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

BRIEF FOR PLAINTIFFS-APPELLANTS

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

By their Attorneys: Julie Connolly Law, PLLC
Julie K. Connolly,
NH Bar # 10984
P.O. Box 665
Concord, NH 03302-0665
Tel.: (603) 496-5927
Email: julie@jkc-law.com

To be argued by: Julie K. Connolly

TABLE OF CONTENTS

TABLE OF AUTHORITIES…….…… 4

QUESTIONS PRESENTED……... 6

TEXT OF RELEVANT AUTHORITIES……... 6

STATEMENT OF THE CASE……7

STATEMENT OF FACTS……. 8

SUMMARY OF THE ARGUMENT……10

ARGUMENT……11

I. THE RULES OF STATUTORY CONSTRUCTION SHOW THAT THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION ……11

A. Standard Of Review……..11

B. The Plain Language Of RSA 677:15, I Provides That The 30-Day Appeal Period Ended On June 10, 2019……...11

1. The 30-day appeal period is to be reckoned from the date following the date of the vote……11

2. The last antecedent rule dictates that May 9 must be excluded from the 30-day count……..……...13

C. The Legislative History Demonstrates An Intent To Exclude The Date Following The Date Of The Vote From RSA 677:15, I's 30-Day Appeal Period…….14

D. How RSA 21:35, I Determines The Computation Of The 30-day Appeal Period of RSA 677:15, I Is A Matter of First impression For The Court……17

II. THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFFS' MOTION TO AMEND BASED ON LACK OF SUBJECT MATTER JURISDICTION……21

A. Standard of Review……..21

B. The Trial Court's Denial Of Plaintiffs' Motion To Amend Was An Abuse Of Its Discretion..... 21

CONCLUSION…….24

CERTIFICATION CONCERNING ORDER BEING APPEALED…….24

REQUEST FOR ORAL ARGUMENT…….24

CERTIFICATE OF COMPLIANCE..……...25

CERTIFICATE OF SERVICE……..25

ADDENDUM…….. 26

TABLE OF AUTHORITIES

Cases

Blue Jay Realty Trust v. Franklin, 132 N.H. 502, 507, 513 (1989) 22
Blumer v. Acu-Gen Biolabs, Inc., 638 F. Supp. 2d 81, 88-89 (D. Mass. 2009) 22
Bosonetto v. Town of Richmond, 163 N.H. 736, 742 (2012) 18, 19
Cadreact v. Citation Mobile Homes Sales, 147 N.H. 620, 621-22 (2002) 22
Cardinal Dev. Corp. v. Town of Winchester Zoning Bd. of Adjustment,
157 N.H. 710, 714-715 (2008) 16, 18
Collden Corp. v. Town of Wolfeboro, 159 N.H. 747, 750 (2010) 19, 22
Coughlin v. 750 Woburn St. Operating Co., LLC, No. 19-10330-FDS,
2019 U.S. Dist. LEXIS 112659, at *19 (D. Mass. July 8, 2019) 21
Dermody v. Town of Gilford Planning Bd., 137 N.H. 294, 296-97 (1993) 15
ERG, Inc. v. Barnes, 137 N.H. 186, 189 (1993) 23
Gerard v. Town of Exeter, 159 N.H. 136, 141 (2009) 12, 14
K & J Assocs. v. City of Lebanon, 142 N.H. 331, 334-35 (1997) 15, 17
M & I Heat Transfer Prods. v. Willke, 131 F. Supp. 2d 256, 260-63 (D. Mass. 2001) 22
Morgenstern v. Town of Rye, 147 N.H. 558, 561 (2002) 23
Mountain Valley Mall Assocs. v. Municipality of Conway,
144 N.H. 642, 652 (2000) 13, 14, 18
Nat'l Marine Underwrites, Inc. v. McCormack, 138 N.H. 6, 8 (1993) 21
Olson v. Litchfield, 112 N.H. 261, 262 (1972) 22
Olson v. Town of Grafton, 168 N.H. 563, 566 (2016) 11
Pelletier v. City of Manchester, 150 N.H. 687, 689 (2004) 19, 20
Pesaturo v. Kinne, 161 N.H. 550, 556 (2011) 23
Petition of Carrier, 165 N.H. 719, 721 (2013) 11
Prop. Portfolio Group, LLC v. Town of Derry, 154 N.H. 610, 613 (2006) 19
Quality Disc. Mkt. Corp. v. Laconia Planning Bd., 132 N.H. 734, 737 (1990) 22
Route 12 Books Video v. Town of Troy, 149 N.H. 569, 576 (2003) 19
State v. Lambert, 147 N.H. 295, 296 (2001) 21
Teeboom v. City of Nashua, 172 N.H. 301, 310 (2019) 11, 13
Trefethen v. Town of Derry, 164 N.H. 754 (2013) 18
White v. Auger, 171 N.H. 660, 666 (2019) 11, 12, 17

Statutes

RSA 21:35 ..... passim
RSA 21:35, I 12, 17
RSA 21:35, II 13, 18
RSA 491:22 ..... 6, 21, 23
RSA 491:7 21

RSA 508:4 22
RSA 514:9 21
RSA 541:6 17
RSA 676:3,II 7
RSA 676:5, I 17
RSA 676:5, III 7
RSA 677:15 6
RSA 677:15, I ..... passim
RSA 677:2 ..... 18, 20
RSA 677:4 ..... 17, 18

Rules

N.H. Super. Ct. R. 12(a)(3) 23
N.H. Super. Ct. R. 8(b)(2) 23
Supreme Court Rule 16(3)(i) 24
Supreme Court Rule 16(11) 25

Other Authorities

Am. Law of Zoning 3d, § 27.24, at 540 (1986) 15
Dictionary.com, http://dictionary.com/browse/begin (last visited Feb. 27, 2020) 12

QUESTIONS PRESENTED

I. Whether the trial court erred in granting Defendants' motion to dismiss for lack of subject matter jurisdiction based on its determination that the 30-day period to appeal the May 8, 2019 vote of the planning board started on May 9 and ended on June 7, 2019, despite the unambiguous language of RSA 677:15, I providing that the appeal period *shall begin the date after the date of the vote* and further providing *that the first day of the time period shall be excluded from the count*, in accordance with RSA 21:35? (issue preserved, see Plaintiffs' Objection to Defendants' Motion to Dismiss, Apx. at 25 – 33; Plaintiffs' Surreply to Defendants' Motion to Dismiss, Apx. at 40 – 43).[1]

II. Whether the trial court abused its discretion when it determined that it did not have subject matter jurisdiction to consider Plaintiffs' motion to amend the complaint to add claims for declaratory relief under RSA 491:22, because of its conclusion that the appeal filed pursuant to RSA 677:15, I was untimely? (issue preserved, see Plaintiffs' Motion to Amend Complaint, Apx. at 45-49; Motion to Reconsider, Apx. at 51 – 56; see also Order denying Motion to Dismiss, Add. at 33 n.3; Order denying Motion to Reconsider, Add. at 35).

