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

REPLY BRIEF FOR INTERVENORS THE FAKHOURYS, LLC & MICHELINE ELIAS

THE FAKHOURYS, LLC &
MICHELINE ELIAS

By Their Attorneys:

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II. STATEMENT OF THE FACTS

The Intervenors hereby incorporate by reference the "Statement of the Facts" set forth in the September 1, 2021 Brief for Intervenors, The Fakhourys, LLC & Micheline Elias.

III. ARGUMENT

A. This Court should decline to consider the arguments raised in the City of Dover's Memorandum of Law because they were not preserved for appeal, they present factual issues the Trial Court did not consider, and they are without merit.

In its Memorandum of Law, the City of Dover takes no position on the specific questions raised by the Intervenors in their Rule 7 Notice of Appeal. (See City's Mem. Law at 8–9.) Notwithstanding its neutrality as to the questions on appeal, the City argues the Trial Court's decision denying the Intervenors' Motion to Dismiss should be affirmed on factual and procedural grounds neither presented to, nor argued before, the Trial Court. (See id. at 4–6.) The City Contends that the Intervenors "acquiesced" to the procedure adopted by the Planning Board, that the 2020 Approval is the "operative approval," and that, accordingly, the Intervenors are not entitled to the relief they seek. (See id.) This Court should disregard the City's arguments because they are not preserved for appeal, they present factual issues the Trial Court never considered, and they are ultimately unavailing.

This Court should decline to consider the City's arguments as they were not preserved for appeal. This Court has noted it need not address issues that were not preserved for appeal. See, e.g., Sanderson v. Town of

Candia, 146 N.H. 598, 602–03 (2001); Webster v. Town of Candia, 146 N.H. 430, 444 (2001); DHB, Inc. v. Town of Pembroke, 152 N.H. 314, 324–25 (2005).

The City took no position on the Intervenors' Motion to Dismiss at the Trial Court level, and the Transcript from the Trial Court's December 17, 2020 Hearing reflects the City did not make any of the arguments it has presented to this Court. (See Tr. at 24:22–25:7.) The City's counsel stated on the record that "[t]he city takes no position because this -- to be frank, I guess we view these as a city's role in these appeals is to explain the basis for what was decided . . . ." (Id. at 24:22–24.) The City's counsel went on to state that "[i]t seems like a procedural issue, a jurisdiction issue is being raised in appeal, and happy to answer any factual questions, but we didn't feel it was appropriate to essentially try to express the Planning Board's will where I'm not really sure what it is, frankly." (Id. at 25:1–5.) The City did not argue that the Intervenors' Motion to Dismiss should be denied, that the Intervenors "assented" to the procedure adopted by the Planning Board, or that the 2019 Approval was the "operative approval." As such, the City's arguments are not preserved for appeal, and this Court should decline to consider the same.

This Court should decline to consider the City's arguments as they are based upon questions of fact that were never presented to the Trial Court. Ordinarily, factual disputes do not arise in Planning Board appeals brought under RSA 677:15 because "a planning board's factual findings are considered *prima facie* lawful and reasonable." Trustees of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 513 (2018). Nevertheless, "[e]vidence beyond the certified record may be introduced in superior court

and may be taken into consideration even though it was not before the board." Peter Christion'S v. Hanover, 132 N.H. 677, 683 (1990). "It is within the discretion of the trial court to determine whether additional evidence will be taken. Id. at 683.

In its memorandum, the City asserts that "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." (City's Mem. Law at 5.) The City draws these *inferences* from the Planning Board's July 28, 2020 meeting minutes, reflecting that the Intervenors' non-attorney representative purportedly commented that the 2019 Approval had expired, (see Appd'x Vol. IV at 35), and a letter from the Intervenors' non-attorney representative requesting the Planning Board "'re-approve' the project," (see Appd'x Vol. III at 40). (See City's Mem. Law at 3, 4.)

