

---

---

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

---

JEFFREY E. RAYMOND, TRUSTEE OF THE J&R REALTY TRUST  
*Plaintiff-Appellant,*

v.

TOWN OF PLAISTOW  
*Defendant-Appellee*

CASE NO. 2022-0236

---

ON APPEAL FROM  
ORDER OF THE ROCKINGHAM COUNTY SUPERIOR COURT

---

**BRIEF OF THE PLAINTIFF-APPELLANT**

---

Peter J. Nicosia, BBO No. 567627  
NICOSIA & ASSOCIATES, P.C.  
259 Middlesex Road, PO Box 721  
Tyngsboro, MA 01879  
(978) 649-4300  
[nicosia@nicosia-associates.com](mailto:nicosia@nicosia-associates.com)

---

---

TABLE OF CONTENTS

Table of Authorities..... Pg. 4

Statement of Issues..... Pg. 6

Statement of the Case..... Pg. 7

Statement of the Facts..... Pg. 9

    I. Plaintiff's Proposed Development  
       of the Subject Property..... Pg. 9

    II. Relevant Zoning Ordinance  
        Provisions..... Pg. 11

    III. Proceedings Before the Plaistow  
        Zoning Board of Adjustment..... Pg. 12

    IV. Proceedings Before Rockingham  
        Superior Court..... Pg. 14

Standard of Review..... Pg. 15

Summary of the Argument..... Pg. 17

Argument..... Pg. 18

    I. It is Unreasonable to Construe  
       the Plaintiff's Proposed Use of  
       the Property as a "Contractor's  
       Storage Yard" Rather than as a  
       "Trade Business" In Light of the  
       Evidence Presented by the Plaintiff..... Pg. 18

    II. The Decision of the Superior Court  
        Condoning the ZBA's Overwhelming  
        Reliance on Alleged Issues of Non-  
        Compliance at Properties Other than  
        the Subject Property of the  
        Plaintiff is Both Unreasonable and  
        Legally Erroneous..... Pg. 23

<p>A. The Superior Court Decision is Legally Erroneous Where the Consideration Given to Alleged Issues of Non-Compliance at Properties Other than the Subject Property of the Plaintiff Went Well Beyond Merely Using their Own Knowledge, Experience, and Common Sense.....</p>	Pg. 29
<p>B. The Superior Court Decision is Legally Erroneous Where the Court Failed to Address the Plaintiff's Argument that its Right to Due Process was Violated by the ZBA Effectively Converting the Hearing for Zoning Relief at the Subject Property into an Enforcement Action Concerning Alleged Non-Compliance at a Separate Property.....</p>	Pg. 32
<p>Conclusion.....</p>	Pg. 34
<p>Certificate of Service.....</p>	Pg. 35
<p>Addendum Index.....</p>	Pg. 36

TABLE OF AUTHORITIES

**Cases:**

*Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 155 N.H. 307 (2007)..... Pg. 15, 16

*Garrison v. Town of Henniker*, 154 N.H. 26 (2006)..... Pg. 15

*Harrington v. Town of Warner*, 152 N.H. 74 (2005)..... Pg. 16

*Mountain Valley Mall Assocs. v. Municipality of Conway*, 144 N.H. 642 (2000)..... Pg. 16

*Nadeau v. Town of New Durham*, 129 N.H. 663 (1987)..... Pg. 16

*Girard v. Town of Plymouth*, 172 N.H. 576(2019)..... Pg. 16

*Petition of Sawyer*, 170 N.H. 197 (2017)..... Pg. 16

*Trustees of Dartmouth Coll. v. Town of Hanover*, 171 N.H. 497 (2018)..... Pg. 16

*Petition of Guillemette*, 171 N.H. 565 (2018)..... Pg. 19, 20

*Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491 (2007)..... Pg. 19

*Dietz v. Tuftonboro*, 171 N.H. 614 (2019)..... Pg. 30

*Nestor v. Town of Meredith*, 138 N.H. 632 (1994)..... Pg. 30

*Vannah v. Bedford*, 111 N.H. 105 (1971)..... Pg. 30

*Cont'l Paving, Inc. v. Town of Litchfield*, 158 N.H. 570 (2009)..... Pg. 31

*Condos East Corp. v. Town of Conway*, 132 N.H. 431 (1989)..... Pg. 30-31

*Barrington East Owners' Assoc. v. Town  
of Barrington*, 121 N.H. 627 (1981)..... Pg. 31

*N.H. Alpha of SAE Trust v. Town  
of Hanover*, 174 N.H. 269 (2021)..... Pg. 32-33

**Statutes:**

RSA 677:2..... Pg. 14

RSA 677:4..... Pg. 14

RSA 676:17..... Pg. 33

## STATEMENT OF ISSUES

1. Did the trial court err in upholding the Town of Plaistow Zoning Board of Adjustment decision that the Plaintiff's proposed use for the subject property is more akin to a "Contractor's Storage Yard" than a "Trade Business"? See Add. 037-042.<sup>1</sup>
2. Did the trial court err in finding that the Town of Plaistow Zoning Board of Adjustment acted reasonably and lawfully where it failed to consider the Plaintiff's voluntary stipulations regarding the proposed use of the subject property? See Add. 037-042.
3. Did the trial court err in concluding that the Town of Plaistow Zoning Board of Adjustment's overwhelming reliance on alleged issues of non-compliance by a non-party to the petition for zoning relief at properties other than the subject property of the Plaintiff was not improper? See Add. 037-042.
4. Did the trial court err in failing to consider the Plaintiff's argument that its right to due process was violated by the Town of Plaistow

---

<sup>1</sup> The abbreviation "Add." refers to the Addendum which is included as a part of the Brief of the Plaintiff-Appellant.

