THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0601

CANDICE K. HARVEY

v.

TOWN OF BARRINGTON

APPEAL FROM THE FINAL ORDER OF THE STRAFFORD COUNTY SUPERIOR COURT PURSUANT TO RULE 7

BRIEF FOR THE INTERVENOR APPELLEE, GARVEY & COMPANY, LTD.

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STATEMENT OF THE CASE

Plaintiff appeals the Strafford County Superior Court (Howard, J.) Order affirming Barrington Planning Board's two-lot subdivision approval presented by Applicants David R. and Glenda J. Henderson ("Applicants") and Intervenor Garvey & Company, Ltd. ("Intervenor"). (App. 65-68, 40-42). Applicants' and Intervenor's interests are aligned. Intervenor has a contract to purchase Applicants' land for which the Planning Board's two-lot subdivision approval was granted.

Plaintiff/Appellant's ("Harvey") "Statement of the Case" and Appendix Table of Contents provide further procedural background. The transcript of the Trial Court's September 10, 2021 Webex hearing (Hereinafter "Tr.") has been filed with this Court.

Harvey's Appendix did not include the entire Trial Court Certified Record ("C.R.") as transmitted by the Town of Barrington to the Superior Court as required for Planning Board appeal review. Inclusion of the entire C.R. is not necessary. However, Harvey's Appendix excludes relevant portions considered by the Trial Court, which are submitted as a Supplemental Appendix (hereinafter "Supp. App.") as a companion filing with this Brief. Key documents excluded include a copy of the Applicants' 2021 Subdivision Plan (Supp. App. 2-7) ("the 2021 Plan") approved by the Barrington Planning Board's Notice of Decision, the Barrington Zoning Board of Adjustment Approval (Supp. Spp. 8), and meeting minutes of a Planning Board meeting. (Supp. App. 24).

By Assented to Motions to Enlarge the Record, filed by the parties' respective counsel, and approved by the Trial Court, four additional

Exhibits were submitted and considered as part of the Trial Court's Record. (See Tr. 3). Harvey's Supplemental Exhibits were included as the first two items of her Appendix (App. 19-20 and 21). Intervenor's Supplemental Exhibits, specifically referred to during argument before the Trial Court and specifically referenced and explained in Intervenor's Memorandum in Support of Upholding Barrington Planning Board Decision (App. 61-64) were not included in Harvey's Appendix. Intervenor's Assented to Motion to Supplement the Certified Record with attached Intervenor's Exhibit 1 and Intervenor's Exhibit 2, are relevant, were considered by the Trial Court and are attached. (Supp. App. 45- 51).

This Court's review of the Trial Court's decision on the Planning Board Appeal requires a determination of whether "a reasonable person could have reached the same decision as the Trial Court based on the evidence before it." Star Vector Corp. v. Town of Windham, 146 NH 490, 493 (2001) (quotation omitted). To the extent Harvey argued before the Trial Court, and again in her Brief, that the Trial Court wrongly interpreted the language of the Applicants' deed to Harvey's predecessor in title, repeated in Harvey's deed (App. 20, 66) (top of Trial Court's Order Page 2), any *de novo* review by this Court interpreting Harvey's deed's servient estate easement text should affirm the Trial Court as addressed by this Brief.

STATEMENT OF THE FACTS

The Trial Court's Statement of Facts, recited on the first and second page of its Order (App. 65-66) is concise, accurate, and annotated with respect to the C.R. and identified Exhibits. Harvey's Statement of Facts supplements the Court's, but its concluding remarks (concluding six lines of Harvey's Brief at page 4, and most of page 5) are more appropriately characterized as argument than facts.

Intervenor adds these facts to the above for further clarity. Applicants' (David and Glenda Henderson) acquired all of the land shown on the 2006 Plan and the 2021 Plan free of the easement in question. Applicants created the easement when they first subdivided their land and conveyed Lot 1-0 as shown on the 2006 Plan to Harvey's predecessor in title (Ward) using the deed text "[s]ubject to a forty foot (40') wide access and utility easement to benefit Lot 1-1 as shown" on the 2006 Plan. (App. 19 and App. 20, 66). This language made Harvey's lot the servient estate with respect to the easement benefitting Applicants' Lot 1-1 dominant estate. At that time, Applicants' dominant estate existed only as Lot 1-1 as shown on the 2006 Plan. At that time, Lot 1-1 had local ZBA and Planning Board approval subject to the one building limitation of the ZBA's Special Exception grant and 2006 Plan approval. New Hampshire law allows modification of such local land use board approvals. Some 15 years later, the new ZBA variance authorizing re-subdivision of Applicants' dominant estate and the Planning Board approval of the 2021 Plan gives rise to this case.

