

**THE STATE OF NEW HAMPSHIRE  
THE SUPREME COURT**

**GEORGE STERGIU & a.**

**v.**

**CITY OF DOVER**

**CASE NO. 2021-0139**

**MEMORANDUM OF LAW IN LIEU OF BRIEF SUBMITTED  
PURSUANT TO SUPREME COURT RULE 16(4)(b) BY CITY OF  
DOVER PLANNING BOARD (CITY OF DOVER)**

NOW COMES the City of Dover Planning Board (City of Dover) (hereinafter “City”), by and through the undersigned City Attorney, and submits this Memorandum of Law in the above-captioned matter pursuant to Supreme Court Rule 16(4)(b), stating in support as follows.

**I. Introduction**

This appeal presents pure questions of law. In the City’s view, the trial court correctly denied the appellants’ motion to dismiss. The appellants consented to the procedure by which the Planning Board re-approved the application in July 2020. In *sua sponte* dismissing the appeal of the 2020 re-approval, the trial court addressed an area of the law that could benefit significantly from clarification by this Court, and below the City has offered certain information and authority of potential interest to the Court in addressing that issue.

## II. Brief Recitation of the Case

This appeal has its roots in 2019, when the applicants (several of whom are now appellants) sought site plan approval from the City's Planning Board. On April 23, 2019, the City's Planning Board approved the site plan application. *See* App. Volume III at 37-39. The applicants did not submit the final plans for signature within ninety days, as required by the City's Planning Board Site Review Regulation § 153-8<sup>1</sup>. *See* App. Volume IV at 35.

Thereafter, the applicants sought re-approval in 2020, *see* App. Volume II at 40, which the Planning Board granted on July 28, 2020, *see* App. Volume IV at 45-46. Certain abutters appealed that July 28, 2020 re-approval to the Superior Court. *See* App. Volume V at 4-12. In the proceedings before the trial court, the City filed an answer to the abutters' appeal, but the merits of the appeal have yet to be adjudicated.

Eventually, certain of the applicants and their entity intervened in the Superior Court matter and moved to dismiss, asserting that the 2019 approval is the operative approval and the abutters were barred from challenging the 2019 approval. *See* App. Volume V at 13, 23, 27.

In a series of two orders, the second of which resolved a motion for reconsideration, the trial court denied the appellants' motion to dismiss, but ultimately did dismiss this matter *sua sponte*, finding that the administrative

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<sup>1</sup> Available at: <https://ecode360.com/33400339>.

appeal to the Superior Court was, in essence, filed prematurely. *See* Order dated February 12, 2021 attached within Appellants' Brief p. 39; Order dated March 10, 2021 attached within Appellants' Brief p. 49. This appeal followed.<sup>2</sup>

### **III. Brief Statement of the Facts**

The City agrees with the detailed statement of the facts within the appellants' brief, but brings one additional fact to this Court's attention. At the July 28, 2020 meeting of the Planning Board, the applicants' representative expressly concurred that the 2019 approval had expired, stating: "the applicant wasn't able to fulfill the conditions of approval before the approval expired." *See* App. Volume IV at 35 (emphasis added); *see also* App. Volume II at 40 (letter from applicant's representative requesting re-approval).

### **IV. Standard of Review**

The trial court's rulings in this matter all centered upon the issue of subject matter jurisdiction. The existence of subject matter jurisdiction "is a question of law subject to *de novo* review." *In the Matter of Mallett & Mallett*, 163 N.H. 202, 207 (2012). In addition, statutory construction is a

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<sup>2</sup> To date, the City had not briefed or really even taken a position on the motion to dismiss below because, as the City explained at the hearing below, the motion was premised upon assertions and arguments not raised before the Planning Board, *see* Transcript of Hearing December 17, 2020, at 24:22 to 25:7.

legal issue reviewed *de novo*. See *State v. Eldridge*, 173 N.H. 61, 67 (2020).

