THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Strafford Superior Court
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Dover NH 03820

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NOTICE OF DECISION

Judith E. Whitelaw, ESQ
Mitchell Municipal Group
25 Beacon Street East
Laconia NH 03246

Case Name: **George A. Calef and Arvilla T. Calef, Trustees of The George A. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008, et al v Town of Barrington,**
Case Number: **219-2014-CV-00471** ***219-2014-CV-00166***

Enclosed please find a copy of the court's order of October 27, 2015 relative to:

Court Order re: Zoning Board Appeal and Planning Board Appeal

October 30, 2015

Kimberly T. Myers
Clerk of Court

(273)

C: Gregory D. Wirth, ESQ; John L. Arnold, ESQ

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS. SUPERIOR COURT

George A. Calef and Arvilla T. Calef,
as Trustees of the George A Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008
and as Trustees of the Arvilla T. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008
v.

Town of Barrington

Docket No.: 219-2014-CV-00471; 219-2014-CV-00166

ORDER

The plaintiffs, George A. Calef and Arvilla T. Calef, as Trustees of the George A. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008 and as Trustees of the Arvilla T. Calef Living Revocable Trust of 2008 u/t/a dated May 21, 2008 ("the Calefs"), initiated litigation against the defendant, the Town of Barrington ("the Town"), appealing a decision of the Town's Planning Board. The Calefs later initiated another action against the Town, appealing a related decision of the Town's Zoning Board of Adjustment ("the ZBA"). These two actions were thereafter consolidated. (See ZBA court index #6.)[1] Subsequently, the Three Socios, LLC ("Three Socios"), intervened in this action. (ZBA court index #7.) After hearing, and based on the parties' arguments, the relevant facts derived from the record, and the applicable law, the court dismisses the Calefs' Planning Board appeal and affirms the decision of the ZBA.

FACTUAL AND PROCEDURAL BACKGROUND

The certified record reveals the following relevant facts. The Calefs own property on Route 125 in Barrington, where they operate a convenience store, Calef Fine Foods. (See PB C.R. JJJ at 3.)[2] The Calefs' lot abuts Route 125 to the west and property owned by the Three

[1] Though the Calefs' two suits have been consolidated, two separate case files and certified records exist. For the sake of clarity, the court will denote a court index or certified record citation to docket number 219-2014-CV-00471 with "ZBA" and a reference to items in docket number 219-2014-CV-00166 with "PB" (e.g. "PB court index #1", "ZBA C.R. at 1").

[2] The certified record provided in docket number 219-2014-CV-166, the Planning Board docket, is separately tabbed according to document and separately paginated, excluding the final two tabs, III and JJJ. The court will cite to III and JJJ as if they were exhibits in the certified record by citing the tab name and the specific page within the tab.

Socios to the north. (See PB C.R. JJJ at 2, 3.) Like the Calefs' lot, Three Socios's lot abuts Route 125 to the west. (See PB C.R. JJJ at 2, 3.) Three Socios's lot also abuts a lot owned by the Journey Baptist Church to the north and a lot owned by George Tsoulakas ("Tsoulakas") to the east. (See PB C.R. JJJ at 3.) Tsoulakas's lot, in turn, is abutted to the east by a larger lot owned by the Barrington Village Place, LLC ("Barrington Village Place"). (See PB C.R. JJJ at 3.)

The Calefs' lot has traditionally received water from a well located on Tsoulakas's property and has done so under the terms of an express easement since 2007. (See PB C.R. at 362–63, JJJ at 2; see also ZBA Compl. ¶¶ 9–12; ZBA Answer ¶¶ 9–12.) Tsoulakas's property is located near and to the northeast of the Calefs' property, but does not abut the Calefs' lot. (See PB C.R. JJJ at 3.)

In January of 2012, Three Socios submitted an application to the Planning Board[3] for major site plan review for proposed construction of a 5,000 square foot convenience store and gas station on Route 125. (PB C.R. at 1–6.) The proposed project site is located in the Barrington Town Center and Stratified Drift Aquifer Zoning Districts. (PB C.R. at 12.) Three Socios's proposed construction and operation of the gas station will include storage of fuel in several underground fuel storage tanks. (See PB C.R. at 138, JJJ at 4.) New Hampshire Department of Environmental Services ("NHDES") regulations require a certain distance between such underground fuel storage tanks and water supply wells. See N.H. Admin. Rules, Env-Or 407.06; (see also PB C.R. at 362.) Accordingly, the Three Socios's major site plan involved abandonment of several existing private wells, including the well which currently services the Calefs', and others', property. (See PB C.R. JJJ at 2, 3.) In order to provide an alternative water source for the properties serviced by the wells that would need to be abandoned, Three Socios began working with the local Conservation Commission and neighboring landowners to plan construction of a community well within a nearby conservation area. (See PB C.R. at 104, 164.)

