THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Rockingham Superior Court
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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 May 06, 2015 relative to:

Order on Pending Motions

May 08, 2015

Raymond W. Taylor
Clerk of Court

(507)

C: Jane Mackin Ferrini, ESQ; Christopher Cole, 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 ON PENDING MOTIONS

These consolidated cases are appeals brought by the City of Portsmouth ("Portsmouth") from the Town of Newington ("Newington") Planning Board ("Planning Board") and Town of Newington Zoning Board of Adjustment ("ZBA"). Sea-3, Inc. ("Sea-3") has moved to intervene, to which Portsmouth objects. Richard and Catherine DiPentima, John and Jane Sutherland, Margaret and Louis Salome, Robert Gibbons, Patricia Ford, Matthew and Erica Nania, Thomas and Corrine Szopa, and Steve and Carole Edwards (collectively "the Portsmouth Intervenors") move to intervene. Sea-3 and the Planning Board object to the Portsmouth Intervenors' motion. Sea-3 also moves to dismiss the appeal brought by Portsmouth—a motion that the Court will address in part. For the reasons discussed below, Sea-3's motion to intervene is

GRANTED the Portsmouth Intervenors' motion to intervene is **DENIED**, and Sea-3's motion to dismiss is **DENIED IN PART**.

Sea-3 is the owner of two adjoining parcels of land located at 190 Shattuck Way, in Newington. The two lots together are almost 11 acres in size, and house structures which facilitate the transmission of liquefied petroleum gas (LPG) by water and railroad. Due to changes in the global energy market, the economic feasibility of running such an operation has changed, and Sea-3 sought approval to increase the number of rail unloading berths and construct additional improvements. It is alleged that this will lead to an increase in rail traffic over the lines which run through Portsmouth.

In August of 2013, Sea-3 submitted preliminary plans for renovation to the Planning Board for approval. On December 9, 2013, the project was designated a "development of regional impact" pursuant to RSA 36:55. As a result, notice was given to the Rockingham Planning Commission and surrounding communities, including the City of Portsmouth. Portsmouth was, and continues to be, actively involved in the process. Ultimately, on May 19, 2014, the Planning Board issued its conditional approval for the redevelopment plan. Portsmouth appealed that decision both to this Court (Docket No. 218-2014-CV-654) and the ZBA. The Planning Board appeal was stayed in this Court during the pendency of the ZBA action. On September 15, 2014, the ZBA upheld the Planning Board's decision. Portsmouth filed a motion for rehearing, which was denied on November 7, 2014. Portsmouth subsequently appealed that decision to this Court (Docket No. 218-2014-CV-1287) and the cases were consolidated.

"Any person shown to be interested may become a party to any civil action upon

filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause. . ." N.H. R. Super. Ct. (Civil) 15. Here, it is beyond cavil that Sea-3 is an interested party. As the owner of the property and holder of the conditional approval, Sea-3 unquestionably has an interest in this case, and thus Sea-3's motion to intervene is **GRANTED**.

Turning to the Portsmouth Intervenors, the Court notes "[o]nly 'persons aggrieved' have standing to appeal planning and zoning board decisions to the superior court." Nautilus of Exeter, Inc. v. Town of Exeter, 139 N.H. 450, 452 (1995); see also RSA 677:15, I. "To be considered a person aggrieved, a litigant must have a direct definite interest in the outcome of the proceedings." Joyce v. Town of Weare, 156 N.H. 526, 528 (2007). "[A]n appellant must demonstrate that the appellant has suffered or will suffer an injury in fact." Appeal of Londonderry Neighborhood Coalition, 145 N.H. 201, 203 (2000). The Court reasons that the "injury" must be one capable of being remedied by the administrative agency whose actions have been challenged.

"'Whether a party has a sufficient interest in the outcome of a planning board or zoning board proceeding to have standing is a factual determination' for the trial court." Nautilus, 139 N.H. at 452 (quoting Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544-45 (1979)). In making this determination, the Court considers "factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the administrative hearings." Weeks, 119 N.H. at 545. Standing requires a "definite" injury, as a merely speculative injury is not enough. See Joyce, 156 N.H. at 530 (finding no standing where the petitioner was engaged in litigation which might result in his

acquiring property). The burden lies on the putative intervenors to demonstrate standing. See Golf Course Investors of NH v. Town of Jaffery, 161 N.H. 675, 680 (2011) ("[W]hen the issue of standing is raised, the party challenging the administrative action . . . must sufficiently demonstrate his or her right to claim relief").

In this case, the Portsmouth Intervenors all live between two and three miles from Sea-3's property by road travel. See Planning Board's Objection to Motion to Intervene. The Portsmouth Intervenors represent that "most live within 100 feet of the rail line leading to the Sea-3 property." Reply of Portsmouth Intervenors to Planning Board's and Sea-3's Objections to Motion to Intervene, p. 2. The Court concludes that the proximity factor weighs against a finding of standing in this case—the proposed intervenors all live over two miles away. See Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 767 (2013) (noting that petitioner concede that a distance of 3.8 miles "lacks proximity"). That some of the Portsmouth Intervenors live near the rail lines is irrelevant in this case because the Planning Board is without authority to regulate the railroad itself. See CSX Transportation, Inc. – Petition for Declar. Order, Finance Docket No. 34662 at 2 (S.T.B. May 3, 2005) ("[U]nder the plain language of the statute [49 U.S.C. §10501(b)], any state or local attempt to determine how a railroad's traffic should be routed is preempted."); Burlington N. & Santa Fe Ry. Co v. Dep't of Trasp., 206 P.3d 262, 263 (Or. Ct. App. 2009) (holding the act "broadly precludes state regulation on those matters" specified in 49 U.S.C. §10501(b)). In this case, Sea-3, Newington and Portsmouth all agree that regulation of railways is preempted, although Portsmouth argues that Newington may still regulate aspects of the site plan that do not directly touch on rail. In so far as the Portsmouth Intervenors seek standing based on

