THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0719

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

v.

TOWN OF MOULTONBOROUGH, NEW HAMPSHIRE
AND TYBX3, LLC

RULE 7 MANDATORY APPEAL FROM
CARROLL COUNTY SUPERIOR COURT

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

Krainewood Shores Association,
Inc. and
Black Cat Island Civic Association

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SUMMARY OF ARGUMENT

Defendants' interpretation of RSA 677:15, I defies the well-settled rules of statutory construction, which require the court to apply the plain and ordinary meaning of every word in the statute. Defendants ignore select words to construe the language inconsistently with how the statute is written. Their reliance on the phrase "in accordance with" is miscalculated, because the reference to RSA 21:35 does not support their argument, but instead confirms that Plaintiffs properly understood how to count the 30-day appeal period set forth in RSA 677:15, I.

Defendants' argument that Plaintiffs' motion to amend was properly denied also is unpersuasive. The cases on which Defendants rely to contend that the Superior Court was without subject matter jurisdiction to consider Plaintiffs' Motion to Amend are distinguishable and not binding precedent. Defendants' request that the Court deny Plaintiffs any opportunity to present their claims for declaratory relief is improper and must be denied.

ARGUMENT

I. DEFENDANTS' INTERPRETATION OF RSA 677:15, I IGNORES THE PLAIN LANGUAGE OF THE STATUTE AND DEFIES THE RULES OF STATUTORY CONSTRUCTION[1]

Defendants submit that Plaintiffs misinterpret the phrase "in accordance with" in RSA 677:15, I and that if Plaintiffs understood that "in accordance with" means "in a way that agrees with or follows (something, such as a rule or request)," Defs. Br. at 9, Plaintiffs would realize that day one of the 30-day appeal period was May 9 and day thirty was June 7, 2019. Id. Defendants' argument depends entirely on the faulty premise that the 30-day appeal period began the day the planning board voted. The language of RSA 677:15, I,

[1] The Superior Court's decision is reviewed *de novo,* because Defendants moved to dismiss based on the statute of limitations, which required the court to construe RSA 677:15, I. See Anderson v. Estate of Wood, 171 N.H. 524, 527 (2018) (explaining standard of review).

however, unambiguously provides that the 30-appeal period begins the day after the date of the planning board vote. Ironically, Defendants' focus on the phrase "in accordance with," as meaning to agree with or follow, to prove their point actually underscores the accuracy of Plaintiffs' construction of RSA 677:15, I.

Defendants argue that the incorporation of RSA 21:35 into RSA 677:15, I means that the date the planning board voted is the beginning of the appeal period and is excluded from the 30-day time count. Unfortunately for Defendants, the statutory language does not support their position. To uphold Defendants' construction of the statute, it would need to have been written:

> 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, in accordance with RSA 21:35.

If the statute were written like that, then the time period would be reckoned from the day the Planning Board voted, here May 8, which day would be excluded from the count pursuant to the dictates of RSA 21:35. Alternatively, the statute could have been written:

> 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, ~~in accordance with RSA 21:35~~.

If the statute were written like that, then also arguably day one of the 30-day count would have been May 9 – the date following the May 8 vote – because the rule of RSA 21:35 would not implicated. The problem with Defendants' argument is that ***both clauses are included***, and the rules of statutory construction require that every word be given effect when interpreting a statute. See White v. Auger, 171 N.H. 660, 666 (2019) (citing authority). Giving effect to both clauses, the appeal period began on May 9, the day after the May 8 Planning Board vote, and, as the date from which the time limit was to be reckoned, May 9 was excluded from the 30-day count.

Defendants attempt to bolster their argument that "in accordance with RSA 21:35" does not mean what it says in RSA 677:15, I, by asserting that the last antecedent rule is

"meaningless in this context." Defs. Br. at 10. Their argument is as confusing as it is unpersuasive. Defendants cite no authority for their cavalier position that the last antecedent rule does not apply to assist in the interpretation of RSA 677:15, I. In complete disregard of the rule, Defendants' construction of RSA 677:15, I requires that a phrase found at the very end of the statute modify a sentence at the beginning of the statute, as if it were written:

> 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 day 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.

