THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2021-0139

George Stergiou & a. v. City of Dover

Rule 7 Mandatory Appeal from
Strafford County Superior Court

BRIEF FOR INTERVENORS THE FAKHOURYS, LLC & MICHELINE ELIAS

THE FAKHOURYS, LLC &
MICHELINE ELIAS

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II. QUESTIONS PRESENTED

1. Under New Hampshire law, conditions precedent contemplate further action on the part of a municipality. On April 23, 2019 and July 28, 2020, the City of Dover Planning Board approved the Intervenors' application(s) for site plan review subject to "conditions to be met prior to signing of the plans" that were wholly administrative in nature. Did the Trial Court err in ruling that the Planning Board's approvals were subject to conditions precedent? (Appd'x Vol. V at 19, 40–43, 54.)

2. Under New Hampshire law, planning board approvals subject only to conditions subsequent are considered "decision[s] of the planning board" within the meaning of RSA 677:15, I. On April 23, 2019 and July 28, 2020, the City of Dover Planning Board approved the Intervenors' application(s) for site plan review subject to conditions subsequent that were wholly administrative in nature. Did the Trial Court err in ruling that the Planning Board's approvals were not decisions of the Planning Board? (Appd'x Vol. V at 19, 40–43, 54.)

3. The New Hampshire Supreme Court has ruled that RSA 676:4, IV and RSA 677:15 must be read in conjunction. The Trial Court, however, ruled that reliance on RSA 676:4 is misplaced when considering the appealability of a planning board decision under RSA 677:15, I. Did the Trial Court err in declining to read RSA 676:5, I(i) and RSA 677:15, I in conjunction? (Appd'x Vol. V at 41–44, 53–54.)

III. CONCISE STATEMENT OF THE CASE

This case arises from a January 24, 2019 Site Review & Conditional Use Permit Application that the Intervenors, through their civil engineer, filed with the City of Dover Planning Board. Although the Planning Board approved the Intervenors' Application subject to conditions subsequent on April 23, 2019, personal tragedy prevented the Intervenors from proceeding with their project.

One year later, when they were ready to move forward, the Intervenors, in consultation with the City of Dover through their civil engineer, requested via a one-page letter that their Application be "reapproved" by the Planning Board for purposes of complying with certain timelines set forth in the City of Dover's Site Review Regulations. No new Site Plan Review application or supporting studies or evidence were filed by the Intervenors, and the City of Dover assigned the original 2019 Site Plan Review Application Case number to the request. Notwithstanding the Intervenors' request for "reapproval," the Planning Board's April 23, 2019 Approval remains valid to this day pursuant to the City of Dover's Site Plan Review Regulations.

On July 28, 2020, the Planning Board conducted a duly-noticed hearing on the Intervenors' request for "reapproval," after which the Planning Board again voted to approve the Intervenors' January 24, 2019 Application. At the Planning Board's July 28, 2020 hearing, the Petitioners—four neighboring property owners—appeared in opposition to the Intervenors' Application despite the fact that none of them had appeared at, or participated in, the Planning Board's April 23, 2019 hearing.

The Petitioners then appealed the Planning Board's July 28, 2020 decision to the Superior Court in an attempt to unravel the final, unappealable, April 23, 2019 decision of the City of Dover's Planning Board. Recognizing the Petitioners' Superior Court appeal as an end run around the still-valid 2019 approval, the Intervenors moved to dismiss on the grounds that any Court action on the 2020 Approval would ultimately be ineffective as to the 2019 Approval. The Trial Court, however, misapplied applicable law, ruling that neither the 2019 Approval nor the 2020 Approval was a "decision of the planning board" within the meaning of RSA 677:15, I. The Trial Court thus remanded to the Planning Board for further proceedings.

IV. STATEMENT OF THE FACTS

Except as otherwise indicated, the following facts are derived from the City of Dover Planning Board's October 8, 2020 Certified Record, as reflected in Volumes I–IV of the Intervenors' Appendix (cited herein as "**Appd'x Vol. [volume #] at [page #]**").

On January 24, 2019, the Intervenors' civil engineer filed a Site Review & Conditional Use Permit Application to construct a four-story mixed-use business and residential building with driveway and parking lot (the "**Project**") at 6-12 Preble Street, Dover, also identified as Town Assessor's Map 4, Lot 40 (the "**Property**"). (Appd'x Vol. I at 15.) With their applications, the Intervenors filed a stormwater analysis and a Traffic Impact Analysis from TEPP, LLC, among other supporting documents and materials. (Appd'x Vol. I at 15–60; Appd'x Vol. II at 4–28.)

On April 23, 2019, after a public hearing, the City of Dover's Planning Board (the "**Board**" or the "**Planning Board**") conditionally approved the Intervenors' Site Review and Conditional Use Permit Applications (the "**2019 Approval**"). (Appd'x Vol. III at 37–39.) Pursuant to the 2019 Approval, the Intervenors were required to comply with several conditions subsequent. (Id. at 38.) Those conditions were described in the Board's Notice of Decision as "Condition[s] to be Met Prior to Signing of the Plans" and included the following:

1. The Conditional use permit (P19–12) shall be approved.
2. The applicant shall provide:
   a. A digital version of the plan set
   b. Example parking lease, with a 5 year term, to the satisfaction of the Assistant City Manager
   c. Replacement Letter to Serve from Eversource

Engineering or Site Supervisor
   d. Copy of the recorded cross access easement and book and page at the Strafford County Registry of Deeds
3. The applicant must revise final plan set to:
   a. Add LLS & PE signatures and stamps to final plan
   b. Note that the applicant shall overlay Preble Street in the Construction Sequence.
   c. Revise lighting plan so that there is no spill over onto abutting properties.
   d. Provide a plan showing the 6 Parking spaces on lot 76 properly marked and striped[.]

(Appd'x Vol. III at 38.) Beyond requiring that these conditions be completed before the signing of the plans, the Notice of Decision did not place any additional time requirements on the conditions. (Id. at 37–38.)

Another condition imposed by the Planning Board was that the Intervenors provide the Town Planning Office with four full-size plans, one 11" x 17" plan, one CAD file format of the plan, and one PDF digital version of the plan within ninety days of the Board's 2019 Approval. (Id. at 37.) The requirement that the Intervenors submit the specified copies of their plan within ninety days of the Board's final approval is imposed by the Site Review Regulations of the City of Dover at Chapter 153, Article I § 153-8 (hereafter the "**Certification Requirement**"). (See Appd'x Vol. V at 85; also accessible online at https://ecode360.com/33400293 (last accessed Aug. 30, 2021).) A copy of the City's Site Review Regulations was submitted to the Intervenors as part of the Certified Record. (See id.) The Certification Requirement regulation states:

> The applicant shall submit to the Planning and Community Development Department an electronic copy and five copies of the final site development plan for the Planning Board's Chair's signature within 90 days of receipt of final site plan

> approval by the Planning Board. The Director of Planning and Community Development may grant one ninety-day extension if circumstances arise beyond the control of the applicant. An extension denial by the Director of Planning and Community Development can be appealed to the Planning Board. Any additional extensions can only be granted by the Planning Board.

(Appd'x Vol. IV at 85.)

The Certification Requirement regulation does not state that failure to certify final plans results in the expiration of the Planning Board approval. (See id.) Rather, by the plain language of Certification Requirement, failure to certify final plans within 90 days from a Planning Board approval may be remedied by requesting an extension of time from either the Director of Planning and Community Development or the Planning Board. (Id.) This is consistent with the language of the Planning Board's Notice of Decision of the 2019 Approval which states: "The plans must be submitted within 90 days from the Planning Board approval." (Appd'x Vol. III at 37.) Importantly, the Notice of Decision does not state that failure to achieve plan certification results in the expiration of the approval. (Id.)

Expiration of Planning Board approvals is addressed in a distinct section of the Site Review Regulations, titled "Expiration of Planning Board Approval." See §153-9 of the Site Review Regulations (the "**Expiration Regulation**"). (Appd'x Vol. IV at 85–86.) The Expiration Regulation states that "Planning Board approval shall be valid for five years from the date of said approval. If a building permit has not been issued within such time constraints, then said approval shall be considered null and void, except as provided below." (See id.) The Expiration

Regulation goes on to describe the authority and process by which the Planning Board may issue up to one-year extensions to Planning Board approvals. (Appd'x Vol. IV at 85.) As noted above, the Expiration Regulation *does not* state that Planning Board approvals expire if the applicant is unable to comply with the Certification Requirement. (Id.)

Due to unforeseen circumstances, the Intervenors were unable to fulfill the Conditions to be Met Prior to Signing of the Plans and were unable to submit copies of their plans within ninety days of the Board's 2019 Approval, though they were able to address the plan changes required by the Planning Board pursuant to the 2019 Approval. (See Appd'x Vol. IV at 35.) As a result, when the Intervenors were prepared to move forward with the Project in the Summer of 2020, the City of Dover required that they appear before the Planning Board for "re-approval" of the Site Review Application, apparently for the purpose of adhering to the Certification Requirement set forth in § 153-8 of the City's Site Review Regulations. (See id.) ("C. Parker explained that on April 23, 2019 the applicant received conditional approval" but "[s]ince that time the plan expired unsigned due to unforeseen issues encountered by the applicant.").