TEXT OF RELEVANT AUTHORITIES

RSA 677:15 – Court Review.

I. Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable. Such petition shall be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was taken, including the written

[1] Citations to the record are as follows:
"Add." refers to the Addendum at the back of this brief;
"Apx." refers to the Joint Appendix filed simultaneously with this brief.

decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. This paragraph shall not apply to planning board decisions appealable to the board of adjustment pursuant to RSA 676:5, III. The 30-day time period shall be counted in calendar days beginning with the date following the date upon which the planning board voted to approve or disapprove the application, in accordance with RSA 21:35. See Apx. at 3 for a complete copy of the statute.

RSA 21:35 – Time Reckoned; Days Included and Excluded.

I. Except where specifically stated to the contrary, when a period or limit 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. See Apx. at 5 for a complete copy the statute.

STATEMENT OF THE CASE

On June 8, 2019, Krainewood Shores Association, Inc. and Black Cat Island Civic Association (collectively referred to hereinafter as "KSA") filed an appeal from a decision of the Moultonborough, New Hampshire Planning Board ("Planning Board"), to approve a site plan review application and a subdivision application, which had been filed by TYBX3, LLC ("TYBX"). Apx. at 6. KSA sought to reverse the decision of the Planning Board, because it was issued in violation of New Hampshire law and several Site Plan Review Regulations ("SPRR") and Subdivision Regulations ("SDR") of the Town of Moultonborough, New Hampshire ("Town"). TYBX filed a motion to dismiss the complaint, which the Town joined, contending that it was filed outside the thirty (30) day appeal period. Apx. at 22, 35. While the motion to dismiss was pending, KSA filed a motion to amend the complaint, to add counts for declaratory relief. Apx. at 45. On October 9, 2019, the Superior Court, (Ignatius, J.) granted Defendants' motion to dismiss and denied KSA's motion to amend the complaint. Add. at 33. KSA filed a motion to

reconsider, based on the Court's ruling that it did not have jurisdiction to consider the motion to amend. Apx. at 51. The Court denied the motion to reconsider on November 14, 2019. Add. at 35. A timely notice of appeal was filed on December 11, 2019.

STATEMENT OF FACTS[2]

In the fall of 2018, TYBX[3] filed a Site Plan Review Approval application and a Subdivision Approval application (hereinafter collectively the "Application") with the Planning Board, to develop a vacant lot at the intersection of Whittier Highway/N.H. Route 25 and Redding Lane in Moultonborough into a condominium complex, with units that combined storage for large "toys," such as boats, snow mobiles and motorcycles, with human amenities, such as kitchenettes, bathrooms, HV/AC and internet. Apx. at 7 – 8. The project, self-described as "Toy Box III, A Condominium known as Carriage House on Whittier Highway," proposed thirteen (13) privately owned, residential storage units (either 18' x 36' or 20' x 50'), spanning two wings of a two-story building that covered the entire buildable area of the lot. Id. The development was considered a "Major Subdivision," and TYBX paid the corresponding application fee. Id.

The Planning Board opened a public hearing on the Application in December 2018. Id. at 9. At the first hearing, TYBX explained that it had received a variance, with conditions, from the Zoning Board of Adjustment ("ZBA") for the use of the property as "residential storage units." Id. At that hearing, the Town Planner and Town Code Enforcement Officer both identified several issues, as did the public, regarding traffic, storm water management, and the size and hours of operation of the proposed facility. Id. Of paramount concern was the adverse impact of trucks pulling trailers at the intersection

[2] The Statement of Facts are taken from KSA's Complaint, which were accepted as true for purposes of deciding Defendants' Motion to Dismiss. See Add. at 28.

[3] At the time the Application was filed, the property was owned by the Sharen J. Fuller Revocable Trust, and TYBX2, LLC was the named Applicant. During the application approval process, the property was sold to TYBX3, LLC, which became the named applicant before the Planning Board. See Apx. at 7 – 8.

of Route 25 and Redding Lane, which already sustained significant congestion from the over 300 homeowners whose only access to Route 25 was from Redding Lane, and which already had been identified by state and local officials as a dangerous intersection. Id. at 9 – 10.

The hearing was continued over seven more meetings, finally closing for public input on April 24, 2019. Id. at 10. During the review process, changes were made to address the storm water drainage and vegetative buffering issues, but no changes were made to the location of the driveway to mitigate the public safety concerns about the additional traffic on Redding Lane. Id. at 10, 14 – 17.

A member of the Planning Board during the review process is an individual whose family stood to financially benefit from the proposed project. Id. at 11 – 12. That Planning Board member's husband and father-in-law own the landscaping company that had prepared the landscaping plan for the project. Id. That Planning Board member's father and father-in-law were the vice-chairman and chairman, respectively, of the ZBA when it granted the variance for the project. Id. Despite these conflicts of interest, that Planning Board member participated in the review hearings and voted to grant TYBX several waivers of SPRR and SDR regulations, but did not participate in the final vote. Id. at 11 – 14.

At its meeting the night of May 8, 2019, which TYBX attended but none of the homeowners in KSA or BCICA attended because no further input from the public was allowed, the Planning Board voted to approve the Application. Id. at 10.

SUMMARY OF THE ARGUMENT

The trial court erroneously determined that it did not have subject matter jurisdiction to review KSA's appeal from the Planning Board's decision or to consider its motion to amend the complaint to add claims for declaratory relief. The decision must be reversed and the matter remanded for consideration of the merits of KSA's claims.