Zoning Board of Adjustment effectively converting the hearing for zoning relief at the subject property into an enforcement action concerning alleged non-compliance at a separate property? See Add. 037-042.

5. Did the trial court err in upholding the Town of Plaistow Zoning Board of Adjustment decision based on erroneous claims not supported by the evidence or the ZBA deliberations? See Add. 037-042.

#### **STATEMENT OF THE CASE**

This case arises from the Town of Plaistow Zoning Board of Adjustment's (the "ZBA") denial of zoning relief sought by Jeffrey E. Raymond, Trustee of the J&R Realty Trust (the "Plaintiff") in connection with the planned development of a property located in Plaistow, NH. In particular, the Plaintiff sought to overturn the Town of Plaistow Building Inspector's determination that the Plaintiff's proposed use should be characterized as a "Contractor's Storage Yard", which is not a permitted use in the zoning district where the Property is located, rather than a "Trade Business", which is a permitted use in the zoning district, as those terms are defined in the applicable

zoning by-laws. In the alternative, the Plaintiff concurrently requested a use variance which would permit the Plaintiff to operate as a "Contractor's Storage Yard" with stipulated conditions that the Plaintiff would not permit the outside storage of materials, or of heavy equipment.

The ZBA conducted public hearings to consider the zoning relief sought by the Plaintiff. During these hearings, the ZBA failed to give any consideration to the voluntary stipulations proposed by the Plaintiff which clearly make the proposed use more akin to a "Trade Business" than a "Contractor's Storage Yard". Instead, the ZBA improperly focused on alleged issues of non-compliance by a non-party to the petition for zoning relief at properties other than the subject property of the Plaintiff and ultimately voted to deny the relief sought by the Plaintiff. The Plaintiff made a timely request for a Re-Hearing to the ZBA which was hastily denied with Plaintiff having no further opportunity to be heard.

An appeal of the ZBA's decision to the Rockingham Superior Court followed. Based upon consideration of the Certified Record of the proceedings before the ZBA, the pre-hearing memoranda of law submitted by the



parties, and the presentation of the parties' arguments at the hearing, the trial court issued an Order denying the Plaintiff's appeal. As set forth in detail herein, the Superior Court decision is not supported by the evidence or is legally erroneous and, therefore, must be reversed.

#### STATEMENT OF THE FACTS

##### **I. Plaintiff's Proposed Development of the Subject Property**

The Plaintiff is the owner of 190 Plaistow Road, Route 125, Plaistow, NH 03865 (the "Property") by virtue of a Deed recorded at Book 5877, Page 165 on December 7, 2017, in the Rockingham County District Registry of Deeds. See Apx. 034-035, 048-049.<sup>2</sup> The Property is also identified as Plaistow Assessor's Tax Map 44, Lot 2 and is located in the Commercial One (C1) zoning district. See Apx. 051. The Property currently contains a non-conforming residential dwelling (now vacant). The Property has access from both Route 125 and Old Country Road. The lot is 1.18 acres with 271 feet of frontage on Route 125 and approximately 100 feet of frontage on Old Country Road. See Apx. 051-059.

---

<sup>2</sup> The abbreviation "Apx." refers to the separately filed Appendix to the Brief of the Plaintiff-Appellant.

The Plaintiff seeks to convert the Property from the current non-conforming residential use to a new commercial use that is more consistent with the existing uses in the zoning district (the "Project"). The Plaintiff's intent is for the Property to be leased to a tenant--JNR Gutters, Inc. which would be relocated from its current headquarters at 38-40 Lancaster Street, Haverhill, MA. JNR Gutters is a home improvement business engaged in the sale, service, and installation of windows, siding, roofing, decks, and gutters.

In particular, the Plaintiff seeks to raze the existing dwelling and to construct a two-story, 2,200 sq. ft. office building within the existing residential structure footprint. Behind the proposed office building, the Plaintiff seeks to construct a 1 ½ story, 3,400 sq. ft. warehouse building. See Apx. 051-059. The office will be for management, administration, sales and will contain a retail showroom. The warehouse building will be used to store materials that will be sold to the public. The Plaintiff has stipulated that there will be no outside storage of materials on the site. The site provides ample parking and maneuvering space for employees and

customers as well as space to park company light vehicles, trailers, man lifts and lulls. The Plaintiff has also stipulated that there will be no heavy equipment vehicles such as bulldozers, front-end loaders, and back-hoes stored on the site. The access is proposed to remain as is, with two-way access at Old County Road and two-way access at Route 125. See Apx. 022-026, 038-040, 051-059.

