

**THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Joint Application of Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility for the Construction of a New High Voltage Transmission Line in New Hampshire

Docket No. 2015-06

**MUNICIPAL GROUPS 1 SOUTH, 2, 3 SOUTH AND 3 NORTH'S
OBJECTION TO MOTION FOR REHEARING AND REQUEST TO VACATE
DECISION OF FEBRUARY 1, 2018 AND TO RESUME DELIBERATIONS**

Municipal Intervenor Groups 1 South, 2, 3 South and 3 North (collectively “the Referenced Municipal Groups”) respectfully object to the motion for rehearing and request to vacate the decision of February 1, 2018 filed by Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively, the “Applicants”), stating as follows:

1. On February 1, 2018, the Site Evaluation Committee (“SEC” or “Subcommittee”) took a vote on a motion to end deliberations in the above-referenced matter. Tr. 2/1/18 at 24 (Day 3AM Deliberations). The Subcommittee then unanimously approved a motion to find that the Applicants had failed to meet their burden of proof under RSA 162-H:16 to show that “the site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of the municipal and regional planning commissions and municipal governing bodies.” Tr. 2/1/18 at 24-26 (Day 3AM Deliberations).

2. On February 28, 2018, the Applicants filed a Motion for Rehearing and Request to Vacate Decision of February 1, 2018 and to Resume Incomplete Deliberations (hereinafter “Motion for Rehearing”). In summary, the Applicants argue that: (1) the Subcommittee should have considered whether there were “mitigation conditions” that would have resulted in a different finding on undue interference with orderly development; (2) the Subcommittee’s

decision to end deliberations was premature; and (3) the Subcommittee failed to properly deliberate the “undue interference” finding. Those arguments should be rejected.

3. As a procedural matter, the filing of the motion is untimely because the Subcommittee has not yet issued its written decision. Even assuming that the filing of the motion is timely, which is disputed, the motion also lacks any sufficient legal basis. Rather than waiting for the written decision, the Applicants have attempted to support their motion by using selected quotations from the Subcommittee members that are not representative of the full deliberations. When the record is reviewed as a whole, the arguments lack merit and are insufficient to overcome the Subcommittee’s decision to deny the application.

I. The Motion for Rehearing Is Premature

4. As of the date of the filing of this objection, the Subcommittee has not yet issued its final written decision. It is inappropriate for the Applicants to file the Motion for Rehearing before the final written decision has been issued, and it is even more inappropriate for the Applicants to seek to take multiple bites at the apple by stating that they “preserve their right to challenge the merits of the Subcommittee’s final written order pursuant to RSA 541:3 upon the issuance of such an order.” Motion for Rehearing at 5, n.6.

5. The SEC’s administrative rules provide that “[t]he committee or subcommittee, as applicable, shall make a finding regarding the criteria stated in RSA 162-H:16, IV, and Site 301.13 through 301.17, *and issue an order pursuant to RSA 541-A:35 issuing or denying a certificate.*” In turn, RSA 541-A:35 states as follows:

A final decision or order adverse to a party in a contested case *shall be in writing or stated in the record*. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings. If, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon

each proposed finding. Parties shall be notified either personally or by mail of any decision or order. Upon request, a copy of the decision or order shall be delivered or mailed promptly to each party and to a party's recognized representative.

In this case, the current procedural schedule requires that the final written decision be issued by March 31, 2018. Tr. 8/31/17 at 143-49 (Day 30AM). The Applicants' motion for rehearing should not be considered until after the issuance of the Subcommittee's final written decision.

6. The Applicants' seek to justify the filing of the motion by arguing that "[u]nder the law and relevant facts, the Applicants are not required to wait until a written order is issued to move for reconsideration of the Subcommittee's decision, particularly in the circumstances of this case, where the decision to end the deliberations is a plain error of law, and should be remedied now, and that a written order cannot resolve." Motion for Rehearing at 5. The problems with this argument are twofold.

7. First, the Applicants are not simply seeking a rehearing on the decision to end the deliberations before evaluating all of the findings required in RSA 162-H:16. The motion contains substantive arguments regarding whether the Subcommittee applied the appropriate standard for evaluating impacts to orderly development. Motion for Rehearing at 22-28. For example, the Applicants argue that the Subcommittee did not appropriately evaluate "undue interference" and impacts to the "region" when discussing orderly development. Motion for Rehearing at 22-28. The motion also asserts that the Subcommittee should have concluded that the Applicants have met their burden of proof. Motion for Rehearing at 28. These arguments extend well beyond the procedural legal issue of whether the SEC is allowed to end deliberations before considering all of the criteria in RSA 162-H:16. There is no way to interpret the motion other than being a request for a rehearing on all aspects of the denial of the Project.

