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THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2022-0707, PPI Enterprises, LLC v. Town of Windham, the court on February 2, 2024, issued the following order:

The court has reviewed the written arguments and the record submitted on appeal, has considered the oral arguments of the parties, and has determined to resolve the case by way of this order. See Sup. Ct. R. 20(2). The plaintiff, PPI Enterprises, LLC (PPI), appeals orders of the Superior Court (Attorri, J.) affirming a decision of the planning board (Board) for the defendant, the Town of Windham (Town), denying PPI's site plan application. PPI also appeals the trial court's determination that PPI's inverse condemnation claim is not ripe. We affirm.

I

This appeal arises out of ongoing litigation between PPI and the Town regarding PPI's site plan application to construct a self-storage facility at 14 Ledge Road. Many of the underlying facts and related procedural history are set forth in our prior order and will not be repeated here. See PPI Enterprises, LLC v. Town of Windham, Nos. 2020-0249 and 2020-0250 (non-precedential order at 1–3), 2021 WL 2580598 (N.H. June 23, 2021). As pertinent to this appeal, the facts set forth below were found by the trial court or are supported by the record.

In September 2018, PPI filed a site plan application which included an access road with an eight-percent grade. Throughout numerous public hearings on the application, the Board's primary

concern centered around the amount of proposed blasting called for by the application. PPI agreed to comply with all applicable blasting regulations, including the Town's ordinance, and, in an effort to further address the Board's concerns, amended its application to increase the grade of the access road to ten percent in order to reduce the amount of blasting. In June 2019, the Board denied the application as amended. The Board based its decision on section 100 of the Windham Zoning Ordinance, which sets forth its general purposes. See id. at *1.

After PPI filed a series of appeals — including to the Town's zoning board of adjustment, superior court, and this court — we remanded the case for the Board to "resume its deliberations and issue a final decision on PPI's site plan application." Id. at *4. In August 2021, the Board again denied the application, due, in part, to safety concerns regarding the ten-percent grade. The Board's grounds also included threats to public health and safety and the possible impact of contamination of surface and groundwater from blasting.

PPI appealed the Board's denial to the superior court, asserting that the grounds stated by the Board did not provide a reasonable basis for its decision. In addition, PPI argued that the Board's consecutive denials of its application had rendered the property "essentially undevelopable, therefore resulting in an 'inverse condemnation' without just compensation."

In July 2022, following a hearing, the trial court upheld the Board's decision, finding that "the Board's safety concerns arising from the grade of the proposed access road were sufficient" to support denial of the application. However, the court directed the parties to

submit further briefing with respect to PPI's inverse condemnation claim, expressing its concern that the Board "seemed intent on preventing PPI from developing the Property at all, inasmuch as such development would necessarily involve blasting." In support, the trial court observed that the Town: (1) considers the property "geographically challenged"; (2) effectively concedes that blasting is required to develop the property; (3) is "very concerned about blasting" on the property because of issues that arose from the previous owner's blasting; and (4) believes that the blasting ordinance "assumes a blank slate" and that "mere compliance with the ordinance would not be enough to gain approval" from the Board given the prior history of the property. (Quotations omitted.) The court also observed that the Board had twice denied PPI's application because of concerns about blasting "regardless of whether PPI's application complies with the Town's blasting ordinance." Thus, it "[struck] the Court as a foregone conclusion" that the Board would "certainly deny" a revised application with an eight-percent grade "since it would necessarily entail a greater amount of blasting than the application which ha[d] now been twice denied." (Quotations omitted.) Therefore, the trial court concluded, there was "a serious question" whether the Board's actions had "substantially interfered with, or deprived PPI of, the use of" its property.

In October 2022, after reviewing the parties' supplemental filings, the trial court determined that PPI's inverse condemnation claim was not ripe for review. The court found that there were "at least two possible paths" to developing the property — first, by exploring the possibility of obtaining access to the site

"via an easement over an abutting commercial lot," or, second, by submitting a site plan application "which returns to the 8% driveway grade required by the Chief of Police and the Board," and which the Town had "affirmatively asserted that the Board will fairly consider." Given those options, the trial court could not conclude that PPI would "suffer undue hardship if the Court [did] not address its takings claim at this juncture" or that "the Board's denial of the [site plan application] constitute[d] a final and authoritative determination of the type and intensity of development legally permitted" on the site. This appeal followed.

II

On appeal, PPI argues that the trial court erred by affirming the Board's decision to deny the site plan application and in determining that PPI's inverse condemnation claim is not ripe. Our review of a trial court's decision on an appeal arising from a decision of a planning board is limited. See Girard v. Town of Plymouth, 172 N.H. 576, 581 (2019). We will reverse the trial court's decision only if it is not supported by the evidence or is legally erroneous. Id. We review the trial court's decision to determine whether a reasonable person could have reached the same decision as the trial court based on the evidence before it. Id. at 582.

PPI first asserts that the trial court erred in upholding the Board's denial on the ground that the ten-percent grade violated the standard in the road grade regulation. PPI argues that "nothing in the road grade regulation itself" supports its applicability to a site driveway and, therefore, that ground for denial of PPI's application was "unlawful and unreasonable."

However, regardless of whether the so-called road regulations applied, the court found that "the Board's safety concerns arising from the grade of the proposed access road were sufficient in themselves to support denial of the application." The trial court's finding is supported by the record.

At a hearing in May 2019, the Board considered PPI's amended site plan application to increase the grade of the driveway to ten percent. The meeting minutes reflect that the Board expressed disfavor with the increased grade, "considering that many people who would be using it would be inexperienced in driving box trucks." According to the minutes, at the hearing in August 2021 following remand from this court, the Chair "said that the grade of the road was questionable as it was presented as 10%," that "the police department disagreed that the grade was not a safety issue," and "questioned the health and safety of the sight lines from the proposed driveway." Accordingly, we agree with the Town that "[g]iven the nature of the expected traffic at a self-storage facility, and the projected capabilities of drivers, it was entirely reasonable for the Planning Board not to approve a 10% slope." See Star Vector Corp. v. Town of Windham, 146 N.H. 490, 493 (2001) (explaining that if any of the reasons offered by the Board to reject a site plan application supports its decision, then an appeal from the Board's denial must fail).

PPI next argues that the trial court erred in refusing to consider the merits of its inverse condemnation claim, asserting that the court's "conclusion that PPI's inverse condemnation claim was not ripe was unlawful and lacked any record support." According to PPI, the trial court's reliance

on town counsel's assertion that the Board would consider a revised application in good faith "had no record support being contrary to the actual conduct of the Planning Board in the case," and the court's finding that "there were at least two alternatives that could be pursued by PPI was likewise unlawful and unsupported by the record." Further, PPI asserts, it would be "futile" to submit an application with an eight-percent grade because, even if it could obtain alternative access to the site, some amount of blasting would be required to complete the project, and the Board has "repeatedly adopted the position that the Property is not suitable for development due to the need for blasting."