## **II. Relevant Zoning Ordinance Provisions**

This Appeal concerns the interpretation and application of the definitions of the "Contractor's Storage Yard" and "Trade Business" uses contained in the Plaistow Zoning Ordinance. See Apx. 030-031. Article II-Definitions (220-2) defines these uses as follows:

### Trade Business

"A business enterprise which holds the necessary state and local licenses to provide trade services directly to the ultimate consumer. Such examples would be electricians, plumbers and HVAC contractors. This does not include businesses such as landscaping or construction contractors that typically call for outdoor storage of materials."

### 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."

Plaistow Zoning Ordinance Table 220-32B sets forth the permitted uses in the Commercial One (C1) zoning district. Pursuant to the ordinance, a "Trade Business" is a permitted use in the zoning district and a "Commercial Storage Yard" is not permitted. See Apx. 029-030.

### **III. Proceedings Before the Plaistow Zoning Board of Adjustment**

The Project, among other local and state approvals, requires a Planning Board Site Plan Approval Special Permit. One of the submittal requirements to the Planning Board is a "Use/Zoning Determination" letter from the Plaistow Building Inspector. In furtherance of the Project, the Plaintiff submitted the proposed plans to the Plaistow Building Inspector and requested a Zoning Determination. On October 21, 2020, the Town of Plaistow Building Inspector issued a Zoning Determination letter (the "Zoning Determination") concluding that the Plaintiff's proposed use should be characterized as a "Contractor's Storage Yard" which

is not a permitted use in the Commercial One (C1) zoning district. See Apx. 027, 041.

On November 6, 2020, the Plaintiff timely filed an Administrative Appeal of the Zoning Determination to the Plaistow Zoning Board of Adjustment (the "ZBA") seeking to overturn the Building Inspector's determination that Plaintiff's proposed use should be characterized as a "Contractor's Storage Yard". Through this appeal, the Plaintiff argued that the proposed use is more appropriately categorized as a "Trade Business," which is a permitted use in the Commercial One (C1) zoning district. See Apx. 037-050. In the alternative, and concurrently, Plaintiff also requested a Use Variance from the provisions of Table 220-32B ("CI"-Commercial I) (B) Uses to permit the Plaintiff to operate as a "Contractor's Storage Yard" with conditions of no outside storage of materials or heavy vehicles, including bulldozers, front-end loaders, and back-hoes. See Apx. 020-036.

Public hearings occurred on both the Administrative Appeal and the Variance Request before the ZBA on December 3, 2020, and January 7, 2021. See Apx. 060, 103-110, 146, 155-164. On January 7, 2021, the ZBA voted to deny the Administrative Appeal,

thereby upholding the Building Inspector's Zoning Determination. Similarly, on January 7, 2021, the ZBA voted to deny the Plaintiff's Variance Request. Neither vote was unanimous. See Apx. 153-154.

On January 28, 2021, the Plaintiff timely submitted a Motion for Re-Hearing to the ZBA pursuant to RSA 677:2. See Apx. 170-175. A public hearing took place on February 25, 2021, before the ZBA regarding Plaintiff's Motion for a Re-Hearing. See Apx. 176, 177-203. The ZBA allowed no presentations from anyone, including the Plaintiff. See Apx. 177-203. Rather, the ZBA went right into deliberations and denied Plaintiff's Motion for a Re-Hearing. See Apx. 177-203, 204-205.

#### **IV. Proceedings Before Rockingham Superior Court**

The Plaintiff filed a Complaint in the Rockingham Superior Court pursuant to NH RSA 677:4 appealing the decision on the ZBA. See Apx. 003-015. Pursuant to RSA 677:8 the Certified Record of Proceedings Before the Town of Plaistow Zoning Board of Adjustment was filed with the Superior Court providing copies of all of the referenced documents in this matter which provides the fact base for the Plaintiff's appeal. See Apx. 016-220. An evidentiary hearing was scheduled by the

Superior Court on August 2, 2021. The parties agreed to proceed upon the Certified record and no additional or new evidence was presented to the Superior Court. Prior to the hearing, the parties each submitted a pre-hearing memorandum setting forth the parties claims and arguments. See Apx. 221-239, 240-247. Following the hearing, the Superior Court issued an Order on March 31, 2022, denying the Plaintiff's appeal. See Add. 037-042. On April 27, 2022, the Plaintiff timely filed a Rule 7 Notice of Mandatory Appeal from the Order of the Superior Court. See Apx. 248-259.

#### **STANDARD OF REVIEW**

The party seeking to set aside a ZBA decision in the superior court bears the burden of proof. *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 155 N.H. 307, 309 (2007); citing *Garrison v. Town of Henniker*, 154 N.H. 26, 29-30 (2006). Factual findings of the ZBA are deemed *prima facie* lawful and reasonable and will not be set aside by the superior court absent errors of law, unless the court is persuaded by a balance of probabilities on the evidence before it that the ZBA decision is unreasonable. *Id.*

The Supreme Court, in turn, will uphold the superior court's decision unless it is not supported by the evidence or is legally erroneous. *Kalil*, 155 N.H. at 309; *citing Harrington v. Town of Warner*, 152 N.H. 74, 77 (2005). In doing so, the Supreme Court reviews the Superior Court's decision to determine whether a reasonable person could have reached the same decision as the Superior Court based upon the evidence before it. See *Mountain Valley Mall Assocs. v. Municipality of Conway*, 144 N.H. 642, 646-647 (2000); *Nadeau v. Town of New Durham*, 129 N.H. 663, 666 (1987); *Girard v. Town of Plymouth*, 172 N.H. 576, 581-582 (2019).

