STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-24-384

NEWFIELD SAND

Appellant

v.

TOWN OF NEWFIELD

Appellee

ON APPEAL FROM THE BUSINESS AND CONSUMER COURT
Docket No. BCD-APP-2024-00004

BRIEF OF APPELLANT NEWFIELD SAND

Dated: December 30, 2024

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I. INTRODUCTION

This appeal presents the question of whether a municipal administrative board can place conditions on a permit that allow the board to retake jurisdiction over the application at any time in the future and change the terms under which the permittee may operate. Newfield Sand and its team of experts spent two years seeking land use approval from the Town of Newfield Planning Board for an expansion of its mineral extraction operation. Despite the Planning Board finding that Newfield Sand had met all the approval standards based upon the facts and testimony in the record, and placing operating conditions intended to ensure compliance, the Planning Board placed other conditions on the application that would give the Board the ability, in perpetuity, to retake jurisdiction over the application and place further restrictions if complaints were filed. These conditions, if upheld, would vastly change the playing field for Maine businesses, preventing them from ever being able to rely on the permits they receive. Such a precedent would also vastly expand the reach of municipal administrative boards beyond the bounds of the ordinances they are appointed to administer.

II. FACTUAL AND PROCEDURAL HISTORY

Newfield Sand owns real property located on Carroll Pit Road and shown on the Town's tax maps at Map 35, Lot 9 (the "Property"). Rec. at 1, 43. (hereinafter R.#). In 1994, the Town's Planning Board granted a permit to Newfield Sand's

predecessor in title, Douglas Woodward, to operate a "[f]ive acre gravel extraction operation" on a portion of the Property ("the Woodward permit"). R.2 (finding #8); R.374. Newfield Sand's parent company, R. Pepin & Sons, acquired the Property from Mr. Woodward, and Newfield Sand acquired the Property from R. Pepin & Sons in 1998 and has since conducted mineral extraction activities on it. R.2 (finding # 10). Newfield Sand's Property also directly abuts a long-term mineral extraction operation on a 320-acre tract by the name of Carroll Materials. R.1 (finding #4). Carroll's permit does not contain the conditions at issue in this appeal. R.486–493.

In August of 2022, Newfield Sand filed an application with the Town's Planning Board to expand mineral extraction operations on the Property to a total area of 85.21 acres, with 30 acres maximum to be "open" (under excavation) at any time. Prior to the Application, Newfield Sand was already approved for 70 trucks per day and did not intend to increase the amount of trucks to and from the site after the Application. R.382. Newfield Sand estimated one or two truckloads per day from the site going forward and stated that trucks would not travel on Bridge Street or residential roads and would only travel on state roads. R.382. Newfield Sand trucks also do not run in the winter, mostly just summer and fall. R.353. Newfield Sand trucks do not run on Saturdays, as Saturday operations only

include screening on site. *Id.* Newfield Sand expects the expansion from 30 open acres to 85.21 to be a gradual across a period of 30 or more years. *Id*.

The Planning Board considered Newfield Sand's application (the "Application") at numerous Planning Board meetings between August of 2022 and November of 2023. The Planning Board held a public hearing on December 7, 2022. A few residents, during public comment at the hearing and in other written submissions, expressed generalized concern regarding trucks traveling on roads within the town, including speed and safety. App. 135–139; R.482–486. No member of the public or the Planning Board raised any past speeding or safety issues, or traffic violations attributed to Newfield Sand's trucks or to those of its predecessor. R.350–477. No member of the public raised specific concerns about Newfield Sand's trucks, as differentiated from other trucks operating for the benefit of businesses located inside or outside of the Town. *Id.* There is nothing in the record regarding noise or traffic related violations related to the Property. *Id.* There is also nothing in the record regarding any other nuisance-type complaints about the operation. *Id.*

When discussing traffic related to the project at the August 9, 2023 meeting, the following discussion occurred:

Ben Plant: So, I think that is what you are looking for. So if for some reason 70 trips does create hazardous conditions then the Board can reassess.
Gloria D: Well it has but it is not them.
Attorney Ben Plante: Well, I think this condition should be limited to this operation.
Lee Jay: Right. You can't take into consideration, the other operation.
Gloria D: There is a hazardous situation with traffic.
Lee Jay: How do we have proof that there is a hazardous situation? Do we have accident data that shows that there have been truck accidents? Or with cars at the intersection? So there really isn't any empirical data to back that up.
Gloria D agreed with Lee Jay's statement.
Attorney Ben Plante: And I think that at the public hearing there wasn't necessarily any evidence presented that there has been accidents resulting from these trucks as I interpreted it. It was more some general complaints.
Gloria D agreed.