"[A]rbitrary or unreasonable restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking . . . requiring the payment of just compensation." Hill-Grant Living Trust v. Kearsarge Lighting Precinct, 159 N.H. 529, 532 (2009) (quotation omitted). "While the owner need not be deprived of all valuable use of his property, a taking occurs if the denial of use is substantial and is especially onerous." Id. (quotations and brackets omitted). "There can be no set test to determine when regulation goes too far and becomes a taking. Each case must be determined under its own circumstances." Id. at 532–33 (quotation omitted).

"It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." Id. at 533 (quotation omitted). "A court cannot determine whether a regulation has gone

'too far' unless it knows how far the regulation goes." Id. (quotation omitted). Thus, "a State taking claim must meet the ripeness requirement of presenting a final decision of the applicable governmental entity regarding the application of the regulations to the property at issue." Id. (quotation and brackets omitted).

Ripeness relates to the degree to which the defined issues in a case are based on actual facts and are capable of being adjudicated on an adequately developed record. Univ. Sys. of N.H. Bd. of Trs. v. Dorfsman, 168 N.H. 450, 455 (2015). Although we have not adopted a formal test for ripeness, we have found persuasive a two-pronged analysis that evaluates the fitness of the issue for judicial determination and the hardship to the parties if the court declines to consider the issue. Id. With respect to the first prong of the analysis, fitness for judicial review, a claim is fit for decision when: (1) the issues raised are primarily legal; (2) they do not require further factual development; and (3) the challenged action is final. Id. The second prong of the ripeness analysis requires that the contested action impose an impact on the parties sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage. Id.

Here, the trial court recognized that whether PPI's condemnation claim was ripe for review presented "a close call" and that "[g]iven the lengthy proceedings before the Board and PPI's good faith efforts to alleviate the Board's concerns, PPI's skepticism as to whether the Board would approve an alternate proposal for developing the Property [was] understandable." Nonetheless, in determining that

the Board's denial of the application did not constitute a "final and authoritative determination of the type and intensity of development legally permitted," the court relied on the fact that since it issued its July 2022 order the Town had "repeatedly asserted that the Board would not necessarily deny subsequent applications to develop the Property." For example, the court noted that the Town has represented that PPI "could re-submit a new application that conforms with the 8% grade deemed acceptable by the Police Chief, and with other mitigation or modification, it could be found acceptable." (Brackets omitted.)

Should PPI choose to resubmit a site plan application that proposes an eight-percent grade, the Board shall, as represented by the Town and relied on by the trial court, "fairly consider the merits of such an application." See Hill-Grant Living Trust, 158 N.H. at 538 ("Government authorities . . . may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." (quotation omitted)). Accordingly, we agree with the trial court that, given the Town's affirmative representations, the Board's denial of PPI's amended site plan application proposing a ten-percent grade does not, as a matter of law, present a final decision regarding the application of the regulations to the property at issue and, therefore, we affirm the court's decision that PPI's taking claim is not ripe.

Affirmed.

MACDONALD, C.J., and BASSETT J., concurred; HANTZ MARCONI, J., concurred specially.

Timothy A. Gudas,
Clerk

HANTZ MARCONI, J., concurring specially. I concur in the result reached by my colleagues. I write separately to point out that this applicant has become wedged between the proverbial "rock and hard place." First, the applicant was denied for concerns over the amount of on-site blasting and then, after increasing the road grade to reduce the blasting, the applicant was denied for the excessively steep road grade. The town has represented that a resubmitted application that "conforms with the 8% grade . . . and with other mitigation or modification, could be found acceptable." I trust the Board will articulate the "other [reasonable] mitigation or modification" that will render the application acceptable. Carbonneau v. Town of Rye, 120 N.H. 96, 99 (1980).

Filed October 14, 2022

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

PPI Enterprises, LLC

v.

Town of Windham

No.: 218-2021-CV-00959

ORDER ON TAKINGS CLAIM

In this action, Plaintiff PPI Enterprises, LLC ("PPI") appealed a decision of the Planning Board (the "Board") for the Town of Windham (the "Town") denying PPI's site plan application (the "Application") to construct a self-storage facility located at 14 Ledge Road (the "Property"). See Doc. 1; see also Doc. 4 (Certified Record ("C.R.")); Doc. 11 (Town's Hr'g Mem.); Doc. 12 (PPI's Hr'g Mem.). PPI also alleged a constitutional takings claim based on the Board's denial of the Application. See Doc. 1 ¶¶ 127–147. By Order dated July 11, 2022, the Court concluded that in light of "the Board's safety concerns arising from the grade of the proposed access road," the Board's denial of the Application "must be upheld." Doc. 13 at 7. However, because the Court perceived that "PPI may well have a meritorious inverse condemnation claim," the Court directed the parties to submit further briefing on that issue. See id. at 9–12. After review of the arguments raised in the supplemental

filings, see Doc. 16 (Town's Supp. Mem.); Doc. 17 (PPI's Supp. Mem.); Doc. 18 (Town's Reply to PPI's Supp. Mem.), and upon consideration of the overall history of this case, the Court concludes that PPI's inverse condemnation claim is not ripe for review.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are relevant here. In May of 2018, PPI filed the Application, which sought to construct a self-storage facility and an access road or driveway leading thereto. See C.R. Tab 3 (Application). The Board first considered the Application during a June 20, 2018 hearing. See id. at Tab 9. At that time, "Vice Chair Gosselin immediately addressed the most pressing issue in the minds of residents . . . and asked if blasting would be needed . . . ." Id. at 4. PPI's representative, Mr. Burns, "confirmed that some blasting would be utilized" but said PPI "was open to exploring ways to minimizing blasting on this site." Id. During public comment, one abutter opined that the Town "should buy this land to keep it from ever being developed." Id. In response to this and similar comments, "Vice Chair Gosselin" advised abutters to "purchas[e] the land themselves or draft[] a warrant article for the [T]own to purchase the land if they wanted to be assured there would never be any development at the site." Id. at 5.

Mindful of the concerns shared by the Board and the abutters, over time PPI amended the Application to reduce the amount of blasting that would be necessary. See, e.g. id. at Tab 12 (September 5, 2018 letter requesting waiver from what PPI perceived to be required number of parking spots in effort to reduce blasting). In September of 2018, the Town's Chief of

Police advised the Board to "[e]nsure that the driveway grade does not exceed 8%." Id. at Tab 19. Nevertheless, in a further effort to reduce blasting, PPI subsequently amended the Application such that a portion of the driveway would now have a grade of 10%. See id. at Tab 51 (April 24, 2019 letter) at 1.

At various points during the series of public hearings, Mr. Burns was asked whether the Property could be developed without any blasting. See id. at Tab 25 (Board's October 3, 2018 meeting minutes) at 3; id. at Tab 31 (Board's December 5, 2018 meeting minutes) at 3. In response to one such inquiry, Mr. Burns opined that "the pad site where the building would go might be possible but there would be no way to create a road up to that area with no blasting whatsoever." Id.

