STATE OF NEW HAMPSHIRE

SUPREME COURT

2020 TERM

Case No. 2019-0719

KRAINEWOOD SHORES ASSOCIATION, INC. AND BLACK CAT ISLAND CIVIC ASSOCIATION

V.

TOWN OF MOULTONBOROUGH AND TYBX3, LLC

APPEAL FROM DECISION OF THE CARROLL SUPERIOR COURT

JOINT BRIEF OF DEFENDANTS-APPELLEES

Submitted by:

Drummond Woodsum & MacMahon
Matthew R. Serge, NHBA #14243
670 North Commercial St., Suite 207
Manchester, NH 03101
(603) 716-2895
e-mail: mserge@dwmlaw.com

Law Office of Stephan T. Nix
Stephan T. Nix, Esq. NHBA# 12923
25 Country Club Rd., Unit 502
Gilford, NH 03249
(603) 524-4963
e-mail: snix@metrocast.net

Oral Argument to be presented by Attorneys Matthew Serge and Stephan Nix

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: New Hampshire Page

Cases: Out-of-State

Statutes: New Hampshire

STATEMENT OF CASE AND FACTS

The relevant facts in this matter are undisputed. In November 2018, TYBX3, LLC (ToyBox) submitted an application to the Town of Moultonborough Planning Board for site plan and subdivision approval to construct storage units to store cars, boats, motorcycles, and other large collectibles. Brief for Appellants at 28. These storage units will be owned as condominiums and are located at the intersection of New Hampshire Route 25 and Redding Lane in Moultonborough. Id.

The Planning Board held the first public hearing on the ToyBox application on December 12, 2018. Id. at 29. The Appellants, among others, attended the public hearing and opposed the project primarily because of traffic safety concerns. Id. Due to the traffic concerns from the Appellants, the town planner, and others, the Planning Board asked for additional information on the traffic issues and continued the hearing multiple times. Id. The hearing was ultimately reconvened on April 24, 2019, and on May 8, 2019, the Planning Board voted to approve the application with sixteen (16) conditions. Id.

On June 8, 2019, the Appellants filed an appeal of the Planning Board's decision pursuant to RSA 677:15. Joint Appendix at 6-21. In this appeal, the Appellants claimed that a non-voting member of the Planning Board should have recused herself from participating in prior hearings. Id. at 10-12. The Appellants also claimed that the Planning Board's decision should be reversed because: 1) the Board failed to grant waivers from what were otherwise applicable regulations; 2) the Planning Board failed to demand a peer-review study of the ToyBox traffic study; and 3) the approval allegedly violated density requirements. Id. at 12-19. The Defendants, ToyBox and the Town of Moultonborough, moved to dismiss the appeal on the basis that it was untimely, thereby depriving the superior court of subject matter jurisdiction over the case. Id. at 22-24. Prior to the superior court's ruling on the motion to dismiss, the Plaintiffs filed a motion to amend, seeking to convert the claims of conflict of interest and the Planning Board's failure to grants waivers as declaratory judgment claims. Id. at 45-50. The Defendants

objected to this motion on substantive grounds, arguing that the claims are not the kind that are allowed to be filed in a declaratory judgment proceeding, but rather must be brought through a RSA 677:15 appeal, which is what the Plaintiffs did initially. Id. at 58-61.

The superior court subsequently granted the Defendants' motion to dismiss and, because the superior court was without subject matter jurisdiction over the complaint, it ruled that it had no jurisdiction to grant the motion to amend. Brief for Appellant at 32, 35. This appeal followed.

SUMMARY OF THE ARGUMENT

Contrary to well-established canons of statutory construction, the Plaintiffs posit that RSA 677:15 does not mean what it says - that the 30-day appeal 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." Rather, the Plaintiffs, seizing on the reference to RSA 21:35, ignore the legislature's clear instruction in RSA 677:15, and claim that the beginning date for appealing a planning board decision is the day after the day after the board votes. This interpretation of RSA 677:15, while somewhat creative, is contrary to statute's plain language and results in statutory words having no meaning. In addition, the Plaintiffs' attempt to use the last antecedent rule as a means of achieving their desired outcome is misplaced and results in mistreatment of the clause "in accordance with". Contrary to the Plaintiffs' arguments, RSA 677:15 states clearly that the appeal period begins to run the day after the board vote, which is consistent or in accordance with RSA 21:35. Because the Plaintiffs' appeal was filed one day late when measuring the 30-day period from the day after the vote, the superior court correctly concluded that it did not have subject matter jurisdiction and dismissed the appeal.

