THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2021-0410

RICHARD ANTHONY & SANAZ ANTHONY

v.

TOWN OF PLAISTOW

Appeal from the Rockingham County Superior Court

BRIEF OF INTERVENORS-APPELLEES MILTON REAL PROPERTIES OF MASSACHUSETTS, LLC

SULLOWAY & HOLLIS, PLLC

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QUESTIONS PRESENTED FOR REVIEW

1. The Anthonys waited more than a year to challenge the decision of the Plaistow Code Enforcement Officer deeming Milton's proposed use as a retail rental facility (an allowed use in the Commercial District where the site is located) instead of a so-called "contractor's storage yard" (which is not an allowed use as a matter of right in the Commercial District). When presented with the Anthonys' appeal, the Zoning Board denied it as untimely, and the Trial Court affirmed the Zoning Board's denial in a separate Zoning Board appeal case. Did the Trial Court appropriately reject the duplicative zoning claim in this case, essentially treating the issue as resolved under the doctrine of *res judicata* by referring to and relying on the rationale in its prior Zoning Board decision?

2. Did the Trial Court err in affirming the Planning Board's approval of the Milton site plan application where the Court determined that the Board acted reasonably and legally, having vetted Milton's application over the course of six months and guided by the expertise of a consulting engineer who testified that all technical aspects of the project – traffic, water quality protection and design standards – were properly addressed, establishing that Milton's use would not detrimentally impact the residents of Plaistow, let alone those in other communities such that regional impact had to be taken into account.

STATEMENT OF THE CASE AND THE FACTS

Intervenor Milton Real Properties of Massachusetts, LLC submitted a site plan for a construction equipment rental facility to the Plaistow Planning Board. The Board approved the project after extensive vetting – including five meetings over the course of six months, a site visit by the Board, a secondary review by the Town's Conservation Commission, and multiple technical reviews by the Town's third-party, independent engineering firm, Keach-Nordstrom Associates, Inc. ("Keach-Nordstrom"). Despite this vigorous review and consideration by the Board, the Appellants, Richard and Sanaz Anthony, remained unsatisfied and filed suits against both the Town's Planning Board and the Zoning Board of Adjustment relating to Milton's project. Both appeals were heard by the Trial Court, but only this suit – the one against the Planning Board – was appealed to this Court.

Type of Project Approved by the Planning Board

The proposed use of the site at issue in this case is for a "Milton Rents" equipment leasing facility. The Milton family, the owner of the New Hampshire Caterpillar equipment dealer, Milton CAT, acquired the rental equipment company ProQuip at the end of 2017. ProQuip had been operating in Plaistow since 2015, but the Milton family found the existing ProQuip facility unsatisfactory and not to the high standards the Milton family set for their facilities. Therefore, the Milton family purchased the property at issue here with the intent of constructing a new and improved facility for its new Milton Rents business.

The proposed facility is located near the center of Plaistow on the corner of State Route 125 and Route 121A (Main Street), and includes a 12,000 square feet rental and maintenance facility, a 1,800 square feet wash building and outdoor display area. Certified Record, Appellants' App. ("App.") at 35. The site will also include a 2,000-gallon diesel fuel tank and three 275-gallon storage tanks for hydraulic fluid, motor oil and waste fuel oil, all of which must be reviewed and approved by the New Hampshire Department of Environmental Services ("NH DES"). App. at 35, 79. The property, known at Tax Map 30, Lots 72 and 73, is located in the Town's Commercial Zone. App. at 35.

Preliminary Consultation and Review by the Town

Prior to submitting its site plan for review, Milton and its engineers met with the Town's Code Enforcement Officer, Michael Dorman, to discuss its planned project. Based on Mr. Dorman's feedback that the proposed development was permitted in the Commercial District as retail and there were no zoning issues, Milton prepared and submitted its Preliminary Design Site Plan Application in December 2018.

The Planning Board held a Preliminary Design Review meeting in January 2019. App. at 5-6, 26-29. At that meeting, the project was described by Milton's representative, Brad Farrin, who, along with engineer Lee Allen of Colby Company, Inc., responded to questions from the Planning Board and the public. App. at 26-29. Concerns were expressed about the then-proposed storm water pond and protecting groundwater from contaminating water runoff. App. at 28. It was noted that the State of New Hampshire was "very thorough" in its review of groundwater discharged, and the Town's Planning Director, John Cashell, stated that "anything to do

with storm water is extensively reviewed by [the Town's third-party, independent engineering firm] Keach-Nordstrom Associates." App. at 29.

Formal Site Plan Application Submitted

After receiving comments on its preliminary design, Milton submitted its formal application site plan review and approval to the Planning Board in late January 2019. App. at 35-54. The submission to the Board noted that a Stormwater Management Analysis Report had been developed in accordance with the requirements of the Town and that such report "provides a detailed analysis of the stormwater system management system to be implemented for the development and confirms the development will not create potential degradation of water quality" and that "post development peak flows do not exceed pre-development peak flows." App. at 36. It was noted that none of the changes to the site would impact any of the wetlands. App. at 36. Also, the submission confirmed that a landscaping plan was submitted, and that it met Town regulations and provided the required buffers along all residential property to the rear of the development. App. at 36. In fact, the proposed buffer was 70 feet, more than double the 25 feet required by the Town's regulations. App. at 36. The submission also noted that the NH DES would require an Alteration of Terrain Permit, and that the application and supporting data would be submitted to the Town. App. at 36. That was provided, and the NH DES later provided a Notice of Acceptance of that permit to the Town. App. at 72. While this case was pending before the trial court, the NH DES issued Milton's Alteration of Terrain Permit. (*See* Report of Town's retained engineer, Keach-Nordstrom Associates, Town's Supplemental Record, Intervenor's Appendix, "I-App." at 13.)

