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NOTICE OF DECISION

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Case Name: **City of Portsmouth v Newington Planning Board, et al**
Case Number: **218-2014-CV-00654 218-2014-CV-01287**

Enclosed please find a copy of the court's order of October 06, 2015 relative to:

Order on the Merits

October 07, 2015

Patricia A. Lenz
Clerk of Court

(504)

C: Jane Mackin Ferrini, ESQ; John J. Ratigan, ESQ; Laura Spector-Morgan, ESQ

The State of New Hampshire

ROCKINGHAM COUNTY

SUPERIOR COURT

CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON PLANNING BOARD

Docket No.: 218-2014-CV-654

Consolidated With

CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON ZONING BOARD OF ADJUSTMENT, ET AL

Docket No.: 218-2014-CV-1287

ORDER

These consolidated cases are appeals brought by the City of Portsmouth ("Portsmouth") from the Town of Newington ("Newington") Planning Board ("Planning Board") and Newington's Zoning Board of Adjustment ("ZBA"). A hearing was held on July 21, 2015, on the merits of the pending appeals. Based on the parties' arguments and submissions and the certified record, the Court now finds and rules as follows. Due to the extensive certified record and the nature of the complaints against the Planning Board and ZBA by Portsmouth, the Court sets forth detailed findings from the certified record.

Procedural History

Sea-3, Inc. ("Sea-3"), the applicant and owner of certain property in question, intervened and moved to dismiss. By order dated May 6, 2015 ("the May Order"), the Court deferred ruling on the preemption basis for dismissal and denied the motion to dismiss on standing grounds. Sea-3 moved for reconsideration on the May Order's denial of the motion to dismiss on standing grounds. A hearing was held on May 20, 2015, on Sea-3's motion to dismiss on preemption grounds. By order dated June 16, 2015 ("the June Order"), the Court denied both Sea-3's motion to dismiss on grounds of preemption and Sea-3's motion for reconsideration on standing grounds. Sea-3 then moved for reconsideration of the June Order's denial of its motion to dismiss, again arguing Portsmouth lacks standing, which the Court denied.

Background

Sea-3 owns two parcels of land located in Newington, where it operates a liquefied petroleum gas ("LPG") energy terminal and storage use business. The first parcel Sea-3 owns is 7.02 acres and is depicted on Newington's tax map as Map 20, Lot 13 ("Lot 13"). Sea-3's main building, truck loading racks, two large LPG storage tanks, a smaller distribution tank, and associated pipelines are housed on Lot 13. Lot 13 is located in the following two zoning districts: (1) General Industrial District ("I-zone"), and (2) Waterfront Industrial and Commercial District ("W-zone"). The boundary between the I-zone and the W-zone on Lot 13 bisects one of Sea-3's LPG storage tanks.

The second parcel owned by Sea-3 is 3.92 acres and is depicted on Newington's tax map as Map 14, Lot 2 ("Lot 2"). Lot 2 is located entirely in the W-zone. Lot 2 and

Lot 13 are separated by the railway owned and operated by Boston and Maine Corporation/Springfield Terminal Railway Company d/b/a/ Pan Am Railways ("Pan Am"), which is not a party in this case. Sea-3 was in the process of entering into a lease with Pan Am during the public hearing process regarding certain portions of Pan Am's property so that it could make improvements to increase its capacity to offload LPG from railway tankers. C.R. 404.

September 9, 2013 Hearing

On September 9, 2013, the Planning Board held a meeting during which it discussed Sea-3's application for conceptual site plan review. Sea-3's application proposed construction of additional facilities on Lot 2 "to provide for an increase in off-loading capacity of [LPG]." Id. at 2. It sought this expansion to "increase the volume of product the existing facility can off-load from rail cars and store in the existing tanks on site. . . . [and] to provide bulk volume available for shipping by sea to accommodate domestic and foreign product price fluctuations." Id. at 2, 36. Sea-3 explained that it had been importing propane at its Newington location since 1975, but in 2011 it began to see a drastic loss in domestic sales due to an increase in cost from its Algerian suppliers. Id. at 10. To combat this loss, Sea-3 sought to bring domestic LPG by refrigerated rail and then redistribute it overseas as well as to "some parts of New Hampshire, and New England." Id. In order to accomplish this expansion, Sea-3 proposed "upgrades to the existing railroad siding, installation of a new railroad siding with 5 discharge pads to accommodate up to 10 rail cars, installation of [three] 90,000 gallon above ground tanks and associated chilling and pumping equipment." Id. at 36.

At the September 9th meeting, the Planning Board discussed the issue of LPG having a different pressure coming by rail than it had coming from ships. Id. The Planning Board also discussed that very little noise would be emitted from the electric motors running the proposed refrigeration units onsite and addressed periodic shutdowns at Sea-3 for maintenance. Id.

The Planning Board also raised concerns regarding the railway. Sea-3 indicated that its rail shipments would increase to 12 shipments per day under the new operation. Id. at 11. Due to this increase in railway usage, the Planning Board inquired about extra rail car storage and current railway conditions. Id. Pan Am's representative at the meeting explained that the extra rail cars would be stored at Rockingham Junction and that Pan Am would be upgrading its rails from Portsmouth to Newington. Planning Board member Thomas Morgan then brought up the issue of regional impact and stated that under RSA 36:54 the Planning Board could notify and invite other communities to join its review. Id.

The Planning Board then addressed Sea-3's frontage so that Sea-3 could proceed with its plans for formal review. Because Lot 13 and Lot 2 are bisected by the railway, the need for two access points to get to both parcels was discussed. Id. The Planning Board voted to keep Sea-3's existing ingress and egress. Id.

On September 16, 2013, the Planning Board completed a site visit at Sea-3. Id. at 14. During this site visit the Planning Board viewed the control room, tank and containment area, rail site, proposed loading area, and the Newington Energy pier. Id.

In a letter to the Planning Board dated October 28, 2013, the Town of Greenland asserted that Sea-3's proposed expansion significantly impacted the Town of Greenland

and requested that the Planning Board declare Sea-3's site plan review to be one of regional impact under RSA 36:54. Id. at 32.

November 18, 2013 Hearing

Sea-3 requested a formal review at the Planning Board's November 18th meeting. During this public hearing, Sea-3 explained that if the LPG market changed again in the future, the company would not be able to revert back to receiving LPG imports by ship. Id.

Members of the Planning Board and the public inquired about the impact of truck traffic in the area. Id. 90–91. Sea-3 explained that while previous Planning Board approvals had limited the maximum number of trucks per day at the site to 16, Sea-3 was planning on no more than 12 trucks per day for the foreseeable future. Id. at 91. Sea-3 further explained that truck traffic on Shattuck Way would be reduced. Id.

An abutter raised the issue of Sea-3 completing a safety assessment. Id. The Planning Board's Chairman voiced concern about the risks of LPG hazards and asked Sea-3 how it would handle a worst-case scenario malfunction. Id. Sea-3 responded that all improvements had to be "done under the FDA's National Fire Protection [Association]," which would work with the local fire chief as the project moved forward. Id. Sea-3 also noted its proposal included a sprinkler system used to cool and prevent boiling liquid vapor explosions that could otherwise result from a lack of cooling water if the LPG became hot and weakened the steel storage tanks. Id. Moreover, Sea-3 indicated that the New Hampshire Department of Transportation ("DOT") required all "rail cars to be insulated and equipped with head shields at the front and ends to prevent explosions as well as safety couplers that cannot come apart." Id. In the event

of a fire or an explosion, Sea-3 asserted that although it was required to pump only 2,000 gallons per minute from its sprinkler system, its system was capable of pumping 3,500 gallons per minute. Id. Moreover, Sea-3 indicated that if it lost electrical power, it had a diesel water pump that supplied two sprinkler systems, and if more water was needed, its neighbor had a water storage tank that could be accessed. Id.

The Planning Board noted that it had been impressed and confident in the safety system it viewed during the site visit, but inquired as to whether Sea-3 ought to have “a review for their FDA 50 compliance [sic].” Id. at 92. Sea-3 indicated that at that time it was “hesitant to expend \$100,000” during the preliminary stages of their site plan approval for such a review. Id.

The issues of storing the extra rail cars at the Rockingham Junction and whether this was a project of regional impact were also discussed. The Town of Greenland’s Planning Board Chair, Attorney Paul Sanderson, voiced his concern about having LPG transported through his town’s railway crossings. Id. at 91. While acknowledging that the Planning Board had no jurisdiction over the railways due to preemption under federal law, Attorney Sanderson noted that the DOT retained some jurisdiction pertaining to railway crossings. Id.

The Planning Board concluded by voting that Sea-3’s site plan application was substantially complete. It also deemed the project one of regional impact and voted to send notice to the surrounding municipalities of Greenland, Portsmouth, Newfields, and Stratham. Id. at 92. Finally, it also voted to authorize the hiring of fire safety and rail safety experts. Id.