Further, because the superior court did not have subject matter jurisdiction over the appeal, it was unable to amend the action and properly denied the Plaintiffs' motion to amend. Regardless, because the Plaintiffs' amended claims (which were initially a part of the untimely planning board appeal) are claims that are within the ambit of the planning board's scope of review, they cannot be re-filed as a declaratory judgment action to avoid the consequences of an untimely appeal. Because this Court addresses questions of law de novo, it can rule in the first instance that the Plaintiffs' amended claims are not proper declaratory judgement claims, and that they are also subject to dismissal for lack of subject matter jurisdiction.

ARGUMENT

A. STANDARD OF REVIEW

"Generally, in ruling upon a motion to dismiss, the trial court must determine whether the allegations contained in the plaintiff's pleadings sufficiently establish a basis upon which relief may be granted." Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010) (quotations omitted). "[W]hen "the motion to dismiss does not challenge the sufficiency of the plaintiff's legal claim but, instead, raises certain defenses, the trial court must look beyond the plaintiff's unsubstantiated allegations and determine, based on the facts, whether the plaintiff has sufficiently demonstrated his right to claim relief." Id. (quotation omitted).

B. THE SUPERIOR COURT CORRECTLY INTERPRETED RSA 677:15 WHEN IT DETERMINED THAT THE FIRST DAY FOR COUNTING THE 30-DAY APPEAL PERIOD BEGINS ON THE DAY IMMEDIATELY FOLLOWING THE PLANNING BOARD'S VOTE

There is no dispute that this matter is governed by RSA 677:15, which, in part, provides:

> 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 . . . . 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.

RSA 677:15, I, "provides the jurisdictional deadline for superior court review of a planning board decision." Collden Corp. v. Town of Wolfeboro, 159 N.H. 747, 750 (2010) (quotation omitted). "New Hampshire law requires strict compliance with statutory time requirements for appeals of planning board decisions to the superior court because statutory compliance is a necessary prerequisite to establishing jurisdiction

there." Id. (citation, quotation, brackets and ellipsis omitted). The interpretation and application of RSA 677:15 is a question of law, which this Court reviews *de novo*. Trefethen v. Town of Derry, 164 N.H. 754, 755 (2013). In matters of statutory interpretation, the Court is the "final arbiter of the legislature's intent as expressed in the words of a statute considered as a whole." Id. When examining the language of a statute, the Court will ascribe the plain and ordinary meaning to the words used. Id.

The Plaintiffs continue to press the extraordinary argument that even though the legislature states clearly in RSA 677:15 that the 30-day appeal period shall begin on the date following the date of the planning board vote, we must disregard that mandate and instead look to RSA 21:35 as providing yet a different timeline by adding yet another day to the date following the date of the vote. This argument runs contrary to not only well-established cannons of statutory construction, but also common sense and grammatical principles.

RSA 21:35, I states "Except where specifically stated to the contrary, when a period or limit of time is to be reckoned from a day or date, that day or date shall be excluded from and the day on which an act should occur shall be included in the computation of the period or limit of time." While RSA 677:15, I refers to RSA 21:35, that reference simply reinforces that consistent with RSA 21:35, the event giving rise to the appeal (i.e. the vote of the planning board) is not counted, and the first day of the appeal period begins the following day. What is fatal to the Plaintiffs' position is the misinterpretation of the phrase "in accordance with." This is a phrase used in hundreds of state statutes and means "in a way that agrees with or follows (something, such as a rule or request)." www.merriam-webster.com. Thus, RSA 677:15, I means exactly what is says, that the 30-day appeal period starting on the date immediately following the vote agrees with or follows the rule set forth in RSA 21:35.

The Plaintiffs' reliance upon the last antecedent rule is misplaced here because the reference to RSA 21:35 does not alter the language pertaining to the 30-day appeal period. "The 'last antecedent rule,'…is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless

there is something in the subject matter or dominant purpose which requires a different interpretation." Mt. Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 652 (2000) (citations omitted, underline added). The clause "in accordance with" does not modify the last antecedent but references as in agreement with the last antecedent. The reference to RSA 21:35, therefore, renders the last antecedent rule meaningless in this context. Moreover, to accept the Plaintiffs' interpretation means that RSA 677:15, I would not be "in accordance with" RSA 21:35 since the start date provided for in RSA 677:15, I is contrary to the start date the Plaintiffs claim is called for in RSA 21:35.

