THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2019-0121

TORROMEO INDUSTRIES

v.

THE STATE OF NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

RULE 7 MANDATORY APPEAL FROM
ORDERS OF THE ROCKINGHAM COUNTY SUPERIOR COURT

BRIEF FOR APPELLANT THE STATE OF NEW HAMPSHIRE DEPARTMENT OF TRANSPORTATION

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

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It shall be the duty of the board and it shall have power and authority:

…

III. To hear and determine all matters relating to the condemnation of property for public uses and the assessment of damages therefor as provided in RSA 498-A.

…

310-B:3 Licensure and Certification Use

I. No person, other than a certified or licensed real estate appraiser, shall assume or use that title or any title, designation, or abbreviation likely to create the impression of certification or licensure as a real estate appraiser by this state. A person who is not certified or licensed pursuant to this chapter shall not describe or refer to any appraisal or other evaluation or real estate located in this state by the term "certified" or "licensed."

…

498-A:11 Possession; Entry and Payment of Compensation

I. The condemnor, after the filing of the declaration of taking, shall be entitled to possession or right of entry upon deposit with the board of the amount of just compensation as estimated by the condemnor, and interest shall not accrue thereafter on such sum, but shall only accrue on the amount of final award or judgment in excess thereof. The clerk of the board shall pay over the sum deposited upon demand to the condemnee. Whenever the

board is satisfied that any person, whether holding under the owner or not, is preventing or obstructing the condemnor from entering upon or taking possession of the property after the condemnor is entitled to do so, it may grant such rights as it may think necessary or may proceed for contempt.
…

498-A:19 View; Technical Rules Not Controlling; Burden of Proof
The board in any case may, and at the request of a party shall, take a view of the premises, the subject of a declaration of taking. In any hearing before the board, the board shall not be bound by the technical rules of evidence and may, in its discretion, admit all testimony having reasonable probative value on the issue of just compensation. Issues of fact shall be determined upon the balance of probabilities and the burden of proof shall be upon the condemnor.

498-A:27 Appeal on Damages
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.

674:36 Subdivision Regulations

…

II. The subdivision regulations which the planning board adopts may:

…

(n) Include provision for waiver of any portion of the regulations. The basis for any waiver granted by the planning board shall be recorded in the minutes of the board. The planning board may only grant a waiver if the board finds, by majority vote, that:

(1) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations; or

(2) Specific circumstances relative to the subdivision, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations.

Plaistow Subdivision Regulation §235-11 Waivers

A. When a proposed subdivision plat is submitted for approval, the applicant may request the Planning Board to waive specific requirements of these regulations as they pertain to the plat. All requested waivers shall be in writing. The basis for any waiver granted by the planning board shall be recorded in the minutes of the board. The planning board may only grant a waiver if the board finds, by majority vote, that:

(1) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations; or

(2) Specific circumstances relative to the subdivision, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations.

…

QUESTIONS FOR REVIEW

(1) Did the Superior Court err when it assumed that the Subject Parcel could be subdivided before the taking, which was an issue neither party raised, and therefore each party was deprived of developing the factual record or opinion testimony that would be necessary to make such an assumption?

Preserved at State's Motion for Reconsideration, Appendix 48-52

(2) Did the Superior Court err in determining that a subdivision waiver should have been assumed before the taking, because there is no statutory or common law authority to make that assumption, and because the assumption is contrary to standard appraisal practice?

Preserved at State's Motion for Reconsideration, Appendix 48-52

(3) Did the Superior Court err when it assumed that a subdivision waiver would have been granted before the taking, because there was no evidentiary basis to support that assumption?

Preserved at State's Motion for Reconsideration, Appendix 48-52

STATEMENT OF THE CASE

This case concerns the calculation of just compensation in an eminent domain taking. The New Hampshire Department of Transportation ("NHDOT"), defendant/condemnor, determined to take property belonging to Torromeo Industries ("Torromeo"), plaintiff /condemnee, and offered a just compensation deposit of $35,000. In 2017, Torromeo notified NHDOT of its intentions to challenge the just compensation deposit at a hearing before the New Hampshire Board of Tax and Land Appeals ("BTLA"). On June 27, 2017, the BTLA viewed the Subject Parcel and held a hearing, pursuant to RSA 71-B:5, III and RSA Chapter 498-A:19. The BTLA issued its report, dated July 27, 2017, which agreed that NHDOT proved that $35,000 justly compensated Torromeo.