[3] George Calef was a member of the Planning Board at the time the Three Socios's application was pending and considered by the Planning Board. Mr. Calef recused himself from discussion of the Three Socios's application during each Planning Board meeting on the subject. (See PB C.R. at 12, 26, 41, 51, 65, 76, 84, 96, 106, 146–47, 164, 185, 221, 224, 274, 361.)

On August 6, 2013, Three Socios representatives provided the Planning Board with an update on the progress of its application and project plans. (PB C.R. at 164–65.) They informed the Planning Board that they had been working "with the Conservation Commission to locate a well on an adjacent conservation area, so that the build out could be more dense as indicated in the Town Center Plan." (PB C.R. at 164; see also PB C.R. at 104.) There was some public discussion regarding the well, including how many hook-ups would be available. (PB C.R. at 165.) George Calef questioned who would be responsible for maintaining the well, and someone explained that the developers and landowners would maintain the well. (PB C.R. at 165.) The Planning Board continued further consideration of the application. (PB C.R. at 165.)

On August 28, 2013, Barrington Village Place, which owns the conservation area upon which the proposed community well would be situated, applied for major site plan review for installation of a community well on its property. (PB C.R. at 172–75.) This application was discussed in conjunction with the Three Socios's application at the Planning Board's September 10, 2013 meeting; further discussion of both applications was continued until a later time. (PB C.R. at 184–87.)

On October 1, 2013, the Planning Board accepted the Three Socios's application as substantially complete during a public hearing on the application. (PB C.R. at 225.) The Planning Board and public also discussed the proposed construction of the community well on Barrington Village Place's property, including whether the proposed location of the community well complied with applicable zoning ordinances. (PB C.R. at 225–26.) The Planning Board voted to conclude that the applicable zoning ordinance, Section 6.2.2(8), did not allow for the location of a community well in open space for service to off-site locations. (PB C.R. at 226–27.) On December 3, 2013, however, the ZBA granted a variance approving construction of the community well in the open conservation area that could be used to serve off-site locations. (PB C.R. at 243.)

Following the ZBA's grant of this variance, the Planning Board held another public hearing on Three Socios's proposed project in March 2014. (PB C.R. at 321–29.) The Planning Board and the public discussed a variety of issues, including water run-off, drainage, and the proposed community well. (PB C.R. at 321–29.) Following this discussion, the Planning Board voted to require Three Socios to submit individual minor site plan applications for three

properties related to the proposed community well which were not included in the original site plan application—Tsoulakas's property, Barrington Village Place's lot, and Journey Baptist Church's ("Church") lot. (PB C.R. at 329.) The Planning Board determined that minor site plan review was needed for these three properties because they each would house part of the community well infrastructure—Barrington Village Place's lot would house the well itself, the Tsoulakas's lot would house a pump house, and the Church's lot would contain a connection and water line. (See PB C.R. at 232, 321–22.) After this vote, the Town Planner informed Three Socios that she would be recommending to the Planning Board that Three Socios submit a minor site plan for the Calefs' property because of the proposed connective sidewalk and easement between the two properties. (PB C.R. at 331, III at 4.) The Calefs' and Three Socios's agreement regarding connections between the two sites later collapsed. (PB C.R. at 343.) Thereafter, Three Socios submitted updated plans to the Planning Board in April 2014 that eliminated the connection and accompanying easements. (Compare PB C.R. III at 4, with JJJ at 4.)

At some point during the application process, Three Socios requested the Calefs to abandon their existing well service in favor of service from the new, proposed community well. In furtherance of this goal, Three Socios requested the Calefs to enter into an Easement and Water Supply Agreement ("the Agreement") which provided for well service to the Calefs' lot from the new well, among other things. (PB C.R. at 293–301.) The Calefs found the terms of the Agreement to be unacceptable and repeatedly refused to execute the Agreement or enter into any other agreement regarding water supply from the new well.

On April 15, 2014, the Planning Board held another public hearing regarding Three Socios's application after its review of the updated plans. (PB C.R. at 361–64.) The public hearing included extensive discussion regarding the community well and provision of water from that well to the Calefs' property. (PB C.R. at 362–63.) Mr. Calef expressed concerns that he would not receive water from the new well and that he had no guarantee of such service from Three Socios. (PB C.R. at 362–63.) Several Planning Board members and the Planning Board's legal counsel commented that Mr. Calef would continue receiving water from the Millos'

property as governed by the 2007 private agreement.[4] They further stated that Mr. Calef's receipt of water through the Millos' property under their existing agreement was a private matter to be resolved by those parties. (PB C.R. at 362–63.) After extended discussion on these and other issues, the Planning Board voted to conditionally approve Three Socios's major site plan review application. (PB C.R. at 363–64.)