Code Enforcement Office Issues Zoning Decision

On February 6, 2019, Town Code Enforcement Officer Dorman issued a written determination that the proposed use was equipment rental and permitted as retail use in the Commercial District where the Milton property was located. App. at 59. It is this zoning decision about which the Anthonys complain extensively in their Brief. However, importantly, they did not appeal the Code Enforcement Officer's zoning decision to the Zoning Board until July 7. 2020, more than a year after the decision was made. *See* Zoning Board Record, I-App. at 95, 98. As explained in more detail below, the Zoning Board found the appeal untimely, which divested it of jurisdiction, and the Trial Court, in a separate case, affirmed that decision. *See* Zoning Board Record, I-App. at 119-120, 135; *see also* March 1, 2021 Order of Judge Wageling, I-App. at 89.

Revised Plans Submitted to Incorporate the Town's Initial Comments

Later in February 2019, Milton submitted revised plans to the Town. App. at 60-62.[1] Based on the comments provided during the preliminary review design review process, Milton redesigned the stormwater collection system to avoid installing the detention pond that had given rise to concerns, instead replacing it with an underground detention system. App. at 61. The Town's engineer, Keach-Nordstrom, provided its initial third-

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[1] Note that the Town's certified record inadvertently included the wrong first page, App. at 60, of the February 25th letter from Colby Company submitting the revised plans. The first page appears to be a duplicate of Colby Company's January 30th letter, App. at 35. However, the text of the two first pages are nearly identical. It is the subsequent pages that indicate changes to the plans, App. at 61 and 62, and those are correctly included in the Certified Record and the Appellants' Appendix.

party technical review. App. at 66-70. That report – which turned out to be the first of five such reports (four as part of the initial approval and a fifth one on remand) – provided comments with respect to zoning and design matters. App. at 66-70.

In early March 2019, the Board voted that the application for "final Site Plan review for the proposed use as an equipment rental business, with related site improvements" was complete, and it scheduled a public hearing on the application for later in the month. App. at 71. In anticipation of that Board meeting, Milton held a meeting with abutters to provide more information about the project and to hear concerns.

Planning Board Holds Second Hearing

In late March 2019, the Planning Board held a lengthy public hearing on Milton's application. App. at 76, 78-81. At that meeting, Mr. Allen, the engineer involved in the project explained that the stormwater drainage plan had been changed to address concerns of the community, no longer including the previously-proposed above-ground detention pond. App. at 78; *see also* App. at 81 (Mr. Ferrin of Milton confirming same). The revised stormwater management system consisted of catch basins that drain into a chamber system which treats the water; the system is designed to handle 100-years storm so as to "make sure that there will be no flooding or contamination issues caused by the project." App. 78-79. Mr. Allen noted that the stormwater management system "will cause storm water runoff to be less than there is currently" and that the system "will actually turn [the stormwater outflow] away from abutters' properties." App. at 79. With respect to the diesel fuel tank, Mr. Allen confirmed that State review and approval will be required. App. at 79. Also, Mr. Allen noted that the

tank will consist of a concrete, double-walled barrier to contain any leaks. App. at 79.

Additionally, Mr. Allen testified that parking area for the equipment near the back of the property where it abuts properties on Village Way (where the Anthonys' property is located) will be set back 200 feet from the nearest abutter. App. at 79. The plans called for a 120 feet tree buffer between the parking area and the abutting properties on Village Way. App. at 78. Orange flags had been placed at about four-feet in height along the equipment parking area, and they were not visible through the trees, according to Mr. Allen. App. at 78. It was stated that all equipment stored in the back of the site near village way (such as lifts, etc.) would be below the existing tree line. App. at 79. Furthermore, Mr. Allen confirmed that all of the Keach-Nordstrom's issues were being addressed. App. at 78. At the conclusion of the late March hearing, the Planning Board continued review of the application to the next meeting in April 2019.

Milton Provides Additional Information, As Requested by the Town

Shortly after the March meeting, Mr. Allen responded in writing to each of the issues raised by Keach-Nordstrom's technical review. App. at 200-206. Mr. Allen also submitted to the Town the Best Management Practices Report for the site, which is what establishes how the applicant will prevent spills of the diesel fuel, oils, and hydraulic fluid to be stored on the site and provide for prompt and appropriate spill response. App. at 215-219. That independent report was prepared by a separate engineering firm, CREDERE Associates, and it noted, among other things, that no contaminants could be release into the stormwater system because there were no floor drain in the buildings, the diesel fuel tank would be designed,

inspected and maintained to United States Environmental Protection Agency standards, and storm drain manholes would remove oil, gasoline, light petroleum compounds, and grease such that they will not reach the groundwater aquifer. App. at 216. The author the report, an environmental engineer, responded to questions at the next Planning Board hearing, which occurred in April 2019. App. 239-240.

After receiving the additional comments and materials from Milton's engineers, Keach-Nordstrom, as part of its ongoing review, identified remaining technical areas to be addressed in a second technical review report. App. at 223-226.

The Planning Board Holds a Third Meeting

The Board held another lengthy hearing on Milton's application as planned in April 2019. App. at 232, 234-244. At this hearing, Mr. Ferrin focused on the equipment parking area and questions about it. Specifically, Mr. Ferrin of Milton confirmed that trees to the rear of the Milton parcel near Village Way are 30 to 40 feet tall and that none of the trees would be cut down. App. at 235.

Mr. Ferrin noted that the Town's interim fire chief did not feel comfortable reviewing the plans for fire safety issues, and therefore Milton had hired a third-party specialty engineering firm, SFC, to undertake an independent fire safety review. App. at 237. There was also discussion about the wash bay and whether the water from that facility might contaminate any nearby water supply. On that issue, engineer Allen stated that the wash bay has a closed-loop water recycling system, which separates sediment from the water, and the water is re-fed into the system and not discharged onto the site or enter the septic system. App. at 237. It

was also pointed out the sediment filters are disposed of off-site by Clean Harbors. App. at 237. It was noted that the NH DES's review of the Alteration of Terrain Permit was also included an environmental analysis. App. at 243.