R.443. Despite the above exchange confirming that there was no evidence of hazards and no problems arising from Newfield Sand's existing operation, the Planning Board, starting at the same August 9 meeting, discussed potential conditions of approval that would allow it to reconsider Newfield Sand's hours of operation and limits on truck trips at any point in the future if safety conditions were raised. R. 443; 461. Newfield Sand repeatedly responded that the Planning Board had no authority under the Town's ordinances to give itself ongoing jurisdiction to change the terms of a permit based upon hypothetical future occurrences. R.449–451; 487–494. Newfield Sand set forth its legal arguments against the proposed condition(s) at several meetings and in several written submissions to the Planning Board. *Id*.

Over Newfield Sand's objection, the Planning Board ultimately approved the Application by verbal vote taken on November 16, 2023 and by written decision dated November 29, 2023 which included the following two conditions (collectively, the "Conditions") that are challenged in the present appeal:

a. Condition #2 provides that "The Applicant's hours of operation shall be limited to 6:30 a.m.-5:30 p.m., Monday – Saturday, excluding Holidays. The Applicant shall only be allowed to operate one machine on the Property on Saturdays. *The Board reserves the right to reevaluate the Applicant's hours of operation in the event that the CEO presents evidence, at a duly noticed public hearing in which the applicant is permitted to present evidence and object to any evidence presented by the CEO, to the Board that the Applicant's operations have resulted in a significant adverse impact upon the value or quiet possession of surrounding properties greater than would normally occur from such a use in the zoning district in which the Property is located.*" (Emphasis added to the challenged portion of the condition).

b. Condition #3 provides that, "The daily truck trips from the Property shall be limited to seventy (70) trips per day, and no more than seven (7) truck trips may occur in any one hour. *The Board reserves the right to reevaluate this truck trip limitation in the event that the CEO presents evidence, at a duly noticed public hearing in which the applicant is permitted to present evidence and object to any evidence presented by the CEO, to the Board that truck traffic travelling to and from the Property has resulted in a significant adverse impact upon the value or quiet*

possession surrounding properties greater than would normally occur from such a use in the zoning district in which the Property is located."

(Emphasis added to the challenged portion of the condition).

Newfield Sand filed this Rule 80B appeal in the York County Superior Court on December 18, 2023. The parties subsequently agreed to transfer the appeal to the Business and Consumer docket. Newfield Sand filed an Amended Complaint on May 28, 2024, with the Town's consent, which is the operative Complaint supporting this Brief.

The Business and Consumer Court denied Newfield Sand's appeal of the Planning Board's conditional approval and affirmed the Planning Board's decision on August 12, 2024. This appeal followed.

III. ISSUES ON APPEAL

1. Did the Town of Newfield Planning Board exceed its authority in placing conditions allowing it to reconsider the approval at any time in the future?

2. Were the disputed conditions reasonably justified based on the facts in the record?

3. Did the disputed conditions reasonably relate to approval standards in the Town's Land Use and Zoning Ordinance?

4. Are the disputed conditions so vague as to be unenforceable?

IV. SUMMARY OF ARGUMENT

The Town of Newfield's Planning Board is an administrative body, and its authority is constrained to that specifically provided in the Town's Land Use and Zoning Ordinance ("LUZO") and other land use ordinances. The Planning Board's duty is to apply the facts and testimony it receives on a particular application to the approval standards in the LUZO, and to approve or deny the application. It may place conditions on the approval, but those conditions must be tied to standards in the LUZO and relate to facts in the record.

The Planning Board here exceeded its jurisdiction by placing conditions that did not relate to any facts in the application record, but rather attempted to hedge for the *possibility* of changed facts in the future. The conditions allow the Planning Board, in perpetuity, to retake jurisdiction over the project, and change the facility's operating conditions or even order its closure. In placing these conditions, the Planning Board has legislated a whole new regulatory structure that is not called for under the Ordinance and that puts the Planning Board in a legislative and enforcement role rather than its administrative role. The conditions treat Newfield Sand differently than an abutting, larger mineral extraction facility, and effectively prevent it from undertaking the permitted activities with any degree of security in its investment.

V. ARGUMENT

A. Standard of Review.

In a Rule 80B appeal, the Superior Court acts in an appellate capacity, and, therefore, reviews the Planning Board's decision directly. *Logan v. City of Biddeford*, 3006 ME 102, ¶ 8, 905 A.2d 293, 295. When the Superior Court acts in an appellate capacity regarding a Planning Board decision, the Law Court reviews the Planning Board's decision directly for "[e]rror of law, abuse of discretion, or findings not supported by substantial evidence in the record." *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577 (citations omitted.)