The legislature, however, chose to place the phrase "in accordance with RSA 21:35" in the final sentence, to modify how the 30-day time period shall be counted, and to explicitly provide how to do the count: the 30-day appeal period ***shall be counted*** not from the date the Planning Board voted, as Defendants wish it said, but ***from the date following the date Planning Board voted***, and ***shall be counted "in a way that agrees with" the rule of RSA 21:35***, which excludes the first day of the time period from the count.

Defendants posit that Plaintiffs' understanding of the 30-day count results in "complete disharmony" and an "absurd result," Defs. Br. at 10, without demonstrating what is absurd or disharmonious about Plaintiffs' construction of RSA 677:15, I. There is nothing "extraordinary," as Defendants contend, see Defs. Br. at 9, about Plaintiffs' argument that the 30-day time period expired on June 10, because that determination "agrees with or follows" the rule of RSA 21:35. By contrast, Defendants' analysis is

flawed, because it fails to adhere to the settled rules of statutory construction. See White, 171 N.H. at 666 ("The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect." (quoting Gerard v. Town of Exeter, 159 N.H. 136, 141 (2009)). Defendants' position is further undermined by their claim that Plaintiffs' argument "ignores Supreme Court precedent interpreting an identical statue applicable to zoning boards of adjustment." Defs. Br. at 10. In fact, Plaintiffs directly addressed each of the cases Defendants cite. See Pls. Br. at 17 – 20. None of the cases precludes Plaintiffs' analysis of how the 30-day time period to appeal set forth in RSA 677:15, I is to be counted.

In short, Plaintiffs' interpretation of RSA 677:15, I's appeal period correctly applies settled principles of statutory construction, conforms to the statute's legislative history, and is consistent with Supreme Court precedent. Plaintiffs accurately determined that any appeal had to be filed by Monday, June 10, 2019, in accordance with RSA 21:35. Their complaint, therefore, was timely filed on June 8, and the Superior Court erred when it dismissed the complaint for lack of subject matter jurisdiction.

II. DEFENDANTS' ERRONEOUSLY SUBMIT THAT DECLARATORY RELIEF IS UNAVAILABLE

A. The Superior Court Had Subject Matter Jurisdiction To Consider Plaintiffs' Motion To Amend

Defendants cite no binding precedent to support their argument that the Superior Court did not have jurisdiction to consider Plaintiffs' Motion to Amend. All the cases on which Defendants rely involve questions of federal law that were brought in federal court, where the parties either lacked standing to bring the claim or were immune from suit. See Arrow Drilling Co. v. Carpenter, Civ. No. 02-9097, 2003 U.S. Dist. LEXIS 18775, 2003 WL 23100808 (E.D. Pa. Sept. 25, 2003), aff'd, 125 Fed. Appx. 432 (3rd Cir. 2005) (dismissing for lack of standing because plaintiff was not authorized under ERISA to file suit); see also Pressroom Unions-Printers League Income Sec. Fund v. Cont'l Assurance Co., 700 F.2d 889, 892 (2d Cir. 1983) (same); Summit Office Park, Inc. v. U.S. Steel

Corp., 639 F.2d 1278, 1280 (5th Cir. 1981) (same for securities law violations); Comm. Warehouse Leasing, LLC v. KY Trans. Cabinet, Civ. No. 4:18-cv-45-JHM, slip op. at 3-4 (W.D. KY Aug. 7, 2018) (dismissing because Defendant enjoyed Eleventh Amendment immunity).[2] As courts of limited jurisdiction, these federal courts could not create a cause of action where none existed. See e.g. Ray v. Eyster (In re Orthopedic "Bone Screw" Prods. Liab. Litig.), 132 F.3d 152, 155 (3d Cir. 1997) ("A federal court can only exercise that power granted to it by Article III of the Constitution and by the statutes enacted pursuant to Article III.") (citing authority).

