THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021- 0410

Richard Anthony and Sanaz Anthony, Appellants

v.

Town of Plaistow Planning Board, Appellee and

Milton Real Properties of Massachusetts, Intervenor

APPELLEE'S BRIEF – TOWN OF PLAISTOW

MANDATORY APPEAL PURSUANT TO
SUPREME COURT RULE 7

Charles F. Cleary, Esq. (#8145)
William P. Reddington, Esq. (#271590)
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101

Oral Argument: Charles F. Cleary, Esq.

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STATEMENT OF THE FACTS AND THE CASE

The Subject Property, 143 and 145A Plaistow Road, Plaistow, New Hampshire contains 19 acres and is located near the geographic center of town in a Commercial Zoning District on New Hampshire Route 125, which constitutes the primary business corridor in Plaistow. Certified Record, Appellants' Appendix ("App.") at 35-36. Milton Real Properties of Massachusetts ("Milton") agreed to purchase the Subject Property for purposes of constructing a 12,000 square foot equipment rental facility. App. at 35. The Appellants own a single-family home situated to the southeast of the Subject Property. App. at 184. On January 16, 2019, the Plaistow Planning Board ("Planning Board") held a design review hearing on Milton's proposed project. App. at 23. On January 30, 2019, Milton applied to the Planning Board for Site Plan approval. App. at 35-54. The Planning Board retained consulting engineer Keach-Nordstrom Associates to make sure the Milton proposal complied with the Plaistow Site Plan Regulations and best practices for protection of the environment. App. at 66. As is the practice in Plaistow, New Hampshire (and other municipalities), the planning staff asked the Code Enforcement Officer to review Milton's proposal to determine if the proposed use was permitted by right under the Plaistow Zoning Ordinance. On February 6, 2019, the Code Enforcement Officer issued a written decision that the proposed use was permitted in the Commercial Zoning District (the "Administrative Officer Decision"). App. at 59. The Administrative Officer Decision was placed in the Planning file for the Subject Property. The Appellants disagreed with the Administrative Officer Decision claiming the Milton proposed use was

a Contractor's Yard, but did not appeal it under RSA 676:5, I. See App. at 184-87, 189-93. At all times after the date of the Administrative Officer Decision, the Appellants were represented by counsel.

On March 20, 2019, the Planning Board held its first public hearing on Milton's Site Plan application and requested Milton review stormwater controls. App. at 76-81. On April 17, 2019, the Planning Board held its second public hearing on the Site Plan application and required that comments and concerns regarding stormwater be addressed by Milton and reviewed by Keach-Nordstrom. App. at 232-44. On May 4, 2019, the Planning Board conducted a site walk of the Subject Property. App. at 328-31. On May 15, 2019, the Planning Board held its third public hearing on Milton's Site Plan application. App. at 363-70. On June 19, 2019, the Planning Board held its fourth public hearing on Milton's Site Plan application. App. at 458-67. At the June 19, 2019 Planning Board meeting, Keach-Nordstrom Associates reported to the Planning Board that Milton had addressed all of its concerns regarding the project. App. at 453-56; 458-67. Finding that Milton had adopted reasonable measures to protect the environment and minimize any impact to abutters, the Planning Board issued a conditional approval of the Site Plan ("June 19 Planning Board Decision"). App. at 458-67; 470-73. By rendering a decision on the Site Plan application, the Planning Board determined the Administrative Officer Decision was accurate ("Planning Board Zoning Determination") App. at 71. As of such date, Appellant did not file any appeal of the Administrative Officer Decision or the Planning Board Zoning Determination to the Plaistow Zoning Board of Adjustment (the "ZBA").

On July 19, 2019, the Appellants appealed the June 19 Planning Board Decision to Superior Court but did not appeal any zoning issue to the ZBA under RSA 676:5.

On May 19, 2020, the Superior Court remanded the matter back to the Planning Board for determination whether the Planning Board intended the June 19 Planning Board Decision to constitute a final decision free from conditions precedent. Following a public hearing on June 17, 2020, the Planning Board confirmed its decision was a final decision (the "Remand Decision"). App. at 480-86.

On July 7, 2020, the Appellants appealed the Remand Decision to the ZBA on the issue of whether Milton's proposed use was a permitted use or a Contractor's Yard. Certified Record, Intervenor's Appendix ("I-App.") at 68-78. The Appellants appealed the Remand Decision to the Superior Court on July 17, 2020. App. at 488-502. The ZBA denied the Appellants' appeal on the basis that it was untimely as filed more than 15 months from the date of the Administrative Officer Decision and 12 months from the date of the Planning Board Zoning Determination, and that it otherwise failed to comply with the requirements of RSA 676:5. I-App. at 135. The Appellants filed a Motion for Reconsideration with the ZBA which was denied on September 24, 2020. I-App. at 154-55. The Appellants appealed the ZBA decision to Superior Court on October 26, 2020. I-App. at 68.