A close reading of RSA 677:15, I demonstrates that the trial court erred when it concluded that the 30-day appeal period began May 9 and ended June 7, 2019, which rendered KSA's brief filed on June 8, 2019 untimely. The plain language of RSA 677:15, I provides that the time period shall begin the date after the date of the vote and further provides that the first day of the time period shall be excluded from the 30-day count, in accordance with RSA 21:35. The time period to appeal the May 8 vote of the Planning Board began on May 9, which, as the day that the time clock started to run, was excluded from the 30-day count, rendering the thirtieth day Saturday, June 8, and the filing deadline Monday, June 10, 2019. Any ambiguity in the statutory language is clarified by the legislative history, which reflects an intent to balance the dual goals of ensuring quick review of planning board decisions with fair notice to the public of those decisions, before the 30-day time period starts to run. The trial court in fact had subject matter jurisdiction over KSA's appeal, because the complaint was filed on June 8, 2019, two days before the June 10, 2019 expiration of the appeal period.

The trial court further erred when it denied KSA the right to amend its complaint to add claims for declaratory relief, based on its determination that it lacked subject matter jurisdiction to grant the motion. Although the filing deadline may have deprived the court of jurisdiction to consider the planning board appeal, it did not deprive the court of subject matter jurisdiction over other claims that were not time-barred, such as the claims for declaratory relief KSA sought to assert. When, as here, KSA could be denied any means of redressing its injuries unless the motion to amend were allowed, principles of fundamental fairness and justice required the trial court to consider the motion. The trial court's refusal to consider KSA's motion to amend was an abuse of discretion that must be reversed and remanded for consideration on the merits.

ARGUMENT

I. THE RULES OF STATUTORY CONSTRUCTION SHOW THAT THE TRIAL COURT ERRED WHEN IT DISMISSED PLAINTIFFS' COMPLAINT FOR LACK SUBJECT MATTER JURISDICTION

A. Standard of Review

The trial court's interpretation of RSA 677:15, I is a question of law, which is reviewed *de novo*. See White v. Auger, 171 N.H. 660, 666 (2019) (citing Olson v. Town of Grafton, 168 N.H. 563, 566 (2016)). To construe a statute, the court begins by looking at the words used and, if possible, gives them their plain and ordinary meaning. Id. (citing Petition of Carrier, 165 N.H. 719, 721 (2013)). Legislative intent is interpreted from the statutory language, without adding words the legislature chose not to include or disregarding provisions the legislature chose to include, in order "to effectuate [the statute's] overall purpose and avoid an absurd or unjust result." Id. Words and phrases are read within the context of the whole statute, to construe them to advance the statutory purpose or policy. Id. at 666-67; see also Teeboom v. City of Nashua, 172 N.H. 301, 310 (2019). If the statutory language is ambiguous, then the Court looks to the legislative history to discern the legislature's intent. See id.

B. The Plain Language of RSA 677:15, I Provides That The 30-Day Appeal Period Ended on June 10, 2019

1. The 30-day appeal period is to be reckoned from the date following the date of the vote.

Based on the plain, unambiguous language of RSA 677:15, I, the 30-day time period to file an appeal from a planning board's decision begins the day after the planning board voted and is calculated "in accordance with RSA 21:35." The two statutes provide, in relevant part:

> 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* …, in accordance with RSA 21:35.
>
> [W]hen a period or limit of time is to be reckoned from a day or date, *that day or date shall be excluded from* … the computation of the period or limit of time.

RSA 677:15, I and RSA 21:35, I (emphasis added). Read together, the statutes clearly state that the 30-day count begins the date following the date upon which the planning board voted and that the day the time period begins is excluded from the 30-day count.

The trial court's interpretation of the 30-day appeal period as having ended on June 7 effectively deletes, and erroneously disregards, critical language in the last sentence RSA 677:15, I. It is not possible to uphold the trial court's interpretation without vitiating one of the two applicable provisions, *i.e.*, either: "[t]he 30-day time period shall be counted in calendar days, in accordance with RSA 21:35"; or: "[t]he 30-day time period shall be counted in calendar days beginning with the date following the date upon which the planning board voted." The statute, however, includes both clauses, and both must be given effect. 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)). As written, the statute clearly directs (i) that the 30-day period shall be reckoned, or counted, *not* from the day of the vote, but from the *date following the date* of the vote, and (ii) that the date following the vote *shall be excluded* from the 30-day count. No other construction gives effect to every word in the statute.

RSA 677:15, I mandates that the 30-day clock began to run on May 9, 2019, the date following the May 8 vote. The plain meaning of the word "begin" is to commence or start. See "begin," Dictionary.com, http://www.dictionary.com/browse/begin (last visited Feb. 27, 2020). May 9, therefore, was the date when the time period started, and the 30 days were to be counted from that date. By explicitly incorporating RSA 21:35, the statute further mandates that the date the time period starts, here May 9, is excluded

from the computation of time. Accordingly, the thirtieth day was Saturday, June 8, and KSA's brief was not due until the following Monday, June 10, 2019. See RSA 677:15, I; see also RSA 21:35, II.

2. The last antecedent rule dictates that May 9 must be excluded from the 30-day count.

Under settled rules of statutory construction, the phrase "in accordance with RSA 21:35" must be construed to modify how to compute the 30-day appeal period that begins "the date following the date" of the vote. See Mountain Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 652 (2000) ("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"); see also Teeboom, 172 N.H. at 316 (explaining that the legislature is presumed to follow "ordinary rules of grammar pursuant to which a modifying phrase should be placed next to the clause it modifies"). KSA's interpretation of how to count the appeal period follows the last antecedent rule: that May 9, the date after the May 8 vote, was the beginning date to count the 30-day time period, and May 9 was excluded from the 30-day count, in accordance with RSA 21:35.

The trial court failed to follow the last antecedent rule when it determined that May 9 was day one of the 30-day count. The trial court's interpretation plucks the clause "in accordance with RSA 21:35" out of the sentence in which the legislature put it, and places it a few sentences earlier in the statute, as if RSA 677:15, I read: "[s]uch petition shall be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application, *in accordance with RSA 21:35*." If the clause were there, then the date upon which the board voted arguably would be excluded from the count, here May 8, and May 9 would have been day one. If the clause were there, then there would be no need for the last sentence of RSA 677:15, I, because the statute would already have provided how to count the appeal period. The clause, however, is not in that sentence, but instead is found in the final sentence of RSA 677:15, I, which

explicitly states how to count the 30-day appeal period. The trial court's determination of how to count the appeal period violates the rule that "qualifying phrases are to be applied to the words or phrases immediately preceding and are not to be construed as extending to others more remote." Mountain Valley Mall Assocs., 144 N.H. at 652 (internal quote omitted).