Conservation Commission Review

At the request of the abutters, including the Anthonys, the Plaistow Conservation Commission also reviewed and considered Milton's Site Plan application. The Conservation Commission held two public meetings, one in April 2019 and a second in May 2019, where the abutters' concerns were discussed. App. at 336-37, 339-40. The Conservation Commission sent a letter to the Planning Board asking Milton to respond to its questions. App. at 334-35. Milton's engineer, Lee Allen, and Brad Ferrin of Milton attended a June 2019 meeting of the Commission and addressed their questions. App. at 379-81.

Planning Board Holds Site Visit

In May 2019, the Planning Board held a public site visit to walk the property. App. at 327-28. During the visit, Milton's representatives answered a variety of questions, including those related to where various aspects of the project would be in relation to wetlands, where the stormwater treatment system would be located, and where, in relation to Village Way, the equipment parking area would be situated. App. at 328-30.

Milton's Engineers Respond to 2nd Technical Review of Keach-Nordstrom and Receive a 3rd Technical Review to Which to Respond

Milton's engineers provided a comprehensive response to the lingering issues raised by the Keach-Nordstrom in its second technical

review report. App. at 247-251. Following the response, Keach-Nordstrom issued a third technical review report and raised additional questions, many related to the plans for the stormwater system. App. at 342-46.

The Planning Board Holds a Fourth Meeting

The Board held another meeting on the Milton project in later May 2019. App. at 362-368. This meeting, like the prior ones, was an extended one. At this meeting, Keach-Nordstrom provided information to the Board as to his suggested critique of certain technical aspects of the plans and asked for Milton to provide further information and review of its proposed stormwater treatment system. App. at 364-66. Mr. Keach did confirm that the type of stormwater system proposed – the Storm Tech system with hydrodynamic separators – had been tested in both labs and in the real world and that it is approved by NH DES. App. at 364-65. There was an additional discussion about spill prevention. App. at 365-66.

Also at the meeting, there was discussion about tree height and the stockade fencing and vegetative screening being provided near property lines. App. at 365. There was also discussion about traffic, and a Vehicle Trip Generation Projections Memorandum was provided to the Board. App. at 365; *see also* App. 390-422. Winter maintenance and snow removal was discussed. App. at 366. Ultimately, the Board continued discussion of the project to the next meeting, which was to be held in late June 2019.

Milton's Engineers Respond to 3rd Technical Review of Keach-Nordstrom and a 4th Technical Review is Undertaken

After the May Board meeting, Milton's engineers responded to the comments and concerns raised by the Town's engineer, Keach-Nordstrom, in its third technical review report. App. at 382-389. In response to

Milton's responses, Keach-Nordstrom created a 4th technical review report, noting that "it appears that the applicant's consultants were able to satisfactorily address many of our remaining concerns" and providing a few remaining minor comments. App. at 452-55. Mr. Keach attended the June Planning Board meeting to ensure that the Board's questions and any lingering issues were addressed. App. at 459-61.

After Nearly Half a Year of Review, the Planning Board Approves Milton's Site Plan at Fifth Meeting on the Application

The Planning Board held its next and final meeting (prior to the Trial Court's remand, more on that below) regarding Milton's application at the end of June 2019, and it is at this meeting that a majority of the Board approved the project. App. at 457-468. Mr. Allen, on behalf of Milton, confirmed that Milton had submitted the requested applications to the NH Department of Transportation (Driveway Permit) and the NH DES (Alteration of Terrain Permit). App. at 458. He reiterated that a traffic study had been provided to the Planning Board. App. at 458. Again questions were asked about the fencing in the area of the Village Way abutters, and Mr. Allen confirmed the six-foot high fence would be constructed of commercial grade PVC and positioned at a high point on the site. App. at 458. It was noted that the buffer as between the rear equipment parking area and the Village Way residences was extended another 20 feet, with the buffer now being 320 feet. App. at 458.

With respect to the stormwater treatment system, the Town's engineer commented that Milton was using best available technology and that "there is nothing that could be done above and beyond what is already being proposed that would prove to be of any additional benefit." App. at

459. Still, Keach suggested that the Board require the installation of monitoring wells and semi-annual testing an extra cautious "as a belt and suspenders" approach – a condition approved by the Board. App. at 459; *see also* Notice of Approval, Condition No. 3, App. at 470-71. After significant further discussion and public input, the Board approved the application on a 3-2 vote, with 14 separate stipulations. App. at 468-472.

Anthonys File First Court Appeal and the Trial Court Affirms Reasonableness of the Decision, but Also Finds Conditions Precedent, Divesting it of Jurisdiction

After the Planning Board approved the Milton project, the Anthonys appealed to the Rockingham County Superior Court, (the "First Court Appeal"). The Trial Court held a hearing on the appeal in December 2019 and then undertook a site visit in February 2020. On May 19, 2020, the Trial Court (J. Schulman) issued a Final Order essentially affirming the Planning Board's decision on the merits, but remanding the appeal back to the Board, after reading two of the Board's conditions as conditions precedent that divested it of jurisdiction. *See* May 18, 2020 Order of J. Schulman, I-App. at 3. Those conditions – Condition Nos. 3 and 7 – related to the Town's consulting engineer, reviewing and approving the final plans, which were to show monitoring wells. Though the Trial Court in this second Planning Board appeal did not find them to be technically binding because of the jurisdictional issue and remand, the Trial Court in the First Court Appeal did expressly and unequivocally reject the Anthonys' substantive arguments, stating as follows:

> The plaintiffs and others from the Village Way neighborhood raised several substantive objections to Milton's proposed site plan. One of their objections was that the alteration of terrain and the proposed

use would cause increased drainage onto their properties. Milton's engineers, however, proposed a system of above and below ground drainage that they claimed would avoid any additional drainage onto plaintiff's land, even in 100 year storm events. The Town's engineer reviewed the drainage plans. . . .