On August 8, 2017, pursuant to RSA 498-A:27, Torromeo filed a petition in the Rockingham County Superior Court for a *de novo* reassessment of just compensation. At the Superior Court's request, the parties filed pre-trial memoranda of law providing an overview of the valuation process. Judge Andrew Schulman, Torromeo, and NHDOT viewed the property on July 24, 2018, and the Superior Court held a bench trial the following day. The parties primarily disputed the value of the single-family residence located on the Subject Parcel and whether it became valueless due to impacts to the well and foundation from NHDOT's planned use. At the close of trial, the parties submitted post-trial memoranda to elaborate on the issues raised at trial.

The Superior Court issued an order, dated January 7, 2019, finding that neither Torromeo nor NHDOT properly assessed just compensation.

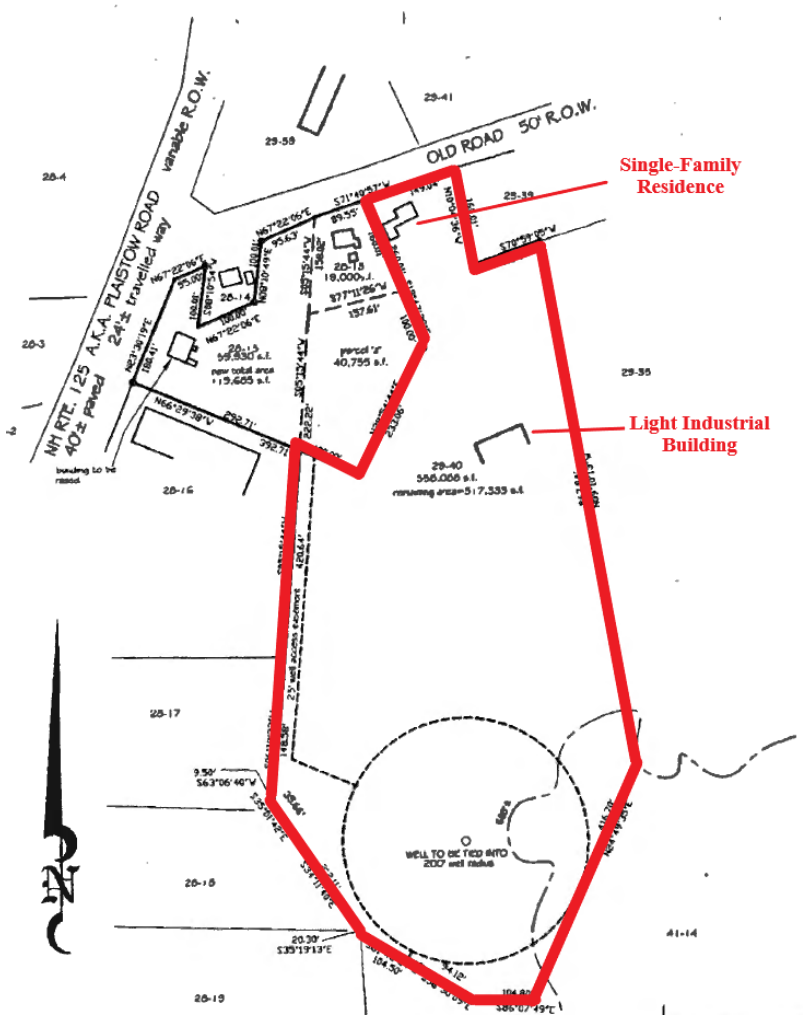
The order stated that both parties made an incorrect assumption of law when they determined the highest and best use of the property before the taking. The Superior Court found that the highest and best use before the taking was to subdivide the Subject Parcel into two salable lots. Based on its own analysis, the Superior Court ordered just compensation of $70,800.

NHDOT filed a Motion to Reconsider, dated January 16, 2019. NHDOT argued that the Superior Court assessed just compensation based on information that was outside of the record, or contrary to standard appraisal practice. Torromeo filed an Objection on January 22, 2019. The Superior Court denied NHDOT's motion to Reconsider by Order dated January 30, 2019.

STATEMENT OF FACTS

This case arises out of NHDOT's eminent domain taking of Torromeo's property for the alteration of NH Route 125 in Plaistow, New Hampshire. SA at 473.[1] Prior to the taking, Torromeo owned an 11.88 acre single lot of record that included a 4,000 square foot light industrial building and a 1,500 square foot single-family residence ("Subject Parcel"). SA at 229. Below is a highlighted and labeled plan that depicts the configuration and boundaries of Torromeo's property before the taking. A copy of the original plan introduced at trial is included in the appendix. SA at 245.

[1] State's Appendix of supporting documents is designated as SA.



