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

Reply 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
mskolnick@archipelagona.com
(207) 558-0102

Attorneys for Appellant

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INTRODUCTION

The Town's opposition brief confirms the fundamental defect in the Planning Board's decision: Condition 6 was imposed despite the Board's express findings that the application satisfied all applicable ordinance standards, including traffic and safety requirements. The Town attempts to defend its decision by invoking generalized notions of "health and safety," deference to municipal decision-making, and lay testimony expressing concern about increased traffic. None of these arguments supply what Maine law requires—delegated ordinance authority and substantial, competent evidence tied to an unmet review standard**.**

This appeal does not ask the Court to consider whether the Planning Board or nearby residents would have preferred a different access configuration. Rather, it asks this Court to determine whether a planning board, after failing to consider any evidence that conflicts with its own predetermination, may impose a condition that restricts access to a public road, redesigns an approved subdivision plan, and reroutes all residential traffic through two other towns after expressly finding that the proposal complies with every applicable ordinance standard. Maine law says it cannot.

ARGUMENT

I. THE TOWN MISSTATES THE SCOPE OF THE PLANNING BOARD'S AUTHORITY IN DEFENSE OF CONDITION 6.

The Town's assertion that the Planning Board possesses broad authority to impose Condition 6 in the name of public safety is unsupported by Maine law. When a municipal board imposes a condition that exceeds the authority conferred by the ordinance, that condition is void. *Phillips Petroleum Co. v. Zoning Bd. of Appeals*, 260 A.2d 434, 435 (Me. 1970) (holding that a board's action beyond its delegated authority constitutes an impermissible usurpation of legislative power and is therefore invalid). When an application satisfies all applicable ordinance standards, the board "has no discretion or choice but to approve." *Boutet v. Planning Bd. of Saco*, 253 A.2d 53, 55 (Me. 1969).

Here, the Board found that every applicable review standard was satisfied, including the traffic safety standard requiring that the subdivision "will not cause unreasonable highway or public road congestion or unsafe conditions." (A. 36-41.) Those findings are undisputed. Having made them, the Board lacked authority to impose a condition restricting lawful access on Meadow Pond Road, a Town road. The Town's effort to justify the condition by invoking generalized public safety concerns improperly transforms discretionary preferences into enforceable conditions.

The Town relies on § 140-77(E) of the Site Plan Ordinance, which permits the Board to impose conditions it "finds legally necessary" to further ordinance purposes. (A. 101.) The Ordinance provides no legislative guidance to the Board as

to what constitutes "legally necessary" or what the scope of permitted conditions would be, should such a legally necessary reason be found. The Town nevertheless construes that provision to allow the Board to impose any condition its members arbitrarily or subjectively deem beneficial, even after finding full compliance with all objective standards. Maine law forecloses such an interpretation. Discretionary authority may be exercised only within clearly defined legislative limits, and ordinances must be construed to avoid vesting boards with essentially unguided discretion. *Cope v. Brunswick,* 464 A.2d 223, 227 (Me.1983) ("Whether a use will generally comply with the health, safety, and welfare of the public and the essential character of an area is a legislative question"); *Stuki v. Plavin*, 291 A.2d 508, 511 (Me.1972) (an administrative Board should have no discretion to deny a permit if the conditions have been met, "[t]hat determination should be made by legislators" *Id.* at 511); *see also Waterville Hotel Corp. v. Bd. of Zoning Appeals*, 241 A.2d 50, 53 (Me. 1968); *Chandler v. Pittsfield*, 496 A.2d 1058, 1061 (Me. 1985). Further, to the extent the Town relies on this section of the ordinance as a basis for supporting the Board's decision, § 140-77(E)'s lack of any legislative guidance that would delimit the power of the Board in its application renders that section unconstitutionally vague. *See Stuki v. Plavin*, *supra*.

The Town's reliance on the Subdivision Ordinance fares no better. Although discretionary authority may be delegated, it must be accompanied by standards

sufficient to guide the board's decision. *Ogunquit Sewer Dist. v. Town of Ogunquit*, 1997 ME 33, ¶ 7, 691 A.2d 654. The Subdivision Ordinance provisions cited by the Town do not establish standards authorizing the imposition of a condition that contradicts the Board's express findings that all ordinance requirements were met.