A second substantive objection raised by the plaintiffs had to do with the risk that fuel oil and other volatile liquids could pollute the ground water. Milton, however, retained a specialized team of engineers to ensure that its site plan would comport with both DES requirements and local needs. As the engineers noted, none of the structures would have floor drains. This would eliminate a pathway for the discharge of pollutants into the stormwater system. The manholes were all designed to separate floating oil and other contaminants, providing a second layer of protection. The above ground oil tank was planned to be double-walled and designed, inspected and maintained in accordance with the strict requirements of DES and the US EPA. Milton's engineer testified before the Planning Board and answered their questions. The Town's engineer reviewed the plans and raised no concerns. (Additionally, the wash facility has a closed-loop water recycling system that keeps harmful solids out of the drainage and septic system.)

The last major substantive objection raised by the plaintiffs had to do with the disruption of the view from their property. As noted above, there is a small wooded buffer between the Village Way yards and Milton's commercial land. Milton's site plan included both an additional no-cut wooded buffer, creating a total buffer, approximately fifty feet deep, consisting of fully mature twenty to forty foot trees. Additionally, there is a distance of more than 200 feet—all woods—between the Village Way backyards and Milton's planned rear parking lot. Finally, the site plan includes a six foot high fence at the rear of the parking lot.

To be sure, some of the tall "cherry pickers" that Milton plans to store and lease might be seen from some second and third floor windows. Additionally, somebody who deliberately looks through the woods might well be able to spy the commercial use beyond the

> buffer. But as a practical matter, Milton's final site plan provides a significant buffer between the Village Way residential neighborhood and the Route 125 commercial strip.
>
> With respect to particulars of these issues (i.e. drainage, risk of ground and water pollution and the creation of a possible eyesore), the court adopts the facts and legal argument set forth in the Milton's Trial Memorandum. (Docket Document 11). Thus, Milton's proffered facts are now the court's findings and rulings.
>
> May 18, 2020 Order of J. Schulman, pp. 3-4, I-App. at 5-6.

On Remand, the Planning Board
Addresses the Conditions Raised by the Trial Court

In response to the remand order in the First Court Appeal, the Board held a hearing in June 2020 to review Judge Schulman's Order and to ensure that Conditions Nos. 3 and 7 were met. App. at 474, 480-86, and Supplemental Record, I-App. at 38-44.) At its June 2020 hearing, the Board considered and approved two supplemental reports prepared by Keach-Nordstrom. Supplemental Record, I-App. at 12-15, 26.) Keach-Nordstrom noted in its first supplemental report of June 11, 2020 that it found Milton's Monitoring Plan to be in compliance with Stipulation No. 3. Supplement Record, I-App. at 13-14.

In this supplement report, Keach-Nordstrom also provided comment on Condition No. 7, requiring its final technical review of the Milton plans. Keach-Nordstrom identified some minor technical changes to be made to the plans, such as changes to wording of certain title blocks and notes and other non-substantive matters. I-App. at 15. Milton's engineer addressed each of these minor technical changes and submitted a memo to the Town confirming that. I-App. at 16-25. Following Milton's supplemental

submission, Keach-Nordstrom issued its second supplemental report in which it confirmed that Milton had incorporated all necessary technical changes. I-App. at 26.

At its June 2020 hearing the Planning Board heard from Keach-Nordstrom who explained that Milton has met Condition Nos. 3 and 7. I-App. at 39-40. The Board first confirmed its intent that the engineering review identified in Condition Nos. 3 and 7 were to be ministerial in nature and not require further input or review by the Planning Board, I-App. at 41-42, but then it went on to approve the Keach-Nordstrom reports and their conclusion that the conditions have been met, I-App. at 43-44. The Planning Board issued its Notice of Decision on June 25, 2020. I-App. at 46-47.

The Anthonys File a Zoning Board Appeal

After the Planning Board approved the Milton application for a second time, the Anthonys filed an appeal to the Zoning Board of Adjustment. Essentially, their appeal claimed that the Planning Board should never have accepted the Code Enforcement Officer's determination – more than a year previously – that the proposed use was allowed. Zoning Board Record, I-App. at 101-107. As noted above, the Zoning Board found the appeal untimely, which divested it of jurisdiction, and the Trial Court affirmed that decision. *See* Zoning Board Record, I-App. At 119-120, 135; *see also* March 1, 2021 Order of Judge Wageling in the separate Zoning Board Appeal case, I-App. at 89.

The Anthonys File a Second Appeal of the Planning Board Decision

After the Planning Board complied with the Trial Court's remand order and confirmed its approval of Milton's application, the Anthonys also filed a second court appeal of the Planning Board decision. It is that case that is the subject of this appeal. In this second suit, the Anthonys asserted the same allegations as in their first case. The Trial Court (this time Judge Wageling) again reviewed all of the Anthonys' claims, but rejected them and affirmed the Planning Board's decision. *See* Order on the Merits of July 8, 2021, I-App. at 51. In its Order, the Trial Court reviewed the extensive factual record, *see* Order, pp. 2-9, I-App. 52-59, and concluded that "contrary to the [Anthonys'] assertions, the record reflect that the Planning Board adequately considered abutters' concerns and interests" and at each stage of the "rigorous site plan review process . . . the abutters' concerns about water quality, wetlands preservation, pollution, noise, and buffering were address by Milton and/or the Planning Board." Order, I-App. at 61.

With respect to the regional impact determination, the Trial Court noted that the Town's Planning Director discussed regional impact issues with the Board at its June 19, 2019 public meeting before it voted to approve the application. Order p. 16, I-App. at 66. The Planning Director stated that no commercial development he had reviewed for the Town ever had such regional impact and that for the Milton project specifically the traffic impact was "nominal." Order p. 16, I-App. at 66. Importantly, the Trial Court in this case rejected the Anthonys' zoning complaint in which they asserted that Milton's use was a prohibited "contractor's yard," noting

that it was the subject of a separate court case involving the Zoning Board appeal and that Court in that separate case affirmed the Zoning Board determination that the zoning challenge was not timely. Order pp. 9-10, I-App. at 59-60. This appeal followed.