The trial court's calculation of the appeal period distorts the plain language of RSA 677:15, I. Applying the rules of statutory construction to RSA 677:15, I, it is clear that May 9, 2019 was the date from which the appeal time period was to be reckoned, which date was excluded from the 30-day count, which rendered the thirtieth day Saturday, June 8, and the deadline to file the appeal Monday, June 10, 2019. KSA's appeal, therefore, was timely filed, and the trial court erred when it granted Defendants' motion to dismiss for lack of subject matter jurisdiction.

C. The Legislative History Demonstrates An Intent To Exclude The Date Following The Date Of The Vote From RSA 677:15, I's 30-Day Appeal Period

If the Court determines that some ambiguity remains about what the statutory language means, the legislative history of RSA 677:15, I demonstrates that KSA's interpretation of the appeal period was correct and that, therefore, its June 8, 2019 filing was timely and the trial court had subject matter jurisdiction to consider its complaint. See Gerard, 159 N.H. at 143 (looking to legislative history only if statutory language is ambiguous). The legislative history of RSA 677:15, I reflects a legislative intent to balance the dual goals of ensuring quick review of planning board decisions with fair notice to the public of those decisions. The statute has been amended to provide more certainty and clarity about how the appeal period is calculated, while consistently upholding the requirement of public notice of the decision to trigger the limitations clock. *See* RSA 677:15, I (amended 1991, 1995, 2000, 2005, 2009 and 2013).

In 1992, RSA 677:15, I provided:

> Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the planning board.

The 30-day appeal period did not begin until after the public was put on notice of the decision by its filing in the planning board's office. See e.g. Dermody v. Town of Gilford Planning Bd., 137 N.H. 294, 296-97 (1993) (dismissing appeal filed on the thirty-first day after the Notice of the Decision had been filed in the planning office); see also K & J Assocs. v. City of Lebanon, 142 N.H. 331, 334-35 (1997) (allowing appeal filed thirty-three days after decision first filed because official copy filed three days later). In 1995, the statute was revised to clarify and confirm the importance of the public's access to the filed decision:

> Such petition shall be presented to the court within 30 days after the decision of the planning board has been filed **and first becomes available for public inspection** in the office of the planning board.

(emphasis added). As the Court explained in K & J Assocs., "[t]he time for appeal begins to run when the decision is delivered to the official whose duty it is to file it and [the official] places the decision in the place where such decisions usually are kept." Id. at 334 (quoting 4 R. Anderson, Am. Law of Zoning 3d, § 27.24, at 540 (1986)).

In 2000, the legislature changed the triggering event from the date the decision was filed to date the vote was taken, which provided more certainty to the 30-day time period. Despite this change, the legislature still recognized the need for public notice of the decision, by providing a right to amend petitions for review:

> Such petition shall be presented to the court within 30 days after the date upon which the board voted …; provided however, that if the petitioner shows that the minutes of the meeting … [and] the written decision, were not filed within 144 hours of the vote … the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed.

In 2009, "144 hours," which was changed to "within 5 business days," which again reflects an intent to provide more certainty and clarity.

In 2005, the last sentence was added, which is the critical language at issue here:

> 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.

By adding this sentence, the legislature directly addressed how to calculate the time period for an appeal. The appeal period begins the day after the night of the vote, and as the date from which the time period is reckoned, that day is excluded from the thirty-day count. This language reflects the consistent legislative intent to balance the need for quick review with the need for public notice of planning board decisions.

This language also recognizes that planning board decisions are made at night, after the close of business and, as such, cannot be made publicly available by the board until the next business day. See e.g. Cardinal Dev. Corp. v. Town of Winchester Zoning Bd. of Adjustment, 157 N.H. 710, 714-715 (2008) (discussing how the day ending with the close of business is a "matter of common sense" and holding night-time filing was not effective until the next day). The first opportunity for public notice of the vote is the next day when the planning board office reopens for business. The 2005 amendment acknowledges that reality by explicitly providing the 30-day count begins the day after the night-time vote. By explicitly stating the appeals period begins the day after the night-time vote, the legislature confirmed its intent to ensure that public notice of the vote must be given before the clock can start to run. And by explicitly providing that the appeal period shall be counted in accordance RSA 21:35, the legislature clarified that the day after the vote – the date from which the time period is to be reckoned – is excluded from the 30-day count.

In RSA 677:15, I, the legislature not only stated when the thirty-day time period begins, but affirmatively directed that the calculation must be done in accordance with RSA 21:35. By contrast, the legislature has not included a direct reference to RSA 21:35

in several other statutes. See e.g. RSA 677:4 (allowing appeals from applications for rehearing before the zoning board "within 30 days after the date upon which the board voted"); RSA 676:5, I (allowing appeals to the board of adjustment "within a reasonable time, as provided by the rules of the board"); RSA 541:6 (allowing appeals from applications for rehearing before certain state commissions "within thirty days after the decision on such rehearing"). The explicit reference to RSA 21:35 here, therefore, can only be considered a deliberate decision to exclude the first day after the planning board voted from the thirty-day appeal period.

If any ambiguity remains about how the legislature intended the 30-day appeal period to be counted, the law favors allowing KSA's appeal to proceed. See e.g. K & J Assocs., 142 N.H. at 334 ("Ambiguities as to whether an appeal is timely are resolved in favor of the person seeking to review the determination." (quoting 4 E. Ziegler, Rathkopf's The Law of Zoning and Planning, § 42.04, at 42-21 (4th ed. 1996)). KSA's understanding of RSA 677:15, I provides a definite date to trigger the 30-day appeal clock, which ensures both quick review and clear notice of planning board decisions. That interpretation is consistent with fair process and justifies allowing KSA's appeal to proceed.

D. How RSA 21:35, I Determines The Computation Of The 30-day Appeal Period of RSA 677:15, I Is A Matter of First Impression For The Court

The issue of how RSA 21:35, I affects the computation of the 30-day appeal period has not previously been presented directly to the Court. The cases which have addressed the timeliness of appeals from planning board decisions under RSA 677:15, I have not involved the precise issue before the court here: whether the incorporation of RSA 21:35 into RSA 677:15, I requires the first day following the date upon which the planning board voted to be excluded from the 30-day count. Without having developed argumentation on the issue, the Court has not yet had the opportunity to answer the question. See White, 171 N.H. at 665 (declining to address undeveloped argument); see

also Mountain Valley Mall Assocs., 144 N.H. at 659 (citing authority to explain that "vague and insubstantial arguments will not be addressed").