On April 24, 2014, the Planning Board issued a notice of decision conditionally approving Three Socios's major site plan review application. (PB C.R. at 366–68.) The notice of decision conditioned approval on a number of conditions precedent listed in the notice:

> All of the precedent conditions below must be met by the applicant . . . prior to the plans being certified by the Planning Board. Certification of the plans is required prior to commencement of any site work or recording of any plans. Once these precedent conditions are met and the plans are certified the approval is considered final.

(PB C.R. at 366.) The notice listed thirteen conditions precedent specific to Three Socios's proposed project. (PB C.R. at 366–68.) Relevant here, the conditional approval required that "[t]he applicant shall attain site plan approval for the installation of the well, well house and connecting infrastructure on the lots 238-14, 238-7, and 235-83, including all necessary easements." (PB C.R. at 367.) The three properties identified in this condition are Barrington Village Place's lot, Tsoulakas's lot, and the Church's lot. (See PB C.R. JJJ at 3, 4.) The notice of decision further required "Final Approval of the Non Community Transient Water System by NHDES shall be provided to the Town prior to construction" as a general or subsequent condition of approval. (PB C.R. at 368.) The Planning Board's conditional approval also required Three Socios to appear before the Planning Board again for review of its compliance with the conditions of approval prior to certification of the final plan. (PB C.R. at 367.)

On May 13, 2014, the Calefs appealed the Planning Board's decision to the ZBA pursuant to RSA 676:5 (Supp. 2014). (ZBA C.R. at 1–8.) The Calefs' appeal asserted that the Planning Board's conditional approval of Three Socios's application was not in conformance with the Barrington Zoning Ordinance ("zoning ordinance"). (ZBA C.R. at 4.) Generally, the Calefs asserted that the Planning Board's decision addressed issues of water supply related to the

[4] It is not clear who the Millos are, or which property they own. For purposes of this order, the court infers, based on the context of Planning Board discussions and other documents in the certified record, that the Millos are now, or were formerly, the owners of the property now or formerly owned by Tsoulakas. (See e.g., PB C.R. at 362–63.)

Church's, Tsoulakas's, and Barrington Village Place's properties, but failed to adequately address water service to the Calefs' property. (ZBA C.R. at 4–5.)[5] Specifically, the Calefs argued that the Planning Board's decision failed to comply with Articles 4.1.2, 4.5, and 4.5.2 of the Barrington Site Plan Review Regulations ("site plan review regulations"). (ZBA C.R. at 6.) They further pointed out that Three Socios's planned construction is dependent upon the Calefs' abandonment of their well. Based on their refusal to abandon, the Calefs argue that the Planning Board's conditional approval was in error because the placement of underground storage tanks in proximity to wells "may not comply with [NHDES] setback requirements for water supply wells." (ZBA C.R. at 6.) Finally, the Calefs asserted that to the extent the Planning Board's decision requires the Calefs to abandon their existing well service, that requirement violates Article 12-A of the New Hampshire Constitution and the Fifth and Fourteenth Amendments to the United States Constitution as an unlawful taking of property. (ZBA C.R. at 6.) The Calefs' also alleged generally that "the Planning Board decision, based upon the terms of the Barrington Zoning Ordinance or upon the construction, interpretation or application of the Barrington Zoning Ordinance, is in error and is not in conformance with the Barrington Zoning Ordinance." (ZBA C.R. at 6.)

On May 14, 2014, the Calefs filed an appeal of the Planning Board's decision in the Superior Court under RSA 677:15 (Supp. 2014). (PB Compl. ¶¶ 17–39.) This appeal asserted essentially the same grounds for reversal as the Calefs' appeal before the ZBA. (Compare ZBA C.R. at 1–8 with PB Compl. ¶¶ 18–39.) Specifically, the Calefs again asserted that the Planning Board's decision was unreasonable or illegal in that it: (1) failed to comply with Articles 4.1.2, 4.5, and 4.5.2 of the site plan review regulations; (2) may not comply with NHDES setback requirements for water supply wells if the Calefs' well is not abandoned; and (3) amounted to an unconstitutional taking of private property by requiring the Calefs to abandon their historical water source. (PB Compl. ¶¶ 36–38.) Shortly after the Calefs filed this appeal, Three Socios intervened in that action. (PB court index #7.) In June 2014, the court stayed the Calefs' direct

[5] The Calefs also aver that the Planning Board's "draft Notice of Decision" of its April 15, 2014 conditional approval of Three Socios's project included different language than its final notice of decision. (ZBA C.R. at 5.) Specifically, the Calefs maintain that the draft notice of decision included a condition requiring minor site plan approval for their property in relation to the community well. (ZBA C.R. at 5.) This draft notice of decision does not appear to be part of the certified record. If the Calefs are referring to the Planning Board's pre-public hearing minutes for April 15, 2014, which include staff recommendations on pending action items, those minutes do not reflect the language the Calefs assert. (PB C.R. at 355–57.)

appeal of the Planning Board's decision to the Superior Court pending resolution of its appeal to the ZBA. (PB court index #6.)