The Superior Court dismissed Appellants' appeal of the ZBA decision by Order dated March 1, 2021. I-App. at 79; Order of Judge Wageling in Richard Anthony, et al., v. Town of Plaistow Zoning Board,

Docket no. 218-2020-CV-1121 (hereinafter "ZBA Order"). The Appellants did not appeal the ZBA Order.

On July 8, 2021, the Superior Court affirmed the Planning Board Remand Decision. I-App. at 51; Order of Judge Wageling in Richard Anthony, et al., v. Town of Plaistow Planning Board, Docket no. 218-2020-CV-716 (hereinafter "Order"). This appeal followed.

SUMMARY ARGUMENT

A planning board's reliance on the municipal code enforcement officer's determination of permitted and unpermitted uses for particular properties according to the town zoning ordinance is widely practiced in New Hampshire and is reasonable, efficient, and lawful.

Any party aggrieved by such a decision has the right to appeal it to the zoning board of adjustment pursuant to RSA 676:5. However, such appeal must be made within a reasonable time, as provided by the rules of the zoning board of adjustment. In the present case, the Appellants were required to appeal the February 6, 2019 Administrative Officer Decision within twenty (20) days. The same time limitation applies to the Planning Board Zoning Determination. RSA 677:15, I-a(b) does not extend the strict time limitation contained in RSA 676:5 as to decisions made by an administrative officer and extends the time limitation for an appeal of a planning board zoning determination only when the parties were unaware of the zoning issue at the time of the appeal. Compare RSA 676:5 with RSA 677:15, I-a(b).

The purpose of identifying certain land use applications as Developments of Regional Impact is to provide notice to potentially affected municipalities where a development is likely to have impact beyond the boundaries of a single municipality. In the instant case, the Planning Board held the discretion and authority to determine that the construction of a 12,000 square foot equipment rental facility on NH Route 125 in the center of Plaistow was not a Development of Regional Impact. The Planning Board members are entitled to rely on their own knowledge and experience in considering whether to deem a project a Development of Regional Impact.

Deference is afforded to the factual findings and decisions of planning boards. Here, the Superior Court correctly found that the Planning Board did not act unlawfully or unreasonably where it conducted an extensive review of Milton's Site Plan application, which included four public hearings, a site walk, traffic impact reports, and multiple reviews by a third-party engineer.

ARGUMENT

I. THE SUPERIOR COURT APPROPRIATELY DETERMINED IT DID NOT HAVE JURISDICTION TO REVIEW THE APPELLANTS' ZONING ISSUE

The Appellants' argument with respect to the "contractor's yard" zoning issue being preserved is premised on three conclusions of law: (1) the Administrative Officer Decision made on February 6, 2019 was an illegal declaratory judgment which did not trigger 676:5; (2) this Court's holding in Atwater v. Town of Plainfield, 160 N.H. 503 (2010) is no longer good law; and (3) that RSA 677:15, I-a(b) allows a zoning issue to remain

adjudicable even after the administrative remedy process of RSA 676:5 has been completed to a final unappealable order. These conclusions are incorrect and unsupported.

In their brief, the Appellants first argue that the Administrative Officer Decision made by the Plaistow Code Enforcement Officer was somehow an illegal declaratory judgment. See Appellants' Brief at 21-25. This argument, however, is unsupported by New Hampshire law and, if followed, would invalidate the numerous zoning determinations made each year by building inspectors and code enforcement officers. New Hampshire's real estate market cannot properly function unless there are individuals consistently available to comprehend, interpret, and enforce municipal zoning ordinances.

New Hampshire law clearly provides that the proper (and only) avenue for an initial appeal of an administrative decision is to the local zoning board of adjustment. Under RSA 674:33, "The zoning board of adjustment shall have the power to . . . [h]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance . . . ." Pursuant to RSA 676:5, I "Appeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved . . . *by any decision of the administrative officer*." (Empasis added). "Administrative officer" means "any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility." RSA 676:5, II (a). Further,

a "decision of the administrative officer" includes "any decision involving construction, interpretation or application of the terms of the [zoning] ordinance." RSA 676:5, II (b). Finally, RSA 676:5, I requires that appeals to the zoning board "be taken within a reasonable time, as provided by the rules of the board". In this case, Plaistow's zoning bylaws provided that an aggrieved party had twenty (20) days to file an appeal of an administrative decision. I-App. at 132.