In February of 2019, the Board asked "about the possibility of extending the driveway behind the proposed structure and sharing a driveway with a neighbor instead of trying to blast and fill to create a roadway." Id. at Tab 36 (Board's February 6, 2019 meeting minutes) at 2. The Board re-raised this possibility in March of 2019. See id. at Tab 45 (Board's March 6, 2019 meeting minutes) at 3. In response, Mr. Burns described that possibility "as a non-starter." Id. The minutes do not reflect that Mr. Burns elaborated on his assessment of that proposal. See id. Later in the meeting, the owner of the Property, Mr. Peterson, reiterated that "blasting had to be used to build the new road to the building." Id. at 4. He claimed that the "only way the plan could be done solely with hammering [wa]s if the existing road could be used." Id. He noted, however, that the existing road ran afoul

of the site plan regulations in several respects. Id. Later in that meeting, Mr. Peterson asked whether the Application would be approved "if this site could be hammered instead of blasted . . . ." Id. at 6. The Board and the abutters responded favorably to that question. See id.

Ultimately, PPI requested that the Board vote on the Application as modified to include an access road with (at most) a 10% grade. See id. at Tab 62 (Board's June 5, 2019 meeting minutes) at 2. This proposal involved some amount of blasting. See id. Before the Board voted on the Application, Mr. Partington "lamented the lack of a blasting expert to advise the [B]oard" and suggested that the Board hire "its own expert." Id. at Tab 53 (Board's May 1, 2019 meeting minutes) at 3. The Board thereafter voted to "retain an expert on blasting specific to this site." Id. at 4. During the next hearing, however, Planning Board Director Gregory explained that "all of the experts he had contacted had declined to attend and that [PPI] had found and compensated th[at] evening's presenter." Id. at Tab 62 at 2. While the expert clarified that he "was not in the employ of" PPI and represented "the blasting industry," id. at 5, several Board members expressed frustration at this turn of events.

After the case took a unique and protracted procedural course, the Board ultimately voted to deny the Application. See id. at Tab 66 (Board's August 18, 2021 meeting minutes) at 3–5. While the gravamen of the Board's deliberations concerned blasting, see, e.g., id. at 3–4, the Board also expressed concern regarding the grade of the driveway, see id. In discussing the

Board's concerns about blasting, several Board members lamented the absence of site-specific analysis as to the safety of the proposed blasting work given the unique history of the Property. See id.; see also id. at Tab 61 (PowerPoint presentation describing the nature and risks of blasting, generally, without reference to the history or current circumstances concerning this specific site).

In upholding the Board's denial of the Application, the Court concluded that "the Board's safety concerns arising from the grade of the proposed access road were sufficient to support denial . . . ." Doc. 13 at 7. The Court observed, however, that "PPI may well have a meritorious inverse condemnation claim." See id. at 9. The Court summarized the basis for this view as follows:

> [T]he Town: (1) considers the Property "geographically challenged," see Doc. 11 at 2; (2) effectively concedes that blasting is "required to develop the property," see id.; (3) is very concerned about blasting on the Property as a result of Meadowcroft's previous blasting, see Tab 67 at 3–5; (4) believes the blasting ordinance "assumes a blank slate" and that mere compliance with the ordinance would not be enough to gain approval given the Property's history, see Record of H'rg; and (5) has denied PPI's application twice because of concerns about blasting, regardless of whether PPI's application complies with the Town's blasting ordinance . . . . It strikes

> the Court as a foregone conclusion that, if PPI were now to submit a revised application with an 8% road grade (as it has expressed a readiness to do), the Board would certainly deny it, since it would necessarily entail a greater amount of blasting than the application which has now been twice denied.

Id. at 11. Accordingly, the Court directed the parties to submit further legal briefing with respect to PPI's inverse condemnation claim. See id. at 11–12.

ANALYSIS

Since the Court issued its July 11, 2022 Order, the Town has repeatedly asserted that the Board would not necessarily deny subsequent applications to develop the Property. See, e.g., Doc. 15 (Town's Obj. to PPI's Mot. Reconsider) at 3 ("The Defendant does not concede that if the applicant returned to the . . . Board with an 8% driveway slope, it would be rejected . . . . The fact remains that [PPI] could re-submit a new application [that] conforms with the 8% grade deemed acceptable by the Police Chief, and with other mitigation or modification, it could be found acceptable."). For that reason, the Town argues (among other things) that PPI's inverse condemnation claim is not yet ripe. See Doc. 16 at 4–5 (citing Hill-Grant Living Trust v. Kearsage Lighting Precinct, 159 N.H. 529, 535 (2009) "for the proposition that any claim for taking damages is premature until the Town refuses alternative means to access the site").

"Inverse condemnation occurs when a governmental body takes property in fact but does not

formally exercise the power of eminent domain." Sundell v. Town of New London, 119 N.H. 839, 845 (1979). The New Hampshire Supreme Court has recognized that "arbitrary or unreasonable restrictions which substantially deprive the owner of the economically viable use of his land in order to benefit the public in some way constitute a taking . . . requiring the payment of just compensation." Hill-Grant Living Tr., 159 N.H. at 532 (citation and quotations omitted). "While the owner need not be deprived of all valuable use of his property, a taking occurs if the denial of use is substantial and is especially onerous." Id. (citation, quotations and brackets omitted).

Notably, "an essential prerequisite" to the assertion of a "regulatory takings claim . . . is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." Id. at 533 (quoting MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 348 (1986)). This is because a "court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." Id. (quoting Yolo County, 477 U.S. at 348). For that reason, "a State taking claim must meet the ripeness requirement of presenting a final decision of the applicable governmental entity regarding the application of the regulations to the property at issue." Id. (citation, quotations and brackets omitted).

The Supreme Court has summarized the application of the ripeness doctrine in the context of a regulatory action, as follows:

> Ripeness relates to the degree to which the defined issues in a case are based on actual facts and are capable of being adjudicated on an adequately developed record. In determining whether a claim is ripe, we evaluate the fitness of the claim for judicial determination and the hardship to the parties caused by the court's decision not to address an issue. A claim is fit for determination when it raises primarily legal issues, it does not require further factual development, and the challenged action is final. In evaluating hardship on the parties, we examine whether the contested action imposes an impact upon the parties that is sufficiently direct and immediate to render the issue appropriate for judicial review at this stage. Whether any regulatory action results in an unconstitutional taking of private property is a question that turns upon the specific facts of that case.

Soc'y for the Prot. of New Hampshire Forests v. N. Pass Transmission, LLC, No. 2016-0322, 2017 WL 695385, at *2 (N.H. Jan. 30, 2017) (non-precedential) (citations, quotations, and brackets omitted) (holding inverse condemnation claim based on "potential approval of a license" was "too speculative . . . for judicial determination").