In a Rule 80B appeal, issues of law, including whether the agency had jurisdiction, are reviewed de novo. *Town of Eddington v. Emera Maine*, 2017 ME 225, ¶ 15; 174 A. 3d 321, 324. The interpretation of local ordinances is also a question of law that the court reviews de novo. *Rudolph v. Golick*, 2010 ME 106, ¶ 8, 8 A.3d 684. The court examines an ordinance for its plain meaning and construes it "[r]easonably in light of the purposes and objectives of the ordinance and its general structure." *Id.* at ¶ 9. The court will not construe an ordinance "to create absurd, inconsistent, unreasonable or illogical results." *Duffy v. Town of Berwick*, 2013 ME 105, ¶ 23, 82 A.3d 148.

B. The Planning Board committed errors of law and abused its discretion in attaching the Conditions to Newfield Sand's operations.

i. The Planning Board lacks the authority to oversee or modify permitted operations.

Article VIII of the Land Use and Zoning Ordinance (LUZO) governs conditional uses. It provides in Section 1 that "A building, structure or parcel of land may be employed for a conditional use if the use is specifically listed in the regulations governing the zoning district in which the use is proposed, and if a conditional use permit is approved by the Planning Board." App. 70, R.524. The LUZO allows the Planning Board to hold a public hearing. Art. VIII(2)(B). *Id.* It further provides that "a conditional use may be granted by the Planning Board only in the event that the applicant has established to the satisfaction of the Planning Board that" various specific standards are met. Art. VIII(3). *Id.* Other standards specific to mineral extraction are contained within Article X, Section 7. App. 94, R.548.

Article VIII(5) provides that "[t]he Planning Board may attach conditions to its approval of a conditional use permit. These conditions may include, but not [be] limited to, such requirements as: A. Street improvements; B. Access restrictions; C. Hours of use; D. Buffering and screening; E. Utility improvements; and F. Performance guarantees for required off-site improvements." App. 72, R.526. A conditional use approval extends in perpetuity and does not require

future renewals; it only expires if there has been inactivity for two years. Art. VIII(7). *Id.*

As to enforcement of permits once granted, Article IV, Section 6 gives the Code Enforcement Officer authority to notify responsible parties of any violations of the ordinance and to order any action necessary to correct them. App. 59, R.504. The Municipal Attorney and Board of Selectmen are provided with authority to bring enforcement actions "[t]hat may be appropriate or necessary for the enforcement of the provisions of this Ordinance." *Id.*

As demonstrated by the various sections referenced above, the overall administrative structure of the LUZO is that the Planning Board is given authority to hold hearings and render decisions on conditional use approvals based upon the general conditional use standards and those specific to the use. Conditions may be placed at the time of approval, but there is no authority for the Planning Board to modify those standards or to modify or revoke a permit <u>following</u> the time of issuance. Once a permit is issued, it remains in place unless the land use is ceased for two or more years. And only the Code Enforcement Officer and Selectmen may enforce violations of the LUZO.

The Planning Board's jurisdiction is constrained by the ordinance. "A licensing board or official must act upon an application for a license without delay and in accordance with governing regulations." 9 McQuillin Mun. Corp. § 26:93

(3d ed.). "The grant or denial of a license or permit by a municipal corporation must be in conformity with the terms of the charter or statute conferring the licensing power, and it must be in accordance with applicable municipal ordinances and regulations." *Id.* "Administrative bodies…are statutory in nature and can only have such powers as those expressly conferred on them by the Legislature, or such as arise therefrom by necessary implication to allow carrying out the powers accorded to them. *Hopkinson v. Town of China*, 615 A.3d 1166, citing *Valente v. Bd. Env'tl Prot.*, 461 A.2d 716, 718 (Me. 1983).

The Planning Board's role is to rule upon land use applications based upon the facts on record at the time of the application, and nothing more.

> Among the factors to be considered in determining whether, notwithstanding lack of specific statutory authority, an administrative agency has power to reopen and reconsider a final decision, the most important one is the nature of the functions of the agency. The courts take into consideration whether the jurisdiction of the administrative agency is necessarily continuing in character, and whether the power is necessary to the efficient performance of the duties or functions of the administrative agency in administering the law, and in particular, to the exercise of some substantive power expressly conferred upon the agency.

73 A.L.R. 2d 939, § 6. There is no indication in Newfield's ordinances that the Planning Board is intended to have any ongoing oversight of permitted applications. Once an approval is issued, it becomes the Code Enforcement Officer's and Select Board's role to ensure ongoing compliance with the ordinance as well as the terms of the permit, and to bring any enforcement actions required.