The City did not require the Intervenors to file a new Site Plan Review Application and continued to refer to the case pursuant to the original 2019 case number (19-11). (Appd'x Vol. IV at 12, 15, 33, 35–39.) No new application or supporting materials were filed by the Intervenors. (Appd'x Vol. III at 40–55; Appd'x Vol. IV at 4–11.) Rather, the Intervenors' civil engineer filed a one-page letter requesting that the Planning Board "re-approve" the original application. (See Appd'x Vol. III at 40) ("Dear Chris: On April 23, 2019, the Dover Planning Board voted to

conditionally approve the Site Plan & Conditional Use Permit for the above referenced project. Unfortunately, due to unforeseen circumstances the applicant was unable to fulfill the conditions set forth by the planning board in the prescribed time frame. At this time, the applicant wishes to move forward with the project and requests that the board 're-approve' the project."). On July 28, 2020, the Board conducted a duly noticed meeting at which it considered and conditionally "re-approved" the Intervenors' site review application under the original 2019 case number (hereafter the "**2020 Approval**"). (Appd'x Vol. IV at 45.)

As with the 2019 Approval, the Planning Board's 2020 Approval included a variety of "Conditions to Be Met Prior to the Signing of the Plans":

1. The applicant shall provide:
   a. A digital version of the plan set.
   b. A parking management plan indicating how the parking on map 4 lots 76 and 40 will be managed and shared between all users.
   c. Parking lease, with a 5 year term, to the satisfaction of the Assistant City Manager
   d. Replacement Letter to Serve from Eversource Engineering or Site Supervisor.
   e. A plan to remove the knotweed before construction activity or demolition.
2. The applicant must revise final plan set to:
   a. Add the owner's signatures to the final plat submitted for signature to be recorded at the Strafford County Registry of Deeds.
   b. Add LLS, PE, Landscape Architect, and Architect signatures and stamps to final plan.

(Appd'x Vol. IV at 46.) Beyond requiring that these conditions be completed before the signing of the plans, the Notice of Decision did

not place any additional time requirements on the conditions. (See Appd'x Vol. IV at 45–46.)

The Petitioners, George Stergiou, Jen McCarthy, Brendan Sullivan, and Kiran Kumar Tamminidi, are four individuals who own land down the street from the Property. (See Pet. ¶¶ 3–6; Appd'x Vol. V at 5.) Although the Petitioners participated, to some extent, in the Planning Board's July 28, 2020 "re-approval" meeting, (see Appd'x Vol. IV at 36), none of the Petitioners participated in the Board's April 23, 2019 meeting at which the Board conditionally approved the Intervenors' actual site review application. (See Appd'x Vol. III at 26–35.)

On August 27, 2020, the Petitioners filed their Verified Petition for Certiorari Review of the Planning Board Decision with Strafford County Superior Court (the "**Petition**"), seeking judicial review of the Planning Board's 2020 Approval pursuant to RSA 677:15, I. (Appd'x Vol. V at 4–12.) Thereafter, on November 16, 2020, the Intervenors filed a motion to dismiss the Petition in its entirety on the grounds that the Petitioners' claims were untimely, that any action reversing or modifying the Planning Board's 2020 Approval would be moot, and that the Petitioners are not entitled to the relief they seek. (Id. at 13.) On November 27, 2020, the Petitioners filed an objection to the Intervenors' motion to dismiss, followed by a December 22, 2020 memorandum of law. (Id. at 23, 27.) The Intervenors filed a reply thereto on January 4, 2021. (Id. at 35.)

On December 17, 2020, the Trial Court conducted a hearing on the Intervenors' motion to dismiss, at which it heard oral argument from the parties on the Intervenors' motion to dismiss and the Petitioners' objection thereto. (See Addendum at 39.) Thereafter, by Order dated February 12,

2021, the Court (Nadeau, C.J.) denied the Intervenors' motion to dismiss, ruling that the 2019 Approval and the 2020 Approval were both subject to conditions precedent, that neither the 2019 Approval nor the 2020 Approval was a "decision of the planning board" within the meaning of RSA 677:15, I, and explicitly declining to consider RSA 676:5, I(i) in conjunction with RSA 677:15, I in conjunction. (Addendum at 45–48.) As a result, the Trial Court declined to consider the Intervenors' remaining arguments as being "inapposite." (Addendum at 47.)

On February 22, 2021, the Intervenors filed a motion for reconsideration of the Trial Court's February 12, 2021 Order, arguing that the Trial Court overlooked or misapprehended the distinction between conditions precedent and conditions subsequent under New Hampshire Law, that the Trial Court overlooked or misapprehended the validity of the Planning Board's 2019 Approval, and that the Trial Court overlook or misapprehended the applicability of RSA 676:4 in determining the finality of the 2019 Approval. (Appd'x Vol. V at 50.) By Order dated March 10, 2021, the Trial Court (Nadeau, C.J.) denied the Intervenors' motion for reconsideration. (Addendum at 49–55.)

This Appeal follows.

V. SUMMARY OF THE ARGUMENT

The Trial Court erred as a matter of law when it ruled that the Planning Board's 2019 Approval and 2020 Approval were subject to conditions precedent and that, accordingly, neither was a "decision of the planning board" within the meaning of RSA 677:15, I. Under applicable New Hampshire law, conditional planning board approvals subject only to conditions subsequent are "decision[s] of the planning board" within the meaning of RSA 677:15, I, and must therefore be appealed within 30 days from the date of the decision. Planning board approvals subject to conditions precedent, however, require further discretionary action on the part of the Planning Board and, as such, are not considered "decision[s] of the planning board" for purposes of the 30-day appeal period.

Here, the Planning Board approved the Intervenors' January 24, 2019 Site Review & Conditional Use Permit Application subject to "conditions to be met prior to signing of the plans," a reference to the City of Dover's filing procedures for approved site plans. Each of the "conditions to be met prior to signing of the plans" was minor, wholly administrative in nature, and required no further discretionary action on the part of the Planning Board. Accordingly, each of the "conditions to be met prior to signing of the plans" was a condition subsequent, and the Planning Board's decision(s) became final on the date(s) thereof. Thus, any appeals of the Planning Board's April 23, 2019 Approval must have been filed on or before May 23, 2019.

The 2019 Approval was never appealed, however, and it became unappealable on May 24, 2019. Under the City of Dover's site review

regulations, Planning Board approvals are valid—without limitation—for five years from the date of the Planning Board's approval. The Intervenors, therefore, have a valid, unappealable Planning Board approval, dated April 23, 2019, under which they may proceed with their site work at their Property. Thus, while the Petitioners' appeal from the Planning Board's 2020 Approval may have been timely, any Court action thereon is rendered moot by the 2019 Approval. The Trial Court's Orders denying the Intervenors' Motion to Dismiss and Motion for Reconsideration must therefore be reversed.

VI. STANDARD OF REVIEW

Review of planning board decisions is limited. Girard v. Town of Plymouth, 172 N.H. 576, 581 (2019) (citing Trustees of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 504 (2018)). A person may appeal a planning board's decision to the Superior Court pursuant to RSA 677:15. Pursuant to RSA 677:15, the "court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable." RSA 677:15, V; see also Girard, 172 N.H. at 581. "The trial court must treat the factual findings of the planning board as *prima facie* lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law." Girard, 172 N.H. at 581. "The appealing party bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable." Id. "The trial court determines not whether it agrees with the planning board's findings, but whether there is evidence upon which its findings could have reasonably been based." Id. Similarly, this Court "will uphold the trial court decision unless it is legal erroneous." Route 12 Books & Video v. Town of Troy, 149 N.H. 569, 574 (2003).

VII. ARGUMENT

A. The Trial Court erred as a matter of law in ruling that the Planning Board's approvals were subject to conditions precedent and that, consequently, the Planning Board's approvals were not "decision[s] of the planning board" within the meaning of RSA 677:15, I.

"RSA 677:15, I, provides the jurisdictional deadline for superior court review of a planning board decisions." Collden Corp. v. Town of Wolfeboro, 159 N.H. 747, 750 (2010) (quotation omitted). Under that statute, any petition appealing a Planning Board decision must "be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application." RSA 677:15, I. "New Hampshire law requires strict compliance with statutory time requirements for appeals of planning board decisions to the superior court because statutory compliance is a necessary prerequisite to establishing jurisdiction there." Collden Corp., 159 N.H. at 750 (quotation, brackets, and ellipsis omitted).