On June 20, 2014, the Town and Three Socios filed a joint motion to dismiss the Calefs' Planning Board appeal, arguing primarily that the Planning Board's conditional approval of the project was not a final decision subject to appeal under RSA 677:15. (PB court index #10 at 3–5.) The motion also argues that the appeal is inappropriate because it improperly seeks to require the Planning Board to enforce private property rights. (PB court index #10 at 5–6.) The Calefs objected. (PB court index #11.)

The Town and Three Socios also filed a similar motion to dismiss with the ZBA, arguing that the ZBA lacked jurisdiction to hear the Calefs' appeal because the appeal did not challenge the Planning Board's application of the zoning ordinance. (ZBA C.R. at 26–32.) The Calefs also objected to that motion before the ZBA, arguing that their appeal specifically identified that the Planning Board's decision did not conform to certain site plan review regulations, which are incorporated by reference into the zoning ordinance. (ZBA C.R. at 33–38.) The Calefs further argued that the factual allegations contained in the appeal together with the general assertion that the Planning Board decision did not conform with the zoning ordinance, "support a finding that the April 15, 2014 Planning Board Decision is not in conformance with Articles 2.2, 2.2.5, 3.1.5, 3.1.6, 4.2.4(1), 6.2.2(8), 6.2.2(9), 7.1, 7.1(1), 12.1, 12.1(3) and 12.2." (ZBA C.R. at 35–36.)

On August 27, 2014, the ZBA held a public hearing on the Calefs' appeal, including the Town's and Three Socios's joint motion to dismiss the appeal for lack of jurisdiction. (ZBA C.R. at 56–64.) The ZBA first heard arguments and presentation by the public on the issues raised by the motion to dismiss for lack of jurisdiction. (ZBA C.R. at 56–59.) The presentations also discussed whether the ZBA should consider the grounds for appeal raised in the Calefs' appeal petition only, or whether it should consider grounds raised in their objection to the Town's motion to dismiss as well. (ZBA C.R. at 57–59.) The ZBA decided to take the issues raised by the motion to dismiss under advisement and hear the merits of the Calefs' appeal. (ZBA C.R. at 59.) The parties then presented arguments on the merits of the appeal. (ZBA C.R. at 59–62.) The ZBA then considered the merits of the Calefs' appeal by going through each of the Calefs' asserted violations of site plan review regulations and zoning ordinance separately, including the specific zoning ordinance sections raised only in the Calefs' objection to the

motion to dismiss. (ZBA C.R. at 63–64.) The ZBA concluded that the Calefs' appeal should be denied for the reasons discussed at the hearing. (ZBA C.R. at 64.)

The ZBA issued a notice of decision on September 25, 2014, articulating the reasons for its denial of the appeal. (ZBA C.R. at 76–77.) The ZBA granted the Town's motion to dismiss in part, finding that the Calefs' claims based on the Planning Board's failure to comply with site plan review regulations were not within the ZBA's jurisdiction. (ZBA C.R. at 77.) The decision then specifically addressed each of the zoning ordinance articles and site plan review regulations raised by the Calefs in their appeal and objection to the motion to dismiss. (ZBA C.R. at 76–77.) It noted first that the Calefs had withdrawn any claims based on zoning ordinance sections 6.2.2 (8) and 6.2.2 (9). (ZBA C.R. at 59, 61, 63, 76.) The ZBA then found that the other zoning ordinance sections cited—2.2, 2.2.5, 7.1, and 12.2—were all general statements of purpose and were not appealable. (ZBA C.R. at 76.) It further noted that, to the extent that violations of statement of purpose are appealable, the Calefs did not meet their burden of proving that the Planning Board's decision contravened or misapplied these sections of the zoning ordinance. (ZBA C.R. at 76.) The ZBA also found that the remaining zoning ordinance sections cited—3.1.6, 3.1.5, and 4.2.4(1)—were sections that require compliance with other regulations, such as NHDES regulations and site plan review regulations. (ZBA C.R. at 76.) The ZBA found that if those regulations are violated, an appeal should be taken under the applicable procedures for each regulatory scheme, not to the ZBA. (ZBA C.R. at 76.) Finally, the ZBA also found no violation of zoning ordinance section 7.1, as the Planning Board's approval was conditioned upon approval of site plans for three sites related to construction of the new well, and any water issues would be resolved in that process. (ZBA C.R. at 76–77.) The ZBA denied the Calefs' appeal and affirmed the Planning Board's decision to the extent, if any, it involved application or interpretation of the zoning ordinance. (ZBA C.R. 76–77.)