The Applicants, as grantor and author of the deed to Harvey's predecessor in title (Ward), used only the language "[s]ubject to a forty foot (40') wide access and utility easement to benefit Lot 1-1 as shown" on the 2006 Plan to express their intent about the easement benefit retained for their dominant estate. That deed language was repeated without change in the deed to Harvey.

Harvey's Brief (App. 4) and the Trial Court's Order (App. 65; see specifically at App. 66) explains that the Applicants obtained a variance from the Barrington ZBA in 2021 to modify the 2006 Note 12 Plan note limitation. This 2021 ZBA modification of the prior 2006 Special Exception approval was specifically noted in Note 7 to the 2021 Plan. (Supp .App. 51).

Harvey, as a noticed abutter to the 2021 ZBA matter, participated in some, but not all, ZBA hearings. (App. 29). Harvey had standing to, but did not appeal the ZBA's 2021 variance. (App. 29). The ZBA's approval thus became an approved exception to the Town of Barrington's Zoning Ordinance and Subdivision Regulations authorizing the presentation of Applicants' 2021 Planning Board Subdivision application, which was approved, appealed to the Trial Court, and now appealed to this Court.

In fulfilling conditions to the Barrington Planning Board's 2021 subdivision approval, the Applicants, with Intervenor's assistance, drafted and submitted the Declaration of Intent to Convey Lots With Reciprocal Access & Utility Easements and with Common Maintenance Obligations (Supp. App. 47). This Planning Board required declaration is further evidence of Applicants' intended retained easement benefit to use the easement in question (located on Harvey's servient estate) to benefit

Applicants' dominant estate to whatever extent Barrington's land use boards might have in the future modified the 2006 ZBA Special Exception and Planning Board approval of the 2006 Plan.

SUMMARY OF ARGUMENT

The Certified Record supports the approval by the Barrington Planning Board of the subdivision plan presented by Applicants and Intervenor. The Trial Court properly affirmed the Planning Board's decision. The Trial Court committed no legal error. The Record supports the Trial Court's Order. This Court should affirm.

ARGUMENT

THE TRIAL COURT PROPERLY UPHELD THE PLANNING BOARD'S DECISION

RSA 677:15, V, governs the Trial Court's review of a planning board's decision. RSA 677:15 states the Trial 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 [the board's] decision is unreasonable." Id. The trial court cannot set aside the planning board's decision unless there is a finding of unreasonableness or a specific error of law. Motorsports Holdings v. Town of Tamworth, 160 N.H. 95, 99, (2010). It is a limited review; the Trial Court must uphold the planning board's decision as long as its findings could be reasonably based. Id.

A. The Trial Court properly found that the Barrington Planning Board approval had no specific error of law.

At the second paragraph of her brief, Harvey argues that the Planning Board's subdivision approval and Trial Court affirmance violates RSA 674:41. Harvey misreads the statute. All lots shown on the 2006 and 2021 Plans have legal frontage and actual access (Applicants' land via the easement in question) to NH Route 9. The 2021 Plan fully complies with RSA 674:41.

At its public meetings, Harvey complained to the Barrington Planning Board only of an overburdening of the right of way with too many cars and that the original intent of the 2006 Plan should prevail. (App. 29). Her overburden assertion was never determined as fact by either the ZBA in granting a variance as a pre-condition to Applicants' subdivision application to the Planning Board, or the Planning Board in approving the 2021 Plan. The Trial Court reviewed the Planning Board's reasoning of these issues and found no legal error. (App. 65-68).

The Trial Court interpreted Harvey's deed correctly consistent with New Hampshire law. In reviewing an Applicants' subdivision plan, a planning board must determine if all terms of the zoning ordinance are met. Hoffman v. Town of Gilford, 147 N.H. 85, 88 (2001) (cited by Trial Court at App. 67). The Planning Board properly relied on the 2021 ZBA decision granting a variance to allow Applicants' Lot 1-1 to be subdivided into two lots if the Planning Board otherwise approved their application. Reliance on

the ZBA's decision as part of that review is legal and a fact relied upon by both the Planning Board and the Trial Court.