Here, it is undisputed that the Code Enforcement Officer made a zoning determination on February 6, 2019 that Milton's proposed use was permitted by right. This decision was public record and the Certified Record shows the Appellants were aware of the Administrative Officer Decision at least as early as March 13, 2019. See App. at 184-87. The Planning Board relied on the February 6 Administrative Officer Decision in its review of Milton's application and granting conditional site plan approval on June 19, 2019. Pursuant to RSA 676:5, I and the Town of Plaistow's zoning bylaws, the Appellant had twenty days in which to file an appeal of the Administrative Officer Decision. No appeal was filed to the ZBA within twenty days of February 6, 2019 nor June 19, 2019. In fact, an appeal to the ZBA was not filed until more than a year later, on July 7, 2020. I-App. at 98.

Although the Appellants claim the Administrative Officer Decision is somehow an illegal declaratory judgment, the Administrative Officer Decision is and was exactly the type of decision contemplated under RSA 674:33 and RSA 676:5.

In affirming the ZBA's decision to deny the Appellants' appeal as untimely, the Superior Court in the ZBA Order, relied on this Court's decision in Atwater v. Plainfield and Accurate Transp., Inc. v. Town of Derry, 168 N.H. 108 (2015) (citing Atwater) which addressed the issue of when a planning board's decision interpreting a zoning ordinance becomes appealable. The Atwater Court held that "a planning board decision about a zoning ordinance is ripe and appealable to the ZBA when such a decision is made." Atwater, 160 N.H. at 590. In reaching this conclusion, this Court observed:

> Allowing or requiring parties to wait until a final vote of the board before challenging zoning determinations would be inefficient, and would impose significant hardship on applicants seeking site plan approval. As a practical matter, it makes far more sense to resolve the question of whether a planning board's interpretation or application of the zoning ordinance is accurate as early as possible in the application review process.

Id. at 510. For instance, in this case, Milton incurred additional engineering costs following each public hearing. To avoid having an applicant potentially waste time and money on Site Plan review only to find its underlying use is not permitted, an aggrieved party must appeal a zoning decision when the decision is made. See Atwater, 160 N.H. at 590. As noted above, the Appellants did not file an appeal to the ZBA until July 7, 2020, more than a year after the Administrative Officer Decision on February 6, 2019, and the Conditional Approval on June 19, 2019.

The Appellants state in their brief that "the New Hampshire legislature overturned the Atwater case by statute, and amended RSA

677:15, I-a in 2013." The Atwater case has received no negative treatment on Westlaw, and has been discussed and relied on by this Court after 2013 in Accurate Transp., Inc. v. Town of Derry, 168 N.H. 108 (2015) and Crawford v. Town of Gilford, No. 2018-0605, 2019 WL 2371966 (N.H. May 31, 2019). Additionally, Atwater has been cited by this Court on several occasions since 2013 without indication of negative treatment. See Krainewood Shores Ass'n, Inc. v. Town of Moultonborough, 174 N.H. 103 (2021); see also Dembiec v. Town of Holderness, 167 N.H. 130, 133 (2014).

The Appellants claim the zoning issue is properly preserved under RSA 677:15, I; however, RSA 677:15, I-a is not applicable to this situation as it is intended to provide a good faith party an opportunity to exhaust its administrative remedies on a zoning issue, not provide a new avenue to those who have already exhausted such administrative remedies.

The record is clear that the Appellants created the zoning issue by characterizing Milton's proposed use under a different section of the zoning ordinance than interpreted by the Code Enforcement Officer and Milton, and repeated this mischaracterization multiple times before the Planning Board. The Appellants failed to timely appeal the Administrative Officer Decision to the ZBA. On July 7, 2020, the Appellants finally appealed to the ZBA and the ZBA denied the appeal as untimely. The Appellants unsuccessfully moved for reconsideration and then appealed the ZBA decision to Superior Court. Once the Superior Court dismissed the Appellants' zoning issue appeal, no further appeal was taken, and this issue is res judicata. See Finn v. Ballentine Partners, LLC, 169 N.H. 128, 147

(2016) ("The doctrine of res judicata prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action.").

II. THE SUPERIOR COURT APPROPRIATELY AFFIRMED THE PLANNING BOARD'S FINDING OF NO REGIONAL IMPACT

The Appellants argue that the Planning Board failed to make a determination of regional impact under RSA 36:56; therefore, the Planning Board decision, in its entirety, is void ab initio for lack of subject matter jurisdiction. See Appellants' Brief at 27-29. Appellants never raised this issue before the Planning Board despite multiple opportunities to do so. See Planning Board minutes beginning at App. 76, 232, 363, 458. The Appellants do not live in a neighboring municipality and they received notice of the Milton proposal; therefore, they have not been harmed by the Planning Board's regional impact determination. The record clearly demonstrates the proposed project was not a Development of Regional Impact and the Planning Board made a determination that there was no regional impact as required under RSA 36:56.