NHDOT followed the eminent domain process set forth in RSA Chapter 498-A to acquire the following property interests: fee simple to 1.19 acres; 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 474-76. The primary purpose of the taking was to create a two-lane, paved service road.

SA at 345. Below is a highlighted and labeled aerial photograph that depicts Torromeo's property and the location of the service road that NHDOT constructed after the taking. A copy of the original aerial photograph and construction overlay introduced at trial is included in the appendix. SA at 246.

Pursuant to RSA 498-A:11, I, NHDOT deposited $35,000 with the BTLA to justly compensate Torromeo for the taking. SA at 230. NHDOT determined the amount of just compensation based on the real property appraisal performed by Jeffrey Leidinger ("Leidinger Appraisal"). A key aspect of Leidinger's valuation was the special benefit the property

received as a result of the taking. SA at 312. Before the taking, the single-family residence and the light industrial building did not have adequate road frontage to satisfy local subdivision requirements, meaning they could not be separated from one another. SA at 248. This unique configuration made the property less valuable because it would be difficult to find a buyer that is interested in purchasing both a single-family residence and a light industrial building. The taking, and the newly constructed service road, however, would create additional road frontage that could satisfy the local subdivision requirements. SA at 296. The service road effectively separated the single-family residence from the light industrial building, creating a *de facto* subdivision that allowed the single-family residence and light industrial building to be marketed separately, therefore raising their value. SA at 296. The Leidinger Appraisal found that the *de facto* subdivision would specially benefit residential property, making it $35,000 more valuable after the taking. SA at 312. Leidinger applied the $35,000 increase in value to offset $70,000 in damages to other portions of the parcel, which resulted in a final amount of $35,000 in just compensation. SA at 312.

Leidinger concluded that the taking created a special benefit because the Subject Parcel was not eligible for subdivision before the taking, but would become eligible for subdivision after the taking. SA at 312. The Leidinger Appraisal provides ample discussion that, prior to the taking, the only way to separate the single-family residence from the light industrial building was to convert the entire parcel to condominium ownership. SA at 248, 258-59.

Torromeo relied upon appraiser Vern Gardner, who produced two reports that, similar to Leidinger, concluded the Subject Parcel could not be

subdivided before the taking. Gardner first produced a restricted appraisal ("Gardner Restricted Appraisal") for the BTLA hearing, which relied upon the Leidinger Appraisal, and stated that Leidinger accurately developed the value components of the taking.[2] SA at 333. Gardner then produced a more developed appraisal report ("Gardner Appraisal Report") for trial, which also concluded the Subject Parcel was not eligible for subdivision before the taking, and that the only way to separate the single-family residence from the light industrial building was through condominium ownership.[3] SA at 389-91.

Both Leidinger and Gardner testified at trial. Leidinger's testimony primarily focused on his valuation methods and comparable sales. SA at 9-121. Gardner's testimony primarily focused on the impacts to the residential well, residential foundation, and lot sizes. SA at 122-161. Neither expert entertained the idea that the Subject Parcel could have received a subdivision, until the Superior Court raised the issue. SA at 96-46. In response to the Superior Court's inquiry, Leidinger testified that he had interviewed local municipal officials, who believed that a subdivision waiver would run afoul of the local zoning ordinance, and that there was very little likelihood of a waiver being granted. SA at 98-99. The grant of a subdivision waiver is an adjudicative process that would require a

[2] The Gardner Restricted Appraisal agreed with the value components of the Leidinger Appraisal, but factored in additional damages after the taking. The differences between the Gardner Restricted Appraisal and the Leidinger Appraisal relate only to damages based on impacts to the residential well and foundation.

[3] The Gardner Appraisal Report focused on damages to the well and foundation of the residence as the basis for additional damages. The differences between the Gardner Appraisal Report and the Leidinger Appraisal relate to damages to the well and residential foundation, and do not relate to the issues on appeal.

landowner to apply, notice to abutters, a contested hearing, and ultimately a decision by the planning board. RSA 676:4; Plaistow Subdivision Regulation §235-12. Leidinger opined that he would never assume a variance when performing an appraisal, because sometimes a variance is granted and sometimes it isn't, making it a hypothetical condition. SA at 99.