By its requirement to include Note 12 on the 2006 Plan, the Barrington Planning Board limited the Applicants' Lot 1-1 as one buildable location consistent with the 2006 ZBA granted Special Exception referenced in Note 11 on the 2006 Plan (App. 22). As pointed out by the Trial Court, "the deed itself does not limit the access to only one building site." (App. 66, 68). Applicants could have expressed such intent with additional deed text, but did not in their deed to Harvey's predecessor in title, which language was repeated in Harvey's deed (App. 20). The language in the Harvey deed (subject to . . . as shown on the 2006 Plan) conveyed the lot Harvey now owns as the servient estate, burdened by an easement retained by Applicants benefitting their dominant estate, then subject to 2006 ZBA and Planning Board approvals, but with no language limiting the possibility of those approvals being modified in the future. "A board of adjustment has the power to modify conditions previously imposed with respect to the grant of variance" Pope v. Little Boar's Head Dist., 145 N.H. 531, 535 (2000). The 2021 ZBA variance grant modified the local land use approval status of the Applicants' dominant estate, and the Planning Board, in 2021, properly relied on the ZBA's decision in approving the subdivision plan. Likewise, the Trial Court properly affirmed the Planning Board decision.

Harvey contends the ZBA had no authority to modify the previous subdivision plan. This is false. This Court has settled this question and further developed guidance on the standards for a re-subdivision of a past plan., "No applicable law or regulation …require[s] a subdivision of

property to meet any standard or requirement different from an initial subdivision" Feins v. Wilmot, 154 N.H 715, 718 (2007). "Were that the test, an owner of a subdivision, or any other property for which a land use approval was previously received, could not change the use of the property." Id.

In Feins, Petitioner Feins brought an application to its planning board seeking, in relevant part, a re-subdivision of a previous subdivision plan. Similar to this appeal, the Feins sought to take a subdivided lot on a plan and further divide that into more lots. Feins, at 716-16. The planning board denied their application, finding that the further subdivision did not conform to the original plan and did not meet the overall intent of the original subdivision plan. Id. Upon appeal, the trial court affirmed, but this Court remanded, finding that subdivision and re-subdivision have identical standards under planning board review in RSA 672:14, I, and therefore the intent of an original subdivision has no bearing on a future decision to re-subdivide. Feins at 717. A Planning Board's decision on whether to re-subdivide must rely on current zoning, including any ZBA approvals creating specific exceptions to a zoning ordinance, and planning considerations, not on a past plan. Id.

In the public meetings, Harvey argued that the Barrington Planning Board should rely on the original intent of the Henderson Plan. (App. 29). The Planning Board discussion shows a rejection of that argument and an understanding that it was making a decision based on the merits alone of the application and not the intent of a previous plan:

> J. Brann also expressed that they are bound by the regulations and if they were to make any decision on a basis other than the approved regulation that decision would be overturned. J. Brann explained that if an applicant meets all the regulations the Board was bound to approve in application.

(App. 30) (underlining in original). The Barrington Planning Board acted legally in relying on the merits of the application to approve it. Based on the expanded C.R., and arguments of counsel, the Trial Court properly approved the Planning Board's decision.

Harvey argues for review of a ZBA determination that is not on appeal. Harvey attended ZBA hearings and was aware of the pending ZBA action, yet she neither attended the ZBA hearing at which the Applicants' 2021 variance was granted, nor appealed the variance decision. She slept on her rights to have this Court review the ZBA decision.

The ZBA's 2021 variance grant authorizing the possible subdivision of Applicants' dominant estate into two building lots (subsequently approved by the Planning Board) is a fact, relied upon by the Planning Board and should be treated as *prima facie* lawful. See Trustees. of Dartmouth College v. Town of Hanover, 171 N.H. 497 (2018) (The trial court treats the factual findings of the Planning Board as prima facie lawful). The Planning Board relied on the most recent, 2021 relevant final decision by the ZBA, which is legal. The Trial Court was correct in finding no error of law by the Barrington Planning Board relying on that 2021 granted variance.