The Planning Board never found, as matters of fact, that the Intervenors agreed their 2019 Approval expired or that the Intervenors acquiesced to the actual procedure employed by the Planning Board. The Certified Record indicates the opposite as the Planning Board itself did not require the Intervenors to file a new Site Plan Review Application, (compare Appd'x Vol. III at 5 with Appd'x Vol. IV at 15), did not require the Intervenors to update any of the supporting documents submitted in 2019, (compare Appd'x Vol I at 4–Appd'x Vol. III at 39 with Appd'x Vol. III at 40–Appd'x Vol. IV at 46), and continued to reference the matter utilizing the case number assigned in 2019. (See, e.g., Appd'x Vol. IV at 35, 45.) Additionally, the City never moved for the Trial Court to expand the record, or to find, as a matter of fact, that the Intervenors agreed their 2019 Approval expired or acquiesced to the procedure adopted by the

Planning Board. The City "[took] no position." (Tr. at 24:22.) As a result, the factual determination the City is requesting of this Court, (see City's Mem. Law at 5), was never made by either the Planning Board *or* the Trial Court. The City is thus requesting that this Court act as a trier of fact, in the first instance, on appeal. In light of this Court's standard of review, the City's request is inappropriate at this stage of the proceedings. This Court should therefore decline to consider the arguments set forth in the City's Memorandum of Law.

Finally, this Court should decline to consider the City's arguments as they are without merit. The City argues that under the terms of the Dover Site Review Regulations, the 2019 Approval expired due to the Intervenors' failure to comply with Section 153-8, A, of the City's Site Review Regulations (the "Certification Requirement"). (See City's Mem. Law at 4-5.) In support of its argument, the City asserts that the word "shall" is mandatory in the context of the Certification Requirement. (See id. at 4.) The City's argument is belied by the fact that the regulation goes on to provide: "The Director of Planning and Community Development may grant one ninety-day extension," and "additional extensions can only be granted by the Planning Board." (Appd'x Vol. V at 85.) Based on the plain language of the Certification Requirement, therefore, the 90-day period for submission of final site plans may be extended by the Planning and Community Development Director or by the Planning Board itself. Thus, while an applicant's obligation to submit final site development plans is certainly mandatory, the 90-day submission period is not necessarily mandatory.

The City is also mistaken in asserting that failure to comply with the Certification Requirement results in the expiration of a Planning Board approval. (See City's Mem. Law at 4.) Section 153-9 of the City's Site Review Regulations is titled "Expiration of Planning Board approval," and provides that "Planning Board approval shall be valid for five years from the date of said approval." (Appd'x Vol. V at 85–60.) It does not set forth any qualifications or exceptions to this rule. Under Sections 153-8 and 153-9, therefore, failure to timely comply with the Certification Requirement could result, at most, in the denial of a building permit, certificate of occupancy, or other procedural prerequisite to the initiation of site work; it does not, and cannot, result in expiration of the Planning Board's approval.

The City next contends that because the Intervenors availed themselves of the "reapproval" process adopted by the Planning Board—a process that does not exist under New Hampshire land use law—the Intervenors cannot avail themselves of the protections afforded by the City's Site Review Regulations. (City's Mem. Law at 4–5.) In support of this proposition, the City cites to Morrill v. Amoskeag Sav. Bank, 90 N.H. 358, 359 (1939), and Chasan v. Village Dist. of Eastman, 128 N.H. 807, 813 (1986), in which this Court discussed the general principle that a litigant, having availed itself of a given procedure, cannot thereafter object to the form of that procedure. In both cases, this Court observed that "the test of the validity of a form of procedure is . . . whether or not it is what justice and convenience require." Chasan, 128 N.H. at 813; Morrill, 90 N.H. at 359. Neither case is apposite. In Morrill, the defendants moved to dismiss at the close of evidence, and the plaintiffs made no objection to the

form of the motion; this Court thus ruled that the plaintiffs waived any such objection. Morrill, 90 N.H. at 358–59. In Chasan, the plaintiffs submitted various documents to assist the trial court in ruling on the defendants' motion to dismiss; the plaintiffs then objected to the trial court having considered such documents in ruling on the motion. Chasan, 128 N.H. at 813. This Court ruled that the plaintiffs were not entitled to object to a procedure to which they had acquiesced, and indeed, had themselves suggested. See id.