Upon review, whether PPI's inverse condemnation claim is ripe for review presents a close call. Given the lengthy proceedings before the Board and PPI's good

faith efforts to alleviate the Board's concerns, PPI's skepticism as to whether the Board would approve an alternate proposal for developing the Property is understandable. Indeed, the Court expressed similar concerns in the July 11, 2022 Order. Yet, after that Order issued, the Town has affirmatively stated that the Board will consider, in good faith, any alternative plans to develop the Property. The Court takes the Town at its word in this regard. But see Hill-Grant Living Tr., 159 N.H. at 538 ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land use procedures in order to avoid a final decision." (citation and quotations omitted)).

In light of the foregoing, the Court agrees with the Town that PPI's inverse condemnation claim is not yet ripe.[1] Having carefully reviewed the certified record, it strikes the Court that there are at least two possible paths to developing the Property. The first involves the Board's suggestion of obtaining access to the pad site via an easement over an abutting commercial lot,

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[1] Given this conclusion, the Court need not address the Town's other arguments as to the viability of PPI's inverse condemnation claim. The Court notes, however, that the Order issued in the Meadowcroft litigation reflects that the Town expressly indicated it would "conduct a full re-evaluation of" an "amended development plan" concerning the Property. See Doc. 11, Ex. A, at 21. In addition, the Property has apparently been taxed as if it is developable. Further, when the Board first began to consider PPI's Application, Vice Chair Gosselin stated that the abutters or the Town would need to purchase the Property from PPI in order to be assured there would never be any development at the site. These considerations seemingly undermine the Town's assertion that PPI should have known the Property could not be developed and thus that any hardship here is self-created. See Doc. 16 at 5–6.

as both Mr. Peterson and Mr. Burns indicated that the pad site could be developed without blasting. While Mr. Burns characterized the possibility of obtaining access to the pad site in this fashion as a "non-starter," the record in no way expands on that statement. It may be that PPI fully explored that approach but could not secure an easement. It may also be that PPI simply prefers a private means of access. Or the explanation may be something else entirely.

On the record presented, the Court can only speculate as to the feasibility of this approach. See id. at 535 (holding "affiant's assertion" that property was inaccessible was "merely a conclusory allegation" and thus insufficient to defeat summary judgment). The record does not demonstrate that PPI adequately explained to the Board why this approach was not feasible, or that this approach is in fact impossible. PPI must address this issue before the Court can find that PPI's inverse condemnation claim is ripe for review. See id. at 533 (quoting Yolo County, 477 U.S. at 348 for the proposition that "an essential prerequisite" to the assertion of a "regulatory takings claim . . . is a final and authoritative determination of the type and intensity of development legally permitted").

Alternatively, PPI could submit a site plan application which returns to the 8% driveway grade required by the Chief of Police and the Board. While that scenario would apparently necessitate some amount of blasting, PPI now has the benefit of the Board's detailed explanation as to what information was missing from the instant Application with respect to that topic. See C.R. Tab 66 at 3–5; see also id. at

Tab 67 (memorandum authored by Board Member Post) (noting PPI had not fully answered the Board's questions regarding, among other things, the specific differences between the proposed blasting and the blasting that had previously been performed on the Property, a plan for dust control, and a plan for appropriately responding to damage reports from abutters). Drawing on the lengthy proceedings that have already occurred, the Board will presumably be in a position to quickly and clearly identify the remaining areas of concern so that PPI has a full and fair opportunity to address same in the event that PPI pursues this approach. As previously noted, the Town has affirmatively asserted that the Board will fairly consider the merits of such an application. See, e.g., Doc. 15 at 3; see also Hill-Grant Living Tr., 159 N.H. at 538 ("Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision." (citation and quotations omitted)).

In light of the foregoing, the Court cannot conclude that PPI will suffer undue hardship if the Court does not address its takings claim at this juncture. See N. Pass Transmission, LLC, 2017 WL 695385, at *2 (non-precedential). Nor can the Court conclude that the Board's denial of the Application constitutes ["]a final and authoritative determination of the type and intensity of development legally permitted" on the Property. See Hill-Grant Living Tr., 159 N.H. at 533 (quoting Yolo County, 477 U.S. at 348). Accordingly, PPI's inverse condemnation claim is not ripe for review. See id.; see also N. Pass Transmission, LLC, No. 2016-0322, 2017 WL 695385, at *2 (N.H. Jan. 30, 2017) (non-precedential) (explaining a "claim is fit for

determination when it raises primarily legal issues, it does not require further factual development, and the challenged action is final").

CONCLUSION

For the reasons set forth above, the Court concludes that PPI's inverse condemnation claim is not yet ripe. Going forward, the Court encourages the parties to work in good faith towards a solution that will serve the best interests of all involved. See Hill-Grant Living Tr., 159 N.H. at 538. As the Court has now upheld the Board's denial of PPI's application, and herein concludes that PPI's takings claim is not ripe for review, this matter is now closed.

So Ordered.

October 13, 2022

s/ Hon. Mark D. Attorri
Hon. Mark D. Attorri

Clerk's Notice of
Decision
Document Sent to
Parties on 10/14/2022

Filed July 11, 2022

The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

PPI Enterprises, LLC

v.

Town of Windham

No.: 218-2021-CV-00959

ORDER

Plaintiff, PPI Enterprises, LLC ("PPI"), appeals a decision of the Planning Board (the "Board") of the Town of Windham (the "Town") denying PPI's site plan application to construct a self-storage facility located at 14 Ledge Road (the "Property"). See Doc. 1; see also Doc. 4 (Certified Record ("C.R.")); Doc. 11 (Town's Mem.); Doc. 12 (PPI's Mem.).[1] PPI also asserts a constitutional inverse condemnation claim and requests damages. See Doc. 1; ¶¶ 127–147. Upon careful review of the record and consideration of the arguments of counsel, the Court affirms the Board's denial of the application and orders further briefing on PPI's inverse condemnation claim.

[1]Hereafter, citations to the certified record will be to the pertinent Tab number only.

FACTUAL BACKGROUND

The underlying facts of this case have been extensively outlined in previous court opinions, see, e.g., PPI Enterprises, LLC v. Town of Windham, No. 2020-0249, 2021 WL 2580598, at *1–2 (N.H. June 23, 2021), and need not be restated in their entirety here. As pertains to the instant matter, the salient facts are as follows:

PPI is not the first applicant to attempt to develop this Property. In 2006 Meadowcroft Development ("Meadowcroft") attempted a project on the Property that required significant blasting. See Doc. 11 at 1–2. Unfortunately, the blasting by Meadowcroft resulted in property damage and other harms to abutters, including adverse impacts to air and groundwater quality. Legal action followed, the development was halted, and the site plan approval expired without completion of the project. See id. Ex. A (April 24, 2009 Court Order in Meadowcroft Development, LLC v. Town of Windham et al., 09-E-107)). Meadowcroft's abortive effort to develop the Property led to the Town's adoption in 2008 of a blasting ordinance, which provides safeguards and restrictions exceeding those imposed by state law. See Tab 38 (Town blasting ordinance).