STANDARD OF REVIEW

The Trial Court's review of a planning board's decision is limited by statute. *See* RSA 677:15, V (the trial 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"); *see also Property Portfolio Group, LLC v. Town of Derry*, 163 N.H. 754, 757 (2012); *Ltd. Editions Properties v. Town of Hebron*, 162 N.H. 488, 491 (2011). With respect to a planning board's factual findings, the Trial Court must treat them "as *prima facie* lawful and reasonable, and cannot set the decision aside absent unreasonableness . . . ." *See Property Portfolio Group*, 163 N.H. at 757. Specifically, 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." *See Ltd. Editions Properties*, 162 N.H. at 491 (citing *Motorsports Holdings v. Town of Tamworth*, 160 N.H. 95, 99 (2010)). Thus, before the Trial Court, it was the Anthonys' burden to demonstrate, by the balance of probabilities, that the Board's decision was unreasonable. *See Property Portfolio Group*, 163 N.H. at 757; *Ltd. Editions Properties*, 162 N.H. at 491. Here, the trial court properly concluded that the Anthonys did not meet that burden.

This Court's review is similarly limited. *Ltd. Editions Properties*, 162 N.H. at 491. This Court will uphold the Trial Court's order unless it is

unsupported by the record or legally erroneous, looking to whether a reasonable person could have reached the same decision as did the trial court based upon the same evidence. *Property Portfolio Group*, 163 N.H. at 757. In this case, there was ample evidence in the record to support both the trial court's and the planning board's factual findings with respect to the mitigation of any impacts of the proposed development. Thus, those findings should be affirmed by this Court. Likewise, the Trial Court's legal ruling with respect to the zoning issues having already been decided in the Zoning Board appeal case is equally supported by the record and should be upheld.

SUMMARY OF THE ARGUMENT

The primary issue raised in this appeal – whether Milton's use is a "contractor's yard" under the terms of the Plaistow Zoning Ordinance and therefore prohibited – was properly deemed untimely, as had been decided by both the Zoning Board and then the Trial Court in the Zoning Board suit. Additionally, the Anthonys did not appeal that final ruling to this Court, and therefore, they are barred from raising that issue in this Planning Board case. With respect to the Anthonys' assertion that the Planning Board failed to address the so-called regional impact of Milton's project, that claim was appropriately rejected by the Trial Court because the record established that Board rightly believed that the project has no such impact. Finally, the approval was not unlawful or unreasonable as affirmed by the Trial Court, because Milton's project met the requirements of the Town's site plan review regulations – with traffic not materially changing, water

resources adequately protected with vegetative and other visual buffers being in place.

ARGUMENT

The Trial Court's decision on both the factual and legal issues presented below was appropriate, as supported by both the record and the law.

I. THE TRIAL COURT'S REJECTION OF THE ANTHONYS' "CONTRACTOR'S YARD" ZONING ISSUE AS UNTIMELY BASED ON THE COURT'S PRIOR DECISION IN A SEPARATE ZONING BOARD CASE WAS APPROPRIATE.

In their Brief, the Anthonys focus predominantly on their claim that Milton's proposed use should be deemed a "contractor's storage yard," which is not allowed as a matter of right in the Commercial Zone in which the property is located. *See* Appellants' Brief, pp. 15-16, 17, 18, 19-20, 21-27. What the Anthonys do not elaborate on in their Brief is that this "contractor's storage yard" zoning issue had already been addressed in separate litigation brought against the Plaistow Zoning Board, which they did not appeal to this Court. The Trial Court in this case – having been the one to already decide the zoning issue in the Zoning Board case – relied on its prior decision in that case to reject the zoning issue raised (again) in this matter. The Trial Court was right to do so.

In its Order on the Merits in this matter, the Trial Court noted that the Anthonys acknowledged that the same "contractor's storage yard" issue was previously raised in the prior Zoning Board appeal, and then it referred back to its prior order in the Zoning Board case and found the zoning

challenge to be untimely. *See* Order on the Merits, pp. 9-10, I-App. at 59-60.

In the prior Zoning Board case, the Trial Court had dismissed the Anthonys' zoning interpretation claims – affirming a decision of the Zoning Board finding that the challenge of the Town Code Enforcement Officer's determination (that the proposed use was equipment rental and not a "contractor's storage yard") was more than a year too late. *See* March 1, 2021 Order of Judge Wageling in the separate Zoning Board Appeal case, p. 11, I-App. at 89. On the substance in that Zoning Board case, the Trial Court conducted an extensive review of the record and found that:

(a) The Code Enforcement officer made his zoning determination (that Milton's use was a retail rental facility and not a "contractor's storage yard") on February 6, 2019.

(b) The Anthonys' counsel had submitted a letter to the Planning Board in March of 2019, asserting that Milton's use was prohibited in the Commercial District.

(c) The Planning Board discussed the zoning determination at its March 20, 2019 meeting.

(d) The Town's Planning Director agreed to have counsel review the zoning determination.

(e) Counsel for the Planning Board opined that the proposed use was a retail use permitted in the Commercial District and that in any event, the 20-day deadline for challenging the determination to the Zoning Board had passed.

(f) In May 2019, the Anthonys' counsel again submitted a letter to the Planning Board challenging the legality of the zoning determination and the Board's ability to approve Milton's application.

(g) After the Planning Board approved the Milton Site Plan Application on June 19, 2019, the Anthonys included their "contractor's storage yard" zoning claim in their first Planning Board appeal case.

(h) The Trial Court remanded the first case to the Planning Board because of its belief that a couple of conditions were conditions precedent that required additional Planning Board review, and the Anthonys sought reconsideration of that portion of the decision that found the "correctness of th[e] zoning determination is not presently before the court."

(i) The Town objected to the Anthonys' Motion for Reconsideration, asserting that the zoning issue was not before the Court because the Anthonys failed to timely appeal the zoning determination to the Zoning Board within the 20 days provided by the Town's Zoning Ordinance.