## V. Argument

### A. The trial court correctly determined that the 2019 approval expired.

In its reconsideration Order, the trial court held that the operative approval in this matter is the 2020 re-approval. The City believes the Superior Court decided this issue correctly.

First, it bears noting the City’s 90-day regulation calling for plans to be timely signed (Section 153-8 of the City’s site review regulations) uses the word “shall”, which creates a mandatory requirement. See, e.g., *In the Matter of Liquidation of Home Ins. Co.*, 157 N.H. 543, 553 (2008) (observing “shall” is mandatory).

There is no dispute the mandatory 90-day certification requirement was not met with respect to the 2019 approval.

The record also shows that, at the July 28, 2020 meeting of the Planning Board, City staff (through Mr. Parker) explained that the April 23, 2019 approval “expired unsigned due to unforeseen issues encountered by the applicant”, and that the planning board “is being asked to reapprove the application.” See App. Volume IV at 35.

The applicants’ representative then proceeded to concur, explaining “the applicant wasn’t able to fulfill the conditions of approval before the approval expired.” *Id.*; see also App., V.II at 40 (letter from applicant’s representative requesting re-approval).

So as a procedural and factual matter, before the Planning Board there was agreement that the 2019 approval expired as well as agreement on the re-approval process used. As the trial court in this matter noted (on reconsideration), “the Intervenors cannot seek and obtain re-approval of the application by the Board (the July 28, 2020 Decision) and subsequently assert that such approval is irrelevant or moot because of the existence of the April 23, 2019 Decision.” Reconsideration Order at 5.

The trial court’s reasoning accorded with prior decisions of this Court rejecting after-the-fact efforts to, on appeal, challenge a procedure used below without objection:

It is not necessary . . . for us to consider the legality of the procedure adopted . . . in the case at bar because counsel for the plaintiffs made no objection and took no exception to it and this acquiescence on their part amounts to a waiver by them of any possible irregularity which there may be therein.

*Morrill v. Amoskeag Sav. Bank*, 90 N.H. 358 (1939); *see also Chasan v. Village Dist. of Eastman*, 128 N.H. 807, 813 (1986) (“Having acquiesced in the procedure employed, the plaintiffs cannot now object to the form of the proceeding.”).

The trial court’s ruling also accorded with RSA 676:4, IV, which addresses the planning board’s procedures and generally stresses substance over form:

The procedural requirements specified in this section are intended to provide fair and reasonable treatment for all parties and persons. The planning board's procedures shall not be subjected to strict scrutiny for technical compliance. Procedural defects shall result in the reversal of a planning

board's actions by judicial action only when such defects create serious impairment of opportunity for notice and participation.

RSA 676:4, IV. Here, there is no suggestion of the type of procedural defect (*e.g.*, lack of notice or opportunity to participate) of the type that might call the re-approval process into question.

In the City's view, the trial court correctly held that the 2020 approval is the operative approval.

**B. The “conditional” versus final approval issue and the interplay between RSA 677:15, I and 676:4, I(i)(2).**

With respect to the *sua sponte* dismissal on jurisdictional grounds<sup>3</sup>, the City brings the following authority and information to the Court's attention in construing RSA 677:15, I.

A planning board decision is not subject to appeal unless it is a “decision of the planning board” within the meaning of RSA 677:15, I. Where conditions are attached to a planning board approval, they can either be classified as conditions precedent or conditions subsequent. *See* generally *Prop. Portfolio Grp., LLC v. Town of Derry*, 154 N.H. 610, 615 (2006); *Totty v. Grantham Planning Board*, 120 N.H. 388, 389 (1980). While conditions precedent will delay a decision from being appealable, conditions subsequent will not.

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<sup>3</sup> As discussed above, the City views the 2019 approval as having expired, meaning there is no need to address whether the 2019 approval was a “decision of the planning board” within the meaning of RSA 677:15.