PPI acquired the Property from Meadowcroft in 2017. See Tab 40 (Warranty Deed). In 2018, PPI filed the site plan application at issue. See Tab 3 (May 2018 application); Tab 11 (September 2018 application). The Board held numerous public hearings on the application. See, e.g., Tabs 25, 28, 31, 36, 45, 53, 62. The Board was primarily concerned with the proposed blasting called for by the application, given the history

of prior blasting at the Property negatively impacting abutting properties. See, e.g., Tab 45 (Board's March 2019 meeting minutes) at 2–6. PPI agreed to comply with all applicable blasting regulations, including the Town ordinance. It also took a number of other steps in an effort to address the Board's concerns and mitigate the effects of the blasting. For example, PPI amended its application to include an access road with a 10% road grade, as opposed to the initially proposed 8% grade, in order to reduce the necessary amount of blasting. See Tab 51 at 1. Although an expert hired by the Town (at PPI's expense) advised the Board that blasting could be safely undertaken, other witnesses felt the opinion was not "site specific," *i.e.*, did not take sufficient account of the conditions and history of this particular Property. See Tabs 33, 62. See also Tab 67 at 3 ("Mr. Partington said it was a previously damaged site and he did not feel there was enough site-specific data presented about the parcel to say if the issues were from the previous developers not following best management practices or if it was something about the site itself . . .").

Ultimately the Board denied PPI's application by a 4-3 vote, relying on the general purposes section of the Windham Zoning Ordinance (Section 100). See id. at Tab 62 (Board's June 2019 meeting minutes) at 2–6; Tab 63 (Board vote). Thereafter, PPI appealed to both the Windham Zoning Board of Adjustment and the superior court. See PPI Enterprises, 2021 WL 2580598, at *1–3. The superior court, among other things, remanded PPI's site plan application back to the Board for further consideration. See id. at *3. The Supreme Court ultimately affirmed the superior court's remand decision. See id. at *4 ("the superior

court's remand to the planning board was appropriate, and we affirm its decision.").

On remand, the Board held another hearing on PPI's site plan application. Tab 67 (Board's August 18, 2021 meeting minutes) at 3–5. As at previous public hearings relating to PPI's application, the predominant topic of discussion was the need for blasting and the desire to avoid a recurrence of the harms that had been caused by the Meadowcroft effort. The Board also expressed safety concerns arising from the 10% grade of PPI's proposed access road. See, e.g., id. at 3–4 ("Chair Monson said a lot of blasting was involved with developing the plan and given the history of the site he had not been convinced that public safety was going to be protected . . . Mr. Rounds said his primary concern was the blasting and the driveway grade . . . [Vice Chair Bradley] said that the blasting was a major concern . . . ."); id. at 3 ("Chair Monson said that the grade of the road was questionable as it was presented at 10%, while 6% was listed in the ordinances for commercial development and 8% for residential.").

Following the hearing, the Board voted 6-0 to again deny PPI's application. See id. at 5; Tab 68 (Board's September 10, 2021 Notice of Decision). This time, the Board provided three justifications in the accompanying Notice of Decision. See id.[2] All three grounds were based, either directly or indirectly, on the Board's concerns about blasting. See id. First, the Board pointed to sections 501, 702.1.4, and 602.2 of

[2] The Board also "incorporated by reference" the "[a]dditional reasons and justifications appear[ing] in the Minutes of Meeting of August 18, 2021." See id.

the Windham Site Plan Regulations (the "Regulations") with respect to safety concerns regarding the 10% road grade. See id. (As mentioned above, PPI had revised its original application to include the 10% grade in a specific effort to address the Board's concerns about blasting. See Tab 51 at 1.) Second, the Board pointed to section 504 of the Regulations with respect to "threats to public health and safety" by virtue of the proposed blasting and potential contamination of surface and ground water, such as had occurred due to the prior blasting by Meadowcroft. See id. Third, the Board pointed to section 506 of the Regulations with respect to the possible impact of groundwater contamination; the origin of this concern was likewise the blasting done by the prior owner. See id. The Board did not separately analyze whether the application conformed to the Town blasting ordinance. See id.

PPI now appeals from the Board's denial, and also brings constitutional takings and damages claims (see Doc. 1 ¶¶ 127–139).

STANDARD OF REVIEW

The Court's review of a planning board's decision is limited. See Girard v. Town of Plymouth, 172 N.H. 576, 581 (2019). RSA 677:15 provides that the Court "may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that [the planning board's] decision is unreasonable." RSA 677:15, V. The Court must "treat the factual findings of the planning board as prima facie lawful and reasonable and cannot set aside its decision

absent unreasonableness or an identified error of law." Girard, 172 N.H. at 581. "The appealing party bears the burden of persuading the [Court] that, by the balance of probabilities, the board's decision was unreasonable." Id. Thus, the Court "determines not whether it agrees with the planning board's findings, but whether there is evidence upon which its findings could have reasonably been based." Id.

ANALYSIS

PPI advances two main arguments in support of its appeal. First, PPI argues that the reasons stated by the Board in its September 2021 Notice of Decision do not provide a reasonable basis for the Board's decision. See id. at 7–12. PPI also argues that the Board prejudged the proceedings on remand, and that its decision was therefore predetermined and unreasonable. See Doc. 12 at 5–6. In making this argument PPI relies primarily on a memorandum prepared in advance of the August 2021 hearing by a member of the Board. See id.; Tab 66 (Post memo).

For its part, the Town argues that any one of the three reasons stated in the Board's denial, standing alone, was sufficient to justify denial of the application. See Doc. 11 at 7–13. The Town relies in particular on the road grade issue. See id. at 7–9. With respect to PPI's claim of prejudgment, the Town argues that "the hearing process was [already] fully completed," and that on remand "the Board was in the process of deliberations." See Doc. 11 at 11–12.

"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." Trustees of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 504 (2018) (quotation omitted). "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). "These purposes are accomplished by subjecting the plan to the very expertise expected of a planning board in cases where it would not be feasible to set forth in the ordinance a set of specific requirements upon which a building inspector could readily grant or refuse a permit." Id. (quotation omitted). "Site plan review is, nonetheless, limited." Id. at 504–05. "A planning board's review does not give the planning board the authority to deny a particular use simply because it does not feel that the proposed use is an appropriate use of the land. Whether the use is appropriate is a zoning question." Id. at 505 (quotations omitted).

Generally, "if any of the reasons offered by a planning board to reject a site plan application support its decision, then an appeal from the board's denial must fail." See Richmond Co. v. City of Concord, 149 N.H. 312, 316 (2003); see also Motorsports Holdings, LLC v. Town of Tamworth, 160 N.H. 95, 108 (2010). Thus, the Court is not empowered to sit as a "super planning board" and overturn a decision it does not agree with; instead, the Court must determine whether there is evidence upon which the Board's findings could have been reasonably based. See Girard, 172 N.H. at 581; Seabrook Onestop, Inc. v. Town of Seabrook, No. 2020-0251, 2021 WL

4228693, at *4 (N.H. Sept. 16, 2021) ("The trial court's role in this case was not to sit as a super planning board.").

