

STATE OF NEW HAMPSHIRE

BELKNAP, S.S.

SUPERIOR COURT

Pine Hollow Camping World, Inc. d/b/a
Pine Hollow Campground

v.

City of Laconia – Planning Board

No. 211-2023-CV-00116

ORDER

Plaintiff, Pine Hollow Camping World, Inc. d/b/a Pine Hollow Campground (“Pine Hollow”) brings this action to appeal a decision of the City of Laconia Planning Board (the “Board”) approving an application by Tiki Plaza LLC (“Tiki Plaza”) to construct a 2,700 square-foot structure on property abutting Pine Hollow’s campground (the “Campground”). See Doc. 1 (Compl.). The Court held a hearing on Pine Hollow’s appeal on September 11, 2023. After reviewing the pleadings and record, the arguments presented at the hearing, and the applicable law, the Court rules as follows.

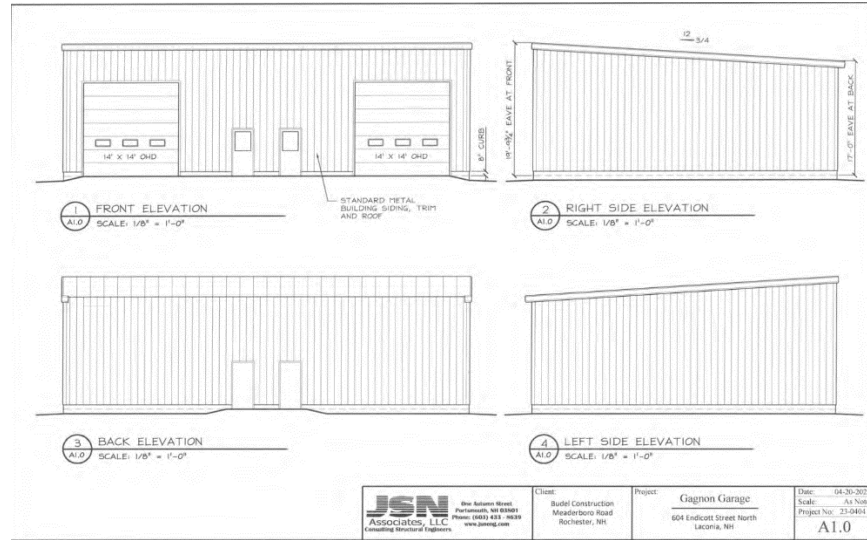
Standard of Review

When a decision of a planning board is appealed to the superior court, “[t]he 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 said decision is unreasonable.” RSA 677:15, V. “Thus, the trial court’s review is limited.” Girard v. Town of Plymouth, 172 N.H. 576, 581 (2019). “The trial 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.” Id. “The appealing party bears the burden of persuading the trial court that, by balance of the probabilities, the board’s decision was unreasonable.” Id. “The trial 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.

Facts

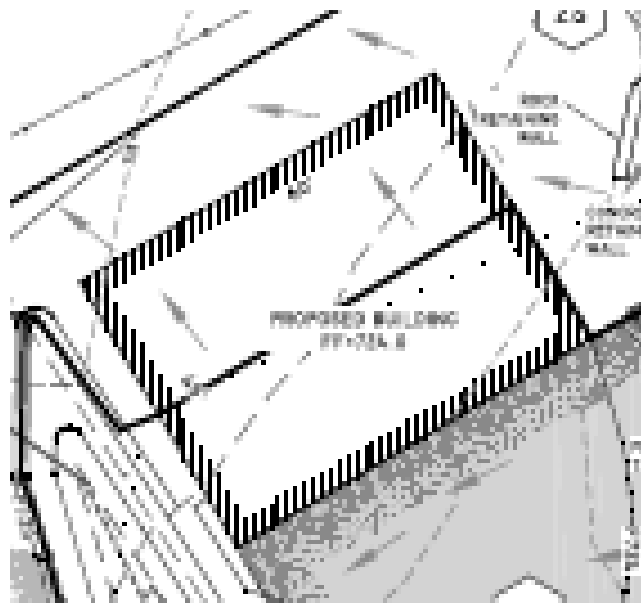
Tiki Plaza owns property at 604 Endicott Street in Laconia (the “Property”). The Property consists of one building that houses a craft beer retail store, a screen-printing and embroidery business, a candy and chocolate retailer, and a woodworking shop.