It was therefore an overextension of the Planning Board's jurisdiction to impose Conditions #2 and 3, which establish an ongoing performance standard not called for under the LUZO and place the Planning Board in charge of enforcing that standard.[1]

The Business Court's ruling relies on a finding that the LUZO does not contain any provisions specifically barring the Board from modifying or revoking a permit. Its finding is not supported by well-established municipal and administrative law. In so holding, the Court relied on *Fitanides*, 2015 ME 32, ¶ 14, 113 A.3d 1088, *Bushey v. Town of China*, 645 A.2d 615, 618 (Me. 1988), and *Cardinali v. Town of Berwick*, 550 A.2d 921, 921 (Me. 1988). First and foremost, the Court went so far as to include a footnote recognizing the present case's distinguishability from *Fitanides*. App. 12. As the court alluded to, the Law Court in *Fitanides* upheld the Planning Board's authorization of the City Planner to approve minor deviations from conditional use plans if needed during the construction process. 2015 ME 32, ¶ 14–15. But in *Fitanides*, the City Planner's authority to approve minor deviations notably served to facilitate the business's successful operation, not subject it to future restrictions as Newfield Sand is subjected to in the present case. Here, the LUZO does not include any provisions

[1] It makes no difference that the conditions require the Code Enforcement Officer to act as the conduit to bring the permit back before the Planning Board. The Planning Board has still vested itself with ultimate and sole authority to conduct a further hearing and to change the operating conditions for the facility (note that under the LUZO, not even the Code Enforcement Officer has authority to revoke or modify a permit based upon perceived noncompliance).

suggesting the Planning Board should have any ongoing oversight over or authority to modify permitted operations. It is telling that at oral argument prior to the Business Court's decision, the Court repeatedly requested that Defendant point to a provision in the LUZO providing the Board with authority to oversee or modify permitted operations. Defendant failed to identify any such provision.

Bushey v. Town of China, 645 A.2d 615, 618 (Me. 1988) is also distinguishable from the present case. In *Bushey*, the planning board granted a conditional use approval to a dog breeding operation with three specific conditions: offsite disposal of waste, installation of a noise control buffer, and installation of a mechanical dog silencer device. The planning board also confirmed that these conditions were implemented as part of its final approval. On appeal, the board of appeals determined the conditions were either insufficient to address the ordinance, or not met.

The conditions in *Bushey* were clear, specific, and based on evidence in the record before the planning board and board of appeals. The permittee knew exactly what it had to do to comply with the conditions and could rely on being able to continue its operations so long as it did comply. The conditions in *Bushey* were therefore very different from the Conditions at issue here. The Business Court's reliance on *Bushey* would be appropriate if Newfield Sand were challenging (for example) the similarly specific condition of 70 truck trips per day. But the

Conditions at issue here are neither clear nor specific, as they arise only based upon on future, unspecified events, and allow for the complete revisiting of the application. Newfield Sand faces continued oversight and the arbitrary assessment of "significant adverse impacts."

Lastly, *Cardinali* does not support the Business Court's holding because it prefaces its ruling that a board is free to reconsider past action in large part on Robert's Rules and *Jackson v. Kennebunk*, 530 A.2d 717 (Me. 1987). *See Cardinali* 550 A.2d at 923. The Court in *Jackson* upheld the board's eventual approval of a subdivision plan, following an initial denial, modifications from the applicant, and subsequent approval upon reconsideration. *Jackson*, 530 A.2d at 717. The reconsideration at issue in *Jackson* represented a commonsense procedure allowing for efficient processing of an application. *Id.* The reconsideration took place during the permitting process, not after a permit was granted and the permittee had undertaken the permitted activities.

The Business Court does not cite any precedent supporting a condition providing for ongoing jurisdiction and ability to reconsider a permit already granted. The cases it does cite involve standard conditions that are specific, definite, and either help to facilitate a development or at least to provide clear standards for compliance, in alignment with a healthy balance of regulation and successful business. The Business Court's decision fails to acknowledge the

Planning Board's administrative overreach into the legislative and enforcement arenas, and its interference in what should be Newfield Sand's vested rights in its approval.

An administrative agency's authority must be found in specific provisions conferring that authority, rather than in the absence of provisions barring that authority. This Court has held that agencies, like planning boards, are creatures of statute and have only such powers as "[t]hose expressly conferred upon them by the Legislature…" *See Clark v. State Emps. Appeals Bd.,* 363 A.2d 735, 737 (Me. 1976) (emphasis added; denying a Rule 80B appeal based on a holding that the State Employees Appeals Board did not have the power to reopen and rehear a dispute after final decision because the granting of a rehearing would undermine the concept of finality, proliferate litigation, and cause an economic problem the legislature sought to avoid). "If the condition. . .exceeds the statutory authority of the agency, it cannot stand." State Env'tl. Law*,* § 15:58 (2023). *See e.g. Appeal of N.H. Div. of State Police*, 286 A.3d 170 (N.H. 2022) (holding a condition that the board would have ongoing jurisdiction to modify its decision was ultra vires because nothing in the regulatory scheme provided the board with the authority to exercise ongoing jurisdiction over its decisions). [2]

[2] The condition in question gave the board authority "to modify [its] decision for good cause at the request of [the employee], the State, or on its own motion as the interests of justice and public safety may require."