With respect to statutory and regulation-based claims which require the interpretation of the statutes and regulations governing the ZBA's decision, the Supreme Court reviews the interpretation of said statutes and regulations *de novo*. See *Girard*, 172 N.H. at 582; *citing Petition of Sawyer*, 170 N.H. 197, 203 (2017). Accordingly, the Supreme Court is not bound by the interpretation of the ZBA. *Id.*; *citing Trustees of Dartmouth Coll. v. Town of Hanover*, 171 N.H. 497, 508 (2018).



### SUMMARY OF THE ARGUMENT

The record clearly demonstrates that the Superior Court decision should be reversed because it is not supported by the evidence and is legally erroneous.

As an initial matter, the decision of the Superior Court upholding the ZBA's determination that the Plaintiffs proposed use for the Property is more akin to a "Contractor's Storage Yard" than a "Trade Business" strains credulity in light of the evidence presented by the Plaintiff. This is especially true where the Plaintiff offered specific voluntary stipulations concerning the use of the Property which clearly make the Plaintiff's proposed use more consistent with that of a "Trade Business". As was the case with the ZBA, the Superior Court failed to give due consideration to the import of these stipulations in rendering its decision.

Additionally, the decision of the Superior Court is both unreasonable and legally erroneous to the extent that it condones the ZBA's overwhelming reliance on alleged issues of non-compliance at properties other than the subject Property of the Plaintiff. First, such reliance is impermissible where the Certified Record demonstrates that the ZBA

members based their decision entirely upon their personal opinions concerning the Plaintiff's proposed occupant of the property rather than the proposed development itself. Second, such reliance is impermissible where it has the effect of converting the Plaintiff's request for zoning relief at one property to an enforcement action concerning alleged zoning violations at a separate property, thereby violating the Plaintiff's right to procedural due process.

#### ARGUMENT

**I. It is Unreasonable to Construe the Plaintiff's Proposed Use of the Property as a "Contractor's Storage Yard" Rather than as a "Trade Business" In Light of the Evidence Presented by the Plaintiff**

The decision of the Superior Court upholding the ZBA's determination that the Plaintiffs proposed use for the Property is more akin to a "Contractor's Storage Yard" than a "Trade Business" is patently unreasonable when due consideration is given to the evidence presented by the Plaintiff.

Plaintiff's proposed use is for the Property to be used as a new headquarters for JNR Gutters, which is engaged in the sale, service, and installation of windows, siding, roofing, decks, and gutters. See

Apx. 038-040. The proposal for the Property includes office space for management, administration, sales, and a retail showroom, as well as warehouse space for storage of materials. *Id.* Of central importance to this issue, in connection with this proposed use the Plaintiff additionally voluntarily stipulated to conditions that (1) there will be **no outside storage of materials** at the site; and (2) there will be **no storage of heavy equipment or vehicles** such as bulldozers, front-end loaders, or back-hoes at the site. *Id.*<sup>3</sup>

When construing statutes, where possible, the Court must ascribe the plain and ordinary meaning to the words used. *Petition of Guillemette*, 171 N.H. 565, 568 (2018). The same is true for the interpretation of a municipal zoning ordinance. If the language used in a zoning ordinance may reasonably be construed to have some purpose and effect, it must be read in that light. *Anderson v. Motorsports Holdings, LLC*, 155 N.H. 491 (2007). The Court must not consider what the legislature or administrative agency might have said

---

<sup>3</sup> During the initial hearing, the Plaintiff additionally proposed a condition that there would be no storage of man-lifts and lulls in the upward position at the property based on concerns raised by the ZBA. See Apx. 108.

or add language that the legislature or administrative agency did not see fit to include. *Petition of Guillemette*, 171 N.H. at 568. The Court construes all parts of a statute or regulation together to effectuate its overall purposes and to avoid an absurd or unjust result. *Id.* at 568-69.

As set forth above, Plaistow Zoning Ordinance, Article II-Definitions (220-2) defines "Trade Business" and "Contractor's Storage Yard," as follows:

*Trade Business*

"A business enterprise which holds the necessary state and local licenses to provide trade services directly to the ultimate consumer. Such examples would be electricians, plumbers and HVAC contractors. This does not include businesses such as landscaping or construction contractors that typically call for outdoor storage of materials."

*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."

When comparing the Plaintiff's proposed use to the zoning definitions, including the voluntary stipulations concerning outdoor storage of materials

and storage of heavy vehicles, it is clear that the proposed use is far more akin to the permitted "Trade Business" use than the "Contractor's Storage Yard" use. The primary factors which would render a use more consistent with a "Contractor's Storage Yard" than a "Trade Business" are (1) outside storage of materials, and (2) storage of heavy vehicles. By voluntarily stipulating that neither of these uses would be present at the Property, the Plaintiff's proposed use cannot reasonably be interpreted as being more consistent with a "Contractor's Storage Yard" and is clearly more akin to a "Trade Business".