The Plaintiffs' argument not only disregards the plain language of RSA 677:15, I, but it also renders the start date called for in RSA 677:15, I superfluous, and leads to an absurd and illogical result. See State v. Duran, 158 N.H. 146, 155 (2008) (stating that the Court will not interpret a statute in such a way that renders statutory language superfluous and irrelevant, or otherwise leads to an absurd result). Common sense dictates that the "day or date from which an action must be taken" is referring to the date of the planning board decision. In the end, the Plaintiffs' construction of RSA 677:15, I and RSA 21:35 results in complete disharmony, which is the scourge of statutory construction. See Blagbrough Family Realty Trust v. A & T Forest Products, Inc., 155 N.H. 29, 44 (2007) ("We do not construe statutes in isolation; instead, we attempt to do so in harmony with the overall statutory scheme. When interpreting two statutes that deal with a similar subject matter, we construe them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes").

In addition, the Plaintiffs' argument ignores Supreme Court precedent interpreting an identical statute applicable to zoning boards of adjustment – RSA 677:2. RSA 677:2, in pertinent part, provides that the 30-day period for filing a motion for rehearing "shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application in accordance with RSA 21:35 ...." When interpreting RSA 677:2, this Court has determined that the first day of the period to file a motion for rehearing with the zoning board of adjustment was the day after the date of the board of adjustment vote. See Bosonetto v. Town of Richmond, 163 N.H. 736,

742 (2012) (stating that "pursuant to the plain language of RSA 677:2, the thirty-day period began to run the day after the ZBA disapproved the application by a vote of an oral motion on August 10, 2009."); see also Cardinal Development Corp. v. Town of Winchester Zoning Board of Adjustment, 157 N.H. 710, 711 (2008) (stating that RSA 677:2 is "unambiguous," and that the thirty-day appeal period started to run the day following the zoning board of adjustment's vote to deny a special exception application).

The Plaintiffs try in earnest to distinguish these cases on the grounds that the issue before the court was not when the 30-day period began. A review of Bosonetto v. Town of Richmond, 163 N.H. 736 (2012) and Cardinal Dev. Corp. v. Town of Winchester Zoning Board of Adjustment, 157 N.H. 710 (2008), however, reveal that these cases are directly applicable to the question at hand. In Bosonetto v. Town of Richmond, 163 N.H. 736 (2012), while the issue was whether the rehearing period began to run from the date of the ZBA vote to approve its written notice of decision as opposed to after the initial vote to deny the application, this Court stated specifically that "pursuant to the plain language of RSA 677:2, the thirty-day period began to run the day after the ZBA disapproved the application by a vote on an oral motion on August 10, 2009." Id. at 742. At the time of that decision, RSA 677:2 contained the same reference to RSA 21:35 as in RSA 677:15. Further, because this Court is the final arbiter of statutory meaning, it could have certainly ruled that the time period for counting the thirty-day period began as suggested by the Plaintiffs regardless of whether the question was specifically raised by the parties.

The Plaintiffs' attempt to distinguish Cardinal Dev. Corp. also falls short as the Court, when interpreting RSA 677:2, noted that it finds its language clear and unambiguous. In its factual recitation, the Court stated "On November 28, 2006, Cardinal applied to the ZBA for a special exception to excavate loam, sand, gravel and stone. The ZBA held a hearing and denied the application on January 4, 2007. Cardinal then had thirty days, beginning the following day, to move for rehearing before the ZBA." Id. at 711.

Here, the Planning Board voted to approve both the subdivision and site plan applications on May 8, 2019. As a result, the deadline for filing an appeal with the superior court was Friday, June 7, 2019. The record establishes that this action was electronically-filed with the court on Saturday, June 8, 2019, at 7:07pm. The appeal was not filed until thirty-one (31) days after the date upon which the Planning Board voted to approve the TYBX3, LLC applications, so it is untimely under RSA 677:15 and, therefore, the superior court is without subject matter jurisdiction to address the appeal.

C. THE SUPERIOR COURT DID NOT ERR IN DENYING THE PLAINTIFFS' MOTON TO AMEND

1. BECAUSE THE SUPERIOR COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THE PLAINTIFFS' PLANNING BOARD APPEAL, THE COURT DID NOT HAVE JURISDICTION TO CONSIDER AMENDING THAT ACTION.

