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

APPELLANTS' BRIEF

MANDATORY APPEAL PURSUANT TO
SUPREME COURT RULE 7

Kelly E. Dowd (#14890)
Law Offices of Kelly E. Dowd, PLLC
P.O. Box 1017
One Elm St., Suite 202
Keene NH 03431

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules and Constitutional Provisions

Other Authorities

QUESTIONS PRESENTED

1. Did the superior court err in not addressing the zoning issue, which was properly preserved by the Appellant pursuant to RSA 677:15 I-a.?

   Memorandum of Law at 6, 9-10; Motion for Reconsideration ¶¶ 6-11

2. Did the superior court err in failing to void the decision *ab initio* for failure to comply with the Regional Impact Statute?

   Certiorari Petition ¶¶ 19-20; Memorandum of Law at 11-12; Motion for Reconsideration ¶¶ 17-20

3. Did the superior court err in not finding that the approval of the Planning Board is unlawful and unreasonable?

   Certiorari Petition ¶¶ 21-30; Memorandum of Law at 3-8

CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES, OR REGULATIONS INVOLVED IN THE CASE

Town of Plaistow Site Plan Regulations:

§ 230-2. Duties of the Planning Board. A. General.

(1) The Planning Board shall review and approve or disapprove site plans for the development or change or expansion of use of tracts for nonresidential uses or for multifamily dwelling units, which are defined as any structures containing more than two dwelling units, whether or not such development includes a subdivision or resubdivision of the site.

(2) The Planning Board shall ensure that site development plans granted approval shall comply with the requirements set forth in all sections of the land subdivision control regulations of the Town of Plaistow,1 as applicable, and all sections of these nonresidential and multifamily site development plan regulations.

(3) In addition to recognizing the intent and purposes expressed in § 235-2B of the town's land subdivision control regulations as a basis for approval of site development plans, the Planning Board shall also assure that such plans provide for:

(a) The aesthetically pleasing development of the municipality and its environs; and

(b) Green spaces of adequate proportions.

Particular. In addition to recognizing the intent and purposes expressed in § 235-2B of the town's land subdivision control regulations as a basis for approval of site development plans, the Planning Board shall also assure that such plans provide for:

(1) Maximum safety of traffic access and egress, sufficient parking areas to ensure offstreet parking, and applicable handicapped accommodations;

(2) A site layout, including the location, power, direction, and time of any outdoor lighting of the site which would have no adverse effect upon any properties within the district and in adjoining districts by impairing the established character or the potential use of properties in such districts;

(3) The reasonable screening, at all seasons of the year, of all commercial and industrial 1. Editor's Note: See Ch. 235, Subdivision of Land. Plaistow Site Plan Review Regulations Page 3 uses, playgrounds, parking, and service areas, as well as other nonresidential uses, from the view of adjacent residential properties and streets;

(4) Conformance of the proposed plan with such portions of the Master Plan of the Town as may be in existence at the time;

(5) In applicable cases, a drainage system and layout which will afford the best solution to any drainage problems; and

(6) Installation of public improvements and amenities, at the expense of the applicant, to assist in the establishment of a sound environment. Such improvements may include, but not be limited to, curbing, paved sidewalks, streets, trees and/or shrubs.

§ 230-8. Pollution prevention.

A. Monitoring wells. Monitoring wells shall be required in cases where industries may discharge wastes in leach fields, fuel or chemicals are stored on site, large quantities of water are to be used, or in other cases in which the Board makes a determination that the potential for adverse effects on groundwater exists.

B. Subsurface sewage disposal facilities.

(1) Existing subsurface sewage disposal facilities, as a minimum, shall meet current construction design regulations as set by the New Hampshire Water Supply and Pollution Control Commission. The Board may impose additional requirements to protect the present and future health and welfare of the Town if, in its judgment, the topography and soils characteristics within the area and/or the nature and complexity of the plan for expansion or conversion in use indicate such a need.

(2) An inspection of the existing sewage disposal system and a detailed diagram showing type, extent, and location of the system, certified by a registered/licensed professional sanitary engineer indicating that the system is adequate for its proposed use, shall be furnished to the Board.

C. Drinking water supplies.

(1) The water supply shall be designed in accordance with the standards and requirements of the New Hampshire Water Supply and Pollution Control Commission. [Amended 3-2-2005]

(2) No sewer, sewage, or waste disposal system shall be permitted within the protective radius described in Subsection C(1) above.

Town of Plaistow Zoning Ordinance:

§ 220-2. Definitions. Unless the context otherwise requires, the following definitions shall be used in the interpretation and construction of this chapter. Words used in the present tense include the future; the singular number shall include the plural, and the plural the singular; the word "used" shall include "arranged," "designed," "constructed," "altered," "converted," "rented," "leased," or "intended to be used"; and the word "shall" is mandatory and not optional.

. . .

CONTRACTOR’S STORAGE YARD — A site upon which heavy vehicles and equipment (such as bulldozers, front-end loaders, and back-hoes) and materials, supplies and forms, used by Plaistow Zoning Ordinance Page 5 professional contractors in construction, land clearing, site work, utilities, landscaping or other similar activities are stored, including waste disposal containers. Land upon which any of the above items are temporarily stored on-site during the course of an active construction project shall not be considered a contractor's storage yard. [Added 3-12-2013 ATM by Art. Z-13-9]

Table 220-32B "CI" - Commercial I A.

Objectives and characteristics. With today's reliance on automobile transportation and Plaistow's being the commercial center for an area beyond its boundaries, provisions need to be made within the Town for areas to serve as regional commercial centers. These areas should have good highway access, adequate off-street parking, proper lighting, police and fire protection, and adequate water and sewer services provided. B. Uses. [Amended 3-13-2001 ATM by Art. P-34; 3-12-2002 ATM by Arts. P-39 and P-47; 3-11-2008 ATM by Arts. P-08-26, P-08-33, and P-08-34; 3-10-2009 by Art. P-09-14; 3-8-2016 ATM by Art, Z-16-03; 3-14-2017 by Art. Z-17-05; 3-10-2020 ATM by Art. Z-20-6 and Z-20-7].

Allowed by Special Exception
1. Care and treatment of animals
2. (Reserved)
3. (Reserved)
4. Adult-oriented business

Permitted Uses

1. Retail business
2. Wholesale business
3. Personal service business
4. Business office
5. Professional office
6. Bank
7. Restaurant
8. Funeral establishment
9. Private/service club
10. Commercial recreation
11. (Reserved)
12. Vehicular, trailer and recreational vehicles sales and service repair facility
13. Place of Worship
14. Publishing
14.1. Vehicular brokerage office
14.2. Drive-through restaurants
14.3. Drive-in restaurants
14.4. Produce stand
15. Public use, limited to public safety and service
16. Accessory use or structure
17. Storage of equipment/vehicles used to service a product
18. Essential service
19. Small industry
20. Multimodal park and ride lots
21. Theaters
22. Nursing/Convalescent Homes/Assisted Living Facilities
23. Hospitals/Urgent Care Facilities
24. Trade Business

Table 220-32A "INDI" - Industrial I A.

Objectives and characteristics. The purpose of this district is to provide locations for the establishment of plants to improve employment opportunities and broaden the tax base in the community. These areas should be selected so that they will not adversely affect developed residential areas, will have good access to transportation facilities, and will have the potential for being served by public water and sewer systems. A variety of types of manufacturing activities, distribution facilities, and offices should be permitted, as well as certain support facilities, especially of a commercial nature. One of the major characteristics of this zone is its proximity to the rail line that carries both freight and passenger service and should favor those industries that are able to take advantage of the rail connection. The zone is also surrounded by residential uses and in general does not have good access to a major thoroughfare such as Route 125. These areas are extremely traffic sensitive and noise and dust issues will be of paramount importance. Any proposed use must not violate §220-5., Prohibited Uses. [Amended 3-10-2009 ATM by Art. P-09-26] B. Uses. [Amended 3-13-2001 ATM by Art. P-33; 7-7-2005 by ATM by Art. SP-1; 3-11-2008 ATM by Art. P-08-24; 3-10-2009 ATM by Art. P-09-26; 3-14-2017 by Art.; 314-2017 by Art. Z-17-03; 3-10-2020 ATM by Art. Z-20-7]

Allowed by Special Exception None

Permitted Uses

1. Light industry
2. Warehouse
3. Care and Treatment of Animals [Added 3-13-18 ATM by Art. Z-18-04]
4. Outdoor storage
5. Contractor's storage yard
6. Publishing
7. Research and testing labs
8. Office
9. Essential service
10. Trade Business
11. Public use limited to office, public safety, service and recreation
12. (Reserved)
13. Accessory use or structure
13.1. Mini-storage
14. (Reserved)
15. Bank kiosk
16. Rail services and rail stations
17. (Reserved)

N.H. RSA 155-A:4 Permit Required. –
I. Before starting new construction or renovation of buildings and structures as described in RSA 155-A:2, I, the person responsible for such construction shall obtain a permit.
II. In municipalities that have adopted an enforcement mechanism pursuant to RSA 674:51 and RSA 47:22, the permit under this section shall conform to the locally adopted process. No permit

shall be issued that would not result in compliance with the state building code and state fire code.
III. For buildings and structures owned by the state, the community college system of New Hampshire, or the university system, the person responsible for such activities shall obtain a permit from the state fire marshal. Before issuing the permit, the state fire marshal shall give due consideration to any written recommendations of the municipal fire chief, building official, or designee in the community where the state building is located.

N.H. RSA Section 36:54 Purpose. –
The purpose of this subdivision is to:
I. Provide timely notice to potentially affected municipalities concerning proposed developments which are likely to have impacts beyond the boundaries of a single municipality.
II. Provide opportunities for the regional planning commission and the potentially affected municipalities to furnish timely input to the municipality having jurisdiction.
III. Encourage the municipality having jurisdiction to consider the interests of other potentially affected municipalities.

N.H. RSA Section 36:55 Definition. –
In this subdivision "development of regional impact" means any proposal before a local land use board which in the determination of such local land use board could reasonably be expected to impact on a neighboring municipality, because of factors such as, but not limited to, the following:
I. Relative size or number of dwelling units as compared with existing stock.
II. Proximity to the borders of a neighboring community.
III. Transportation networks.
IV. Anticipated emissions such as light, noise, smoke, odors, or particles.
V. Proximity to aquifers or surface waters which transcend municipal boundaries.
VI. Shared facilities such as schools and solid waste disposal facilities.

N.H. RSA 36:56 Review Required. –
I. 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.
II. Each regional planning commission may, with public participation following the public posting of notice of the intent to develop guidelines, including notice published in a newspaper of general circulation in the planning region, develop guidelines to assist the local land use boards in its planning region in their determinations whether or not a development has a potential regional impact. The regional planning commission may update the guidelines as needed and provide them, as voted by the regional planning commissioners, to all municipalities in the planning region.

N.H. RSA 36:57 Procedure. –
I. Upon determination that a proposed development has a potential regional impact, the local land use board having jurisdiction shall afford the regional planning commission and the affected

municipalities the status of abutters as defined in RSA 672:3 for the limited purpose of providing notice and giving testimony.
II. Not more than 5 business days after reaching a decision regarding a development of regional impact, the local land use board having jurisdiction shall, by certified mail, furnish the regional planning commission and the affected municipalities with copies of the minutes of the meeting at which the decision was made. The local land use board shall, at the same time, submit an initial set of plans to the regional planning commission, the cost of which shall be borne by the applicant.
III. At least 14 days prior to public hearing, the local land use board shall notify, by certified mail, all affected municipalities and the regional planning commission of the date, time, and place of the hearing and their right to testify concerning the development.
IV. Notwithstanding the foregoing, when the building inspector determines that a use or structure proposed in a building permit application will have the potential for regional impact and no such determination has previously been made by another local land use board, he or she shall notify the local governing body. The building inspector shall also notify by certified mail the regional planning commission and the affected municipalities, who shall be provided 30 days to submit comment to the local governing body and the building inspector prior to the issuance of the building permit.