The Calefs filed a motion for rehearing of the ZBA's decision and, later, an amended motion for rehearing. (ZBA C.R. at 67–75, 93–103.) The Town and Three Socios objected to a rehearing. (ZBA C.R. at 78, 79, 104–05, 106.) On November 19, 2014, the ZBA voted to deny the Calefs' request for rehearing. (ZBA C.R. at 107–08.) It issued a notice of decision to that effect on November 20, 2014. (ZBA C.R. at 114.)

On December 18, 2014, the Calefs appealed the ZBA's decision to this court. (ZBA court index #1.) That appeal was consolidated with the pending appeal of the Planning Board's decision before the Superior Court on January 26, 2015. (ZBA court index #6.) Three Socios then intervened. (ZBA court index #7.) Appeals of both the Planning Board's decision and the ZBA's decision are now before this court pursuant to RSA 677:15 and RSA 677:4, as are the motions to dismiss. The court will consider each issue in turn.

PLANNING BOARD APPEAL

I. Standard of Review

Any person aggrieved by a planning board decision may appeal to the superior court. RSA 677:15, I (Supp. 2014). "[O]nly a final decision of the planning board is appealable under RSA 677:15, I." Saunders v. Town of Kingston, 160 N.H. 560, 564 (2010) (citations omitted). Upon appeal of a final appealable planning board decision, "the burden of proof is on the party seeking to set aside the decision of the . . . planning board to show that the decision is unlawful or unreasonable." Bayson Prop., Inc. v. City of Lebanon, 150 N.H. 167, 169 (2003); see also RSA 677:6 (2008). "The superior court is obligated to treat the factual findings of both the zoning board and the planning board as prima facie lawful and reasonable and cannot set aside their decisions absent unreasonableness or an identified error of law." Bayson Prop., Inc., 150 N.H. at 170 (quotation, internal quotation marks, and brackets omitted). "The review by the superior court is not to determine whether it agrees with the [planning board's] findings, but to determine whether there is evidence upon which they could have been reasonably based." Lone Pine Hunters' Club, Inc. v. Town of Hollis, 149 N.H. 668, 670 (2003) (quotation, internal quotation marks, and brackets omitted). Although "[i]n another town, on an identical fact pattern, a different decision might lawfully be reached by another [planning board,] [t]his does not mean that either finding or decision is wrong per se." Nestor v. Town of Meredith, 138 N.H. 632, 634 (1994). The burden here, therefore, is on the Calefs to demonstrate by "a balance of probabilities" that the Planning Board's decision was unlawful or unreasonable. RSA 677:6.

II. Analysis

The Calefs' Planning Board appeal focuses on reasons why the Planning Board's conditional approval of Three Socios's project is asserted to have been unlawful or unreasonable.

They argue that the Planning Board's decision was unlawful or unreasonable because: (1) it failed to comply with site plan review regulations 4.1.2, 4.5, and 4.5.2; (2) it may not comply with NHDES setback requirements for wells; and (3) to the extent the decision requires the Calefs to abandon their existing well, it effectuates an unconstitutional taking of private property. (PB Compl. ¶¶ 36–38.) The Town and Three Socios argue in their motion to dismiss that in the present posture of this case the court lacks jurisdiction to reach the issues raised by the Calefs' appeal. As the motion to dismiss raises a threshold question concerning the court's jurisdiction, the court must take up and resolve that issue prior to considering the merits of the Calefs' appeal.

A. Lack of Jurisdiction

The Town and Three Socios jointly move to dismiss. In that motion, the Town and Three Socios argue that this court has no jurisdiction to consider this appeal under RSA 677:15 because the Planning Board's conditional approval of the Three Socios's project was not a final decision. (PB court index #10 at 3.) The Calefs objected to this motion, but did not specifically articulate why the Planning Board's conditional approval was a final decision. (See PB court index #11 at 1–5.)

The court agrees with the Town and Three Socios. "[O]nly a final decision of the planning board is appealable under RSA 677:15, I." Saunders v. Town of Kingston, 160 N.H. 560, 564 (2010) (citations omitted). Conditional approval of an application does not necessarily preclude a decision from being final; such a determination depends on whether the approval is premised upon conditions precedent or conditions subsequent. Id. "Conditions precedent contemplate additional action on the part of the town, and, thus, cannot constitute final approval. Conditions subsequent, on the other hand, do not delay." Id. (quotation, brackets, and ellipsis omitted). "Thus, a conditional approval imposing only conditions subsequent constitutes a final decision appealable under RSA 677:15, I[,]" while a decision imposing conditions precedent is not final and appealable under RSA 677:15, I. Id. (citation omitted); see also, Prop. Portfolio Grp., LLC v. Town of Derry, 154 N.H. 610, 615 (2006), as modified on denial of reconsideration (Jan. 24, 2007) ("We noted that conditions precedent, such as those in Totty, contemplate additional action on the part of the town and, thus, cannot constitute final approval."); Sklar Realty, Inc. v. Town of Merrimack, 125 N.H. 321, 327–28 (1984); Totty v. Grantham Planning Bd., 120 N.H. 388, 389–90 (1980) overruled in part on other grounds in Winslow v. Town of

Holderness Planning Bd., 125 N.H. 262, 268–69 (1984), (finding planning board's grant of conditional approval was not final order appealable under previous version of statute).