The Town's interpretation would permit a planning board to impose any condition whenever residents express discomfort, even after finding full compliance with the ordinance. That approach collapses the distinction between legislative policymaking and administrative review and allows compliant plans to be redesigned by the planning board based on political pressure rather than adopted standards. Maine law does not allow a permit to be denied, or conditioned, on grounds other than those specified in the ordinance. *See Nestlé Waters N. Am. v. Town of Fryeburg*, 2009 ME 30, ¶ 31, 967 A.2d 702.

The Town's reliance on *In re Belgrade Shores, Inc.*, 371 A.2d 413 (Me. 1977), is misplaced. In *Belgrade Shores*, the planning board denied approval because the applicant failed to satisfy specific ordinance standards governing the suitability of the site for the proposed use. *Id*. at 416. This Court upheld that decision precisely because the board's action was grounded in the applicant's failure to meet an express standard set forth in the ordinance. Here, by contrast, the Planning Board expressly found that all applicable standards, including traffic

safety, were satisfied. (A. 36-41.) Unlike in *Belgrade Shores*, there was no noncompliance to be addressed, mitigated, or conditioned. Condition 6 therefore did not implement an ordinance standard; it overrode the Board's own findings and substituted a policy judgment unsupported by any unsatisfied ordinance criteria.

The Law Court has upheld conditions where they were consistent with an ordinance that expressly authorized the imposition of conditions and where the conditions implemented, rather than contradicted, the ordinance's substantive standards. *See e.g. Fitanidas v. City of Saco*, 2015 ME 32, § 14, 113 A.3d 1088. Condition 6 bears no resemblance to the conditions upheld in those cases. Rather than implementing the South Berwick ordinances, it contradicts them by overriding the Board's express finding that traffic safety standards were met and by substituting a policy judgment without nexus to any unmet standard.

Condition 6 exceeds the Board's delegated authority and is ultra vires as a matter of law because the Town identifies no ordinance provision that authorizes the Board to impose a condition that overrides an affirmative finding of compliance.

II. THE TOWN'S "SUBSTANTIAL EVIDENCE" ARGUMENT FAILS AS A MATTER OF LAW.

A. Generalized Lay Concerns Do Not Constitute Substantial Evidence

The Town contends that resident testimony regarding children playing in the roadway, curvy roads, and perceived danger constitutes substantial evidence supporting Condition 6. That contention misunderstands both the substantial-evidence standard and the record. It is true that the mere possibility of drawing two inconsistent conclusions from the evidence does not render a board's decision unsupported. *Sproul v. Town of Boothbay Harbor*, 2000 ME 30, ¶ 12, 746 A.2d 368. But that principle does not relieve the Town of its burden to identify competent and reliable evidence supporting the Board's findings, nor does it permit a board to disregard substantial contrary evidence in the record.

Substantial evidence must consist of competent evidence relevant to the ordinance criteria under review. Speculative fears, personal preferences, and generalized safety concerns do not satisfy that standard, particularly when they are contradicted by unrefuted expert testimony and objective site conditions. *See Gorham v. Town of Cape Elizabeth*, 625 A.2d 898, 903 (Me. 1993). While courts defer to a board's fact-finding role, that deference does not extend to findings grounded in conjecture or to decisions that ignore, *in toto,* material evidence bearing directly on the applicable standards.

The Planning Board in the present matter did not merely rely on weak "evidence," it plainly ignored substantial evidence demonstrating compliance and the failure of the Board to even reference this evidence in its Findings is damning.

For example, while the Findings provide a neighbor's comment, that removal of Condition 6 would "negatively impact his daughter's safety playing outside and impact the value of all current homeowner's property based of [*sic*] statistics of property values on throughways" (A. 49.), and comments from the Phase I and II residents that their children are "biking and rollerblading around the [public] road" (A. 46.), it omits *entirely* the evidence that sidewalks exist along Meadow Pond Road (which once again, is a public street) (A. 94). Nor does it comment on testimony to the Board that evidence of diminished property values requires more than unsupported statements and that there is nothing in the record that supports this assertion. (A. 289.) Likewise, the Findings omit any reference to the evidence that Phases I and II were expressly approved with a required, recorded connector road anticipating full access to Phase III (including a condition of approval that the two Phase II subdivision lots abutting the Phase III connector "contain deed restrictions for the future connections of Meadow Pond Road") (A. 128, 175-76.), that the subdivision's circulation design, sidewalk configuration, and road safety was evaluated and approved by the Planning Board in prior phases (A. 131-34, 175-77.), and that Meadow Pond Road, with its Phase III connector, has since been accepted by the Town as a public road. (A. 133.) Nor does the Board discuss Section 121-44(C) of the Subdivision Ordinance that 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, 296.), a requirement clearly upheld in the Phase I and Phase II approvals. None of that evidence was addressed in the Board's findings. Instead, the Board focused exclusively on generalized resident concerns contrary to all recorded objective data, professional analysis, and ordinance review standards.