N.H. RSA 36:58 Applicability. – The provisions of this subdivision shall supersede any contrary or inconsistent provisions of local land use regulations enacted under RSA 155-E and RSA 674.

N.H. RSA 672:7 Local Land Use Board. – "Local land use board" means a planning board, historic district commission, inspector of buildings, building code board of appeals, zoning board of adjustment, or other board or commission authorized under RSA 673 established by a local legislative body.

N.H. RSA 676:3 Issuance of Decision. –
I. The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. If the application is not approved, the board shall provide the applicant with written reasons for the disapproval. If the application is approved with conditions, the board shall include in the written decision a detailed description of all conditions necessary to obtain final approval.
II. Whenever a local land use board votes to approve or disapprove an application or deny a motion for rehearing, the minutes of the meeting at which such vote is taken, including the written decision containing the reasons therefor and all conditions of approval, shall be placed on file in the board's office and shall be made available for public inspection within 5 business days of such vote. Boards in towns that do not have an office of the board that has regular business hours shall file copies of their decisions with the town clerk.
III. Whenever a plat is recorded to memorialize an approval issued by a local land use board, the final written decision, including all conditions of approval, shall be recorded with or on the plat.

N.H. RSA 676:5 Appeals to Board of Adjustment. –
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 or by any officer, department, board,

or bureau of the municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board, by filing with the officer from whom the appeal is taken and with the board a notice of appeal specifying the grounds thereof. The officer from whom the appeal is taken shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.
II. For the purposes of this section:
(a) The "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.
(b) A "decision of the administrative officer" includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.
III. If, 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; provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15.
IV. The board of adjustment may impose reasonable fees to cover its administrative expenses and costs of special investigative studies, review of documents, and other matters which may be required by particular appeals or applications.
V. (a) A board of adjustment reviewing a land use application may require the applicant to reimburse the board for expenses reasonably incurred by obtaining third party review and consultation during the review process, provided that the review and consultation does not substantially replicate a review and consultation obtained by the planning board.
(b) A board of adjustment retaining services under subparagraph (a) shall require detailed invoices with reasonable task descriptions for services rendered. Upon request of the applicant, the board of adjustment shall promptly provide a reasonably detailed accounting of expenses, or corresponding escrow deductions, with copies of supporting documentation.

N.H. RSA 677:15 Court Review. –
I. Any persons aggrieved by any decision of the planning board concerning a plat or subdivision may present to the superior court a petition, duly verified, setting forth that such decision is illegal or unreasonable in whole or in part and specifying the grounds upon which the same is claimed to be illegal or unreasonable. Such petition shall be presented to the court within 30 days after the date upon which the board voted to approve or disapprove the application; provided however, that if the petitioner shows that the minutes of the meeting at which such vote was

taken, including the written decision, were not filed within 5 business days after the vote pursuant to RSA 676:3, II, the petitioner shall have the right to amend the petition within 30 days after the date on which the written decision was actually filed. This paragraph shall not apply to planning board decisions appealable to the board of adjustment pursuant to RSA 676:5, III. The 30-day time period shall be counted in calendar days beginning with the date following the date upon which the planning board voted to approve or disapprove the application, in accordance with RSA 21:35.

I-a. (a) If an aggrieved party desires to appeal a decision of the planning board, and if any of the matters to be appealed are appealable to the board of adjustment under RSA 676:5, III, such matters shall be appealed to the board of adjustment before any appeal is taken to the superior court under this section. If any party appeals any part of the planning board's decision to the superior court before all matters appealed to the board of adjustment have been resolved, the court shall stay the appeal until resolution of such matters. After the final resolution of all such matters appealed to the board of adjustment, any aggrieved party may appeal to the superior court, by petition, any or all matters concerning the subdivision or site plan decided by the planning board or the board of adjustment. The petition shall be presented to the superior court within 30 days after the board of adjustment's denial of a motion for rehearing under RSA 677:3, subject to the provisions of paragraph I.

(b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III.

II. Upon presentation of such petition, the court may allow a certiorari order directed to the planning board to review such decision and shall prescribe therein the time within which return thereto shall be made and served upon the petitioner's attorney, which shall not be less than 10 days and may be extended by the court. The allowance of the order shall stay proceedings upon the decision appealed from. The planning board shall not be required to return the original papers acted upon by it; but it shall be sufficient to return certified or sworn copies thereof, or of such portions thereof as may be called for by such order. The return shall concisely set forth such other facts as may be pertinent and material to show the grounds of the decision appealed from and shall be verified.

III. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, it may take evidence or appoint a referee to take such evidence as it may direct and report the same to the court with the referee's findings of fact and conclusion of law, which shall constitute a part of the proceedings upon which the determination of the court shall be made.

IV. The court shall give any hearing under this section priority on the court calendar.

V. The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable. Costs shall not be allowed against the municipality unless it shall appear to the court that the planning board acted in bad faith or with malice in making the decision appealed from.

N.H. Constitution Part I, Art. 15. [Right of Accused.]

No subject shall be held to answer for any crime, or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse or furnish evidence against himself. Every subject shall have a right to produce all proofs that may be favorable to himself; to meet the witnesses against him face to face, and to be fully heard in his defense, by himself, and counsel. No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land; provided that, in any proceeding to commit a person acquitted of a criminal charge by reason of insanity, due process shall require that clear and convincing evidence that the person is potentially dangerous to himself or to others and that the person suffers from a mental disorder must be established. Every person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.

STATEMENT OF FACTS/STATEMENT OF THE CASE

The Appellants in this matter live in a bucolic neighborhood in Plaistow, New Hampshire and which abuts two mostly forested lots located at 143 and 145A Plaistow Road in Plaistow. Appendix at 182. (Hereinafter "A. at ___.") The two abutting lots total approximately 19.88 acres in size and are located within the Commercial I district, which includes over 9 acres of wetlands. A. at 38, 90. Milton Real Properties of Massachusetts, LLC (hereinafter "Milton") filed an application for preliminary design review with the Town of Plaistow Planning Board on the two lots. A. at 6, 38. It planned to clear approximately half the parcel in order to locate a 12,000 sq. ft. commercial building, an 1,800 sq. ft. building for washing heavy vehicles and construction equipment, and to use nine (9) acres to store heavy vehicles and construction equipment. A. at 6, 90. In addition, the plans called for a 2,000 gallon above ground diesel storage tank. A. at 27. On January 16, 2019, the Planning Board held a hearing addressing preliminary design review. A. at 26. Abutters, including the Appellants, spoke against the proposal, citing concerns about buffering, groundwater contamination, and the location of an industrial use next to a residential neighborhood. A. at 28. On January 30, 2019, Milton, through their engineer, Colby Company Inc., made an application for site plan review with the Town of Plaistow Planning Board. A. at 35.

Town of Plaistow Zoning Ordinance Sec. 220-2 "Definitions" includes the following:

> CONTRACTOR'S STORAGE YARD — A site upon which heavy vehicles and equipment (such as bulldozers, front-end loaders, and back-hoes) and materials, supplies and forms, used by professional contractors in construction, land clearing, site work, utilities, landscaping or other similar activities are stored, including waste disposal containers. Land upon which any of the above items are temporarily stored on-site during the course of an active construction project shall not be considered a contractor's storage yard. [Added 3-12-2013 ATM by Art. Z-13-9]

Table of Use 220-32B for the Commercial I District does not permit a contractor's storage yard, which is a permitted use in the Industrial I ("INDI") District. Town of Plaistow Zoning Ordinance, Table of Use 220-32A. On February 6, 2019, in a one-page document entitled "Zoning Determination," the Code Enforcement Officer opined that "equipment rental is a permitted retail use in the CI district." A. at 59. No notice to abutters was provided of the "application" for a zoning determination. A. at 108. No abutters were afforded an opportunity to be heard on the "application" for a "Zoning Determination," and the abutters and other directly affected parties were never provided with notice of the "Zoning Determination" after it was made. An Attorney for the Little River Village Association provided testimony that on February 22, 2019, he examined the Planning Board file which did not include the so-called "Zoning Determination" letter. A. at 188. The Appellants on March 20, 2019 were advised by the Planning Board of the "Zoning Determination," and that it had to be appealed within 30 days of the date of the determination, e.g. it was a *fait accompli.* These concerns were also reflected by the Planning Board itself, which was not aware of the "determination" until the March 20, 2019 meeting. A. at 82. This "determination" was also inconsistent with a subsequent "determination" made by the Town of Plaistow. A. at 523.

On March 4, 2019, Keach-Nordstrom Associates, Inc., an engineering firm hired by the Planning Board to conduct an independent review submitted a letter to the Board setting forth five (5) pages of recommendations and concerns about the proposed project. A. at 66. On March 6, 2019, the Town of Plaistow voted and found the application to be complete. A. at 71.

On March 20, 2019, the Planning Board opened a public hearing on the application. A. at 76. At that hearing, the Appellants presented a .pdf presentation outlining concerns about the project. A. at 84-107. While the Applicant claimed that heavy equipment stored on the property

would be less than 3 years old, photographs from the use at the Applicant's existing property show equipment well on the way toward obsolescence, making the risk of groundwater contamination from leaking vehicles and equipment much higher than that claimed by the Applicant. A. at 84-88, 96, 103-104. This is compounded by the inclusion of a 2,000 gallon above ground diesel storage tank. Equipment at the Applicant's current location shows staging platforms in excess of 30'-40'. A. at 104. In addition, most of the portion of the lot left undeveloped is a sensitive wetland area, compounding the dangers created by this proposal. A. at 92.

On April 17, 2019, a second public hearing was held on the application. A. at 232. The Applicant responded to criticism that the equipment housed at their current location (in the Industrial I Zone) is as old as 2005 and higher than 10' as represented by the applicant. A. at 236. The Applicant claimed that they were in the process of updating their heavy equipment. Id. A resident of Village Way expressed concerns that the development would have on the traffic and road access to schools. A. at 242. Additionally, it was brought to the attention of the Planning Board that a car wash establishment was a prohibited use within the Aquifer Protection Zone (which includes the proposed use). A. at 237. The Applicant stated that it was not a car wash but a "wash bay" for rental equipment. Id. The Appellants again attended and pointed out that the proposed use is a "contractor's yard" which is not permitted within the district, and an industrial use not appropriate to an abutting residential development. A. at 240-1. The Appellants highlighted the problems of a secret "Zoning Determination" made without notice or input from abutters, and the manner in which the "Determination" was hidden from the public record until the March 20, 2019 meeting. Id. Appellants submitted a report discussing the Plaistow's existing watershed conditions and aquifer. A. at 111-179, 241. According to

NHDES, the majority of Plaistow's drinking water sources are ranked as either "high" or "medium" risk for contamination based on existing conditions in 2015. A. at 140-1.

Following the meeting, on April 26, 2019, another "Zoning Determination" appeared, again without notice or opportunity for hearing to abutters and other directly affected parties, and with even notice of the "Zoning Determination" provided after the fact. A. at 246. This "Zoning Determination" found that because the "wash bay" was an accessory use, it was permitted in the Aquifer Protection District. Id. On May 4, 2019, the Town of Plaistow Planning Board conducted a site walk. A. at 327.

On May 15, 2019, the Town of Plaistow conducted another public hearing on the application. A. at 362. Abutters again repeated concerns about the project. A. at 368. At the Planning Board meeting, there were concerns expressed about the inadequacy of the filtering provided by the storm water management system. A. at 365. On June 13, 2019, the Town's Engineer, tasked with peer-review of the application, sent correspondence outlining concerns about groundwater contamination, and noting the Planning Board's "authority to require installation of monitoring wells in instances where the Board makes a determination that the potential exists for adverse effects on groundwater." A. at 455. On June 19, 2019 the Planning Board conducted another public hearing on the application. A. at 458. It was acknowledged by the Applicant's engineer that proposed landscaping and fencing would provide only partial visual screening of the equipment from the residential neighbors. A. at 459-60. In addition, while the stormwater system was capable of removing solids from wastewater, it provided no way of filtering liquids, so that any liquid hydrocarbon not bonded to solid matter would be introduced to the groundwater. A. at 460-1. The Appellants reiterated concerns about negative aesthetic visual impacts, as well as noise and smells as a result of the intensive industrial use of the

property. A. at 464-5. There were further concerns about secret meetings resulting in "Zoning Determinations" in favor of the Applicant, without notice or hearing to abutters. Id. In addition, concerns were expressed that the aquifer, which supplied three regional communities, was threatened by the proposed use. Id. The public hearing was closed.