Later in the trial, the Superior Court again inquired why Leidinger did not make the assumption that a subdivision waiver would have been granted. SA at 170-72. Leidinger again explained that he never assumes a variance because appraisal assignments call for valuing the property "as-is" using the zoning ordinance as of the date of the appraisal. SA at 172-73. Applying the zoning ordinance as it was written on the day of the valuation, which would not have allowed subdivision, paired with his interview of the code enforcement officer, who found the likelihood of a subdivision waiver "remote at best," Leidinger had no data that would make it proper to assume a subdivision waiver. SA at 172-73. Before the trial closed, the Superior Court posed yet another question about the propriety of assuming a subdivision waiver before the taking. SA at 218-220. Judge Schulman explained his disbelief that appraisers, consistent with standard methodology, could not assume a subdivision waiver, and he mused that if this matter came before him as an appeal of a subdivision denial, he would likely grant the waiver. SA at 222. Throughout the several discussions on subdivision waivers, neither Gardner, nor Torromeo's counsel, put forth any evidence or argument that it would have been feasible to subdivide the Subject Parcel before the taking. In fact, Gardner testified that he agreed with the State's opinion that the Subject Parcel could be separated before

the taking by condominiumization, making "the variance almost irrelevant." SA at 186.

In light of the Superior Court's interest on the undisputed issue of subdivision waivers, NHDOT used its post-trial memorandum to emphasize that, standard appraisal methodology makes it improper to assume a subdivision waiver. NHDOT explained that the Subject Parcel did not meet minimum requirements for a subdivision under the municipality's subdivision regulations. SA at 21-22. NHDOT explained that standard appraisal practice requires an appraiser to confer with municipal land use officials before an appraiser can assume a subdivision, which Leidinger did, revealing that a waiver was unlikely. SA at 21-22. Torromeo also submitted a post-trial memorandum, which notably makes no mention or argument that a subdivision waiver should have been assumed before the taking.

In its final order, he Superior Court found that both appraisers made an incorrect assumption of law when they determined that the *de facto* residential lot could not be turned into a *de jure* lot prior to the taking. AD at 17.[4] The Superior Court concluded, contrary to both appraisers, that the nature of the residential lot and the character of the surrounding neighborhood would entitle the Subject Parcel to a subdivision waiver. AD at 17-19. The Superior Court assumed that the Subject Parcel could have been subdivided either before the taking or after the taking, meaning the residence did not receive a special benefit of $35,000 as a result of the taking and NHDOT's road construction. AD at 20-21. Without any change to value, there was no special benefit to deduct from total damages, and the

[4] Appended Orders are designated as AD.

Superior Court awarded $70,800[5] in just compensation based on damages to other portions of the property that are not part of this appeal. AD at 26.

SUMMARY OF ARGUMENT

The Superior Court accepted all of the Leidinger Appraisal's findings, except for his position – with which Gardner agreed – that he could not assume subdivision approval prior to the taking. AD at 28. The Superior Court's determination, unfounded in any evidence in the record, served as the sole basis for the Superior Court's award of an additional $35,000 of just compensation. The Superior Court's assumption that a subdivision waiver would be granted before the taking is erroneous because: (1) neither party argued that such an assumption could be made; (2) the Superior Court's assumption is contrary to accepted appraisal practice; and (3) the Superior Court's assumption lacks and support in the evidentiary record.

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).

I. THE SUPERIOR COURT ERRED WHEN IT ASSUMED THAT THE SUBJECT PARCEL COULD BE SUBDIVIDED BEFORE THE TAKING, WHICH WAS AN ISSUE NEITHER PARTY RAISED, AND THEREFORE EACH PARTY WAS DEPRIVED OF DEVELOPING THE FACTUAL RECORD OR OPINION TESTIMONY THAT WOULD BE NECESSARY TO MAKE SUCH AN ASSUMPTION.

[5] An additional $800 was awarded for the temporary construction easement. This additional $800 is not in dispute.

The Superior Court erred by unilaterally raising the issue that both appraisers should have assumed a subdivision. Neither party argued such an assumption could be made, and neither party developed a proper factual record from which the Superior Court could make that assumption. By the time of trial, the parties had already fully litigated the matter before the BTLA. The multiple appraisals, prior litigation, and pre-trial memoranda left one primary point of contention: whether the single-family residence was rendered valueless after the taking due to impacts to the well and foundation. SA at 15 ("The objective quintessential question is can the house be lived in safely, can it be financed and sold in its after configuration?"); SA at 187 (quoting Judge Schulman "therefore the only real, meaningful dispute between the two witnesses has to do with the before and after valuation of the residential portion of the property."); SA at 223 (quoting Torromeo's counsel "where the rubber meets the road here is the habitability of the property."). When the Superior Court, unprompted, raised the issue of assuming a subdivision of the Subject Parcel before the taking, the Superior Court injected an issue into the action that neither party raised or contested, and which neither party had prepared to litigate or to develop the record necessary to litigate.