December 9, 2013 Hearing

After a regional impact notice had been properly sent to neighboring municipalities, on December 9th, the Planning Board held the second public hearing on Sea-3's site plan review. Id. at 111. The Planning Board indicated it had hired Steven Sawyer, P.E. ("Sawyer"), an independent railway engineering consultant, to explain the railway safety inspection process. Id. at 112. Sawyer reported that railway traffic safety was governed by the Federal Railroad Administration ("FRA") and federal law, while the safety of railway crossings fell under the purview of the DOT. Id. Sawyer recommended that the Planning Board, along with the communities of regional impact, contact the FRA to request an investigation of the condition of the railway tracks and product carrier. Id. Sawyer also recommended that they jointly contact the DOT to inspect and assess the railway crossings. Id. Sawyer expressed doubt that either the FRA or DOT would hold an open forum for public comment on their investigations. Id.

Abutters and others in attendance raised concerns of increased potential for explosions, acts of terrorism, and light and noise pollution. Id. at 113. Sea-3 indicated that it had to comply with the United States Coast Guard's Homeland Security Plan and that the facility would be monitored 24 hours a day by cameras and employees trained in emergency safety response. Id. Sea-3 indicated that more lights would be installed for security purposes and that it was considering placing a berm along the property line. Id. Sea-3 reiterated that there was no additional noise impact from the proposed improvements. Id. Responding to these concerns, the Planning Board acknowledged, "Steel on steel does make noise." Id.

Portsmouth was not represented at the December 9th public hearing, however, on the same day its planning director had sent a letter to the Planning Board (id. at 108, 114) indicating that Sea-3's plan potentially impacted Portsmouth because of the "possible storage of rail cars . . . and the increased frequency of rail transport through [Portsmouth] and in particular through the downtown area." Id. at 108. The Planning Board responded to Portsmouth's letter by noting it "should ask the City of Portsmouth to take part in the process. . . . [further stating it would invite Portsmouth and] the other towns to participate within the next ten days" Id. The public hearing was then continued until January 13, 2014.

In light of the Planning Board's regional impact determination, the Rockingham Planning Commission convened a meeting of its Developments of Regional Impact Committee ("Committee"). Id. at 127. The Committee sent a letter to the Planning Board dated January 10, 2014, which addressed the following four areas of concern: (1) the need for community education regarding increased idling trains near residential areas; (2) fire safety concerns raised by the Newfields regarding Rockingham Junction most likely not having fire suppression systems; (3) the physical adequacy of the railways; and (4) the need for Newington to engage in post-development approval inspections of the Sea-3 facility. Id. at 128.

January 13, 2014 Hearing

At the Planning Board's public hearing on January 13, the Planning Board explained that issues of rail safety were the biggest concern, but it lacked direct authority over railway usage. Id. at 132. The Planning Board further noted that such

issues had to be balanced with the local need for electric, gas and oil energy coming into the region at an affordable cost. Id. at 132–33.

A representative from Greenland Conservation Commission, as well as another attendee, voiced unease regarding the safety and environmental degradation of the area. Id. at 133. Specifically, they asked what impact the proposed expansion would have on the air, water, noise, and light. Id. Sea-3 answered that the proposed project was small enough in size so as to not require the completion of impact studies of this nature. Id.

Pan Am and Sea-3 confirmed that the maximum amount of rail cars they could receive per day was 16. Id. Pan Am explained that passenger cars took priority on the railways, so there was no specific timetable for freight cars. Id. at 134. Thus, it was possible that freight cars could run from 2:00 a.m. to 4:00 a.m. Id. Moreover, Sea-3 recognized that LPG was flammable and therefore required safety standards that had, and would continue to be, implemented. Sea-3 further stressed that the proposed project was smaller than similar operations and that it would not be increasing truck traffic. Id. at 134. In fact, Sea-3 indicated the project would decrease the amount of trucks sent out from 200 trucks per day to 50 trucks per day. Id. at 134, 170. The Planning Board concluded the hearing by noting that Sea-3 could move forward “so long as [it works] with the DOT and FRA[.]” The public hearing was then continued to February 10th. Id. at 134.

February 10, 2014 Hearing

The Planning Board heard from Richard Cricenti, P.E. (“Cricenti”), a representative from SFC Engineering Partnership, Inc. (“SFC”). Newington had hired

SFC to assess Sea-3's site plan and compliance with New Hampshire state codes regarding fire safety, drainage issues and stormwater management. Id. at 167–68. Cricenti had provided the Planning Board with a report that reviewed Sea-3's site plan's compliance with fire safety codes. Id. at 167. Cricenti concluded that “[o]verall the site plan appears to be in general compliance with NFPA 58 and 54 . . . and [i]n terms of fire safety compliance, no significant problems have been found with this layout.” Id. at 147. He explained the report provided a “first assessment of site plans to identify potential areas of legislative non-compliance . . . [and that no] fire safety analysis, mechanical/electrical or structural plans [were] reviewed” Id. at 144. The Planning Board noted it would obtain further comment from Newington's fire chief regarding the project. Id. at 171.

Portsmouth's mayor and city manager attended this public hearing. The mayor read a letter, dated February 10, 2014, he had written to the Planning Board (id. at 168) where he detailed Portsmouth's primary concerns regarding the “public safety implications of increased rail traffic carrying hazardous materials close to neighborhoods and business areas.” Id. at 165. Specifically, he stressed concern about inadequate railway maintenance to support the proposed increased rail traffic and outdated equipment used to transport LPG through Portsmouth. Id. Portsmouth's city manager expressed concerns with Sea-3's terminal expansion and its impact on Portsmouth's citizens. Id.

The Planning Board acknowledged the importance of knowing the safety conditions of the railway. Id. at 168, 171. It indicated that it had successfully contacted and received information from the DOT but had not heard anything regarding its request

for the FRA to investigate railway conditions. Id. at 168. The Planning Board noted it had reached out to congressional delegates to put pressure on the FRA to respond to this request. Id. at 171. The Planning Board explained that it understood that it “could not tell Pan Am what to do, but . . . [the] citizens had a right to public commentary and a right to know what the safety conditions of the rail tracks were, . . . if the tracks were found to be unsafe, . . . [and] what the FRA would do to make Pan Am resolve the issue.” Id. at 168.

The Planning Board inquired as to whether “the U.S. government required the use of odor in gasoline [sic],” to which Cricenti answered that it did not. Id. The Planning Board asked if an environmental study needed to be completed as it pertained to ground water recharge on the site plan. Id. at 170. Cricenti’s report also reviewed drainage and stormwater management, finding legislative compliance. Id. at 154. Sea-3 asserted that LPG is not a pollutant, countered by a member of the public who stated that the diesel engines on the rail cars were polluting. Id. at 169. The Planning Board responded that it “had no jurisdiction over railroad operations because it was already in place and grand fathered (sic).” Id.

The Planning Board again fielded concerns of increased railway traffic carrying hazardous materials. Id. Sea-3 responded that railway transportation was the only viable way to execute the proposed expansion. Id.

The Planning Board ended the hearing by commenting that it would not vote on Sea-3’s proposal during the hearing and offered Sea-3 the option to voluntarily request an extension, to which Sea-3 consented. Id. at 171, 175. Accordingly, the public hearing was again continued to March 10, 2014.

March 10, 2014 Hearing

At the March 10th public hearing, Pan Am and John Killoy (“Killoy”), a representative from the FRA, answered several questions and engaged in lengthy discussions regarding railway conditions, maintenance, and inspection. Id. at 233–42. Killoy explained that it was the FRA’s responsibility to regulate the railroads and their partners to improve railway tracks and employee safety. Id. at 233. Killoy clarified that each railroad was responsible for its own bridges and railway maintenance, and that each railroad set its own standards. Id. at 233–34. Killoy explained that several individuals then review the railway condition, including an FRA inspector who looks at the structure of the railway tracks. Id. at 233. Pan Am indicated that all of its railway bridges and tracks had an internal inspection schedule and that these inspections are audited by the FRA. Id. at 233. Pan Am stressed that all improvements and maintenance it made to its railway would have to comply with FRA regulations; otherwise Pan Am would either be fined or shut down. Id. at 235. Pan Am also reiterated that the Planning Board had no authority to regulate the railway or the end user in a way that impacted or prohibited railway usage. Id. at 242.