New Hampshire generally recognizes that amendments to existing actions should be treated liberally, with claims being allowed at various stages of a proceeding when justice requires. See Kravitz v. Beech Hill Hosp., LLC, 148 N.H. 383, 392 (2002). That said, the court cannot amend that which it has no jurisdiction over in the first place. "Without subject matter jurisdiction, a court cannot let a party amend a complaint to cure the deficiency." See Arrow Drilling Co. v. Carpenter, Civ. A. No. 02-9097, 2003 WL 23100808, at 5 (E.D. Pa. Sept. 23, 2003) ("A plaintiff . . . may not amend the complaint to substitute a new plaintiff in order to cure a lack of jurisdiction, because a plaintiff may not create jurisdiction by amendment when none exists."), aff 'd, 125 Fed.Appx. 423 (3d Cir. 2005); see also Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co., 700 F.2d 889, 893 (2d Cir. 1983) ("The longstanding and clear rule is that if jurisdiction is lacking at the commencement of [a] suit, it cannot be aided by the intervention of a [plaintiff] with a sufficient claim."); Summit Office Park, Inc. v. U.S. Steel Corp., 639 F.2d 1278, 1282-83 (5th Cir. 1981) ("[W]here a plaintiff never had standing to assert a claim against the defendants, it does not have standing to amend the complaint and control the litigation by substituting new plaintiffs . . . .").

This Court has explained:

> Subject matter jurisdiction is jurisdiction over the nature of the case and the type of relief sought: the extent to which a court can rule on the conduct of persons or the status of things. In other words, it is a tribunal's authority to adjudicate the type of controversy involved in the action. A court lacks power to hear or determine a case concerning subject matter over which it has no jurisdiction. A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive subject matter jurisdiction.

Appeal of Cole, 171 N.H. 403, 408 (2018). An excellent discussion of a court's inability to amend an action for which it has no subject matter jurisdiction is found in Commercial Warehouse Leasing, LLC v. Kentucky Transportation Cabinet, Civil Action No. 4:18-cv-00045-JHM 2018, WL 3747466 (W.D. Kentucky) (2018). In that case, the Kentucky Transportation Cabinet, Department of Highways (KYTC) filed a condemnation action concerning property owned by Commercial Warehouse Leasing, LLC (CWL), which resulted in the elimination of CWL's access easement. Id. at 1. CWL then filed an action against the State of Kentucky seeking various declaratory and injunctive relief, and to quiet title to the easement. Id. KYTC moved to dismiss the action on the basis that the court did not have subject matter jurisdiction under the Eleventh Amendment to the United States Constitution. Id. CWL subsequently moved to amend its complaint to add the secretary of KYTC in his individual capacity in order to cure any jurisdictional defect. Id.

Because jurisdiction is a threshold matter that must be addressed at the outset, the court first considered the motion to dismiss and ruled that CWL's complaint must be dismissed given the Eleventh Amendment's proscription against citizens suing their own states. The court then considered whether it could amend the lawsuit despite the lack of subject matter jurisdiction. In ruling that the complaint could not be amended, the court stated as follows:

> The question then becomes whether this Court can entertain CWL's motion to amend the complaint. KYTC argues that the Court must dismiss the action without considering the motion to amend, as it lacks subject matter

> jurisdiction over the dispute and thus the power to do anything other than dismiss the suit. CWL argues that it would be an abuse of this Court's discretion to dismiss the present action without considering the pending motion to amend. The Court agrees with KYTC and finds that the only action it may take is to dismiss the suit. Without jurisdiction the court cannot proceed at all in any cause . . . the only function remaining to the court is that of announcing the fact and dismissing the cause. The Court cannot assume subject matter jurisdiction will exist after it considers and possibly grants the motion to amend the complaint, as the Court must presently possess subject matter jurisdiction over the dispute to have the authority to even consider the merits of the motion to amend. While some district courts have considered motions to amend the complaint that would give the court subject matter jurisdiction when none presently existed, this practice should be limited to attempts to correct defective allegations of jurisdiction when jurisdiction actually existed at the time the complaint was filed. Here, though, CWL has not defectively alleged subject matter jurisdiction where it otherwise existed at the time of the action's commencement. At the time of this action's commencement, the dispute was between CWL and KYTC. Under the Eleventh Amendment, the Court did not have subject matter jurisdiction over this dispute. As such, the Court cannot consider the motion to amend the complaint so as to create subject matter jurisdiction. Thus, CWL must refile the action so that subject matter jurisdiction exists at the commencement of the suit.

