

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

Docket No. Yor-25-345

Mick Land Development, Inc.
Plaintiff/Appellant

v.

Town of South Berwick
Defendant/Appellee

On appeal from the York County Superior Court

Brief of Appellant, Mick Land Development, Inc.

Sandra Guay (Bar No. 9350)
Michael J. Skolnick (Bar No. 6719)
Archipelago
1 Dana Street
Portland, ME 04101
sguay@archipelagona.com
mokolnick@archipelagona.com
(207) 558-0102

Attorneys for Appellant

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INTRODUCTION

On April 20, 2022, Mick Land Development, Inc. (“Mick or “Appellant”) submitted an application for Phase III of a three-phase subdivision in the Town of Berwick, Maine. Although later converted to a residential cluster style development, the means of primary access to Phase III was never amended from the initial application submission. As originally designed and approved in Phase II of the subdivision, access to the land for Phase III (also referred to as Samville) was via a 50-foot-wide connector from Meadow Pond Road, an existing public road that serves Phases I and II. The plan also provided a secondary gated emergency access via Industry Drive, a private commercial road located in the abutting town of Berwick. During the course of application review by the South Berwick Planning Board (“Board”), the Berwick Planning Board approved the use of the private commercial road as a secondary access.

Despite it being a public road and sidewalk system that was shown to connect to the Phase III land in the approved site plans for Phases I and II, homeowners in the first two Phases objected to vehicles from Phase III passing over Meadow Pond Road. Although Mick submitted unrefuted expert reports that the Phase III use of the existing Meadow Pond Road would meet the requirements of the Town’s applicable review criteria and standards, including traffic safety requirements, homeowners complained that their children would

no longer be safe playing and bicycling in what is presently a dead-end street should the Phase III vehicles be allowed access.

The South Berwick Planning Board ultimately found that the application met all requirements under the Ordinance, including that “[t]he subdivision will not cause unreasonable highway or public road congestion or unsafe conditions with respect to use of the highways or public roads”. (A. 38.) Despite this, just prior to its final vote, the Board added Condition 6 to its Findings of Fact and Conditions of Approval, that: “The new private road access from Meadow Pond Road into Samville Estates Subdivision will be posted with appropriate road signs stating, “Emergency Access Only” and “No Thru Way.” (A. 42.) Upon remand by the Superior Court for additional findings on Condition 6, the Board attempted to justify the condition by suggesting that Condition 6 was a response to the unsubstantiated concerns raised by a group of Phase I-II homeowners and was intended as mitigation of these concerns. (A. 48.)

There is no competent support in the record for these perceived homeowner “concerns.” Furthermore, despite requests by Mick’s consultants as to what section of the Ordinance the Board was relying on for justification of

Condition 6, the Board never once pointed to anywhere in the Ordinance that permitted to Board to arbitrarily make up mitigation standards. The Board has pointed to no legislative guidance in the Ordinance to as to where, when, or what would constitute mitigation in the review of a cluster subdivision plan, or even as to what circumstances under the Ordinance would require mitigation.

Furthermore, there is no explanation in the findings, or in the record, as to why the existing public road and sidewalks, which had been designed and constructed to meet the requirements of the Ordinance, had been approved by the South Berwick Planning Board, and had been accepted by the Town in Phases I and II in contemplation of a Phase III, were not adequate to allow for “safe traffic circulation for pedestrians and bicyclists”. (A. 48.)

This appeal is taken from the South Berwick Planning Board’s arbitrary imposition of Condition 6 to the Phase III Meadow Pond Subdivision Major Site Plan approval and its subsequent denial of Mick’s Approved Site Plan Amendment Request.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Property and Subdivision History

Mick Land Development, Inc. owns a 174-acre parcel of land off Meadow Pond Road in South Berwick. (R. 144.) The corporation is operated by Carol Mick who, together with her late husband Samuel Mick, previously developed

Phases I and II of the Meadow Pond Estates Subdivision. (A. 113, 116.) The proposed development, also referred to as Samville Estates in honor of Samuel Mick (“Samville” or “Phase III”), comprises Phase III of the subdivision. (A. 126, 127, 134, 153.)

On March 6, 2024, the South Berwick Planning Board found that the application met all requirements in the South Berwick Subdivision (hereafter “Subdivision Ordinance”) and Site Plan Ordinance (hereafter “Site Plan Ordinance”) and approved Samville as a Cluster Subdivision Housing Development. (A. 36-42.) This appeal challenges only Condition 6 of the Board’s Findings of Fact and Conditions of Approval, which provides: “The new private road access from Meadow Pond Road into Samville Estates Subdivision will be posted with appropriate road signs stating, ‘Emergency Access Only,’ and ‘No Thru Way.’” (A. 42.)

B. Application Review and Traffic Access History

The Phase III project was introduced at the April 20, 2022, Planning Board meeting as a 37-lot proposal. (A. 113, R. 17.) The plan showed the primary access to Phase III to be via a 50-foot wide connector from Meadow Pond Road, a public road passing through Phases I and II. (A. 115.) The 50-foot connector from Phase II to Phase III had been a condition in the Phase II design and approval. (A. 128.) The Phase III plan also showed a secondary connection

to Industry Drive, a private road located in the neighboring town of Berwick. (A. 115.) Industry Drive, a road that the South Berwick Planner/CEO refers to as “very much an industrial park” exits onto busy Route 4 in Berwick. (A. 169.) From sketch plan review through final plan approval, the application consistently proposed and supported primary access through Meadow Pond Road. (A. 115, 154, 242, 286.)

The May 10, 2022, submission by Attar Engineering included a cluster subdivision narrative and a quitclaim deed from Carol L. Mick to Mick Land Development, Inc., conveying the shown 50-foot right-of-way for the benefit of Phase III. (A. 116, 126.) The deed referenced the approved and recorded 2006 Meadow Pond Phase II plan which, in anticipation of the future Phase III road extension, included “Condition 12”. (A. 127-128.) Condition 12 on the Phase II approval reads:

LOTS 14 & 15 CONTAIN DEED RESTRICTIONS FOR THE FUTURE EXTENSION OF MEADOW POND ROAD. THE AREA INDICATED IN DETAIL A & B SHALL BE EXCHANGED TO ALLOW THE ROAD TO MEET TOWN OF SOUTH BERWICK ROAD STANDARDS.

(A. 128.)

David Galbraith, the Board’s planning consultant from the Southern Maine Planning and Development Commission (SMPDC), acknowledged in a May 18, 2022, project review memo that the submitted plans showed Meadow

Pond Road as the primary access to Samville with Industry Drive as a secondary access. (A. 131-134.) Specifically, with respect to Meadow Pond Road, Mr. Galbraith comments "It is my understanding that neighbors in MPE I & II do not want the roadway extended to [the] Project, *despite the ROW extension being illustrated and approved by the Board during the review of those phases.*" (A. 134 (emphasis added).)