On June 19, 2019, the Town of Plaistow Planning Board conditionally approved the Application with 14 separate conditions, which included a condition for groundwater monitoring on a semiannual basis consistent with its authority in the event it determined that there were concerns about potential groundwater contamination. A. at 471-73. Among the conditions was a condition permitting the Applicant to operate from 6:00 am until 7 pm, Monday through Saturday, with heavy equipment to be moved between 7:00 am and 7:00 pm. A. at 472. The Planning Board decision was appealed to the Superior Court for a determination over whether the approval constitutes a final decision. On May 19, 2020, the Superior Court determined that it was not a final approval, and the matter was remanded back to the Planning Board, which conducted a hearing on June 17, 2020, and gave final approval on June 25, 2020. The matter was then again appealed to the Superior Court, which affirmed the decision in an Order dated July 8, 2021.

SUMMARY ARGUMENT

The Town of Plaistow attempted to address zoning issues posed by the application through secret declaratory "decisions" made by code enforcement in favor of the Applicant. Code Enforcement had no statutory or other legal basis to issue said declaratory "decisions," which were further undertaken contrary to the Due Process and constitutional rights of affected parties pursuant to Part I., Article 15 of the New Hampshire Constitution. Further, due to the lack of notice and hearing afforded directly affected parties, any such "decisions" are *void ab*

initio for want of subject matter jurisdiction. Additionally, the trial court erred in refusing to address Appellant's appeal on issues of zoning interpretation contrary to the provisions of RSA 677:15 I-a (b), which requires the court to address an appeal of the Planning Board, unless the parties and/or the court determine within 30 days of service that the matter should have been appealed to the Zoning Board of Adjustment pursuant to RSA 676:5, and specifically provides the appellant with 30 days to do so after the court's determination.

The Town of Plaistow Planning Board failed to make a determination of regional impact regarding the application required under RSA 36:56, despite it being located on a major state highway and within the Aquifer Protection District which provides groundwater to Plaistow and two abutting municipalities. Accordingly, failure to comply with statutory notice provisions divested the Planning Board of subject matter jurisdiction and the decision is void *ab initio*. The trial court erred in not reversing the decision of the Planning Board and remanding due to the failure to comply with the regional impact statute.

Last, the superior court erred in affirming the Town of Plaistow's approval which was both illegal and unreasonable. The Intervenor proposes a project which *de facto* meets the description of a "contractor's yard," an industrial use not permitted in the Commerical I District. Whether the use is permitted or not, it has the same industrial impacts on the abutting residential neighborhood as it would if the Applicant had obtained a variance. In addition, the use includes a wash facility for heavy equipment which is not permitted in the Aquifer Protection District as a stand-alone use, but which was permitted as a so-called accessory use. The engineer hired by the Town to conduct third-party review recognized that the proposed use has the serious potential to cause groundwater contamination, and recommended semi-annual and annual testing of groundwater quality due to the threat. A condition for testing was included in the final decision

of the Planning Board. However, the condition made no provision for any consequences in the event that groundwater testing determined environmental contamination from the use, and provided no indemnification to the abutting residential property owners. Further, the conditions called for the Intervenor to be permitted to operate from 6:00 am to 7:00 pm, Monday through Saturday, and move heavy equipment from 7:00 am to 7:00 pm, Monday through Saturday, creating noise, odor, and unpleasant visual impacts that deprived the abutting residential properties of quiet enjoyment in violation of Site Plan Regulations. In addition, provisions for fencing and other buffers to prevent visual pollution, noise, and odors were grossly inadequate in light of Site Plan Regulations. The proposed use is illegal and independently unreasonable.

ARGUMENT

I. Superior court erred in not addressing the zoning issue, which was properly preserved by the Appellant pursuant to RSA 677:15 I-a.

The Appellant appealed the decision of the Planning Board including, specifically, the issue that the proposed use, a contractor's yard, was not a permitted use in the Commercial I District. The Town and the Intervenor argued i.) that the "Zoning Determination" of February 6, 2019 constituted an "Administrative Decision" pursuant to RSA 676:5 and that the Appellant's had not exhausted their administrative remedies, and, in the alternate, ii.) that the issue should have been appealed to the Zoning Board of Adjustment within 20 days of the June 19, 2019 conditional approval. Both the Town and the Intervenor acknowledge that neither the superior court nor the parties moved within 30 days of service and requested that the matter be submitted to the Zoning Board of Adjustment pursuant to RSA 677:15 I-a (b).

RSA 676:5 allows the Zoning Board of Adjustment to hear appeals of an "administrative decision" of an "administrative officer." It specifically excludes formal or informal enforcement

decisions undertaken by an "administrative officer," but does include "any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings." RSA 676:5 II(b). According to 676:5 II. (a), an "administrative officer" is defined as "any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance." RSA 672:7 defines a "local land use board" for purposes of Title LXIV "Planning and Zoning":

> "Local land use board" means a planning board, historic district commission, inspector of buildings, building code board of appeals, zoning board of adjustment, or other board or commission authorized under RSA 673 established by a local legislative body.

It is clear that a "local land use board" issuing permits or certificates (pursuant to statutory authority) would constitute an "administrative officer" for purposes of RSA 676:5. RSA 676:3 provides the universal rules for the issuance of all decisions by a land use board:

> 676:3 Issuance of Decision. –
>
> I. The local land use board shall issue a final written decision which either approves or disapproves an application for a local permit and make a copy of the decision available to the applicant. . .

For example, if a building inspector denied an application for a building permit pursuant to RSA 155-A citing zoning restrictions, that decision would be appealed to the Zoning Board of Adjustment pursuant to RSA 676:5. In contrast, the purported "Zoning Determination" amounts to, in effect, a "declaratory judgment" by a code enforcement officer, for which there exists no statutory or other legal authority. Town of Tuftonboro v. Lakeside Colony, Inc., 119 N.H. 445, 448 (1979)("Municipalities that attempt to exercise this delegated power can only do so in a manner that is consistent with the provisions of the enabling statute."); Formula Dev. Corp. v. Town of Chester, 156 N.H. 177, 182 (2007) ("[A]dministrative officials do not possess the power to contravene a statute [and] ... administrative rules may not add to, detract from, or modify the

statute which they are intended to implement."). To the extent the "Zoning Determination" is an "administrative decision", it is void *ad initio* as no statute delegates authority to zoning officials to issue declaratory judgments, and the zoning board of adjustment would have no subject matter jurisdiction pursuant RSA 676:5 to exercise over such an ersatz "decision."

Assuming *arguendo* that New Hampshire law provides zoning enforcement officials with authority to issue declaratory judgments with respect to matters of zoning intrepretation, it remains defective. When a land use board issues an administrative decision, it decides "rights and liabilities based upon past or present facts," and it acts in a quasi-judicial capacity. City & Cty. of Denver v. Eggert, 647 P.2d 216, 222–23 (Colo. 1982). In New Hampshire, a quasi-judicial proceeding is subject to a juror standard. Winslow v. Town of Holderness Planning Board, 125 N.H. 262, 266 (1984). In a quasi-judicial process, parties directly affected are entitled to notice and hearing prior to a final determination making factual adjudications and interpreting local ordinances and directly affecting property rights. As the Colorado Supreme Court held:

> Individual license or permit decisions involving adjudicative facts are subject to basic due process guarantees. The due process clause of the Colorado Constitution, Art. II, Sec. 25, "requires at a minimum the same guarantees as those protected by the due process clause of the federal constitution under the fourteenth amendment." "The essence of procedural due process is fundamental fairness. This embodies adequate advance notice and an opportunity to be heard prior to state action resulting in deprivation of a significant property interest."

Eggert, 647 P.2d at 224 (Colo. 1982)(citations omitted)(holding that issuance of a Cease and Desist Order violated notice and hearing requirements of due process);. Coastal Grp. v. Planned Real Estate Dev. Section, Dep't of Cmty. Affairs, 267 N.J. Super. 49, 61, 630 A.2d 814, 820 (App. Div. 1993)(temporary cease and desist order did not violate due process because notice and hearing were provided prior to issuance of a final order); Unistrut Corp. v. State, Dep't of Labor & Training

ex rel. Orefice, No. C.A. PC 04-6702, 2006 WL 798903, at *5 (R.I. Super. Mar. 28, 2006), judgment entered sub nom. Unistrut Corp. v. State of Rhode Island Dep't of Labor (R.I. Super. 2006), quashed sub nom. Unistrut Corp. v. State Dep't of Labor & Training, 922 A.2d 93 (R.I. 2007)(Initial cease and desist order did not violate due process because the Plaintiffs received a prompt post-deprivation hearing on the merits of the cease and desist orders).

In In re Kilton, 156 N.H. 632, 637 (2007), this Court held:

> To determine whether particular procedures satisfy the requirements of due process, we typically employ a two-prong analysis. Initially, we ascertain whether a legally protected interest has been implicated. We then determine whether the procedures provided afford appropriate safeguards against a wrongful deprivation of the protected interest. [Citations omitted.]

The final "administrative decisions" in question adversely affected the property interests of the Appellants, which are protected by the Due Process clause, Part I, Article 15 of the New Hampshire Constitution. Property rights are legally protected constitutional interests. As far as the procedural safeguards, the most basic procedural safeguards are notice and hearing afforded to the persons directly affected by the potential final decision. McIntyre v. Sec. Comm'r of S.C., 425 S.C. 439, 443, 823 S.E.2d 193, 194–95 (Ct. App. 2018)(Recipient of Cease and Desist Order entitled to notice and hearing on cease and desist order and hearing was subject to administrative rules). Illustrative of this point is the U.S. District Court's holding with respect to prejudgment attachments on real estate:

> The effect of the New Hampshire law is the same as the Maine law; it authorizes a plaintiff to make an immediate attachment of a defendant's real estate upon the plaintiff's unsubstantiated assertion that he has a claim against the defendant for damages without any notice or opportunity for the defendant to be heard. This impairment of the right of an owner of real estate to have the unrestricted use of his property fails to meet even the minimum demands of due process.

Clement v. Four N. State St. Corp., 360 F. Supp. 933, 935 (D.N.H. 1973). To the extent that "zoning enforcement officials" are permitted to secretly issue declaratory judgments adversely

affecting the property rights of abutters, without either notice or hearing, said "decisions" blatantly violate the N.H. Constitution. The Zoning Board of Adjustment has no subject matter jurisdiction to act on an illegal, unconstitutional zoning "decision," so there can be no failure to exhaust administrative remedies on that basis.

In addition to the Town of Plaistow acting in an illegal and unconstitutional manner depriving the Appellants of due process, the consequences for failure to provide notice are well established: in zoning, compliance with notice requirements is necessary to confer subject matter jurisdiction. Hussey v. Town of Barrington, 135 N.H. 227 (1992)(Failure to follow notice provisions deprived zoning board of subject matter jurisdiction to adjudicate variance). If the February 6, 2019 decision is in fact an "administrative decision," then the Town of Plaistow official issuing it, in not providing notice and hearing to affected parties, had no subject matter jurisdiction to do so, and the decision is void *ad initio* for want of subject matter jurisdiction. Last, lack of subject matter jurisdiction is not waivable and may be raised at any time, even on appeal. A party may challenge subject matter jurisdiction at any time during the proceeding, including on appeal, and may not waive subject matter jurisdiction. Gordon v. Town of Rye, 162 N.H. 144, 149 (2011).