Portsmouth’s city manager then read a letter, dated March 6, 2014, written by Portsmouth’s mayor. Id. at 228, 233. The letter enunciated Portsmouth’s support of the requests of a group of Portsmouth’s residents who were present at the public hearing. Id. at 238. The residents had expressed concern that aside from a “very limited and narrowly focused site-specific safety review” by Cricenti, the Planning Board had not engaged in any comprehensive safety or security review of Sea-3’s proposal. Id. at 220. Specifically, they requested that a comprehensive all-hazards assessment be

completed, which at a minimum needed to include “hazard identification and vulnerability assessment; risk evaluation; environmental risk assessment; analysis of the emergency response capabilities for the impacted communities; physical security assessment and an incident/hazard response analysis.” Id. at 203, 210, 221. Additionally, they asserted that the Planning Board needed to review site-specific questions, especially as they pertained to traffic ingress and egress regarding the “20 million gallons of propane [Sea-3 was] bringing in annually.” Id. at 238.

Others in attendance also voiced concerns about the environmental impact of Sea-3’s proposal. Id. at 233, 240. One Greenland resident inquired as to how Sea-3 mitigated spills. Sea-3 responded that LPG is not a contaminate but they provided environmental training (during their educational programs) to local fire, police, and emergency responders. Id. at 240. The Chairman of the Planning Board noted that LPG evaporates. Id. Issues of the railway in wetlands as well as railway bridges over Great Bay were discussed. Killoy explained that the FRA did not conduct environmental impact studies and that the established railways could be in compliance with FRA regulations. Id. at 233 & 236. In response to concerns about odorization of LPG, Sea-3 explained that the current LPG product at the terminal was deodorized, as the use of an odorizing agent in the refrigeration process would congeal and cause the system to malfunction. Id. at 237.

In addition to comments from those in attendance, the Planning Board received eight letters in support of Sea-3’s proposed expansion from employees of Pan Am, articles from local newspapers, and the ten-year FRA report of Pan Am’s accidents in Region 1 [sic]. Id. at 187–98, 204 & 224–27. It also received from Cricenti a report that

he met with Newington's fire chief, during which the following two changes to Sea-3's site plan were recommended: (1) adding a second access point to the property and (2) installing master streams along the railroad sidings. Id. at 211.

The Planning Board highlighted the importance of considering the health, safety, and welfare of the public and recognized its "authority to approve or deny uses on Sea-3's property depending on the hazards to the surrounding community." Id. at 237. The Planning Board acknowledged the importance of bringing LPG to the area, but noted that there were still issues of safety to consider. Id. at 242. Specifically, the Planning Board noted the need to resolve truck traffic issues with the DOT, and receive information from Sea-3 on where trucks would park and idle. Id. The Planning Board continued the public hearing until March 24th to allow state representatives to present more information from their inspection. Id. at 240.

March 24, 2014 Hearing

The Planning Board first heard from Portsmouth's city manager, who stated it would cost approximately \$2,400,000 to upgrade the condition of Portsmouth's rail infrastructure. Id. at 317. He also expressed concern that there was over 1.5 miles of "excepted track," which is the lowest condition grade for railways, running through the most densely populated areas of Portsmouth. Id.

The Planning Board next heard from John Robinson ("Robinson"), a railway safety inspector for DOT's Rail and Transit Bureau. Id. at 317. Robison answered many questions from Portsmouth residents regarding the condition of the railway and outlined the FRA process governing railway inspections. Id. at 318. He confirmed that an inspection from Rockingham Junction to Newington had been completed. Id. He

also stated that even tracks in excepted condition were approved to transport hazardous materials so long as no more than five rail cars at a time were in use. Id. Robinson then admitted that Sea-3's proposal for the use of 16 rail cars would "create an operational challenge" unless the railways were upgraded. Id. He noted that without these upgrades, rail cars would have to be left at Rockingham Junction, where they would be unprotected and unguarded. Id. Lastly, Robinson clarified that a "certain number of defects [on the railway tracks] was not outside the realm of other Class I tracks and they were considered safe." Id.

The Planning Board asked Robinson about the allocation of costs associated with railway crossings under RSA 373. Id. at 320. Robinson explained that the railroad was responsible for the right of way, maintenance of signage, signals and tracks, and had a duty to provide suitable crossings for the public. Id. That being said, Robinson expressed that the railroad's view was that it built railroads and not roads. Id. He indicated that a town official could petition the DOT Commissioner ("Commissioner") for a change of protection, and that a hearing would be held where he would be called to testify about road traffic, and the number and speed of trains. Id. The Commissioner would then decide whether the town or the railroad would be responsible for upgrades and would assign distribution of such costs. Id. Robinson stated that there were federal programs that might match Portsmouth's cost for safety upgrades and that often railroads coordinated with construction forces for the installation or upgrade of signals at crossings. Id. at 321.

The Planning Board concluded that "like it or not . . . this was how the U.S. government set up the railroads and it was not within the Planning Board's purview to

tell Pan Am what to do. . . . they had to get engineering involved and trust the FRA guidelines and what DOT would do” Id. The Planning Board then emphasized the need for every railway crossing to be assessed and to set priorities on those in most need for upgrades. Id. The Planning Board added that it “had to move away from the railroad, which was not in [its] purview and look at the site to consider if site changes were necessary.” Id.

Sea-3’s fire safety analyst, Philip Sherman, P.E. (“Sherman”), a fire protection engineer and building code consultant, presented his assessment to the Planning Board. Id. at 322. Sherman had reviewed Sea-3’s proposed design under the New Hampshire fire code and specifically considered the risk of LPG release and fire and coordination with local response for the safety of workers as well as the public. Id. After reviewing exposure to other properties, analyzing water supply and reviewing protection measures, Sherman indicated approval of Sea-3’s plan. Id.

The Planning Board asked Sherman about the use of UV detectors and their ability to detect flame or non-odorized vapor. Id. Sherman confirmed that Sea-3 had flame detectors, but not sniffers. Id. The Planning Board asked about increasing the number of firefighters trained for LPG emergencies. Id. Sherman answered that because Newington had a small number of firefighters on duty, firefighters from surrounding areas would also respond to an emergency. Id. Sea-3 added that it had provided specialized training in the past and would do so again for Newington, Portsmouth, and other surrounding areas. Id.

The Planning Board then inquired about offsite incidents. Id. Sea-3 indicated that it had an emergency response plan to address offsite incidents as well as

equipment and personnel available to go to the scene. Id. at 322–23. Newington's fire chief confirmed that a mutual aid agreement existed between Newington and the surrounding areas. Id. at 323. He explained that the location of a fire would determine which fire department would be in charge of managing that emergency. Id. He then indicated that he thought Newington's fire department was adequately prepared with training and equipment to handle any fire safety concerns resulting from Sea-3's operation. Id.

Residents of Portsmouth then raised concerns regarding evacuation plans of hotels, restaurants, and shops within a one-mile radius if a catastrophic LPG explosion was to occur. Id. Newington's fire chief responded that his evacuation plans were limited to his jurisdiction over Newington, but that the state provided emergency management plans that include evacuations with escape routes for the whole seacoast area. Id.

The Planning Board acknowledged that fire safety scenarios change and that it believed the fire departments were “prepared with apparatus, equipment, personnel, and chains of command [which are] practiced . . . on a regular basis.” Id. at 324. The Planning Board expressed concern with fire trucks having to cross railway tracks for emergency access. Id. Sherman asserted that the fire safety code required fire access roads before Sea-3 could legally obtain any permits. Id. Sea-3 also stated it would build a second access road beside the railway tracks so fire trucks would not have to drive over railway ties. Id. Finally, the Planning Board inquired about overhead power lines at the site. Id. Sea-3 explained that future lines could be run from the poles to the

underground, but that the existing overhead lines met setback requirements from the Propane and Gas Association. Id.

The Planning Board then heard from Sea-3's expert, Kim Hazarvartian, P.E. ("Hazarvartian"), about his traffic assessment of the Sea-3 site. Id. Hazarvartian explained that when leaving the site, trucks travel "down Avery Avenue, down Shattuck Way and then split directions up the Spaulding Turnpike or down I-95." Id. at 325. Hazarvartian stated he had reviewed the truck transportation history from February 2002 to present and found that an average of 103 to 161 trucks visited Sea-3 per day. Id. Hazarvartian noted that in 2012 and 2013 this average was lower due to market conditions. Id. Hazarvartian concluded that Sea-3's proposed site changes would not increase the volume of trucks to and from its site because the site capacity is limited to ten trucks per hour. Id.

The Planning Board asked how many trucks could be onsite on any given day. Id. Sea-3 indicated it had five transport loading spots, and it had arranged with Newington Energy to "stack trucks if they were backing up on Avery [Avenue]." Id. The Planning Board inquired as to what percentage of product would be distributed to customers north of Sea-3 versus south of Sea-3. Id. Sea-3 believed it to be an even distribution between New Hampshire, Maine and Massachusetts. Id. Sea-3 then stressed that due to its ten trucks per hour maximum, it would see 200 trucks per day, if it ran 24 hours. Id. Similarly, Sea-3 discussed its restraints from expanding into exportation to foreign markets because the size of its property limited its capability to 16 railway tankers per day. Id.