In rendering their decisions on this issue, both the ZBA and the trial court unreasonably failed to give due consideration to the Plaintiff's voluntary stipulations. In essence, the ZBA refused to take "yes" for an answer when the Plaintiff plainly and proactively agreed to not operate the Property as a "Contractor's Storage Yard". The trial court decision followed suit and similarly fails to address the Plaintiff's proposed stipulations or why they are inadequate to alter the classification of the proposed use for the Property. Both decisions offer no explanation for the determination that the proposed

use should be a "Contractor's Storage Yard" despite the Plaintiff's stipulations which clearly remove its proposed use from that classification. The Certified Record contains no evidence which rebuts the Plaintiff's proposed voluntary stipulations or to rebut the facts that clearly indicate that Plaintiff's proposed business uses are more consistent with a "Trade Business". Of particular note, when given the opportunity to defend his decision during the initial public hearing, the Plaistow Building Inspector agreed that the Plaintiff "made a good argument that the business is closely related to a trade business" and offered no further support for his determination to the ZBA. See Apx. 108.

Meanwhile, in presenting its request for relief to the ZBA the Plaintiff provided direct evidence showing that there is clear precedent for allowing businesses with similar uses in the Commercial One (C1) zoning district. In particular, the Plaintiff provided the ZBA with a map showing numerous businesses existing in the zoning district with uses that are substantially similar to the Plaintiff's proposed use, including a construction company named Build It Construction and a Roofing Company named

Absolute Roofing. See Apx. 040, 047. However, in considering the Plaintiff's request for relief the ZBA failed to address the fact that there are other businesses already operating within the zoning district which are substantially the same as the Plaintiff's proposed business use. At no point in the proceedings did the ZBA distinguish the Plaintiff's proposed use from these existing businesses or offer any basis for its decision to characterize the Plaintiff's proposed use differently than these other construction companies.

The decisions of both the ZBA and the Superior Court to uphold the determination that the Plaintiff's proposed use is more akin to a "Contractor's Storage Yard" are inconsistent with the plain language of the zoning ordinance and are devoid of factual support in the Certified Record. As a result, the Court must find the decision to be unlawful and unreasonable and reverse the decision.

**II. The Decision of the Superior Court Condoning the ZBA's Overwhelming Reliance on Alleged Issues of Non-Compliance at Properties Other than the Subject Property of the Plaintiff is Both Unreasonable and Legally Erroneous**

In considering the relief requested by the Plaintiff necessary for the Project to advance, the

ZBA improperly based its decisions upon consideration related to two (2) separate properties and thereby failed to base its decisions upon considerations relating to the submittals specific to the Property. The first property in question is 213 Main Street, Plaistow, NH. Since 2015, the 213 Main Street property has been owned individually by Jonathan Raymond ("Mr. Raymond"), the President/Owner of JNR Gutters, which has certain business operations ongoing at the 213 Main Street property as a tenant. See Apx. 148-150. The second property in question is 38-40 Lancaster Street, Haverhill, MA, which is the location where JNR Gutters is presently headquartered. Evidence of the ZBA's improper consideration of these other properties and the failure to base its decisions upon the considerations related to the subject Property is replete throughout the Certified Record.

Upon receiving the Plaintiff's Administrative Appeal and Variance Request, ZBA Chair Bealo immediately requested copies of all non-compliance letters and/or notices of violation for the 213 Main Street property for inclusion in the ZBA's meeting packet. See Apx. 067. Such documents were compiled by the Plaistow Building Inspector and were disseminated



to the ZBA in advance of the initial public hearing on December 6, 2020. See Apx. 067, 076-102. No advance notice that the ZBA was considering allegations related to the 213 Main Street property was provided to the Plaintiff or Plaintiff's representatives prior to the hearing. See Apx. 108. Despite this lack of notice, during the initial hearing the ZBA repeatedly focused on the alleged violations present at the 213 Main Street property and made assumptions that such issues would simply be relocated to the new site. See Apx. 107-109. Ultimately, the hearing was continued at the request of Plaintiff's counsel in order to provide an opportunity to review and respond to the alleged violations at the 213 Main Street property which dominated the discourse of the hearing. See Apx. 109.

Following the initial hearing, Plaintiff's counsel obtained from the ZBA a copy of all documents concerning the alleged violations at the 213 Main Street property which were raised during the initial hearing. See Apx. 111-145. The violations in question all generally relate to allegations of trash and debris at the site and dumpsters and/or storage containers located at the site. *Id.*

In advance of the continued hearing on January 7, 2021, the Plaintiff submitted a letter in response to the various alleged violations at the 213 Main Street Property. See Apx. 148-152. The letter reiterates that the proposed Project is not a relocation of JNR Gutters' business activities at 213 Main Street, but a relocation of its headquarters in Haverhill, MA to a brand new and significantly larger facility. *Id.*

The letter further provides context to the alleged violations and explains how they have been addressed and that the property is in compliance with the town's zoning ordinance. *Id.* The letter explains that the violations described in the notices tie back to alleged non-compliance with a site plan which was approved for the previous owner of the property and that there is nothing that obliges Mr. Raymond to comply with that plan. *Id.* To the extent that the site plan does place obligations upon Mr. Raymond, the letter points out that the storage containers objected to by the town were left behind by the former owner and that there are storage containers shown on the site plan. *Id.*