The Planning Board is a purely administrative entity. It may only act within the jurisdiction it is given by ordinance and apply the permitting and approval standards set forth in the ordinance. While the grant of authority to place conditions as set forth in Article VIII, Section 5 appears to suggest no constraints ("including, but not limited to"), the above-cited administrative law principles place inherent constraints on the Board's ability to place conditions, preventing the Board from attaching conditions not within its jurisdiction and/or not reasonably related to approval standards in the ordinance. The LUZO cannot be read to bestow any continued oversight over permitted applications to the Planning Board, or an ongoing requirement to absolutely avoid any "significant adverse impacts." Because the Planning Board has no jurisdiction other than to apply the facts of an application to the LUZO standards, and to render a final decision on that application, the challenged portions of Conditions #2 and 3 are ultra vires and should be voided.

If conditions related to traffic safety or nuisance were to be considered, they should have been focused on quantifiable, definite, and addressable issues such as the street improvements, access restrictions or hours of use referenced in Article VIII, Section 5 of the LUZO. Applying the facts before it, the Planning Board did set forth these types of restrictions in the conditions limiting operating hours, site design, truck trips and preferred routes of travel. The Planning Board clearly felt

those restrictions to be satisfactory to ensure compliance based upon the evidence and application materials before it, or it could not have granted approval in the first place. The Planning Board only had the authority to consider the record and facts before it. It did not have authority to set a mechanism to address and respond to future unforeseen impacts of the development.

ii. The Planning Board exceeded its authority in adopting Conditions #2 and 3.

In attaching the challenged language to Conditions #2 and 3, the Planning Board acted in a legislative capacity, by writing an ongoing performance standard (avoidance of "significant adverse impact") that would apply to this permit and no other. Article VIII, Section 3 does use similar "adverse impact" language prefatory to specific standards relating to the size, intensity, nuisances and other characteristics of the use, but those standards are all specifically listed as *permitting* standards, and not ongoing *performance* standards. By contrast, the standards contained within Article IX, including those specifically applicable to mineral extraction, are cast as ongoing "performance standards" that apply to all uses, whether they require a conditional use permit or not. None of these performance standards include "significant adverse impact" language.

As to traffic impacts, Section 19 requires that vehicular access be *designed* to safeguard against traffic hazards, but it contains no ongoing performance standard prohibiting traffic from causing "significant adverse impact." In *Valente*

v. Bd. of Envtl. Prot, the Board of Environmental Protection denied a permit under the Site Location of Development Law solely because of the elimination of farmland. 461 A.2d 716, 719 (Me. 1983). This Court reversed the decision of the Superior Court which had upheld the Board's denial, holding that the "[S]ite Law is a controlled development law—it is not a farmland preservation law." *Id.* at 719. Likewise, here, the LUZO is an ordinance contemplating permitting standards centered around the operation and its vehicles, not oversight of the town's truck traffic in general.

In adopting Conditions #2 and 3 as written, the Planning Board took on the role of the municipal legislative body (the town meeting in Newfield), by converting an approval standard (avoidance of significant adverse impact) into an ongoing performance standard. It then gave itself unfettered authority to take action to modify the terms of Newfield Sand's permit even if it hasn't violated any provision of the LUZO or of its existing permit.

It is understandable that the Planning Board might have felt some apprehension that, despite its imposition of limits on truck trips and hours of operation and other operating conditions, issues might arise in the future. But if that is a perceived gap in the Town's regulatory structure, it is not the Planning Board's role to fill it. The Town would absolutely have legislative authority to adopt an ordinance scheme that makes mineral extraction or other permits subject

to expiration and renewal, in which the planning board could be given the authority to pass judgment on a project after the initial approval. Certainly there are many examples of such ordinances in the State (c.f. City of Augusta[3]). But that is not the permitting structure that was put in place under Newfield's LUZO. The Planning Board can only apply the ordinance authority it is given and cannot use conditions of approval to correct for perceived failures in the ordinance it administers.

iii. Conditions #2 and 3 are unconstitutionally vague and arbitrary

Conditions #2 and 3 are also voidable because they are unconstitutionally vague and arbitrary. As to vagueness, Maine courts have held that broad and vague terms in an ordinance constitute an improper delegation of legislative authority to the administrative board, allowing a board to "[r]oam at large in policy-making." *See Wakelin v. Town of Yarmouth*, 523 A.2d 575, which stated as follows:

> The absence of standards to control the authority delegated to the Board is inconsistent with the principle that "[t]here should be no discretion in the Board. . . as to whether or not to grant the permit if the conditions stated in the ordinance exist. That determination should be made by the legislators." *Stucki v. Plavin,* 291 A.2d at 511. *See also Cope v. Town of Brunswick,* 464 A.2d 223, 227 (Me. 1983). The ordinance opens the door wide to favoritism and discrimination by permitting the Board to grant or deny special exceptions for reasons that are unconnected to the ordinance but that masquerade as quasi-judicial findings of fact. *Waterville Hotel Corp. v. Board of Zoning*