The trial court relied on three cases to justify its decision that first day of the 30-day count was May 9, which rendered KSA's filing on June 8, 2019 untimely and divested the court of subject matter jurisdiction. Each of the cases on which the court relied, however, are distinguishable: Trefethen v. Town of Derry, 164 N.H. 754 (2013); Bosonetto v. Town of Richmond, 163 N.H. 736 (2012); and Cardinal Dev. Corp., *supra*. As an initial though not dispositive matter, those cases involved petitions for review of zoning board of adjustment decisions, not planning board decisions.[4] More importantly, the cases do not support the trial court's conclusion that the Court "implicitly analyzed the deadline with RSA 21:35 [I] in mind." See Add. at 32, n.2.

The focus in both Trefethen and Cardinal Dev. Corp. was not when the 30-day period began, but when it ended. In both Trefethen and Cardinal Dev. Corp., the last day fell on a weekend, and the question was not whether the period ended on Saturday or Sunday, but whether RSA 21:35, II applied to push the deadline to Monday. See Trefethen, 164 N.H. at 756; see also Cardinal Dev. Corp., 157 N.H. at 711-12. Whether the day after the date of the vote was excluded from the 30-day period was irrelevant, because either weekend day caused the time period to end on the next business day. In both cases, the Court's focus was on subsection II, not subsection I, of RSA 21:35, to determine the filing deadline. In Cardinal Dev. Corp., the central issue was not even the Monday filing deadline, but whether a filing after the close of business on that Monday could be considered timely. The Court concluded that a night-time filing was not deemed filed until the next business day, which was a day too late. See id. at 715. Significantly, the rationale of Cardinal Dev. Corp. – that night-time activity cannot be officially recognized until the next business day – is consistent with KSA's interpretation of how to

[4] The language providing the 30-day time period to seek review is identical in RSA 677:2 and RSA 677:15, I. RSA 677:4 does not include an explicit reference to RSA 21:35; however, Trefethen applied the provisions of RSA 21:35 to determine the 30-day filing deadline. See id., 164 N.H. at 756.

construe the language of RSA 677:15, I to compute the 30-day appeal period: the night-time vote of the planning board is not officially recognized until the next business day, the date after the date of the vote, which, as the first day of the time period, is excluded from the count in accordance with RSA 21:35.

The issue in Bosonetto was what event triggered the running of the 30-day period. The statutory construction issue before the Court was what "any order or decision" meant, not how the time period should be computed. The petitioner argued the date the ZBA voted to approve the written decision triggered the clock. See id., 163 N.H. at 742. The Court rejected that argument and concluded that the words "any order or decision" included the vote on oral motion at the August 10, 2009 meeting. Id. The Court's statement that "the Petitioner had to have filed his motion for rehearing within thirty days of August 11, 2009," id., does not explain how the 30-day count is done and is not the holding of the case. In Bosonetto, the petition for review was filed on September 14, 2009, which was several days beyond the 30-day time period regardless of whether August 11 was counted as the first day or not.

The cases emphasizing strict compliance with statutory requirements for appeals of planning board decisions do not support the conclusion that the 30-day clock began to run on May 9 and expired on June 7, 2019. See e.g. Collden Corp. v. Town of Wolfeboro, 159 N.H. 747, 750 (2010) (construing "final decision" to encompass all decisions and dismissing appeal filed three years after the decision); Prop. Portfolio Group, LLC v. Town of Derry, 154 N.H. 610, 613 (2006) (determining "final decision" encompasses conditional approvals and dismissing appeal as untimely filed five months late); Route 12 Books Video v. Town of Troy, 149 N.H. 569, 576 (2003) (deciding under prior version of statute that appeal filed four months after notice of decision was untimely). These cases, and the cases on which the trial court relied, demonstrate that the Court has not had the opportunity to construe the statutory language at issue here.

The analysis set forth in Pelletier v. City of Manchester, 150 N.H. 687 (2004), supports the conclusion that KSA's complaint filed on June 8, 2019 was timely, even

though Pelletier involved a motion for rehearing to the ZBA pursuant to an older version of RSA 677:2. The then-current version of RSA 677:2 provided, in relevant part:

> Within 30 days after any order or decision of the zoning board of adjustment … any party to the action or proceedings … may apply for rehearing … This 30-day period *shall be counted in calendar days beginning with the date upon which the board voted* to approve or disapprove the application.

Id. at 689 (emphasis added). The plaintiff argued that RSA 21:35 should apply to exclude the first day of the time period. The Court rejected plaintiff's argument because the plain language of RSA 21:35 provides that its general rule does not apply when a statute specifically states a contrary rule. Id. The Court concluded that because the statutory language specifically provided that the appeal period began on the date of the vote, that was the first day of the count and RSA 21:35 did not apply.

By comparison, although RSA 677:15, I also provides a specific rule about how to count the time period, it specifically incorporates into its rule that the count shall be done in accordance with RSA 21:35. Following Pelletier, the 30-day time period would have begun on May 9, 2019 as the trial court ruled, *but for* the clear directive of RSA 21:35 that the day the count begins is excluded from the computation of time. Any other construction of RSA 677:15, I ignores its plain language and renders the inclusion of RSA 21:35 redundant, if not meaningless.

The trial court's determination that the appeal period started on May 9 and ended on June 7, 2019 patently ignores the rules of statutory construction, which require every word in a statute to be given meaning to avoid rendering phrases mere surplusage. The trial court's decision failed to effectuate the plain language of RSA 677:15, I, which explicitly incorporates RSA 21:35 to exclude the first day after the planning board voted when calculating the 30-day time period. KSA's appeal was timely filed on June 8, 2019. The trial court's decision to dismiss the appeal for lack of subject matter jurisdiction, therefore, must be reversed.