RSA 36:56 provides the relevant language:

> A local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact.

Not every development is one with regional impact. A 12,000 square foot equipment rental facility in the center of Plaistow on NH Route 125 is not the type of business that would materially impact a neighboring municipality. The Superior Court found that the Planning Board did not act unlawfully or unreasonably in determining there was no regional impact. See Order at 15-17. There was evidence before the Planning Board that Milton's proposed site was centrally located within Plaistow away from neighboring borders, any increase in traffic caused by the Milton project would be nominal, and that the project would have no detrimental impact on groundwater or nearby wetlands. Id. The Superior Court also found that the Town's Planning Director discussed regional impact issues before the Planning Board and testified that in his 16 years of experience, he had worked on many sizable commercial projects in which none had caused any regional impact. Order at p. 16; App. at 461; 391-98 (Vehicle Trip Generation Projection finding that the traffic related to the operation of Milton's site "is not expected to be a noticeable increase and is not likely to affect operating conditions in the area.").

Despite the Appellants' claim, the Planning Board complied with the requirements under RSA 36:56. The project was reviewed, at length, by the Planning Board over several months and several meetings. The Record shows the Board gave extensive consideration to this project and conducted a site walk. Given the extensive review by the Board, and the discussion of regional impact included in the meeting minutes, the Planning Board implicitly made a determination this was not a Development of Regional Impact in compliance with RSA 36:56. See Ltd. Editions Properties, Inc. v.

Town of Hebron, 162 N.H. 488, 497 (2011) ("a planning board is entitled to rely in part on its own judgment and experience in acting upon applications . . . .").

The Appellants argue that the Planning Board decision is void ab initio because the Town failed to provide notice to the abutting municipalities under RSA 36:57. However, where the Board made the determination that this was not a Development of Regional Impact, the notice requirement under RSA 36:57 is not triggered. An affirmative finding of regional impact by a planning board is a condition precedent to the requirement that notice be given to other municipalities. All parties who were entitled to notice of the Milton proposal received notice.

III. THE SUPERIOR COURT APPROPRIATELY AFFIRMED THE PLANNING BOARD DECISION

The Superior Court's review of a planning board's decision is limited. Pursuant to RSA 677:15, V the superior court may reverse or modify a planning board decision only if "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." Upon review, the superior court must treat the planning board's "factual findings as prima facie lawful and reasonable, and cannot set the decision aside absent unreasonableness or identified error of law." See Property Portfolio Group, 163 N.H. 754, 757 (2012). "The trial court is not to determine whether it agrees with a planning board's findings, but rather whether there is evidence upon which they could have been reasonably based. It is the petitioner's burden to

demonstrate, by the balance of probabilities, that the board's decision was unreasonable." Id.

The Planning Board was charged with allowing Milton the reasonable use of the Subject Property while limiting adverse impacts of such use on residential abutters. This requires a balance of the competing interests where a commercial zoning district adjoins a residential zoning district. One method is to require a reasonable buffer of undisturbed land. The development of the Appellants' residential subdivision required only a 50 foot buffer between the subdivision and the then existing commercial zoning district. See App. at 78. The Planning Board, in acting on Milton's site plan application required an additional 120 foot tree buffer between the site's parking area and the abutting residential properties. Id. at 78. The Planning Board retained a consulting engineer to independently review all aspects of the site plan proposal for compliance with Town site plan regulations. The Planning Board held four public hearings on the site plan application, examining the potential impacts that may be created and requested solutions from Milton. In the end, as the Superior Court found, the Planning Board conducted a very thorough site plan review and reached a reasonable decision in granting conditional site plan approval.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Trial Court, which found that the Appellants had failed to meet their burden of establishing that the Planning Board acted unreasonably or unlawfully in approving the Intervenor's Project.

REQUEST FOR ORAL ARGUMENT

The Appellee requests fifteen minutes of oral argument to be shared by Attorney Cleary and Attorney Lick.

RULE 16(11) CERTIFICATION

I hereby certify that this Brief is in compliance with the word limit requirement of New Hampshire Supreme Court Rule 16(11). The number of words in this Brief is 3,532.

Respectfully submitted,

Town of Plaistow
By their attorneys

WADLEIGH, STARR & PETERS, PLLC

Dated: June 15, 2022

By:/s/ Charles F. Cleary, Esq.__
Charles F. Cleary, Esq.
NH Bar ID#8145
William P. Reddington, Esq.
NH Bar ID #271590
95 Market Street
Manchester, NH 03101
(603) 669-4140

CERTIFICATION OF SERVICE

I hereby certify that a copy of this pleading was served via the Court's electronic notification system to all counsel of record.

Dated: June 15, 2022

By: /s/Charles F. Cleary, Esq._____
Charles F. Cleary, Esq.