The Planning Board noted that “the zoning ordinance and site regulations applied to the site changes to accommodate the . . . changes, but the existing use for trucking LPG was approved in 1996 and it was in effect grandfathered as an existing, lawful use. . . . [Therefore,] the Board could only revoke approval if [it] were to expand beyond that 1996 agreement” Id. at 326.

Newington’s fire chief reported on emergency response. Id. During this discussion, Pan Am indicated that the railroad operated on an as needed basis, so there was not a regular schedule that could be considered regarding the noise impact on the community. Id. at 327. A Portsmouth resident also raised concerns about the economic impact on “abutting communities to protect citizens from increased traffic and speed hazards by building gateways across Maplewood Avenue and Market Street where there was high traffic.” Id. at 328. Robinson responded that as places become popular, towns and cities grow, which results in railroads and power lines being proposed near people’s homes “in the interest of benefitting the larger community as a whole.” Id.

April 14, 2014 Hearing

At the final public hearing, the Planning Board discussed Portsmouth’s mayor’s letter dated April 9, 2014, indicating Portsmouth’s City Council had voted unanimously to oppose the approval of Sea-3’s site plan. Id. at 375, 390. The letter further expressed that should the Planning Board approve Sea-3’s project over Portsmouth’s objection, Portsmouth would request that Sea-3 be required to provide a comprehensive safety and environmental plan. Id. at 375.

The Planning Board entertained comments directly concerning the railway from those in attendance. Id. at 390. The Planning Board responded by reiterating that issues regarding railway crossings could be addressed with the State and that the Planning Board had “no say on the rail.” Id. at 392–93.

The Planning Board then turned to its independent consultant, Dirk Grotenhuis, P.E. (“Grotenhuis”), regarding Sea-3’s traffic study. Grotenhuis stated that instead of a traffic impact study, he was given a memo to review, which did not provide complete information. Id. at 393. Accordingly, he listed in his report 11 follow-up questions regarding Sea-3’s traffic assessment. Id. at 382–83. Grotenhuis explained that he had reviewed “how the truck traffic affected intersections, including changes to the Spaulding Turnpike, which might alleviate some of the traffic down Woodbury Avenue and through Portsmouth . . . [as well as] the impact of trucks to and from site and rail crossings.” Id. at 393. In light of his review and in spite of his follow-up questions, Grotenhuis asserted that the proposal would not change the site’s long-term average of 160 trucks per day. Id. Grotenhuis also clarified that river traffic studies were not common, and that he mostly executed land traffic studies. Id. Sea-3 repeated that it was not increasing the number of truck terminals on the site, but that it was expanding the rail car off-loading to unload ambient temperature LPG. Id.

Individuals in attendance asked whether there would be increased traffic leaving Sea-3 with the refrigerated LPG; whether any traffic studies regarding increase in general traffic such as mall traffic had been reviewed; and, whether there was a more comprehensive report accounting for the amount of trucks leaving the site as it related to the amount of LPG coming into it. Id. at 393. The Planning Board responded that

“truck traffic would not increase,” and that a traffic study had been completed in 1999 that granted Sea-3 permission for a certain number of trucks, which had not changed in 30 years. Id. at 393–94.

Sea-3 then clarified issues regarding its lease with Pan Am. Id. at 395, 403–04. The Planning Board expressed concern over Pan Am’s ability to take over the operation if the lease should terminate. Id. at 396. Sea-3 indicated a term in the lease agreement or a stipulation could be drafted that required the infrastructure on Pan Am’s property be removed if the lease ended. Id.

May 5, 2014 Hearing

Sea-3 requested that the next Planning Board meeting be held on May 5, to which the Planning Board agreed. At the May 5th meeting, the Planning Board closed the public hearing and opened deliberation. Id. at 432. In light of the multiple requests for a comprehensive safety study, the Planning Board members commented on its pertinence to the Sea-3’s site plan. The Planning Board looked to a study completed by the Massachusetts Department of Transportation as an example of a railroad impact study. Id. While a few members found that a study of this magnitude would aid in addressing the level of impact the surrounding areas would absorb, others questioned its relevance to the Sea-3 site and did not find any gain from requesting such a study from Sea-3. Id. at 432–33. The Planning Board concluded “the public hearing already reviewed studies and it didn’t seem like another study would be helpful” Id. at 433. The Planning Board also asserted that Sea-3 had completed a significant safety study when it was first approved almost 40 years ago, and had also completed a separate safety study 15 years ago during another expansion. Id. at 434. While

concerns about relying on a safety study conducted almost 40 years ago were expressed, the fact that here the railroad was privately owned raised a question as to whether one such as the Massachusetts DOT study could be completed. Id. at 434–35. Ultimately, the Planning Board voted to not request a general study similar to the Massachusetts study. Id. at 436.

The Planning Board then deliberated on whether Sea-3's site plan was a permitted use. Id. at 439. Specifically, the Planning Board determined that the site plan was in harmony with the character of the surrounding area and consistent with overall long range plans for the community. Id. at 525. Additionally, it found the site plan would not be an over-intensive use of the land and it would not result in undue traffic congestion or hazards. Id. In fact, the Planning Board noted that the entrance to the site was configured to route traffic away from shopping centers and apartment buildings. Id. at 438. The Planning Board found that the landscaping was consistent with properties in the I-zone. Id. at 525. Accordingly, the Planning Board found that Sea-3's proposal promoted the health, safety and welfare of the community, especially since the proposed project would result in fire and railway improvements. Id. at 437, 525.

The Planning Board continued its deliberations until May 19th, when it adopted its finding of facts and found that Sea-3's site plan improvements “[met] all applicable requirements of the Town of Newington's Site Plan Review Regulations.” Id. at 526.

The Planning Board approved Sea-3's site plan with the following conditions:

1. Trucks exiting the SEA-3 facility shall make a right hand turn only and shall travel north on Shattuck Way to the Spaulding Turnpike's Exit 4.
2. The SEA-3 facility shall be authorized to receive no more than 16 rail tank cars carrying LPG per day. Any

proposal by SEA-3 to receive more than 16 tank cars carrying LPG per day shall require further site plan review and approval by the Newington Planning Board.

3. Any lease between SEA-3 and Pan Am (or their successors or assigns) on land leased to SEA-3 for the siting of the unloading racks and other improvements to be constructed and operated by SEA-3 on such leased land, shall contain a provision that SEA-3 shall remove all such improvements prior to any termination of the lease. The lease shall further provide that if SEA-3's operation is ever moved or discontinued, such improvements shall not be transferred to Pan Am. These required lease provisions shall be submitted to the Planning Board for review and approval by the Board and its legal counsel, and any proposal to amend such lease provisions shall require the pre-approval of the Planning Board.
4. The final design and plan shall meet the requirements of the N.H. Fire Code and the NFPA Code, per the opinion of the Newington Fire Chief and the Town's Fire Safety Consultants.
5. Several safety plans were adopted in conjunction with the original SEA-3 site plan approval. They shall be reviewed by SEA-3, updated and submitted to the appropriate public officials (including Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval.
6. If, after the track has been upgraded to a Class II status, SEA-3 learns, or has reason to know, that the Class II track has degraded to a lower level of service, or there is a carrier mandated reduction in rail car deliveries to 5 cars or less, the Selectmen and the Planning Board shall be notified in writing by SEA-3 of this reduction in the level of service within seven (7) business days of receiving such information. This is to allow Newington officials to notify proper authorities.

Id. at 526–27.

Portsmouth appealed the Planning Board's decision simultaneously to this Court as well as to the ZBA. This Court stayed its proceedings pending resolution of the ZBA appeal, which was denied. Portsmouth filed a request for rehearing with the ZBA, which was also denied. This Court consolidated Portsmouth's Planning Board and ZBA appeals, and will discuss each in turn.

Standard of Review

When reviewing a decision of a planning board or ZBA, a trial court should determine on the record before it whether the decision was unreasonable or erroneous as a matter of law. Deer Leap Assocs. v. Town of Windham, 136 N.H. 555, 557 (1992); Lone Pine Hunters' Club v. Town of Hollis, 149 N.H. 668, 669–70 (2003). The court “may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.” RSA 677:15, V. “The [Board's] findings of fact are presumed to be *prima facie* lawful and reasonable and the [Board's] decision will be set aside only when a court is persuaded . . . that it is unlawful or unreasonable.” Olszak v. Town of New Hampton, 139 N.H. 723, 725 (1995); see RSA 677:6; Tausanovitch v. Town of Lyme, 143 N.H. 144, 147 (1998). The court's review “is not to determine whether it agrees with the planning board's findings, but to determine whether there is evidence upon which they could have been reasonably based.” Summa Humma Enters. v. Town of Tilton, 151 N.H. 75, 79 (2004) (citation omitted); see also Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992). Moreover, the burden of proof is on the appealing party to show that the action of the Board was unlawful or unreasonable. RSA 677:6; See Bayson Props. v. City of

Lebanon, 150 N.H. 167, 169 (2003). In other words, planning board and ZBA decisions are subject to limited judicial review. Bayson, 150 N.H. at 170; Labrecque v. Town of Salem, 128 N.H. 455, 457 (1986).