By contrast, there are no standing or immunity issues here that divested the Superior Court of jurisdiction to consider Plaintiffs' claims. Under New Hampshire law, even if standing were an issue, amendments are allowed to substitute the proper plaintiff. See Appeal of Cole, 171 N.H. 403, 410 (2018) (allowing substitution to prevent injustice when no prejudice to defendant) (citing Nat'l Marine Underwriters, Inc. v. McCormack, 138 N.H. 6, 8 (1993)). The Superior Court has the authority to consider petitions for declaratory judgment under RSA 491:22, which grants it subject matter jurisdiction over Plaintiffs' claims for declaratory relief wholly independent of its subject matter jurisdiction over Plaintiffs' claims under RSA 677:15. See Appeal of Cole, 171 N.H. at 408 (explaining subject matter jurisdiction "is a tribunal's authority to adjudicate the type of controversy involved in the action"); see also Morgenstern v. Town of Rye, 147 N.H. 558, 561 (2002) (recognizing alternative legal bases to challenge land use board decision); RSA 491:7 (establishing superior court as court of general jurisdiction). Unlike the federal cases on which Defendants rely where no viable case or controversy existed, here, an actual dispute between proper parties involving cognizable claims exists.

Defendants' attempt to distinguish Cadreat v. Citation Mobile Homes Sales, 147 N.H. 620 (2002) is unpersuasive. It is irrelevant that the court *sua sponte* allowed the plaintiffs to amend their complaint; the case stands for the proposition that motions to amend can be considered even if the court has determined it is without jurisdiction to

[2] The cases were dismissed without prejudice to allow a new action with the proper parties.

consider the case. See id. at 621-22 (allowing amended complaint to assert waiver claim to overcome dismissal based on arbitration clause in contract). In affirming the decision, the Supreme Court explained:

> The trial court granted the motion to amend, "finding the plaintiffs have alleged facts supporting subject matter jurisdiction over the cause of action for which plaintiffs seek relief." This ruling in effect reversed the prior decision granting the motion to dismiss the case and proceeded to a trial on the merits.

Id. at 621. So too here, the Superior Court should have granted the motion to amend to allow the matter to proceed based on Plaintiffs' claims for declaratory relief, even if the court did not have subject matter jurisdiction to consider the claims under RSA 677:15, I.

New Hampshire law allows the court to consider motions to amend even after dismissing a complaint for lack of subject matter jurisdiction. See e.g. id.; see also Laroche v. Doe, 134 N.H. 562, 568-69 (1991) (considering motion to amend to overcome dismissal based on sovereign immunity but denying because proposed amendment did not cure defects in original complaint). Plaintiffs sought to amend the complaint to add claims over which the Superior Court had jurisdiction, which claims would not have unfairly surprised Defendants to their prejudice. The Superior Court erred when it declined to consider Plaintiffs' Motion to Amend, to prevent the injustice that would occur by denying Plaintiffs any review of the Planning Board's allegedly unconstitutional and illegal decision. See Pesaturo v. Kinne, 161 N.H. 550, 556 (2011) ("trial courts must give plaintiffs an opportunity to amend the writ to correct its perceived deficiencies"); see also RSA 514:9.

B. Plaintiffs' Claims For Declaratory Relief Are Not Barred

Defendants now ask the Court to rule as a matter of law that declaratory relief is not available to challenge planning board decisions, to "prevent[] the Plaintiffs from attempting to re-file their new claims and causing further delay to ToyBox proceeding with its approved development." Defs. Br. at 15-16. Defendants' request must be denied for several reasons.

First, Defendants could and should have presented this issue to the Court by way of cross appeal if they wanted a decision on the question of whether a petition for declaratory relief is appropriate here. Defendants' belated attempt to obtain a ruling violates the Court's procedural rules. See N.H. Supreme Ct. R. 16(4)(a) (requiring opposing party to include questions presented if dissatisfied with the presentation in the opening brief); see also id. R. 16(3)(b) (allowing questions not included in the notice of appeal only by motion from party who filed appeal or cross-appeal).

Second, if the dismissal for lack of subject matter jurisdiction were upheld, the dismissal must be without prejudice to Plaintiffs re-filing their petition for declaratory judgment. See Laroche, 134 N.H. at 565 (explaining no *res judicata* effect to dismissal based on sovereign immunity and allowing plaintiffs' second case against properly named defendants to proceed). Plaintiffs cannot be precluded from bringing a timely petition for declaratory judgment that has not even been reviewed by the court to determine whether it states a viable claim.