The New Hampshire Supreme Court has distinguished between conditions subsequent and conditions precedent, explaining that "conditions precedent . . . contemplate additional action on the part of the town and, thus, cannot constitute final approval. Conditions subsequent, on the other hand, do not delay approval." Prop. Portfolio Grp., LLC v. Town of Derry, 154 N.H. 610, 615 (2006). A conditional approval that is subject only to conditions subsequent is a final "decision of the planning board" for purposes of appellate review and thus triggers the 30-day limitations period set forth in RSA 677:15, I. See id. at 615–16 (emphasis added) ("However,

having approved the proposal *with conditions*, the planning board issued a final decision that was appealable to the superior court under RSA 677:15, I"). "If the board could not impose a condition subsequent, both towns and applicants would lack a tool to adjust the pursuit of private interests to reasonable regulation in the public interest." Sklar Realty v. Merrimack, 125 N.H. 321, 327 (1984). On the other hand, "[i]f the board could not impose a condition precedent, . . . any impediment to approval would require formal disapproval and the wasteful requirement to start all over again." Id.

The 2019 Approval at issue in this case was subject to the following "Condition[s] to be Met Prior to Signing of the Plans":

1. The Conditional use permit (P19–12) shall be approved.
2. The applicant shall provide:
   a. A digital version of the plan set
   b. Example parking lease, with a 5 year term, to the satisfaction of the Assistant City Manager
   c. Replacement Letter to Serve from Eversource Engineering or Site Supervisor
   d. Copy of the recorded cross access easement and book and page at the Strafford County Registry of Deeds
3. The applicant must revise final plan set to:
   a. Add LLS & PE signatures and stamps to final plan
   b. Note that the applicant shall overlay Preble Street in the Construction Sequence.
   c. Revise lighting plan so that there is no spill over onto abutting properties.
   d. Provide a plan showing the 6 Parking spaces on lot 76 properly marked and striped[.]

(Appd'x Vol. III at 38.)

In its February 12 Order, the Trial Court ruled that the 2019 Approval was subject to conditions precedent and, as such, was not a

"decision of the planning board" under RSA 677:15, I. (Addendum at 45.) The Court specifically ruled that Condition 2., b., of the 2019 Approval was a condition precedent because "[p]resumably, if the Intervenors were unable to obtain the Assistant City Manager's approval on the parking lease, the final approval and signing of the plans would be delayed." (Id.) The Court also determined that the remaining 2019 Conditions were conditions precedent because "the Board could presumably decline to certify a condition was met if the Board was dissatisfied with the Intervenors' documentation or the manner of completion." (Id.)

In effect, the Trial Court reasoned that because the Planning Board could, theoretically, revoke its April 23, 2019 Decision should the Intervenors fail to comply with the conditions set forth therein, the conditions were necessarily conditions precedent. (See id.) This conclusion is not in accord with New Hampshire law.

First, the Intervenors note that as reflected in the minutes of the April 23, 2019 Planning Board meeting, the Intervenors' Site Plan Review and Conditional Use Permit Applications were taken up simultaneously by the Planning Board. (See Appd'x Vol. III at 28.) Accordingly, Condition 1 of the 2019 Approval, requiring that a Conditional Use Permit be approved by the Planning Board, required no further action by the Planning Board because the Conditional Use Permit was approved at the exact same time the Site Plan Review Application was approved. (See Appd'x Vol. III at 29–30.) Condition 1 is therefore obsolete for the purposes of this analysis because it was satisfied by virtue of the same Planning Board vote which approved the Site Plan Review Application.

All of the remaining "Condition[s] to be Met Prior to Signing of the Plans" either require minor plan changes or are conditions which are in themselves administrative, and which involve no discretionary judgement by the Planning Board. (See Appd'x Vol. III at 38.) None of these conditions require a Planning Board hearing or further "certification" or action by the Planning Board. (See id.)

More specifically, the requirements to "provide" a digital version of the plan set, an example lease, an Eversource letter, and a copy of the recorded cross access easement, are purely administrative in nature, and involve no discretionary judgement from the Planning Board. (See id.) Similarly, the requirement to revise the plans to add signatures, add a note regarding construction sequencing, revise the lighting plan in accordance with direction from the Planning Board, and provide a plan showing the required parking all constitute "minor plan changes," compliance with which is administrative, and which does not involve discretionary judgment of the Planning Board. (See id.)

The 2019 Approval's "Condition[s] to be Met Prior to Signing of the Plans" were therefore conditions subsequent, and the 2019 Approval was an appealable "decision of the planning board" as of the date of the Board's decision, April 23, 2019, pursuant to RSA 677:15, RSA 676:4, and Prop. Portfolio Grp., LLC, 154 N.H. at 615.

This conclusion is supported by the language of the City's Certification Requirement, which requires that copies of "the *final* site development plan" be filed with the City's Community Development Department within 90 days of "*final* site plan approval by the Planning Board." See Site Review Regulations, §153-8(A) (emphasis added)

(Appd'x Vol. IV at 85). Because the 2019 Approval did not contemplate further action by the Board, it was a "decision of the planning board" within the meaning of RSA 677:15, I.

To appeal the Board's April 23, 2019 decision, therefore, the Petitioners were required to submit their Petition no later than May 23, 2019. The Petitioners failed to do so, and the Board's 2019 Approval became final for purposes of Superior Court review on May 24, 2019.

It should also be noted that the Trial Court's reasoning, contemplating that the Planning Board could withdraw its approval if dissatisfied with the Intervenors' compliance with conditions subsequent, (see Addendum at 45), appears to overlook and misapprehend the distinction between the Planning Board's procedure on plats, which is governed by RSA 676:4, and the Board's authority to review and revoke site plan approval for failure to comply with conditions subsequent, which is governed by RSA 676:4-a. The Intervenors acknowledge that the Planning Board could have revoked its 2019 Approval if it were dissatisfied with the Intervenors' compliance with the conditions imposed. That does not mean that the conditions imposed were conditions precedent as the Trial Court's Order mistakenly concludes.

RSA 676:4-a, I(c) explicitly contemplates that a conditional approval may become final before an applicant has complied with conditions imposed by the planning board; otherwise, there would be no need to create a specific procedure by which planning boards may revoke site plans for failure to comply with conditions imposed during the site plan review process. The legislature did not, as the Trial Court's Order implies, create a process by which a planning board may "decline to certify a condition was

met." (See Addendum at 45.) See also RSA 676:4 and 676:4-a. Similarly, no such process exists on the local level within the City of Dover's land use regulations.

Additionally, if applied, the Trial Court's approach would work havoc on the local review of land use applications, and it would complicate public participation in the same, particularly in the context of appeals. Conditional approvals granted under RSA 676:4, I(i) "shall become final without further public hearing, upon certification to the board by its designee or based upon evidence submitted by the applicant of satisfactory compliance with the conditions imposed." If such approvals were not "decision[s] of the planning board" within the meaning of RSA 677:15, it would be nearly impossible for most abutters and other interested parties, except for the applicant or the Planning Board itself, to determine when a conditional approval has become final for purposes of appellate review. Abutters would be forced to monitor the inner workings of their local government to ascertain when a Planning Board decision has become final within the meaning of RSA 677:15, or the Planning Board itself would have to adopt some mechanism to inform abutters when a decision has become final, likely by requiring an additional, duly noticed compliance hearing with the Planning Board in every case. Neither approach is contemplated by New Hampshire's statutory scheme and neither is desirable; the former would place the onus of identifying final decisions on individuals with potentially little-to-no knowledge of municipal law, and the latter would place an undue burden on boards already struggling to perform their statutorily mandated duties in an efficient manner. To the extent any New Hampshire municipalities already conduct such compliance

hearings, they are an inefficient relic of the past that do not reflect the sophistication and resources many New Hampshire municipalities have to deal with and resolve minor Planning Board conditions that do not warrant a return to the Planning Board. The better approach, already contemplated by statute, is that when it is unnecessary for a planning board to take further action on a plat, the planning board's approval becomes final and appealable as of the date of the board's decision. See RSA 676:4, I(i) and RSA 677:15, I; see also Prop. Portfolio Grp., 154 N.H. at 616 (holding that "RSA 676:4, IV must be read in conjunction with RSA 677:15"). Should an applicant, thereafter, fail to comply with any of the conditions imposed, the planning board is expressly empowered to review and revoke its final approval under RSA 676:4-a.[1]

As the Trial Court observed in its February 12 Order, (Addendum at 45–46), the 2020 Conditions imposed by the Planning Board were substantially the same or similar to the 2019 Conditions:

1. The applicant shall provide:
   a. A digital version of the plan set.
   b. A parking management plan indicating how the parking on map 4 lots 76 and 40 will be managed and shared between all users.
   c. Parking lease, with a 5 year term, to the satisfaction of

[1] To the extent the Trial Court relied upon the "Signing of the Plans" process governed by § 153-8 of the City's Site Review Regulations as additional or further action by the Town required for "final approval," the Court overlooked or misapprehended RSA 676:4, which does not contemplate a "signing" requirement for a planning board's decision to become final for the purposes of appellate review. Additionally, to the extent the City intended the date of the signing of the plans to be the date of the planning board's "decision" within the meaning of RSA 677:15, § 153-8 of the City's Site Review Regulations is preempted by Statute as it directly conflicts with RSA 676:4 and 677:15. See Town of Carroll v. Rines, 164 N.H. 523, 528 (2012) ("State law . . . impliedly preempts local law when there is an actual conflict between the two.").

the Assistant City Manager
   d. Replacement Letter to Serve from Eversource Engineering or Site Supervisor.
   e. A plan to remove the knotweed before construction activity or demolition.
2. The applicant must revise final plan set to:
   a. Add the owner's signatures to the final plat submitted for signature to be recorded at the Strafford County Registry of Deeds.
   b. Add LLS, PE, Landscape Architect, and Architect signatures and stamps to final plan.