I. Planning Board Appeal

Portsmouth argues the Planning Board's decision is generally unreasonable and/or unlawful on the following two grounds: (1) the Planning Board failed to comply with the statutory requirements regarding regional impact under RSA 36:54–57 thereby prejudicing Portsmouth, and (2) the Planning Board failed to abide by the site plan review regulations. For the reasons noted below, the Planning Board's decision is **AFFIRMED, in part, and VACATED and REMANDED.**

a. Violation of RSA Chapter 36

Portsmouth contends that the regional impact statutes require the Planning Board to give prompt, advance, and effective notice to affected communities when a pending development will have regional impact.

Portsmouth also argues that the increase in truck and rail traffic affects more than just the four communities that received a regional impact notice. Thus, Portsmouth contends the scope of the Sea-3 project was too narrowly defined and other affected communities were entitled to receive regional impact notice.

Portsmouth further contends it was prejudiced by the Planning Board's delay in declaring Sea-3's proposed development one of regional impact. Portsmouth contends the Planning Board first received notice that Sea-3's project may rise to a level of regional impact at its October 28, 2013 meeting, but did not declare the project a development of regional impact until December 9, 2014. Under RSA 36:56, Portsmouth

highlights that any doubt concerning whether a project should be deemed one of regional impact “shall be resolved in a determination that the development has potential regional impact.” Portsmouth vaguely alludes that the delay in declaring this project one of regional impact resulted in its inability to participate in unspecified ZBA hearings where Sea-3 was allegedly granted variances.¹

Portsmouth also claims the Regional Planning Commission as defined under RSA 36:53 is deprived of commenting on the conditions set forth in the Planning Board’s approval. Portsmouth argues the Planning Board’s fifth condition of approval requires Sea-3 to update existing safety plans and submit them only to the “appropriate public officials.” Accordingly, Portsmouth asserts the fifth condition violates RSA 36:54 by denying affected municipalities a meaningful opportunity to review, understand and comment on these safety reports.²

Newington contends that the Planning Board did not violate the regional impact statute. First, Newington argues under RSA 676:4, I(i), the Planning Board has the authority to impose various types of conditions subsequent to final approval. Newington, therefore, asserts the condition that the Planning Board imposed on Sea-3 to update existing safety plans and submit them to the identified Newington authorities for review and approval is proper. Newington further argues that during the public hearing process the Planning Board reviewed a complete fire safety analysis and heard opinions from its own fire consultants that the site plan complied with pertinent fire codes. In addition, Newington argues the record demonstrates that the fire departments

¹ The Court notes that the variances referenced by Portsmouth were not mentioned in the certified record and were only briefly discussed as a passing comment in Newington’s pleadings. Without further evidence regarding what these variances were and how they were obtained, the Court finds that Portsmouth suffered no prejudice as a result of the timing of the regional impact notice.

² The Court analyzes this issue in section I(b), *infra*.

and rail carriers were prepared to respond to an emergency. Thus, Newington asserts the Planning Board's condition was both reasonable and lawful.

Newington argues that Portsmouth does not have standing to raise the alleged injuries to other surrounding communities not included in the Planning Board's regional impact notice. It further argues that even if Portsmouth had such standing the certified record does not support its claim that truck traffic will increase and affect additional communities. In particular, Newington asserts that neither Portsmouth nor anyone else presented any contrary expert traffic testimony.

Sea-3 contends there was no delay in deeming its development one of regional impact and Portsmouth was not prejudiced by its regional impact notification. Sea-3 also argues that regional impact statutes do not limit municipalities' authority to impose conditions of approval. Furthermore, Sea-3 argues that Portsmouth was given ample opportunity to provide testimony during the public hearing process.

The regional impact statutes require timely notice to be sent to affected municipalities "concerning proposed developments which are likely to have impacts beyond the boundaries of a single municipality." RSA 36:54, I. When determining which municipalities may be affected, transportation networks are considered but only as they pertain to "neighboring municipalities." RSA 36:55, III. Timely notification is required so that regional planning commissions and potentially affected municipalities have the ability to furnish meaningful input to the municipality having jurisdiction. RSA 35:54, II. Accordingly, once a development is defined as having regional impact, the regional planning commission and affected municipalities obtain the "status of abutters

as defined in RSA 672:3 for the limited purpose of providing notice and giving testimony.” RSA 36:57, I.

Here, the Planning Board first mentions the potential of Sea-3’s development having regional impact at its September 9, 2013 meeting when increased railway traffic through surrounding communities was discussed. The Planning Board later received a letter dated October 28, 2013 from the Town of Greenland requesting Sea-3’s development be found one of regional impact. On November 18, the Planning Board made its first formal review of Sea-3’s site plan and voted Sea-3’s development one of regional impact. The Planning Board then continued its discussion of Sea-3’s site plan so that it could send notice to the potentially affected municipalities of Greenland, Portsmouth, Stratham and Newfields.

While the Court notes that it is questionable whether Portsmouth has standing to raise the issue that the Planning Board should have provided regional impact notices to additional municipalities, it does not need to decide that issue in this case. It is clear from the record that all of the neighboring municipalities that could reasonably be impacted were notified. In particular, the transportation networks affected by Sea-3’s development are the railway and roads travelled by truck traffic. The railway shipments will travel from Rotterdam, New York to Sea-3 in Newington. If abutters status was afforded to every municipality along the railway, the purpose of the regional impact statute would become frustrated and would not be limited to “neighboring municipalities.” See RSA 36:55, III. Likewise, it was stated multiple times in the certified record that the volume of truck traffic would remain the same. Thus, the certified record does not support a reasonable expectation that municipalities beyond

Greenland, Portsmouth, Stratham and Newfields would be impacted by increased traffic.

Furthermore, the Planning Board's timeline for deeming Sea-3's development one of regional impact does not suggest that it delayed in notifying potentially affected municipalities. Rather, the certified record demonstrates that Portsmouth received proper notice on or before the Planning Board's December 9, 2013 public hearing and that Portsmouth refrained from attending this hearing. While the Planning Board read a letter Portsmouth had submitted, it stated for the record that it should reach out to Portsmouth to take a more active role in the public hearing process.

Over the next five months, the Planning Board held five additional public hearings where it received meaningful testimony and documentation from Portsmouth and the regional planning commission. This testimony, in pertinent part, addressed safety concerns of fire, hazardous materials and truck traffic at the Sea-3 site.

It is clear, therefore, from the record that Portsmouth was afforded all its rights under RSA 36:54–57. Specifically, Portsmouth was provided timely notice and was able to provide the Planning Board with meaningful testimony. Accordingly, the Court finds that the Planning Board did not violate its duties under the regional impact statutes and that Portsmouth was not prejudiced by any undue delay.³

b. Site Plan Review Regulations

From the parties' pleadings and arguments at the hearing, Portsmouth asserts the Planning Board unlawfully and unreasonably approved Sea-3's site plan and failed

³ The Court addresses the issue raised by Portsmouth of whether the Planning Board acted unreasonably or unlawfully by approving Sea-3's site plan on the condition that Sea-3 update existing safety plans below. See § 1(b), *infra*.

to adhere to site plan review regulations on several grounds. The Court will address each in turn.

1. *Additional Safety Assessments*

First, Portsmouth raises the same argument that the Planning Board should have executed a comprehensive safety and hazard assessment and it was error for them to only conditionally require Sea-3 to update existing safety plans from the original site plan approval. Portsmouth explains that it is not requesting a railway study like the one completed by Massachusetts DOT on which the Planning Board relied, but rather argues it is necessary for the Planning Board to consider a comprehensive review of all safety concerns in order for it to find that the site plan is safe for the public health and welfare.

Portsmouth contends that neither the Planning Board nor an independent expert hired by the Planning Board reviewed the actual existing safety plans prior to or at a public hearing. Portsmouth asserts that it does not contest the Planning Board's imposition of conditions under RSA 676:4(I)(i), but rather argues that the existing safety plans that were conditionally required to be updated were not reviewed by the Planning Board. Portsmouth argues that its ability to provide testimony and comment on these safety plans has been thwarted. At the hearing on the merits of the appeal, Portsmouth indicated information regarding the existing safety plans had been submitted to Newington during the SEC process. Portsmouth argues that the Planning Board was not a part of the SEC process and that the Planning Board, not Newington, needed to review this information in order to make a decision on Sea-3's site plan approval. Because the existing safety plans were not part of the certified record, Portsmouth

argues the Planning Board's condition relying upon them was unlawful and unreasonable.