8. Second, the motion is flawed because, rather than relying on the final written decision issued in accordance with RSA 541-A:35, the Applicants use comments of individual Subcommittee members during deliberations to support their arguments. This underscores the need for a written decision by the Subcommittee. The deliberations were conducted to allow members of the Subcommittee to discuss their opinions about the application. The statements of the individual Subcommittee members during deliberations constitute their personal opinions because they were never adopted by a formal vote by the Subcommittee.

9. The reliance solely on deliberative comments to overturn an administrative tribunal's decision is routinely rejected. *See, e.g., Daniels v. Town of Londonderry*, 157 N.H. 519, 523-25 (2008) (holding that objectionable statements made by certain zoning board members during deliberations simply expressed "a general concern, rather than a final determination"); *S.S. Baker's Realty Company, LLC v. Town of Winchester*, 2014 WL 11646612 at *2 (March 19, 2014)¹ (rejecting argument that the opinions of planning board members expressed during deliberations were adequate to overturn decision because "the planning board's written record, coupled with its denial letter, apprised the petitioner of the board's reasons for denial and enabled review on appeal").

10. By way of further example, in *Limited Editions Properties, Inc. v. Town of Hebron*, 162 N.H. 488, 491-93 (2011), the New Hampshire Supreme Court addressed an argument regarding whether individual statements of planning board members were sufficient to support a decision because those comments do not constitute "collective reasoning." The Court ultimately upheld the planning board's decision because the majority of the board voted on a motion to adopt the reasoning referenced by some of the individual board members to deny the

¹ For the Subcommittee's convenience, a copy of this unpublished opinion is attached hereto.

application. That type of vote did not occur in this case, and, therefore, it is incorrect for the Applicants to seek to discredit the Subcommittee's decision based on comments of the individual Subcommittee members.

11. Similar to the applicable statutes analyzed in the foregoing cases, RSA 541-A:35 requires that the decision of the SEC be supported by findings of material facts and legal conclusions. The statements by individual Subcommittee members during deliberations are not the "findings of material facts and legal conclusions," and therefore are insufficient to overcome the decision. It is instead necessary to review the final written decision that sets forth the reasoning of the *full* board. *See, e.g., Motorsports Holdings, LLC v. Town of Tamworth*, 160 N.H. 95, 102-08 (2010) (rejecting argument that the record should be combed to determine which aspects of a project were deficient, and instead remanding for the board to issue a decision explaining their vote).

12. Finally, as a matter of judicial economy, it is inappropriate for the Applicants to seek to file multiple motions for rehearing regarding the denial of its application. For whatever reason, the Applicants deliberately chose to seek rehearing of the denial of the application before the issuance of the written decision. It is unfair to the Subcommittee, as well as the intervenors in this matter, to be forced to address multiple motions for rehearing on the same decision. To put it simply, having made their bed, the Applicants must lie in it, for better or worse. It is recommended that the Subcommittee wait until the issuance of its final written decision before deciding this motion, and the Applicants should also be prohibited from filing another motion for rehearing.

II. The Motion for Rehearing Should Be Denied On Its Merits

A. Standard of Review

13. The specifications required for a motion for rehearing is set forth in RSA chapter 541. Under RSA 541:4, a party seeking rehearing is required to “set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable.” The purpose of rehearing “is to direct attention to matters that have been overlooked or mistakenly conceived in the original decision” *Damqis v. State*, 118 N.H. 309, 311 (1978) (internal quotations omitted). A rehearing should only be granted when the Subcommittee finds “good reason” or “good cause” has been demonstrated. *See O’Loughlin v. NH Pers. Comm.*, 117 N.H. 999, 1004 (1977); *Appeal of Gas Service, Inc.*, 121 N.H. 797, 801 (1981).

14. Moreover, while any decision of the Subcommittee will be reviewable by the New Hampshire Supreme Court under RSA chapter 541, its orders will be deemed prima facie “lawful and reasonable.” RSA 541:13. The burden is on the complaining party to prove by “a clear preponderance of the evidence” that an order is “unjust or unreasonable.” *Id.* It is the expressed intention of RSA 541:13 to ensure that the decisions of an administrative agency “are entitled to great weight and are not to be set aside lightly.” *Plymouth Fire District v. Water Pollution Commission*, 103 N.H. 169, 173-174.

B. The Subcommittee Did Not Need To Deliberate On All Required Factual Findings Before Denial of the Application

1. It Is Not The Responsibility Of The SEC To Develop Conditions To “Fix” Undue Interference To Orderly Development

15. The Subcommittee’s decision to complete deliberations after determining that the Applicants failed to meet their burden of proof regarding orderly development was not a violation of RSA chapter 162-H or the SEC’s administrative rules. The Applicants argue N.H.

Admin. Rules, Site 202.28(a) and 301.17 require the Subcommittee to consider whether the imposition of conditions could address issues associated with each of the statutory findings, including orderly development. In support of that argument, the Applicants argue that the thirteen certificates issued over the last thirty years have included over 300 conditions, and that many of those conditions were “crafted” by the SEC. Motion for Rehearing at 7-8, n.9.