(Appd'x Vol. IV at 46.) As such, and for the reasons set forth above, the Planning Board's 2020 Approval was also a "decision of the planning board" within the meaning of RSA 677:15, and it was appealable as of July 28, 2020.

Plainly, the Planning Board's 2019 Approval and 2020 Approval were subject only to conditions subsequent. As a result, both of the Approvals were "decision[s] of the planning board" within the Meaning of RSA 677:15, I, and were thus appealable within 30 days from the dates thereof. The Trial Court's February 12 and March 10 Orders on the Intervenors' Motion to Dismiss and Motion for Reconsideration, respectively, must therefore be reversed.

B. The Trial Court erred as a matter of law in declining to read RSA 676:4, I(i) and RSA 677:15, I in conjunction.

The Trial Court also erred in explicitly declining to consider the interaction between RSA 676:4, I(i) and RSA 677:15, I in determining whether the Planning Board's Approvals were subject to conditions precedent. (See Addendum at 47, 51–52.)

The State Legislature made the distinction between conditions precedent and conditions subsequent clear in enacting RSA 676:4, I(i), which sets forth three instances in which a conditional approval subject only to conditions subsequent becomes final without further action by the Town, and is therefore ripe for appeal. That statute provides, in its entirety:

> A planning board may grant conditional approval of a plat or application, which approval shall become final without further public hearing, upon certification to the board by its designee or based upon evidence submitted by the applicant of satisfactory compliance with the conditions imposed. Such conditions may include a statement notifying the applicant that an approval is conditioned upon the receipt of state or federal permits relating to a project, however, a planning board may not refuse to process an application solely for lack of said permits. Final approval of a plat or application may occur in the foregoing manner only when the conditions are:
>
> (1) Minor plan changes whether or not imposed by the board as a result of a public hearing, compliance with which is administrative and which does not involve discretionary judgment; or
>
> (2) Conditions which are in themselves administrative and which involve no discretionary judgment on the part of the board; or
>
> (3) Conditions with regard to the applicant's possession of permits and approvals granted by other boards or agencies or approvals granted by other boards or agencies, including state and federal permits.
>
> All conditions not specified within this subparagraph as minor, administrative, or relating to issuance of other approvals shall require a hearing, and notice as provided in subparagraph I(d), except that additional notice shall not be required of an adjourned session of a hearing with proper notice if the date, time, and place of the adjourned session were made known at the prior hearing.

RSA 676:4, I(i).

This statute clearly distinguishes between final approvals subject only to conditions subsequent, *i.e.*, final approvals that are subject only to those types of conditions explicitly contemplated by RSA 676:4, I(i)(1)–(3), and approvals subject to conditions precedent, *i.e.*, approvals subject to conditions that are not minor or administrative and thus require a noticed hearing with the planning board. RSA 676:4, I(i) thus draws the exact same distinction that this Court has drawn in cases such as Prop. Portfolio Grp., LLC, 154 N.H. at 615 ("Conditions subsequent . . . do not delay approval."), and Saunders v. Town of Kingston, 160 N.H. 560, 564 (2010) ("[A] conditional approval imposing only conditions subsequent constitutes a final decision appealable under RSA 677:15, I."). See also Collden Corp., 159 N.H. at 751 (holding that a planning board's decision regarding whether conditions subsequent are met is not a decision of the planning board within the scope of RSA 677:15, I). RSA 676:4, I(i) and this Court's jurisprudence are thus in accord as to the finality of planning board decisions. In determining whether a planning board decision is subject to conditions precedent or conditions subsequent, therefore, it is appropriate for courts to consider the finality of the planning board's conditional approval under the plain terms of RSA 676:4, I(i).

Hillsborough County Superior Court, Southern Division, recently considered arguments like those made by the Petitioners in this case. See Lowe, et al. v. Town of Pelham Planning Board, Hillsborough Cty. Super. Ct. South, No. 2020-CV-00291 (Dec. 16, 2020) (Order, Temple, J.) (Appd'x Vol. V at 60–76). The Planning Board in Lowe approved the applicant's site plan subject to the following five conditions:

1) Based upon the applicant's representations to the Planning Board, the Town shall have the right to access the site and shall be able to install its public safety emergency communications equipment on the top 25ft. of the tower and that the Town shall have no less than 10ft.x10ft. area on the ground to install a structure/cabinet to house some of its communications equipment. The applicant shall work with the Town to draft and execute a cell tower lease acceptable to the Town, notice of which shall be recorded at the Registry of Deeds prior to the plan being signed, prior to the required pre-construction meeting being held and prior to the issuance of any permits or the start of any construct.
2) Any waivers approved by the Planning Board along with this Notice of Condition to be noted on the final plan.
3) Written memorandum from Steve Keach (of Keach Nordstrom) indicating his satisfaction with all final plan details prior to the plans being signed.
4) Surety and plan compliance escrow are to be provided as estimated by Keach Nordstrom prior to permit issuance and commencement of construction.
5) In conformance with Pelham Zoning Article X, Sections 307-61 and 307-62, a separate long-term surety in a sufficient amount shall be provided, as estimated by Keach Nordstrom, to cover the cost of the tower, compound, pad and equipment removal in the event it becomes abandoned or is inadequately maintained at any point in the future.

Lowe, Order at 7 (Appd'x Vol. V at 66).

The Petitioners in that case argued, *inter alia*, that the Court was without jurisdiction because the planning board's approval "was not a final approval of the site plan; rather, they contend[ed] that the conditions imposed were conditions precedent." Id. at 8 (Appd'x Vol. V at 67). The Petitioners specifically challenged the first and third conditions. Id. at 10 (Appd'x Vol. V at 69).

After reviewing the finality of the Planning Board's decision under the terms of RSA 676:4, I(i), the Court ruled that the conditions imposed by the Planning Board were conditions subsequent as they were purely administrative and did not require further action on the part of the Planning Board. Id. at 10–12 (Appd'x Vol. V at 69–71). The Court therefore ruled that the Planning Board's decision was final for purposes of appellate review. Id. at 12 (Appd'x Vol. V at 71).

Just like in Lowe, the Planning Board's "Condition[s] to be Met Prior to Signing of the Plans" in in this case were conditions subsequent because they were administrative in nature and required no further action on the part of the Planning Board. Each of the conditions set forth in the Planning Board's 2019 and 2020 Approvals constituted either "[m]inor plan changes . . . , compliance with which is administrative and which does not involve discretionary judgment," RSA 676:4, I(i)(1), or "[c]onditions which are in themselves administrative and which involve no discretionary judgment on the part of the board." RSA 676:4, I(i)(2). As such, the 2019 and 2020 Approvals were "decision[s] of the planning board" within the meaning of both RSA 676:4, I(i) and 677:15, and were appealable as of April 23, 2019 and July 28, 2020, respectively.

The Trial Court in this case, however, rejected the Intervenors' reliance upon both RSA 676:4 and Lowe v. Town of Pelham Planning Board, Hillsborough County (South) Super. Ct., No. 226-2020-CV-00291 (Dec. 16, 2020) (Order, Temple, J.). (Addendum at 47, 51–52.) Citing to Prop. Portfolio Grp., LLC v. Town of Derry, 154 N.H. 610, 616 (2006), the Trial Court ruled that "reliance on RSA 676:4 when analyzing the appealability of 'a decision of the planning board' pursuant to RSA 677:15

is 'misplaced as that provision does not address the process by which one may appeal a planning board decision.'" (Addendum at 47.)

In so ruling, the Trial Court overlooked the fact that the arguments raised by the petitioner in Prop. Portfolio Grp. were distinct from the issues raised in the Intervenors' Motion to Dismiss. In Prop. Portfolio Grp., the Petitioner filed a claim for declaratory judgment under RSA 491:22, seeking to overturn a decision made by a planning board 3 years earlier. 154 N.H. at 616. The town in that case argued that the petitioner's claims were barred because he failed to appeal the planning board's decision within 30 days as required by RSA 677:15, I. Id. In response, the petitioner argued that the Superior Court had jurisdiction to consider his claims under RSA 676:4, IV. Id. The Court found the petitioner's reliance on RSA 676:4, IV misplaced because that statute does not govern the process by which one may appeal a planning board decision. Id. In stark contrast to the petitioner's jurisdictional arguments in Prop. Portfolio Grp., all the parties in this case agree that this Court's jurisdiction is governed by RSA 677:15, not by RSA 676:4, IV.