Separately, Portsmouth raises the argument that the Planning Board's fourth condition of approval requires that only Newington's Fire Chief and Fire Safety consultants review Sea-3's final design to ensure that it meets the requirements of the New Hampshire Fire Code and the NFPA Code. Due to the inherently risky nature of Sea-3's project, Portsmouth argues that without critical review of these final plans, the Planning Board's action was unreasonable and unlawful.

Newington and Sea-3 argue site plan regulations do not require a safety and hazard assessment to be completed prior to the Planning Board's approval. Newington asserts it is within the Planning Board's discretion to decide which reviews or studies are required for its consideration of site plan review. In fact, Newington and Sea-3 argue the certified record is replete with expert and professional testimony regarding fire safety. Specifically, they highlight that the Planning Board heard that the site plan meets all pertinent fire code provisions from Newington's and Portsmouth's fire chiefs as well as Sea-3's and Newington's fire safety experts that the site plan met pertinent fire code provisions. Moreover, Newington argues the Planning Board, Newington's fire chief, and two New Hampshire state fire marshals visited the site and raised no fire safety concerns.

Newington and Sea-3 further argue that the Planning Board's conditional approval was lawful and reasonable under RSA 676:4(I)(i). They stress that Sea-3's project is at the planning stage and Sea-3 still must obtain proper building permits for its final plans. Specifically, Newington and Sea-3 contend every element of Sea-3's facility

is governed by the fire code, which has adopted the NFPA code. Because the Planning Board reviewed expert reports regarding fire safety compliance, Newington and Sea-3 contend the Planning Board's condition to update existing safety plans is purely to ensure code compliance. Sea-3 and Newington argue that such an administrative action is delegated by Newington's ordinances to the building permits inspection office. Thus, they argue the Planning Board's condition is strictly administrative in nature.

The Court finds, contrary to Portsmouth's argument, the certified record demonstrates that the Planning Board engaged in extensive safety review of the Sea-3 site. During the public hearing process, the Planning Board repeatedly noted the importance of considering the health, safety, and welfare of the public and its ability to approve or deny Sea-3's site plan based on hazards to the surrounding community. Much of the certified record contains discussions directly relating to the increased transportation of LPG on railways and the condition and safety of those railways. The Planning Board correctly and continuously stated that it is preempted by federal law from regulating the actual railway and transportation on railroads.

First, the Planning Board hired an independent railway-engineering consultant, who explained that railway traffic safety was governed by the FRA, but that safety of railway crossings fell under the DOT's jurisdiction. The representatives from the FRA and the DOT confirmed that the railway was regularly inspected and met required regulations in its current state.

Second, the Planning Board received multiple opinions regarding fire and security safety issues as they pertain to site safety concerns. The Planning Board heard directly from Sea-3 that all improvements to its operation must comply with the federal fire

protection regulations and Homeland Security Plans. Sea-3 also provided a detailed explanation of the sprinkler system and equipment safety requirements necessary for transporting LPG. Sea-3 explained it was implementing fire suppression systems that performed higher than minimally required and had around the clock surveillance at the site.

Third, the Planning Board hired Cricenti, who personally reviewed Sea-3's site plans and found they complied with fire safety codes. Cricenti met with Newington's fire chief who also indicated Newington's fire department was adequately prepared with training and equipment to handle any fire safety concerns relating to Sea-3's operations. The record also reflects that Portsmouth's fire chief commented that Sea-3's proposal was not drastically different from that which was currently in place, and recommended conditional approval. See C.R. 31.

Fourth, the Planning Board received a fire safety analysis provided by Sea-3's expert, Sherman. Sherman reiterated that the site plans met fire safety codes and explained Sea-3's use of UV detectors.

Fifth, concerns with fire trucks crossing railways at the site were dispelled when Sea-3 indicated it was building a second emergency access road to avoid such a scenario. The Planning Board confirmed that no overhead power lines posed a safety threat because they all met set back regulations with the Propane and Gas Association.

Sixth, the record demonstrates that the proposed expansion was very limited in size and impact. Evidence shows that Sea-3's operation and handling of LPG was largely being modified as to how LPG was being received at the site, and not how LPG was being

handled. The limited scope of changes made it reasonable for the Planning Board to rely on prior plans and studies.

During the Planning Board's deliberations, board members noted the safety studies presented at the public hearing were thorough and did not leave any safety issues undiscussed. Accordingly, the Planning Board decided it was unnecessary to require a rail impact study like the one completed by Massachusetts.

In light of these consistent findings and except as noted herein, it was reasonable and lawful for the Planning Board to conclude that the site plan adequately addressed fire safety and hazard concerns.

Under RSA 676:4, planning boards may grant conditional approval when the conditions are:

- (1) Minor plan changes whether or not imposed by the board as a result of a public hearing, compliance with which is administrative and which does not involve discretionary judgment; or
- (2) Conditions which are in themselves administrative and which involve no discretionary judgment on the part of the board; or
- (3) Conditions with regard to the applicant's possession of permits and approvals granted by other boards or agencies or approvals granted by other boards or agencies, including state and federal permits.

RSA 676:4, I(i)(1-3) (Supp. 2013).

Here, the fourth condition requires Sea-3 to obtain approvals by the proper authorities to ensure compliance with fire code regulations. This approval is administrative by nature and requires no further discretionary judgment by the Planning Board. The

Court also finds that the Planning Board is in no better of a position than Newington's fire chief and fire safety consultants to review compliance with fire codes, regardless of the level of risk associated with Sea-3's project. Accordingly, the Court finds that the fourth condition in the Planning Board's approval is both lawful and reasonable.

Turning to Portsmouth's argument that the Planning Board erred by granting approval on the condition that Sea-3 update its safety plans from its original site plan approval, the Court finds the record is unclear. The Planning Board's findings state "that there are existing safety studies which detail the safety protocols and procedures to be followed on the SEA-3 property in the event of a[n] LPG incident." C.R. 524 ¶ 44. The Planning Board then conditioned its approval on the existing safety plans being "reviewed by SEA-3, updated and submitted to the appropriate public officials (including the Newington Fire Chief) for review and approval prior to the commercial operation of the improvements authorized by this approval." *Id.* at 527.

To the extent the Planning Board's condition requires approval by boards and agencies, it falls squarely within the terms of RSA 676:4(l)(i)(3). Beyond board and agency approvals, it is less clear from the certified record whether the nature of the condition is administrative or if it requires further discretionary judgment by the Planning Board. More specifically, the record is silent as to what is contained in the existing safety plans and it is unclear whether the Planning Board reviewed those existing plans in any detail. While the record supports the finding that the Sea-3 site is heavily regulated by state and federal agencies,⁴ there is nothing in the certified record addressing the contents

⁴ See C.R. at 91 (discussing NFPA compliance and proposed updates to sprinkling system); *id.* at 112 (discussing compliance with the United States Coast Guard Homeland Security Act and updates to security surveillance); *id.* at 167 (discussing compliance with fire codes); and *id.* at 323 (discussing Newington's fire department's preparedness to handle LPG emergency and jurisdictional evacuation plans).

of the existing safety records or plans. Further, the condition does not on its face limit the required updates to only administrative approvals. If the existing safety plans contain more than code and regulation compliance, the Planning Board's review of this condition may involve further discretionary judgment on matters that should have been discussed during the public hearings. If, on the other hand, the conditional updates are limited in scope to only meeting regulatory compliance, then the condition would fully satisfy RSA 676:4(l)(i). The certified record, however, lacks evidence to support or deny either conclusion.

Being mindful that the issue before the Planning Board was whether Sea-3's most recent site plan application met Newington's site plan and subdivision regulations, the Court recognizes the Planning Board was not tasked to review Sea-3's prior site plan approvals for validity. As outlined above, the Planning Board properly reviewed safety issues as they pertain to the proposed developments in Sea-3's current site plan application. Any safety studies and plans associated with prior site plan approvals were reviewed and deemed sufficient by prior planning boards. It would be unnecessary and redundant, therefore, for either the Planning Board or an expert hired by the Planning Board to again review the validity of the existing safety plans. Rather, the Court assumes the current Planning Board, at the very least, must review the existing safety plans to determine if updates to such studies are administrative in nature.

Accordingly, the Planning Board's decision is **VACATED** and **REMANDED** insofar as the record is unclear as to whether the Planning Board previewed the existing safety plans noted in condition 5 of its order and based its conditional approval thereon. Upon remand, the Planning Board must review the existing plans noted in condition 5. If the

Planning Board finds the existing plans are administrative in nature, the Planning Board must make its finding clear through a further order and no further hearing is needed. However, if the Planning Board determines that the plans call for discretionary judgment on matters that should have been discussed during the public hearings, further hearings must be held to allow input from the public, including Portsmouth. After such hearing, the Planning Board must make further findings and issue an order consistent with this Court's order.