As support for the safety and adequacy of Meadow Pond Road as the primary access to Samville, Mick submitted two Preliminary Traffic Impact Assessments prepared by Diane Morabito, P.E., PTOE, of James W. Sewall Company (Sewall Assessments I and II, A. 137, 252.) Both reports analyzed the subdivision using Meadow Pond Road as the main access route and Industry Drive as a gated emergency-only connection. In Sewall Assessment I, submitted June 9, 2022, Ms. Morabito found that the Project would generate a low volume of new daily vehicle trips and would have no significant off-site (beyond the Samville boundary) impact on traffic operations. (A. 137-38.) She also reviewed accident data at both access points, Meadow Pond Road at Knights Pond and Harvey Roads, and Industry Drive at Route 4, and confirmed that no high-crash locations were identified, requiring no further accident analysis. (A. 139.)

Sewall Assessment II, submitted October 13, 2022, updated the analysis to reflect a reduction in the number of proposed lots and addressed concerns

raised by the Town's planning consultant regarding separation of residential traffic from commercial vehicles on Industry Drive. (A. 252.) Ms. Morabito reiterated that Meadow Pond Road would serve as the primary access, with Industry Drive restricted by a locked gate for emergency use only. This configuration, she explained, would keep residential traffic safely separated from industrial traffic and still pose no significant impact on capacity, safety, or traffic flow. (A. 252.)

On January 4, 2023, the South Berwick and Berwick Planning Boards held a joint meeting to discuss the proposed emergency access via Industry Drive, the gated Knox Box, traffic safety, and road standards for the Berwick segment of Industry Drive. (A. 141.) As reiterated in the application materials, testimony, and Sewall Assessment II, primary access to the subdivision was via Meadow Pond Road, with Industry Drive to remain gated for emergency use only. The South Berwick Planning Board then voted to accept the Sketch Plan as a Cluster Subdivision and proceed to preliminary plan review. (A. 142.)

Following submission of a revised 35-lot Preliminary Subdivision Application by Attar Engineering on March 28, 2023 (A. 153.), the Planning Board held its second joint meeting with the Berwick Planning Board on April 19, 2023. (A. 155.) At that meeting, the applicant confirmed that the required 50-foot right-of-way had been reserved in earlier approvals for access to the

Phase III parcel. (A. 160.) The boards discussed the pros and cons of using Industry Drive as a gated emergency access versus allowing unrestricted access. While both boards expressed a preference for keeping the connection open and ungated, the applicant responded that it had no preference and remained open to either configuration. (A. 157.) Importantly, even after almost one full year of application review, the South Berwick Board never discussed swapping primary access from Meadow Pond Road in South Berwick to Industry Drive in Berwick with the Berwick Planning Board. Toward the conclusion of the meeting, the Board voted to submit the plan for full third-party engineering review. (A. 159)

At the May 3, 2023, public hearing, some of the Phase I-II residents opposed using Meadow Pond Road, citing general safety concerns and stating that, despite the recorded Phase II subdivision Plan showing a connector for Phase III, their expectation was that the Phase II cul-de-sac would be the end of the Meadow Pond Subdivision development. (A. 167-69.) Anthony Palazzetti, the President of the Meadow Pond Estates (Phases I-II) Homeowner's Association¹ ("HOA") told the Board "the gate should be put at the Meadow

¹ HOA spokesperson Anthony Palazzetti, who at the November 1, 2023 meeting introduced himself to the Board as "I think most of you know me, Tony Palazzetti (A. 210.) and who the Board Chair simply refers to as Tony (e.g., A. at 230.), joined the Planning Board as a member prior to Mick submitting its Site Plan Amendment request on June 7, 2024. Palazzetti was recused from the Amendment review but sat in the audience and participated as a homeowner. (A. 288, 296.)

Pond Road access with a Knox box that would solve the concerns of the Homeowners Association." (A. 167.) The Phase I-II residents opined that if an alternate access is not found it will "wreck the whole neighborhood." (A. 168.)

The insistence of these abutters led to a subsequent Board request for Attar Engineering to seek an alternative access, a sketch for which was presented to the Board at the June 7, 2023 meeting. (R. 435-36.) It was agreed however that this was not a viable solution as that access would have required a 2,894-foot new road through the Phase II dedicated open space and would impact 8,449 sq. ft. of wetlands. (R. 435-36, A. 174, 178.) Attar once again noted the Phase II approval condition that required reservation of the Meadow Pond Road connection and pointed to the Ordinance's 600-foot limit on dead-end roads and requirement of two means of access. (A. 174.)² The Board then voted to hold off on the third-party review "until the access was defined." (A. 170.)

² Under section 121-44(H)(3), an existing dead-end street or cul-de-sac can only be extended beyond 600 feet if the street either "connects back to itself at a point no less than 300 feet from the current terminus, thus forming a loop, or provides direct connectivity to a second means of egress." Subdivision Ordinance, § 121-44(H)(3) (A. 82.). While conditioning the approval of Phases I and II on connectors to be built to Town standards between the three completed phases, the then acting Board effectively waived the road length requirement for Phase I allowing for a 2,250-foot dead-end road and likewise waived the requirement and again allowing a second 2,250-foot road for Phase II. (A. 175-77, 296.) *Currently, Meadow Pond Road is functioning as an approximately 4,500-foot long dead-end road with only one point of ingress or egress.* (A. 175-77.) Clearly it was the intent from the Phase I and II approvals that, as required under 121-44(C) and 121-44(H)(3), there would be a primary access to Phase III

On September 12, 2023, the requested third-party engineering review, prepared for the Town by Civil Consultants, was submitted to the Board. (A. 189.) That report confirmed that the Phase III primary access would be connecting “to the existing portion of Meadow Pond Road,” with Industry Drive as a secondary emergency access. (A. 189.) It did not contradict traffic engineer Morabito’s conclusions that Samville would have no significant impact on Meadow Pond Road. (A. 189-97.)

The Civil Consultants report was reviewed by the Board at its November 1, 2023 meeting where, after several comments by the Planning Board Chair about possible future town fiscal impacts if the Samville roads and the Meadow Pond Road connector were ever to become public roads (A. 203-205.), the Chair stated “So I want to be clear. I don’t see any issues with the third-party review . . . So what I’m saying is I’m fine with the third-party review. I’m raising another issue.” (A. 201-205.)

Despite the record and the Board’s acceptance of Civil Consultant’s third-party review, at the November 1, 2023, meeting, the Board Chair stated, “we heard from the residents out there, wonderful. We know what they’re thinking.” (A. 202.) Yet the residents’ comments focused on issues largely unrelated to the

through Meadow Pond Road and the Phase II connector, with a secondary emergency access through Industry Drive in the neighboring Town of Berwick.

