of the proceedings upon which the determination of the court shall be made.
IV. The court shall give any hearing under this section priority on the court calendar.
V. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable. Costs shall not be allowed against the municipality unless it shall appear to the court that the planning board acted in bad faith or with malice in making the decision appealed from.

STATEMENT OF FACTS AND THE CASE

Property

Torromeo Industries, Inc. ("Torromeo" or "Appellee") owns an 9.98-acre lot of land at 22 Old Road in Plaistow, New Hampshire (the "Subject Parel"). SA at 5.[2] This property contains a 4,000 square foot industrial building, and a 1,500 square foot, cape-style residential home. SA at 229. The residential home and the industrial building are separated by a public way owned by the State of New Hampshire. SA at 10. The residential home is on .38 acres at the northwest corner of the lot (the "residential portion"). SA at 8.

The State of New Hampshire (the "State" or the "Appellant") constructed the public way in 2015. SA at 10. In order to construct this new road, the State acquired approximately 1.9 acres of land from Torromeo through condemnation proceedings. This taking reduced the size of the Subject Parcel and reduced its frontage on Old Road from 149 feet to approximately 100 feet. SA at 12. The taking also converted a gravel driveway used solely for the industrial portion of the property into a paved, public road connecting Old Road and Route 125. SA at 10. The taking also included permanent easements over approximately 22,000 square feet of the Appellee's property. SA at 13.

[2] State's Appendix is referred to herein as SA.

The residential structure is a 1,500 square foot cape used exclusively for residential rental purposes. SA at 6. The home is approximately 70 years old and is serviced by a private well and septic system. *Id.* After the taking, the well was located a mere 28" from the edge of the sidewalk. *Id.* Both before and after the taking, the property was rented for $1,500 per month. SA at 6.

The property is located within the Town of Plaistow's (the "Town") "Industrial I" zone. SA at 8. Although residential uses are not permitted in this zone, the residential use of the Subject Parcel is "a lawful, nonconforming use . . . [which can] continue until abandoned." SA at 8.

Procedure

The State entered condemnation proceedings in 2015 pursuant to RSA 498-a. The State acquired 1.9-acres in fee simple, a permanent drainage easement containing 1,025 square feet, a permanent slope easement containing 20,900 square feet, a permanent retaining wall easement containing 25 square feet, and a temporary construction easement containing 8,425 square feet. SA at 474-76. With this land, the State constructed a two-lane, paved service road. SA at 345. The State initially offered Torromeo $500 in exchange for the 1.9-acre taking and the collective easements. SA at 13; see also the Declaration of Taking, SA at 477. Torromeo appealed to the Board of Tax and Land Appeals (BTLA), which

granted $35,000 as just compensation. SA at 477, see generally RSA 498-A:27.

Torromeo then appealed to Rockingham County Superior Court pursuant to RSA 498-A:27. The matter of *Torromeo Industries, Inc. v. State of New Hampshire*, Docket Number 218-2017-CV-00870 was heard on July 25, 2018. Judge Andrew Schulman and the parties conducted a view of the Subject Parcel on July 24, 2018. Judge Andrew Schulman issued an order on January 7, 2019 (the "Order"), granting Torromeo $70,800 as just compensation for the taking. Order at 23.

The Trial Court concluded the non-residential portion of the land of the subject property was reduced in value by $70,000 as a result of the taking. *Id.* The Trial Court further found the value of the industrial building and the residential portion were unaffected by the taking. Finally, the Trial Court found the temporary construction easement on the Subject Parcel was worth $800. *Id.* The value of the non-residential portion of the Subject Parcel, the easements, and the industrial building are not on appeal.

The sole remaining issue is the Trial Court's finding that the value of the residential portion of the Subject Parcel was unchanged in value. The State's position is that the residential lot was worth $155,000 prior to the taking, and $190,000 following the taking, resulting in a $35,000

increase in property value. SA at 17. This increase in value is attributed to Torromeo's ability to sell the residential portion of land independent of the rest of the lot, something the State believes it was unable to do.