Here, the Planning Board's approval of Three Socios's project was conditioned upon thirteen conditions precedent and four general and subsequent conditions. (PB C.R. at 366–68.) The conditions precedent require extensive work by Three Socios, including revision of construction and maintenance plans, site plan approval for several other sites related to the well, update of its driveway permit, and approval of easement language by town counsel, among other things. (PB C.R. at 366–68.) The Planning Board's decision clearly distinguishes between conditions precedent and conditions subsequent, and also explicitly states that "[p]rior to certification of the final plan, the applicant will appear before the board for review of compliance with the conditions of approval." (PB C.R. at 366–68.) Because the Planning Board's conditional approval of Three Socios's application was dependent upon the fulfillment of numerous conditions precedent and contemplated further action by the Planning Board, it was not a final decision under RSA 677:15, I. See Sklar Realty, Inc., 125 N.H. at 327; Totty, 120 N.H. at 389. This court, therefore, has no jurisdiction to hear an appeal based on this preliminary decision. See Saunders, 160 N.H. at 564; RSA 677:15, I. The Calefs' appeal of the Planning Board's decision must accordingly be dismissed at this point in the planning board process. The motion to dismiss the planning board appeal filed by the Town and Three Socios is granted.

ZONING BOARD APPEAL

Although the conditional nature of the Planning Board's decision deprives this court of jurisdiction over the Calefs' appeal of that decision at this point in the process, it does not affect this court's jurisdiction over the Calefs' appeal of the ZBA's decision. The statutory scheme governing planning and zoning does not "require[] that the planning board first complete its consideration of the planning issues involved in a site plan review, or that the applicant satisfy the conditions imposed on a site plan application prior to the zoning board considering the zoning issues on appeal." Atwater v. Town of Plainfield, 160 N.H. 503, 508–10 (2010); see also, RSA 677:15, I; RSA 676:5, III. The court, accordingly, turns to the issues raised by the Calefs' ZBA appeal.

I. Standard of Review

Any person aggrieved by a zoning board of adjustment order or decision may appeal to the superior court. RSA 677:4 (Supp. 2014). "[T]he burden of proof is on the party seeking to set aside the decision of the zoning board . . . to show that the decision is unlawful or unreasonable." Bayson Prop., Inc., 150 N.H. at 169; see also RSA 677:6. It is the province of the zoning board of adjustment, not the trial court, to resolve conflicting evidence and determine issues of fact. Lone Pine Hunters' Club, Inc., 149 N.H. at 671. Accordingly, "[t]he superior court is obligated to treat the factual findings of both the zoning board and the planning board as prima facie lawful and reasonable and cannot set aside their decisions absent unreasonableness or an identified error of law." Bayson Prop., Inc., 150 N.H. at 170 (quotation, internal quotation marks, and brackets omitted). "The review by the superior court is not to determine whether it agrees with the zoning board of adjustment's findings, but to determine whether there is evidence upon which they could have been reasonably based." Lone Pine Hunters' Club, Inc., 149 N.H. at 670 (quotation, internal quotation marks, and brackets omitted). Even though "[i]n another town, on an identical fact pattern, a different decision might lawfully be reached by another ZBA[,] [t]his does not mean that either finding or decision is wrong per se." Nestor, 138 N.H. at 634. The burden here, therefore, is on the Calefs to demonstrate "by the balance of probabilities" that the ZBA's decision was unlawful or unreasonable. RSA 677:6.

II. Analysis

The Calefs allege a number of reasons why the ZBA's decision is asserted to be unreasonable or illegal. Their claims fall into three categories: (1) violations of site plan review regulations which the Calefs argue are enforceable by the ZBA pursuant to the zoning ordinance; (2) violations of specific provisions of the Town's zoning ordinance; and (3) a claim that the decision affects an unconstitutional taking. (ZBA Compl. ¶¶ 43, 47.)