Here, the Court agrees with the Town that the Board's safety concerns arising from the grade of the proposed access road were sufficient in themselves to support denial of the application. At the hearing before this Court there was disagreement as to whether the applicable regulations call for a maximum grade of 6% or 8%. In either case, PPI's application included a proposed access road with a 10% grade. Thus, as it existed in August 2021, the application did not comply with the applicable Regulations. PPI concedes as much. See Doc. 12 at 8 ("With the exception of the road grade issue, which [PPI] remains willing to resolve by compliance, the other reasons for denial are arbitrary, speculative and not supported by the record.").

Since there is evidence in the record to support it, the Board's denial based on lack of compliance with the road grade regulations must be upheld. See Girard, 172 N.H. at 581; Richmond Co., 149 N.H. at 316. Nor is the Court persuaded that either the Board or its members engaged in any procedural irregularity that would void its denial of the application. See Doc. 11 at 11–12.

These conclusions, however, do not dispose of this action since, in addition to its appeal, PPI has also raised a constitutional taking claim. Specifically, PPI contends that the Board's consecutive denials of its application have rendered the Property essentially undevelopable, therefore resulting in an "inverse condemnation" without just compensation. See Doc. 1

at ¶ 139. In the Court's view, this claim has sufficient merit to warrant further briefing by the parties.

"Inverse condemnation occurs when a governmental body takes property in fact but does not formally exercise the power of eminent domain." Kingston Place, LLC v. N.H. Dep't of Transp., 167 N.H. 694, 697 (2015). "Governmental action which substantially interferes with, or deprives a person of, the use of his property in whole or in part, may constitute a taking, even if the land itself is not taken." Id. "However, to constitute a taking, the interference must be more than mere inconvenience or annoyance." Id. (brackets and quotations omitted). "While inverse condemnation may be effected through either physical act or regulation, the right to recover for inverse condemnation cannot be made to depend upon the means by which the property is taken." J.K.S. Realty, LLC v. City of Nashua, 164 N.H. 228, 234 (2012) (brackets, ellipses, quotations, and citations omitted). The Court "look[s] to the individual circumstances of each case to determine whether there is an unconstitutional taking." Id. The question of whether an unconstitutional taking has occurred "is one of degree and its resolution is governed by no set test." J.K.S. Realty, 164 N.H. at 234. Thus, the specific facts of each case "will affect the determination of whether a compensable taking has occurred." See id.

Based on its review of the certified record and consideration of the entire history of this case, see PPI Enterprises, 2021 WL 2580598, at *1–2, it appears to the Court that PPI may well have a meritorious inverse condemnation claim. Although the Town treats the Property as developable for purposes of

assessing property taxes, see Tab 1 (2021 Property tax assessment card), it has consistently represented that it considers the Property to be "geographically challenged." See Doc. 11 at 2. As the Town notes, the Property is 60-feet above the level of the adjoining public way (Ledge Road), and the proposed access road would have "create[d] vertical ledge faces on both sides [of] where the building [wa]s proposed." See id. at 9. It appears beyond dispute that development of the Property is simply not feasible or practical without significant blasting. See Tab 67 at 2–5 (acknowledging that the Property needs to be blasted to be developed).

At the same time, while PPI has agreed to comply with all applicable blasting regulations and to take measures to mitigate potential adverse impacts from blasting, the Town has consistently rejected PPI's development proposal because of its (understandable) concerns that blasting on the site will cause a recurrence of the harms caused by the prior blasting by Meadowcroft. See Doc. 11 at 2. These concerns are evident throughout the certified record, in the August 18, 2021 meeting minutes and in the Board's Notice of Decision.[3] As the Town aptly summarizes in its legal memorandum to the Court, "[f]ar and away the

[3] See, e.g., Tab 67 at 3–5 ("Chair Monson said a lot of blasting was involved with developing the plan and given the history of the site he had not been convinced that public safety was going to be protected . . . Ms. Post said she would never say that the application could not be approved at some point, but she had a great deal of concerns about the blasting and jack hammering and rock crushing, as they were the same processes that created so many issues for the abutters back in 2007 . . . ."); Doc. 11 at 2 ("the effort by Meadowcroft to develop the property ran into difficulties due primarily to blasting required to develop the property.") (emphasis added).

primary concern" of the Planning Board members "was the fear of a repetition of the conditions which the abutters experienced during the original Meadowcroft development effort." See id. at 9.

To avoid such a repetition, the Board required PPI to provide "levels of assurance" that other applicants would not have had to provide to engage in blasting at other locations in Windham. See Doc. 11 at 10. The Board did not seek such assurances in order to ascertain whether PPI's application would comply with the Town's blasting ordinance; rather, the Board seemed intent on preventing PPI from developing the Property at all, inasmuch as such development would necessarily involve blasting. See, e.g., Tab 67 at 3–5; Doc. 11 at 9–10.

Counsel for the Town all but conceded this point at argument before this Court by suggesting that the blasting ordinance "assumes a blank slate" and that the Property is problematic given the significant history of detrimental impacts to abutters from the blasting done by Meadowcroft. See Record of Hr'g. Counsel further suggested that, in the Town's view, mere compliance with the blasting ordinance would not be enough to warrant approval, given the Property's history. The reasonable inference from these comments is that that the Town considers the Property effectively undevelopable. See id.

In sum, the Town: (1) considers the Property "geographically challenged," see Doc. 11 at 2; (2) effectively concedes that blasting is "required to develop the property," see id.; (3) is very concerned about blasting on the Property as a result of Meadowcroft's previous blasting, see Tab 67 at 3–5; (4)

believes the blasting ordinance "assumes a blank slate" and that mere compliance with the ordinance would not be enough to gain approval given the Property's history, see Record of H'rg; and (5) has denied PPI's application twice because of concerns about blasting, regardless of whether PPI's application complies with the Town's blasting ordinance, see PPI Enterprises, 2021 WL 2580598, at *1–2. It strikes the Court as a foregone conclusion that, if PPI were now to submit a revised application with an 8% road grade (as it has expressed a readiness to do), the Board would certainly deny it, since it would necessarily entail a greater amount of blasting than the application which has now been twice denied.

For these reasons, the Court concludes there is a serious question as to whether the Town's actions have substantially interfered with, or deprived PPI of, the use of the Property. See Kingston Place, 167 N.H. at 697. In reaching this conclusion, the Court recognizes the legitimacy of the Board's interest in protecting abutters from the adverse effects of blasting. In serving that legitimate interest, however, the Town must also give due consideration to the constitutional property rights of PPI. See N.H. CONST. pt. I, art. 12; Arcidi v. Town of Rye, 150 N.H. 694, 697 (2004).