16. In essence, the Applicants argue that it was the Subcommittee’s obligation to craft conditions that would “fix” the flawed application. This argument is nonsensical. Although past SEC decisions have imposed conditions of approval, a detailed review of the orders demonstrates that most of the conditions were boilerplate and/or stipulated to by the applicant. *See, e.g., Application of New England Power Company d/b/a National Grid and Public Service Company of New Hampshire d/b/a Eversource Energy for a Certificate of Site and Facility (Merrimack Valley Reliability Project)*, SEC Docket 2015-05, Order and Certificate of Site and Facility with Conditions dated October 4, 2016 (conditions were boilerplate and/or stipulated to by applicant); *Application of Antrim Wind Energy, LLC*, SEC Docket 2015-02, Order and Certificate of Site and Facility with Conditions dated March 17, 2017 (conditions were boilerplate and/or stipulated to by applicant); *Application of New England Power Company d/b/a National Grid for Certificate of Site and Facility for Construction of a New 230kV Tap Line in Littleton, New Hampshire*, SEC Docket 2014-02, Order and Certificate of Site and Facility with Conditions dated August 29, 2014 (conditions were boilerplate).

17. In several proceedings, the applicants had entered into stipulations to resolve impacts to orderly development, and the host municipalities agreed that those conditions would be sufficient to receive their support. *See, e.g., Application of Granite Ridge Energy, LLC f/k/a AES Londonderry, LLC*, SEC Docket No. 1998-02, Decision dated May 25, 1999 at 8 (the Town

of Londonderry, as the host community, supported siting of the facility contingent upon certain conditions that were stipulated to by the applicant); *Application of Newington Energy, LLC*, SEC Docket No. 1998-01, Decision dated May 25, 1999 at 7, 13-14 (the Town of Newington through its Board of Selectmen, Planning Board and attorneys supported the granting of a certificate as the host community, subject to certain conditions that were stipulated to by the applicant and approved by the SEC).

18. Unlike the above-referenced proceedings, the Applicants failed to propose conditions that were sufficient to satisfy the concerns of the host municipalities and other governing bodies. The SEC does not have the responsibility to develop a large set of conditions to “fix” a finding that the Applicants failed to meet their burden of proving that there would not be an undue interference with orderly development as a result of impacts to land use, tourism, property values and the views of municipal and other governing bodies.

2. The Potential Conditions Submitted By The Applicants Should Not Be Considered

19. The Applicants argue that, in order to resolve the concerns discussed by the Subcommittee members during the deliberations, the Subcommittee should consider adopting or tailoring the proposed conditions in Attachment C to the Motion for Rehearing. It is inappropriate for the Applicants to submit potential conditions for consideration by the Subcommittee at this time. It is well accepted that “a motion for rehearing to consider new evidence should not be granted . . . absent a showing that the evidence could not have been presented at the hearing.” *Appeal of Sloan*, 2017 WL 1373597 at *2 (Feb. 15, 2017). The Applicants have failed to provide any explanation for why they are now submitting a stipulation on many of the exact or nearly identical conditions that they previously opposed in their post-

hearing brief.² The Applicants have also failed to identify any reason why the “examples of additional conditions that the Subcommittee could impose” that are set forth in Attachments B and C were not previously included in their post-hearing brief. Motion for Rehearing at 2. Moreover, although the Applicants assert that they included the conditions as examples of what the Subcommittee “could do, or could have done,” such an argument is insufficient to make an end-run around the rules for reopening the record and introducing new evidence. Motion for Rehearing at 2, n.4.

3. The Applicants Have Failed To Identify Any Conditions That Are Adequate To Resolve The Concerns Raised By the Subcommittee

20. Even if it is appropriate to consider the newly submitted potential conditions, the conditions fail to resolve the fundamental failures in the application identified by the Subcommittee. In fact, there is no set of conditions that could have been imposed by the Subcommittee to address the flaws it found other than requiring a completely new design and route, as well as requiring the submission of a new analysis of the subject areas in which the experts hired by the Applicants were deemed to lack credibility or given little weight due to identified shortcomings. The concerns raised by the Subcommittee during their deliberations cannot be simply “fixed” or “mitigated” through the imposition of conditions, particularly with respect to impacts to land use, views of the municipalities, tourism and property value. While it is challenging for the intervenors to fully address the findings and legal conclusions before the issuance of the Subcommittee’s written decision, the following provides an overview of this issue.

² See, e.g., Motion for Rehearing, Attachment A at 3, ¶3 (Monitoring) (Applicants opposed almost identical condition at page 405 of brief); Attachment A at 3, ¶4 (Blasting) (Applicants opposed identical condition on pages 405-406 of brief); Attachment A at 6, ¶11 (Independent Claims Fund) (Applicants opposed identical condition on pages 412-412 of brief).