Id. at 2-3 (citations and quotations omitted).

A review of the cases cited in the Plaintiffs' brief do not support the argument that a court can amend a claim that has been dismissed for lack of subject matter jurisdiction. By way of example, in Cadreact v. Citation Mobile Homes Sales, 147 N.H. 620 (2002), the only New Hampshire case cited, the issue presented was whether the trial court erred in failing to dismiss the plaintiffs' breach of contract action because the parties were allegedly required to arbitrate their dispute pursuant to a warranty contract. Id. at 621. While the court initially granted the motion to dismiss, it *sua sponte* allowed the plaintiffs to amend their complaint to show why the warranty contract did not apply. Id. The plaintiffs subsequently amended their complaint and the court concluded that they raised sufficient facts to show that the warranty contract was not applicable and, therefore, it could exercise jurisdiction over the original claims. Id. The key factor to Cadreact, and the other cases cited in the Plaintiffs' motion, is that the plaintiffs amended their claims to

cure what was otherwise defective allegations of jurisdiction, when jurisdiction otherwise existed. Here, the Plaintiffs cannot cure the fact that their planning board appeal was filed one day too late and, therefore, was untimely under RSA 677:15.

Moreover, the Plaintiffs' contention that the court should have considered their motion to amend prior to the motion to dismiss in this circumstance is unfounded. The case of Coughlin v. 750 Woburn St. Operating Co., LLC, 19-10330-FDS, U.S. Dist. 2019 WL 2912763 (D. Mass. July 8, 2019) involved a plaintiff's motion to amend her complaint of workplace discrimination, which had been removed to federal court under diversity of citizenship, and also whether the case should be remanded to state court for lack of diversity jurisdiction in light of the proposed amended complaint. The court noted in that case the remand was entirely dependent upon the ruling on the motion to amend since it would be determinative of which parties are ultimately involved, so the court addressed the motion to amend first. After granting the motion to amend, in part, the court addressed the motion for remand and concluded that diversity of citizenship was now destroyed since one of the named defendants in the motion to amend was a citizen of Massachusetts (as was the plaintiff). Id. at 3.

Thus, the Superior Court did not err in denying the motion to amend on the procedural basis that it did not have subject matter jurisdiction to address the motion.

2. THE PLAINTIFFS SHOULD NOT BE PERMITTED TO RE-FILE THEIR CLAIMS AT A LATER DATE IN SUPERIOR COURT SINCE THOSE CLAIMS WERE REQUIRED TO BE BROUGHT AS PART OF A PROPERLY-FILED PLANNING BOARD APPEAL UNDER RSA 677:15.

Although the superior court did not address whether the proposed claims were of the kind that could be raised via declaratory judgment, this Court may address this issue in the first instance since it involves a question of law. See Community Resources for Justice, Inc. v. City of Manchester, 154 N.H 748, 753 (2007); see also Choquette v. Roy, 167 N.H. 507, 518 (2015) ("because the applicability of RSA 477:27 to P.E. Roy's counterclaim presents a question of law, we need not remand the issue for the trial court's

determination in the first instance."). Resolving this legal issue now not only conserves judicial resources, but it also prevents the Plaintiffs from attempting to re-file their new claims and causing further delay to ToyBox proceeding with its approved development.

The claims the Plaintiffs attempt to raise separately are not proper declaratory judgment claims that can be filed outside of the normal appeal process. Rather, both claims deal directly with administrative action of the Planning Board, and do not challenge the constitutionality or legality of any particular land use regulation. See McNamara v. Hersh, 157 N.H. 72, 74-75 (2008).

> Generally, parties must exhaust their administrative remedies before appealing to the courts. This rule is based on the reasonable policies of encouraging the exercise of administrative expertise, preserving agency autonomy and promoting judicial efficiency. However, this rule, as applied, is flexible, and recognizes that exhaustion is not required under some circumstances. In limited situations, it is unnecessary to burden local legislative bodies and zoning boards with the responsibility for rulings on subjects that are beyond their ordinary competence. Thus, a petitioner need not exhaust administrative remedies and may bring a declaratory judgment action to challenge the decisions of municipal officers and boards when the action raises a question that is peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available. Judicial treatment may be particularly suitable when the constitutionality or validity of an ordinance is in question or when the agency at issue lacks the authority to act. These are the types of legal issues as to which specialized administrative understanding plays little role.