Harvey further argues there was a legal error because the 2006 Plan and the deed created an easement that limited use of Applicants' dominant

estate to one buildable lot. A planning board is limited in its review of an application. "Site plan review is designed to insure that uses permitted by a zoning ordinance are 'constructed on a site in such a way that they fit into the area in which they are being constructed without causing drainage, traffic, or lighting problems.'" Summa Humma Enters. v. Town of Tilton, 151 N.H. 75, 78 (2004) (quoting 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 30.01, at 425 (2000)). "Site plan review is intended to ensure 'that sites will be developed in a safe and attractive manner and in a way that will not involve danger or injury to the health, safety, or prosperity of abutting property owners or the general public.' Id. (quotation omitted)..." Trs. of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497 (N.H. 2018). A planning board is not equipped or expected to make legal determinations regarding deeds. The Barrington Planning Board echoed this in their discussion:

> S. Diamond asked if the Board had a responsibility to assess whether easements are held and used for the purpose that they are there for.
>
> M. Gasses explained that the Board members are not attorneys. The Town attorney was consulted, and the attorney came back with the same answer. M. Gasses explained that these are private property issues.

(App. 30) (underlining in original). The Planning Board was obligated to review the application before it and not get entwined with legal questions regarding the language of an easement. It did not commit legal error on an issue that was beyond its scope.

The Trial Court committed no legal error rejecting Harvey's argument that the 2006 Plan and deed together created an easement that

limited Applicants' dominant estate to one building lot. Harvey relies on Soukup v. Brooks, 159 N.H. 9 (2009) to support her argument. Support from Soukup is misplaced. Soukup is an action to quiet title, with the court making a determination of law regarding an easement. In Soukup, the Court focused on a dominant estate land owner's right to extend a retained easement benefit to an after acquired, non-dominant estate (land adjoining the originally benefitted dominant estate).

Typically, an intended extension of such an easement access benefit for property other than the dominant estate represents an overburden of the servient estate, regardless of the amount of usage. Ettinger v. Pomeroy Ltd. Partnership, 166 N.H. 447, 451 (2014). The Soukup Court, however, found the language used by the author of the deed creating the retained easement benefitting the dominant estate (then later extended to the adjoining property not part of the original dominant estate) sufficiently broad to manifest an intent allowing such extended access. The Soukup Court did not find the language to preclude use of the easement to benefit the additional land. Soukup, Supra. at 19. A summary of this rationale is made by the Ettinger Court, Supra. at 451-452.

Unlike the facts in Soukup, in this case the Applicants' ZBA and Planning Board approved expanded use of their retained easement provided access not to an adjoining non-dominant estate parcel, but to the original dominant estate (Lot 1-1 as shown on the 2006 Plan). And, like the facts in Soukup, in this case the Applicants' deed text creating the burden on the servient estate, did not preclude use of the easement to benefit a building lot subdivided from the dominant estate as it existed in 2006 as shown on the 2006 Plan. The Trial Court correctly concluded that "the deed itself does

not limit the access to only one building site" with reference to the deed text "subject to a forty foot (40') wide access and utility easement to benefit Lot 1-1 as shown" on the 2006 Plan. (App. 66).

The Trial Court's interpretation of the deed as explained above is consistent with the rule of reason summarized by this Court in Sakansky v. Wein, 86 N.H. 337 (1933). Sorting out facts of a servient land owner's desire to build over defined easement land providing access to an abutter's dominant estate, and limiting the height of a pass-through in the new construction to eight feet (but offering to provide alternative access to the precisely defined easement), the Sakansky Court provides an insight to the application of the rule of reason when interpreting deed text relating to easements. Id. Rejecting an argument advanced that what is reasonable must be considered in light of the situation only as it was at the time of the easement grant, the Court explained: "[w]hat is or is not a reasonable use of a way does not become crystallized at any particular moment of time. Changing needs of either owner may operate to make unreasonable a use of the way previously reasonable, or to make reasonable a use previously unreasonable. There is an element of time, as well as of space, in this question of reasonableness." Id at 341.