21. **Land Use:** With respect to whether there would be undue interference with orderly development, the SEC is required to consider among other things the extent to which the siting, construction and operation of the proposed Project will affect land use. *See* Site 301.15(a). The unanimous consensus of the Subcommittee members was that the Project would be inconsistent with prevailing land uses along the route due to the size and scope of the Project in the existing right-of-way or in the new right-of-way in the North Country. *See e.g.* Tr. 1/31/18 at 17-51 (Day 2AM Deliberations). The Applicants have criticized one Subcommittee member's references to the zoning law doctrine of expansion of non-conforming uses, Motion for Rehearing at 13-14, however that discussion has been taken out of context because the Subcommittee member was clear that the comparison to zoning laws was simply intended as guidance for consideration of whether the size and scope of the Project made it inconsistent with prevailing land uses. Tr. 1/31/18 at 43-44 (Day 2AM Deliberations). There was never a vote to apply the law of non-conforming uses to this application, and the Applicants' representation of this portion of deliberations results in a misleading portrayal of the Subcommittee's discussion.

22. The Subcommittee found insufficient evidence in the record for Applicants to satisfy their burden in regards to orderly development. For example, a majority of the Subcommittee members found that Mr. Varney was not a credible witness in regards to testimony that there would be no undue impacts to land use when using an existing right-of-way. Tr. 1/31/18 at 33-39 (Day 2AM Deliberations). The Subcommittee members found ample evidence from municipal and other witnesses that the Project would be inconsistent with prevailing land uses due to the Project's size and scope. Tr. 1/31/18 at 38-48 (Day 2AM Deliberations). In regards to the latter points, the Subcommittee members believed there was a "tipping point" at which the Project's size and scope made it inconsistent with the prevailing

land uses. *See e.g.* Tr. 1/31/18 at 47-48 (Day 2AM Deliberations) (as explained by Chairman Honiberg, “There’s a point at which it’s no longer the same kind of use.”). To inform their analysis, the Subcommittee members also considered the testimony submitted by municipal witnesses explaining that the Project was not consistent with their respective master plans and zoning ordinances. Tr. 1/31/18 at 49-63 (Day 2AM Deliberations).³

23. Views of the Municipalities and Other Governing Bodies: Another factor relative to a finding of undue interference with orderly development that the Subcommittee must consider is the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility. RSA 162-H:16, IV(b); N.H. Admin. Rule, Site 301.15(c). While this is one of the specific factors that must be considered by the SEC relative to a finding of undue interference with orderly development, the Applicants attempt to minimize its importance by giving it short shrift. In a footnote, the Applicants gloss over this requirement by arguing that “[n]egative views and beliefs *are not evidence* and deferring to those views and beliefs amounts to consideration that is undue.” Motion for Rehearing at 27, p.36. It appears that the Applicants are arguing that the municipalities and other governing bodies opposed to the project failed to present any evidence to substantiate their concerns about the project. That argument is unfounded and strains credibility. During deliberations, the Subcommittee members themselves refuted this argument by noting the evidence in the Referenced Municipalities’ post-hearing brief that established the inconsistency with prevailing land uses as well as the respective master plans and zoning ordinances. Tr. 1/31/18, at 49-63 (Day 2AM Deliberations).

³ In discussing the Project’s consistency with prevailing land uses, Subcommittee member Ms. Dandeneau stated: “...we should listening to feedback that we’ve gotten from the communities and really internalizing that as we try to form our own opinions about that.” Tr. 1/31/18 at 51-52 (Day 2 AM Deliberations). In addition, Subcommittee member Ms. Bailey stated later that same morning: “So, I think the Joint Muni’s brief show us that there are master plans that specifically apply to orderly development and can be interpreted to say something about this subject even though the word “transmission line” is not used in the document.” Tr. 1/31/18 at 63 (Day 2AM Deliberations).

24. The evidence presented by the municipalities and other governing bodies was voluminous, and their concerns were specifically identified in pre-hearing testimony, testimony during adjudicatory hearings, exhibits and the post-hearing memoranda. This evidence was referenced at length during the Subcommittee deliberations. Moreover, the Site Evaluation Committee is required by law to take into consideration the views of municipalities and governing bodies, which logically will include whether they support or oppose the project. *See* RSA 162-H:16, IV(b); Site 301.15(c); *see also In re Londonderry Neighborhood Coalition*, 145 N.H. 201, 206 (2000) (explaining that the Site Evaluation Committee must give due consideration to views of municipal and regional planning commissions and municipal governing body, which can include relying upon and giving weight to the views of those governing bodies who oppose and/or support a project). There is no legal support for the suggestion that the views of the municipalities and other governing bodies should not be considered “evidence,” and it was entirely appropriate for the Subcommittee to give weight and rely upon those views.