Board's review criteria such as children biking in the street, inadequate plowing of the sidewalks that run along Meadow Pond Road in Phases I and II, and their mistaken belief that the Phase II cul-de-sac would be the endpoint of the subdivision. (A. 167-69.) Parents permitting children to bike on public roads, particularly when there are sidewalks available, and the adequacy of the Town's public works department in clearing snow off sidewalks are not planning considerations under the Ordinance and the recorded plans for Phases I and II, along with their conditions of approval, clearly advised new homeowners that the 50-foot connector was not only anticipated, but required, as a connector to a future Phase III. (A. 128, 175-76.)

The Chair's lengthy discussion about the Town's fiscal responsibilities included whether the Council would later accept the Phase III road as public. (A. 202). He speculated, without support, that the Samville homeowners would call the Town if the Phase III private road (to be maintained by a homeowners' association unless accepted by the Town) was not plowed. (A. 202-206.) He told Board members that the Board has the right to consider the possible future Town acceptance or non-acceptance of a subdivision road and that the Board was being "asked as nonpolicymakers [sic] to do something and access something that is setting the Town up for budgetary increases." (A. 208.) The Chair however was unable to point to any section of the Ordinance that gave the

Board authority to include in the application review any such impacts that are not part of the Planning Board's cluster subdivision review criteria. (*See e.g.*, A. 53-89.) For example, he stated "one of the things I want to consider... is, what is this [B]oard's responsibility in terms of... impact... on Town resources." (A. 202.) Impact on town resources apply town-wide and fall under the Town Council's legislative purview, not the Planning Board's quasi-judicial review. Nonetheless, the Chair used this rationale to advocate gating Meadow Pond Road and routing access solely through Industry Drive. (R. 202-217.) This advocacy continued throughout the remainder of the application review and led to his drafting and championing of Condition 6.

At the November 1, 2023, meeting, the Chair suggested that the connector be left as is, that is traversable but unimproved and unpaved, and let the developer go back to the town and ask for an amendment to the plan if they want to change that. (A. 205.) As support, the Chair said "based on the information, concerns being brought up about impact taxes down the road, do we need to give this consideration? I think so." (A. 205.) At the November 15, 2023, meeting, the Chair conceded to comments from other Board members by proposing the paving of the Meadow Pond Road connector, but to only 12 feet for emergency use and posting "no entrance" signs at both ends. (A. 219.) A second Board member agreed, providing as reasoning that it would "make the

existing developments happier.” As her reasons for supporting the condition, this same Board member added:

If everyone becomes friends and decides it needs to change it they can if all the residents decide it’s become a pain in the butt and want to travel between [the phases], they can change that.

(A. 222.)

When asked by Mick’s legal counsel to cite authority for not allowing full access from Meadow Pond Road, as supported by the application and as depicted on the Phase II plans, the Chair replied that the Town Attorney would review the issue before final approval to determine whether the Board’s “desire” was supported by Ordinance: “I think if we ask our attorney to confirm whether or not the desire of this board is within the confines of those Ordinances, if the answer is no, we’ll have to come back and talk about it. If the answer is yes, then the decision's made.” (A. 223-24, 231.) The Board assured Mick’s legal counsel that the Board would get this guidance before final plan review and would “communicate that to [Mick].” (A. 224.) No such legal opinion was ever provided.

Also on November 15, HOA president Palazzetti voiced support for the Chair’s proposed emergency-access-only condition, stating Meadow Pond homeowners “would be ecstatic.” (A. 226.) At the meeting’s end, when Board member Hirschkop moved for preliminary approval of the Project, the Chair

asked whether her motion was based on his proposed conditions of preventing full access via Meadow Pond Road. (A. 227.) Board member Hirschkop disagreed, stating that they were still grappling with the road issue which needed resolution before final review. (A. 227.) The Chair nevertheless tried again: “so the – what you’re saying is the final plan should reflect those changes we’re requesting.” (*Id.*) Again Ms. Hirschkop disagreed, stating that the issue still needed to be resolved. (*Id.*) Ultimately, the Board granted preliminary approval of the Project as submitted, showing full, unrestricted access via Meadow Pond Road with the connector built to Town standards, and advanced it to final review. (A. 227-28.)

On February 21, 2024, the Board found the Project satisfied all of the § 121-12 Subdivision Ordinance review criteria, including § 121-12(E) (that the subdivision will not cause unsafe conditions with respect to use of “public roads, existing or proposed”) and preliminarily approved the final plan.³ (A. 245.) Nonetheless, at the urging of the Chair, the Board added a draft Condition 6 to the Conditions of Approval, restricting Meadow Pond Road to emergency-only access. (A. 248.) At that meeting, Mick objected to the Chair’s new draft condition that restricted Meadow Pond Road access to emergency vehicles only

³ At time of approval and dissemination of the proposed Findings of Fact, Standard 121-12(E) simply read: “This standard has been met.” (A. 245.)

with a “No Thru Way” sign. (A. 231-32.) The Chair again said the Town Attorney would review whether the Board’s condition was legally valid and invited Mick to submit its objections to the Town’s attorney as well. (A. 232.) Mick submitted a detailed five-page letter with attachments on February 29, 2024, to the Town Attorney, Planner, and Code Officer. (A. 237-57.) No response was received, nor was any legal opinion disclosed.

On March 6, 2024, despite not providing an opinion from the Town’s attorney as to the legality of Condition 6, the Chair signed a revised Findings of Fact and with an amended Condition 6. (A. 36.) In its final version, Section 121-12(E) of the Findings reads:

This standard has been met. A traffic Impact Assessment was completed with a date of October 13, 2022 and is within the application documents. To limit residential traffic from the development from travelling through the existing Meadow Pond Road Phases 1 and 2, the Planning Board imposed Condition 6. This condition requires a sign stating “emergency access only” on the roadway connecting the new development and Meadow Pond Phases 1 and 2, which allows for a 2nd point of egress in the case of emergency but does not cause undue burden on the residential roadways existing in Meadow Pond Phases 1 and 2. All residential traffic from the new development must utilize the industry drive entrance, except in case of emergency.

(A. 36.)

The final version of Condition 6 reads:

The new private road access from meadow Pond Road into Samville Estates Subdivision will be posted with appropriate road signs stating, "Emergency Access Only," and "No Thru Way".

(A. 42.)

Meadow Pond Road is the only South Berwick access to Phase III of the subdivision. (A. 242.) If Condition 6 is permitted to stand, Samville homeowners would need to drive through two other towns, Berwick and North Berwick, in order to access their homes. (A. 198, 238, 242, 275.) Delivery and other vehicles seeking to locate the Phase III homes by use of their vehicle GPS will reach the end of Meadow Pond Road and be able to see the connector and the Samville homes beyond the connector, only to have to turn around, drive back up Meadow Pond Road, and seek an alternate route through the two other towns. (*Id.*) South Berwick school buses and postal delivery will likewise have to drive miles out of their way through two other towns. (*Id.*)⁴ This is an untenable situation and an arbitrary, absurd, unnecessary, legally unsupported and illogical result.