Either the "Zoning Determination" is an illegal, unconstitutional "administrative decision" or it constitutes an advisory opinion provided to the Planning Board in the process of site plan review. Associate Transport v. Town of Derry, 168 N.H. 108, 116 (2015)(Building Inspector's opinion on zoning issue during a public hearing on an application was not a "decision" necessitating administrative appeal). Assuming that the "Zoning Determination" represents an advisory opinion to the Planning Board, the Town of Plaistow and the Intervenor argue that consistent with Atwater v. Town of Plainfield, 160 N.H. 503 (2010), that the Appellants should

have appealed the June 19, 2019 decision to the Zoning Board of Adjustment within 20 days of that determination even if the decision was not final. It is further noted that the Appellants appealed the decision of June 19, 2019 to the superior court, and the issue of the need to appeal to the Zoning Board of Adjustment was not raised by the court, the Respondent, or the Intervenor.

This Court in Atwater, 160 N.H. 503 (2010), found that a conditional approval of a planning board decision which interpreted zoning, even if not a final decision for purpose of appeal under RSA 676:15, must be appealed to Zoning Board of Adjustment pursuant to RSA 676:5. In reaching its holding, this Court explicitly noted:

> Nothing in the plain language of RSA 677:15, I, or RSA 676:5, III requires that the planning board first complete its consideration of the planning issues involved in a site plan review, or that the applicant satisfy the conditions imposed on a site plan application prior to the zoning board considering the zoning issues on appeal. Indeed, RSA 676:5, III speaks of appealing determinations made "in the exercise of ... site plan review," and, unlike RSA 677:15, does not identify the date of the planning board vote to approve or disapprove the application as the date upon which the appeal period begins to run.

Id., 160 N.H. at 510. In response to the Atwater decision, the New Hampshire legislature overturned the Atwater case by statute, and amended RSA 677:15, I-a in 2013 to include:

> (b) If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. *Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III*. [Emphasis added.]

The superior court's Order would not be erroneous prior to the 2013 amendment to RSA 676:15, however, the order under appeal is clearly erroneous and in explicit contradiction with the provisions of RSA 677:15 I-a (b). In addition, the Respondent and Intervenor are clearly estopped/barred from raising the issue of exhaustion of administrative remedies unless they raised the issue within 30 days of service of the appeal. The intent of the amendment to RSA 676:15 was to provide for zoning board review of zoning issues if the court or the parties felt that appeal pursuant to RSA 676:5 was appropriate, and to provide adequate time for the appellant to do so, but also to prevent parties from utilizing RSA 676:5 as a procedural trap in order to evade judicial review. If the Town of Plaistow and the Intervenor sincerely felt that appeal to the Zoning Board of Adjustment was necessary, they legally had every right to request it, but elected not to exercise that right. On the other hand, if neither the court nor the parties raise the issue in a timely manner, RSA 677:15 I-a (b) compels the superior court to act on the appeal. The superior court erred in violation of RSA 677:15 I-a (b) by not addressing the zoning issue as properly set forth by the Appellants.

II. The Superior Court Erred in Failing to Void the Decision *Ab Initio* for Failure to Comply with the Regional Impact Statute.

RSA 36:54-58 sets forth the Regional Impact statute. RSA 36:55 defines a "development of regional impact" as:

> In this subdivision "development of regional impact" means any proposal before a local land use board which in the determination of such local land use board could reasonably be expected to impact on a neighboring municipality, because of factors such as, but not limited to, the following:
>
> I. Relative size or number of dwelling units as compared with existing stock.
> II. Proximity to the borders of a neighboring community.

> III. Transportation networks.
> IV. Anticipated emissions such as light, noise, smoke, odors, or particles.
> V. Proximity to aquifers or surface waters which transcend municipal boundaries.
> VI. Shared facilities such as schools and solid waste disposal facilities.

With respect to the Intervenor's proposed project, it is located on a significant junction of state highways and will have measurable impacts on regional traffic. It is anticipated to produce light, noise, smoke, odors, and particles. It is in the Aquifer Protection District on an aquifer supplying water to three municipalities. It is anticipated to operate a nonpermitted use in that zone as an "accessory use." The proposed development is clearly a development of regional impact. In addition, RSA 36:56 mandates that *all* local land use boards make a determination of regional impact on all applications, and further that any doubt be resolved in favor of finding that the development is a development of regional impact. RSA 36:57 provides that in the event of a determination of regional impact, the regional planning committee and abutting municipalities must be given notice and opportunity to be heard on the application.

RSA 36:55-58 constitutes a statutory notice provision. For a land use board to have subject matter jurisdiction to adjudicate a land use decision, there must be strict compliance with all statutory notice provisions. Hussey, 135 N.H. 227, 231 (1992)(Failure to follow statutory notice provisions deprived zoning board of subject matter jurisdiction to adjudicate variance). "Where a notice provision is contained in the enabling act, such provision is mandatory and must be complied with to confer jurisdiction upon the board of appeals." § 57:53.Who must be notified—Notice required by enabling acts, 3 Rathkopf's The Law of Zoning and Planning § 57:53 (4th ed.). The superior court erred in not finding that the failure of the Planning Board to comply with the

regional impact statute deprived the Board of subject matter jurisdiction, and not reversing the decision of the Planning Board and remanding it for compliance with the Regional Impact statute.

III. Approval of the Planning Board is Unlawful and Unreasonable

Whether or not the approved plan is an "contractor's yard" or a "retail" use, the impact of the proposal is identical to the industrial use of the property as a "contractor's yard," and the location of a *de facto* industrial use next to a residential neighborhood is per se independently unreasonable. Site Plan Regulations Sec. 230-2 B. (3) requires:

> The reasonable screening, at all seasons of the year, of all commercial and industrial uses, playgrounds, parking, and service areas, as well as other nonresidential uses, from the view of adjacent residential properties and streets;

The Planning Board approval did not provide for adequate fencing or other visual buffer between large, loud, dirty and noisy industrial equipment and the abutting residential neighbors. It was admitted by agents of the Intervenor on the record that the fencing would not stop visual impacts from the use. Whether the "car wash" constituted a non-permitted use or an accessory use in the Aquifer Protection Zone, the impact of an industrial washing facility to wash heavy construction equipment will have the same impact on the wetlands and the aquifer regardless of whether it was an independent use or an accessory use. In the vicinity of the Appellants' neighborhood, it represents a significant threat to groundwater and surface water which supplies drinking water to the Appellants' as well as surrounding municipalities. The engineering firm tasked with third party review of the proposal recommended semi-annual and annual groundwater monitoring due to legitimate scientific concerns about groundwater contamination from the use. The Planning Board adopted the monitoring as a condition of approval based on those same sound concerns. Site Plan

Regulations Sec. 230-2 B. (5) requires "[i]n applicable cases, a drainage system and layout which will afford the best solution to any drainage problems." However, while the approval includes plans to monitor groundwater quality, there are no provisions in the approval to address issues if there is significant contamination as a result of this proposed use. There is no proposed solution, let alone a "best solution," to address drainage problems. There are no provisions in the approval to address what happens in the event of contamination, and there is no indemnification of the abutters in the event they suffer from groundwater contamination as a result of this approval. Last, the abutters have to endure the sound, smells and visual impacts of heavy construction equipment moving about from 7:00 am to 7:00 pm, six days a week, which is a clear threat to their basic quiet enjoyment of their residential homes. The approval of the Planning Board is clearly illegal and unreasonable and the trial court erred in affirming that decision.

WHEREFORE, for all the reasons set forth above, the Appellants respectfully requests that this Honorable Court:

A. Find that the superior court erred in refusing to address the interpretation of zoning offered by the Town of Plaistow Planning Board finding that the proposed contractor's yard constitutes a permitted "retail use" in violation of RSA 676:15 I-a (b), and reverse and remand for further deliberation on this issue;

B. Find that the superior court erred and find the Planning Board decision void *ad initio* for failure to comply with the regional impact statute, RSA 35:55-58, and reverse and remand with instructions to remand the matter to the Planning Board;

C. Find that the superior court erred in affirming the Planning Board's illegal and unreasonable approval of the Intervenor's application, and reverse and remand with instructions to reverse the decision of the Planning Board;

D. For such other and further relief as may be equitable and just.

Respectfully submitted,

Richard Anthony
Sanaz Anthony

by their attorneys
Law Offices of Kelly E. Dowd PLLC

Dated: May 11th, 2022

By: /s/Kelly E. Dowd
Kelly E. Dowd
NH Bar ID 14890
One Elm Street, Suite 202
P.O. Box 1017
Keene, NH 03431
(603) 499-8261

CERTIFICATION OF SERVICE AND REQUEST FOR ORAL ARGUMENT

I hereby certify that I have, on this 11th day of May 2022, caused a copy of the within to be forwarded via was forwarded via to the case management system to the Attorney for the Appellee, Town of Plaistow, Charles F Cleary, Esq. at Wadleigh, Starr & Peters, PLLC, 95 Market St., Manchester, NH 03101 and Attorney for Intervenor, Derek D Lick, Esq., Sulloway & Hollis, PLLC, 9 Capitol St., Concord, NH 03301. The Appellants respectfully request oral argument before the full court and time to address the Court, not to exceed 15 minutes.

/s/Kelly E. Dowd
Kelly E. Dowd, Esq.

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

RICHARD ANTHONY, ET AL.

V.

TOWN OF PLAISTOW PLANNING BOARD

Docket No. 218-2020-CV-716

ORDER

This case is part of an ongoing dispute between Petitioners Richard and Sanaz Anthony and the Town of Plaistow ("the Town") surrounding the development of property abutting Petitioners' home. Pursuant to RSA 677:15, Petitioners appeal the June 17, 2020 decision of the Town's Planning Board ("the Planning Board") granting site plan approval for the consolidation and development of two lots ("the Property") by Intervenor Milton Real Properties ("Milton").[1] See Doc. 1 (Compl.); Doc. 17 (Pets.' Mem. Law). The Town and Milton object. See Doc. 10 (Town's Ans.); Doc. 14 (Milton's Trial Mem.); Doc. 15 (Town's Trial Mem.); Doc. 18 (Joint Reply). The parties presented argument at a final hearing on May 3, 2021, after which the Court conducted a view of the Property and Petitioners' abutting residential lot. For the reasons that follow, the decision of the Planning Board is **AFFIRMED**.

[1] Petitioners previously challenged the Planning Board's decision, but the Court ultimately determined that the approval was conditional and remanded the decision to the Planning Board for further consideration. See Anthony v. Town of Plaistow Planning Board, Rockingham County Super. Ct., No. 218-2019-CV-968. Petitioners also challenged a decision of the Town's Zoning Board of Adjustment ("ZBA"), in which it declined to hear their appeal of the Town's zoning determination regarding permitted uses of the Property. See Anthony v. Town of Plaistow Zoning Board, Rockingham County Super. Ct., No. 218-2020-CV-1121.

STANDARD OF REVIEW

Any person aggrieved by a decision of the planning board concerning a plat or subdivision may file an appeal with the Superior Court. RSA 677:15, I. However, the Court's "review of planning board decisions is limited." CBDA Dev. v. Town of Thornton, 168 N.H. 715, 720 (2016). The Court "must treat the factual findings of the planning board as prima facie lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law." Upton v. Town of Hopkinton, 157 N.H. 115, 118 (2008) (citing RSA 677:15). The Court's inquiry is not whether it agrees with the Planning Board's findings, but whether there is evidence upon which they could have been reasonably based. CBDA Dev., 168 N.H. at 720. Petitioners bear the burden of persuading the Court, by the balance of probabilities, that the Planning Board's decision was unreasonable or unlawful. See id.

FACTUAL AND PROCEDURAL BACKGROUND[2]

Unless otherwise noted, the following facts are derived from the certified record. See Planning Board Certified Record ("CR"); Planning Board Supplemented Certified Record ("CRS"); Binder A (Stormwater Management Analysis); Binder B (Plan Sets). At a January 16, 2019 Planning Board meeting, Milton introduced its plan to combine and relocate Lots 72 and 73 on Tax Map 30, in the C1 Commercial District. See CR 22–24. Abutters (including Petitioners) expressed concerns about the project, particularly as it related to groundwater quality and buffering from neighboring residential areas. CR 24–25. Following the meeting, Milton submitted an application for a preliminary design review. See CR 31–50.