Two appraisers testified at trial. The State's appraiser concluded that the construction of the access road created two *de facto* lots, when before there was only one. He concluded that, prior to the taking, the property could not have been subdivided, and thus the State had conferred a "special benefit" on Torromeo which it had not requested. Using the sales approach to appraisals, he concluded that the residential portion was more appealing to a prospective buyer after the taking. Thus, the State and the BTLA concluded that the compensation award should be reduced accordingly.

The State's appraiser made other factual findings. First, using the income-approach to appraisals, he concluded the property was worth the same before and after the taking. *Id.* There was no change in rent as a result of the taking, and the tenants in the property did not vacate the premises. The appraiser further concluded that prior to the taking, the Subject Parcel could have been condominiumized, thereby creating two salable interests in the land.

At trial, Torromeo claimed that the taking had rendered the residential portion worthless. Torromeo argued that the lot was worthless because (a) the well was located too close to

the public way and the property line; (b) the new *de facto* lot is undersized and lacks enough frontage, and; (c) it would be impossible to obtain a mortgage for the residential lot on the secondary market. SA at 21. As a result, Torromeo requested the full value of the residential lot as just compensation. *Id.*

The Trial Court rejected each parties' respective conclusions and decided the taking did not affect the value of the residential portion of the Subject Parcel. SA at 21-22. The Trial Court relied on several factors in reaching its conclusion. First, the Trial Court found the economic value of the property was unchanged as a result of the taking. SA at 22. There was no evidence that the rental income of the residential property had decreased, and the State's appraiser found that, under the income approach to appraisals, the property value remained unchanged. SA at 20, 22.[3]

Second, the Trial Court found the physical condition of the residential property was unchanged by the taking. The Trial Court concluded that, before and after the taking, "a casual observer . . . would likely conclude that the residential lot was already a real lot prior to the taking;" and that, after the taking "Torromeo would be entitled to subdivision waivers

[3] The Trial Court did note that the change in use of the road, from a private, gravel driveway to a public access road, may diminish the attractiveness of the residential home to prospective tenants, however, no evidence was presented on this matter. SA at 25.

and zoning variances for the limited purpose of continuing the existing use." SA at 18.

Third, the Trial Court found that the residential lot was entitled to a subdivision waiver and variance, both before and after the taking. The Trial Court arrived at this conclusion by carefully considering the nature and characteristics of the property, the surrounding neighborhood, and the relevant standard for granting a variance. The Trial Court concluded that the Subject Parcel met the specified criteria as a matter of law, and as a result the value was unaffected by the taking.

SUMMARY OF THE ARGUMENT

The narrow question before this Court is whether the Trial Court committed reversable error. The Appellant claims one central error in the Trial Court's reasoning: that the Trial Court could not have found the residential portion was worth the same after the taking as it was before the taking. The Appellant claims that the Trial Court erred by concluding that the Subject Parcel would have been entitled to a variance prior to the taking. However, this Court need not reach this issue, because there is a more fundamental flaw in the Appellant's reasoning. The Subject Parcel was worth the same before the taking as after, because it could have been condominiumized prior to the taking, and the property continues to produce the same income for the Appellee. These factual findings by the Trial Court are sufficient to uphold the Order and award.

ARGUMENT

On appeal, the Supreme Court will uphold the Trial Court's judgment unless it is unsupported by the evidence or erroneous as a matter of law. *Cook v. Sullivan*, 149 N.H. 774, 780 (2003). "An error is considered to be harmless if it is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party asserting it." *McIntire v. Lee*, 149 N.H. 160, 816 A.2d 993 (2003). Furthermore, "[i]t is well settled here that a wrong reason given by a court does not invalidate a correct ruling." *Sprague v. Acworth*, 120 N.H. 641, 643 (1980); *quoting H. P. Hood & Sons, Inc. v. Boucher*, 98 N.H. 399, 404 (1953); *see also Estate of Mortner v. Thompson*, 170 N.H. 625, 631 (2018). This Court will uphold a Trial Court's factual findings unless "clearly erroneous or unsupported by the evidence." *Daly v. State*, 150 N.H. 277, 282 (2003); *quoting Whitcomb v. Peerless Ins. Co.*, 141 N.H. 149, 151 (1996). "This court will not substitute its judgment for that of the trier of fact if it is supported by the evidence, particularly when the trier of fact has bolstered his conclusions with a view." *N.H. Donuts, Inc. v. Skipitaris*, 129 N.H. 774, 779 (1987).