⁴ In addition, Condition 6 does not resolve the issue of the existing Meadow Pond Road being a 4,500-foot long dead-end road, as the Phase III homeowners would not be required to allow Phase I and Phase II homeowners access to the roads in Phase III so long as the developer or Phase III homeowners chose to keep them private, or in the event the Town did not later accept them as public. This is particularly likely as the Phase I-II HOA president testified that the Phase I-II homeowners would not allow Phase III to join their HOA. (A. 211.)

C. Appeal and Site Plan Amendment Request

Mick timely appealed the imposition of Condition 6 on April 5, 2024. Subsequently, upon agreement of the parties, Mick filed a Motion to Stay the appeal in order to pursue an amendment of Condition 6 by the Planning Board. That Motion was granted on May 17, 2024.

On June 10, 2024, Mick filed a site plan amendment application (the “Amendment Application”) seeking removal of Condition 6. (A. 259.) In support of the requested amendment, Plaintiff submitted a third traffic assessment, Sewall Assessment III, reaffirming that full access via Meadow Pond Road would not negatively impact traffic operations or safety. (A. 276-79.) The assessment affirmed that the intersection of Meadow Pond Road with Harvey Road and Knights Pond Road exceeded the minimum site distance requirement in both directions. (A. 277.) As additional support, Ms. Morabito provided testimony to the Board:

I also summarized the preceding trip generation and safety analysis results in Planning Board meetings and noted that there would be no level of service concerns on Meadow Pond Road, or at the intersection of Meadow Pond Road and Knight’s Pond Road, given the existing minor volumes on these roadways. I stated that the level of service would be “A” on Meadow Pond Road and at the intersection of Knight’s Pond Road. Given this “A” level of service, there would be no capacity or congestion concerns with the primary access being Meadow Pond Road.

(A. 278.)

In response to the Chair's repetition of the homeowners' comments about Meadow Pond Road being a windy road, Ms. Morabito testified that the fact that the road was designed to be windy was a calming measure in itself, preventing vehicles from driving fast through Phases I and II, and that there "is a sidewalk along it so there is safe places for pedestrians." (A. 293-94.)

In Sewall Assessment III and in her testimony, Ms. Morabito also informed the Board that requiring Industry Drive as the only access would force all traffic out onto high-speed Route 4, when they would otherwise be able to exit Meadow Pond Road and take a right. (A. 295.) Furthermore, if the private, commercial, Industry Drive remained the only approved access (a use that had not been approved by the Town of Berwick Planning Board), it would trigger Maine DOT requirements, including a mandatory full traffic impact study and possible left turn-lane construction costing over \$250,000. (A. 279, 290-94.)⁵

At the July 17, 2024 Planning Board meeting, despite expressing his agreement that the Sewall assessments were accurate and recognizing that there were no reported accidents at the Meadow Pond Road intersection, the Chair again raised concerns about vehicle speed, brush trimming, pedestrian

⁵ The Board member comment that if the homeowners get along, they can change the access later themselves (*infra* at P.13, A. 222) not only obviates that the signage is not needed for any safety reasons but could only happen after the then unnecessary costly installation of the Route 4 turning lane.

activity, and homeowner concerns regarding cars driving on Meadow Pond Road, none of which had been substantiated in the record by *any* source other than the homeowner comments. (A. 293.) Of note, there was no supporting documentation or testimony from the Town’s own consultants, Town staff, the South Berwick police, or public works personnel.

Also at the July 17, 2024 meeting the Chair finally provided the section of the Ordinance that he believed “gets to the heart of this issue here” as Subdivision Ordinance § 121-44(G) (A. 293-94.), which he then read into the record. Section 121-44(G) however provides only that “all streets *in* the subdivision *shall be so designed* that in the opinion of the board they will provide safe vehicular travel while discouraging through travel.” (emphasis added) (A. 294, 81.) The only application under review was for Phase III and the Board expressed no issues with the Phase III road design. With respect to the existing road in Phases I and II, they had already been designed and built to meet the Ordinance standards, approved by the Planning Board, and accepted by the Town with the knowledge, and even the requirement, that Phases I and II would be connected to a future Phase III.

During the course of the July 17 meeting, Board member Page opined:

“I think we should at least pay attention to the fact, like, we do have a traffic study based on using both of those entrances that do show

it will be safe ... I didn't really like the solution we came up with to both appease the homeowners' association ... ”

(A. 296.)

When the Chair insisted on moving forward with maintaining the original Condition 6, another Board member brought up the possibility of using an amendment to Condition 6 suggested in the Amendment Application, which was signage at the Industry Drive and Samville boundary to prevent construction vehicle access. (A. 298.) When Mick's consultant attempted to point out that the only traffic analysis supports “two, full, unfettered means of access” (A. 298.), the Chair interrupted him to say, “All right, I'm going to limit the conversation.” (*Id.*) This was followed by another Board member stating, “let's let the courts decide.” (*Id.*)

The Board denied the Amendment Application by a 4-1 vote. (A. 299) Plaintiff subsequently filed a second appeal on August 15, 2024. The Superior Court granted the request to consolidate the two appeals on July 25, 2024. By Order dated May 6, 2025, the Superior Court denied Plaintiff's appeals. The present appeal before the Law Court was then timely filed on July 16, 2025.

ISSUES PRESENTED FOR REVIEW

1. Whether the Planning Board erred as a matter of law by exceeding its authority under the South Berwick Ordinance when it imposed Condition 6.

2. Whether the Planning Board's findings for its imposition of Condition 6 were supported by substantial evidence.

3. Whether the imposition of Condition 6 on the Planning Board's approval is lawful under the South Berwick Ordinance.

ARGUMENT

I. CONDITION 6 IS ULTRA VIRES AND VOID AS A MATTER OF LAW.

A municipal board has no authority beyond that granted by its Ordinance. *Nestlé Waters N. Am. v. Town of Fryeburg*, 2009 ME 30, ¶ 31, 967 A.2d 702 (a permit cannot be denied on grounds other than those specified in the Ordinance). A condition exceeding the authority granted by the Ordinance is void. *Phillips Petroleum Co. v. Zoning Board of Appeals*, 260 A.2d 434, 435 (Me. 1970) (Board's decision to deny permit effectively usurped legislative authority, rendering the condition void).