[2] The Court will provide a general overview of the facts and procedural history. Additional relevant facts will be interwoven in the Court's analysis below.

The proposed project involves consolidating two lots, demolishing the existing structures, and constructing a 12,000 square foot rental and maintenance facility, an 1,800 square foot equipment wash building, approximately nine acres of equipment display and storage areas, a 2,000 gallon above-ground fuel storage tank, and three 275 gallon tanks for hydraulic fluid and motor oil. CR at 31. The application indicated a traffic study was initiated, a stormwater management analysis report had been developed, and a landscape plan was prepared. CR 32. The proposed plans also called for the collection and treatment of stormwater on the site, and included a 70-foot wooded buffer between Milton's facility and residential abutters. Id. The application also indicated none of the proposed developments would impact existing wetlands, and that additional permits would be required from the New Hampshire Department of Environmental Services ("NHDES") and the New Hampshire Department of Transportation ("NHDOT"). Id. On February 6, 2019, a Town code enforcement officer determined that Milton's proposed use was permitted in the zoning district. CR 55. The Planning Board formally accepted Milton's application on March 6, 2019. CR 67.

As part of the preliminary review process, Keach-Nordstrom Associates ("KNA"), an engineering firm retained by the Planning Board, reviewed the plan and, on March 4, 2019 provided recommendations concerning zoning, permitting, and other issues. CR 62–66. On March 20, 2019, the Planning Board held a public hearing on the application. See CR 74–78. Milton's engineer testified that all issues identified in KNA's March 4, 2019 review had been addressed. CR 74. Specifically, he explained that the stormwater drainage plan had been altered from an above-ground retention pond to an underground storage system capable of withstanding a 100-year storm.

CR 74–75. The engineer further noted there would be a 120-foot tree buffer and a 50-foot vegetation buffer between the site and Village Way, and there would likewise be a 200-foot buffer between the equipment parking area and the nearest residential abutters. CR 74. Milton's engineer explained that orange flags had been placed along the edge of the equipment parking area, and were not visible from the abutting residential properties through the vegetation and trees. Id. Milton promised that all equipment stored on the Property would be kept below the tree line and would be between 0–3 years old, decreasing the risk of oil and fuel leaks. CR 75. Finally, the building and 2,000-gallon fuel tank would be moved to the side of the Property away from Village Way. Id.

On April 4, 2019, Milton's engineer responded in writing to each of the issues identified by KNA in its review. CR 196–201; see also CR 62–66. On April 9, 2019, Credere Associates performed an environmental best management practices review of Milton's proposal to minimize impacts on groundwater quality. CR 211–14. In a letter dated April 11, 2019, KNA informed the Planning Board that "the applicant's consultants were able to satisfactorily address many of our earlier comments and recommendations." CR 219. KNA then provided further recommendations and technical revisions to the Planning Board. CR 219–22. Milton's engineer again responded to KNA's comments. CR 243–47.

On April 17, 2019, the Planning Board held a third public meeting on Milton's proposal. CR 230. At this meeting, a representative of Milton addressed some of the concerns raised by abutters. He testified that the tree line, as viewed from Village Way, would remain the same, and that the trees stand 30–40 feet tall. CR 231. He also

noted there was now a 300-foot buffer between Village Way and the proposed equipment storage area. Id. Milton's engineer provided further detail to the Planning Board regarding the proposed wash bay water filtration/recycling system, and the Planning Board discussed the wash bay, Milton's oil spill prevention plans, outstanding permits, waivers, and other technical issues related to the project. CR 233–36. After abutters were given an opportunity to raise their concerns, the Planning Board agreed to schedule a site visit and to seek input from the Town's Conservation Commission. CR 236–39.

The Conservation Commission then held three meetings on Milton's application. The first occurred on April 18, 2019. CR 332–34. Abutters, including Petitioners, voiced their concerns to the Conservation Commission, which took them under advisement and agreed to review the plans. Id. The second meeting occurred on May 2, 2019, at which the Conservation Commission reviewed and discussed Milton's specific plans. CR 335–37. The Conservation Commission sent a letter summarizing its questions and concerns to the Planning Board, and asked a Milton representative to attend an upcoming meeting to respond. CR 330–31. A third meeting was held on June 6, 2019, where Milton's engineer responded to the Commission's questions. See CR 375–77. The Commission then issued a letter to the Planning Board, providing Milton's responses to its inquiries and indicating it had no further questions or concerns regarding the project. CR 372–74.

The Planning Board conducted a site walk of the Property on May 4, 2019. CR 323. Petitioners and other abutters participated, and representatives of Milton were present to answer questions regarding the proposal. Id. The Planning Board had the

opportunity to visualize, through the use of flags and markers, the location of proposed facilities in relation to the property lines, abutters' properties, and the wetlands. CR 324–25. The Planning Board also surveyed the Property from the Petitioners' lot line. CR 325.

On May 8, 2019, KNA provided the Planning Board with another technical review of subsequent submittals. CR 338–44. KNA again reported that "[b]ased upon our careful consideration and review of the cited information, we are pleased to advise your Department that it appears that the applicant's consultants were able to satisfactorily address many of our earlier comments and recommendations." CR 338. KNA then offered additional technical recommendations, many related to the stormwater drainage system. CR 338–44.

At a fourth public hearing was held on May 15, 2019, a KNA representative noted there needed to be "substantial re-visitation of the stormwater system." CR 360. Milton's engineer promised to respond to KNA's comments, CR 361, and indeed, did so on June 12, 2019, see CR 378–85. Milton also provided the Planning Board and KNA with updated site plans, Binder B, Tab F, the results of vehicle trip projections related to the project, CR 386–408, an updated stormwater management report, Binder A, and third-party testing results for the stormwater treatment devices specified in the projects plans, CR 409–18. Finally, Milton provided a report from the New Hampshire Natural Heritage Bureau noting no reported occurrences of threatened or endangered species in the project area. CR 419.

On June 13, 2019, KNA provided the Planning Board with yet another technical review of the project. See CR 448–51. KNA again informed the Planning Board that it

was satisfied by the responses provided by Milton. CR 448. KNA's subsequent recommendations largely involved outstanding permits, administrative errors, and pending waiver requests. CR 449-50. However, based on the Planning Board's concerns, KNA recommended that the Planning Board consider requiring Milton to install groundwater monitoring wells on the Property. CR 450, ¶ 6.

On June 19, 2019, the Planning Board held a fifth public hearing on the application, at which Milton's engineer provided a summary of the traffic analysis conducted by a third party indicating that the project would not cause any significant impact or increase on traffic. CR 454. He also testified that the project included a six-foot high PVC fence that, in addition to landscape grading, would help separate Milton's proposed business from the residential abutters. CR 454–55. Additionally, he explained that in the latest revision, the equipment storage area was moved another 20 feet away from the residential abutters, and was now 320 feet away from the residences on Village Way. CR 454. Finally, Milton's engineer offered a review of the site's drainage and the three-phase stormwater treatment system to be installed. CR 455.

A KNA representative testified next. He offered that "the stormwater treatment accommodations that are now being implemented are utilizing the best available technology" and that there was "nothing that could be done above and beyond what is already being proposed that would prove to be of any additional benefit." Id. He also proposed semi-annual testing from groundwater monitoring wells, and that the wells be kept in place "in perpetuity until there is a change of use." Id.

At the conclusion of the public hearing, the Planning Board approved Milton's request for lot consolidation and final site plan review. See CR 465. In addition to

requiring conformity with the plans and drawings as submitted to the Planning Board, the Planning Board required the installation of groundwater monitoring wells and limited hours of construction and operation at the site. CR 466–67. The Planning Board also made the proposal subject to a final review by KNA. CR 467.

Subsequent to the Planning Board's approval, Petitioners filed an appeal with the Superior Court. See Anthony v. Town of Plaistow Planning Board, Rockingham County Superior Court, No. 218-2019-CV-968. Petitioners challenged the Planning Board's decision on a variety of grounds, including that the decision granted only conditional approval, and that the decision violated the Town's zoning requirements regarding contractor's yards. See Doc. 1 in 218-2019-CV-968. Ultimately, the Court (Schulman, J.) determined that it lacked jurisdiction to hear the appeal, because the decision of the Planning Board was a conditional, and not final approval. See May 18, 2019 Order (Schulman, J.) (Doc. 17 in 218-2019-CV-968). Specifically, the Court held that conditions 3 and 7 in the Planning Board's approval were conditions precedent.[3] See id.; see also CR 466–67, ¶¶ 3, 7. As a result, the Court remanded the matter to the Planning Board without addressing the merits of the appeal. Doc. 17 in 218-2019-CV-968.

Consistent with Judge Schulman's Order, KNA provided the Planning Board with an additional review of the project, CRS 1–4, to which Milton's engineer responded, CRS 5–8. On June 1, 2020, KNA issued a memo addressed to the Planning Board indicating Milton had addressed all of KNA's concerns, save two clerical errors on the

[3] Condition 3 required Milton to install monitoring wells, and coordinate with KNA to determine the number, location, testing, maintenance, and operation of said wells. CR 466. Condition 7 required that, prior to the Planning Board's endorsement, Milton's proposal was subject to a final review by KNA. CR 467.

drawings. CRS 15. The Planning Board then held a public meeting on June 17, 2020 at which it again took up Milton's application. CRS 27. Petitioners were present and represented by counsel. A representative of KNA testified that the requirements delineated in conditions three and seven had been met by Milton. CRS 28–29. The Planning Board voted that it considered conditions 3 and 7 to be ministerial in nature, requiring no further action on the part of the Planning Board, and affirmed that the Board's June 19, 2019 site plan approval was a final decision. See CRS 32–33, 35. This appeal followed.[4]

ANALYSIS

Petitioners argue that the Planning Board's June 17, 2020 decision is both unlawful and unreasonable. Doc. 17 at 3. First, Petitioners assert that Milton's proposed use violates the Town's Zoning Ordinance. Doc. 1, ¶ 27; Doc. 17 at 8–10. Second, Petitioners contend the Planning Board failed to adequately protect them and other residential abutters from the adverse impacts that will result from Milton's proposed use. Doc. 1, ¶ 21; Doc. 17 at 3, 7. Third, Petitioners challenge the validity of a waiver allowing Milton to use recycled asphalt pavement instead of the required bituminous concrete. Doc. 1, ¶¶ 14–18; Doc. 17 at 10–11. Finally, Petitioners argue the Planning Board erred by failing to make a regional impact determination pursuant to RSA 36:56. Doc. 1, ¶¶ 19–20; Doc. 17 at 11–12. The Court will address each argument, in turn.

I. "Contractor's Yard" Issue

Petitioners first argue the Planning Board's approval violates the Town's Zoning

[4] The parallel ZBA appeal also followed.

Ordinance by permitting a "contractor's yard" in the commercial (C1) district. Doc. 1, ¶ 27; Doc. 17 at 8–10. A recitation of the procedural history of this zoning dispute is contained in the Court's March 1, 2020 Order in Anthony v. Town of Plaistow Zoning Board, Rockingham County Super. Ct., No. 218-2020-CV-1121, and to the extent relevant, is incorporated herein. As Petitioners acknowledge, the Planning Board's determination that the proposed use does not violate the Town's Zoning Ordinance was the subject of an appeal to the ZBA, and subsequently, this Court. See id. The ZBA determined that Petitioner's appeal was not timely, and the Court ultimately affirmed that decision. See Doc. 13 in No. 218-2020-CV-1121. Because Petitioners did not exhaust their administrative remedies with the ZBA, the Court lacks jurisdiction to review this issue. See, e.g., 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"); McNamara v. Hersh, 157 N.H. 72, 76 (2008) (affirming the Superior Court's dismissal of declaratory judgment action where plaintiffs failed to exhaust administrative remedies with the ZBA). Accordingly, the Court will not overturn the Planning Board's decision on this basis.