25. **Tourism:** Based on the record before them, the Subcommittee members found that the Applicants failed to establish that tourism would not be unduly negatively impacted by the Project. Tr. 1/31/18 at 83-95 (Day 2 PM Deliberations). Many of the Subcommittee members found the Applicants’ expert in this field, Mr. Nichols, severely lacking in credibility. As explained by one of the Subcommittee members, “. . . of all the witnesses, Mr. Nichols was the least credible in my mind. And not credible almost at all.” Tr. 1/31/18 at 87 (Day 2PM Deliberations). The Subcommittee members discussed flaws with Mr. Nichols’ listening sessions, online survey, and the lack of any analysis of the potential for impacts from construction. In light of their view of his credibility and the identified shortcoming in his

opinion, it should come as no surprise that the Subcommittee members determined that the Applicants had failed to meet their burden on this required element of orderly development.

26. **Property Values:** Similar to tourism, the Subcommittee members also found that Applicants' expert, Mr. Chalmers, was not credible. The Subcommittee members identified numerous problems with Mr. Chalmers' conclusions and his underlying methodology. Tr. 1/31/18 at 111-23 (Day 2AM Deliberations). The Subcommittee members could not accept that the impact to surrounding property values would be as minimal as suggested by the Applicants. *See id.* Based on the lack of reliable evidence submitted by the Applicants, the Subcommittee determined that it was unable to find that there would not be an undue impact to property values.

27. **Overall Finding on Orderly Development:** In reaching its ultimate conclusion on the orderly development criteria, the Subcommittee applied the correct legal standard. On the second day of deliberations, the Subcommittee members evaluated the evidence submitted on the various elements of the orderly development criteria. *See generally* Tr. 1/31/18 (Day 2 AM and PM Deliberations). The following day, in order to more concisely frame those discussions, Chairman Honiberg provided an overview of the legal framework and standards to apply when evaluating the various elements of orderly development. Tr. 2/1/18 at 3-6 (Day 3AM Deliberations) (discussing RSA 162-H:16, IV(b) and N.H. Admin. Rules, Site 301.15 and 301.09). Each of the Subcommittee members then concluded that, after considering the various components of orderly development, the Applicants failed to meet their burden. *See generally* Tr. 2/1/18, at 6-32⁴ (Day 3AM Deliberations). The decision later that afternoon to deny the application on the basis that the orderly development standard had not been satisfied was informed by the analysis and discussions earlier in the morning, during which the Subcommittee

⁴ See particularly pages 10, 14, 18, 20-21, 25, 29, and 31-32.

members evaluated the orderly development criteria within the legal framework described by the Chair. *See* Tr. 2/1/18, at 24-25 (Day 3PM).

28. The concerns identified by the Subcommittee cannot be fixed by the imposition of conditions, and therefore, there was no need to deliberate and/or to consider potential conditions. The potential conditions proposed by the Applicants are insufficient to address impacts to orderly development of the region, particularly with respect to the new overhead corridor in northern New Hampshire and the increased size and scope of the proposed structures along the existing corridor. For example, the Applicants' suggestion that impacts to land use could be resolved through a proposal to give \$100,000 to host municipalities to develop and implement master plans has no logical relationship to the concerns raised by the host municipalities and other intervenors. Motion for Rehearing, Attachment B at ¶4. The installation of an underground segment in Plymouth along Main Street using horizontal directional drilling fails to resolve the opposition by the Town of Plymouth and business owners to any use of the downtown main street to construct the Project. *Id.* at Attachment B at ¶6. The suggestion to use horizontal directional drilling in Franconia is inadequate for the same reason. *Id.* at Attachment B at ¶6.

29. Similarly, the Applicants' proposed conditions that seek to "throw" some extra money into the Project and/or earmark existing proposed money from the Forward New Hampshire Fund is entirely inadequate to resolve the concerns raised by the Subcommittee members regarding the undue interference with orderly development as a result of impacts to land use, tourism, property values and the views of municipalities and other governing bodies. The issues raised by the Subcommittee members are not the type that can easily be fixed with mitigating conditions because it would essentially require the entire project to be rerouted and/or

reengineered. This type of “mitigating condition” would require an entirely new application and is not a viable condition for that reason alone.

30. In the end, the Subcommittee’s evaluation is not an “iterative” process. As the Applicants acknowledged in their post-hearing brief, they had the initial burden to establish that the application satisfied the statutory criteria to warrant issuance of a certificate pursuant to RSA 162-H.⁵ As the Subcommittee correctly and legally found, the Applicants failed. If the Subcommittee believed that the shortcomings inherent in the application could be sufficiently mitigated with conditions to warrant issuance of the certificate, it would have done so. The Subcommittee did not, however, and the Applicants’ opportunity to make its case and create a record has passed. The record is what it is and the Applicants will be judged based on that record alone.

WHEREFORE, the Referenced Municipal Groups request that the Site Evaluation Committee:

- a. Deny the Motion for Hearing;
- b. Disregard and/or Strike from the Record Attachments A, B and C to the Motion for Rehearing; and
- c. Grant such further relief as it deems appropriate.