"In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation." *Michael Greenlaw v. United States,* 554 U.S. 237, 243 (2008). "That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* at 243-44. "As a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the

facts and arguments entitling them to relief. *Id*. at 244. "Counsel almost always know a great deal more about their cases than [the court does]…" *Id*.

NHDOT and Torromeo framed the relevant issues and presented them to the court through pre-trial memoranda, expert testimony, and post-trial briefing. By raising the issue of subdivision, and making it the singular basis for awarding additional just compensation, the Superior Court crossed the line from being a neutral arbiter overseeing the parties' dispute, to becoming an advocate. The court erred by disregarding the principle of party presentation by raising, then opining, on an issue that neither party chose to present or dispute.

While the trial court may raise certain issues *sua sponte*, these occasions are particular and limited, routinely requiring that the trial court provide the parties an opportunity to present evidence to support or refute the newly raised issue. *In re Nathan L*., 146 N.H. 614, 619 (2001) (trial court may *sua sponte* instruct the jury of lesser included offenses, but the better practice is to notify the parties at the close of evidence and give both sides an opportunity to express their views); *Exeter Hosp. v. Hall*, 137 N.H. 397, 399-400 (1993) (trial court may *sua sponte* raise affirmative defenses, but the plaintiff must have opportunity to present evidence to rebut the defense); *State v. Bertrand*, 123 N.H. 719, 725 (1983) (trial court must raise the issue of competency *sua sponte* if there is legitimate doubt of whether a defendant is competent to stand trial, the raising of this issue triggers an evidentiary hearing). In the limited instances where a trial court may raise an issue *sua sponte*, that issue arises out of concerns of judicial economy or fundamental fairness. Furthermore, issues raised *sua sponte* are based on

the trial court's observance of facts that are presented in the record. To counsel's knowledge, there is no case law that supports a trial court raising a dispositive issue *sua sponte*, which issue is not based on efficiency at trial or concerns of fairness for either party, but is instead based on the court's own curiosity.

Furthermore, because neither party intended to, or was prepared to litigate this issue, neither party developed an appropriate record necessary to decide the issue. Neither party introduced the standard to receive a subdivision waiver or prepared to discuss the standard. Had the parties intended to litigate this issue, they would have provided evidence in support of, or to refute, application of the subdivision waiver regulation. *See* NH RSA 674:36, II(n); Plaistow Subdivision Regulation §235-11. For example, the parties may have reviewed the Plaistow Subdivision Regulations thoroughly, presented witnesses from the Plaistow Zoning Board, introduced evidence of hardship or lack of hardship to the landowner, and provided evidence that the waiver was or was not within the spirit and intent of the regulations. By raising an issue that neither party intended to litigate, the Superior Court deprived NHDOT and Torromeo from developing the record for the issue that ultimately decided the case.

II. THE SUPERIOR COURT ERRED IN DETERMINING THAT A SUBDIVISION WAIVER SHOULD HAVE BEEN ASSUMED BEFORE THE TAKING, BECAUSE THERE IS NO STATUTORY OR COMMON LAW AUTHORITY TO MAKE THAT ASSUMPTION, AND BECAUSE THE ASSUMPTION IS CONTRARY TO STANDARD APPRAISAL PRACTICE.

Even if it were proper for the Superior Court to raise an issue that neither party intended or prepared to litigate, the Superior Court erred by reaching a conclusion on that issue that was not supported by standard appraisal methodology, case law, or statute.

A. Neither expert could have arrived at the Superior Court's determination that a subdivision waiver should have been assumed, because standard appraisal practice and the information available to the appraisers precluded such a finding.

The appraisal of real estate requires specialized education and state certification. RSA Chapter 310-B:3, I. When an individual has sufficient skill, experience, training, and education to give them superior knowledge about valuation, they may provide expert testimony to assist the trier of fact. *Public Service Co. of New Hampshire v. Town of Bow*, 139 N.H. 105, 108-09 (1994). Ordinary persons are not qualified to appraise property. NH Admin R., Rab 302. The Superior Court, like other ordinary persons, lacks the education, training, or experience to provide superior knowledge on valuation, and therefore lacks the ability to appraise property. Certainly, the Superior Court can weigh evidence and resolve conflicts within the testimony or evidence, but Leidinger and Gardner were not fact witnesses, but rather expert witnesses who testified on the basis of their specialized knowledge derived from education and training, as to their expert opinions of value[6]. Each provided evidence, moreover, that their appraisals comported with the rules, guidelines, and standards or real estate

[6] Leidinger is a State of New Hampshire Certified General Real Estate Appraiser with 29 years of appraisal experience. Gardner is a State of New Hampshire Certified General Appraiser, State of New Hampshire Certified General Appraiser, holding MAI and SRA certifications, with 49 years of appraisal experience.

appraising. SA at 310-11, 334, 350. The Superior Court's ability to weigh evidence does not allow the Superior Court to ignore the professional standards that govern the methodology of *all* appraisers, while simultaneously determining that *each* parties' expert testimony was incorrect, particularly when both witnesses agreed.