As a preliminary matter, there is no case law to the best of counsel's research supporting a Superior Court adopting

original jurisdiction over an application for subdivision approval. Subdivision applications ordinarily originate at the Town Planning Board level. RSA 674:35. Persons aggrieved by a Planning Board's decision may then appeal to the appropriate Superior Court. RSA 677:15. However, even if this Court finds the Trial Court improperly ruled on the issue of a subdivision variance, there are sufficient alternative grounds upon which the Order may be upheld.

I. The value of the residential portion of the Subject Parcel was unchanged as a result of the taking, thus the Trial Court's order must be sustained.

The Trial Court's novel approach to this case is unsupported by case law, nevertheless its conclusion is supported by sufficient alternative grounds and thus the order is sustainable.

The Trial Court did not err by ruling that the residential portion of the Subject Parcel was worth the same before and after the taking. The Appellant seems to argue the Trial Court relied exclusively on the proposition that the Subject Parcel would have been entitled to a subdivision prior to the taking. However, the Trial Court made significant factual findings which also support its conclusion. Furthermore, the Appellant acknowledges that the parcel could have been converted to a condominium form of ownership prior to the taking, which would have had a similar practical effect as a

subdivision. This Court does not need to reach the issue of whether the property was entitled to a subdivision, because there is a more fundamental flaw in the Appellant's reasoning.

The ruling in *Daly*, while factually distinguishable, is instructive in this case. In *Daly*, the plaintiff appealed a compensation award following a taking by the New Hampshire Department of Transportation (NHDOT). *Daly*, 150 N.H. at 287. NHDOT, in conjunction with the United States Department of Transportation (USDOT), the Environmental Protection Administration (EPA), and the Town of Conway, took portions of various properties in North Conway and Conway for a bypass project. *Daly*, 150 N.H. at 287. Prior to the taking, North Conway enacted certain zoning restrictions to facilitate the roadway project, which reduced the value of the plaintiffs' properties. *Id.* at 280. Thereafter, NHDOT commenced condemnation proceedings against the several plaintiffs. *Id.* The plaintiffs argued that the changed zoning ordinance should be taken into account in the compensation award, because the ordinance was an "integral part of the bypass project," used to depress the property values in advance of the taking. *Id.* at 283. The trial court found ordinance change could not be taken into account in the property valuation, because the ordinances were not an integral part of NHDOT's scheme. *Id.*

On appeal, this Court did not review that finding, however, because there was a "more fundamental flaw in the plaintiff's claim." *Daly*, 150 N.H. at 282. The town had enacted ordinances reducing property values, but NHDOT had instituted the taking. *Id.* at 283. Thus, the trial court's finding that there was no common plan between the government findings was irrelevant, because different government bodies acted, and there was no common plan between them. *Id.*

Similarly, in this case, this Court does not need to reach the issue raised by the Appellants on appeal. Although the Trial Court may have erred in a portion of its Order, this does not undermine the integrity of the reasoning. The Trial Court made substantial factual findings supporting its conclusion the issue of whether the Trial Court may rule that a property would have been entitled to a variance prior to a government taking. In this case, there are ample alternative factual findings in the record and findings made by the Trial Court to support the outcome.

First, by using the income-based approach to property appraisal, the Trial Court found that the property was worth the same before and after the taking. There was no evidence that the rent charged had decreased, and expenses had stayed the same. Furthermore, as a preexisting use, the use of the property may continue as a nonconforming residential

use. This fact alone supports the Trial Court's finding that the value of the residential building was unchanged by the taking.