The application also includes a diagram of the proposed building:



Id. at 3. This diagram shows that the proposed building will have a mono-pitch roof with the highest elevation in the front of the building and the lowest elevation in the back, closer to the Campground.

The first diagram reproduced above is arguably ambiguous in its depiction of the roof. The following image, extracted from that diagram, includes grey arrows showing the direction in which rain would flow from the front of the building to the back. However, it also includes a solid line running the length of the roof which the legend indicates is a stormwater "Subcatchment Area Line." This suggests a gabled (peaked) roof, since a mono-pitch roof would presumably lie entirely within a single catchment area:



Id. at 59.

A representative for Tiki Plaza, Mario Focareto, explained the following to the Board:

You'll see from the arrows that the storm water from the roof will run – just run off, most of it not caught into the stormwater basin. But that's part of the analysis, as well . . . that's been taken into account when we do the analysis. So in order to make the runoff lesser at the [Campground's] property line, we need to capture some of it and slow it down. And that's what we do.

Id. at 83.

In the southeast (lower left) corner of the image is a representation of the stormwater basin, or retention pond, that Focareto referenced. The stormwater basin is designed to catch rainwater before it flows over onto the Property's abutters. See id. As noted above, the grey arrows on the diagram appear to indicate rain from the roof being directed towards the Campground rather than the stormwater basin. See id. The Report concludes that "[t]he proposed site development by Tiki Plaza LLC will not create any adverse effects downstream in storm water flow rates or quality." Id. at 10.

On May 1, 2023, Pine Hollow's owner, Bob Heavey, sent an email expressing Pine Hollow's concerns regarding the proposal. See id. at 67. They included the sufficiency of parking following construction of the proposed building, and the need for a traffic consultant to ensure that large trucks making deliveries to the Property have enough space to turn. Id. Pine Hollow also expressed concern about stormwater runoff; it requested that the proposed building be constructed with a roof that would direct water to flow back onto the Property and not the Campground. Id.

On May 3, 2023, the Board held a meeting on the application. Id. at 76. The Board heard statements from Focareto, Heavey, and the Board's staff members before rendering their decision on the application.

Heavey explained his drainage concerns to the Board by saying, "[T]hey're trying to put all the water onto our property, all of it. There's no other place for it to go, as they show it being funneled and dump two feet, three feet from our property line." Id. at 95. Focareto responded:

[W]hat we do when we do these hydraulic analyses is look at the point of analysis. So this property line at the point of analysis . . . And what you'll see is when we break it out, a lot of the water does get into the pond area; but some of it doesn't, so you have to take the summation of all this runoff area. But I think it's . . . a good concern. It's a common concern, and that's why we pick the point of analysis as the property line as a whole line, not just that one point, but all the water that . . . comes onto our property and then . . . leaves our property onto [the Campground]. And that's what we look at specifically for that comment.

Id. at 113.

Board Member Dellavecchia further commented “I believe that the retention area will take care of the 2,700 square-foot building. There’s not going to be additional runoff because that building is there, because they’ve addressed it with the retention area . . . the retention area is enough to satisfy the 2,700 square-foot building. So I’m in favor of it.” Id. at 126–27.

However, the Board still required Tiki Plaza to install a “[g]ravel catchment area to be put under [the] drip edge of [the] proposed structure” in order to further slow the flow of rainwater, allowing it to infiltrate back into the ground. See id. at 90, 140.

The Board then addressed Pine Hollow’s concerns about traffic in the following exchange:

THE CHAIRMAN: [T]he flow of traffic within their property is their problem not . . . the City’s, not abutters, right? Or am I misunderstanding[?]

HEAVEY: No, no, you’re right . . .

THE CHAIRMAN: I think your suggestions are very good, but I think . . . and this is just me – I think the Board’s interest in this is to make sure that this development does not have an adverse effect on abutters, including yourself. I think part of what you’re saying is they should be doing a better job in their site planning. But that’s not within the purview of the Board and – or the abutters, for that matter.

HEAVEY: But we just don’t want to [have] water coming on our property.

Id. at 104.