A. Site Plan Review Regulations Incorporated by Zoning Ordinance

The Calefs assert that the ZBA's partial grant of the Town's motion to dismiss due to lack of jurisdiction was unlawful or unreasonable because the zoning ordinance specifically incorporates the site plan review regulations in Article 2.2.5 and 3.1.6 of the zoning ordinance. (ZBA Compl. ¶¶ 43A–C.) In its decision, the ZBA refused to consider the Calefs' arguments based on contravention of the site plan review regulations because it found that it does not have

"jurisdiction to review appeals of the planning board's interpretation, construction, or application of its site plan review regulations." (ZBA C.R. at 77.)

The court agrees with the ZBA's conclusion. Articles 2.2.5 and 3.1.6 both state that development under the zoning ordinance should also comply with the Town's site plan review regulations. (See ZBA C.R. at 118, 120.) The court cannot find, however, under the extensive statutory scheme governing planning and zoning and the zoning ordinance and regulations involved here, that this reference gives the ZBA jurisdiction over the Planning Board's interpretation or application of site plan review regulations. RSA 676:5, III (Supp. 2014) and RSA 677:15 establish a dual track appeal process for appeals from a planning board decision or determination. See Atwater v. Town of Plainfield, 160 N.H. 503, 507–09 (2010); P. Loughlin, New Hampshire Practice: Land Use Planning and Zoning § 33.02 at 593–95 (2010 & Supp. 2014.) If an appellant challenges a planning board decision based "upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer," that decision must be appealed to the zoning board of adjustment in the first instance. RSA 676:5, III; RSA 677:15, I-a (Supp. 2014). The zoning board of adjustment's decision regarding the planning board's interpretation of the zoning ordinance may then be appealed to the superior court. RSA 677:15, I-a. All other appeals of planning board decisions or determinations must be taken directly to the superior court. RSA 677:15, I, I-a.

The Calefs' interpretation of the zoning ordinance here as incorporating by reference the site plan review regulations wholesale as part of the zoning ordinance would undermine or totally eliminate the dual track appeal process and limited jurisdiction of zoning boards established by the legislature. The Calefs have cited no authority in support of this position, and court declines to interpret the Town's zoning ordinance to implicate such a result. The court finds the ZBA's decision finding that it did not have jurisdiction to consider the Calefs' claims regarding site plan review regulations both lawful and reasonable.

B. Zoning Ordinance

The Calefs also assert that the ZBA erred in finding that the Planning Board's decision conformed to a number of specific zoning ordinance articles—articles 2.2, 2.2.5, 3.1.5, 3.1.6, 4.2.4(1), 7.1, 7.1(1), 12.1, 12.1(3), and 12.2. (ZBA Comp. ¶ 43.) The court finds no error in the

ZBA's decision with respect to each zoning ordinance article, and briefly addresses the issues raised in respect to its decision on each.

1. Purpose clauses: articles 2.2, 2.2.5, 7.1, 12.1, and 12.2

The ZBA found that articles 2.2, 2.2.5, 7.1, 12.1, and 12.2 are all general "purpose statements," which do not contain specific regulatory requirements, and are not appealable. (ZBA C.R. at 76.) Additionally, the ZBA also found that, even if appealable, the Calefs failed to present sufficient evidence demonstrating that the Planning Board's decision misapplied these articles of the zoning ordinance. (ZBA C.R. at 76.) The court agrees with the ZBA that these articles of the zoning ordinance establish general principles that should govern interpretation and implementation of the ordinance. (See ZBA C.R. at 63–64, 76, 116–24.) The court also finds that the Calefs failed to provide adequate evidence demonstrating that the ZBA incorrectly decided that the Calefs provided insufficient evidence to show that the Planning Board's decision did not conform to these provisions of the zoning ordinance. See Saunders, 160 N.H. at 568 ("Where [the plaintiffs] made factual allegations in the motion itself, the plaintiffs failed to cite any record support for them, a failure they have not remedied before this court."). The ZBA's decision on this issue was lawful and reasonable.

2. Compliance with other administrative regulations: articles 3.1.5, 3.1.6, 4.2.4(1)

The Calefs argue that the ZBA erred by not ensuring that the Planning Board's decision complied with zoning ordinance articles 3.1.5, 3.1.6, and 4.2.4(1), which all require compliance with site plan review regulations and NHDES regulations. (ZBA C.R. at 120–21.) This argument is essentially a reconfiguration of the Calefs' claims that the Planning Board's decision violated site plan review regulations and NHDES regulations, rather than a claim actually related to the zoning ordinance.

As explained above, the ZBA has limited jurisdiction to hear appeals based "upon any construction, interpretation, or application of the zoning ordinance," upon an administrative official's enforcement of a zoning ordinance, or upon issues related to requests for special exceptions or variances from the zoning ordinance. RSA 674:33 (Supp. 2014); RSA 676:5, III. Any claim that the Planning Board has contravened its site plan review regulations or that the NHDES has failed to enforce its regulations must be taken according to the proper administrative

appeals process; the ZBA has no jurisdiction over such appeals. The court finds that the ZBA did not err on these issues.