Although each parties' appraiser identified that the property would benefit from a subdivision, they also stated the property did not meet the legal criteria for a subdivision. The only way to separate the residential portion of the lot from the commercial portion prior to the taking was through either: (1) condominium ownership, or (2) by a waiver of the local subdivision regulations. Neither appraiser assumed that a subdivision waiver would be granted. Moreover, Leidinger stated that making such an assumption would be contrary to the rules that govern appraisal methodology, and contrary to the undisputed statements of local planning officials.

In order to achieve an accurate estimate of value, a property must be appraised as-is. According to *The Appraisal of Real Estate*, the preeminent authority on appraisal techniques, an appraiser must determine which uses of the property are legally permissible by examining local land use regulations. *See* The Appraisal Institute, Appraisal of Real Estate 338-39 (14th ed. 2012), SA at 29-32. If the highest and best use of a site is predicated on a regulation change, the appraiser must investigate the probability that such a change could occur. SA at 29-32. The treatise provides that to assess the likelihood of a change to local regulations, the appraiser may interview local municipal staff. SA at 29-32.

Leidinger testified that he followed the standard appraisal guidelines by interviewing local planning and zoning staff to inquire about the likelihood of a subdivision waiver. SA at 67, 92-94, 98-99, 172-73. Local planning officials stated there was no likelihood of a subdivision waiver. No evidence in the record contradicted Leidinger, or provided any basis for the Superior Court to choose to disagree. Leidinger also testified that appraisers do not assume a waiver will be granted because waivers are hypothetical and quixotic, which contradicts the need to appraise a property as-is, and undermines the reliability of the appraisal. SA at 99, 172. Following standard appraisal practice, and relying upon the information they received from local officials, there was no evidence in the record from which the appraisers could reasonably opine that subdivision was available prior to the taking.

B. The Superior Court had no statutory or common law basis to assume that a subdivision waiver would have been granted prior to the taking.

In its Final Order, the Superior Court found that "Torromeo would be entitled to subdivision waivers and zoning variances." AD at 18. The Superior Court previously elaborated that, had the issue arisen in the context of an appeal, the Superior Court would have granted the waiver. SA at 222.

When the Superior Court ruled on NHDOT's Motion to Reconsider, the Superior Court declared that it "properly disagreed with both experts' conclusions of law relating to the viability of a variance application."[7]

However, while Torromeo may have been *eligible* for a subdivision waiver, there is no statute or case law that allows for the Superior Court to reject the findings of both experts, and to assume that Torromeo was *entitled* to a subdivision waiver.

Ordinarily, the law is well established that the fact-finder may accept or reject, in whole or in part, the testimony of any witness or party, and is not required to believe even uncontroverted testimony. *Brent v. Paquette*, 132 N.H. 415, 418 (1989). But in matters of subdivision approval, this Court has stated that the deciding body cannot chose to blatantly ignore completely uncontradicted expert testimony. *Condos East Corp. v. Town of Conway*, 132 N.H. 431, 438 (1989). In *Condos East Corp*., a planning board was presented with the testimony of three experts, all of which reached the same conclusion that a road which accessed a proposed subdivision was adequately safe. *Id.* Despite this uncontradicted testimony, the planning board questioned the safety of the road, and denied the subdivision. *Id*. at 434. This Court found that the record was devoid of facts to support the planning board's decision, making the planning board's

[7] This quotation provides a further example of why the Superior Court's decision to assume a subdivision waiver, when no party had raised this issue, was erroneous. *Variances* are controlled by RSA 674:33 and involve the zoning ordinance, which the Zoning Board of Adjustment oversees. Here, the issue became subdivision *waivers*, which have different statutory requirements under RSA 674:36, and which are overseen by the Planning Board, not the Zoning Board of Adjustment. The Superior Court found that it disagreed with both experts' conclusions about the viability of a *variance*, yet it made that determination analyzing the *waiver* criteria. Had the parties intended to litigate this issue, they would have presented arguments about the relief sought and the applicable standards.

decision a "plainly unsubstantiated, conclusory opinion, [which] is wholly insufficient to justify the board's complete disregard of the uncontradicted testimony of the experts." *Id*. at 438. The Superior Court, in this appeal, has similarly ignored the uncontradicted testimony of two experts, and the record is likewise devoid of evidence to support the Superior Court's contrary position.