The Trial Court also overlooked that, despite finding the petitioner's reliance on RSA 676:4, IV misplaced, the Prop. Portfolio Grp. Court went on to hold that "RSA 676:4, IV must be read in conjunction with RSA 677:15 . . . , which describes the process and requires that such appeal be brought within thirty days of the planning board's decision." Id. (emphasis added). In other words, the decision of the Planning Board—and specifically the method in which the decision becomes final—is governed by RSA 676:4, while RSA 677:15 governs the timing of any appeals therefrom. By disregarding the Intervenors' reliance upon Lowe and

otherwise declining to address the Intervenors' arguments relating to RSA 676:4, the Trial Court failed to read RSA 676:4 in conjunction with RSA 677:15 as required by Prop. Portfolio Grp.

In sum, the Planning Board's 2019 Approval did not contemplate further action on the part of the Town as contemplated by RSA 676:4, I(i), provided—as was assumed by all parties involved—that the Intervenors complied with the conditions imposed by the Board. The 2019 Conditions were therefore conditions subsequent, and the 2019 Approval was a "decision of the planning board" within the meaning of RSA 677:15, I, and was appealable as of April 23, 2019. The Trial Court's February 12 and March 10 Orders must therefore be reversed.

C. The Petition should therefore be dismissed as any ruling on the 2020 Appeal would be moot.

Finally, the Petition appealing the Planning Board's 2020 Approval should be dismissed on the grounds that any decision or ruling thereon is moot in light of the finality of the Planning Board's 2019 Approval. In Dover, Planning Board approval is valid for five years from the date of approval, regardless of whether an applicant has failed to comply with conditions of the approval. Because the 2019 Approval is final and unappealable, as discussed above, it is still valid and grants the Intervenors all of the same relief granted in the 2020 Approval. The Planning Board's decision on the 2020 Approval, therefore, was effectively a decision to extend the City's Certification Requirement, as opposed to a decision on a full site review application such as the 2019 Approval. Thus, even if the Trial Court were to reverse the 2020 Approval in its entirety, the

Intervenors are nevertheless entitled to proceed with their site work under the terms of the 2019 Approval.

The City's Site Review Regulations provide, in relevant part, that "Planning Board approval *shall be valid for five years from the date of said approval*." Site Review Regulations of the City of Dover Ch. 153, Art. II § 153-9, A (emphasis added) (Appd'x Vol. V at 85). Under this provision, the Board's 2019 Approval is still valid. The Petitioners seek to avoid this result by arguing that Ch. 153, Art. II § 153-9 "obviously" and "clearly" "refers to a *final, perfected approval*." (Appd'x Vol. V at 31.) The Petitioners' legal conclusion is neither clear nor obvious in light of the plain language of §153-9, which is inconsistent with Petitioners' interpretation. If the City had intended "approval" to mean "final, perfected approval," or intended to distinguish an "approval" from a "conditional approval," it could have done so.

When interpreting such regulations, this Court has repeatedly held that it "look[s] to the plain meaning of the words used in the regulations and will not add words that the town did not see fit to include." Mountain Valley Mall Assocs. V. Municipality of Conway, 144 N.H. 642, 648 (2000). As such, this Court should decline to interpret the City's Site Review Regulations as the Petitioners do, *i.e.*, by adding words that the City did not see fit to include when it adopted its Regulations. The City did not choose to use the phrase "final, perfected approval," but instead used the word "approval." Plainly, this regulation should be interpreted as applying to *any* approval of the Planning Board unless and until the City's Site Plan Review Regulations are amended. This regulation should certainly be interpreted to apply to a final decision of the Planning Board

which was made subject only to certain administrative conditions which did not implicate the discretionary judgment of the Planning Board.

Further support for this interpretation is found in the City's Land Subdivision Regulations. In its Subdivision Regulations, the City explicitly differentiated between an "approval" and a "conditional approval." With respect to minor subdivision applications *exclusively*, the City's Subdivision Regulations provide that "[a]ny applicant that received plat approval subject to conditions precedent must comply with the conditions precedent by the time of submission of the final plat." Land Subdivision Regulations of the City of Dover Ch. 157, Art. III § 157-18(G). (Appd'x Vol. V at 87; also accessible online at https://ecode360.com/33401375 (last accessed Aug. 30, 2021).)

Neither the City's Site Review Regulations nor the remainder of the City's Subdivision Regulations contains a similar provision. This plainly demonstrates that if the City had intended a "conditional approval" of a site review application to lapse if certain conditions are not met within a given timeframe, it would have included a provision to that effect, as many New Hampshire municipal land use regulations do. Instead, the City used the words it intended: "Planning Board approval shall be valid for five years from the date of said approval." Site Review Regulations of the City of Dover Ch. 153, Art. II § 153-9 (Appd'x Vol. V at 85).

Similarly, had the City intended to ensure approval expiration where the Certification Requirement was not met, it could have. Instead, the City intended to legislate a Certification Requirement which permits City Staff and the Planning Board to approve extensions where, like here, circumstances arise beyond the control of the applicant.

Accordingly, the Planning Board's 2019 Approval is valid for five years from the date of approval, *i.e.*, until April 23, 2024. The practical effect of this is that the 2020 Approval was, as a matter of law, a vote by the Planning Board to extend the deadline to meet the City's Certification Requirement, regardless of the fact that it was fashioned as a "reapproval", which process is not contemplated by State or local law. That is why, presumably, the City did not require a new Site Plan Review Application to be filed and why the City assigned the original 2019 case number to the 2020 request. (See, e.g., Appd'x Vol. IV at 15, 33, 35–46.) The Intervenors' and City of Dover's inadvertent mischaracterization of the relief requested—seeking "reapproval" as opposed to an extension of the Certification Requirement—does not occasion a contrary result, as the Petitioners appear to argue. In fact, the Planning Board is still able to grant this relief given that the 2019 Approval is still valid. As such, any relief granted as a result of the Petitioners' appeal from the 2020 Approval would ultimately be moot as the Intervenors may proceed under the terms of the 2019 Approval.

The Trial Court erred as a matter of law in ruling that the Planning Board's 2019 Approval and 2020 Approval were subject to conditions precedent, that the 2019 Approval and 2020 Approval were not "decision[s] of the planning board" within the meaning of RSA 677:15, I, and declining to read RSA 676:4 in conjunction with RSA 677:15 as required by this Court's jurisprudence. The orders of the Trial Court denying the Intervenors' motion to dismiss and motion for reconsideration must therefore be reversed, and the Petition must be dismissed as it is rendered moot by the Planning Board's still-valid 2019 Approval.

VIII. CONCLUSION

The Trial Court erred as a matter of law when it ruled that the Planning Board's 2019 Approval and 2020 Approval were subject to conditions precedent and that, accordingly, neither was a "decision of the planning board" within the meaning of RSA 677:15, I. The Planning Board's Approvals were subject only to conditions subsequent and, as a result, were appealable as of the dates thereof. The Trial Court likewise erred as a matter of law when it explicitly declined to consider RSA 676:4, I(i) in determining the finality of the Planning Board's decisions for purposes of appeals under RSA 677:15, I. As a direct result, the Trial Court committed reversible error, invalidating the final, unappealable 2019 Approval that rendered moot any court proceedings on the 2020 Approval. The Trial Court's February 12, 2021 and March 10, 2021 Orders denying the Intervenors' Motion to Dismiss and Motion for Reconsideration, respectively, must therefore be reversed.

Dated this 1st day of September, 2021.

Respectfully Submitted:

THE FAKHOURYS, LLC &
MICHELINE ELIAS

By Their Attorneys:

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COMPLIANCE WITH SUPREME COURT RULE 16(11)

I hereby certify that the foregoing Brief For Intervenors The Fakhourys, LLC & Micheline Elias complies with Supreme Court Rule 16(11) and contains a total of 8,439 words exclusive of the Table of Contents and Table of Authorities.

/s/ Justin L. Pasay
Justin L. Pasay, Esq.
William K. Warren, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been transmitted via the Court's electronic filing system this 1st day of September, 2021, to Scott Hogan, Esq., counsel for George Stergiou, Jen McCarthy, Brendan Sullivan, and Kiran Kumar Tamminidi, and to Joshua M. Wyatt, City Attorney for the City of Dover, New Hampshire.

/s/ Justin L. Pasay
Justin L. Pasay, Esq.
William K. Warren, Esq.

IX. ADDENDUM – TABLE OF CONTENTS

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A. Appealed Decisions from Strafford County Superior Court

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

George Stergiou, Jen McCarthy,
Brendan Sullivan, and Kirankumar Tamminidi

v.