⁵ This is discussed at page 10 of their post-hearing brief, during which they state: “In the first instance, the Applicants must prove facts sufficient for the Subcommittee to find that they have the financial, technical and managerial capability to construct and operate the facility, that the facility will not unduly interfere with orderly development of the region or have unreasonable adverse effects, and that the issuance of a certificate for the facility will serve the public interest. The Applicants prove those facts in either of two ways: first, by substantial credible evidence in instances where there is no evidence to the contrary, and second, in instances where there is evidence to the contrary, by a preponderance of the evidence, that is, by showing, for instance, that it is more likely than not, or that the balance of the probabilities is, that the Project will not unduly interfere with the orderly development of the region.”

Respectfully submitted,

By and through its attorneys,

CITY OF CONCORD

Dated: March 8, 2018

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WATER & SEWER DEPARTMENT

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CERTIFICATE OF SERVICE

I hereby certify that on this date, a copy of the foregoing was sent by electronic mail to persons named on the Service List of this docket.

Dated: March 8, 2018

By: /s/ Danielle Pacik
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Only the Westlaw citation is currently available.
Supreme Court of New Hampshire.

S.S. BAKER'S REALTY COMPANY, LLC

v.

TOWN OF WINCHESTER

Case No. 2013-0337

March 19, 2014

Opinion

*1 The petitioner, S.S. Baker's Realty Company, LLC, appeals an order of the superior court affirming a decision of the planning board (board) for the respondent, the Town of Winchester (town), denying approval of the petitioner's site plan application. The petitioner contends that the trial court erred by: (1) finding sufficient evidence to support the planning board's denial based upon concerns about traffic; (2) failing to find the board's other two grounds for denial unsupported by the evidence; (3) finding that the petitioner waived its claim that board members were biased; and (4) upholding the board's decision not to reconsider its vote. We affirm.

The trial court's review of a planning board decision is limited. *Ltd. Editions Properties v. Town of Hebron*, 162 N.H. 488, 491 (2011). It must treat the board's factual findings as *prima facie* lawful and reasonable and cannot set aside its decision absent unreasonableness or an identified error of law. *Id.* The appealing party bears the burden of persuading the trial court that, by the balance of probabilities, the board's decision was unreasonable. *Id.* Our review is similarly limited. *Id.* We will uphold the trial court's order unless it is unsupported by the record or legally erroneous, looking to whether a reasonable person could have reached the same decision as did the trial court based upon the same evidence. *Prop. Portfolio Group v. Town of Derry*, 163 N.H. 754, 757-58 (2012).

We begin by addressing the petitioner's contention that the trial court erred when it found sufficient evidence to support the board's decision. The petitioner argues, first, that the "issuance by NHDOT of the Driveway Permits 'creates a presumption that the proposal protects the public interest,' " which obligated the board "to find 'specific facts' and 'concrete evidence' to rebut the presumption established by the NHDOT Driveway Permits." However, such a presumption does not arise

automatically whenever a State permit is issued; it is created, if at all, by the specific language of the town ordinance. *Ltd. Editions*, 162 N.H. at 494. Compare *Derry Senior Dev. v. Town of Derry*, 157 N.H. 441, 450 (2008) (finding presumption where ordinance stated "sewage disposal system may be designed and constructed as long as ... the applicant has secured appropriate permits" from the DES), with *Ltd. Editions*, 162 N.H. at 495 (finding no presumption where municipal ordinance did not identify State permit as standard for town approval).

Therefore, to determine whether a State permit creates a presumption, we must examine the relevant town ordinance. The interpretation of a zoning ordinance is a question of law, which we review *de novo*. *Town of Barrington v. Townsend*, 164 N.H. 241, 246 (2012). Because the traditional rules of statutory construction govern our review, we construe the words and phrases of an ordinance according to their common and approved usage. *Id.*

In this case, the municipal ordinance states that "access to Class I, II or III streets require[s] conformity with the driveway permit standards of the NH Department of Transportation" and "State regulations apply to driveway access onto State roads." This is not the equivalent of stating that the town will deem the traffic impact of a project to be adequately addressed "as long as" the applicant obtains a driveway permit from the State. *Cf. Derry Senior Dev.*, 157 N.H. at 450. The ordinance merely acknowledges the State's rights to control access to its roads. Although the State has the power to regulate access to State highways, towns may legitimately consider the impact that increased traffic may have upon the safety of an existing or proposed access in determining whether to approve an application. *Diversified Prop's v. Hopkinton Planning Bd.*, 125 N.H. 419, 420 (1984).