The Board also considered the adequacy of parking. See id. at 85. Tiki Plaza represented that the proposed building would be used by “an antique guy that might want . . . to work on one or two cars” and “a landscape guy that contacted me, might be interested.” Id. at 86. According to Tiki Plaza, “[t]hey’re not going to have 33 cars in the parking lot because it’s not designed for that.” Id. at 88. Ultimately, the proposed building would have two exterior parking spaces, see id. at 5, and a space for parking inside the proposed building, see id. at 85. While Heavy brought his parking concerns to the Board, he conceded that his primary concern was about storm water drainage. See id. at 103. Accordingly, the Board found that three parking spaces were sufficient for the anticipated uses of the proposed building. See id. at 140.

After considering Tiki Plaza’s application and Pine Hollow’s concerns, the Board granted conditional approval to begin construction of the proposed building. See id. at 140–41.

Pine Hollow then filed the instant appeal, alleging that that Board acted unreasonably and committed errors of law when it rendered its decision. See Doc. 1.

Analysis

I. Issues Not Raised Before the Board

Pine Hollow's arguments for reversing the Board's decision include several that were not raised before the Board. Specifically, Pine Hollow contends that the Board erred by failing to analyze "all site plan criteria for the entire property." Doc. 10 at 4 (Pl.'s Mem. of Law). It also argues that the Board did not perform a boundary survey and impermissibly relied on Tiki Plaza's "green space calculations." Id. at 4, 11. The Board submits that Court should not consider these issues as they were not brought before the Board or addressed at the hearing on the application. See Doc. 9 at 5, 11 (Def.'s Mem. of Law).

"In governmental proceedings, interested parties are entitled to object to any error they perceive but they are not entitled to take later advantage of error they could have discovered or chose to ignore at the very moment when it could have been corrected." Bayson Props. v. City of Lebanon, 150 N.H. 167, 172 (2003); see also Alexander et al. v. City of Nashua, No. 226-2019-CV-00845, Court Doc. 32 at 14 (Apr. 13, 2021) (Temple, J.), aff'd, 2022 WL 601923 (N.H. Feb. 18, 2022) (nonprecedential) (declining to address the plaintiffs' argument on appeal when "there was nothing in the meeting minutes demonstrating that the plaintiffs adequately raised concerns . . . while in front of the Planning Board.").

In this case, Pine Hollow, through its owner Mr. Heavey, expressed its concerns to the Board in a pre-hearing email, see CR at 67, and in comments during the hearing, id. at 95–106. However, nothing in the Certified Record or the meeting minutes reflects that he expressed any concerns regarding the necessity for a site plan review of the entire Property, the lack of a boundary survey, or the issue of green space. See id. Rather, Heavey used his time before the Board to voice objections regarding parking, the impact on traffic, and his primary concern of rain runoff onto the Campground. See id. Pine Hollow took full advantage of its opportunity to air those concerns before the Board; it cannot now seek to take advantage of errors on appeal that could have been addressed at the hearing. The Court therefore declines to address these issues here. See Bayson Props., 150 N.H. at 172.

II. Issues Raised Before the Board

The Court turns now to the issues Pine Hollow raised before the Board. Pine Hollow argues that the Board's decision should be vacated or remanded because the Board: (1) failed to consider the traffic and parking impacts on surrounding properties; (2) unreasonably relied on a flawed Stormwater Management Analysis; and (3) failed to make specific findings of fact under RSA 676:3, I. See Doc. 10. The Board responds by arguing that the certified record demonstrates it engaged in the appropriate analysis,

relied on proper expert evidence, and made the requisite findings of fact to support its decision. See Doc. 9.

a. Parking and Traffic

The Court finds that the Board adequately considered the traffic and parking issues before granting conditional approval of the application. Pine Hollow's traffic argument was focused on the inadequacy of space for delivery trucks to turn and make deliveries. See CR at 100. While Pine Hollow is correct that the adequacy of turning space on an applicant's property is within the purview of the Board, see id. at 165 at §7.8, the record demonstrates that the Board adequately considered this issue. Specifically, the Chairman asked one of the Board members, Rob Mora, the former assistant planner and zoning technician for Laconia, whether he saw the turning space issue "as a problem based on the site plan." Id. at 109. Mora responded:

I don't think that's an issue with the site plan concerning vehicles having a turnaround point there . . . [T]here's no requirement for them to have a turnaround point within that parking area for fire apparatus in an area like that . . . And I'm sure TRC reviewed that with the fire department. I'm sure if there was an issue with that, the chief would have brought that forward.

Id. at 109–10.