2. *Traffic Study*

Portsmouth next argues the Planning Board only reviewed a traffic memorandum, and did not require the completion of a traffic study. Portsmouth contends that the traffic impact cannot be fully resolved without an updated traffic study. It asserts the Planning Board's expert deemed the traffic memorandum incomplete. Specifically, Portsmouth articulates that the Planning Board should not only have looked at the number of trucks at the site, but also considered the current traffic patterns and timing of traffic.

Newington and Sea-3 argue the Planning Board reviewed extensive information regarding traffic impact stemming from the site expansion. Newington and Sea-3 assert that both Sea-3's traffic report (from Hazarvartian) and the review of the traffic report by the Planning Board's consultant (Grotenhuis) concluded that truck traffic would not change from the 161 truck-per-day average which existed before the expansion.

At its first meeting on Sea-3's site plan application, the Planning Board heard that the truck traffic to and from the site would not change. Sea-3, Hazarvartian, Grotenhuis reiterated this multiple times during the public hearing process. While Grotenhuis

testified that he believed Harzarvartian's report was incomplete, he noted his own review of how the traffic affected intersections and indicated that current construction on the Spaulding Turnpike may actually alleviate some traffic down Woodbury Avenue and through Portsmouth. It was evident from the certified record that due to site limitations regarding how much product Sea-3 could process, the truck traffic generated at the site would not change from its current volume.

The Planning Board also addressed that only five trucks were able to queue on site, and that any back up on the road could be stacked at Newington Energy. Also worth noting, neither Rockingham Planning Commission nor Portsmouth enunciated any concern regarding specific traffic impacts resulting from Sea-3's development.

In light of this evidence, it was not unlawful or unreasonable for the Planning Board to conclude that Sea-3's site plan would not have significant impacts on traffic associated with existing uses on the site. Accordingly, the Planning Board was reasonable in not requiring additional studies.

3. *Odorized v. Deodorized Facility*

Portsmouth argues that the Planning Board did not consider whether the Sea-3 operation was an odorized or deodorized facility. Noting that federal regulations provide different requirements for handling odorized LPG than those for handling deodorized LPG, Portsmouth contends that knowing this distinction is critical in assessing the safety of the site and its impact on public health and welfare. Moreover, Portsmouth argues the Planning Board unlawfully and unreasonably ignored its own expert's recommendation that the LPG should be odorized.

Newington and Sea-3 both argue that the Planning Board was informed that Sea-3 operates under today's common practice of receiving odorless, pressurized and ambient temperature LPG by rail. Sea-3 further contends that the Planning Board had evidence before it that the LPG received would be refrigerated for storage and that odorant would congeal in the refrigeration process and cause system malfunctions.

It is clear from the record that the Planning Board knew Sea-3 would receive deodorized LPG and was only able to refrigerate deodorized LPG because odorant congeals in the refrigeration process. Additionally, Cricenti indicated that odorant was not required by the United States government, but that odorant could be added in tanks and the Planning Board could make it a condition of its approval. Portsmouth incorrectly interprets Cricenti's response as a "recommendation." In fact, he noted offhandedly that it could be made a condition, not that it should be made one.

Although the Planning Board expressed concerns about detecting leaks of deodorized LPG, the certified record demonstrates that UV, gas and flame detectors were currently in use at the site and would be upgraded with the proposed expansion. Thus, the record supports that the Planning Board was aware of the deodorized nature of LPG during its deliberations and it was not unreasonable or unlawful for the Planning Board to conclude that deodorized LPG did not pose a detrimental impact on the public's health, safety and welfare.

4. *Import vs. Export Facility*

Portsmouth argues that the Planning Board failed to clarify the nature of Sea-3's operations and never fully resolved the extent that LPG would be exported to foreign markets. It claims without this clarification, the Planning Board failed to thoroughly

assess the benefit to the region as it is unknown how much of the imported LPG would be distributed locally. Newington objects, arguing the issue of exportation is not relevant.

Portsmouth is correct that Sea-3's testimony regarding the extent of exportation of LPG to foreign markets was not consistent over the site plan review. At first, Sea-3 indicated it wished to redistribute LPG overseas as well as to some parts of New Hampshire and New England. By the end of the public hearing process, however, Sea-3 indicated it would "fill local market contracts and demand in the winter months first and [Sea-3] could export any remaining product in summer months." C.R. 325. These inconsistencies, however, are balanced by repeated testimony in the certified record that some portion of the imported LPG would be used to meet regional demand.

The Court finds that any inconsistency here was not material to the Planning Board's decision. Ultimately, Sea-3 is seeking to import domestic LPG at a lower cost, which would be reflected in consumer prices. While some of Sea-3's product may be exported to foreign markets, it does not make the Planning Board's decision unreasonable or unlawful.

5. Noise, Light, Water Supply and Air Quality

Portsmouth argues the Planning Board failed to evaluate the impact the site will have on air quality, noise and light pollution, and water supply adequacy. Portsmouth asserts that idling trucks and railway cars will increase emissions into the air as well as noise in nearby communities. Portsmouth further states that the Planning Board did not review any site lighting plan, nor did it analyze the impact on the public water supply in an event of a catastrophic event. Accordingly, Portsmouth contends the Planning Board

violated its site review regulations and its approval was therefore unlawful and unreasonable.

Newington and Sea-3 argue that light, noise, and air-quality issues were addressed by the Planning Board. Noting that the certified record indicated that truck traffic would not increase and that any regulation of the railway was preempted by federal law, Newington and Sea-3 contend the only issue is whether noise and light levels at the site would be discernable offsite. Newington and Sea-3 assert that Sea-3's application clearly demonstrates that light, glare, odor and noise would be consistent with current operational levels.

As to noise at the site, Sea-3 attested that none of the proposed developments would result in additional noise. Sea-3 explained that idling trucks at the site would be limited to five. While the planning board noted that steel hitting steel did create noise, this alone does not outweigh the evidence in the record that Sea-3's development would have minimal noise impact.

Similarly, it is clear that Sea-3 would install additional security lighting at its site. However, nowhere in the record is there any indication that this lighting would impact the surrounding areas and there was no cause raised for the Planning Board to require a more significant study. Although the record reflects that the pressure of the public water supply was unknown, the Planning Board was presented with information that water could be accessed from a neighboring water storage tank.

Finally, the record demonstrates that LPG was repeatedly described as a non-toxic gas and not a pollutant. Specifically, LPG evaporates at its boiling point, leaving

no residue or contamination behind. Likewise, emissions from trucks would not drastically increase because truck traffic at the site would not change.

Balancing the probabilities derived from the certified record, the Planning Board's conclusion that Sea-3's proposal would have little additional noise, light, water supply and air quality impacts on the surrounding area was not unreasonable or unlawful.

6. *Sea-3's Lease*

Finally, Portsmouth argues that some of the proposed changes by Sea-3 are located on land owned by Pan Am. Portsmouth asserts there is no notice of lease on file with the registry, therefore Sea-3 sought to make improvements on property in which it has no right, title or interest. Without reviewing a lease or the property rights, the Planning Board unlawfully and unreasonably approved its site plan.

Newington and Sea-3 both counter that Portsmouth's argument is without merit. Specifically, they contend that the initial site plan depicted the boundaries of Lot 2, Lot 13 and Pan Am's property bisecting these two lots. They also argue Sea-3's site plan clearly showed that the new rail sidings and rail berths would be built on Pan Am's property. Newington and Sea-3 argue that Pan Am's letter of authorization sent to the Planning Board on May 8, 2014 answered any questions as to Sea-3's authority to act upon the improvements on Pan Am's property. See C.R. at 511. Newington further argues that no party was prejudiced by Sea-3 not setting forth by name the properties where site improvements would occur.

Newington's subdivision regulations require that formal applications include "the correct names and mailing addresses of the applicant and owner(s) of record (if different)" Sect.3 (D)(2)(a). RSA 676:4, IV, provides:

The procedural requirements specified in this section are intended to provide fair and reasonable treatment for all parties and persons. The planning board's procedures shall not be subjected to strict scrutiny for technical compliance. Procedural defects shall result in the reversal of a planning board's actions by judicial action only when such defects create serious impairment of opportunity for notice and participation.

RSA 676:4, IV.