II. THE TRIAL COURT ERRED WHEN IT DENIED PLAINTIFFS' MOTION TO AMEND BASED ON LACK OF SUBJECT MATTER JURISDICTION

A. Standard of Review

A trial court's decision whether or not to grant a motion to amend a complaint is reviewed for an abuse of discretion. See Nat'l Marine Underwrites, Inc. v. McCormack, 138 N.H. 6, 8 (1993). Amendments to pleadings are liberally allowed, either to cure technical defects or to make substantive changes "when they are necessary for the prevention of injustice." Id. (citing authority). Denying a motion to amend that would prevent an injustice, and that would not prejudice the defendant by adding new evidence or claims, constitutes an abuse of discretion. See id.; see also State v. Lambert, 147 N.H. 295, 296 (2001) (abusing discretion if ruling was "clearly untenable or unreasonable to the prejudice of [the party's] case").

B. The Trial Court's Denial Of Plaintiffs' Motion To Amend Was An Abuse Of Its Discretion

The trial court abused its discretion when it declined to consider KSA's motion to amend based upon the erroneous assumption that it did not have jurisdiction to do so. See RSA 491:7 (establishing the superior court as the court of general jurisdiction); see also RSA 491:22, I (allowing petitions for declaratory judgment in superior court); RSA 514:9 ("Amendments in matters of substance may be permitted in any action, in any stage of the proceedings, upon such terms as the court shall deem just and reasonable, when it shall appear to the court that it is necessary for the prevention of injustice;"). The court could and should have considered the motion, which was properly before it, to determine whether it had jurisdiction over the declaratory judgment claims KSA sought to add. See Coughlin v. 750 Woburn St. Operating Co., LLC, No. 19-10330-FDS, 2019 U.S. Dist. LEXIS 112659, at *19 (D. Mass. July 8, 2019) (considering motion to amend before assessing subject matter jurisdiction).

At the time the motion to amend was filed, the court had not yet determined it lacked subject matter jurisdiction to review the RSA 677:15, I appeal. Even after the court concluded it did not have subject matter jurisdiction over the planning board appeal, it retained the authority to consider KSA's motion to amend, specifically to determine whether the amendment could cure any jurisdictional defects in the complaint. See Cadreact v. Citation Mobile Homes Sales, 147 N.H. 620, 621-22 (2002) (allowing motion to amend to correct jurisdictional deficiencies *after* motion to dismiss for lack of subject matter jurisdiction had been granted); see also Blumer v. Acu-Gen Biolabs, Inc., 638 F. Supp. 2d 81, 88-89 (D. Mass. 2009) (granting motion to amend and allowing proposed third amended complaint to establish subject matter jurisdiction); M & I Heat Transfer Prods. v. Willke, 131 F. Supp. 2d 256, 260-63 (D. Mass. 2001) (considering claim asserted in amended complaint to determine whether subject matter jurisdiction was established). There was no dispute that the claims for declaratory relief were timely filed, which the court could have considered even if it dismissed the RSA 677:15, I claims. See RSA 508:4 (providing a three year statute of limitations for all personal actions).

New Hampshire law has long recognized that declaratory relief must be available to challenge a zoning ordinance "especially … where, as here, the question is one peculiarly suited to judicial rather than administrative treatment *and no other adequate remedy is available to plaintiff*." Olson v. Litchfield, 112 N.H. 261, 262 (1972) (emphasis added). Challenges to zoning decisions through petitions for declaratory judgment have continued to be allowed. See e.g. Collden Corp. v. Town of Wolfeboro, 159 N.H. 747, 752 (2010) (allowing declaratory judgment action to challenge zoning decision after the expiration of the statutory appeal period when the issue involved a question of law); Quality Disc. Mkt. Corp. v. Laconia Planning Bd., 132 N.H. 734, 737 (1990) (allowing amended complaint to add declaratory judgment claim); Blue Jay Realty Trust v. Franklin, 132 N.H. 502, 507, 513 (1989) (allowing declaratory judgment petition challenging validity of zoning decisions outside of the statutory time periods for direct review).

At the preliminary stage of the proceedings, where only a Motion to Dismiss had been filed, the amendment should have been allowed to prevent the injustice of denying KSA any opportunity to present its claims. See Pesaturo v. Kinne, 161 N.H. 550, 556 (2011) (citing ERG, Inc. v. Barnes, 137 N.H. 186, 189 (1993) to explain "trial courts must give plaintiffs an opportunity to amend the writ to correct its perceived deficiencies"); see also N.H. Super. Ct. R. 12(a)(3) ("amendments in matter of substance may be made on such terms as justice may require"); N.H. Super. Ct. R. 8(b)(2) (providing amendment to the complaint is timely if claim "arose out of the conduct, transaction or occurrence set out – or attempted to be set out – in the original pleading"). Nothing in the rules precludes KSA from pursuing alternative claims based upon the same operative facts. KSA sought relief pursuant to both the declaratory judgment statute, RSA 491:22, and the planning board appeals statute, RSA 677:15, I. The validity of one cause of action did not divest the Court of jurisdiction to consider another cause of action. See Morgenstern v. Town of Rye, 147 N.H. 558, 561 (2002) ("A challenge to a zoning ordinance as applied to a particular property may be initiated by way of a statutory appeal, declaratory judgment or equitable proceeding.").

The trial court unreasonably declined to consider the merits of KSA's motion to amend complaint. The trial court's decision precluded KSA from having any opportunity to seek review of its claims, despite the fact that the petition for declaratory relief was timely and properly before the court. When, as here, KSA's claims would not prejudice Defendants, because they involve the same events and evidence as in the original complaint[5], the court's refusal to consider the motion to amend constituted an abuse of its discretion. The trial court's decision must be reversed and the matter remanded for consideration of the motion to amend on the merits.

[5] The two claims KSA asserted as petitions for declaratory judgment involve the same issues as the two claims in the RSA 677:15, I appeal that the planning board's decision was illegal.

CONCLUSION

For the reasons set forth above, KSA 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 KSA's claims.

Pursuant to Supreme Court Rule 16(3)(i), I certify that each of the decisions appealed from are submitted simultaneously herewith, by including a copy of them in the Addendum following this brief, at pages 28 and 34.

Respectfully submitted,

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

By their Attorney,

Dated: March 2, 2020

/s/ *Julie K. Connolly*
Julie K. Connolly
NH Bar # 10984
Julie Connolly Law PLLC
P.O. Box 665
Concord, NH 03302-0665
Tel.: (603) 496-5927
Email: julie@jkc-law.com

Request for Oral Argument

Plaintiffs-Appellants, by their counsel, respectfully request fifteen (15) minutes of oral argument before the full Court, because how the appeal period set forth in RSA 677:15, I is calculated based upon the explicit incorporation of RSA 21:35 is a matter of first impression.