The planning board, which regularly deals with subdivision issues, can rely in part on its own judgement and experience in acting upon application for subdivision approval, however, the board's decision must be based upon more than the mere personal opinion of its members. *Richmond Co., Inc. v. City of Concord*, 149 N.H. 312, 316 (2003) (citing *Durant v. Town of Dunbarton,* 121 N.H. 352, 357 (1981)). The board's ability to rely on its own judgment and experience is because members of the board live close to the circumstances and conditions in question, and they have familiarity with the area involved. *Vannah v. Town of Bedford*, 111 N.H. 105, 108 (1971) (overruled on other grounds in *Cook v. Town of Sanbornton*, 118 N.H. 668, 671 (1978)). Conversely, the Superior Court acts as an appellate body in matters of local planning, may lack familiarity with the area involved, and therefore cannot rely on its own judgment or experience. In matters of land use, it is the local regulatory body, not the trial court, which must decide factual matters in the first instance. *Chester Rod and Gun Club, Inc. v. Town of Chester*, 152 N.H. 577, 584 (2005) (stating that it is not the trial court's role to act as a super zoning board to decide factual matters in the first instance). The Superior Court may act as an appellate body, but not as a fact finder, and therefore cannot make a *de novo* review of evidence. *Id.* The review by the Superior Court is not to

determine whether it agrees with the local land use board's findings, but to determine whether there is evidence upon which the local land use board's determination could have reasonably been based. *Lone Pine Hunters' Club, Inc. v. Town of Hollis*, 149 N.H. 668, 670 (2003).

Had Torromeo actually applied for a subdivision waiver, the Plaistow Zoning Board would not have been able to disregard the uncontradicted expert testimony. It follows that, on appeal, when determining whether there was evidence upon which the planning board could have based its decision, the Superior Court would be unable to disregard uncontradicted testimony. Here, the Superior Court first erred by stepping into the role of fact finder and determining, in the first instance, that the Subject Parcel could be subdivided. The Superior Court then applied the wrong standard, by determining whether the Superior Court agreed that the local planning board would have denied a subdivision waiver, rather than applying the correct standard, and examining whether there was evidence upon which the planning board could have reasonably determined that a subdivision waiver would be denied.

III. THE SUPERIOR COURT ERRED WHEN IT ASSUMED THAT A SUBDIVISION WAIVER WOULD HAVE BEEN GRANTED BEFORE THE TAKING, BECAUSE THERE WAS NO EVIDENTIARY BASIS TO SUPPORT THAT ASSUMPTION.

Even if it were proper for the Superior Court to unilaterally raise the issue of subdivision, and even if it was appropriate for the Superior Court to make conclusions that are contrary to standard appraisal practice, and even if the Superior Court is able to reject uncontradicted evidence, the Superior Court's judgment must be

supported by the evidence. The record, however, reveals a lack of any evidentiary support for the Superior Court's subdivision determination.

The evidentiary record contains ample support that it is improper to assume the Subject Parcel could have been subdivided before the taking. Conversely, and notably, the record is devoid of any evidence that the property was eligible for subdivision in the before scenario. The Leidinger Appraisal explains that the Subject Parcel cannot be further subdivided due to lack of the required frontage, and cannot be further subdivided without obtaining relief from local land use regulations. SA at 258-59. The Leidinger Appraisal additionally states that the "Planning Director, and Code Enforcement Officer were interviewed regarding the property to document current zoning and dimensional requirements, existing approvals for the Subject Parcel, and development trends in the community and within the neighborhood." SA at 237. At trial, Leidinger testified that when he spoke with the Plaistow Code Enforcement Officer and Planning Director, they described the likelihood of obtaining a subdivision variance as "unlikely if not impossible" and "remote." SA at 98-99. Because the property did not meet the requirements for traditional subdivision, the Leidinger Appraisal surmised that the residence could only be separated from the industrial building through conversion to condominium ownership. SA at 259.

The Gardner Restricted Appraisal freely states that it "is in large part dependent upon the Leidinger Appraisal" and that Gardner is "reasonably confident that [Leidinger's] data is correct." SA at 328. In its reliance upon the Leidinger Appraisal, the Gardner Restricted Appraisal impliedly accepts

Leidinger's findings that the property is not eligible for a subdivision, and the Gardner Restricted Appraisal makes no assertion that a subdivision could have been granted in the before scenario.