II. Protections for Abutting Residential Properties

Petitioners next argue the Planning Board failed to adequately protect Petitioners and other residential buffers from the deleterious effects of Milton's proposed use of the Property. Doc. 1, ¶ 27; Doc. 17 at 3. Specifically, Petitioners contend the Planning Board failed to: (1) ensure an adequate buffer between Petitioners and the proposed facility or require any meaningful protections against possible nuisances; (2) protect groundwater and endangered species at the site; and (3) provide for reasonable hours

of construction and operation. Doc. 17 at 7.

Contrary to Petitioners' assertions, the record reflects that the Planning Board adequately considered abutters' concerns and interests, and that those concerns were incorporated into the final site plan. The Planning Board subjected Milton's application to a rigorous site plan review process, including six public hearings and a site visit, multiple technical reviews by its outside consultant KNA, and consultation with the Town's Conservation Commission. At each stage of the process, abutters' concerns about water quality, wetlands preservation, pollution, noise, and buffering were addressed by Milton and/or the Planning Board. Indeed, the approved final site plan requires, among other things: (1) a 25-foot "no-cut" buffer adjacent and in addition to the 50-foot buffer 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. On the record presented, the Court cannot conclude that the Planning Board failed to appropriately consider or protect abutters. Accordingly, the Court will not overturn the Planning Board's June 17, 2020 decision on this basis.

III. Bituminous Concrete Waiver

Petitioners also challenge the validity of a waiver allowing Milton to pave a portion of its parking lot with recycled asphalt pavement ("RAP") rather than the required bituminous concrete. Doc. 1, ¶¶ 14–18; Doc. 17 at 10–11. Specifically, Petitioners argue that the record before the Planning Board contains no evidence to support granting the requested waiver. Doc. 17 at 11.

The Town's Site Plan Review Regulations require that "[all] off-street parking areas and driveways, loading and unloading areas and fire lanes shall be surfaced with two inches of binder and one inch finish of bituminous concrete pavement or four inches of concrete." See CR 60, 222, ¶ 12; see also Town of Plaistow Site Plan Review Regulations § 230-12.H(2)(f) (2018).[5] The Regulations further provide:

> When a proposed site plan is submitted for approval, the applicant may request the Planning Board waive specific requirements of these regulations. All request for waivers shall be provided in writing at the time of application to the Planning Board. The basis for any waivers granted by the Planning Board shall be recorded in the minutes of the board. The [P]lanning [B]oard may only grant a waiver if the board finds, by majority vote, that:
>
> (1) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations; or
>
> (2) Specific circumstances relative to the site plan, or conditions of the land in such site plan, indicate that the waiver will properly carry out the spirit and intent of the regulations.

Id. § 230-15. The Town's requirements for the granting of a waiver are consistent with the statutory requirements contained in RSA 674:44, III(e). Thus, an analysis of the Planning Board's decision to grant a waiver is the same under both frameworks.

[5] Though referred to in the pleadings, neither party provided the Court a copy of the Town's complete Site Plan Review Regulations. However, a copy of the version in effect at the time is publicly available.

The Planning Board ultimately granted a waiver allowing Milton to pave portions of its lot with RAP instead of bituminous concrete. CR 463, 465. Milton requested this waiver in writing, explaining that tracked construction equipment would destroy bituminous pavement. CR 60. According to the waiver request, asphalt pavement reclaim millings, gravel, or crushed stone would be better suited to absorb the wear and tear of tracked equipment. Id. In its second review, KNA recommended to the Planning Board that the waiver be granted, but that Milton be required to use RAP conforming to NHDOT Material Specification 304. CR 222. Specifically, KNA noted that RAP: (1) would create a durable, dustless surface appropriate for the intended use; (2) would be similar to rigid pavement in terms of permeability; and (3) would help substantially retain inadvertently discharged fluids and petroleum products. Id.

At the April 17, 2019 public hearing, the Planning Board Chair noted the importance of concrete for preventing spill contamination and providing proper drainage, and asked a Milton representative whether concrete was cost prohibitive in this case. CR 231–32. The Milton representative opined that the use of concrete would add "considerable cost" to the project and, based on his experience, was not necessary. CR 232. Before closing discussion on Milton's proposal, the Planning Director noted that one of the remaining items of concern was the need for the parking and equipment storage surface to be impervious. CR 239. The proposal was thereafter modified to include RAP instead of gravel on areas where tracked vehicles would travel. CR 234, 244–45, 384. In subsequent letters to the Planning Board, KNA continued to recommend the approval of Milton's waiver request. CR 343, 450. At the May 15, 2019 public meeting, a KNA representative offered that the conditions of the proposed

business might compromise a more rigid surface, and that the use of RAP would allow for any damaged areas to be taken up and resurfaced by Milton. CR 360. On June 19, 2019, the Planning Board granted Milton's waiver request "based on the testimony of the Applicant's representative, the Board's Consultant Eng., Steve Keach, and in accordance with the language included in the submitted waiver request." CR 465; see also CR 463.

Petitioners point to Auger v. Strafford, 156 H.H. 64 (2007), to bolster their argument that "there must be specific evidence to support a claim of unnecessary hardship," and that such specific evidence is lacking here. See Doc. 17 at 11. In Auger, the Supreme Court held that the town's planning board erred by waiving a subdivision regulation's ten-lot requirement because it "had no evidence before it that [a] loop road configuration would cause any hardship to [the developer], much less 'undue hardship.'" Auger, 156 N.H. at 67. Instead, the "record reveal[ed] that the sole reason that the board decided to waive the ten-lot requirement was because it preferred the cul-de-sac design, not because the loop road design would cause 'undue hardship or injustice'" to the developer. Id.

Here, by contrast, the record indicates there was evidence before the Planning Board of undue hardship to Milton. The record reflects that Milton demonstrated that due to the presence of tracked equipment on site, it would be cost prohibitive for Milton to pave its equipment storage area with bituminous concrete in accordance with site plan regulations. The Planning Board considered alternative proposals and, consistent with its outside consultant's repeated recommendations, ultimately decided RAP would provide substantially similar benefits to concrete while avoiding hardship to Milton.

Moreover, the Planning Board additionally heard that use of RAP would enable Milton to repair and replace sections of the parking surface as it became damaged by construction equipment. On the record before it, the Court concludes the Planning Board's decision to grant a waiver allowing the use of RAP instead of bituminous concrete was supported by evidence, and was neither unlawful nor unreasonable.

In reaching this conclusion, the Court is unpersuaded by Petitioners' suggestion that a waiver was unjustified because the hardship at issue is a product of Milton's own proposed use, and therefore of its own making. Doc. 17 at 11. The fact that a hardship is related to an applicant's proposed use, and not to the unique conditions of the land, does not automatically render a waiver unlawful. See McDonald v. Town of Raymond Planning Board, No. 2020-0001, 2021 N.H. LEXIS 61, at *5–7 (April 16, 2021) (non-precedential order). Accordingly, the Court will not overturn the Planning Board's decision on this basis.

IV. Regional Impact Determination

Finally, Petitioners argue the Planning Board erred by failing to make a regional impact determination in accordance with RSA 36:56. Doc. 1, ¶¶ 19–20; Doc. 17 at 11–12. The Town and Milton argue Petitioners failed to raise this issue before the Planning Board and therefore have waived the argument. Doc. 14 at 16; Doc. 15 at 4. Alternatively, they contend the Planning Board heard comment from the Town's Planning Director regarding regional impact issues, and implicitly concluded there would be none. Doc. 14 at 16. Doc. 15 at 4–5.

The relevant statute provides:

> 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.

RSA 36:56. A "development of regional impact" means:

> [A]ny proposal before a local land use board which in the determination of such local land use board could reasonably be expected to impact on a neighboring municipality, because of factors such as, but not limited to, the following:
>
> I. Relative size or number of dwelling units as compared with existing stock.
> II. Proximity to the borders of a neighboring community.
> III. Transportation networks.
> IV. Anticipated emissions such as light, noise, smoke, odors, or particles.
> V. Proximity to aquifers or surface waters which transcend municipal boundaries.
> VI. Shared facilities such as schools and solid waste disposal facilities.

RSA 36:55.

At the June 19, 2019 public meeting, before the Planning Board ultimately granted conditional site plan approval, the Town's Planning Director discussed regional impact issues. CR 461. He testified that in his 16 years of experience, he had never worked on a commercial development that had caused any regional impact. Id. He further explained that, according to the traffic impact assessment, the traffic impact from Milton's proposal was "nominal." Id. Public comment then ended, and the Planning Board voted to approve Milton's site plan proposal. CR 462, 464; see also CR 465.

When it approved Milton's proposal, the Planning Board implicitly found that there was no potential for regional impact. See Kulick's, Inc. v. Town of Winchester, No. 2016-0054, 2016 N.H. LEXIS 219, at *3 (Sept. 16, 2016) (non-precedential order) (noting planning board's finding, while not explicitly made on the record, was implicit in its final decision); cf. Nordic Inn Condo. Owner's Assoc. v. Ventullo, 151 N.H. 571, 586

(2004) (stating trial court is assumed to have made all findings necessary to support its decision). Given the project's close proximity to the center of Plaistow, the Planning Board's determination that, with the implemented controls, the project would have no detrimental impact on groundwater or nearby wetlands, and the minimal impact on traffic in the area, the Court cannot conclude that the Planning Board's decision in this regard was unreasonable or legally erroneous.

Furthermore, Petitioners, who vigorously objected to the site plan approval before the Planning Board, the ZBA, and this Court, have not articulated how the Planning Board's alleged failure to strictly comply with RSA 36:56 has prejudiced them. Cf. Mountain Valley Mall v. Municipality of Conway, 144 N.H. 642, 653–54 (2000) (holding plaintiff-abutter was not prejudiced by municipality's failure to strictly comply with RSA 36:56 because it nonetheless received notice of the proposed development and the potential for regional impact). Thus, to the extent Petitioners' argument is not waived, the Court will not overturn the Planning Board's decision on this basis.

CONCLUSION

For the foregoing reasons, the Planning Board's June 17, 2020 decision is **AFFIRMED**.

So Ordered.

July 8, 2021
Date

Marguerite L. Wageling
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 07/09/2021

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

RICHARD ANTHONY, ET AL.

V.

TOWN OF PLAISTOW ZONING BOARD

NO. 218-2020-CV-1121

ORDER ON DEFENDANT'S MOTION TO DISMISS

This case is part of an ongoing dispute between Petitioners Richard and Sanaz Anthony and the Town of Plaistow ("the Town"). The dispute principally centers on a decision of the Town's Planning Board ("the Planning Board") to grant site plan approval for the consolidation and development of two lots ("the Property") owned by Intervenor, Milton Real Properties. As part of that ongoing dispute, Petitioners, who are abutting landowners, brought this action challenging a decision of the Town's Zoning Board of Adjustment ("ZBA" or "Defendant"), in which it declined to hear their appeal of a zoning determination regarding permitted uses of the Property.[1] See Doc. 1 (Compl.). Defendant and Intervenor[2] now jointly move to dismiss, arguing that Petitioners failed to timely file their appeal of the zoning determination with the ZBA. See Doc. 8 (Joint Mot. Dismiss). Petitioners object.

[1] Petitioners are simultaneously challenging the decision of the Planning Board approving the site plan. See Anthony v. Town of Plaistow Planning Board, Rockingham County Super. Ct., No. 218-2020-CV-716.

[2] For ease of reference, the Court will attribute arguments made by both Defendant and Intervenor in their joint motion simply to Defendant. The Court will otherwise refer to each separately as needed.

See Doc. 10 (Obj. Mot Dismiss). For the following reasons, the joint motion to dismiss is **GRANTED**.