The Town's reliance on the oft-repeated formulation that findings must be affirmed if supported by "any competent evidence" misses the critical qualifier: the evidence must be competent. This does not and cannot mean that any testimony, regardless of its nature or reliability, qualifies as substantial evidence. Abutter comments, unsupported by data, technical analysis, or ordinance-based thresholds cannot by themselves be deemed competent evidence, particularly where they are contradicted by unchallenged professional traffic studies, engineering reports (A. 137-40, 149-52, 276-79.), and third-party review (A. 188-97.). The Town points to no evidence, apart from neighborhood opinion and desire, establishing that Meadow Pond Road is unsafe.

In *V.S.H. Realty, Inc. v. Gendron*, this Court held that "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." 338 A.2d 143, 145 (Me. 1975). That principle governs here. Although the circumstances differ in detail, the Planning Board Chair's generalized concerns regarding pedestrian safety, rested entirely on unsupported and speculative lay opinion. The Board did not consider, in its decision or findings, the substantial, objective expert evidence in the record demonstrating that traffic and pedestrian safety standards were satisfied.

B. Unrefuted Expert Evidence Cannot Be Disregarded Without a Competent Basis

The Planning Board received three traffic impact assessments prepared by a licensed professional engineer. (A. 137-40, 149-52, 276-79.) Each concluded that Meadow Pond Road safely accommodates the projected traffic, that sight distances exceed minimum requirements (A. 140, 151, 277), that no accident patterns exist (A. 139, 151, 277), and that level of service would remain at "A." (A. 278.) No expert testimony contradicted these conclusions. The Town's own consultant did not dispute them (A. 189-97.), and no evidence from police, public works, or Town staff suggested that pedestrian or bicycle safety standards were unmet. Without such evidence, the Board's findings amount to speculation and conjecture, which cannot be a substitute for substantial evidence.

Although a board is not required to accept expert testimony in every case, it must have some competent evidentiary basis for rejecting it. *See V.S.H. Realty*, 338 A.2d at 145. The Town points to none. As noted, the Board relied solely on resident

concerns without addressing sidewalks, prior approvals, or the unrefuted engineering analyses in the record. These resident comments, while perhaps heartfelt, do not rise to the level of substantial or competent evidence that a reasonable mind would rely upon. *See Osprey Family Trust v. Town of Owls Head,* 2016 ME 89, 141 A.3d 114 (substantial evidence is found where a reasonable mind would rely on such evidence as support for the conclusion).

The Town's argument improperly conflates the "any competent evidence" standard with a license to rely on unsupported fears. Generalized concerns about neighborhood character or hypothetical risks—particularly where sidewalks exist, prior approvals contemplated connectivity, and no safety violations are identified—do not meet that threshold.

III. THE TOWN MISAPPLIES THE "ARBITRARY OR CAPRICIOUS" STANDARD.

The Town argues that the Planning Board's decision was not arbitrary or capricious because the Board conducted a lengthy review process and considered public input. That argument misunderstands the governing standard. Process alone does not insulate a decision from reversal where the decision is unlawful, internally inconsistent, or based on improper considerations. A decision is arbitrary where it is willful, unreasoned, or based on improper considerations. *See AngleZ Behav. Health Servs. v. DHHS*, 2020 ME 26, ¶ 23, 226 A.3d 762.

The record demonstrates that Condition 6 was not the product of neutral application of ordinance criteria, but of a desire to accommodate existing neighbor preferences. Board members expressly stated that the purpose of the condition was to make "the existing developments happier" (A. 219) and suggested that "if everyone becomes friends and decides it needs to change, they can change it." (A. 222) Such statements reflect an effort to broker a political compromise rather than to apply fixed legal standards. Considerations of neighborhood appeasement fall outside a planning board's administrative role and demonstrate arbitrary decision-making.