(j) It was uncontested that the Anthonys first brought their appeal of the zoning issue to the Zoning Board in July 2020, after the Planning Board's second approval of the application (on remand) in June 2020, not after the first approval a year earlier in June 2019.

Zoning Board Case Order, pp. 3-6, I-App. at 81-84.

Based on these facts, the Trial Court, in the Zoning Board appeal, concluded that the Anthonys' challenge of the zoning determination was late and could not proceed for failure to exhaust administrative remedies. Zoning Board Case Order, p. 9, 11, I-App. at 87, 89, citing *Daniel v. B & J Realty*, 134 N.H. 174, 176 (1991) (In an appeal to a Zoning Board, "[c]ompliance with the procedural deadline for filing an appeal is a 'necessary prerequisite' to establishing jurisdiction in the appellate body."), *Bosonetto v. Town of Richmond*, 163 N.H. 736, 744 (2012) ("As a general matter, before an administrative board's decision may be reviewed by a

court, a party must exhaust its administrative remedies."), and *McNamara v. Hersh*, 157 N.H. 72, 76 (2008).

It was uncontested that the Zoning Board Bylaws required one to appeal an administration decision of a zoning matter within 20 days of such decision. Zoning Board Case Order, p. 6, I-App. at 84; Zoning Board Certified Record, I-App. at 130, 132. The Court found that the Anthonys were obligated to appeal the zoning determination at least within 20 days of the Planning Board's initial approval of the application in June 2019 because none of the conditions imposed by the Board as part of that first approval implicated that code enforcement officer's zoning determination from February 2019. Zoning Board Case Order, p. 9, I-App. at 87. The Trial Court relied on this Court's decision in *Atwater v. Town of Plainfield*, 160 N.H. 503, 509-11 (2010), finding that although the Planning Board's initial approval was not "final" for purpose of appeal to the Superior Court (at least as deemed by the Trial Court's Judge Schulman in the first appeal), it represented a "decision as to the zoning issue which then should have been appealed to the ZBA." Zoning Board Case Order, p. 9, I-App. at 87.

The Trial Court noted that the Anthonys' counsel was aware of the "two-track" appeal process – where the Planning Board's site plan approval was to be appealed to the Superior Court while the zoning determination was to be appealed to the Zoning Board. Zoning Board Case Order, p. 10, I-App. at 88. Specifically, the Trial Court quoted May 19, 2019 correspondence from the Anthonys' counsel to the Planning Board in which he stated as follows: "The Planning Board cannot approve an application that violates the Zoning Ordinance, as the present application does, and if the Planning Board does render an unlawful and/or unreasonable approval,

then that decision will be immediately subject to an Appeal of Administrative Decision to the Zoning Board . . . and a Petition for Certiorari Review to the Superior Court . . . ." Zoning Board Case Order, p. 10, I-App. at 88. Despite such knowledge of the proper process – an appeal to the Zoning Board within the time frame allowed by the Town's ordinance – the Court noted that the Anthonys chose not to take such an appeal when they could have done so, making their appeal untimely. Zoning Board Case Order, p. 9, I-App. at 87.

The Trial Court was correct in its analysis. With respect to the code enforcement officer's zoning determination, New Hampshire statute clearly provides that the proper (and only) avenue for an initial appeal is with the Zoning Board. 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 . . . ."). 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 requires that appeals to the Zoning Board "be taken within a reasonable time, as provided by the rules of the board," and just as here in the case of Plaistow, a zoning board is permitted to define "reasonable time" within its procedures, bylaws and rules. *See Daniel* at 175 (noting that the Henniker zoning board at issue in that case had procedurally established in its rules a 14-day deadline for filing appeals from administrative decisions and that such a rule was permitted by statute); *see also Hoffman v. Town of Gilford*, 147 N.H. 85, 88 (2001) (noting that when it comes to an appeal of a decision interpreting or

applying the zoning ordinance "[t]he time limit for filing such appeal is determined by local ZBA rules."). Once a Zoning Board sets a specific deadline for an appeal, the Zoning Board is required to apply the rule literally; it cannot deviate and provide an exception for an appeal filed even only a day late. *See Daniel* at 175-76.

In this instance, the Anthonys were required by statute to first present a timely appeal of the code enforcement officer's zoning determination to the Zoning Board before filing an appeal the Trial Court. *See Huard v. Town of Pelham*, 159 N.H. 567, 572 (2009) ("The general rule that one must first exhaust administrative remedies before seeking court intervention "is particularly applicable when . . . substantial questions of fact exist concerning a city zoning ordinance, matters that belong in the first instance to the designated local officials.") (quoting *V.S.H. Realty, Inc. v. City of Rochester*, 118 N.H. 778, 782 (1978)). There is no true dispute that the Anthonys failed to file their appeal within the 20 days of the code enforcement officer's zoning determination of February 2019 or the Planning Board's acquiescence in that decision when approving the Site Plan Application in June 2019. Thus, their appeal to the Zoning Board a year later was untimely, divesting the Zoning Board of jurisdiction and by extension divesting the Trial Court of jurisdiction as well.

Furthermore, the fact that the initial approval by the Planning Board in June 2019 was conditional does not save the Anthonys' challenge to the zoning determination. As the Trial Court noted, this Court has addressed precisely this issue, and concluded that those in the Anthonys' position must immediately appeal a zoning determination and cannot wait for final approval by the Planning Board before initiating an appeal to the Zoning

Board. *See Accurate Transp., Inc. v. Town of Derry*, 168 N.H. 108, 113-114 (2015); *Atwater*, 160 N.H. at 509-510. The rationale for requiring prompt appeals to the Zoning Board was succinctly explained by this Court in the *Accurate Transportation* case:

> In *Atwater*, we observed that the "plain language of RSA 676:5, III, … makes clear that when a planning board makes a decision applying or interpreting a zoning ordinance, that decision must be appealed to the zoning board of adjustment pursuant to the procedures set forth for appeals to the board of adjustment under RSA 676:5." *Atwater*, 160 N.H. at 509. We found that the overall policy and purpose of RSA 676:5, III is best served by interpreting the statute to mean that "a planning board decision about a zoning ordinance is ripe and appealable to the ZBA when such a decision is made." *Id*. We explained that:
>
> Zoning determinations are often made by a planning board at the very beginning of the application review process, and subsequent decisions by a planning board are often based upon these zoning determinations. 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.