STANDARD OF REVIEW

In evaluating a motion to dismiss, the Court considers whether the allegations set forth in the complaint are "reasonably susceptible of a construction that would permit recovery." Lamprey v. Britton Constr., Inc., 163 N.H. 252, 256 (2012). The Court assumes the truth of all well-pled factual allegations and construes all reasonable inferences in the light most favorable to Petitioners. Id. This threshold inquiry tests "the facts in the pleadings against the applicable law." Beane v. Dana S. Beane & Co., 160 N.H. 708, 711 (2010). However, when the motion to dismiss does not challenge the sufficiency of Petitioners' legal claim, but instead asserts that a claim should be dismissed because the trial court lacked jurisdiction due to Petitioners' failure to exhaust their administrative remedies, the trial court must look beyond Petitioners' unsubstantiated allegations and determine, based upon the facts, whether Petitioners have sufficiently demonstrated a right to relief. Atwater v. Town of Plainfield, 160 N.H. 503, 507 (2010); see also Crawford v. Town of Gilford, No. 2018-0605, 2019 N.H. LEXIS 120, at *2 (May 31, 2019) (non-precedential order).

FACTUAL AND PROCEDURAL BACKGROUND

Unless otherwise noted, the following facts are derived from the Complaint and the certified record. See Doc. 1; ZBA Certified Record ("PZBA"); Planning Board Certified Record ("PPB-CR"); Planning Board Supplemented Certified Record ("PPB-CRS").[3] At the January 16, 2019 meeting of the Planning Board, Intervenor

[3] The PPB-CR and PPB-CRS are docketed under the parallel proceeding, Anthony v. Town of Plaistow Planning Board, No. 218-2020-CV-716. Because both parties refer in their pleadings to

introduced its plan to combine and relocate to Lots 72 and 73 on Tax Map 30, in the C1 Commercial District. See PPB-CR 22–25. Following the meeting, Intervenor submitted an application for a preliminary design review.[4] See PPB-CR 31–50. As part of the review process, on February 6, 2019, a Town code enforcement officer determined that Intervenor's proposed use was permitted in the zoning district. See PZBA 32 (Feb. 6, 2019 Zoning Determination); see also PPB-CR 55. In March of 2019, Petitioners' counsel submitted a letter to the Planning Board, asserting that Intervenor's proposed use was in fact prohibited in the Town's C1 commercial district. See PPB-CR 181–182 (Mar. 13, 2019 Letter from Atty. Braucher).

The Planning Board briefly discussed the zoning determination at its March 20, 2019 meeting.[5] See PPB-CR 77–78. The Town's planning director agreed to have counsel review the zoning determination. Id. Counsel for the Planning Board rendered an opinion that any challenges to the zoning determination were likely time-barred in light of the February 6, 2019 Zoning Determination. See PPB-CR 194–195 (Apr. 3, 2019 Letter from Atty. Cleary). Nonetheless, counsel also appears to have considered the proposed use to be permitted in the C1 commercial district as a retail business. See Id. The next month, prior to the May meeting of the Planning Board, counsel for Petitioners submitted a letter challenging, inter alia, the legality of the zoning determination and the Planning Board's ability to approve the application in

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decisions of the Planning Board, the Court likewise looks to the Planning Board's Certified Record. See Boyle v. Dwyer, 172 N.H. 548, 552 (2019) (holding that when ruling on a motion to dismiss, the Court may also consider documents attached to the pleadings, documents the authenticity of which are not disputed by the parties, official public records, or documents sufficiently referred to in the complaint).

[4] This application was formally accepted on March 6, 2019. See PPB-CR 67 (Mar. 7, 2019 Notice of Decision).

[5] The Court notes that it appears from the minutes of the meeting that some members of the Planning Board may not have actually seen the zoning determination by that point. See Minutes at PPB-CR 78.

contravention of the Town's zoning ordinances. See PPB-CR 185–86 (May 13, 2019 Letter from Atty. Hogan).

On June 19, 2019, the Planning Board approved Intervenor's request for lot consolidation and final site plan review. See Doc. 1, ¶ 1; PPB-CR 465 (June 19, 2019 Notice of Approval). After the Planning Board's approval, Petitioners filed an appeal with the Superior Court, pursuant to RSA 677:15. Doc. 1, ¶ 3; see also Anthony v. Town of Plaistow Planning Board, Rockingham County Superior Court, No. 218-2019-CV-968. Petitioners challenged the Planning Board's decision on a variety of grounds, including that the decision granted only conditional approval, and that the decision violated the Town's zoning requirements regarding contractor's yards. See Doc. 1 in 218-2019-CV-968, at ¶¶ 8–12, 26. Ultimately, the Court (Schulman, J.) determined that it lacked jurisdiction to hear the appeal, because the decision of the Planning Board was a conditional, and not final, approval, and thus was not ripe for appeal. See May 18, 2019 Order (Schulman, J.) (Doc. 17 in 218-2019-CV-968). As a result, the Court remanded the decision to the Planning Board for further proceedings without addressing the merits of the appeal. Id.

The parties thereafter moved for reconsideration and clarification. Petitioners challenged the Court's assertion that "[t]he correctness of this zoning determination is not presently before the court." See Doc. 20 in 218-2019-CV-968, at 3–5. Petitioners argued that they specifically referenced the issue in their complaint, and that neither the Town nor the Court remanded the zoning issue to the ZBA in accordance with RSA 677:15, I-a (b). Id. at 4–5. The Town objected to Petitioners' motion, arguing that the zoning issue was not before the Court because Petitioners

failed to timely file an appeal of the zoning determination with the ZBA. See Doc. 21 in 218-2019-CV-968, at ¶¶ 16–17. After considering the motions for reconsideration and clarification by the parties, Judge Schulman clarified his Order. In response to Petitioner's motion for clarification and reconsideration, Judge Schulman ruled:

> The court won't give an advisory opinion on the zoning issue. The court lacks subject matter jurisdiction to adjudicate any portion of this statutory appeal. That said, nothing stops plaintiff from filing an appeal to the ZBA if and when the Planning Board issues a final decision on remand. Whatever the ZBA does with that appeal can then be appealed to this court.

See June 11, 2020 Margin Order (Schulman, J.) (Doc. 20 in 218-2019-CV-968); see also Doc. 1, ¶ 6. In response to the Town's objection to Petitioners' motion, Judge Schulman ruled:

> The court will not give an advisory opinion on the zoning issue. Nothing stops plaintiff from physically filing an appeal to the ZBA. If plaintiff does that, and if the ZBA issues a ruling, the issue might then be brought before the court. Until such time, the court has no occasion to comment on either the merits of the zoning issue or the timeliness of an appeal of the zoning issue.

See June 11, 2020 Margin Order (Schulman, J.) (Doc. 21 in 218-2019-CV-968); see also Doc. 1, ¶ 6.

As a result of Judge Schulman's Order, the Planning Board held a meeting on June 17, 2020 at which it took up the issue of Intervenor's application. After a public hearing, the Planning Board voted that it considered conditions 3 and 7 to be ministerial in nature, requiring no further action on the part of the Planning Board, and affirmed that the Board's June 19, 2019 site plan approval was a final decision. See Doc. 1, ¶ 7; PPB-CRS 32–33; PPB-CRS 35 (June 25, 2020 Notice of Decision).

Subsequent to the Planning Board's decision, Petitioners filed an appeal with

the ZBA, asserting that they were bringing a timely appeal within twenty days of the Planning Boards final decision, and challenging the Planning Board's decision as violative of the Town's zoning ordinance. See PZBA 1 (Petitioners' Application for Appeal); PZBA 4 (Petitioners' Appeal of Administrative Decision). The ZBA held a meeting on July 30, 2020. Prior to opening a public hearing on the merits of the issue, the members voted that the ZBA lacked jurisdiction to hear Petitioner's appeal, because the appeal was not timely filed and service was not properly made on the Planning Board as required by RSA 676:5. See PZBA 22–23; see also PZBA 38 (July 30, 2020 Notice of Decision). After Petitioners' motion for rehearing was denied, see PZBA 57–58, Petitioners then brought this present action challenging the ZBA's decision that it did not have jurisdiction to hear their appeal. See Doc. 1.

ANALYSIS

Defendant now moves to dismiss Petitioners' appeal. Defendant contends that this Court lacks jurisdiction because Petitioners failed to exhaust their administrative remedies by filing a timely appeal with the ZBA. Doc. 8 at 2–3. Specifically, it asserts that in accordance with RSA 676:5 and the Town's zoning bylaws, Petitioners had twenty days in which to file an appeal of the zoning decision that Intervenor's proposed use was permissible under the Town's zoning ordinances. Id. at 5. According to Defendant, that zoning decision was final either: (1) when it was made by the Town's code enforcement officer on February 6, 2019; or (2) when the Planning Board granted conditional approval to the development on June 19, 2019. Id. at 5–6. In either case, Defendant contends that Petitioners failed to file an appeal with the ZBA in a timely manner. Id. at 8. As a result, because Petitioners did

not file their appeal with the ZBA in a timely manner, the ZBA lacked jurisdiction to hear their appeal, as does this Court. Id. at 12. For their part, Petitioners argue that their appeal was properly filed with the ZBA, in accordance with the instructions of the Court in their first challenge of the Planning Board's decision. Doc. 18 at 5, 8 (referencing Orders issued in 218-2019-CV-968). Moreover, they argue that their first appeal of the Planning Board's decision preserved the issue of the zoning determination. Id. at 7–8.

As relevant here, RSA 674:33 provides, "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 . . . ." RSA 674:33, I. For purposes of the statute, a "'decision of the administrative officer' includes any decision involving construction, interpretation or application of the terms of the ordinance." RSA 676:5, II(b). Moreover:

> If, 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 . . . .

RSA 676:5, III. Appeals to the ZBA "shall be taken within a reasonable time, as provided by the rules of the board . . . ." RSA 676:5, I. Here, the ZBA's rules of procedure require that "[a]ppeals from administrative decisions taken under RSA 676:5 shall be filed within twenty (20) days of the decision." See PZBA 35 (Zoning Board of Adjustment Bylaws).

The parties fundamentally disagree as to what decision triggered the relevant twenty-day time limit. Defendant asserts that either the February 6, 2019 decision of the code enforcement officer or the Planning Board's June 19, 2019 conditional approval is the relevant administrative decision. Petitioners, on the other hand, argue that in light of the Court's previous rulings, the issue was ripe for appeal after the Planning Board's June 17, 2020 final approval.

In Atwater v. Town of Plainfield, the New Hampshire Supreme Court addressed the issue of "when a planning board decision interpreting a zoning ordinance becomes appealable" to a zoning board of adjustment. See 160 N.H. 503, 507–10 (2010). After analyzing the overall statutory scheme governing planning board appeals, the Atwater Court concluded:

> 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.

Id. at 509–10 (quotations omitted). In explaining the rationale for its ruling, the Atwater Court observed:

> [P]lanning board reviews may involve months of reviews and meetings. 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.

Id. at 510. Thus, where a planning board grants conditional approval of a site plan review, and the conditions precedent do not involve an issue appealable to the ZBA, the conditional approval is the planning board's decision as to the zoning issue. See id. at 511; see also Accurate Transp., Inc. v. Town of Derry, 168 N.H. 108, 115 (2015) (concluding that planning board's decision to accept a site plan application did not constitute a decision on the zoning issue, while the board's later conditional approval did). The combination of RSA 677:15, I, which governs Planning Board appeals to the Superior Court, and RSA 676:5, III, effectively creates two separate appeal processes when a planning board decision implicates both zoning and planning issues. See Atwater, 160 N.H. at 509.

Here, the Court determines that at the latest, Petitioners were required to file their appeal within twenty days of the Planning Board's conditional approval. Petitioners argued—and Judge Schulman ultimately determined—that the Planning Board's June 19, 2019 approval was conditional. Specifically, Judge Schulman determined that the approval was subject to two conditions precedent, namely, the installation of groundwater monitoring wells and consultation and review by the Town's engineer. See Doc. 17 in 218-2019-CV-968, at 5. However, neither of these conditions implicate the code enforcement officer's determination that Intervenor's proposed use does not violate the Town's zoning ordinance. Thus, as in Atwater, while the Planning Board's approval was not "final" for purposes of appeal to the Superior Court, it represented a "decision" as to the zoning issue which then should have been appealed to the ZBA. See Atwater, 160 N.H. at 509–11. Indeed, counsel

for Petitioners was aware of this two-track appeal process. See PPB-CR 185–86 (May 13, 2019 Letter from Atty. Hogan) ("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 . . . .").