Second, each appraiser agreed that, before the taking, the Subject Parcel could have been separated by condominiumization, making "the variance almost irrelevant." SA at 186, Appellant's Brief at 18. Thus, the Trial Court could have relied upon this fact in its final opinion. The Subject Parcel could have been converted into a condominium form of ownership, and thus Torromeo could have sold the residential portion of the parcel to a third party in much the same manner as is possible today. The primary difference is the presence of the Access Road. Thus, even assuming the lot could not have been subdivided before the taking, the value remains the same.

This Court's holding in *Quinlan* is also instructive. In *Quinlan*, property owners in Dover challenged the City Council's passage of a revised master plan, which rezoned their properties from low-density residential use to commercial use. *Quinlan v. Dover*, 136 N.H. 226, 228 (1992). Relevantly, the plaintiff's challenged the passage of the revised master plan, on the grounds that the City Council had not followed a certain portion of the Dover City Code. *Id.* at 229. The Dover City Code required that before the City Council could adopt an rezoning amendment, the Planning

Board must "make a report and recommendations on the amendments . . . [to the City Council] within thirty-one (31) days." *Quinlan*, 136 N.H. at 229. The rezoning amendment had been initially recommended to the City Council by the Planning Board, and thus the Planning Board did not subsequently submit a "report and recommendation" to the City Council. *Id.*

The trial court found the City Council had "substantially complied" with the ordinance, and thus upheld the rezoning amendment. *Id.* The Supreme Court upheld the trial court's order, but found no support for the substantial compliance with a mandatory provision of the Dover City Code. *Id.* at 230. The Supreme Court found that the 31-day provision did not apply in cases where a rezoning amendment initiated at the Planning Board, because such a holding would "produce [an] illogical result. *Id.* at 229; *quoting Foster v. Town of Henniker,* 132 N.H. 75, 82 (1989). Although the Supreme Court did not agree with the trial court's reasoning, it found reversal unnecessary because the result was sustainable on valid alternative grounds. *Id.* at 230.

As discussed above, there are valid alternative grounds to uphold the Order in this case. The value of the residential portion remains unchanged, because the income to the property was unchanged as a result, and the property could have been divided through condominiumization. These

factual findings were made by the Trial Court, are supported by the record, and thus there is no reason for this Court to believe remand would yield a different result. Thus, this Court should affirm.

The factual findings supporting the valid alternative grounds theory are well developed and distinguish this case from those cases where this Court has declined to apply the doctrine. This Court does not "mechanically follow the alternative grounds rule," and generally does not apply the rule when the parties have not had opportunity to brief the issue. *Doyle v. Comm'r, N.H. Dep't. of Resources & Economic Dev.*, 163 N.H. 215, 222 (2012).

In *Doyle*, the Court declined to follow the alternative grounds rule in a free speech case. *Id.* In that case, the court found a regulation prohibiting certain speech within a state forest was not unconstitutionally overbroad. *Id.* at 220. However, the trial court made this ruling while assuming the forest was a traditional public forum, which was a faulty assumption. *Id.* At trial and at the outset of appeal, neither party had considered this possibility, nevertheless the defendant argued the alternative grounds theory should apply. *Id.* at 222. This Court found the doctrine would not apply, because the parties had the "defendant never had the opportunity to consider that legal issue or the development of

facts that might or might not have supported his argument." *Doyle*, 163 N.H. at 222. (internal quotation omitted).

The parties in this case have had ample opportunity to dispute the value of the residential portion. Each presented experts, and the trial court conducted a view. The Order contained detailed factual findings regarding the Subject Parcel and the surrounding area. As a result, the Order stands on its own without the erroneous finding, and any remand would lead to the same result.

CONCLUSION

For the reasons set forth above, Torromeo respectfully requests that this Court deny the State's appeal and affirm the decision of the Trial Court below.

REQUEST FOR ORAL ARGUMENT

If this Court grants the State's request for oral argument, Attorney Sumner F. Kalman will make oral argument on behalf of Torromeo.

Respectfully submitted,

Torromeo industries, Inc.
By its attorney,

Dated: 9/20/2019

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CERTIFICATIONS

I, Sumner F. Kalman, hereby certify that on this 9/20/2019, copies of the foregoing brief has been sent to Emily C. Goering, Esquire, through the electronic filing system.

/s/ Sumner F. Kalman
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