The South Berwick Subdivision Ordinance authorizes the Planning Board to apply specific review criteria to an application for a Cluster Subdivision Housing Development. § 121-4 (A. 53.) In doing so, the Ordinance requires the Board to consider the specific factors found at § 121-12. (A. 62.) In reviewing the Mick application, the Board found that every one of the subdivision requirements had been met. (A. 38-41.) Unlike elsewhere in the ordinance, there is nothing in the Town's Subdivision Ordinance that gives the Board

authority to add conditions to an approval. Even if the imposition of conditions could be implied, there is no guidance in the Subdivision Ordinance as to what circumstances would permit the Board to add conditions, or what type of the conditions are permitted. Likewise, there is nothing in the Subdivision Ordinance that permits the Board to consider such legislative matters as whether Town approval of a subdivision road at some later date would be “setting the Town up for budgetary increases” (A. 208.), or whether a subdivision road would be an “impact... on Town resources.” (A. 202.)

Pursuant to the Ordinance, Cluster Subdivision Housing Development is also subject to Site Plan review. (A. 107-08.) The Board does not include a discussion about the Site Plan Ordinance in its decision or in its findings and it remains unclear whether Condition 6 is premised in that section of the Ordinance. However, even under § 140-77(E) of the Site Plan Ordinance, the Planning Board is only authorized to attach conditions “that it legally finds necessary to further the purposes of *this chapter and section* and to protect the long-range health, safety and welfare of the Town.” (emphasis added)(A. 101.) Further “the Planning Board *shall* approve the site plan unless the plan does not meet the intent of one or more criteria.” *Id.* (emphasis added) (A. 98.)

The only road related criteria in the site plan review section of the Ordinance are: (1) vehicular access to the site “must be on roads that have

capacity to accommodate the additional traffic generated by the development”; and (2) internal circulation must provide for the safe circulation of vehicles. *Id.* (A. 102.) The Planning Board did not find that Meadow Pond Road lacked adequate capacity to accommodate the additional traffic. (A. 78.) The uncontroverted Sewall reports provide the data that demonstrates the adequacy of road capacity for the Samville vehicles. (A. 137-40, 276-85.) The second road related site plan standard is internal to the Samville development and does not implicate the existing Meadow Pond Road.

Again, the Site Plan Ordinance allows for conditions only when there is a finding that it is legally necessary to further the purposes of the site plan review section of the Ordinance, or to protect the “long-range health safety and welfare of the Town.” § 140-77(E). However, the Town’s legislative body provided no standards in the Site Plan Ordinance to guide the Planning Board as to the meaning or scope of “long-range health safety and welfare of the Town,” or if found, what conditions might be applicable.

In *Waterville Hotel Corp. v. Bd. of Zoning Appeals*, 241 A.2d 50, 52 (Me. 1968) this Court held:

The legislative body may specify conditions under which certain uses may exist and may delegate to the Board discretion in determining whether or not the conditions have been met. The legislative body cannot, however, delegate to the Board a discretion which is not limited by legislative standards. It cannot give the

Board discretionary authority to approve or disapprove applications for permits as the Board thinks best serves the public interest without establishing standards to limit and guide the Board.

This Court has long held that terms such as “health, safety and welfare” of a community do not provide sufficient legislative guidance to a planning board and that conditions imposed on permits or application approvals must be tied to specific standards outlined in the relevant zoning ordinance. *See Chandler v. Pittsfield*, 496 A.2d 1058, 1062 (legislative body cannot give a board discretionary authority to approve or disprove applications for permits that the board deems to be serving public interest, without providing clear standards to limit and guide the board). *See also, Cope v. Inhabitants of the Town of Brunswick*, 464 A.2d 223 (Me. 1983); *Stucki v. Plavin*, 291 A.2d 508 (Me. 1972); *Waterville*, 241 A.2d at 52, *Kosalka v. Town of Georgetown*, 2000 ME 106, ¶ 17, 752 A.2d 183, 187. The Court has held that such broad, undefined terms are “impermissibly broad and therefore void.” *Chandler*, 496 A.2d at 1063. “The danger is that broad policy statements unaccompanied by any specific standards will not effectively curtail the power to discriminate.” *Phillips Petroleum*, 260 A.2d at 435. As such, the Planning Board in this matter cannot rest its imposition of Condition 6 on this standard.

With no authority under the applicable ordinances and with no legislative guidance, the Board has created a condition that goes beyond its authority and that condition should be voided. To the extent the Town relies on these ordinances as support for the Board's imposition of Condition 6 on the approval, those sections are "unconstitutional and void" in that they seek to delegate to the Planning Board authority to apply conditions to permits that meet the standards of the ordinances, "without adequate standards for the Board's guidance". *Waterville*, 241 at 54, *see also Cope v. Inhabitants of Brunswick v. Bd. of Zoning Appeals*, 464 A.2d 223, 227 (Me. 1983)(compliance with the "health, safety and welfare of the public and the essential character of the area" not sufficiently specific").

II. THE BOARD'S IMPOSITION OF CONDITION 6 AND DENIAL OF THE AMENDMENT APPLICATION IS NOT SUPPORTED BY SUBSTANTIAL AND COMPETENT EVIDENCE.

This appeal raises a critical question regarding the integrity of the "substantial evidence" standard: whether that standard alone, without any competent evidence in the record to support a planning board's decision, has deteriorated to such a degree that subjective objections from a vocal, self-interested group of abutters desiring to stop future development can override a lawful, anticipated continuation of a pre-existing subdivision. While the Court will give deference to an administrative board, if the substantial

evidence standard ceases to serve as a meaningful check on unsupported abutter testimony and the arbitrary decision-making that results from reliance on such testimony, it undermines the predictability that both applicants and municipalities rely on in land use planning. *See, Wakelin v. Town of Yarmouth*, 523 A.2d 573, 577 (Me. 1987) (failure of the ordinance to provide quantitative standards necessary to transform unmeasured qualities, and finding “without such specific objective criteria, the [Board] was ‘free to express a legislative-type opinion about what is appropriate for the community.’”)

a. The substantial record evidence compelled the Planning Board to Approve the Application without Condition 6.

The Planning Board’s decision must be vacated if it is: (1) affected by error of law; (2) unsupported by substantial evidence in the record; or (3) arbitrary, capricious, or an abuse of discretion. *Gorham v. Town of Cape Elizabeth*, 625 A.2d 898, 903 (Me. 1993). “Substantial evidence” means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Veilleux v. City of Augusta*, 684 A.2d 413, 415 (Me. 1996). While the Law Court has long held that the term substantial does not require the weighing of evidence, it does require competent evidence to support the findings. *See Oulette v. Saco River Corridor Comm’n*, 2022 ME 42, 278 A.3d 1183 (the Court will vacate a board’s findings if there is no competent evidence in the record).

The Court has reaffirmed that in resolve conflicting evidence, a Board's findings must be supported by competent record evidence and that substantial evidence requires a rational basis in the record and not just mere conjecture. *See, Gorham*, 625 A.2d at 903 (evidence from the applicant's expert appraiser was contradicted by an expert hired by abutters but nonetheless constituted "substantial evidence to support the ultimate conclusion of the Board.")