[3] City of Augusta Code § 198-10(C): "The Planning Board, after any person has received a second letter of noncompliance or upon issuance of a stop-work order by the CEO, and upon written request made by the license holder or the CEO, shall provide an opportunity for public hearing…The public hearing shall be used to determine whether the license holder is in compliance with an extraction license, and if not, the Planning Board shall permanently revoke the license…" https://ecode360.com/30402823#30403026

Appeals, 241 A.2d at 53.

Id. at 577. *Wakelin* and subsequent citing cases all deal with unconstitutionally vague standards within an ordinance. *Fitanides v. Crowley*, 467 A.2d 168, 172, held that, "[i]t is well established principle, constitutionally mandated, that in delegating power to an administrative agency, the legislative body must spell out its policies in sufficient detail to furnish a guide which will enable those to whom the law is to be applied to reasonably determine their rights thereunder, and so that the determination of those rights will not be left to the purely arbitrary discretion of the administrator." *Id.*, other citations omitted.

Even if the Planning Board could expand the scope of the LUZO, it cannot do so in a way that is unconstitutionally vague and arbitrary. Under the wording of the conditions, the Planning Board leaves to itself the sole determination as to what might be a "significant adverse impact" justifying modification of Newfield Sand's permit. The language of the conditions is broad enough that the "significant adverse impact" need not even derive from Newfield Sand's operational practices. Like vehicles frequenting other Newfield businesses, trucks using the facility are often owned and operated by other companies. These conditions are so vague that if a construction company's truck destroyed a mailbox due to driveway inattention at 8:00 am, the Planning Board could limit Newfield Sand's extraction operations to afternoon hours only. If a truck slid off the ice, the Planning Board could

restrict winter operations. And an abutter who decided to build a home within close view of the facility entrance 10 years after approval could complain that Newfield Sand's permitted activities were impacting their enjoyment or property values, causing the Planning Board to further constrain Newfield Sand's operations. Since Newfield Sand was not operating at a significant scale at the time of the public hearing, concerns about the volume of existing truck traffic could have only related to other existing businesses. Ironically, problems caused by those businesses in the future could result in new limitations on Newfield Sand's operations, while those responsible for the unsafe trucks – who are not burdened by conditions providing for ongoing Planning Board oversight – would suffer no risk of their permits being modified.

If the impact of allowing such broad and vague conditions on a commercial or industrial development is not compelling enough, consider what the Business Court's precedent could mean for residential development permits. Land use ordinances often require a positive finding that the development will not cause an undue burden on municipal services. A similar condition might be placed on a subdivision approval to allow the planning board to modify the approved plan if the development as built ends up causing adverse impact on municipal services. If, for example, the schools end up being overcrowded, the planning board could then void or modify the original subdivision plan, or even require occupied dwellings to

be vacated based on these unforeseen adverse impacts. Unlike relatively vague standards that might be tolerated as approval standards (because the applicant has not yet attained vested rights at the time they are applied), ongoing operating conditions must be clear and definitive so that the permittee understands and can reasonably comply with the terms by which they are expected to operate.

Additionally, there are no standards governing the proportionality of the Planning Board's response. If these portions of the conditions are allowed to stand, and the Planning Board strips Newfield Sand to (for instance) two hours and two truck trips per day, thus crippling its operations, the unfairly vague condition language would not guard against that disproportionate response. The application of the conditions would know no bounds and be left entirely within the Planning Board's discretion as a self-christened enforcement authority. This is the very definition of an unconstitutionally vague requirement. Moreover, the effect of the condition is arbitrary. Unsafe or noisy traffic conditions, if they were to occur, would be more likely caused by the cumulative impact of multiple users of the road. Yet only Newfield Sand, as the only property burdened by these conditions, would stand to lose its business.

iv. Newfield Sand is entitled to vested rights in its approval.