Finally, if the Court were to address the question on the merits, Defendants' request must be denied. Defendants contend that Plaintiffs' legal challenges to the Planning Board's decision are attacks on the administrative action of the Planning Board rather than the constitutionality or legality of a particular land use regulation. See Defs. Br. at 16. Defendants fail to appreciate that declaratory judgment petitions are appropriate to challenge the legality of a land use regulation *as applied* to a particular piece of property. See e.g. Morgenstern, 147 N.H. at 561 ("A challenge to a zoning ordinance as applied to a particular property may be initiated by way of statutory appeal, declaratory judgment or equitable proceedings.") (citing Caspersen v. Town of Lyme, 139 N.H. 637, 640 (1995)); see also Bedford Residents Group v. Bedford, 130 N.H. 632, 637, 639-40 (1988) (declaring rezoning decision made in violation of statute void). The very case on which Defendants rely to make their point, McNamara v. Hersh, 157 N.H. 72 (2008), recognizes the validity of declaratory relief to challenge decisions of an administrative board:

> 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.

Id. at 74 (emphasis added). Plaintiffs' challenges to the Planning Board's decisions – (i) to allow a member to participate who was disqualified due to a conflict of interest[3] and (ii) to waive multiple regulations without the requisite showing – clearly may be brought in a petition for declaratory judgment. See id., see also Morgenstern, 147 N.H. at 563-67 (reviewing declaratory judgment petition challenging legality of decision applying an ordinance to nonconforming property); Blue Jay Realty Trust v. Franklin, 132 N.H. 502, 510-13 (1989) (allowing petition for declaratory judgment to challenge the validity of zoning decisions outside the statutory time period for direct review).

Defendants' policy argument fares no better. See Defs. Br. at 17-18. Had the Planning Board adhered to the law, there would be no basis for declaratory relief. See Bedford Residents Group, 130 N.H. at 640 (rejecting argument that declaratory judgment petitions undermine the finality of zoning decisions). Plaintiffs' declaratory judgment claims are that the Planning Board's decision was made in violation of controlling law. These claims raise legal issues that fall squarely within the ambit of declaratory relief. If the Court decides to rule on the merits of the Motion to Amend, it should be granted and Plaintiffs' First Amended Complaint should be allowed as the controlling pleading in this matter.

[3] Defendants' description of the review process before the Planning Board does not fairly convey the involvement of a Planning Board member whose participation, Plaintiffs contend, violated RSA 673:14, I and rendered the Planning Board's vote illegal. See Defs. Br. at 5. The challenged member participated as a full and an alternate board member during the eight hearings when the application of TYBX3, LLC was considered, before the vote was taken on May 8, 2019. That Planning Board member's participation is one of the bases of Plaintiffs' claim that the decision must be voided for violating governing law.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully requests that the Court reverse the Superior Court's decisions to dismiss the Complaint and to deny the motion to amend, and remand this case for consideration of the merits of Plaintiffs' claims.

Respectfully submitted,

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

By their Attorney,

Dated: April 17, 2020

/s/ *Julie K. Connolly*

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CERTIFICATE OF COMPLIANCE

I, Julie K. Connolly, hereby certify that Plaintiffs-Appellants' brief complies with the word limitation prescribed by Rule 16(11) of the Supreme Court Rules, because this brief contains 2,886 words, excluding parts of the brief exempted by Sup. Ct. R. 16(11). This brief also complies with the typeface and type style requirements of Sup. Ct. R. 16(11), because the brief has been prepared in monospaced type facing, using Microsoft Word for Mac, Version 14.7.3 software, in font size 13, type style Times New Roman, with a line space setting of 1.5.

Dated: April 17, 2020

/s/ *Julie K. Connolly*
Julie K. Connolly

CERTIFICATE OF SERVICE

I, Julie K. Connolly, certify that on this 17th day of April, 2020, I filed the foregoing document with the New Hampshire Supreme Court by using the NH e-filing system. I further certify that I caused a true copy of the foregoing document to be served on all necessary parties or their counsel of record, by virtue of electronically filing the same via NH e-filing, as follows:

Defendant Town of Moultonborough, New Hampshire,
through its counsel, Matthew R. Serge;

Defendant TYBX3, LLC, through its counsel, Stephan T. Nix.

/s/ *Julie K. Connolly*
Julie K. Connolly