Since the parties have not addressed PPI's constitutional takings claim in their post-hearing memoranda, the Court directs them to submit further legal briefing on that issue. The Town shall file, within 21 days of the date of notice of this order, a legal memorandum arguing why its actions in this matter do not constitute a constitutional taking of the

Property from PPI. PPI shall then have 14 days thereafter to file a response in support of its inverse condemnation claim.

SO ORDERED.

July 11, 2022

s/ Mark D. Attorri
Judge Mark D. Attorri

Clerk's Notice of Decision
Document Sent to Parties
on 07/11/2022

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case Nos. 2020-0249 and 2020-0250, PPI Enterprises, LLC v. Town of Windham, the court on June 23, 2021, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is unnecessary in this case. In these consolidated appeals, the plaintiff, PPI Enterprises, LLC (PPI), appeals orders of the Superior Court (St. Hilaire, J.) remanding PPI's application for site plan approval to the planning board for the defendant, the Town of Windham (Town), and staying PPI's appeal of a decision of the Town's zoning board of adjustment (ZBA). We affirm in part, vacate in part, and remand.

I. Facts

The following facts either were recited by the trial court or reflect the content of documents in the appellate record. In 2018, PPI applied for site plan approval to construct a three-story, 93,000 square foot, self-storage facility on its 45.57-acre Windham property. After seven public hearings over the course of thirteen months, during which time the primary issue discussed was PPI's proposed use of blasting to develop the site, the planning board denied the application. The planning board's sole basis for doing so was that the site plan was inconsistent with section 100 of the Windham Zoning Ordinance, which sets forth the purposes of the ordinance. PPI simultaneously appealed the planning board's decision to the superior court and the ZBA. PPI asked

the superior court to stay the appeal until the ZBA acted. The superior court granted that request.

In its appeal to the ZBA, PPI argued that the planning board had improperly relied upon section 100 of the ordinance. The ZBA agreed with PPI, reversed the planning board's decision, and remanded the site plan application to the planning board for further review. PPI unsuccessfully moved for reconsideration, and then appealed the ZBA's decision to the superior court, arguing that the site plan application met or exceeded the site plan regulations and should be approved without further proceedings, and asserting that the ZBA had no authority to remand the application to the planning board.

Meanwhile, after the ZBA reversed the planning board decision, the Town asked the superior court to remand the site plan application to the planning board for further proceedings. The trial court granted the Town's motion in a margin order. PPI moved the court to reconsider its decision, maintaining that because the planning board denied PPI's application solely because it violated the zoning ordinance, the planning board must have determined that the application otherwise satisfied the criteria for site plan review. PPI asserted that in light of the ZBA's determination that the planning board had relied improperly upon section 100 of the ordinance to deny the site plan application, the trial court should not have remanded to the planning board, but instead should have reversed the planning board's denial of site plan approval. The Town moved to stay PPI's appeal of the ZBA decision pending resolution of PPI's appeal of the planning board's decision. The Town argued that if the trial court remanded the site plan

application to the planning board, PPI's appeal of the ZBA decision would be moot and, therefore, should be stayed "indefinitely."

In an April 6, 2020 order, the trial court denied PPI's motion to reconsider and granted the Town's motion to stay PPI's appeal of the ZBA decision. In considering whether to remand PPI's site plan application for further review by the planning board, the trial court observed that "the clear statutory preference is for decisions about land use to be made at the local level by local boards, particularly when it comes to factual findings that are often aided by the board's expertise." The court observed that the planning board did not appear to make any factual findings on the necessary site plan approval criteria or, "[a]t the very least, any findings the Planning Board did make are not clear on the face of its decision."

In addition, although the court acknowledged that in a case with a sufficiently-developed record where the merits of a particular proposal are clear, it could find, as a matter of law, that the proposal was entitled to site plan approval, the court concluded that the fact-finding record in the instant matter was insufficiently developed by the planning board. The trial court found that the only topic discussed by the planning board before rendering its decision was the issue of blasting, and the only ground for denying the application was the application's purported conflict with section 100 of the ordinance. Accordingly, the court concluded that "remanding the Application to the Planning Board to develop a record and make factual findings—or clarify any factual findings it did

make—will allow the Planning Board to perform its statutory role."

With regard to the Town's motion to stay PPI's appeal of the ZBA's decision, the trial court observed that "the procedural posture of [PPI's appeals] is unique." The court stated that "the only decision that the Planning Board made at this point has already been reversed and there is thus no other [planning board] decision for the Court to review." The court noted that "no party [had] challenged the ZBA's central ruling that it was improper for the Planning Board to rely on . . . Section 100 [of the zoning ordinance] in denying the Application." The court also explained that although PPI appealed the ZBA's decision on the ground that the ZBA had no authority to remand the site plan application to the planning board for further review, "this issue is now moot because the Court itself remanded the Application." Therefore, the court reasoned that because the court was remanding the site plan application to the planning board for further review, "the ZBA Appeal is superfluous because it presents no issues that have not already been raised in [PPI's appeal of the planning board's decision]."

The trial court noted that the ZBA appeal and the planning board appeal could have been heard together in a single action before the superior court — indeed, PPI had requested that the trial court consolidate the two appeals. The court explained that "[g]iven that the ZBA Appeal and the [planning board] Appeal both ultimately hinge on a question that can be resolved in the [planning board] Appeal, there is no practical difference between the Court consolidating both appeals and then remanding to the Planning Board or

remanding the [planning board] Appeal and staying the ZBA Appeal," as it did in its order.

PPI moved for reconsideration of the April 2020 order, which the trial court denied. The court allowed the planning board, on remand, to "accept additional evidence prior to its final determination on the Application." However, the court observed that "this matter has been before the Planning Board for a long period of time, and the Planning Board has had significant time to gather evidence related to the Application." Accordingly, the court stated that it "appreciate[d] the Town's representation" that, on remand to the planning board, "the review process will . . . not start anew and the next meeting will likely be the last before the Planning Board votes on the Application." The court urged PPI and the planning board to "engage in good faith efforts to achieve a final resolution concerning the Application." We observe that at oral argument, the Town reiterated that the public hearing on PPI's application had already closed and that, on remand, the planning board would resume its deliberations and issue a final decision.

II. Analysis

In this appeal, PPI challenges both the trial court's decision to remand PPI's site plan application to the planning board and its decision to grant the Town's motion to stay PPI's appeal of the ZBA decision. Our review of the superior court's decision on appeals arising from a decision of a planning or zoning board is limited. See Girard v. Town of Plymouth, 172 N.H. 576, 581 (2019) (planning board); Dietz v. Town of Tuftonboro, 171 N.H. 614, 618 (2019) (zoning board). We will reverse the trial court's decision only if it is not supported by the evidence or is legally erroneous.