City of Dover Planning Board

Docket No. 219-2020-CV-00256

ORDER ON INTERVENOR'S MOTION TO DISMISS

The petitioners, George Stergiou, Jen McCarthy, Brendan Sullivan, and Kirankumar Tamminidi (collectively "the Petitioners") filed a verified complaint against the City of Dover Planning Board (the "Board") pursuant to RSA 677:15, alleging the Board's July 28, 2020 conditional site plan approval of Amer Fakhoury and Micheline Elias's site review was unlawful and unreasonable. (Court index #1.) Subsequently, Micheline Elias and The Fakhoury's, LLC[1] (collectively, the "Intervenors") filed an assented-to motion to intervene, which the court granted. (Court index #4.) The Intervenors now move to dismiss arguing that the verified complaint is untimely under RSA 677:15, I. (Court index #10.) The Board takes no position on the motion to dismiss, (court index #12), however, the Petitioners object, (court index ##14–15.) The court held a hearing on this matter on December 17, 2020. See Super. Ct. Civ. R. 13(b). Based on the parties' arguments, the relevant facts, and the applicable law, the Intervenor's motion to dismiss is DENIED.

[1] The Fakhoury's LLC is the owner of the Property in question by virtue of quitclaim deed from Amer Fakhoury and Micheline Elias. (See Mot. Intervene ¶ 3.)

Facts

The following facts are relevant to this motion.[2] However, these facts do not constitute factual findings that are binding upon the parties.

This dispute arises out of the Intervenors' proposed mixed use development project (the "Project") at 6–12 Pebble Street in Dover, New Hampshire. (See Compl. 1.) In January 2019, the Intervenors applied to the Board for permission to construct a four-story building and driveway with parking which will consist of twelve apartments and approximately 1800 square feet of commercial space. (Id.; Mem. Law in support of Obj. 1.) The Petitioners are all abutters to the Project. (Compl. ¶¶ 3–6.)

On April 23, 2019, after a public hearing, the Board conditionally granted the Intervenors' site review and a conditional use permit. (Id. ¶ 1.) The Board's Notice of Decision (the "April 23, 2019 Decision") regarding the Site Review stated that the Board "voted to conditionally approve the above referenced Site Plan." (Certified Record ("C.R.") 13.) The April 23, 2019 Decision further required the Intervenors to provide the Board with the following within ninety (90) days:

- Four (4) full size plane and one (1) 11" x 17" plan
- One (1) CAD file format of the plan
- One (1) PDF digital version of the plan

The April 23, 2019 Decision also imposed several "Conditions to be Met Prior to the Signing of the Plans." (Mot. Dismiss ¶ 4.) The conditions to be met included the following:

1. The [c]onditional use permit (P19-12) shall be approved.

2. The applicant shall provide:
    a. A digital version of the plan set
    b. Example parking lease, with a 5 year term, to the satisfaction of the

[2] The court notes that these facts are derived from the verified complaint and certified record, as well as the Intervenors' motion to dismiss. The Petitioners do not dispute the factual background set forth in the Intervenors' motion to dismiss.

Assistant City Manager
c. Replacement Letter to Serve from Eversource Engineering or Site Supervisor
d. Copy of the recorded cross access easement and book and page at the Strafford County Registry of Deeds

3. The applicant must revise the final plan set to:
    a. Add LLS & PE signatures and stamps to final plan
    b. Note that the applicant shall overlay Preble Street in the Construction Sequence
    c. Revise the lighting plan so that there is no spill over into abutting properties
    d. Provide a plan showing the 6 Parking spaces on lot 76 properly marked and striped.

(Mot. Dismiss ¶ 4; see also C.R. 2, 13.) "The Signing of the Plans" is a process in the City of Dover's Site Review Regulations which requires applicants to submit to the City an electronic copy and five copies of the final site development plan for the Board Chair's signature within 90 days of receipt of final site plan approval by the Board. (Resp. to Obj. ¶ 5 (citing Dover Site Rev. Regs. §153-8).) Due to unforeseen circumstances, the Intervenors were unable to fulfill either the conditions to be met prior to the signing of the plans or submit the requisite plan copies to the Board within ninety (90) days of the approval. (Mot. Dismiss ¶ 13; see also Compl. ¶ 2.)

Subsequently, on July 14, 2020, the Intervenors reapproached the Board, requesting that the Board "re-approve" the original application so the Intervenors could move forward with the project. (Mot. Dismiss ¶¶ 13–14.) Thereafter, on July 28, 2020, the Board conducted a duly noticed meeting at which it "re-approved" the Intervenors' site review application. (Id. ¶ 15; Compl. ¶ 2; see also C.R. 22–23.) Ultimately, the Board conditionally re-approved the Site Review Plan subject to amended "Conditions to be Met Prior to Signing of the Plans" and again required the Intervenors to submit the same plan versions required in the 2019 conditional approval. (C.R. 22–23.) The conditions to be met prior to signing were as follows:

1. The applicant shall provide:

a. A digital version of plan set.
b. A parking management plan indicating how the parking map 4 lots 76 and 40 will be managed and shared between all users
c. Parking lease, with 5 year term, to the satisfaction of the Assistant City Manager
d. Replacement Letter to Serve from Eversource Engineering or Site Supervisor
e. A plan to remove the knotweed before construction activity or demolition

2. The applicant must revise final plan set to:
   a. Add the owner's signatures to the final plat submitted for signature to be recorded at the Strafford County Registry of Deeds
   b. Add LLS, PE, Landscape Architect, and Architect signatures and stamps to final plan.

(C.R. 23.)

The Petitioners now seek the court's review of the Board's July 28, 2020 Notice of Decision (the "July 28, 2020 Decision") conditionally approving the Intervenors' Site Plan. (See Compl.)

Legal Standard

Generally, when ruling on a motion to dismiss, the court must determine "whether the allegations in the [complaint] are reasonably susceptible of a construction that would permit recovery." Boyle v. Dwyer, 172 N.H. 548, 553 (2019). To make this determination, the court would normally accept all facts pled by the petitioner as true, construing them most favorably to the petitioner. Censabella v. Hillsborough Cty. Attorney, 171 N.H. 424, 425–26 (2018). However, "[w]hen the motion to dismiss does not challenge the sufficiency of the petitioner's legal claim but, instead, raises certain defenses, the trial court must look beyond the petitioner's unsubstantiated allegations and determine, based on the facts, whether the petitioner[s] ha[ve] sufficiently demonstrated [their] right to claim relief." Id. at 426. One such defense is that the court lacks jurisdiction to hear a claim. Avery v. New Hampshire Dep't of Educ., 162 N.H. 604,

606–07 (2011); Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010).

Analysis

The Intervenors argue the Petitioners' appeal from the Board's decision is untimely pursuant to RSA 677:15. (See generally Mot. Dismiss.) Specifically, the Intervenors argue the April 23, 2019 Decision, although a conditional approval, did not impose true conditions precedent on the approval because the conditions did not require any further action from the Board, aside from singing the plans. (Id. ¶ 29.) Rather, the Intervenors urge the conditions in the April 23, 2019 Decision were administrative in nature. (Id. ¶ 26.) Thus, the Intervenors contend, the April 23, 2019 Decision was "a decision of the planning board" per RSA 677:15 and the Petitioners had thirty days from that decision to appeal the matter to the superior court. (Id.) In response, the Petitioners argue that the April 23, 2019 Decision expired when the Intervenors failed to satisfy the conditions within ninety (90) days of the April 23, 2019 Decision. (Compl. 1; Obj. ¶ 7.) Thus, the Petitioners seek the court's review of the Board's July 28, 2020 Decision, which they contend was timely appealed. (Compl. 1; Obj. ¶¶ 5, 7.)

New Hampshire law requires strict compliance with statutory time requirements for appeals of planning board decisions to the superior court. Prop. Portfolio Grp., LLC v. Town of Derry, 154 N.H. 610, 613 (2006), as modified on denial of reconsideration (Jan. 24, 2007). 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 planning board" 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.

In this case, the issue before the court is what constitutes "a decision of the planning

board" under RSA 677:15, I. The New Hampshire Supreme Court has repeatedly held that "conditional approval [is] not a 'decision of the planning board' subject to review under RSA [677:15, I]."[3] Totty v. Grantham Planning Bd., 120 N.H. 388, 389 (1980), overruled in part on other grounds by Winslow v. Holderness Planning Bd., 125 N.H. 262, 269 (1984); see, e.g., Sklar Realty, Inc. v. Town of Merrimack, 125 N.H. 321, 327 (1984) ("[I]t is only such final approval that is a 'decision of the planning board' from which an aggrieved party may appeal."); Atwater v. Town of Plainfield, 160 N.H. 503, 510–11 (2010). Conditional approval does not constitute a final order nor does it create any substantive rights. Totty, 120 N.H. at 389. Conditional approval is therefore only an interim step in the process of the Board's consideration. Sklar Realty, 125 N.H. at 327.