A planning board is "entitled to rely in part on its own judgement and experience in acting upon applications," provided the decision is based on more than the board's personal opinions alone. Ltd. Editions Props. Inc. v. Town of Hebron, 162 N.H. 488, 497 (2011). In addition to Board Member Mora's experience, the Board also considered the testimony of Tiki Plaza's abutter, Kevin Hayhurst, who never had an issue with traffic in or around the Property, see CR 106-108, and the lack of any concern from Public Works, see CR 64, 109. Thus, the record supports the Board's finding that Tiki Plaza's application met the Site Plan Review Regulations under Section 7.8. See CR. at 140.

Regarding the parking issue, the Board ultimately determined that there were sufficient spaces for the proposed use of the proposed building. The Board submits that three spaces would be required for the proposed building. See Doc. 9 at 8. Two exterior spaces were documented in Tiki Plaza's application, see CR at 5, and Focareto testified before the Board that an additional space would be located inside the building, id. at 85. Pine Hollow's argument before the Board was focused not on the parking in or around the proposed building, but rather on the use of parking areas on the Campground by the Property's existing businesses. See id. at 102. Similarly, Pine Hollow's argument here is focused on the Board's alleged failure to analyze whether "the addition of just two spaces will be adequate for the three retail uses in the front and the two new tenants in the rear." Doc. 10 at 4 (emphasis added).

The Court finds that the Board engaged in the required analysis and reasonably found that the three spaces provided by the applicant met the Site Plan Review Regulation requiring applicants to “provide for parking . . . to be situated on the same parcel of land as the . . . structure.” CR at 165 at §7.8. The question is not whether this Court would have made the same determination as the Board, but whether the Board’s finding was reasonably supported by the evidence before it; the Court finds that it was. Any further dispute regarding the adequacy of current parking for Tiki Plaza’s existing business was beyond the scope of the application before the Board. To the extent that Pine Hollow claims the Board erred in considering the interior parking space to satisfy the ordinance, such a claim must be appealed to the Zoning Board of Adjustment. See RSA 676:5, III; RSA 677:15, I-a (a); see also Atwater v. Town of Plainfield, 160 N.H. 503, 509 (2010) (“when the planning board makes a decision ‘based upon the terms of the ordinance . . .’ a party must first appeal that decision to the zoning board of adjustments pursuant to RSA 676:5, III. Only after the board of adjustments has rendered a decision may the issue be appealed to the superior court.”).

b. Stormwater Management

The Court turns next to Pine Hollow’s claim that there is insufficient evidence in the record to support the Board’s determination that the proposed building would not increase water runoff onto the Campground.

In reviewing this aspect of the planning board’s decision, the Court “must determine whether there is evidence upon which the planning board’s findings could have been reasonably based.” Motorsports Holdings, LLC v. Town of Tamworth, 160 N.H. 95, 106–07 (2010). Application of this standard is “based upon the premise that the planning board has made findings that provide an adequate record of the board’s reasoning sufficient for a reviewing court to render meaningful review,” *id.* at 107. Where the reasons for the planning board’s decision are unclear from the record, the case may be remanded to the board for more definitive findings of fact. See Kalil v. Town of Dummer Zoning Board, 155 N.H. 307, 310 (2007); see also PPI Enterprises, LLC v. Town of Windham, No. 2020-0249, 2021 WL 2580598, at *4 (N.H. June 23, 2021) (nonprecedential).

Pine Hollow argues that the Board’s reliance on the Report was unreasonable for two reasons. First, Pine Hollow argues that the Report’s analysis is based on a gable roof (peaked in the center) which would direct one-half of rainwater runoff towards the south, i.e., into the subcatchment area served by the retention pond, whereas the actual proposal was for a mono-pitch roof (peaked on the southern side of the building) which would direct runoff only to the north, i.e., towards the Campground. See Doc. 10 at 6. Pine Hollow argues that the “line splitting the 2700 square foot building” on the diagram in the Report reflects this mistaken assumption of a gable roof and shows that “the actual proposed building is likely to produce far more runoff directed at the campground than [Tiki Plaza’s] engineer considered.” *Id.* Second, Pine Hollow contends that, to the extent the Board felt the roof runoff was addressed by the retention pond, that determination was unsupportable because the retention pond is at a higher elevation

than the northern back of the building; thus, water from the roof could not possibly flow to the retention area because “water does not flow uphill.” Doc. 11 at 3.

