


Clerk's Notice of Decision  
Document Sent to Parties  
on 06/11/2020

*STATE OF NEW HAMPSHIRE*

ROCKINGHAM, SS

SUPERIOR COURT

6-11-2020  
See margin order below.

  
Honorable Andrew R. Schulman  
June 11, 2020

Richard and Sanaz Anthony

v.

Town of Plaistow Planning Board

Case No. 218-2019-CV-00968

**PETITIONERS' MOTION FOR CLARIFICATION AND  
RECONSIDERATION**

NOW COME the above-named Petitioners, by and through their attorney, The Law Office of Scott E. Hogan, and move this Court to Clarify and Reconsider its Order dated May 19, 2020. In support of their Motion, the Petitioners state the following:

**No Jurisdiction, Therefore Remand to Planning Board**

1. In its Order the Court found 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.” Order at p.1.

2. Petitioners agree with the Court’s determination that the Planning Board imposed at least one substantive condition precedent, as argued in their original Petition, their Memorandum of Law, and in oral argument at the December 4, 2019 Merits Hearing. Thus Petitioners agree that a remand back to the Planning Board is appropriate. See, e.g., Petition for Certiorari Review, ¶12:

“This Petition has been filed within 30 days of the Board’s conditional approval, to ensure the Petitioners’ appellate rights should that decision somehow be deemed final approval. *If the Court finds that the conditional approval is NOT appealable until Final Approval is granted, the Court should stay the present Petition for Certiorari review, and give the Petitioners the right to amend the Petition following Final Approval.*” (Emphasis added).

3. However, the Court’s Order found that “the court lacks statutory jurisdiction over this appeal”, AND remanded the matter back to the Planning Board, with no further finding, or direction, or instruction as to the actual remand process, or the parties’ rights and procedure for bringing the matter back before the Court following the Board’s remand process.
4. The Petitioners read the Court’s Order (finding “...the court lacks statutory jurisdiction over this appeal) as a finding that the present Petition is not ripe for adjudication, until such time as the Planning Board holds a public hearing to render a final decision within the meaning of 677:15. Thereafter the Petitioners would be required to bring this action again, as if for the first time, and then required to serve the Plaistow Planning Board, return the service to the Court, receive the (new) Certified Record, and then appear at a Merits Hearing, with submissions of Memoranda of Law from counsel, after which the Court would render an Order on the merits, having established jurisdiction in that future matter.
5. The Respondent Town of Plaistow Planning Board, later joined by the Intervenor, has expressed its own reading of the Court’s Order, as articulated in its “Motion for Reconsideration and Clarification as to Jurisdiction”, filed earlier today, as:

“To reconcile the Court’s jurisdictional decision with its remand, the Planning Board interprets the Order to mean that the Court has reached only a preliminary and conditional jurisdictional conclusion, which will be either made final or revisited depending on what information the Planning Board provides the Court on remand.” Town’s 5-29-20 Motion, ¶4.

6. The Court does need to reconcile and clarify the parties’ readings of the Court’s Order, and the scope and terms of the remand process before the Planning Board, and the Petitioners’ ability to bring this matter forward to the Court after the remand process<sup>1</sup>.

The Court Must Reconsider its Order Regarding the “Contractor Yard-Zoning Determination” Issue

7. Somehow, in its Order the Court stated:

“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.**” May 19, 2020 Order, p.3. (Emphasis added).

8. *The Court is incorrect that “this zoning determination is not presently before the court”, as the issue was initially presented to the Planning Board during its review process, and was then presented and preserved in the initial Petition, in subsequent Memoranda, and specifically addressed in argument to the Court.* (See, e.g.:

**“The current approval by the Planning Board violates each of the local zoning and regulation requirements as follows, and is thus unlawful and independently unreasonable within the meaning of RSA 677:15:**

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<sup>1</sup> Throughout the review process the Petitioners and others testified and submitted evidence regarding the range of substantive, technical issues before the Board. At the time of the Board’s “decision” to end the public review process, and render a ‘conditional’ approval, there were continuing, outstanding technical issues still to be reviewed and reconciled by the Board. Instead of continuing to address those concerns within the public hearing process, the Board chose to end the process without resolving those outstanding issues, instead writing conditions to be addressed after approval, ending the Petitioners’ and the public’s ability to participate in the process.

\* The approval allows the establishment of a “Contractor’s Yard”, in specific violation of the Town’s prohibition of such use in this zoning district;

\* 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;” Petition, ¶26 (Emphasis added).

9. Further, the issue of the “Contractor’s Yard” was argued both as a violation of the Plaistow Zoning Ordinance, as being unpermitted, and was argued as otherwise being unlawful and unreasonable within the meaning of 677:15, as it presents numerous unmitigated impacts on the immediately adjoining residential neighborhood.
10. The Court and each of the parties had the original opportunity under the controlling 677:15 statutory scheme to indicate that this, or any other issue, should have been directed to the Zoning Board, but neither the Court nor any party initiated any such Motion, as required by the statute. The relevant portions of the statute state:

**“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.” (Emphasis added).**

11. No such Motion was ever initiated by the Court or any party. The issue is before the Court.

#### CONCLUSION

12. Given the arguments above, and those of the Respondent Town and the Intervenor, the Court must clarify its May 19, 2020 Order as to the Court’s jurisdiction over this matter as it pertains to the Court’s Remand Order, and it must reconsider its Order as to the “Contractor Yard zoning issue described above.

WHEREFORE, Petitioners pray that the Court will:

- A. Grant this Motion For Clarification And Reconsideration ; and,
- B. Grant such other relief as may be just and equitable.

Respectfully submitted,  
Richard and Sanaz Anthony

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

DATE: May 29, 2020

/s/Scott E. Hogan/

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CERTIFICATE OF SERVICE

I state that on this date I am filing this document with the Court's electronic filing system to all parties who have filed electronic service contacts in this case.

DATE: May 29, 2020

/s/ /Scott E. Hogan/  
Scott E. Hogan, Esq.

6-11-2020

First, the court apologizes again for reaching the jurisdictional issue so late in the process. The delay was unfair to all parties. But as explained in the earlier order, the court determined late in the game that it lacked statutory jurisdiction.

The present cross-motions to clarify present issues are a tempest in a teapot. Because the court lacks subject matter jurisdiction, the remand simply allows the Planning Board to pick up where it left off. If final approval is given, then plaintiff may file a new appeal with a new docket number. Of course, the defendant may elect to accept service and both parties may agree that the certified record in this case can serve as the certified record in the next case, as supplemented by the record made on remand. The court is hopeful that all parties can cooperate on such logistical matters.

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.



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