The New Hampshire Supreme Court has further noted the distinction between approvals subject to conditions precedent and those subject to conditions subsequent as it relates to finality and appealability. Saunders v. Town of Kingston, 160 N.H. 560, 564 (2010). "[C]onditions precedent … contemplate additional action on the part of the town, and, thus, cannot constitute final approval. Conditions subsequent, on the other hand, do not delay approval." Prop. Portfolio Grp., 154 N.H. at 615. Thus, a conditional approval imposing only conditions subsequent constitutes a final decision appealable under RSA 677:15, I. Saunders, 160 N.H. at 564. Conditions subsequent are those required to be completed prior to construction commencing, while conditions precedent are those to be completed prior to the Board signing final approval. Compare Prop. Portfolio Grp., 154 N.H. at 612 with Sklar Realty, 125 N.H. at 327.

In this case, the Petitioners expressly appeal the July 28, 2020 Decision, (Compl. 1), and

[3] In Totty, the Supreme Court was analyzing RSA 36:34 which is the former version of RSA 677:15. Sklar Realty, Inc. v. Town of Merrimack, 125 N.H. 321, 327 (1984).

the Intervenors argue that decision was merely a formality re-affirming the April 23, 2019 Decision. (See generally Mot. Dismiss). Thus, the court will analyze the finality and appealability of both decisions.

Beginning with the finality and appealability of the April 23, 2019 Decision, the court finds that the Board's conditional approval of the Project, (see C.R. 13), was not "a decision of the planning board" per RSA 677:15, I. Certain conditions imposed require additional action on the part of the Town. See Prop. Portfolio Grp., 154 N.H. at 615. For example, condition 1(b) requires the Intervenors to draft a sample parking lease "to the satisfaction of the Assistant City Manager." (C.R. 13.) Presumably, if the Intervenors were unable to obtain the Assistant City Manager's approval on the parking lease, the final approval and signing of the plans would be delayed. See id. In addition, each of the conditions require the Board review the documentation submitted evidencing the Intervenors' satisfactory completion of that condition. See Sklar, 125 N.H. at 325 ("Between July 27, 1982 and January 17, 1983, [the applicant] submitted information to the [B]oard to demonstrate that it had met those conditions."). Again, the Board could presumably decline to certify a condition was met if the Board was dissatisfied with the Intervenors' documentation or the manner of completion. See id. Thus, the conditions imposed in the Board's April 23, 2019 Decision were conditions precedent and thus the decision was not a final decision appealable under RSA 677:15. As there appears to be no dispute that the April 23, 2019 conditions were not satisfied prior to the July 28, 2020 Decision, the April 23, 2019 decision never became final.

Turning to the July 28, 2020 Decision, the court likewise finds the Board's conditional re-approval of the Project, (see C.R. 23), was not "a decision of the planning board" per RSA 677:15, I. The conditions in the July 28, 2020 Decision vary slightly from those set forth in the

April 23, 2019 Decision. (Compare C.R. 13 with C.R. 23.) However, both decisions include, as a condition final approval, the condition that Intervenors providing a sample parking lease "to the satisfaction of the Assistant City Manager." (C.R. 13, 23.) The court already determined this condition requires additional action on the part of the Town and, presumably, if the Intervenors failed to obtain the Assistant City Manager's approval on the parking lease, the approval and signing of the plans would be delayed. See Prop. Portfolio Grp., 154 N.H. at 615. Moreover, the remaining conditions in the July 28, 2020 Decision require satisfaction prior to the Board's signing of the plans, i.e., the Board giving final approval, and will require the Intervenors to submit to the Board documentation evidencing their satisfactory completion of those conditions. See Sklar, 125 N.H. at 325. Again, the Board could presumably decline to certify a condition was met if the Board were dissatisfied with the Intervenors' documentation or the manner of completion. See id.; Prop. Portfolio Grp., 154 N.H. at 615. Thus, the conditions imposed in the Board's July 28, 2020 Decision were conditions precedent and thus the decision was not a final decision appealable under RSA 677:15.

Finally, the court addresses two peripheral arguments by the Intervenors. First, the Intervenors urge the court to follow Lowe v. Town of Pelham Planning Board, Hillsborough (South) Cnty. Super. Ct., 226-2020-CV-00291 (Dec. 16, 2020) (Temple, J.)—a recent superior court decision—and find the conditions imposed here were administrative in nature, requiring no additional action by the Board, and thus not true conditions precedent. (See Resp. to Obj. (superior court order attached as exhibit).) The court finds the Lowe order unpersuasive. In Lowe, the court (Temple, J.) relied on RSA 676:4—the statutory provision governing procedures planning boards must use when considering or acting upon a plat or application. RSA 676:4 authorizes a planning board to grant conditional approval, which will become final without

requiring the board to hold further public hearing, when the conditions imposed are:

1. Minor plan changes whether or not imposed by the board as a result of a public hearing, compliance with which is administrative and which does not involve discretionary judgment; or
2. Conditions which are in themselves administrative and which involve no discretionary judgment on the part of the board; or
3. Conditions with regard to the applicant's possession of permits and approvals granted by other boards or agencies or approvals granted by other boards or agencies, including state and federal permits.

The Lowe court (Temple, J.) ultimately concluded the planning board's approval subject to conditions was in actuality a final approval because the conditions imposed were administrative in nature and thus not true conditions precedent. See Lowe, 226-2020-CV-00291 at *9-11. However, the Supreme Court has already taken a contrary position. Specifically, in noting the distinction between RSA 676:4 and RSA 677:15, the Supreme Court stated that reliance on RSA 676:4 when analyzing the appealability of "a decision of the planning board" pursuant to RSA 677:15 is "misplaced as that provision does not address the process by which one may appeal a planning board decision." Prop. Portfolio Grp., 154 N.H. at 616; see also RSA 676:4, IV. Accordingly, the court declines to adopt the reasoning in the Lowe order.

As a final matter, the court finds the Intervenors argument that even if this court found the July 28, 2020 Decision to be unlawful or unreasonable, the Intervenors would still have a valid approval—the April 23, 2019 Decision—to be inapposite. That the Dover Site Review regulations dictate Board approval is valid for five years has no bearing on whether the Board's April 23, 2019 Decision was a final decision and thus whether the present action is untimely.

Based upon the court's conclusion that the July 28, 2020 Decision was a conditional approval, it is not "a decision from the Board" appealable under RSA 677:15. As there has been no suggestion by the parties or the Intervenors that the Board has provided final approval of the plans following the Intervenors' satisfaction of the July 28, 2020 conditions, the court finds it

appropriate to stay the present proceedings until the Board has granted the Intervenors final approval of the Project. (See C.R. 23.)

Conclusion

For the foregoing reasons, the Intervenor's motion to dismiss is DENIED. These proceedings are stayed until the Board gives final approval on the Project. Upon final approval, the Petitioners shall have thirty (30) days to notify the court.

SO ORDERED.

Date: February 12, 2021

Chief Justice

Clerk's Notice of Decision
Document Sent to Parties
on 02/16/2021

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY SUPERIOR COURT

George Stergiou, Jen McCarthy,
Brendan Sullivan, and Kirankumar Tamminidi

v.

City of Dover Planning Board

Docket No. 219-2020-CV-00256

ORDER ON MOTIONS TO RECONSIDER AND CLARIFY

The petitioners, George Stergiou, Jen McCarthy, Brendan Sullivan, and Kirankumar Tamminidi (collectively "the Petitioners") filed a verified complaint against the City of Dover Planning Board (the "Board") pursuant to RSA 677:15, alleging the Board's July 28, 2020 conditional site plan approval of Amer Fakhoury and Micheline Elias's site review was unlawful and unreasonable. (Court index #1.) Subsequently, Micheline Elias and The Fakhoury's, LLC[1] (collectively, the "Intervenors") intervened and moved to dismiss arguing that the verified complaint is untimely under RSA 677:15, I. (Court index ##4, 10.) The Petitioners objected to dismissal. (Court index #15.) Following a hearing, see Super. Ct. Civ. R. 13(b), the court denied the Intervenor's motion to dismiss and stayed these proceedings until the Board gave final approval for the Project. (Court index #19.) The Intervenors now move to reconsider, arguing the court misapprehended or overlooked certain points of law or fact in denying their motion to dismiss. (Court index #20.) The Petitioners move to reconsider or clarify the court's decision to stay these proceedings. (Court index #21.) In addition, the parties and the Intervenors filed an assented-to motion to extend the stay imposed by the court's Certiorari Order. (Court index ##2,

[1] The Fakhoury's LLC is the owner of the Property in question by virtue of quitclaim deed from Amer Fakhoury and Micheline Elias. (See Mot. Intervene ¶ 3.)

22.) Based on the parties' arguments, the relevant facts, and the applicable law, the court finds and rules as follows.

Facts

The court incorporates by reference the factual background set forth in the court's order on the Intervenors' motion to dismiss. (Court index #19 (the "Order").)

Legal Standard

A party moving for reconsideration shall "state with particular clarity, points of law or fact that the court has overlooked or misapprehended and [the motion] shall contain such argument in support of the motion as the movant desires to present." Super. Ct. Civ. R. 12(e).