Here, it is not even a matter of the evidence being inconsistent. The only testimony offered in opposition to removing Condition 6 consisted solely of speculative lay opinions and generalized fears about traffic and safety, uncorroborated by any expert study, Town staff corroboration, or any other competent record data. The Law Court has made clear that such subjective concerns do not constitute "substantial evidence." *See Davis v. SBA Towers, II, LLC*, 2009 ME 82, ¶ 33, 979 A.2d 86 (remanding to planning board to approve the application where speculative complaints from community members and board were not substantial evidence and where the applicant had "met 'its burden of establishing the factual elements necessary for the grant of [its] application.'" (quoting *Gensheimer v. Town of Phippsburg*, 2005 ME 22, ¶ 18, 868 A.2d 161). Because the Board's findings with respect to Condition 6 rest solely upon unsupported and unsubstantiated public opposition, they are arbitrary,

capricious, and contrary to law and the Board must be compelled to remove that Condition.

b. The Planning Board erred in its overreliance on speculative lay testimony that is neither substantial nor competent.

The Board's imposition of Condition 6 was not based on any actual evidence, substantial, competent or otherwise. Rather, it was based on appeasement to a small group of abutter who, in summary, complained to the Board, that: (a) Meadow Pond Road is windy and therefore unsafe; (b) the connector to Phase III is located is on a cul de sac where children play in the street; and (c) the intersection between Meadow Pond Road and Harvey Road/Knights Pond Road is dangerous. (A. 179, 296-97.) Other concerns expressed by Meadow Pond Estates Phase I-II residents about their perceived future impact from Phase III, such as that it would "wreck the whole neighborhood" (A. 168.), or their desire to leave the neighborhood unchanged (A. 169.), similarly have no support in the record, either technical or historical, and offer no rebuttal to the three Morabito assessments, the Town consultant peer review, or the engineers submittal and testimony. Notably, there are no letters or testimony from the Town's public works department, the police department, the fire department, or any other town official or staff member confirming unsafe "windy" roads, dangerous intersections or any of the other

complained of conditions. Indeed, the evidence in the record from the Police Chief and the Fire Chief indicates that the Mick application meets their requirements. (A. 165, 249, 287.)

Likewise, there are no submissions, testimony or even Board discussion that would support the continuation of a 4,500-foot dead end road that could only have been approved in violation of the Ordinance limitation of 600 feet because there was a promised Phase III connection. In other words, neither the homeowners nor the Board provided any substantial evidence, let alone competent evidence, to support the implication of Condition 6 on the Phase III development.

Mick however provided reports and testimony, unrefuted by the Town's own consultants and engineers, from Diane W. Morabito, P.E., PTOE, an experienced professional traffic engineer, as to the safety of utilizing Meadow Pond Road as Samville's primary means of access. (A. 135-40, 149-52, 276-79.) In addition, the Board was provided with evidence that there were sidewalks along Meadow Pond Road to provide a safe place for children to walk, bike and play. (A. 237, 293-94.) The Board was also provided with evidence of a recorded Phase II plan showing that the homeowners had been put on notice that there would be a connector to the next phase of the development (A. 128.); evidence that Meadow Pond Road had been approved in Phase II and accepted as a public

road by the Town with the 50-foot connector to the expected Phase III (*Id.*, A. 132.); and even subdivision documentation informing homeowners of Mick’s right to extend the subdivision onto the remaining land they owned. (A. 184.)

This Court has been consistent that while testimony from those objecting to development proposals may be given consideration, there are limitations to a board’s reliance on that testimony. For example, in *Thacker v. Konover Dev. Corp.*, 2003 ME 30, ¶ 4, 818 A.2d 1013, opponents of a proposed subdivision claimed that the increase in traffic would reduce level of service at intersections which would violate the statute. The Law Court however upheld the board’s approval against abutters traffic concerns because it was supported by a traffic engineer’s report and the Board’s own third-party consultant. *Id.* ¶ 21.

In *Adelman v. Town of Baldwin*, 2000 ME 91, 750 A.2d 577, the Court made clear that substantial evidence requires more than mere objections or abutter opposition when the Court found that, despite opposition from an organized community group, testimony from the developer’s experts “established to the satisfaction of the Planning Board that the [Application] met the necessary criteria for the conditional use permit”.

Although early on in the Phase III review, the Chair acknowledged that the Ordinance permits the proposed connection, stating, “As of right now, the

Ordinance shows that this is okay to go in” (A. 169.), the record is replete with Board members expressing a desire to appease the Phase I-II homeowners by preventing access to Meadow Pond Road. For example: commenting that the homeowners were not “happy about having more traffic in their neighborhood” (A. 157.); saying “You know, it would go a long way, probably, for the neighbors if you stopped calling it Meadow Pond Phase 3, or whatever your calling it” (A. 217.); a suggestion by the Chair that the connector be reduced to an unpaved 12 feet and signed as emergency access only causing one Board member to comment “I think that’d make the existing developments happier . . .” (A. 219.); and later “if everyone becomes friends and decides that needs to change, they can change it” and “if, you know, all the residents decide that’s a pain in the butt want to travel between developments, they can change it. But that’s on them.” (A. 222.). The decision about the use of the connector is not however on “them.” It is on the Board, and it required the Board to make a decision that might not make the homeowners “happier.” The Board’s comments show that the Planning Board decision was based on appeasement of the homeowners and not on verifiable safety concerns, or on substantial or competent record evidence.

This Court’s precedent confirms that substantial evidence must be tethered to something more than speculation or subjective fears. *See Seven*

Islands Land Co. v. Maine Land Use Regul. Com'n., 450 A.2d 475, 479 (Me. 1982) (LURC relied exclusively on the more reliable and specific expert data as the basis for its decision); *Veilleux*, 684 A.2d at 414-15 (upholding a permit denial where the record included technical evidence from a licensed soil evaluator, a city code enforcement officer, and a state chemist).

While the Board is afforded discretion, “appellate review requires, that a decision be based upon substantial evidence rather than the visceral reactions of its members” *V.S.H. Realty, Inc. v. Gendron*, 338 A.2d 143, 145 (Me. 1975) (where “the application was supported by *uncontradicted* evidence, the [Board] 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”). At some point, deference must yield to logical, fact-based evidence. *See e.g. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 387 (2024) (deference cannot override the court’s duty to exercise independent judgment in reviewing decisions and rejecting blind reliance on institutional authority absent reasoned analysis).

If mere opposition from a neighborhood group can substitute for competent planning analysis, the standard becomes little more than a vessel for arbitrary decision-making. The evidence supporting Mick’s proposed access via Meadow Pond Road is so substantial, and the opposition so

speculative and insubstantial, that upholding Condition 6 undermines the very purpose of the substantial evidence standard. Accordingly, the Court should remand with instructions to grant the Amendment Application and thereby strike Condition 6.

c. Condition 6 disregards sound planning principles and violates established subdivision standards.