The Board's arbitrariness is further demonstrated by its failure to resolve acknowledged legal concerns before acting. The Board Chair understood that Mick was challenging the validity of the Board's application of Condition 6 and explicitly stated, on two separate occasions, that he would seek a legal opinion regarding the validity of that action. (A. 224, 232.) At the February 21, 2024 meeting at which the Board voted to approve the application but impose Condition 6, the Chair was specific that the Board would not take final action until it had received advice from its attorney on whether the Board had authority to impose Condition 6 under the ordinance sections provided at that meeting by the Chair, had permitted Mick with an opportunity to also provide comments and arguments to Board's attorney, and had "weighed" the opinions and advice. (A. 231.) The

Chair also commented that Mick would have an opportunity to review the Board attorney's opinion prior to the Board issuing findings, further stating "And we [*sic*] going to just kind of streamline everything and get the legal questions and answered right there." (A. 231.)

Although Mick relied on the Chair's comments to send its comments and arguments to the Town's attorney (copying the Town Planner) (A. 237-41.), no legal opinion was ever obtained from the Board's attorney. Nonetheless, the Board proceeded to impose the Condition 6 without addressing the legal objections raised by Mick, failing to raise § 140-77(E), the section the Town now relies on, as a reason or as authorization to impose that condition. (A. 230-31.) The action taken by the Chair to implement Condition 6 in the face of unresolved legal questions and without providing statutory authority to do so, particularly where the condition restricts access on and to a public road, underscores the absence of reasoned decision-making.

Condition 6 also produces an absurd and unreasonable result. Residents of Phase III are then unable to access their homes from a public road in a Town in which they reside and are instead forced to drive through two other towns to reach homes that are visible across the preapproved connector from Phase II. (A. 232, 238, 275, 289, 294.) Imposition of Condition 6 creates inefficient traffic patterns and unnecessary travel contrary to basic transportation and safety principles and

creates an increased burden on Town resources. A condition that produces such a result cannot be sustained. No reasonable mind would accept that requiring residents to traverse two municipalities to access homes plainly visible from an existing public road is a reasonable land-use condition. Nor does it prevent any number of package, furniture and appliance delivery vehicles, guests, oil and gas delivery vehicles, delivery and domestic vehicles, etc., especially those relying on GPS directions, from driving down Meadow Pond Road only to have to reverse and drive back up the road and attempt to locate an alternate route to its destination. (A. 238, 289.) Condition 6 is arbitrary, it is unreasonable, and it is absurd.

The Board's arbitrariness is compounded by its disregard of prior approvals and the subdivision's integrated design. Meadow Pond Road was designed, approved, and constructed providing access to Phase III, as confirmed by Condition 12 of the Phase II approval. (A. 128.) The Board's findings neither acknowledge nor reconcile that prior approval. (A. 36-52.) Ignoring the binding earlier determinations and conditions of approval in Phases I and II is in itself arbitrary.

The findings are also defective because they omit critical, undisputed evidence. As noted, the Board's written findings do not consider or even mention the existence of sidewalks along Meadow Pond Road. (A. 36-52.) They do not

acknowledge that the subdivision was expressly designed to connect to Phase III. Nor do they explain how maintaining a dead-end road thousands of feet long, far exceeding the ordinance's 600-foot limit (A. 81, 174.), enhances safety. To the contrary, excessively long dead-end roads increase response times and restrict emergency response vehicles to a single point of entry, creating greater safety risks than the traffic Condition 6 purports to address. The planned connection from Phase II to Phase III was clearly intended to remedy that dead-end nonconformance upon approval of Phase III. A decision that ignores such material considerations cannot be considered within reason.

Finally, the Board relied on considerations outside its delegated authority. The Board Chair referenced the "impact on Town resources" and potential "budgetary increases." (A. 202, 208.) Fiscal and budgetary concerns are legislative matters reserved to the Town Council, not a planning board acting in an administrative capacity. Reliance on such considerations further confirms that the decision was not grounded in ordinance standards.

Taken together, these defects demonstrate that Condition 6 is arbitrary and capricious. The Town's attempt to characterize the decision as merely the product of a multiple-meeting process cannot cure these substantive failures.

CONCLUSION

For the reasons set forth above, the South Berwick Planning Board erred as a matter of law in imposing Condition 6 on the approved subdivision. The Board's decision should be vacated, and the matter should be remanded to the Planning Board with instruction that Condition 6 must be removed.

Dated: January 7, 2026

Respectfully submitted,

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

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

Attorneys for Appellant
Archipelago Law, LLP
1 Dana Street, 4th Fl.
Portland, Maine 04101
mskolnick@archipelagona.com
sguay@archipelagona.com

CERTIFICATE OF SERVICE

I hereby certify that on the date below, I caused two copies of the Reply Brief of Appellants 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: January 7, 2026

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