In response to the alleged violations regarding trash, debris, and dumpsters at the property, the

letter explains that the alleged trash and debris on the site is actually materials such as shingles, insulation, and siding which is permitted to be stored outside under the zoning ordinance applicable for this property. *Id.* It further explains that dumpsters are permitted at the site and that Mr. Raymond had relocated the dumpsters and installed fencing and was currently in compliance. *Id.* The letter additionally points out that the town took no action regarding the alleged violations during the first three (3) years that Mr. Raymond owned the property and that Mr. Raymond voluntarily rectified various issues with the property when it was purchased, including prior complaints about drainage from the site and late-night tractor trailer activities. *Id.*

Finally, and most importantly, the letter argues that anything that has been alleged to have occurred at 213 Main Street has no relevance to the ZBA's consideration of the relief being sought with respect to the subject Property and that the ZBA cannot presume that the Plaintiff, or the Plaintiff's tenants, will engage in non-compliance in the future. *Id.*

These issues again dominated the discussion throughout the continued public hearing on January 7, 2021. See Apx. 155-164. During the hearing, Plaintiff again responded to the alleged violations at the 213 Main Street property and reiterated to the ZBA any allegations of non-compliance at that property have no relevance to the development of the subject Property for which the Plaintiff was seeking zoning relief. *Id.* Plaintiff again explained that the new development was intended to be a relocation of the company's headquarters in Haverhill, MA and not a relocation of the 213 Main Street property. *Id.* Plaintiff further reiterated that the development of the subject Property was intended to be a new flagship location which would provide significantly more storage and warehouse space which would likely also aid in further rectifying any concerns related to the 213 Main Street property. *Id.*

It was at this point that ZBA Chair Bealo shifted the focus—not back to the subject Property, but now to JNR Gutter's property in Haverhill, MA. *Id.* ZBA Chair Bealo stated that he "had occasion" to drive by the property in Haverhill, MA and claimed that it "presented much the same as the 213 Main Street site

in Plaistow". *Id.* Plaintiff explained that the state of Haverhill property and the fact that the surrounding area was depressed were the reasons they are looking to move out of Haverhill and to develop the subject Property into a new flagship location and that the intent was to improve and not replicate. *Id.* Plaintiff further reiterated that considerations regarding the Haverhill property should not be outcome determinative for the ZBA's decisions regarding the proposed development of the subject Property. *Id.*

Despite the significant effort to respond to and address the ZBA's concerns about these other properties by the Plaintiff, the ZBA ultimately used these concerns as a reason to justify their denial of the zoning relief being sought for Plaintiff's Property.

**A. The Superior Court Decision is Legally Erroneous Where the Consideration Given to Alleged Issues of Non-Compliance at Properties Other than the Subject Property of the Plaintiff Went Well Beyond Merely Using their Own Knowledge, Experience, and Common Sense**

The Superior Court's conclusion that the ZBA's overwhelming reliance on the alleged issues with the 213 Main Street property and the Haverhill, MA property detailed above was permissible is legally

erroneous. In reaching this conclusion, the Superior Court simply cites to the general principal that ZBA members are allowed to use their own knowledge, experience, and common sense when arriving at a decision. See Superior Court decision, pg. 4; citing *Dietz v. Tuftonboro*, 171 N.H. 614, 624 (2019). See Add. 040. However, the Superior Court's finding is clearly an overbroad application of this general principal.

While the Supreme Court has held that the members of the ZBA can consider their own knowledge based upon their familiarity with the area involved in arriving at a decision, such consideration is generally limited to factors such as traffic conditions, surrounding uses, and other similar factors relative to the subject property. See *Nestor v. Town of Meredith*, 138 N.H. 632, 636 (1994); *Vannah v. Bedford*, 111 N.H. 105, 108 (1971). Moreover, the Supreme Court has made clear that "although [the ZBA] can rely on its personal knowledge of certain factors in reaching its decision, its decision must be based on more than the mere personal opinion of its members." *Cont'l Paving, Inc. v. Town of Litchfield*, 158 N.H. 570, 574 (2009); citing *Condos East Corp. v. Town of Conway*, 132 N.H.

431, 438 (1989); see also *Barrington East Owners' Assoc. v. Town of Barrington*, 121 N.H. 627, 631 (1981).

Here, the ZBA did not merely rely on their own knowledge or common sense with respect to limited issues such as traffic or surrounding uses relative to the Plaintiff's property. The Certified Record demonstrates that the ZBA members went far beyond mere consideration of their own knowledge or common sense, and instead were relying entirely upon their own personal opinions concerning the business that would ultimately occupy the space and gave no actual consideration to the actual proposal presented by the Plaintiff. In doing so, the ZBA members refused to consider the Plaintiff's proposal in good faith. The hearings on the Plaintiff's requested zoning relief were overwhelmingly focused on the alleged issues with these other properties and the ZBA members refused to give due consideration to the Plaintiff's actual plan for how the Plaintiff's Property would be developed under their proposal.

Where the ZBA decision is based on nothing more than the mere personal opinion of its members, the

Superior Court decision is legally erroneous and must be reversed.