Id. at 74 (citations, quotations, and brackets omitted).

At paragraph 9 of the motion to amend, the Plaintiffs argue that the "[planning board] Decision violated constitutional, statutory and regulatory provisions" specifically citing two issues claimed to "fall squarely within the ambit of declaratory relief."

a. [P]articipation of a Planning Board member who should have been disqualified renders the Decision void; and

b. [T]he Decision was made without adhering to the regulatory requirement for waivers, and cite several subdivision regulations and site plan review regulations that were not complied with nor properly waived.

Joint Appendix at 47-48. Neither of the claims raise a challenge to the validity of the zoning ordinance or subdivision regulations, but are limited to the action of the Board. See Blue Jay Realty Trust v. City of Franklin, 132 N.H. 502, (1989); Morgenstern v. Town of Rye, 147 N.H. 558, 561, (2002). (Where the Court held that a plaintiff may initiate a declaratory judgment action to challenge the validity of a zoning ordinance after the expiration of the applicable statutory appeal period). Additionally, neither of these issues are beyond the planning board's ordinary competence, or otherwise uniquely suited to resolution by the court. Rather, both the assessment of board member disqualification, and the application (or lack thereof) to local regulations are exactly the kinds of subjects that fall within the scope of administrative expertise, and preserve agency autonomy and promote judicial efficiency. The Plaintiffs do not challenge the validity of any ordinance or regulation, nor question the Planning Board's legal authority to act on a matter.

It is the Board's decision-making process that is at the heart of the Plaintiffs' attempted declaratory judgment claims. The application of the regulations and waivers clearly falls under the administrative functions of the planning board. See RSA 674:35 (Power to Regulate Subdivisions); RSA 674:36 (Subdivision Regulations, including waiver provisions); RSA 674:43 (Power to Review Site Plans); RSA 674:44 (Site Plan Review Regulations, including waiver provisions). The claims being advanced are similar to those that were rejected in Property Portfolio Group, LLC. v. Town of Derry, 154 N.H. 610 (2006). There, this Court ruled that a challenge to claimed procedural irregularities in a planning board decision was better suited for administrative resolution since the planning board had the ability to consider and weigh the facts presented. Id. at 617. Issues like whether a land use board member is disqualified from participating in a matter, or whether the planning board erred in failing to grant certain waivers, are similarly issues that require the review of facts and information before rendering a decision. The Plaintiffs' argument creates a public policy issue where an aggrieved party could bring a declaratory judgment action challenging a board member's ability to serve,

and application of the regulations, years after a planning board approval creating a situation where there is no finality to the review and approval process.

For these reasons, the Court should rule that the Plaintiffs' claims were properly brought as part of the RSA 677:15 appeal, and cannot be filed as part of a separate declaratory judgment action.

CONCLUSION

For the reasons set forth in this brief, the Court should deny the Plaintiffs' appeal.

Respectfully submitted,

TOWN OF MOULTONBOROUGH

By Its Attorneys,

DRUMMOND WOODSUM & MacMAHON

Date: March 31, 2020

By: /s/ Matthew R. Serge

Matthew R. Serge, NHBA #14243
670 North Commercial St., Suite 207
Manchester, NH 03101
(603) 716-2895
mserge@dwmlaw.com

TYBX3, LLC

By Its Attorneys,

Date: March 31, 2020

By: /s/ Stephan T. Nix

Stephan T. Nix, Esq. NHBA #12923
25 Country Club Road, Suite 502
Gilford, NH 03249
(603) 524-4963
snix@metrocast.net

REQUEST FOR ORAL ARGUMENT

The Appellees respectfully request the opportunity to present oral argument not to exceed 15 minutes, to be presented by Stephan T. Nix, Esq. and Matthew R. Serge, Esq.

/s/ Matthew R. Serge
Matthew R. Serge

CERTIFICATION OF COMPLIANCE

Counsel for the Appellees certify that this brief complies with the requirements of Supreme Court Rule 16(11).

/s/ Matthew R. Serge
Matthew R. Serge

CERTIFICATION

I hereby certify that a copy of this Brief and Appendix has been forwarded to Julie K. Connolly, Esq., counsel for Krainewood Shores Association, Inc. and Black Cat Island Civic Association via the Court's electronic filing system.

/s/ Matthew R. Serge
Matthew R. Serge