Accurate Transp., 168 N.H. at 114 (quoting *Atwater*, 160 N.H. at 510); *see also Dube v. Town of Hudson*, 140 N.H. 135, 138 (1995) (stating that zoning boards have "explicit statutory authority to review the planning board's construction of the zoning ordinance") and RSA 676:5, III (providing that "[I]f, in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation,

or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section.")

In the *Atwater* case, the petitioner argued that planning board's imposition of conditions precedent to its approval effectively tolled the deadline for filing an appeal to the zoning board and allowed the petitioner to file its appeal only after the conditions precedent had been satisfied such that the planning board decision was final. *Atwater*, 160 N.H. at 510. This Court disagreed, holding that "there is no indication . . . in RSA 676:5, III, that the parties must wait for final approval of the site plan before they bring an appeal to the ZBA challenging the planning board's interpretation or application of a zoning ordinance." *Id*. at 511.

As noted by the Trial Court, the *Atwater* decision is particularly illustrative in this instance. In *Atwater*, this Court stated as follows:

> We believe that the overall policy and purpose sought to be advanced by this statutory scheme is best served by interpreting RSA 676:5, III to mean that a planning board decision about a zoning ordinance is ripe and appealable to the ZBA when such a decision is made. This will allow a zoning board to correct any alleged errors made by the planning board as early as possible in the application review process. We agree with the superior court that "it makes little sense to require that the planning board's approval of a site plan be final before a party can appeal to the ZBA on a zoning issue 'including something as fundamental as whether the proposed use is allowed by the zoning ordinance.'" . . .
>
> While the planning board imposed a condition precedent on final approval of the overall site plan, the condition did not implicate any issue appealable to the ZBA. Therefore, as the superior court found, "Although the planning board may not have rendered final approval

> of the plan until August 23, it had already made a decision regarding the zoning issue on August 9." *Id*. at 510-11.

The *Atwater* decision is, as the Trial Court recognized, dispositive in this case, to the extent the Anthonys argue that they were permitted to wait until the Planning Board decision was deemed "final" before filing their appeal on the "contractor's storage yard" issue to the Zoning Board. Thus, the Trial Court was correct in reiterating in this case that the Anthonys' appeal of the zoning decision was untimely, and therefore subject to dismissal.

Finally, Milton asserts that even if the Trial Court's application of its zoning analysis and holding in the Zoning Board case to this Planning Board case is somehow flawed or erroneous – and Milton denies any such error – then the Trial Court's Zoning Board decision should still stand. Specifically, the Anthonys' should be precluded from challenging the Trial Court's decision in the Zoning Board case finding its "contractor's storage yard" zoning appeal as untimely and barred under the doctrine of *res judicata*. In short, the Anthonys did not appeal the Trial Court's decision in the Zoning Board case in which it directly addressed, and rejected, their "contractor's storage yard" zoning claim and they should not be able to circumvent that decision by being permitted to challenge it collaterally in this Planning Board case.

Res judicata "prevents parties from relitigating matters actually litigated and matters that could have been litigated in the first action." *Finn v. Ballentine Partners, LLC*, 169 N.H. 128, 147 (2016) (quoting *Merriam Farm, Inc. v. Town of Surry*, 168 N.H. 197, 199 (2015)). The doctrine applies when three elements are met: "(1) the parties are the same or in

privity with one another; (2) the same cause of action was before the court in both instances; and (3) the first action ended with a final judgment on the merits." *Id*. In this instance, each of the elements of *res judicata* have been met. The parties to the Zoning Board case and this case were the same. The same cause of action – a challenge to the Town Code Enforcement Officer's zoning determination – was asserted. The Zoning Board case ended with a final judgment on the merits, as the Trial Court's order granting dismissal of the zoning claim was never appealed by the Anthonys. *See* Super. Ct. Rule 46(d) ("Final Judgment. In all actions in which a verdict or decree is entered . . . all appeals relating to the action shall be deemed waived and final judgment shall be entered . . . unless a Notice of Appeal has been filed with the Supreme Court . . . on the 31st day from the date on the court's written notice that the court has made the aforementioned entry, grant or dismissal. . . .").

The Order on the Merits in the Zoning Board case was issued on March 1, 2021. *See* Order, p. 12, I-App. at 90. The Anthonys filed for Reconsideration, and that Motion was denied on April 12, 2021. *See* Order on Reconsideration, noted on the Motion itself, I-App. at 91. It is uncontested that the Anthonys did not appeal these decisions within 30 days, and thus the Order dismissing their zoning claims in the Zoning Board case became final such that they are barred from now challenging that decision (as reiterated and re-affirmed by the Trial Court in this case). Indeed, it is precisely this type of case – one that that brings about repetitive litigation and undermines finality – that *res judicata* is designed to preclude. *See Eastern Marine Const. Corp. v. First Southern Leasing*, 129 N.H. 270, 273 (1987) ("Spurred by considerations of judicial

economy and a policy of certainty and finality in our legal system, the doctrines of *res judicata* and collateral estoppel have been established to avoid repetitive litigation so that at some point litigation over a particular controversy must come to an end."). For this additional reason, the Trial Court's denial of the Anthonys' "contractor's storage yard" zoning issue should be affirmed.

II. THE TRIAL COURT ACTED APPROPRIATELY WHEN IT AFFORDED DISCRETION TO THE PLANNING BOARD'S FACTUAL FINDINGS, WHICH WERE SUPPORTED BY THE EXTENSIVE RECORD OF RIGOROUS REVIEW.