Analysis

The Intervenors and Petitioners have filed separate motions for reconsideration. In addition, the Intervenors and the Town filed a motion to stay. The court will address each in turn.

I. Intervenors' Motion to Reconsider

The Intervenors contend the court misapprehended or overlooked points of law in three ways. (See generally Mot. Reconsider.) First, they contend the court overlooked New Hampshire jurisprudence in concluding that reliance on RSA 676:4 is misplaced in determining the finality of a Planning Board decision. (See id. § I.) Second, they contend the court misapprehended the difference between conditions precedent and conditions subsequent in concluding neither the April 23, 2019 Decision nor the July 28, 2020 Decision were "[final] decisions of the planning board." (See id. § II.) Third, they contend the court misapprehended the validity of the Planning Board's April 23, 2019 Decision per the City of Dover's Site Review Regulations. (See id. § III.)

Beginning with the Intervenors' first contention, the court finds it neither misapprehended or overlooked established New Hampshire jurisprudence in concluding that reliance on RSA 676:4 was misplaced. Contrary to the Intervenors' argument in support of this ground for reconsideration, the court considered, addressed, and ultimately disagreed with Lowe and its analysis of RSA 676:4. (Order, at 8–9.) Thus, this is not grounds for reconsideration. O'Donnell v. Allstate Indem. Co., Hillsborough Cnty. (North) Super. Ct., No. 216-2017-CV-00463, at *1 (Dec. 04, 2018) (Messer, J.) (declining to reconsider where the "plaintiff's motion to reconsider contains the same arguments previously raised and considered by the court.").

To the extent that the Intervenors assert that the court failed to read RSA 676:4, IV in conjunction with RSA 677:15, the Intervenors are incorrect. As the court noted in its Order, RSA 676:4, IV governs the procedure planning boards must use when considering an application. Specifically, RSA 676:4 authorizes a planning board to grant conditional approval of an application, which will become final **without additional public hearing**, when the conditions imposed are administrative in nature. (Emphasis added). RSA 676:4, IV does not, however, govern when a conditional approval becomes final. Notwithstanding, the New Hampshire Supreme Court jurisprudence has addressed that issue. In a line of cases beginning with Totty v. Grantham Planning Bd., 120 N.H. 388, 389 (1980), the Supreme Court determined that a conditional approval, subject to conditions precedent, is not "a decision of the planning board" subject to superior court review per RSA 677:15. Sklar Realty, Inc. v. Town of Merrimack, 125 N.H. 321, 327 (1984); Prop. Portfolio Grp., LLC v. Town of Derry, 154 N.H. 610, 613 (2006), as modified on denial of reconsideration (Jan. 24, 2007). The Court in Prop. Portfolio Grp. held that because the applicant had received conditional approval, authorized by RSA 676:4, IV, subject to a condition subsequent, the approval was in effect a final approval

appealable to the superior court pursuant to RSA 677:15. See 154 N.H. 615–16 (concluding the condition imposed was a condition subsequent because the condition did not need to be completed prior to construction commencing). Notably, the Supreme Court made no reference to RSA 676:4, IV in finding the condition imposed was a condition subsequent. See Prop. Portfolio Grp., 154 N.H. at 615 (relying on Totty, 120 N.H. at 389 and Sklar Realty, 125 N.H. at 327.) Rather, the Supreme Court relied on its previously stated definitional distinctions between conditions precedent and subsequent. See id.; (see also Order, at 6.)

In sum, the court's reading of RSA 676:4, IV and relevant Supreme Court jurisprudence together with RSA 677:15, reveals the following. A planning board may issue conditional approval, which will become final without further public hearing, upon satisfaction of the condition pursuant to RSA 676:4, IV. However, such conditional approval is final for appealability purposes under RSA 677:15 only if the conditions imposed are conditions subsequent. On the other hand, conditional approval subject to conditions precedent, will become final without further public hearing, upon satisfaction of the condition, but is not appealable pursuant to RSA 677:15 until those conditions are satisfied.

Accordingly, the Intervenors' motion to reconsider on this ground is DENIED.

Turning to the Intervenors' second contention, the court finds that it did not misapprehend the distinction between conditions precedent and conditions subsequent. As stated previously, RSA 676:4, IV does not govern when a conditional approval becomes final, nor has the Supreme Court looked to that provision in analyzing whether imposed conditions are precedent or subsequent. As the Intervenors highlight, the court already noted that "conditions precedent . . . contemplate additional action on the part of the town and, thus, cannot constitute final approval. Conditions subsequent, on the other hand, do not delay approval." (See Mot. Reconsider ¶ 22; Order, at 6 (quoting Prop. Portfolio Grp., 154 N.H. at 615).). Here, as the court found in its

Order, the conditions imposed by both the April 23, 2019 Decision and the July 28, 2020 Decision require additional action on the part of the Town and thus are conditions precedent. (See Order, at 7–8.) Therefore, as the court found, neither the April 23, 2019 Decision nor the July 28, 2020 Decision was a final decision appealable to the superior court pursuant to RSA 677:15. The court reiterates that this is true notwithstanding the fact that, pursuant to RSA 676:4, IV, conditional approval may become final without further public hearing and the Intervenors will instead merely need to submit documentation to the Board evidencing their compliance with the imposed conditions. See Sklar Realty, 125 N.H. at 325 ("Between July 27, 1982 and January 17, 1983, [the applicant] submitted information to the [B]oard to demonstrate that it had met those conditions.").

Accordingly, the Intervenors' motion to reconsider on this ground is DENIED.

Finally, with respect to the Intervenors' third contention, the court finds that it did not misapprehend the validity of the Board's April 23, 2019 Decision pursuant to the City of Dover Site Review Regulations. As the court already stated, the fact that the City of Dover Site Review Regulations state that approvals are valid for five years, has no bearing on whether the April 23, 2019 Decision was a decision of the planning board, appealable pursuant to RSA 677:15. Further, and contrary to the Intervenors' assertion that they intend to "proceed unchallenged under the terms of the 2019 Approval," the April 23, 2019 Decision never became final. (See Order, at 7.) Thus, even assuming the July 2020 Decision was a mere formality re-approving the April 23, 2019 Decision, (see Intervenors' Mot. Dismiss), the July 28, 2020 Decision is the operative decision, superseding the April 23, 2019 Decision. It is axiomatic that 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. Accordingly, the Intervenors' motion to reconsider on this ground is DENIED.

II. Petitioners' Motion to Reconsider or Clarify

The Petitioners seek reconsideration or clarification of the court's decision to stay the current proceedings until the Board has granted final approval. (See generally Pet'rs' Mot. Reconsider.) They contend that the court cannot stay a matter over which it lacks jurisdiction. (See id. ¶ 2.) Thus, they request that the court reconsider or clarify its order with regard to jurisdiction to preserve their rights. (See id. ¶¶ 3–4.)

Upon review, the Petitioners' motion to reconsider or clarify is GRANTED. As the court determined in its Order and now clarifies, the court lacks jurisdiction over the present appeal because the conditions imposed by the July 28, 2020 Decision—which was a mere formality to re-approve, and thus supersede, the April 23, 2019 Decision— are conditions precedent. (See Order, at 8–10.) Because the July 28, 2020 Decision was subject to conditions precedent and thus was not "a decision of the planning board" pursuant to RSA 677:15, the court chose to stay the proceedings until such time as the Board issued final approval. (See id. at 9–10); Johns-Manville Sales Corp. v. Barton, 118 N.H. 195, 198 (1978) ("The decision to stay or hold in abeyance a particular action is within the sound discretion of the trial court."). However, the Supreme Court has noted that where the superior court "never acquired jurisdiction, its order is void." Kulick's, Inc. v. Town of Winchester, No. 2014-0226, 2015 WL 11071182, at *2 (N.H. Mar. 16, 2015) (non-precedential order). Accordingly, to ensure the Petitioners rights are preserved, the present appeal is DISMISSED for lack of jurisdiction.

Pursuant to RSA 677:15, and in light of this order, any appeal of the July 28, 2020 Decision must be filed within 30 days of the Board granting final approval of the Project.

III. Assented-to Motion to Stay

The parties and the Intervenors filed an assented-to motion to extend the stay (court index #22), initially imposed by the court's Certiorari Order, (court index #2), until such time when the court rules on the pending motions for reconsideration, thus providing a final decision on those issues. As this order addresses those motions and thus effectively lifts the imposed stay, the court finds the motion to stay is MOOT.

Conclusion

For the foregoing reasons, the Intervenor's motion to reconsider is DENIED. The Petitioners' motion to reconsider or clarify is GRANTED and this appeal is DISMISSED, without prejudice, for lack of jurisdiction. The assented-to motion to stay is MOOT.

SO ORDERED.

March 10, 2021

Judge Tina L. Nadeau

Clerk's Notice of Decision
Document Sent to Parties
on 03/10/2021