Sea-3 did not include Pan Am as an owner on its formal site plan application. Pan Am, however, was identified as an abutter, and representatives from Pan Am attended every Planning Board meeting that discussed Sea-3's proposed development. Pan Am supplied documentation and testimony regarding the impact of Sea-3's site plan on the railway. Pan Am also repeatedly addressed concerns from the public raised during the public hearing process. Before the Planning Board deliberated, concerns with Pan Am taking over Sea-3's operation were discussed. Pan Am provided the Planning Board with a standard form lease that it uses in negotiations that specifically provides that any improvements made by lessees "shall remain the property of and may be removed by the lessee at any time before the termination of this Lease" C.R. at 404. Moreover, the Planning Board conditioned its approval by requiring that any lease between Sea-3 and Pan Am "contain a provision that SEA-3 shall remove all such improvements prior to any termination of the lease. . . . [and] such improvements shall not be transferred to Pan Am." Id. at 527.

This evidence supports a finding that Sea-3's procedural defect did not seriously impair public notice or participation. Accordingly, the Court will not strictly scrutinize this technical noncompliance and finds that all parties and persons were provided fair and reasonable treatment.

II. ZBA APPEAL

Portsmouth alleges on four separate counts as to how the ZBA erred in upholding the Planning Board's decision. For the reasons set forth, the Court **AFFIRMS** the decision of the ZBA.

First, Portsmouth argues the ZBA should have found that the Planning Board relied on the wrong zoning ordinance when deciding that Sea-3's proposed expansion promoted the general welfare of the community. Specifically, Portsmouth asserts that because an existing LPG storage tank on Lot 13 is located in Newington's I-zone, the above ground storage of hazardous gas is prohibited. Portsmouth contends that the ZBA erred in finding that the Planning Board reasonably and lawfully found Sea-3's site plan was a long-standing use in the I-zone and that it would not injure present or prospective industrial developments.

Second, Portsmouth argues the ZBA incorrectly concluded that Portsmouth bore the burden to prove that the LPG storage tank in the I-zone was not a vested, grandfathered use.

Third, Portsmouth contends the ZBA erred when it found that the portion of the tank in the I-zone was not an impermissible expansion of a non-conforming use. Portsmouth contends the ZBA should have applied the test set forth in Hurley v. Town of Hollis, 143 N.H. 567 (1999) when determining whether the use will have a substantially different effect on the surrounding neighborhood.

Finally, Portsmouth asserts the ZBA failed to issue a written decision in accordance with its procedural regulations and therefore erred as a matter of law.

Newington and Sea-3 argue that all of the proposed developments in Sea-3's site plan are located not on Lot 13, but on Lot 2, which is wholly situated in the W-zone. They argue the W-zone permits all of Sea-3's proposed uses. Thus, the prohibitions in the I-zone are not applicable to the present site plan application.

Second, Newington and Sea-3 argue that Portsmouth does bear the burden to prove its appeal before the ZBA. They contend that Sea-3 provided evidence at the ZBA hearing that it was granted site plan approval in 1996 to build the existing storage tank on Lot 13, partially within the I-zone. They assert that Portsmouth failed to provide any evidence contrary to this before the ZBA. Accordingly, the ZBA could reasonably rely on Sea-3's representation and presume the existing storage tank was a valid, preexisting use.

Third, Newington and Sea-3 assert there can be no substantially different effect on the community in the I-zone when no change is being proposed there. Rather, all proposed changes will be on Lot 2, in the W-zone.

Finally, Newington and Sea-3 indicate the ZBA's decision was identified in the minutes from its September 15, 2014 meeting. They assert that Portsmouth was able to timely file a motion for rehearing and never alleged it was prejudiced by not receiving an actual written decision from the ZBA. Moreover, they argue that the ZBA rendered a written decision at Portsmouth's request.

It is uncontested that one of the existing LPG storage tanks on Lot 13 is partially located in the I-zone and that the I-zone does not permit storage of LPG in an above ground tank. There is credible evidence in the record that this LPG storage tank was erected on the site no later than July 2002 in accordance with prior site plans for Sea-3.

C.R. 551. Moreover, the record supports that Sea-3's current site plan application does not propose any improvements or expansion to the existing LPG storage tank on Lot 13 or anywhere on Lot 13. In fact, the record supports that Sea-3 only proposes development on Lot 2.

"Appeals to the board of adjustment concerning any matter within the board's powers . . . may be taken by any municipality affected by any decision of the administrative officer. Such appeal shall be taken within a reasonable time, as provided by the rules of the board" RSA 676:5, I (Supp. 2013). "A planning board decision about a zoning ordinance is ripe and appealable to the ZBA when such a decision is made." Atwater v. Town of Plainfield, 160 N.H. 503, 508 (2010).

The issue of whether the LPG storage tank was properly constructed partially in the I-zone became ripe for appeal, at the very latest, in 2002. Raising its nonconformity over a decade later, is not reasonable pursuant to RSA 676:5, I. Under RSA 677:6, it was Portsmouth's burden of proof to show that the ZBA unlawfully or unreasonable found that this LPG storage tank was an unpermitted use, which it failed to do. Because Portsmouth failed to meet this burden, the ZBA did not err in presuming that the existing LPG storage tank on Lot 13 was validly permitted.

While the record is void of any evidence as to whether the permitted use of the LPG storage tank on Lot 13 was established prior to the time the I-zone prohibited uses were enacted, it is clear that this tank, itself, will not be altered in any way by Sea-3's site plan. See Hurley, 143 N.H. at 173 (finding that zoning ordinance do not apply to structures or uses of the property that existed at the time the ordinance was enacted). The only minor change mentioned in the record was that more LPG might flow through

this tank on an annual basis. Because the existing capacity of the LPG storage tank was not increasing, the fact that it might be filled more in the future than it had in the past is not a substantial difference in its use. Accordingly, the ZBA did not err in finding that there would be no expansion or change of use regarding the permitted LPG storage tank in the I-zone.

Because the LPG storage tank partially located on Lot 13 was a validly permitted use and its use was not being expanded or changed by Sea-3's proposed developments, the Planning Board did not need to apply the I-zone zoning ordinance. In fact, the only applicable zoning ordinance to Sea-3's site plan application is the W-zone's zoning ordinance because Lot 2 is entirely located in the W-zone. Under Newington's zoning ordinances, the W-zone

is established as a zone in which the principal use is for activities which depend upon the ocean for transport or resources. There is a relatively limited amount of deep water frontage in the State of New Hampshire. This prime land is recognized as an invaluable natural resource of the Town of Newington and should be reserved for optimum utilization so that the economic benefits may be realized to their fullest extent. Any installation on shore or offshore, temporary or permanent which interferes with the purposes of this district is prohibited.

Newington, N.H., Zoning Ordinance art. V, § 6(A) (2015). The permitted uses include, in pertinent part, "[a]ny Industrial or Commercial activity dependent upon the ocean for transport or resources." Id. at art. V, § 6(B)(1). Prohibited uses in the W-zone include above ground storage of LPG unless all standards and regulations from NFPA, DOT and the Environmental Protection Agency are met. Id. at art. V, § 6(D)(3)(a-c).

Here, the certified record reflects that the Planning Board considered both the I-zone ordinance and the W-zone ordinance when reviewing Sea-3's site plan

application. See C.R. 525–26. While the consideration of the I-zone ordinance was unnecessary because of the reasons state above, it did not render the Planning Board’s decision unlawful or unreasonable. The Planning Board still relied on the W-zone ordinance when it decided Sea-3’s site plan promoted the general welfare of the community. See Id. at 525. Specifically, Sea-3’s proposed development did not require a variance as Sea-3’s site plan complied with the W-zone requirements. Accordingly, the ZBA lawfully and reasonably found that the Planning Board correctly applied Newington’s zoning ordinance to Sea-3’s site plan application.

Lastly, it has repeatedly been held that “disclosure of specific findings of fact by a board of adjustment may often facilitate judicial review, the absence of findings, at least where there is no request therefor, is not in and of itself error.” Thomas v. Town of Hooksett, 153 N.H. 717, 724 (2006), see Kalil v. Town of Dummer Zoning Bd. of Adjustment, 155 N.H. 307, 310 (2007); Pappas v. City of Manchester Zoning Bd. Of Adjustment, 117 N.H. 622, 625 (1977). Here, the ZBA minutes clearly delineate the ZBA’s findings for denying Portsmouth’s appeal of the Planning Board’s decision. Moreover, at Portsmouth’s request, the ZBA rendered a written decision specifying its findings and ruling. Portsmouth suffered no prejudice or harm from the ZBA’s initial absence of written findings.

Conclusion

Accordingly, the Planning Board’s decision is **AFFIRMED, in part**, and **VACATED** and **REMANDED** insofar as the Court requires further information regarding the updating of existing safety plans as a condition of the Planning Board’s approval. The ZBA’s decision is **AFFIRMED** for the reasons stated above.

So Ordered.

October 6, 2015

Date

Marguerite L. Wageling

Marguerite L. Wageling
Presiding Justice