*2 The petitioner argues that the ordinance "standards defer to State regulations." However, the ordinance does not cede to the State the board's authority to consider the traffic impact of a proposed project. Thus, the issuance of the State driveway permits did not create a presumption that the project was safe or relieve the planning board of its responsibility to consider the traffic generated by the project and its impact upon public safety. *See id.*

The petitioner next contends that the trial court erred in finding that the board's decision is supported by the evidence, arguing that

the Board's deliberations show no connection between

isolated, conclusory opinions of Board members, and a reasoned discussion or analysis of the Board that led to a consensus that formed the factual underpinnings for the Denial What the Board “could have” found ... is irrelevant [R]ather, the Trial Court must find evidence in the record that the Board “actually *did* question the credibility or methodology” of the Traffic Impact Study or the NHDOT Driveway Permits based on some specific evidence.

The petitioner, however, overstates the requirements placed on the planning board. RSA 676:4, I(h) (2008) requires that: “In case of disapproval of any application submitted to the planning board, the ground for such disapproval shall be adequately stated upon the records of the planning board.” This statutory requirement anticipates an express written record that sufficiently apprises an applicant of the reasons for disapproval and provides an adequate record of the board’s reasoning for review on appeal. *Ltd. Editions*, 162 N.H. at 491. A written denial letter combined with the minutes of a planning board meeting can satisfy the statutory requirement. *Id.* Ultimately, whether planning board records adequately informed the applicant as to the grounds for disapproval depends upon the particular facts of each case. *Id.*

In this case, the planning board’s written record, coupled with its denial letter, apprised the petitioner of the board’s reasons for denial and enabled review on appeal. The letter states that the reasons for denial include “three safety issues: 1) the left hand turn onto Rt.10 south crosses the northbound lane, 2) parking on the shoulder of Rt.10 northbound, and 3) the overflow of traffic from the drive thru window onto Rt.78.” Each of these issues had been discussed in the public meetings on the application and is reflected in the board’s minutes. Although the petitioner contends that “board members expressed only vague concerns,” the record contains evidence specific to the issues before the board. *Cf. Derry Senior Dev.*, 157 N.H. at 452–53 (finding board’s concerns too vague where evidence not directly related to application). Issues concerning the left hand turn were also specifically addressed in the peer review of the petitioner’s traffic study, which noted that the study’s assessment justified a turning lane and that the proximity of the project’s driveways to the intersection could create turning conflicts with properties on the other side of the street. Thus, the board’s written decision apprised the petitioner of the reasons for its denial, and those reasons are supported by the record, which is sufficient to allow review.

The petitioner argues that because the board did not explicitly refer to the peer review in its deliberations,

“[t]hese unsupported reasons for Denial are exactly the type of ‘*ad hoc* decisions’ and ‘vague concerns’ that make the Board’s denial unreasonable.” It relies upon *Derry Senior Development*, 157 N.H. at 451, and *Condos East Corp. v. Town of Conway*, 132 N.H. 431, 438 (1989). Those cases, however, are inapposite. In *Derry Senior Development*, the town ordinance created a presumption that sewage disposal systems approved by the State were safe. *Derry Senior Dev.*, 157 N.H. at 450. No such presumption exists here. In *Condos East*, the board ignored the unanimous opinion of the applicant’s and the board’s experts, and the record was devoid of evidence supporting the board’s decision. *Condos East*, 132 N.H. at 436, 438. In contrast, the record in this case is not devoid of evidence: it contains conflicting expert testimony, as well as abutters’ testimony regarding traffic impacts.

*3 In addition, neither *Derry Senior Development* nor *Condos East* supports the petitioner’s contention that a board must explicitly refer to evidence in the record for that evidence to support its conclusion. *Cf. Prop. Portfolio Group*, 163 N.H. at 758–59 (upholding planning board waiver of site plan regulations where board failed to state basis for waiver, but basis apparent in record).

Next, the petitioner argues that the record does not support the board’s concerns about traffic safety. We disagree. Abutters testified about traffic problems. The police department submitted a report on accidents at the intersection. The board received conflicting expert testimony about the traffic impact of the proposed project. Thus, the board’s concerns were based on more than personal opinion. *Cf. Condos East*, 132 N.H. at 438 (noting board cannot rely exclusively on personal opinion). Nonetheless, the board members considered their own judgment and experience, as they are entitled to do. *See Ltd. Editions*, 162 N.H. at 497. As a result, the trial court could have reasonably concluded that the board’s denial of the application because of traffic safety concerns was not unreasonable or unlawful. Because this ground alone is sufficient to support the board’s decision, we need not address the remaining grounds for the denial.