Newfield Sand has a right to rely on its permit and to be able to plan its business activities accordingly. If its permit can be significantly limited at any

point in the future, for any of the vague and arbitrary reasons set forth in the conditions, it cannot be relied upon. Through Conditions #2 and 3, the Planning Board has conferred itself with ongoing authority to amend or revoke its approval. While case law has held that administrative boards have inherent power to reconsider their actions, that power is limited under constitutional law. *See, e.g.*, *Albertson v. FCC,* 182 F.2d 397, 399 (D.C. Cir. 1950). Reconsideration must occur within a "[s]hort and reasonable time period," which "[w]ould be measured in weeks, not years." *See*, *e.g.*, *Belville Mining Co. v. United States*, 999 F. 989, 1000 (6th Cir. 1993). The inherent power to reconsider ends entirely once an applicant attains vested rights in the approval. *See also*, *NECEC Transmission LLC v. Bureau of Parks and Lands*, 2022 ME 48, ¶ 42, 281 A.3d 618, 633 ("Constitutional protection of vested rights properly resides in Maine's due process clause"). "An agency's inherent power to reopen proceedings must be sparingly used if administrative decisions are to have resolving force on which persons can rely. *Doe, Sec Offender Registry Board No. 209081 v. Sex Offender Registry Board*, 86 N.E. 3d 474 (2017). "In Maine and other states, the right to proceed with construction in the municipal-law context vests once a developer undertakes significant, visible construction in good faith and with the intent to carry

construction through to completion as authorized by a validly issued building permit." *NECEC Transmission LLC,* 2022 ME 48 at ¶ 46.[4]

The Planning Board's conditional use approval by its terms allows Newfield Sand to proceed on the permitted mineral extraction operation. Mineral extraction is a years-long, if not decades-long, activity in which earth is moved and material removed, and completed areas reclaimed, in a systematic fashion to allow maximum extraction with minimal environmental impact. This application in particular involved a substantial outlay of engineering costs to develop groundwater monitoring and testing plans and other operational protocols to limit environmental impact. Once Newfield Sand begins its expanded operations, it would be immensely problematic and costly to have to stop mid-stream because the Planning Board has chosen to reconsider and change its operating terms. Depending on the result of that process, Newfield Sand could end up with open areas that would have to lie fallow, requiring immediate and costly reclamation without material having been retrieved. Given the financial outlay needed to

[4] *NECEC Transmission LLC v. Bureau of Parks and Lands* further holds that "a claim of unconstitutional impairment of vested rights arises under the following conditions. First, the claimant holds a validly issued and final permit, license, or other grant of authority from a governmental entity that is not subject to any further judicial review. Second, the law under which the permit, license, or other grant of authority was issued changed thereafter and would, if applied retroactively, eliminate or substantially limit the right to proceed with the activity authorized by the permit. Third, the claimant undertook substantial good-faith expenditures on the activity within the scope of the affected permit prior to the enactment of the retroactive legislation, meaning that the expenditure was made (1) in reliance on the affected permit or grant of authority, (2) before the law changed, and (3) according to a schedule that was not created or expedited for the purpose of generating a vested rights claim." *Id.* at ¶ 47, 635. While *NECEC* involved retroactive state legislation, its principles apply here as well, since the Planning Board's conditions go beyond the LUZO's express authority and are akin to new legislation.

comply with all applicable laws and ordinances, these projects simply are not economically viable over the long term unless the great majority of the available material planned for is able to be extracted. Conditions #2 and 3 prevent Newfield Sand from ever being able to rely on its permit and, therefore, its property rights. In that way, these are different than conditions that are concrete, finite and within Newfield Sand's control, such as groundwater monitoring and hours of operation. Because of their vagueness and permanence and the lack of restraints on the Planning Board's reconsideration authority, the portions of Conditions #2 and 3 allowing for an indefinite reconsideration period are an *a priori* violation of Newfield Sand's vested property rights and must be invalidated.

C. Conditions #2 and 3 were not supported by substantial evidence in the record.

When the Superior Court acts in an appellate capacity regarding a Planning Board decision, the Law Court reviews the Planning Board's decision directly for "[e]rror of law, abuse of discretion, or findings not supported by substantial evidence in the record." *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577 (citations omitted.) "Substantial evidence is evidence that a reasonable mind would accept as sufficient to support a conclusion." *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, 746 A.2d 368 (citations omitted.) One seeking to overturn a decision of the Board "[h]as the burden of establishing that the evidence compels a contrary conclusion." *Herrick v. Town of Mech. Falls*, 673 A.2d 1348 (Me. 1996)

(citations omitted.) All application decisions must be based only upon evidence in the record, i.e., on the application materials and testimony before the deciding body. Decisions may not be based upon speculative concerns. See *V.S.H. Realty, Inc. v. Gendron*, 338 A.2d 143, 145 (Me. 1975).[5]

Here, the Board's conditions empowering itself to reevaluate hours of operation and truck traffic for "significant adverse impacts" were not based on substantial evidence in the record. In fact, the record demonstrates that there was no evidence of issues from the preceding hours of operation or from Newfield Sand's truck traffic already using the road. The Planning Board conceded as much during its August 9, 2023, hearing:

> Ben Plant: So, I think that is what you are looking for. So if for some reason 70 trips does create hazardous conditions then the Board can reassess.
> Gloria D: Well it has but it is not them.
> Attorney Ben Plante: Well, I think this condition should be limited to this operation.
> Lee Jay: Right. You can't take into consideration, the other operation.
> Gloria D: There is a hazardous situation with traffic.
> Lee Jay: How do we have proof that there is a hazardous situation? Do we have accident data that shows that there have been truck accidents? Or with cars at the intersection? So there really isn't any empirical data to back that up.
> Gloria D agreed with Lee Jay's statement.
> Attorney Ben Plante: And I think that at the public hearing there wasn't necessarily any evidence presented that there has been accidents resulting from these trucks as I interpreted it. It was more some general complaints.
> Gloria D agreed.