**B. The Superior Court Decision is Legally Erroneous Where the Court failed to Address the Plaintiff's Argument that its Right to Due Process was Violated by the ZBA Effectively Converting the Hearing for Zoning Relief at the Subject Property into an Enforcement Action Concerning Alleged Non-Compliance at a Separate Property**

As part of its appeal to the Superior Court, the Plaintiff argued that its right to due process was violated by the ZBA effectively converting the hearing on the zoning relief at the Plaintiff's Property into an enforcement action concerning the alleged zoning non-compliance at the 213 Main Street property. In denying the Plaintiff's appeal, the Superior Court fails to even address this argument despite its legitimacy.

To the extent that the ZBA had an interest in taking action with respect to the 213 Main Street property, such action is required to be through a separate enforcement action to determine whether there has been a violation of the applicable zoning ordinance. A "violation" in the enforcement context is not the same as the review of an administrative decision. See *N.H. Alpha of SAE Trust v. Town of Hanover*, 174 N.H. 269, 278 (2021). Determining a



"violation" is the result of a criminal or civil proceeding in which due process would require, at a minimum, a neutral fact finder in an adjudication in which the burden of proof would be upon the municipality to establish the violation. *Id.*; citing RSA 676:17, V. "It is beyond dispute that the ZBA lacks the power to convict a party of a crime or impose civil penalties for a violation of a zoning ordinance." *Id.*

Here, the ZBA simply used the Plaintiff's application for zoning relief at the Plaintiff's property as an opportunity to address the alleged issues of non-compliance at other properties that happen to be owned by the business that is proposed to occupy the Plaintiff's property. The Certified Record clearly demonstrates that the ZBA gave virtually no consideration to the actual relief being requested and instead used the public hearings on the Plaintiff's requests for relief as an opportunity to castigate the Plaintiff for alleged violations at the 213 Main Street property and perceived issues at the Haverhill property over which the ZBA has no jurisdiction.

In doing so, the ZBA effectively hijacked the Plaintiff's request for zoning relief and improperly

converted it into an enforcement action concerning the alleged violations at the 213 Main Street property. Moreover, the ZBA impermissibly placed the burden on the Plaintiff to disprove the alleged violations where the burden of proof for zoning violations is supposed to be on the municipality. By focusing entirely on these other properties, the ZBA effectively deprived the Plaintiff of a hearing on the merits for the relief sought for the subject Property in violation of the Plaintiff's due process rights.

#### **CONCLUSION**

For the above stated reasons, Plaintiff-Appellant Jeffrey E. Raymond, Trustee of J&R Realty Trust respectfully requests that the Order of the Superior Court denying the appeal from the decision of the Plaistow Zoning Board of Adjustment be reversed.

Respectfully submitted by,

Plaintiff/Appellant,  
**JEFFREY E. RAYMOND, TRUSTEE OF THE  
J&R REALTY TRUST**

By his Attorney,

/s/ Peter J. Nicosia  
Peter J. Nicosia, Esq.  
NH Bar #14922  
NICOSIA & ASSOCIATES, P.C.  
259 Middlesex Road, PO Box 721  
Tyngsboro, MA 01879  
(978) 649-4300  
nicosia@nicosia-associates.com

August 9, 2022

**CERTIFICATE OF ATTACHMENT OF APPEALED DECISION**

I, Peter J. Nicosia, Esq., hereby certify that pursuant to Supreme Court Rule 16 the appealed decision is in writing and a copy of the decision is included in the Addendum to this Brief.

/s/ Peter J. Nicosia  
Peter J. Nicosia, Esq.

**CERTIFICATE OF SERVICE**

I, Peter J. Nicosia, Esq., hereby certify that on August 9, 2022, this document was served via filing through electronic filing and email, on Charles Cleary, Esq., counsel for the Defendant/Appellee.

/s/ Peter J. Nicosia  
Peter J. Nicosia, Esq.

ADDENDUM INDEX

3/31/2022 Order of Rockingham  
County Superior Court..... Pg. 37

# The State of New Hampshire

SUPERIOR COURT

ROCKINGHAM COUNTY

Jeffrey Raymond, Trustee of J&R Realty Trust

v.

Town of Plaistow

Docket # 218-2021-CV-338

## ORDER

### Background

Before the Court is an appeal from the Plaistow Zoning Board of Adjustment's ("ZBA") (i) denial of a motion for rehearing on a variance application filed by Jeffrey E. Raymond, Trustee of the J&R Realty Trust ("Petitioner") and (ii) decision upholding the determination by the Code Enforcement Officer ("Officer") as to permitted use under the Plaistow Zoning Ordinance, both concerning property at 190 Plaistow Road, Plaistow, New Hampshire (the "Property"). At the time of the ZBA decisions, the Property was located within the Commercial I (C-I) Zoning District.

Following the ZBA decisions, Petitioner filed the instant appeal to this Court and also presented a new Site Plan for the Property to the Plaistow Planning Board, which is

pending review. A hearing was held on August 8, 2021. For the following reasons, the Petitioner's appeal is DENIED.