Furthermore, contrary to what Petitioners assert, see e.g., Doc. 1 ¶ 28; Doc. 10 at 4–5, language in Judge Schulman's Orders did not require the ZBA to take up the zoning issue on remand. Indeed, the Court did not even address the issue of a ZBA appeal until the parties' respective motions for reconsideration—after the Court had determined that it lacked jurisdiction to address the merits of the case. See Doc. 17 in 218-2019-CV-968 ("the court lacks statutory jurisdiction over this appeal."). Nor do any of the Court's Orders purport to confer any jurisdiction to the ZBA where it is otherwise lacking. And while the Court observed that "nothing stops [Petitioners] from physically filing an appeal to the ZBA if and when the Planning Board issues a final decision on remand," see Doc. 20 in 218-2019-CV-968, the Court also offered no opinion as to "either the merits of the zoning issue or the timeliness of an appeal." See Doc. 21 in 218-2019-CV-968.

Finally, Petitioners appear to argue that because the Court had the ability to remand the zoning issue to the ZBA during Petitioners' first Planning Board appeal and did not do so, the issue is preserved for appeal now that the Planning Board's decision is final. See Doc. 10 at 7–8. This argument misconstrues both the law and the nature of Judge Schulman's original ruling. It is true, as Petitioners assert, that

RSA 677:15 provides a mechanism for the Superior Court to remand a portion of a planning board appeal to the relevant ZBA. However, Judge Schulman ultimately determined that the Court lacked jurisdiction to hear Petitioner's planning board appeal at all. Thus, Petitioner's arguments regarding the procedure set forth in RSA 677:15 are inapposite in light of the Court's ruling that it could not exercise any jurisdiction over the case in the first instance.

For these reasons, the Court concludes that the ZBA did not err when it determined that it did not have jurisdiction to hear Petitioners' appeal. See, e.g., Daniel v. B & J Realty, 134 N.H. 174, 176 (1991) ("Compliance with the procedural deadline for filing an appeal is a 'necessary prerequisite' to establishing jurisdiction in the appellate body"). As a result, because Petitioners did not exhaust their administrative remedies with the ZBA, this Court likewise lacks jurisdiction to hear their appeal. See, e.g., 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"); McNamara v. Hersh, 157 N.H. 72, 76 (2008) (affirming the Superior Court's dismissal of a plaintiff's declaratory judgment action where plaintiffs failed to exhaust their administrative remedies with the ZBA). Because the Court concludes that the ZBA did not err in determining that it lacked jurisdiction over the untimely appeal, the Court need not address arguments relating to that portion of the ZBA's decision dealing with the service of notice. See Canty v. Hopkins, 146 N.H. 151, 156 (2001) (holding that the court need not consider a party's remaining arguments where one or more was dispositive of the case);

Genworth Life Ins. Co. v. N.H. Dept. of Ins., No. 2019-0727, __ N.H. __ , __ (Feb. 17, 2021) (Slip Op. at 9).

CONCLUSION

For the foregoing reasons, the Defendant and Intervenor's joint motion to dismiss is **GRANTED**.

SO ORDERED.

March 1, 2021
Date

Marguerite L. Wageling
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 03/01/2021

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT
Case No. 218-2020-CV-0716

Richard and Sanaz Anthony

v.

Town of Plaistow Planning Board

PETITIONERS' MOTION FOR RECONSIDERATION

NOW COME the above-named Petitioners, by and through their attorney, The Law Office of Scott E. Hogan, and move the Court to reconsider its Order dated July 9, 2021 in the above-referenced matter. In support of their Motion the Petitioners state the following:

INTRODUCTION

1. The Court's Final Order begins by characterizing this matter as "an ongoing dispute" between the Petitioners and the Town of Plaistow. Order, p.1.
2. The "dispute" began when the Intervenor proposed and the Town approved applications that would allow the construction of an industrial-commercial heavy construction equipment facility immediately adjacent to a previously buffered residential neighborhood, including: a prohibited Contractor's Yard use with no appropriate buffering; no sureties regarding surface or groundwater protection; no reasonable sight or noise buffers; no reasonable hours of construction or operation. The Petitioners and others have actively participated in every

aspect of these proceedings, in the reasonable defense of the daily use, enjoyment, value, and future marketability of their residential property.

3. The "dispute" has been "ongoing", as the Petitioner have had to navigate the myriad legal proceedings, both locally and in this Court, and comply with each of the required machinations that have been part of this lengthy process between the local review processes and the three relevant actions in this Court. (See Order, p.1, Footnote 1 re: referenced Case Numbers).

Standard of Review

4. Motions for Reconsideration are designed to state "points of law or fact that the Court has overlooked or misapprehended". Superior Court Rule 59-A(1).
5. After the Petitioners' lengthy and good faith participation in the local and judicial review process, they respectfully request that the court reconsider its Final oOder as follows.

Contractor's Yard Issue

6. While the court spent much of its Order addressing the regional impact and waiver issues, it has conspicuously ignored the Petitioners' exacting presentation and preservation of the "Contractor's Yard" issue, specifically within the jurisdiction of this RSA 677:15 Petition, in numerous, specific and unique ways. Neither the Court, nor the Town, nor the Intervenor have responded to the well-preserved point in each of the Planning Board Petitions, subsequent pleadings and arguments, which is that *no party has ever filed the requisite motion required by RSA 677:15 to object to any issue that was raised before the Court in this and the prior Petition, to argue why it should be referred to the Zoning Board*.

7. RSA 677:15(I)(b) states:

> **"If, upon an appeal to the superior court under this section, the court determines, on its own motion within 30 days after delivery of proof of service of process upon the defendants, or on motion of any party made within the same period, that any matters contained in the appeal should have been appealed to the board of adjustment under RSA 676:5, III, the court shall issue an order to that effect, and shall stay proceedings on any remaining matters until final resolution of all matters before the board of adjustment. Upon such a determination by the superior court, the party who brought the appeal shall have 30 days to present such matters to the board of adjustment under RSA 676:5, III. Except as provided in this paragraph, no matter contained in the appeal shall be dismissed on the basis that it should have been appealed to the board of adjustment under RSA 676:5, III."** (Emphasis added).

8. Again, no such Motion has ever been presented by the Court or any other Party. In its Final Order the Court not only failed to explain either why this provision does not apply, or why the Court and Town and Intervenor aren't now estopped given their failure to bring the statutorily-required Motion, *but the Court failed to mention this issue at all*.

9. Further, the court also failed to recognize or discuss the fact that the Petitioners have argued and preserved the Contractor Yard issue independently within the context of RSA 677:15, as being *independently unreasonable* within the meaning of RSA 677:15, as:

> "Beyond the fact that a "Contractor's Yard" is specifically prohibited in this zone, the specific placement of the Contractor's Yard in the Applicant's preferred design maximizes the daily impacts that such an Industrial use will have on neighboring residential properties, while providing no meaningful protections to neighboring land owners, and is thus both unlawful and independently unreasonable within the meaning of RSA 677:15…". See e.g., Petitioners' Memorandum of Law, p.6.

10. The Court also failed to recognize or discuss that the Certified Record contains an opinion letter from counsel for the Planning Board, opining on the issue of the "Contractor Yard".

See letter from Attorney Cleary to Planning Board, CR 194-195. This letter is clear in stating that a Contractor Storage yard "…does NOT have a retail component associated with it." (as the approval at issue does), i.e. it is NOT permitted. The letter goes on to confirm the differences between associated (permitted) retail uses and (non-permitted) industrial uses. *The non-permitted industrial uses were the ones ultimately approved here.*

11. The Contractor Yard issue has been specifically and consistently presented *within this RSA 677:15, independent of any other Appeal or action, according to the explicit language of that* statute. The Court's failure to address these issues within this Petition is itself error.

Protections for Abutting Residential Properties

12. Regarding issues of buffering and other protections, in its Order the Court somehow finds that "… the record reflects that the planning board adequately considered abutters concerns and interests, and that those concerns were incorporated into the final site plan." Order, p.11.

13. As the Court recognized in its order, "Abutters (including Petitioners) have expressed concerns about the project, particularly as it related to groundwater quality and buffering from neighboring residential areas." Order, p.1. The Court's recitation of the process itself and the Court's references otherwise include numerous and conflicting descriptions of the supposed buffer and distances that were part of the Planning Board's approval[1], while overlooking the clear acknowledgements by the Town and the Intervenor regarding the insufficiency of the "buffering". *The Court fails to acknowledge that the approval allows the Applicant to provide only its suggested 6 foot fence buffer, while the Applicant and the Board*

[1] See e.g., Order at p.3, 4, 5, 7, 11.

acknowledged on the Record that the (20 foot plus) heavy construction equipment that will be stored and displayed and washed on the site will NOT be buffered by the approved six foot fence, nor will the other proposed commercial and industrial uses, although such buffering is required by the Board's Regulations. CR p. 455.

14. The Court also fails to acknowledge that the approval does not provide any assurance to the Petitioners or other neighboring property owners regarding the safety of their groundwater drinking supplies, and specifically does NOT provide any mechanism to test and assure the quality of the effluent coming out of this commercial/industrial site, while acknowledging that the entire Town of Plaistow's water supply comes from groundwater. The approval also acknowledges that the system approved to address the many pollutants that are a product of this facility does not address "hydrocarbons in the form of a liquid not being removed by the StormTech system", and the Board's consulting engineer "offered that unfortunately hydrodynamic separators will not separate liquids". (See, Planning Board Minutes June 19, 2019, p.4). *These are not "adequate protections".*
15. The Court also fails to acknowledge the patently unreasonable hours of construction and operation of this industrial commercial facility that would be allowed under the Planning Board's approval.
16. The Petitioners respectfully suggest that the court has either misapprehended or misunderstood the Record regarding these issues, and its conclusions that the Planning Board's approval provides adequate, lawful and reasonable protections for neighboring residential properties from this proposed industrial-commercial use, and they respectfully

request that the court grant this Motion for Reconsideration on those bases.

Regional Impact Determination

17. The Petitioners have argued that the Planning Board erred by not making a determination regarding noticing regionally impacted municipalities, including based on potential impacts to surface water, groundwater and traffic. In its Order the Court concluded, "*When it approved Milton's proposal*, the planning board *implicitly found* that there was no potential for regional impact". Order, p.16. (Emphasis added).

18. "36:56 Review Required" states:

> I. 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***." (Emphasis added).

19. The Planning Board has no discretion to ignore this statutory requirement, and then have the Court characterize it as an "implicit", after-the-fact "finding". This is legal error that must be reversed.

20. The Court also finds that the Petitioners "… have not articulated how the Planning Board's alleged failure to strictly comply with RSA 36:56 has prejudiced them". Order, p.17. The prejudice comes from the lack of notice to potentially affected municipalities, which eliminates the opportunity for them to participate and comment on the subject application to the Plaistow Planning Board. It isn't a matter of notice *to the Petitioners*.

CONCLUSION

21. For all of the reasons stated above the Petitioners respectfully request that the Court reconsider its July 9, 2021 Order.

WHEREFORE, the Petitioners pray that the Court will:

A. Grant this Motion for Reconsideration; and,

B. Grant such other and further relief as the Court deems just.

Respectfully submitted,
Richard and Sanaz Anthony

By their attorney,
THE LAW OFFICE OF SCOTT E. HOGAN

DATE: July 19, 2021 /s/*Scott E. Hogan*/

Scott E. Hogan, Esq.
P.O. Box 57
Lyndeborough, NH 03082
603-969-1183
hoganlaw@comcast.net
Bar ID #: 10542

CERTIFICATION

I, Scott E. Hogan, certify that I filed this Motion this day with the electronic filing system, and so with the certified service contacts.

/s/*Scott E. Hogan*/