R.443. The above-quoted exchange from the August 9, 2023 meeting demonstrates that the challenged portions of Conditions #2 and 3 arose not from

[5] "While an administrative agency of government does possess a broad area of discretion, it is apparent that the Legislature intended, and appellate review requires, that a decision be based upon substantial evidence rather than the visceral reactions of its members. When, as in the instant case, the application was supported by uncontradicted evidence that the proposed operation did not pose a threat to the public safety, the Council may not base its adverse decision, however well motivated, solely upon the personal opinion of one of its members, particularly where the reservations expressed were purely speculative."

findings in the record, but as a means to hedge against unspecified and hypothetical future concerns (*not* demonstrated in the record), by allowing the Planning Board to take the application back up and modify the attached conditions in perpetuity. This is a problem not only because the Planning Board has no continuing jurisdiction after the time of approval, but also because the Planning Board had no facts in the record to demonstrate that, with the conditions already placed, the trucks or hours of operation were likely to be a problem now *or* in the future. There is no discussion in the record on how the conditions limiting hours and truck trips might not be a sufficient safeguard in the future or how hazards might arise in the future. There was no evidence of any complaints at all having been filed in relation to Newfield Sand's existing operation. Nothing in the record suggests that mineral extraction trucks in general or Newfield Sand trucks specifically were an issue.

Overall, as the Board agreed, the public comments were general complaints about trucks in town. Accordingly, the Board found that with the conditions on operating hours and truck traffic, "[t]he Applicant's proposed use will not have a significant adverse impact upon the value or quiet possession of surrounding properties greater than would normally occur from such a use in the zoning district." R.6. This was the conclusion the Planning Board drew from the facts

and testimony in the record, and that conclusion must be final and binding on both parties.

There was also no evidence that any other facet of Newfield Sand's project was likely to cause impacts that were not already anticipated, evaluated and accounted for in other facets and conditions of the approval. Again, this application involved two years of meetings with the Planning Board. Newfield Sand presented expert information from various engineers, and made iterative changes to components of its project, such as crushing, to address concerns about impacts on or off the property. The Planning Board hired its own engineer to evaluate Newfield Sand's application and make any additional recommendations. The Planning Board's findings and conclusions were based on all of this information, which provide the best possible evidence within the confines of the Planning Board's jurisdiction to understand and evaluate the potential impacts of Newfield Sand's development. The Planning Board placed robust conditions on the approval related to testing and monitoring of the site, plus restrictions on operating hours, signage, site security and many other aspects of the development.

Approval of any development is a calculated risk; planning boards must work with the information available and determine whether that information – which is by its nature prospective – satisfies the test for approval. Once conclusions are made based upon the available information, and so long as the

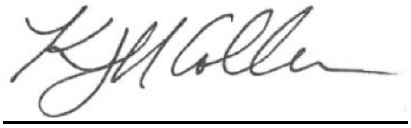
applicant has not misrepresented anything to the planning board, the applicant is entitled to vested rights in its approval. The construct set up by the Planning Board here is an unprecedented intrusion into the legislative arena, greatly impinges on Newfield Sand's vested rights in its approval, and practically prevents this small business from entering the local business market with any degree of security in its investment.

VI. CONCLUSION

The Town of Newfield has adopted a regulatory scheme that does not allow a Planning Board ongoing oversight over and ability to modify a land use permit. Such a scheme would require approval by the Town of Newfield town meeting as an amendment to the Land Use and Zoning Ordinance. The Planning Board found that Newfield Sand's application satisfied all applicable permitting standards based upon copious information in the record, and Newfield Sand is entitled to vested rights in that approval. If the Law Court upholds the conditions imposed by the Planning Board, it will give administrative boards in all venues throughout the state virtually unlimited authority to place and then modify operating conditions, without legislative authorization to do so. This would vastly change the playing field for Maine businesses and developers, and significantly blur the lines between legislative, administrative and enforcement authorities within municipalities and other agencies. The subject conditions must be invalidated.

Respectfully submitted,

Dated: December 30, 2024



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CERTIFICATE OF SERVICE

I, Kristin M. Collins, hereby certify that I served electronically the foregoing Brief of Appellant and two copies via U.S. mail, first-class, postage prepaid when prompted to the parties listed below addressed as follows:

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