### Facts

The plaintiff is the owner of 190 Plaistow Road, Route 125, Plaistow, New Hampshire. The property contains a non-conforming residential dwelling. The lot in question is at a corner and has 271 feet of frontage on Route 125 and 100 feet of frontage on Old Country Road. The plaintiff wishes to convert the property from the current non-conforming residential use to a new commercial use. The plaintiff wishes to lease the location to JNR Gutters, Inc. which would relocate from its current headquarters at 38-40 Lancaster Street, Haverhill, Massachusetts. JNR Gutters sells, services and installs windows, siding, roofing, decks and gutters. The plaintiff intends to raze the existing dwelling and construct a two story 2,200 square foot office building. Behind this, the plaintiff seeks to construct a one and one half story 3,400 square foot warehouse building. After submitting proposed plans, the building inspector issued a zoning determination letter stating that the proposed use should be characterized as a contractor's storage yard – which is not a permitted use in that zoning district, C1. After hearing, the ZBA denied the plaintiff the requested relief. This appeal follows.

### Standard of Review

In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body to show that the order or decision is unlawful or unreasonable. All

findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable. RSA 677:6.

### Analysis

The Petitioner raised the following objections to the ZBA's decision to uphold the Officer's use determination for the Property: (1) the use of improper use of information concerning other properties operated by the plaintiff and (2) the written decision contains "no findings".

#### **I. ZBA's consideration of plaintiff's business at another location**

In its argument, the Petitioner argues that the ZBA improperly based its decision upon considerations relating to two separate properties which were not the subject of this process. The Petitioner contends that the ZBA has had ongoing issues with properties located at 213 Main Street and an out of jurisdiction property at 38-40 Lancaster Street in Haverhill, Massachusetts. The petitioner explained in its memorandum and at hearing, the various issues the ZBA has had with the other properties and the fact that it was discussed at length during the hearing. The Certified Record attached to this action does indeed indicate that the ZBA discussed an existing site at 213 Main Street operated by the plaintiff. This site was grandfathered as a contractor's storage yard even though it is in a Medium Density Residential ("MDR")

zone. See record at #7. According to the record, the municipality had been dealing with code violation by this same plaintiff at that location. See record at #8. Multiple letters of non-compliance by the plaintiff were sent to the plaintiff. By one letter dated May 14, 2019 the respondent alleged violations including:

“Junk piles of debris, unsightly piles of discarded building materials, containers trailers (sic), parts etc....unpermitted storage containers/trailers, POSSIBLE GOUND CONTAMINATION FROM STORAGE OF JUNK/DEBRIS ; (All of which were violations as stated in previous letters).” Id. at PZBA – CR 58

The petitioner argues that use of the extraneous information that is not related to the exact location at which the variance is requested is unlawful and unreasonable. On the contrary, the Court finds that the ZBA members “...could properly use their own knowledge, experience – as well as their common sense...” Dietz v Tuftonboro, 171 N.H. 614, 624 (2019). Here, the plaintiff seeks a variance at a location that does not allow for contractor's storage yards. It is highly relevant and appropriate for a ZBA member to consider the plaintiff's lack of compliance of his contractor's storage yard at another location when deciding whether to allow for an exception to the ordinance to allow a contractor's storage yard at the new location. The use of the Town's own records of the plaintiff's violations in considering whether to grant a variance for a non-conforming use in an area is neither unreasonable nor unlawful. Further, to the extent that the plaintiff argues to the Court that the violations were mitigated, the Court is not persuaded on the evidence before it that the ZBA's decision was unreasonable. See RSA 677:6.



## **II. ZBA findings**

The plaintiff argues that the ZBA made no written findings upon. The record does support that the ZBA made a decision memorialized in writing. The record supports the ZBA's determination that the plaintiff sought to operate a contractor's storage yard which was not permitted without the variance. The denial of the variance was issued in writing. As stated in 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.

A review of the certified record shows that these legal requirements were complied with by the Town. The record supports the reasons for the denial and indeed, the plaintiff cites those reasons as being unreasonable and unlawful. Specifically, that the plaintiff wished to operate a contractor's storage yard and that the plaintiff operated a similar business within their jurisdiction, that on numerous occasions, violated their ordinance.

Further, “[a]lthough disclosure of specific findings of fact by a board of adjustment may often facilitate judicial review, the absence of findings, at least where there is no request therefor, is not in and of itself error”; Kalil v. Town of Dummer Zoning Bd. of Adjustment, 155 N.H. 307, 310 (2007). The plaintiff did not show that such a request was made. Even if it was, the certified record does contain the reasons for denial.

Plaintiff also argues that is was entitled to an independent review by the ZBA. The plaintiff argues that its application for a variance was pending concurrent with its administrative appeal of the zoning determination. The Court disagrees with the plaintiff and finds no legal requirement for such a bifurcation. It is the same board that decides these issues and the decisions made thereof of those issues were not unlawful or unreasonable.

#### Conclusion

The ZBA found that the plaintiff’s proposed use was closely aligned with a Contractor’s Storage Yard. This was a non permitted use in the CI Zoning District. A variance request was made by the plaintiff and the ZBA did not grant it. The plaintiff failed to show that the ZBA made errors of law and the Court is not persuaded by the balance of probabilities, on the evidence before it, that said orders or decisions are unreasonable. Therefore, the plaintiff’s appeals are DENIED and the ZBA’s decisions are upheld.

SO ORDERED.

March 30, 2022  
Date

  
Judge Daniel I. St. Hilaire

Clerk's Notice of Decision  
Document Sent to Parties  
on 03/31/2022