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N.H. Supreme Court curbs planning board authority to deny site plan approval - by Philip Hastings and Alexandra Brewer

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Philip Hastings

Alexandra Brewer

The New Hampshire Supreme Court recently curbed a planning board's ability to deny site plan approval of development projects. In *Mojalaki v. Franklin*, decided this spring, the court overturned the planning board's denial of site plan approval for a solar farm on a former golf course.

Although the project was allowed by right under the city's zoning ordinance, it was met with substantial public criticism and resulted in multiple public hearings with neighbors raising concerns about the visual and environmental impact of the solar farm. Despite the objections, the planning board could not find that the project failed to meet any of the specific requirements of its site plan review regulations.

Instead, the planning board denied Mojalaki's site plan application because the project conflicted with the general purpose provisions in the regulations. More specifically, the city determined that installation of new utility poles for the solar farm would create an industrial look out of character for the neighborhood, the solar array would have an adverse impact on abutters and other residents in the neighborhood, and cutting down mature trees to plant new trees contradicted the purpose of the regulations.

The developer appealed to the Superior Court, which upheld the planning board's decision. The developer then appealed to the Supreme Court.

Expanding on a 2018 case, *Dartmouth College v. Hanover*, which ruled that planning boards cannot make decisions based in unsubstantiated personal feelings in ad hoc fashion, the Supreme Court agreed with the developer that it was unreasonable for the planning board to deny site plan approval based solely on the general purpose provisions of the regulations when all the site-specific technical regulations had been satisfied. The Supreme Court explained that the purpose of site plan review is to ensure that uses permitted by the zoning ordinance are constructed in such way that they fit into the area without causing drainage, traffic or lighting problems and to ensure that sites will be developed in a safe and attractive manner. Nevertheless, site plan review is limited, and a project cannot be denied simply because the planning board does not feel that the proposed use is appropriate. In other words, if the use is permitted by the zoning ordinance, it cannot be barred by the site plan review process unless the use would create unusual public safety, health or welfare concerns that are specifically provided for in the planning board's regulations.

The Court further explained that the regulations' purpose provisions are goals of the regulations, not substantive requirements themselves. Without specific requirements, developers lack objective standards to guide their projects. Although a planning board is not necessarily prohibited from using the general purpose provisions in considering a site plan application, when an application complies with the specific technical requirements of the regulations, the general purpose provisions alone cannot be the basis for denial.

In addition to overturning the planning board's decision, the court granted the developer a "builder's remedy" to complete the project as proposed without having to return to the planning board because there was no dispute that the application met the specific, applicable site plan review regulations. A "builder's remedy" is extraordinary relief and is not a typical remedy for those developers who prevail on appeal. That the court did so in this case is a strong signal that it will not condone municipal attempts to unreasonably interfere with those development rights clearly provided for under the terms of the applicable zoning and land use regulations.

We should mention the outstanding work of our colleague at Cleveland, Waters and Bass, P.A., Jeff Christensen, who led the effort to overturn the planning board's decision in this case.

Philip Hastings is the president, a director, and shareholder, and Alexandra Brewer is an associate attorney at Cleveland, Waters and Bass, P.A., Concord, NH.

New England Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540