In contrast, the Intervenors in this case have not objected to the procedure adopted by the Planning Board, nor do they challenge the 2020 Approval on the grounds of the procedure adopted. Rather, the Intervenors have argued, and continue to argue, that the Trial Court's action on the 2020 Approval is ultimately moot as the City's Site Review Regulations allow Intervenors to proceed with their proposed site work under the terms of the 2019 Approval. As noted above, Section 153-8 of the City's Site Review Regulations explicitly contemplates that, where an applicant has failed to comply with the Certification Requirement for reasons beyond the applicant's control, the Planning Board may grant an extension of the 90-day certification period. Given that the 2019 Approval is still valid under the plain terms of Section 153-9 of the Site Review Regulations, and the fact that the Intervenors' failure to comply with the Certification Requirement was due to circumstances beyond their control, the Intervenors are clearly eligible for an extension of the 90-day certification period as set forth in Section 153-8.

The City and the Trial Court also appear to misconstrue the Intervenors' argument that the Trial Court's action is ultimately moot. In

its March 10, 2021 Order, the Trial Court commented 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." (March 10, 2021 Order at 5.) The City cites this dictum in support of its argument. (City's Mem. Law at 5.) However, the Intervenors never argued the 2020 Approval is moot; they argued that any court action on the Petitioners' Verified Petition for Certiorari Review would ultimately be moot. See, e.g., Appd'x Vol. V at 21, ¶ 39 ("the Court's action would be moot as the Intervenors would still hold a valid approval to proceed with the Project"); Appd'x Vol. V at 46, ¶ 44 ("any relief granted as a result of the Petitioners' appeal from the 2020 Approval would ultimately be moot"); Appd'x Vol. V at 52, ¶ 9 ("the Intervenors filed a Motion to Dismiss the Petition as being ultimately moot"). The distinction is significant.

As discussed in the Intervenors' opening brief, both the 2019 Approval and the 2020 Approval were "decision[s] of the planning board" under RSA 677:15, I.[1] Each was appealable to the Superior Court only "within 30 days after the date upon which the board voted to approve or disapprove the application." RSA 677:15, I. The date of the 2019 Approval was April 23, 2019, and the date of the 2020 Approval was July 28, 2020. Thus, as of August 27, 2020, the date the Verified Petition was filed, the 2020 Approval was still appealable under RSA 677:15, I, whereas

[1] As additional authority not cited in the Intervenors' opening brief, see P. Laughlin, 15 New Hampshire Practice Series: Land Use Planning and Zoning § 32.11 (4th ed.) ("Note that under RSA 677:15, I, an appeal of a planning board decision must be filed within thirty (30) days after the date upon which the board voted to approve or disapprove the application, so that while a decision may be final for purposes of appeal, it may not constitute a final approval.").

the 2019 Approval was unappealable. See RSA 677:15, I. Moreover, as of August 27, 2020, the Trial Court had jurisdiction to "reverse or affirm, wholly or partly, or . . . [to] modify" the 2020 Approval; but the Trial Court did *not* have jurisdiction over the 2019 Approval. See RSA 677:15, V.

Thus, when the Intervenors' non-attorney representative requested that the Planning Board "'re-approve' the project," (Appd'x Vol. III at 40), he was acting under the 2019 Approval as a *fait accompli*—which it was—a final decision of the Planning Board valid for five years from the date of decision. The only relief the Intervenors sought by their request to "'re-approve' the project" was a *de facto* extension of the 90-day period in which to sign and submit their approved site plans under Section 153-8 of the City's Site Review Regulations. In recognition of this, and as referenced above, the Planning Board did not require a new Site Plan Review Application, did not require any new evidence, and did not require technical review; it proceeded under substantially the same application materials the Intervenors presented in 2019.