The Court is unable to determine from the present record how the Board understood the Report. It is true, as counsel for the Board notes, that the gray arrows shown on the diagram depict roof runoff from the proposed building flowing only in one direction (to the north), and that the same diagram shows runoff from the existing building—which has a center-peaked roof—flowing in two directions. See CR at 59 (excerpted images below showing the existing building on the left and the proposed building on the right):



Counsel for the Board argues that this comparison shows the Report correctly assumed that rainwater would run off the roof of the proposed building only towards the Campground. That argument, however, is difficult to reconcile with the “Subcatchment Area Line” shown on the diagram running the central length of the roof, which would appear to include half of the roof in the same subcatchment area as the retention pond. The Court does not understand how, if the Report was based on a mono-pitch roof, the front half of the roof could lie within one catchment area and the back half within another.

Nor is it clear to the Court whether or how the Board understood water runoff from the roof would be mitigated by the proposed stormwater basin. Certain comments by the Board appear to indicate that the Board was relying on the basin to assuage the concerns expressed by Pine Hollow. See C.R. 126-127 (“I believe that the retention area will take care of the 2,700 square-foot building. There’s not going to be additional runoff because that building is there, because they’ve addressed it with the retention area . . . the retention area is enough to satisfy the 2,700 square-foot building.”) Such reliance would be hard to understand since, as Pine Hollow notes, water cannot flow uphill. Other comments and actions by the Board—including the requirements of a gravel catchment area under the drip edge of the proposed structure, see id. at 90, and

a review of stormwater calculations by Public Works, id. at 140—would indicate that the Board realized further mitigation may be necessary.

Finally, the Court is unclear if the Board’s determination that the project will not increase water runoff was based on the property line as a whole, or on the particular segment of the line that is of critical concern to Pine Hollow—that is, the part of the line behind the proposed building. See e.g., C.R. at 113 (Focareto’s statement that “we pick the point of analysis as the property line as a whole line, not just that one point, but all the water that . . . comes onto our property and then . . . leaves our property[.]”). As counsel for Pine Hollow explained at the hearing, this part of the line is of particular concern because of its immediate proximity to several campsites on that part of its property.

The lack of clarity on the above points is reflected, at least in the Court’s mind, by the Chairman’s statement immediately preceding the final vote:

THE CHAIRMAN: Okay. So that would be the motion. And the finding would be that the board specifically finds that the drainage – that this project will not increase the runoff onto the abutters’ property and is intended to decrease it. Whether it does or not is – you know, I mean that’s – they’ve addressed it.

Id. at 126 (emphasis added).

The Court finds that the Board has not made a sufficient record of the reasons for its determination that the project will not increase water runoff onto the abutting property to enable meaningful review. The matter is therefore remanded to the Board for further explanation and findings on the stormwater runoff issue. See Motorsports, 160 N.H. at 107; see also Kalil, 155 N.H. at 311 (remand is appropriate in the context of a ZBA appeal when a court is “uncertain as to the board’s rationale or conclusions.”) On remand, the Board should explain its understanding of the Report and address the other issues discussed above in this section.

To be clear, the Court does not express any opinion on what findings the Board should make. The Court’s sole concern, at this time, is that the Board produce a record with findings that are explained with sufficient clarity to facilitate “meaningful appellate review” if its decision is appealed again. See Motorsports, 160 N.H. at 105.

c. Specific Findings of Fact

The Court concludes by briefly addressing Pine Hollows objection under RSA 676:3, I. That statute provides that a decision by the Board “shall include specific written findings of fact that support the decision.” The Court is in general agreement with counsel for the Board that the statute cannot reasonably be construed as requiring

specific written findings as to every site plan regulation supporting an approval.¹ See Doc. 9 at 7 (a written decision that goes “through every site plan review criterion and explain why it was met . . . would take hours at each board meeting and would take pages to document in a notice of decision”). To be clear, this is not what the Court is directing here. Rather, the Court respectfully directs the Board to state its findings and reasoning sufficiently for the Court to understand the considerations that support its conclusion.

Conclusion

For the reasons set forth above, the Board’s decision is **AFFIRMED IN PART** and **REMANDED** to the Planning Board for further findings and proceedings consistent with the above.



November 20, 2023

Hon. Mark D. Attorri

Clerk's Notice of Decision
Document Sent to Parties
on 11/20/2023

¹ RSA 676:3, I, mandates “automatic reversal and remand by the superior court” if the Board fails “to make specific written findings of fact supporting a disapproval.” (Emphasis added.)