Condition 6 directly conflicts with the Ordinance. South Berwick requires two means of access for subdivisions and restricts dead-end roads to 600 feet. § 121-44(H)(1) (A. 81.) So long as the Samville roads remain private, and as the Phase I-II homeowners will not permit the Phase III homeowners from joining their HOA, Phase I-II homeowners have no right to access the Samville roads, and Meadow Pond Road remains a 4,500-foot dead end. Likewise, Condition 6 conflicts with § 121-44(C) of the Ordinance which requires “proper continuation of streets from adjacent subdivisions and built-up areas and proper projection of streets into adjacent unsubdivided and open land.” (A. 81.) Without Condition 6, both the previously approved Phase II and the Phase III layout comply fully with these standards. Additionally, Meadow Pond Road is a public way, open to any member of the public. The suggestion that only abutting homeowners can control access is fundamentally incompatible with the legal character of a public way. Complaints about plowing, bushes, or sidewalk

maintenance are matters of general municipal administration, not grounds for prohibiting public use of a public road.

In conformance with the Ordinance standards, the Planning Board's approvals for Phases I and II both contemplated and required a Phase III future connection, as explicitly noted in Condition 12 of the Phase II approval. (A. 251.) The record demonstrates that Meadow Pond Road was designed, constructed and approved for the express purpose of providing access to the next phase of the subdivision, with an emergency outlet through Industry Drive. Condition 6 frustrates that Town planned, and Ordinance-compliant extension of the public road. The practical effect of this is that in addition to exacerbating the safety issues of a 4,500-foot, dead end road, residents attempting to travel from one side of the Meadow Pond subdivision to the other, a 50-foot internal distance, must exit the neighborhood entirely, traverse roads in two neighboring municipalities, and re-enter the subdivision from the opposite side. This creates an inefficient and unnecessary detour that doubles traffic back up Meadow Pond Road, adding strain on local roads in two other municipalities, Berwick and North Berwick. The result defies the Town's fundamental goals of subdivision design: safe, direct, and efficient internal circulation. (A. 81-82.)

III. CONDITION 6 IS UNLAWFUL UNDER THE TOWN'S ORDINANCES.

As required under the Town of South Berwick's Zoning Ordinance, cluster housing developments are subject to both major site plan and subdivision review. (A. 107-08.) There is question that the Samville application met all Ordinance requirements as the Board itself found that to be the case. (A. 38-41.)

- a. The unrefuted evidence in the record clearly shows that all Major Site Plan requirements were met, and the application should have been approved without Condition 6.**

Under the Town's Site Plan Ordinance Criteria and Standards, the Planning Board "shall approve the site plan unless the plan does not meet the intent of one or more of the following criteria," and may impose only those conditions it finds "legally necessary to further the purposes of this chapter and section and to protect the long-range health, safety and welfare of the Town." Site Plan Ordinance, § 140-77(E) (A. 102)⁶. The Board must approve the plan as designed if it complies with the applicable criteria. *See WLH Mgmt. Corp. v. Town of Kittery*, 639 A.2d 108, 110 (Me. 1994) ("If a plan is in compliance with all the provisions of a zoning Ordinance, the board has no authority to deny [a] permit on general grounds.")

As noted, out of the 19 review criteria under § 140-77(E) only two relate to vehicular access and of those only one is relevant, that "access to the site is

⁶ See discussion about the constitutionality of this standard, *supra* at Argument I.

safe and adequate.” Site Plan Ordinance, § 140-77(E)(1) (A. 102.)⁷ The record, and even the Board’s decision, unequivocally supports the conclusion that this standard was met. The Sewall Assessments, prepared by a licensed qualified professional engineer and relied upon by the Town’s own consultants, third-party reviewers, and planning staff, confirmed that traffic from Samville would have no material impact on the surrounding road network. (A. 140, 152, 277.) No competent evidence in the record refutes those conclusions. However, rather than the Site Plan review criteria, the record reflects that the real basis for Condition 6 was the opposition of residents of Phases I and II, in addition to the Planning Board Chair’s preoccupation with the Town’s budgetary concerns.

Plaintiff raised concerns about which sections of the Ordinance was guiding the Board toward Condition 6 during the review process. (A. 224, 231-32.) The Chair acknowledged legal uncertainty and repeatedly stated that Town Counsel would be consulted before imposing any final condition limiting access via Meadow Pond Road. (A. 224, 232.) The Board then proceeded to approve the final plan on February 21, 2024, finding that Samville satisfied all applicable Ordinance requirements (A. 233.), at the same time proposing Condition 6 and again assuring Mick that the legality of the restriction would be reviewed by the

⁷ See Argument I, *supra*.

Town's attorney. (A. 232.) Again, no such review ever occurred. No legal opinion was ever provided. There was no response to Plaintiff's written objections. (A. 237-58.) Nevertheless, Condition 6 remained in the final approval, despite its inconsistency with the Town's Ordinances, the Planning Board's own findings, and fundamental principles of application review.

b. The unrefuted evidence in the record clearly shows that all subdivision requirements were met, and the application should have been approved without Condition 6.

Under South Berwick's Subdivision Ordinance, the Board is also required to approve a cluster subdivision application that satisfies the criteria set out in the Subdivision Ordinance. Once again, the Board found that Samville met each one of the minimum requirements under this section (A. 38-41.), nevertheless, arbitrarily imposing Condition 6, despite having no factual basis in the record to support such a condition.

When questioned once again at the February 21, 2024 meeting about which section of the Ordinance he was relying on as a basis for this condition, the Board Chair vaguely referenced that there was "someplace in the Ordinance" that would allow the Board to impose it, and when pressed further, later cited sections 121-12(E), (H), and (U), and 121-44(M)(2). (A. 230-31.) But the Board's written findings confirm these provisions were satisfied, and none support the condition.

Section 121-12(E) requires that the subdivision “will not cause unreasonable highway or public road congestion or unsafe conditions.” The Board agreed that this standard had been met, citing the October 13, 2022 Sewall Traffic Assessment as part of the application materials. (A. 38, 62.) The Assessment analyzed the access via Meadow Pond Road and the emergency-only connection to Industry Drive, concluding there would be no undue burden on the existing public ways. (A. 149.) No contradictory evidence was presented. Nonetheless, the Board attached Condition 6 to its approval.

Section 121-12(H) requires that the subdivision not place an unreasonable burden on the Town’s ability to provide municipal services. The Board found that this standard had also been met, citing approvals from the Fire Chief, Police Chief, and the Superintendent of RSU35. (A. 39.) The Board nevertheless added speculative language about future burdens should the roads eventually be accepted as public, a decision that lays solely within the jurisdiction of the Town Council and irrelevant to the current approval. The Board itself acknowledged that the standard had been met, and no evidence supports imposing Condition 6 on this ground.