Mt. Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 647 (2000). We review the trial court's decision to determine whether a reasonable person could have reached the same decision as the trial court based on the evidence before it. Girard, 172 N.H. at 582.

Resolving the issues in this appeal requires that we engage in statutory interpretation. "In matters of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." Dietz, 171 N.H. at 619 (quotation omitted). "We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Id. (quotation omitted). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. (quotation omitted).

As noted above, PPI filed two appeals of the planning board decision: one to the superior court and one to the ZBA. Because this case involves a planning board decision with a matter appealable to the ZBA, RSA 677:15, I-a(a) governs. See RSA 677:15, I-a(a) (2016). That statute provides that following "final resolution" of proceedings before the ZBA, appeals may be heard by the superior court on "any or all matters concerning the subdivision or site plan decided by the planning board or the [ZBA]." Id.

Many of PPI's appellate arguments stem from its incorrect assertion that when the planning board denied its application because the application purportedly violated section 100 of the ordinance, the planning board necessarily found that the application

otherwise satisfied the criteria for site plan review. PPI contends that "the letter and spirit of RSA 676:3, I contemplate that the Planning Board would disclose any and all reasons for its denial of PPI's site plan application." PPI reasons that, having identified only one ground for denial, the planning board must have otherwise approved its site plan application. Because PPI contends that the planning board already approved its site plan application, PPI argues that it was error for either the trial court or the ZBA to remand review of PPI's site plan application back to the planning board for a new final decision.

PPI's interpretation of RSA 676:3, I, is mistaken. See RSA 676:3, I (2016). That statute requires local land use boards, including a planning board, to provide an applicant "with written reasons for the disapproval." Id. There is nothing in RSA 676:3, I, requiring a local land use board to "disclose any and all reasons" for denying an application. Nor is there such a requirement in RSA 676:4, which specifically governs planning boards. See RSA 676:4, I(h) (2016) ("In case of disapproval of any application submitted to the planning board, the ground for such disapproval shall be adequately stated upon the records of the planning board."). To the extent that PPI argues that our interpretation of RSA 676:3, I, "encourages dilatory tactics" by the planning board, its argument, in this case, is misplaced. As PPI correctly notes, a municipality's duty to assist arising under Part I, Article 1 of our State Constitution, precludes a board from engaging in "dilatory tactics in order to delay a project." Richmond Co. v. City of Concord, 149 N.H. 312, 315 (2003).

Accordingly, contrary to PPI's argument, the planning board did not approve PPI's site plan application subject only to section 100 of the zoning ordinance. Once the ZBA determined that the planning board erroneously denied site plan approval based upon section 100 of the ordinance, the sole basis for the planning board's decision was addressed, and that aspect of the ZBA's decision was not appealed to the superior court. Under these circumstances, the superior court's remand to the planning board was appropriate, and we affirm its decision.

The planning board is the only administrative body with the authority to approve or disapprove a site plan. See RSA 674:43 (2016). It is now incumbent upon the planning board, consistent with the Town's assertions in the trial court and at oral argument that the public hearing on PPI's application has already closed, to resume its deliberations and issue a final decision on PPI's site plan application. Should the planning board again deny PPI's site plan application, PPI may then appeal the decision in accordance with the statutory scheme.

We agree with the trial court that PPI's appeal of the ZBA's decision to remand to the planning board is now moot. Regardless of whether the ZBA had the authority to remand to the planning board, given our affirmance of the trial court's remand order, PPI's site plan application will now be before the planning board. As the trial court explained, "the only pertinent issue remaining in the ZBA Appeal [was] the same issue raised in the [planning board] Appeal—namely, whether remanding the Application to the Planning Board is appropriate." Having already concluded that remand to the planning board was appropriate, the

court reasoned that "resolving whether the ZBA erred in remanding in the first instance will provide no relief to PPI." We agree with that analysis. Therefore, we vacate the trial court's decision to stay PPI's appeal of the ZBA's decision and, in the exercise of our supervisory authority, instruct the court to dismiss that appeal as moot.

Affirmed in part; vacated in part; and remanded.

MACDONALD, C.J., and HICKS, BASSETT, and HANTZ MARCONI, JJ., concurred.

Timothy A. Gudas,
Clerk

Filed September 15, 2021

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT
Docket No.
218-2021-CV-00959

PPI ENTERPRISES, LLC
9 Shelly Drive
Pelham, New Hampshire 03076

v.

TOWN OF WINDHAM
3 North Lowell Road
Windham, New Hampshire 03087

JURY TRIAL DEMANDED

COMPLAINT

* * * * *

COUNT - II - CONSTITUTIONAL TAKINGS CLAIM

127. The Plaintiff reasserts and incorporates the allegations set forth in the paragraphs above.

128. The right to use and enjoy personal property is protected by the United States and New Hampshire Constitutions. U.S. Co[n]st[.], 5th Amend; N[.]H[.] Const. pt.1, art. 12; and, N.H. Const. pt. 1, art 2.

129. The unreasonable enforcement of land use regulations can result i[n] a government taking of constitutionally protected property rights. Burrows v. Keene, 121 N.H. 590 (1981).

130. The Property, even with the disturbed portion thereon, is assessed at $494,000.

131. With the proposed development, the market value of the Property would be in the millions.

132. Significant damages also result from the loss of income and favorable financing commitments.

133. Blasting is a usual and customary undertaking for development in the Granite State, including the Town of Windham.

134. However, to reasonably use the Property, some blasting is required.

135. The Planning Board has effectively adopted the position that no blasting is permitted on the Property and rock may only be removed by hammering which is not feasible or economical given the amounts needed to be removed.

136. Based on the unreasonable and illegal actions of the Planning Board, the Property cannot be used for an economically reasonable use and the market value is nominal.

137. Moreover, members of the Planning Board have expressed that with the denial of the application, the Plaintiff should look at donating the Property to the Town.

138. In short, Planning Board members consciously saw the denial of the application as a means to have the Property put to public use without the payment of any just compensation.

139. The unreasonable and illegal denial of the relief requested results in inverse condemnation for which just compensation should be awarded based upon the highest and best use of the Property.

* * * * *

WHERFORE, the Plaintiff requests that this Honorable Court:

A. Vacate the denial of the site plan by the Planning Board;

B. Bifurcate the matter and conduct a jury trial on the Inverse Condemnation and Damages Counts;

C. Find the Town inversely condemned the Property;

D. Find the Planning Board acted in ba[d] faith;

E. Award damages within the jurisdictional limits of the Honorable Court;

F. Award the Plaintiff his costs and attorney's fees; and,

G. Grant such other relief as it may deem just and proper.

* * * * *

Filed October 26th, 2021

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SEPTEMBER TERM, 2021

SUPERIOR COURT

PPI Enterprises, LLC

vs.

Town of Windham

Docket No. 218-2021-CV-0959

ANSWER OF THE DEFENDANT

* * * * *

128) The allegations in Paragraph #128 are admitted.

* * * * *