The commencement of the appeal period turns on whether the Planning Board's conditions should be classified as conditions precedent or subsequent. The 2020 re-approval included certain conditions<sup>4</sup> that would need to be characterized in order to mark the commencement of the appeal period. This Court has on two occasions provided case illustrations:

- In *Prop. Portfolio Group*, this Court classified as a condition subsequent a requirement to “[p]rovide landscape buffer details for the Central Street residential uses,” *Prop. Portfolio Group*, 154 N.H. at 612.
- In *Totty v. Grantham Planning Board*, 120 N.H. 388, 389 (1980), this Court classified as a condition precedent a “conditional approval of the preliminary layout.” (Emphasis added).

In weighing the respective arguments in this appeal, the City would offer the following observations for the Court:

- The express text of the relevant statutes seem more focused on whether the approval requires further action by the planning board<sup>5</sup>, with no express reference to actions by City staff after the planning

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<sup>4</sup> For example, the filing of a “parking management plan,” a “[p]arking lease” to the “satisfaction of the Assistant City Manager”, and a “plan to remove the knotweed before construction activity or demolition.” App. Volume IV at 46.

<sup>5</sup> The operative statute at issue (RSA 677:15, I) only concerns itself with “any decision **of the planning board.**” An approval requires no further hearing unless it involves “discretionary judgment on the part **of the board.**” See RSA 676:4, I(i)(2) (emphasis added).

board approval, though one might consider delegated authority to staff as an extension of the planning board's authority.

- The minutes confirm that the Planning Board regarded the 2020 re-approval as the board's final decision on this site plan, meaning the Planning Board did not continue the matter to a future hearing.
- New Hampshire planning boards commonly issues approvals with conditions similar to the 2020 re-approval, with the understanding those approvals still to be "decisions of the planning board" triggering the thirty-day appeal review period within RSA 677:15, I. The outcome reached by the trial court may, if adopted by this Court, surprise some applicants who currently believe their land use approvals to be final and unappealable.
- A failure to articulate a clear rule of law could easily lead to disputes between future applicants/abutters about when the appeal period started, whether notice was sufficient, and the like.

In the end, the City is not advocating for any particular result or outcome. Instead, the City's simply underscoring the need for clarity, as land use applicants and Planning Boards/staff<sup>6</sup> in New Hampshire need certainty about the commencement and expiration of the 30-day appeal period. The City would prefer, if analytically possible, a fairly bright line

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<sup>6</sup> Municipal staff and Planning Boards need to understand (and assist the public with) a variety of administrative issues, up to and including when an administrative appeal period is active and when it is final. *See, e.g., Richmond Co. v. City of Concord*, 149 N.H. 312, 315 (2003) (explaining how, pursuant to Part I of the State Constitution, municipalities have a duty to provide meaningful assistance to their citizens).



rule in place that clearly delineates the commencement of the appeal period of planning board action.

## **VI. Conclusion**

For the reasons outlined above, the City believes the Court should: (i) affirm the trial court’s ruling that the 2020 re-approval is the operative approval, and (ii) clarify the decisional law about the 2020 re-approval and whether it was a “decision of the planning board”.

Respectfully submitted,

City of Dover Planning Board  
(City of Dover)

By its Attorney,

Dated: September 30, 2021

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**CERTIFICATE OF WORD COUNT**

Consistent with Supreme Court Rule 16(4)( b), this memorandum of law does not exceed 4,000 words. This memorandum contains 1,894 words, exclusive of the caption, title, the signature block above, this certification, and the certificate of service below.

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**CERTIFICATE OF SERVICE**

Pursuant to Supreme Court Rule 16(10) and Supplemental Rules of the Supreme Court of New Hampshire for Electronic Filing 8(b)(5), the undersigned certifies that the City of Dover has electronically filed the foregoing, which will cause copies to be distributed to all duly registered counsel of record in this appeal.

Dated: September 30, 2021                      By: /s/ Joshua M. Wyatt  
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