Under applicable law, therefore, the Petitioners' request for appellate review of the 2020 Approval, and the Trial Court's action upon the same, should have been limited to the sole question that was actually presented to the Planning Board via the Intervenors' request for "reapproval," *i.e.*, whether to allow the Intervenors to proceed under the 2019 Approval notwithstanding their failure to comply with the Certification Requirement's 90-day submission deadline. The 2020 Approval process was not a full site plan review, and the Planning Board's proceedings reflected that fact. The Trial Court's proceedings should have reflected the same. As a result, the relief that the Petitioners sought in their August 27,

2020 Verified Petition—reversal of the Petitioners' final, unappealable site plan approval—was unavailable to them as the Intervenors' actual site plan approval had become unappealable on May 24, 2019. Thus, any court action on the Petitioners' appeal would have been moot for the Court's lack of subject matter jurisdiction over the relief requested by the Petitioners.

The City also misconstrues the Trial Court's March 10, 2021 Order, arguing that the Trial Court "ruled" the 2020 Approval was the "operative decision" for purposes of appellate review. The City fails to observe the Trial Court's error. In reaching its determination that the 2020 Approval was the "operative decision," the Trial Court assumed the 2019 Approval was not "final," that the 2020 Approval procedure was merely a formality to reapprove the 2019 Approval (presumably so the Intervenors could finalize the 2019 Approval), and that the 2020 approval was thus the operative approval needed for the Intervenors to proceed with their proposed site work under a valid site review approval. (See March 10, 2021 Order at 5.) The Trial Court's characterization of the 2020 Approval as an "operative decision" was thus premised on the Court's erroneous ruling that the 2019 Approval was not a "decision of the planning board" under RSA 677:15. Having been premised on an error of law, the Trial court's dictum that the 2020 Approval was the "operative decision" was likewise erroneous as a matter of law.

As a final note, the Intervenors assert that fundamental principles of fairness and justice weigh heavily in their favor. The City's Site Review Regulations contemplate that the Certification Requirement's 90-day submission period may be extended by the City "if circumstances arise beyond the control of the applicant." (Appd'x Vol. V at 85.) Neither the

Certification Requirement nor the approvals from the Planning Board state that failure to obtain certification results in expiration of approval. (Appd'x Vol. III at 37–38; Appd'x Vol. IV at 45–46; Appd'x Vol. V at 85.) Similarly, Section 153-9 of the City's Site Review Regulations is silent as to the effect of an applicant's failure to obtain certification. (Appd'x Vol. V at 85–86.) Ever since the Intervenors' non-attorney representative requested that the Planning Board "'re-approve' the project," the City has been aware the Intervenors' failure to comply with the 90-day filing deadline was caused by circumstances beyond their control. As such, the City should not be permitted to argue that the intervenors waived a right the City itself deigned to codify and protect. This Court should decline to address the City's arguments because they were not preserved for appeal, they are based on factual issues not considered by the Trial Court, and they are without merit.

IV. CONCLUSION

The Trial Court erred as a matter of law; its February 12, 2021 and March 10, 2021 Orders must therefore be reversed.

Dated this 14th day of October, 2021.

Respectfully Submitted:

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COMPLIANCE WITH SUPREME COURT RULE 16(11)

I hereby certify that the foregoing Reply Brief For Intervenors, The Fakhourys, LLC & Micheline Elias complies with Supreme Court Rule 16(11) and contains a total of 3,000 words exclusive of the Table of Contents, the Table of Authorities, and the Certifications on this page.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been transmitted via the Court's electronic filing system this 14th day of October, 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/ William K. Warren
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