In analyzing the before scenario, the Gardner Appraisal Report agrees with Leidinger, stating that, "according to the Building Safety Office, the dwelling could be separated from the larger … parcel through a change to condominium ownership. SA at 370. The Gardner Appraisal Report readily identifies that the highest and best use in the before scenario is condominium ownership. SA at 349. It goes on to contain a lengthy discussion that a prudent and competent property owner could convert the Subject Parcel to condominium ownership, which would provide separate identities to the residence and industrial building. SA at 389-91. Like the Gardner Restricted Appraisal, and the Leidinger Appraisal, there is not a single mention in the Gardner Appraisal Report that a subdivision could have been assumed in the before scenario. To the contrary, the Gardner Appraisal Report mirrors the Leidinger Appraisal in identifying that the property is most valuable with separate identities for the residence and industrial building, but acknowledging that traditional subdivision is not feasible, and separate identities can only be achieved via condominium ownership.

During the lengthy discussion about the likelihood of a subdivision, Gardner provided no testimony that would support a subdivision in the before scenario. Sensing the Superior Court's concern about the likelihood of a subdivision in the before scenario, NHDOT again addressed the unlikeliness in its post-trial memorandum, and again in NHDOT's Motion to Reconsider SA at 21-22, 48-52. In each instance, Gardner provided no

evidence that a subdivision would be granted in the before scenario, through Torromeo's post-trial memo or its objection to the motion to reconsider. The only suggestion in the entire action that a subdivision would be granted before the taking came from the Superior Court itself, based on evidence not introduced, and unknown to the litigants.

When the Superior Court raised the assumption of a subdivision waiver *sua sponte*, and presented its own "evidence" to support that assumption, the Superior Court deprived both parties of the opportunity to present rebuttal evidence or to cross-examine the Superior Court's musings. The court must give the parties adequate notice of issues that it considers unresolved. *Blagbrough v. Town of Wilton*, 145 N.H. 118, 125 (2000). When a judge broadens the scope of the trial, the judge must inform the parties and give them an opportunity to present evidence relating to the newly revived issue. *Leddy v. Standard Drywall, Inc*., 875 F.2d 383, 386 (2nd Circ. 1989). Failure to put the parties on notice of unresolved issues deprives them of the opportunity to present evidence and to fully cross-examine witnesses in regards to those claims. *Blagbrough*, 145 N.H. at 125. Here, the parties presented the relevant issues to the Superior Court at the trial management conference and through pre-trail memoranda. Because the Superior Court provided no notice to the contrary, the parties justifiably believed those to be the only unresolved issues, and prepared relevant evidence to argue those issues. By failing to provide notice that the Court wished to argue about subdivision waivers, the Superior Court effectively denied the parties the opportunity to proffer evidence on an issue that both parties assumed to already be settled. *See Algie v. RCA Global Communications, Inc.*, 891 F.Supp. 875, 883 (S.D.N.Y. 1994) (stating that

parties must be given notice so that they understand that additional issues will be open for adjudication at trial and may prepare accordingly).

CONCLUSION

The Superior Court erred because its assumption that a subdivision waiver would be granted is erroneous as a matter of law, and unsupported by the record. It was improper for the Superior Court to raise an issue that neither party intended to litigate, and then to make that issue dispositive in the case. Once the issue was raised, the Superior Court's assumption that a subdivision waiver would be granted runs contrary to standard appraisal practice, and rendered an outcome that neither appraiser could have arrived at. Further, by making the assumption that a subdivision waiver would be granted in the first instance, the Superior Court exceeded its jurisdiction as an appellate body, and took on the fact finding role of the Plaistow Zoning Board. Lastly, nothing in the record supports the Superior Court's finding that the property met the subdivision waiver requirements and would be *entitled* to such a waiver.

REQUEST FOR ORAL ARGUMENT

NHDOT requests oral argument. Oral argument will be presented by Emily C. Goering.

RULE 16(3)(i) CERTIFICATION

I certify that the appealed decisions, consisting of the January 7, 2019 Notice of Decision, and the January 29, 2019 Order on the State's Motion to Reconsider, are in writing and appended to this brief.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION

By its attorneys,

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CERTIFICATE OF SERVICE

I, Emily C. Goering, Esq., hereby certify that on this 22nd day of July, 2019, copies of the foregoing Brief of the Defendant, New Hampshire Department of Transportation, has been served electronically through the Supreme Court e-file system or, conventionally, via first class mail.

/s/ *Emily C. Goering*
Emily C. Goering