Given the great discretion that the Trial Court was to afford the Planning Board with respect to its factual findings and the discretion that this Court is similarly to afford the Trial Court, the Trial Court's Order on the Merits should be affirmed because a reasonable person could have concluded that Milton's plans adequately addressed traffic, water quality, screening and the other concerns raised by abutters like the Anthonys.

As noted above, the Trial Court in this case, just like when the Planning Board case was before it the first time around, again undertook an extensive review of the lengthy factual record, including the supplemental record created on remand related to the particular conditions that caused the Court to remand the case in the first instance. *See* Order, pp. 2-9, I-App. 52-59. The Trial Court noted the Anthonys' list of enumerated concerns about adequate buffers/screening to protect against nuisance, groundwater protection, protection of any endangered species, and hours of construction and operation. *See* Order, pp. 10-11, I-App. 60-61. Like the Trial Court (J. Schulman) in the first instance, the Trial Court in this case (J. Wageling)

ultimately concluded that the record established that the Planning Board adequately considered each of the abutters' concerns "about water quality, wetlands preservation, pollution, noise, and buffering." *See* Order, p. 11, App. 61. In fact, the Trial Court noted in a lengthy list all of the protections afforded to the abutters through the Planning Board process, including: (1) a 25-foot "no-cut" buffer adjacent and in addition to the 50-foot buffer [behind the Anthonys' house] owned by the Village Way Homeowners' Association; (2) a six-foot PVC fence and landscape grading in addition to the vegetative buffer; (3) a distance of 320-feet between the parking area and the residences of Village Way; (4) limited hours of construction and operation; (5) a self-contained stormwater collection and filtration system utilizing the best available technology and capable of withstanding a 100-year storm; (6) the installation of groundwater monitoring wells with monitoring and periodic testing in perpetuity; (7) wetland setbacks; (8) compliance with all NHDES requirements concerning the storage tanks, septic system, and drainage on site; and (9) spill prevention training, controls, and response plans. Order p. 11, I-App. at 61. Given these protections the Trial Court stated that it "cannot conclude that the Planning Board failed to appropriately consider or protect abutters." Order p. 11, I-App. at 61. Such a finding was appropriate and this Court should affirm it.

As for the regional impact determination, the Trial Court properly noted that despite the Anthonys "vigorously" objecting to Milton's Site Plan Application before the Planning Board, they <u>never raised the issue when before the Planning Board</u>. Order, p. 17, I-App. at 67 (emphasis added). Additionally, in their Brief, the Anthonys also claim that the regional impact issue serves to void as *ab initio* the Planning Board

decision. However, the Anthonys never made this "*void ab initio*" argument before the Trial Court. For these reasons, the Anthonys should be precluded from raising these claims now on appeal. *See Treisman v. Kamen*, 126 N.H. 372, 377 (1985) ("it is axiomatic that a party may not urge reversal on the basis of an issue he has failed to raise below") (internal quoting omitted); *Daboul v. Town of Hampton*, 124 NH. 307, 309 (1983) ("It is well established that we will not consider issues raised on appeal that were not presented in the lower court."); *Maplevale Builders, LLC v. Town of Danville*, 165 N.H. 99, 106 (2013) ("parties may not have judicial review of matters not raised in the forum of trial"); *Singer Asset Finance Co., LLC v. Wyner*, 156 N.H. 468, 472 (2007) ("It is a long-standing rule that parties may not have judicial review of matters not raised in the forum of trial. . . . we will not review any issue that was not raised below.") (internal citations and quotations omitted).

In any event, the Trial Court properly concluded that the Planning Board implicitly concluded that there would be no such regional impact. Order p. 15, I-App. at 65. The Trial Court was justified in making this determination based on the record, as it showed that the Town's Planning Director expressly raised and discounting any regional impact at the Board's June 19, 2019 public meeting where the Board voted to approve the application. Order p. 15-16, I-App. at 65-66. Not only did the Planning Director state that he had never reviewed a commercial development for the Town which had such regional impact, but he also stated that for the Milton project specifically the traffic impact (the primary possible regional concern of any such commercial development) was "nominal." Order p. 16, I-App. at 66. The trip generation report provided by a third-party traffic engineer

noted that there would be no noticeable increase in traffic in the area of the site, let alone regionally.

Additionally, the Board heard plenty of testimony about the water quality not being impacted, such that it would somehow leach into ground or surface water affecting other towns. Furthermore, the Board was aware that the site is located at the intersection of two state highways, State Route 125 and Route 121A (CR at 386), which is in the center of the Town of Plaistow and not near any town line. This was pointed out to the Trial Court at the hearing on this second Planning Board Appeal, as the Court was provided with two satellite view Google maps of the area and a consolidated tax map showing that the Milton property is geographically near the center of Plaistow, not near the Town line such that other municipalities would be impacted. *See* Hearing Trans. p. 21, line 4-p. 22, line 20; p. 31, line 11-19; *see also* Hearing Exhibits A, B, and C, I-App. at 48-50. Also, in the vicinity of the project on Route 125 there are multiple commercial uses that have greater or similar impact, including used car dealerships, gas stations, tire shops, strip malls and the like. Thus, in the context of the location at issue, Milton's proposed development is of a same commercial type as those already in the area, and it will not in any way discernibly change the character of the area or impact the area such that regional review might be deemed warranted.

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

Pursuant to New Hampshire Supreme Court Rule 16(3)(h), the undersigned requests 15 minutes for oral argument, to be shared, if requested, with counsel for Appellee, Town of Plaistow.

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 9,375.

Respectfully submitted,

MILTON REAL PROPERTIES OF MASSACHUSETTS, LLC

By their attorneys,
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Dated: June 15, 2022

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CERTIFICATE OF SERVICE

I hereby certify that this Brief complies and has on this date been served via the Court's electronic notification system to counsel for the Appellants and counsel for the Town of Plaistow Planning Board.

/s/ Derek D. Lick____________
Derek D. Lick, Esq.