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

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 6,535 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: March 2, 2020

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

CERTIFICATE OF SERVICE

I, Julie K. Connolly, certify that on this 2nd day of March, 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

ADDENDUM

TABLE OF CONTENTS

October 9, 2019 Notice of Decision and Order…… 28

November 14, 2019 Notice of Decision and Order……..…… 34

THE STATE OF NEW HAMPSHIRE

CARROLL, SS. **SUPERIOR COURT**

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

v.

Town of Moultonborough, New Hampshire
and
TYBX3, LLC

Docket No.: 212-2019-CV-00090

ORDER ON DEFENDANT'S MOTION TO DISMISS

The plaintiffs, Krainewood Shores Association and Black Cat Island Civic Association (collectively "plaintiffs") appeal the decision of the Town of Moultonborough Planning Board ("Planning Board") approving an application for site plan review and an application for condominium subdivision. (Court Index #1.) The defendants moved to dismiss the plaintiffs' claims on subject matter jurisdiction grounds. (Court Index #7.) The plaintiffs object. (Court Index #11.) The court finds that a hearing is not necessary to decide the pending issues. See Super. Ct. Civ. R. 13(b). Based on the parties' arguments by pleading, the relevant facts set forth in the complaint, and the applicable law, the court finds and rules as follows.

Factual Background

The complaint alleges the following facts, which for purposes of this motion to dismiss the court must assume to be true. Berry v. Watchtower Bible & Tract Soc., 152 N.H. 407, 410 (2005). On November 14, 2018 an application was submitted on behalf of TYBX3, LLC to develop a vacant lot (the "property") which is located at the intersection of Whittier Highway / N.H. Route 25 and Redding Lane in Moultonborough. (Compl. ¶ 6.) The application proposed construction of condominium storage units on the property for the purpose of storing large

"toys"—namely, "boats motorcycles, snowmobiles, and other large collectibles." (Id. ¶¶ 6-7.) The application sought a waiver from the Town of Moultonborough Driveway Permit. (Id. ¶ 8.) The record does not reflect that the waiver was granted, however, plaintiffs assert that during the review process the applicant represented that it had "received a Town-approved driveway permit." (Id.)

The Planning Board opened the public hearing on the application on December 12, 2018. (Id. ¶ 9.) At the hearing, both the public and the town planner expressed safety concerns about trucks hauling trailers accessing the storage units via the proposed location of the driveway onto Redding Lane due to pre-existing traffic congestion at the Redding Lane and Route 25 intersection. (Id. ¶¶ 10-11.) The Board voted to continue the hearing to allow the safety concerns to be addressed. (Id. ¶ 12.) Ultimately, the hearing was continued seven times and was finally closed for public input on April 24, 2019. (Id.) On May 8, 2019 the Planning Board voted and approved the application with sixteen conditions. (Id. ¶ 13.)

Plaintiffs filed a complaint with this court on June 8, 2019 appealing the Planning Board's decision to approve the applications. (See generally Compl.) In their complaint, plaintiffs assert that a certain board member's participation in the application review process violated their constitutional due process rights and that the Planning Board improperly granted the application absent required waivers. (See id. ¶¶ 15-23.) Additionally, the plaintiffs contend that the Planning Board's decision should be reversed as unreasonable because the Board approved the application with the densities proposed in the application and accepted a traffic study without peer review. (See id. ¶¶ 24-27.) The defendants move to dismiss the plaintiffs' claims in their entirety, arguing the court lacks subject matter jurisdiction to hear this case as the complaint was not timely filed. (See generally Defs. Mot. Dismiss).

Legal Standard

When ruling on a motion to dismiss the court must discern whether the allegations stated in the plaintiff's complaint "are reasonably susceptible of a construction that would permit recovery." Plourde Sand & Gravel Co. v. JGI E., Inc., 154 N.H. 791, 793 (2007) (quotation omitted). The court must "assume all facts pled in the plaintiff's writ are true, and . . . construe all reasonable inferences drawn from those facts in the plaintiff's favor." Id. (quoting Berry v. Watchtower Bible & Tract Soc'y of N.Y. Inc., 152 N.H. 407, 410 (2005)). But, the court need not "assume the truth of statements . . . that are merely conclusions of law." Gen. Insulation Co. v. Eckman Constr., 159 N.H. 601, 611 (2010). A plaintiff must support his or her legal conclusions and claims with "predicate facts." Id. at 612. The court should assay these facts against the applicable law and deny the motion to dismiss "[i]f the facts as alleged would constitute a basis for legal relief." Starr v. Governor, 148 N.H. 72, 73 (2002).

Analysis

The defendants move to dismiss the plaintiffs' claims in their entirety, arguing the court lacks subject matter jurisdiction to hear this case. (See generally Defs.' Mot. Dismiss). More specifically, the defendants contend that the plaintiffs missed the 30-day deadline imposed by RSA 677:15. (Id.) The defendants maintain that the plaintiffs were required, per the plain language of RSA 677:15 I, to file their appeal by June 7, 2019 as the 30-day period began to run on May 9, 2019—the day after the Board voted. (Id.) The plaintiffs contend that the statutory deadline began a day later—May 10, 2019—and thus the thirtieth day was June 8, 2019. (See Pls.' Obj. Mot. Dismiss ¶¶ 2–4.) The plaintiffs further contend that as this date falls on a Saturday their appeal was not technically due until Monday June 10, 2019. (Id. ¶ 4.)

New Hampshire law requires strict compliance with statutory time requirements for appeals of Planning Board decisions to the superior court. Route 12 Books & Video v. Town of Troy, 149 N.H. 569, 575 (2003). This is because statutory compliance is a necessary prerequisite to establishing jurisdiction in the superior court. Id. RSA 677:15, I provides the jurisdictional deadline for superior court review of a Planning Board decision. Id. It requires that a person "aggrieved by any decision of the [P]lanning [B]oard" present a petition to the superior court "within 30 days after the date upon which the Board voted to approve or disapprove the application." RSA 677:15, I; Prop. Portfolio Grp., LLC v. Town of Derry, 154 N.H. 610, 613 (2006), as modified on denial of reconsideration (Jan. 24, 2007). RSA 677:15, I further sets out that:

> [t]he 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.