Section 121-12(U) applies only to subdivisions that cross municipal boundaries and requires that the project not cause traffic congestion or unsafe conditions in the adjoining municipality. The Board found this standard had

been met and made no further findings under this subsection. Condition 6 substantially increases the burden on the neighboring municipality, which is directly contrary to the goals of the review criteria. There is no support for Condition 6 under this provision either.

Although the Board Chair referenced these Ordinance sections during the meeting, the Board's written decision does not rely on them to justify Condition 6, nor could it have. The Board's findings state that all criteria under section 121-12 were satisfied. (A. 38-41) The subdivision Ordinance does not authorize discretionary conditions disconnected from its finding that the standards have been met. By imposing Condition 6 despite finding full compliance, the Board acted arbitrarily, capriciously, and unlawfully.

c. The Planning Board exceeded the jurisdiction given to it pursuant to the Ordinance when it applied Condition 6.

The role of the Planning Board is to review the application that is before it, not to act as a legislative body basing an application review on town-wide concerns such as whether or not a road may become a public road at some point in the future or on what the financial implications to the Town may be from such a future course of events. (A. 202, 208.) *See, e.g., MSR Recycling, LLC v. Weeks & Hutchins, LLC*, 2019 ME 125 (finding that the Board's role is to evaluate site plans, not address other issues regarding use); *Newfield Sand v. Town of*

Newfield, 2025 ME 45, ¶ 24, 335 A.3d 626 (planning board exceeded its authority by including a condition that permitted the board to reevaluate and modify the approval after the permit was issued); *Osprey Family Tr. v. Town of Owls Head*, 2016 ME 89, ¶¶ 12-13, 141 A.3d 114 (board did not follow review procedure in the Ordinance).

Here, through persistent guidance of the Chair, such as his advising other Board members that the review included “the board’s responsibility in terms of what we believe the impact to be on Town resources, which is well within our rights” (A. 202.), the Board erroneously believed its review of the Phase III application included going beyond the review criteria provided in the Ordinance, and into the role of a legislative body. The review criteria provided in the Ordinance for a Cluster Subdivision Housing Development is clear. Once a developer has met all of the standards, the Board must approve the application. (A. 101). The Board’s legislative concerns do not provide a legally necessary reason to impose Condition 6.

IV. THE BOARD MUST DECIDE THE APPLICATION BEFORE IT, NOT REDESIGN THE PROJECT THROUGH CONDITIONS.

The Planning Board’s mandate is to evaluate whether an application, as submitted, satisfies the Ordinance standards. It is not tasked with unilaterally redesigning the project through the imposition of conditions that

fundamentally change what the applicant proposed. As this Court noted in *Boutet v. Planning Bd. of Saco*, 253 A.2d 53, 55 (Me. 1969), "In exercising its function of approving or disapproving a subdivision plan, the planning board acts in an administrative capacity. In passing upon a plan, its action is controlled by the regulations adopted for its guidance. It has no discretion or choice but to approve a subdivision which conforms to the regulations." Citing to *Langbein v. Planning Bd. of City of Stamford*, 145 Conn. 674, 146 A.2d 412, 414, (1958).

From the outset of the Phase III review, Mick proposed Meadow Pond Road as the primary access and Industry Drive as the secondary access. This configuration was based on the Phase II connector and was so fundamental to the viability of Samville that Mick's consultants asked that the Planning Board vote that configuration up or down (A. 225.) Every proposed subdivision plan, inter-municipal meeting, traffic assessment, third-party engineering review, and planning consultant reports were based on that access arrangement.

The record confirms this understanding. As the president of the Meadow Pond Estates Homeowners Association explained during public comment:

So the developer has put forward a plan to you saying that Industry Drive is going to be gated and only available for emergency access, which only leaves one point of egress into this new development, and that's through Meadow Pond Estates.

(A. 210.) Likewise, Mick’s legal counsel reminded the Board that Industry Drive as the primary access is “not our application that’s before you. . . . What we’ve put before you is consistent with phase one that was approved, with phase two of the subdivision as approved.” (A. 223-24.)

Despite this, the Board imposed Condition 6, shifting primary access to Industry Drive. That condition is not a minor revision. It is a fundamental redesign of the subdivision and functionally rejects the application without actually denying it. If the Board believed that primary access through Meadow Pond Road failed to meet Ordinance standards, its proper course was to deny the application with findings supporting that decision, not to approve a modified version of the plan designed by the Board that was never proposed. Additionally, Condition 6 was never evaluated under the applicable criteria, never supported by a traffic engineering analysis, never reviewed by peer consultants, and never addressed in the Town staff comments.

The Board is not free to rewrite an application to reflect what it believes would be a better or more palatable outcome for neighbors. Its authority is confined to reviewing the proposal before it, applying the Ordinance, and either approving or denying the plan on that basis. Condition 6 exceeded that authority and is unlawful.

CONCLUSION

The Planning Board's decision to impose Condition 6 lacks the support of any substantial or competent evidence. As a result, the Board's decisions to place Condition 6 on the approval and to deny Mick's application to amend, are arbitrary, capricious, an abuse of discretion, and void as a matter of law.

For the reasons set forth above, the Court should reverse the Superior Court's decision and remand this matter back to the Planning Board with instructions to remove Condition 6, grant the Application to Amend, and approve the Samville application with access through Meadow Pond Road as proposed.

Dated: October 15, 2025

Respectfully Submitted,

Attorneys for Appellant
ARCHIPELAGO LAW, LLP
1 Dana Street,
4th Floor Portland, Maine 04101
sguay@archipelagona.com
mkolnick@archipelagona.com

 /s/Sandra L. Guay
Sandra L. Guay, Bar No. 9350

 /s/Michael J. Skolnick
Michael J. Skolnick, Bar No. 6719

Certificate of Service

I hereby certify that on the date below, I caused two copies of the Brief of Appellant to be served upon the following counsel of record via regular U.S.

Mail and one electronic by email:

Philip Saucier, Esq., Bar No. 9837
BERNSTEIN SHUR
100 Middle Street
P.O. Box 9729
Portland, ME 04101-5029
psaucier@bernsteinshur.com

Dated: October 15, 2025

 /s/ Sandra L. Guay
Sandra L. Guay (Bar No. 9350)

ARCHIPELAGO LAW, LLP
1 Dana Street, 4th Floor
Portland, Maine 04101
sguay@archipelagona.com
(207) 558-0102
Attorney for Appellant

Certificate of Conformance

I hereby certify that although this brief exceeds forty (40) pages, the word count, excluding those portions of the brief excluded pursuant to Rule 7A(f)(3), is less than 10,000 words. M.R. App. P. 7A(f)(1), (3), (g)(1)(A).

Dated: October 15, 2025

/s/ Sandra L. Guay
Sandra L. Guay (Bar No. 9350)

ARCHIPELAGO LAW, LLP
1 Dana Street, 4th Floor
Portland, Maine 04101
sguay@archipelagona.com
(207) 558-0102
Attorney for Appellant