We next address the petitioner’s contention that the trial court erred by finding that the petitioner had waived its claim that board members were biased. A party claiming bias on the part of a planning board member must raise that issue before the board at the earliest possible time because “trial” forums should have a full opportunity to come to sound conclusions and to correct errors in the first instance. *Bayson Properties v. City of Lebanon*, 150 N.H. 167, 171 (2003). The burden was on the petitioner to raise an objection to the participation of a board member as soon as it became aware of the grounds for the

objection. *Id.*

In its appeal of the planning board's decision, the petitioner averred that "[d]uring the public hearings on the Application, it became clear that certain members of the Planning Board were acting improperly, had conflicts of interest, or were otherwise biased against the Application." On July 16, during the board's deliberations on the application and prior to its votes, one board member "remind[ed] the board of certain happenings of this board during the public hearing process," intimating bias on the part of another member. In addition, at that meeting, also prior to the board's vote, a letter from an alternate board member was read into the minutes, which described the appearance of "a potential friendship" between a board member and the intervenor. The petitioner does not assert that it was unaware of these events when they occurred.

Thus, no later than the July 16 hearing, and before the vote on the application, the petitioner had knowledge of the facts upon which it based its claim of bias. However, it did not raise this issue with the board, either before the vote or in its motion to reconsider. "In governmental proceedings, interested parties are entitled to object to any error they perceive but they are not entitled to take later advantage of error they could have discovered or chose to ignore at the very moment when it could have been corrected." *Bayson*, 150 N.H. at 172 (quotation omitted).

*4 The petitioner argues that requiring it to raise this issue before the board "unfairly shifts the burden relative to bias from a Board member who fails to disclose such bias, to an applicant who has only evidence that a Board member acted improperly." However, it was the petitioner's duty to give the board an opportunity to come to a sound conclusion and to correct any error. *See id.* at 171. Therefore, the trial court reasonably concluded that the petitioner waived this claim.

Finally, we address the petitioner's contention that the trial court erred by upholding the board's decision not to reconsider its vote. It argues that "[t]he vote by the Planning Board to deny the reconsideration was unreasonable, arbitrary, and unfair to the Applicant. The Board should have considered the motion for reconsideration at its next meeting when Mike Dougherty was available." Mr. Dougherty was an alternate member who voted in favor of the motion to deny the application and subsequently indicated that "he misunderstood what he was voting on." The board was not statutorily required to entertain a motion to reconsider, *see RSA 677:15 (2008 & Supp.2013)*, but it chose to do so. Because Mr. Dougherty was not present at the meeting at which the

reconsideration motion was made, another alternate, Art Charland, acted as a voting member. Mr. Charland, although not present at the vote on the application, had been present for all the other hearings related to the site plan application.

The petitioner does not rely upon, nor are we aware of, any authority establishing that it is improper for a board to empanel an alternate when another member is not present or that the composition of a board voting on a motion to reconsider must be identical to that which cast the vote to be reconsidered. *See Prop. Portfolio Group*, 163 N.H. at 757 (stating petitioner has burden to demonstrate, by the balance of probabilities, that board's decision is unreasonable). The minutes reflect that, in deciding to deny the motion to reconsider, the board reiterated its concerns about the safety of the project. Mr. Charland, having attended all the meetings on the application except the meeting at which the final vote was taken, would have been familiar with the evidence related to those concerns when he voted to deny the motion. Therefore, we cannot conclude that the trial court's decision to uphold the board's denial of the motion was unreasonable or unlawful.

To the extent the petitioner also challenges the board's disapproval of the application, we reject its argument. The petitioner contends that it "was entitled to the benefit of fairness in knowing whether board members were confused in making their votes to deny the Application." However, the petitioner has not demonstrated that resolving any confusion would alter the board's disapproval of its application. As to the initial motion to approve the application, the board voted four against three in favor. Larry Hill voted with the majority, and Michael Dougherty voted with the minority. The board then voted on a motion to deny the application. On this motion, Mr. Dougherty voted, with the majority, to deny the application, while Mr. Hill abstained because "he wasn't comfortable and did not understand the motion enough." Later that evening, after the board had considered and voted on other matters, Mr. Dougherty informed the board that "he was mistaken on his previous vote on the SS Bakers proposal" and "he misunderstood what he was voting on."

*5 If Mr. Dougherty were mistaken in his initial vote, with the minority, in favor of the motion to approve the application, the board's decision to reject that motion would have passed by a larger majority. If Mr. Dougherty were mistaken in his second vote—in favor of the motion to deny the application—the result would have been a tie, with three votes on each side and one abstention.

To the extent that the petitioner contends that, had Mr. Hill not abstained from voting on the motion to deny the application, the board would have rejected the motion to deny, we cannot say that the trial court erred in concluding that the petitioner did not meet its burden. Mr. Hill voted against the motion to approve the application. He abstained from the vote on the motion to deny the application because "he did not understand the motion enough." Given this sequence of votes, the trial court reasonably could have concluded that his abstention had to do with the wording of the motion, and not with its purpose. Therefore, the trial court reasonably concluded that the petitioner had not met its burden to establish, by the balance of probabilities, that the board's decision was unreasonable. See *Ltd. Editions*, 162 N.H. at 491

(establishing petitioner's burden of proof).

Affirmed.

CONBOY, LYNN and BASSETT, JJ., concurred.

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