When construing a statute, the court must "first examine the language found in the statute and where possible, [] ascribe the plain and ordinary meanings to words used." Appeal of Garrison Place, 159 N.H. 539, 542 (2009) (brackets and quotation omitted). "When a statute's language is plain and unambiguous, we need not look beyond [it] for further indications of legislative intent." Id. (quotation omitted); Collden Corp. v. Town of Wolfeboro, 159 N.H. 747, 750 (2010).

As stated above, defendants maintain that the "the date following the date" language in the last sentence of RSA 677:15, I unambiguously establishes that the 30-day deadline begins running the day after the Planning Board's vote. (See Defs.' Mot. Dismiss; Def.'s Resp. Pls.' Obj. Mot. Dismiss). The court agrees. The plaintiffs do not dispute that this language pushes the beginning of the appeal period back one day, but rather go one step

further. (See Pls.' Obj. Mot. Dismiss). Despite the clear language of RSA 677:15, I, the plaintiffs argue that the reference to RSA 21:35 in the last sentence pushes back the beginning of the 30-day period an additional day to May 10, 2019. (Id.)[1]

Although the New Hampshire Supreme Court has not had the opportunity to examine when the Planning Board appeal statute's 30-day period begins to run, the Court has dealt with identical language in the Zoning Board of Adjustment's appeal statute regarding its 30-day deadline. Compare RSA 677:2 with RSA 677:15, I; see Trefethen v. Town of Derry, 162 N.H. 754 (2013) (measuring the 30-day deadline from the day after the ZBA voted to deny the motion for rehearing); Bosonetto v. Town of Richmond, 163 N.H. 736 (2012); Cardinal Dev. Corp. v. Town of Winchester Zoning Bd. Of Adjustment, 157 N.H. 710 (2008).[2] In each instance, the court began its counting of the 30-day period on the day following the board's vote, consistent with the plain meaning of the statutory language. See e.g., Bosonetto, 163 N.H. at 736 ("Thus, 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 . . . .").

The court finds that the defendants have met their burden to show that the plaintiffs did not bring their action within the 30-day statutory deadline under RSA 677:15, I. The Planning Board voted to approve the applications on May 8, 2019. As such, the 30-day deadline began

[1] Plaintiffs seemingly imply that the phrases "following the date" and "in accordance with RSA 21:35" in RSA 677:15 each separately refer to an additional day after which the 30-day begins, which is how plaintiffs reach the conclusion that the 30-day appeal period began May 10, 2019—two days after the Board voted. (emphasis added).

[2] Plaintiffs assert that the defendants' reliance on Cardinal and Bosonetto is misplaced because in neither case was the court focused on calculating the 30-day deadline "considering the legislature's decision to amend the statute to include an explicit reference to RSA 21:35." (See Pls.' Surreply Mot. Dismiss); contra Trefethen, 162 N.H. at 757 (declaring that the dispositive issue in the Bosonetto case was when the thirty-day statutory deadline began). However, the fact that these cases were decided after RSA 677:2 and RSA 677:15 were each amended to add the reference to RSA 21:35 supports the conclusion that the court implicitly analyzed the deadline with RSA 21:35 in mind. See 2005 N.H. Laws ch. 105:1; see id. at ch. 105:2.

running on May 9, 2019—the day after the vote. Thus, the plaintiffs' failure to file this appeal by the thirtieth day—June 7, 2019—divests this court of subject matter jurisdiction.[3]

Conclusion

For the foregoing reasons, the defendants' motion to dismiss is GRANTED.

SO ORDERED.

September 24, 2019

Amy L. Ignatius
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 10/09/2019

[3] Plaintiffs additionally seek to amend their complaint to clarify that they seek declaratory judgment on Counts I and II. (Court index #16.) However, as this court lacks subject matter over the merits of this case, it likewise lacks subject matter jurisdiction to rule on the plaintiff's motion to amend.

STATE OF NEW HAMPSHIRE

CARROLL, ss. SUPERIOR COURT
Docket No.212-2019-cv-00090

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

v.

Town of Moultonborough, New Hampshire,
and TYBX3, LLC

MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFFS' MOTION TO AMEND

NOW COME Petitioners, Krainewood Shores Association, Inc. and Black Cat Island Civic Association ("Petitioners"), by and through their attorney Julie K. Connolly of Julie Connolly Law PLLC, and move pursuant to New Hampshire Superior Court Rule 12(e) for reconsideration of the Court's October 9, 2019 Order granting Defendants' Motion to Dismiss and denying Plaintiffs' Motion to Amend ("Order"). In support hereof, Petitioners state:

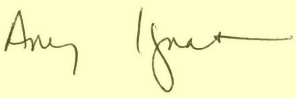
1. A motion for reconsideration is appropriate when a party, like Petitioners here, submits that a decision was rendered without considering a point of law or fact. *See* N.H. Sup. Ct. R. Civ. P. 12(e) (allowing motion to reconsider when there are "points of fact or law that the Court has overlooked or misapprehended"). Petitioners respectfully submit that the Court failed to consider that, as a court of general jurisdiction, *see* RSA §§ 491:7 and 498:1, it had the power, and should have exercised that power, to consider the Motion to Amend Complaint ("Motion to

CERTIFICATE OF SERVICE

I, Julie K. Connolly, certify that on this 17th day of October, 2019, I filed the foregoing document in the Carroll County Superior Court via the NH e-court filing system. I further certify that I caused a true copy of the foregoing document to be served on all necessary parties by virtue of electronically filing the same via NH e-filing. I also certify that I caused a true copy of the foregoing document to be served on the Defendants in this matter who have not registered with the NH e-filing system, by sending it to them via email.

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

Denied



Honorable Amy L. Ignatius
November 6, 2019

While liberal amendment is encouraged, and routinely granted by this court, amendment can only be granted when a complaint is legitimately before the court. Here the filing was time-barred and thus the court has no jurisdiction to grant a motion to amend. Nor is there an amendment that could alter the dates on which the complaint was filed or the statutory mandates.

The court finds no matter
of fact or law that was overlooked or misapprehended to warrant reconsideration.
Motion DENIED.

Clerk's Notice of Decision
Document Sent to Parties
on 11/14/2019