The Applicants' limited "subject to . . . as shown" on the 2006 Plan text certainly did not intend for the 2006 Plan Note 12 to be incorporated by reference as a time and use limiting interpretation of the retained easement benefit. The Trial Court's interpretation of the easement text is correct. Intervenor's counsel argued the very point before the Trial Court. (Tr. 11-13). Harvey's argument that she relied on the 2006 Note 12 limitation as a permanent limitation on her servient estate is one of unjustifiable reliance.

She bought her property with notice of the easement existing, subject to past, but modifiable, local land use board approvals. There is no ambiguity in that. As an abutter, she or any future owner of her property would receive notice of any dominant estate owner's application to modify past approvals. Harvey, in fact, received such notice and appeared before the ZBA and Planning Board, but never appealed the ZBA's 2021 variance grant.

That the Trial Court gave meaning to Applicants' "subject to . . ." words as it did is consistent with the rule of reason summarized by this Court in Heartz v. Concord, 148 N.H. 325 (2002). Applicants' "subject to . . ." text is general in nature, therefore the rule of reason applies and it is perfectly reasonable to interpret the deed consistent with the reasonable approvals given by the Barrington ZBA and Planning Board in 2021. The Applicants' "subject to . . ." words are not a detailed definition in their own right. As the Trial Court pointed out, "the deed itself did not limit the access to only one building site." (App. 67).

B. The trial court properly found that the Barrington Planning Board approval was reasonable.

With no legal error having been committed by the Trial Court, this Court's review of the Trial Court's decision requires determination of whether "a reasonable person could have reached the same decision as the Trial Court based on the evidence before it." Star Vector Corp. v. Town of Windham, 146 N.H. 490, 493, 776 A.2d 138 (2001) (quotation omitted); Id.

The Planning Board considered the application in depth, by reviewing the details of the application, which included mention and enclosure of the ZBA approval. (Supp. App. 2-7). The application itself explained in its definition that, "the drive[way] as located is a [right of way] over the front lot, which was granted under a previous ZBA approval (ZB 06/605) due to the amount of wetlands on the frontage of the lot. (see the enclosed approval 239-1-TC-21-ZBA Var)" (Supp. App. 4). The Planning Board held two public meetings, at which they heard, considered and discussed Harvey's disagreement. (See Supp. App. 24-40 and App. 23- 39). The planning board considered counsel statements and determined they were bound to the application itself, including the ZBA approval.

There was little factual evidence brought by Harvey for the Planning Board to consider regarding her concerns. The Harveys contested the addition of the second lot being added and therefore the addition of one more household of cars. (App. 28). She was concerned about "4-5 cars per household racing up and down the driveway." Id. Garvey testified that Harvey's business on Harvey Lot 1-0 already has significant car traffic of 12-15 cars in the parking lot and adding one household would not add more traffic than that use. Id.

However, the ZBA found the variance in support of substantial justice with no finding of overburdening of the easement. (Supp. App. 8). The application spoke to the specifications of the driveway being 20 feet wide to allow for passage of two vehicles. (Supp. App. 4). It is a reasonable

conclusion that a driveway wide enough for two cars is appropriate for an additional household and not an overburden of a 40 foot wide easement.

The Barrington Planning Board reasonably weighed the facts before it and determined that there would be no future overburdening of the easement. It determined the site application should be approved. A reasonable person could have reached the same decision and therefore the Trial Court was obligated to affirm the decision.

CONCLUSION

For all the foregoing reasons, the Strafford County Superior Court Order dated October 28, 2021 affirming the decision of the Barrington Planning Board's approval of the 2021 Plan should be affirmed.

REQUEST FOR ORAL ARGUMENT

Intervenor Appellee Garvey requests oral argument be scheduled and he be allowed fifteen (15) minutes for oral argument.

Respectfully submitted,

GARVEY & COMPANY, LTD,
Intervenor Appellee

By His Attorneys:
Wyskiel, Boc, Tillinghast & Bolduc, PA

Dated: July 1, 2022

By: /s/Christopher A. Wyskiel
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CERTIFICATE OF SERVICE

I hereby certify that on this date I am sending a copy of this document as required by the rules of the Court. I am electronically sending this document through the Court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts (e-mail addresses) in this case. I am mailing or hand-delivering copies to all other interested parties.

Dated: July 1, 2022

/s/Christopher A. Wyskiel
Christopher A. Wyskiel, Esquire