

STATE OF NEW HAMPSHIRE  
SUPERIOR COURT

Rockingham, ss

RICHARD AND SANAZ ANTHONY

v.

TOWN OF PLAISTOW PLANNING BOARD

218-2019-CV-00968

FINAL ORDER

This matter is a statutory appeal from a decision of the Town of Plaistow Planning Board granting site plan approval for a commercial development on the Route 125 commercial corridor. See RSA 675:15. The court concludes that the Planning Board's approval was subject to at least one condition precedent that requires further Planning Board action. Therefore, the court lacks statutory jurisdiction over this appeal. The case is REMANDED to the Planning Board for further proceedings.

**The court apologizes to the parties and their stakeholders for reaching this threshold issue so late in the process.** Frankly, until the last revision of this order, the court labored under the supposition that all of the conditions imposed by the Planning Board were conditions subsequent. The court had been of the opinion that the wording of these conditions—requiring a further review and recommendation by the Town's engineer—obscured the fact that the engineer's review and the Planning Board's endorsement would be ministerial. However, the court now believes that the Planning Board imposed at least one true condition precedent.

## Background

The plaintiffs live on Village Way, a quiet residential street that runs behind Route 125. Village Way is lined with well-spaced, well-maintained single family homes. The street ends in a cul-de-sac. The backyards of every home face woods. A casual observer might speculate that the woods between Village Way and Route 125 is conservation land or a deeded buffer. But that is not the case. Although there is a wooded buffer, approximately 30 feet deep, behind the plaintiffs' home, most of the land between their backyard and Route 125 is zoned commercial. Further, that commercial land sits on one of the busiest commercial strips in New Hampshire, at the intersection of Route 125 and Main Street.

The commercial land in question consists of two abutting lots on that intersection. For decades one of those lots was the home of Sanborn's Candies. The other lot is undeveloped. The combined area of both lots is almost 20 acres. However, the back portion of the land includes many acres of wetlands.

Intervenor Milton Real Properties Of Massachusetts LLC ("Milton") owns a nearby heavy equipment leasing company. It wishes to relocate that company's operations to the two-lot parcel described above. More specifically, Milton wishes to construct a 12,000 square foot rental and maintenance facility, a 1,800 square foot wash building and an outdoor display area. The facility would include a 2,000 gallon diesel fuel tank and several 275 gallon tanks for storage of hydraulic fluid, motor oil and waste motor oil.

The Town's Code Enforcement Officer opined that all aspects of Milton's planned use were permitted as of right in the Town's Commercial District. The correctness of this zoning determination is not presently before the court.

The plaintiffs and others from the Village Way neighborhood raised several substantive objections to Milton's proposed site plan. One of their objections was that the alteration of terrain and the proposed use would cause increased drainage onto their properties. Milton's engineers, however, proposed a system of above and below ground drainage that they claimed would avoid any additional drainage onto plaintiff's land, even in 100 year storm events. The Town's engineer reviewed the drainage plans. The Planning Board heard from the plaintiffs, considered Milton's engineer's proposal, considered their own engineer's comments, and approved the final site plan subject to certain conditions.

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

a closed-loop water recycling system that keeps harmful solids out of the drainage and septic system.)

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

To be sure, some of the tall "cherry pickers" that Milton plans to store and lease might be seen from some second and third floor windows. Additionally, somebody who deliberately looks through the woods might well be able to spy the commercial use beyond the buffer. But as a practical matter, Milton's final site plan provides a significant buffer between the Village Way residential neighborhood and the Route 125 commercial strip.

With respect to particulars of these issues (i.e. drainage, risk of ground and water pollution and the creation of a possible eyesore), the court adopts the facts and legal argument set forth in the Milton's Trial Memorandum. (Docket Document 11). Thus, Milton's proffered facts are now the court's findings and rulings.

#### The Planning Board Imposed A Condition Precedent

Plaintiff argues that the Planning Board's decision was not final because it contained conditions precedent that required further discretionary Planning Board action

before final site plan approval. See, Saunders v. Town of Kingston, 160 N.H. 560, 564 (2010):

“[O]nly a final decision of the planning board is appealable under RSA 677:15, I. [citations omitted]. . . . Conditions precedent contemplate additional action on the part of the town, and, thus, cannot constitute final approval. Conditions subsequent, on the other hand, do not delay approval.

(internal quotation marks, bracketing and citation omitted); See also, Simpson Development Corp. v. City of Lebanon, 153 N.H. 506 (2006); Property Portfolio Group v. Town of Derry, 154 N.H. 610, 615 (2006).

In this case, the Planning Board’s site plan approval was accompanied by fourteen “stipulations.” Stipulations 3 and 7 are clearly conditions precedent:

3. In accordance with §230-8 of the Board’s Site Plan Review Regulations, and based on documentation and testimony received during the course of the Planning Board’s review of this application, i.e., as same relates to onsite stormwater discharge upon the associated on and offsite wetland environment, the board herein requires installation of monitoring wells; the number, location, proper testing, maintenance and operation of which shall be provided by the applicant, in consultation with the Town’s Consultant Engineer. Further, prior to Planning Board endorsement of the Plan, same shall be amended to reflect the aforementioned monitoring wells and their ongoing testing of onsite discharged stormwater.

7. Prior to Planning Board endorsement of the Plan, it shall be subject to final review and written recommendation by the Town’s Consultant Engineer, Keach- Nordstrom Associates, Inc.

The court reads Stipulations 3 and 7 together as follows: (a) the applicant must consult with the Town’s engineer regarding the number and location of monitoring wells, (b) the applicant must then amend the site plan to reflect the location of all monitoring wells, (c) the amended plan must then be reviewed by the Town’s engineer for a final recommendation to Planning Board, and (d) the Planning Board must make a final decision after receiving that recommendation. This construction of Stipulations 3 and 7

makes sense in light of the discussion concerning monitoring wells at the last Planning Board hearing on June 19, 2019 (CR, 455).

That said, it is possible that the Planning Board intended only that the site plan reflect the need for monitoring wells in general. If the Planning Board meant to impose a ministerial change to the site plan and a condition subsequent of monitoring it may say so on remand.

The Planning Board also required, in Stipulation 12, that the applicant complete a bond estimate worksheet so that the Town's engineer could recommend a bond amount to the Planning Board. This is stated in the form of a condition precedent. However, as Milton argues, the determination of the bond amount is both ministerial and collateral. The court does not believe that Stipulation 12 imposes a condition precedent.

May 18, 2020



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Andrew R. Schulman,  
Presiding Justice

Clerk's Notice of Decision  
Document Sent to Parties  
on 05/19/2020