3. Water supplies: article 12.1(3), 7.1(1)

Finally, the Calefs assert that the ZBA's decision violates articles 7.1(1) and 12.1(3) because it requires the termination of the Calefs' water supply and fails to ensure them an alternate water supply. (ZBA Compl. ¶¶ 43J, 43L.) To the contrary, the Planning Board's decision did not require termination of the Calefs' water supply, and the Planning Board conditioned approval of Three Socios's project on minor site plan approvals related to installation of a new community well which would serve as an alternate water source. The ZBA's decision affirming that decision was lawful and reasonable. Further, Calefs' rights in continuation of its current private water supply presents a private dispute between property owners over which the ZBA had no jurisdiction, and which is not properly before this court in the context of this ZBA appeal.

C. Taking

Lastly, the Calefs assert that the ZBA's decision is unlawful and unreasonable because it affirmed a Planning Board decision which the Calefs assert effected an unconstitutional taking. (ZBA Compl. ¶ 47.) The Calefs assert that the Planning Board's decision effectuates an unlawful taking of private property by requiring the Calefs to abandon their property rights in their existing well access. (Pls. Mem. Supp. Appeals at 12.) The Town and Three Socios argue, in contrast, that the Town has not required the Calefs to abandon their existing well access, but rather, Tsoukalas has voluntarily agreed with the Three Socios to abandon the current system and connect to the new community well. (Town's Amended Trial Mem. at 11; Three Socios's Trial Mem. at 12.)

The court first addresses the Calefs' argument under the State Constitution, as the Federal Constitution provides no greater protection in this context. Webster v. Town of Candia, 146 N.H. 430, 438 (2001) (citations omitted); State v. Ball, 124 N.H. 226, 231–32 (1983). Part I, Article 12 of the New Hampshire Constitution provides that "[e]very member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property . . . no part of a man's property shall be taken from him . . . without his own consent . . . ." See also, Bio Energy, LLC v. Town of Hopkinton, 153 N.H. 145, 156 (2005). A taking of private property in violation

of this right may be affected by the state through formal condemnation, physical invasion, or inverse condemnation. See J.K.S. Realty, LLC v. City of Nashua, 164 N.H. 228, 234 (2012); P. Loughlin, New Hampshire Practice: Local Government Law, § 824 at 22-22 (2011). When a government body is alleged to have taken property through inverse condemnation,

> [t]he interference must be more than mere inconvenience or annoyance and must be sufficiently direct, sufficiently peculiar, and of sufficient magnitude to cause [the court] to conclude that fairness and justice, as between the State and the citizen, requires that the burden imposed be borne by the public and not by the individual alone.

J.K.S Realty, 164 N.H. at 234 (quotation omitted).

Here, the asserted interference with Calefs' property rights is forced abandonment of the Calefs' connection to a well. The record, however, undercuts this assertion. Nothing in the Planning Board's meeting minutes or notice of decision mandate, or even imply, that the Calefs must abandon their existing well access based on Planning Board authority or order. Rather, the Three Socios, a private party, has requested that the Calefs abandon their well and enter into an agreement for service from another water source. If Three Socios is unable to convince the Calefs to abandon their well, their application and project may or may not be unable to proceed as currently planned. That, however, is a private matter independent of Planning Board action.

At bottom, the Calefs' well access is governed by their agreement with Tsoulakas (or the current owner of Tsoulakas's lot) or by whatever rights they have acquired in that regard. The Planning Board's decision does not affect that agreement, nor could it. See Short v. Town of Rye, 121 N.H. 415, 416–17 (1981). Accordingly, the court finds that the Planning Board's decision has no direct impact on the Calefs' private property rights such that an unconstitutional taking has occurred. See J.K.S. Realty, 164 N.H. at 234–238 (finding that prolonged government planning and delayed condemnation proceedings did not constitute a taking); Morrissey v. Town of Lyme, 162 N.H. 777, 783 (2011) (finding that Town's lowering of water level in pond which plaintiffs' property abutted did not constitute taking). The Calefs have asserted no basis for finding that the ZBA decision constitutes a taking of private property other than its affirmance of the Planning Board's decision. (See ZBA Compl. ¶ 47.) Consequently, the ZBA's decision affirming the Planning Board's decision does not constitute an unconstitutional taking of private property and was neither unlawful nor unreasonable.

CONCLUSION

In sum, the court finds that because the Planning Board process is not yet final the court lacks jurisdiction to consider the merits of the Calefs' planning board appeal, and that the Calefs have failed to carry their burden of proving, by a balance of the probabilities, that the decision of the ZBA was illegal or unreasonable. The Planning Board appeal is dismissed and the ZBA's decision is affirmed.

So Ordered.

October 27, 2015

Steven M. Houran
Presiding Justice