their proximity to the railway, and not the site plan, such proximity is no boon to the Intervenors. In order to logically follow, proximity to the rails is only relevant insofar as the project going forward could increase or change the train traffic *on the rails themselves*—an issue which is clearly the exclusive domain of the federal government. See 49 U.S.C. §10501(b) ("The jurisdiction of the Board over (1) transportation by rail carriers and the remedies provided in this part with respect to . . . routes . . . is exclusive."); City of Cayce v. Norfolk S. Ry. Co., 706 S.E.26 6, 11(S.C. 2011) (holding enforcement of nuisance ordinance prohibiting graffiti on bridges in a railroad was preempted).

Turning next to the type of change proposed, the project calls for the construction of new structures, including three 90,000 gallon storage tanks, various industrial appendages, and new train berths. The bigger and more significant a proposal, the more likely it is that neighbors will be affected. Because the size of this change is significant—indeed, it is a project of regional impact—this factor weighs in favor of finding the Portsmouth Intervenors have standing. See Hannaford Bros., 164 N.H. at 767 (holding that "there is no question" a proposal to construct a building twice the 40,000 square foot restriction is substantial).

Turning to the third factor, the Portsmouth Intervenors claim to have "demonstrated amply to the Planning Board their direct interests in the outcome of the proceedings, which include environmental, health and safety concerns and the potential diminution in value of their residential properties located along the rail lines." Reply of Portsmouth Intervenors to Planning Board's and Sea-3's Objections to Motion to Intervene, p. 2. By way of example, the Portsmouth Intervenors submitted a letter to the

Planning Board, expressing their concerns. Planning Board C.R., p. 220. They wrote: "In addition to the significant safety concerns regarding this type of activity and this magnitude of use intensification, there are potential environmental impacts such as increased noise, light and diesel exhaust, and the potential impact on the wetlands where the trains pass." Id. To the extent that the Portsmouth Intervenors claim injury based on their proximity to the lines, for the reasons discussed above, those injuries cannot support standing before the Planning Board. If, hypothetically, the project would lead to increased train travel on the tracks which would be loud when heard in the Portsmouth Intervenors' homes, that injury is outside the jurisdiction of the Planning Board and cannot confer standing. To the extent that the Portsmouth Intervenors' worry about other general safety and environmental claims, those fears are too speculative and generalized to properly form the basis for standing. As discussed above, it is the Portsmouth Intervenors' burden to demonstrate that they have standing, and they have not identified an injury that will affect them particularly.[1] The injury prong therefore weighs against a finding of standing.

Finally, concerning the extent of the Portsmouth Intervenors' involvement below, the Court notes that the Portsmouth Intervenors appeared through counsel below, and some even wrote letters personally. See, e.g., Planning Board C.R., p. 142. This factor weighs in favor of finding standing. On balance, however, the Court holds a lack of a direct injury and lack of proximity tip the scales against a finding of standing. See Hannaford Bros., 164 N.H. at 770 ("Although the second and fourth Weeks factors weigh in favor of standing, we conclude that because the petitioner lacks proximity and

[1] Prayer A in the Portsmouth Intervenors' Reply requests the court conduct a hearing if necessary to determine whether they have standing. A hearing is not necessary here, because the Court is accepting their offer of proof.

has failed to allege any concrete injury to its particular property . . . the Weeks factors, on balance, do not support the petitioner's standing to appeal."). In reaching this holding, the Court notes that it is allowing Portsmouth to remain in the case, discussed infra, and Portsmouth holds a position similar to the Portsmouth Intervenors'. The Court also rejects the Portsmouth Intervenors' argument that the Court has authority to grant the motion to intervene in the absence of Weeks standing. See id. at 768 ("To accept [that] argument would disregard our statutory mandate to limit standing to persons 'directly affected' . . ."). The Portsmouth Intervenors' motion to intervene is therefore **DENIED**.

Finally, the Court addresses Sea-3's motion to dismiss based upon Portsmouth's standing. The Court observes that the motion to dismiss also raises preemption as a ground—that issue will be addressed by a further order of the Court which will issue in due course.

Here, the Court concludes that the City of Portsmouth does have standing to proceed. As discussed above, the change of use weighs in favor of standing, as does Portsmouth's extensive participation in the proceedings.

Portsmouth's risk of injury, however, is much more particularized. In the event of some sort of catastrophic emergency, presumably Portsmouth Fire Department and EMS personnel would respond, potentially on Portsmouth's dime. Planning Board Appeal ¶40. Moreover, such a "catastrophic event at the site would likely require the evacuation of [the] City's residents and the loss of property and damage." Id. ¶38. Such an event, while speculative, is sufficiently generalized and within Portsmouth's duties and obligations in *parens patriae*. Moreover, as it is a municipality, Portsmouth

has the obligation to plan for the unexpected. Finally, as a municipality, Portsmouth has a special "interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air." Massachusetts v. EPA, 549 U.S. 497, 518-19 (2007) (quoting Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1907) (Holmes, J.)) (finding that, under the federal system, states are entitled to "special solicitude" in standing analysis). Portsmouth thus has standing to contest the environmental injury that would be too diffuse for a citizen to bring. Finally, Portsmouth is an abutting city to Newington, and is thus proximate for the purposes of Weeks.

In sum, the Court concludes that Portsmouth has standing to pursue the appeal. Sea-3's motion to dismiss on standing grounds is therefore **DENIED**.

So Ordered.

May 6, 2015
Date

Marguerite L. Wageling
Presiding Justice