

STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-24-384

NEWFIELD SAND,

Plaintiff – Appellant,

v.

TOWN OF NEWFIELD,

Defendant – Appellee.

ON APPEAL FROM THE BUSINESS AND CONSUMER COURT
Docket No. BCD-APP-2024-0004

BRIEF OF APPELLEE

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INTRODUCTION

After violating the extraction limits of its existing conditional use permit for years, Newfield Sand’s appeal seeks relief from two reasonable conditions of approval that, if vacated, would effectively unburden it from accountability for the disruptive impacts its operations pose to residents of the Town of Newfield (“Town”).

This appeal challenges the Planning Board’s authority to impose conditions on Newfield Sand’s after-the-fact conditional use approval to significantly expand its existing mineral extraction business. As the name of the term clearly indicates, “conditional uses,” as defined by the Town’s Land Use and Zoning Ordinance (“LUZO”), are uses that would not otherwise be permitted without the imposition of carefully crafted conditions to minimize their impacts on the surrounding area. Mineral extraction is a classic example of a conditional use that must be purposefully regulated given its attendant negative impacts (such as noise, traffic, and environmental effects).

In keeping with its authority to protect the community from the many hazards posed by large commercial trucks hauling materials over local roads from morning to night, the Planning Board imposed approval conditions that reserved the right to reevaluate, after notice and hearing: (1) Newfield Sand’s hours of operation, and (2) the number of trucks that may haul materials from Newfield

Sand's project site in a given day. These conditions are precisely the kind of restrictions contemplated by the LUZO to adequately control Newfield Sand's mineral extraction use, and to ensure that a company that has exhibited disdain for the state and local laws that govern it will be responsible for its operation's impacts in the future. Moreover, the Planning Board's authority to reevaluate and amend Newfield Sand's daily trucking limits is nothing new. It has been a feature of Newfield Sand's local permit to operate a mineral extraction business for thirty years and may not now be challenged.

Newfield Sand hopes to convince the Court that denying its appeal would reshape municipal law in Maine and wreak havoc on businesses throughout the state. In reality, the question before the Court is a narrow one confined to an interpretation of this Town's *particular* LUZO: Did the LUZO authorize the Planning Board to impose the challenged conditions? The answer to that question is unequivocally yes, and the substantial record evidence—as well as Newfield Sand's extended history of noncompliance—gave the Board good reason to impose the conditions it did.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Newfield Sand owns an approximately +/- 297-acre parcel of land on Carroll's Pit Road within the Town (the "Property"). (Appendix ("A.") 034); Record on Appeal filed on May 29, 2024 ("R.") 1, 43-46.) In 1994, the Town's

Planning Board issued a permit to Douglas Woodward authorizing him to operate a “[f]ive acre gravel extraction operation” on a portion of the Property (the “Original Approval”). (A. 035; R. 495.) The Original Approval included seven conditions of approval. (A. 035; R. 495.) One of the Original Approval’s conditions limited Mr. Woodward’s extraction operations as follows: “Daily Truck trips limited to 70. *The Board reserves the right to revise if hazardous situations occur*” (hereinafter the “Original Truck Trip Condition”). (A. 035; R. 495) (emphasis added). The Original Approval’s conditions also established Mr. Woodward’s hours of operation. (A. 035; R. 495.) The Original Truck Trip Condition was not timely challenged by Mr. Woodward, or anyone else, at the time it issued in 1994, or any time thereafter. In fact, during the Planning Board’s proceedings, Newfield Sand readily conceded that the Original Approval’s conditions, *including* the Original Truck Trip Condition, continued to govern its operations. (R. 25-27).

In 1997, R. Pepin and Sons, Inc. acquired the Property from Mr. Woodward, and Newfield Sand subsequently acquired the Property from R. Pepin and Sons in 1998. (A. 035; R. 43-46.) Newfield Sand took the Property subject to the Original Approval’s conditions, including the Original Truck Trip Condition. (R. 25.)

At some point prior to 2015, Newfield Sand, or one of its predecessors-in-interest, exceeded both the Original Approval’s five-acre extraction limitation, and extraction limits established by state permits issued by the Maine Department of

Environmental Protection (“MDEP”) to Newfield Sand.¹ (R. 307, 354.)

Consequently, in 2015, Newfield Sand sought and obtained “after-the-fact approval” from the MDEP to authorize its unpermitted expansion of extraction operations at the Property. (A. 035; R. 307-10.) Newfield Sand did not, however, at that time seek concurrent approval from the Town to expand its operations beyond the 5-acre limit established by the Original Approval.² (A. 034; R. 307-10.)

It was not until 2022 that Newfield Sand filed an after-the-fact application to authorize both its unpermitted expansion of extraction operations at the Property, and to further allow it to extract materials from 85.21 acres of the Property in total (the “Application”). (A. 035, 38; R. 22-306.) Among many other things, Newfield Sand sought Planning Board approval to permit: (1) 70 truck trips per day to transport extracted materials from the project site, consistent with the Original Approval, and (2) expanded hours of operation at the Property: Monday through Friday 6:00 am – 5:00 pm, and Saturday mornings from 7:00 am to 12:00 PM. (R. 27.)

¹ Additionally, Newfield Sand’s existing operations have destroyed portions of a rare Pitch Pine Scrub Oak (“PPSO”) barren that exists on the Property. (A. 44; R. 62-63, 452.)

² Newfield Sand argued that meeting minutes from a December 1, 1998 Planning Board meeting suggest the Planning Board authorized Newfield Sand to expand its operations “from 5 acres to 30 acres of gravel pit area.” (R. 26.) The Planning Board has no record of any such approval, which Newfield Sand conceded in its conditional use application. (R. 26.) Consequently, the Planning Board concluded that its decision is an “after-the-fact” approval. (A. 034.)

Newfield Sand’s existing and proposed use constitutes “Mineral Extraction,” which the LUZO designates a “conditional use” within the Farm and Forest District where the Property is located. (A. 038-39, 063-064.) The LUZO defines a conditional use as “a use which would not be appropriate without restriction but is acceptable if controlled as to number, area, location, relation to the neighborhood and similar criteria.” (A. 110.)

Over the course of many meetings, the Planning Board conducted a thorough and exhaustive review of the Application, and the complex and technical issues presented by it. (A. 38; R. 350-481.) On December 7, 2022, the Planning Board held a public hearing on the Application. (A. 115-28.) At the public hearing, several members of the public expressed their concerns regarding Newfield Sand’s existing truck traffic, and its impacts on surrounding properties and the Town at large. (A. 118-23.) Paul Marchant, who identified that he lives on Route 11 in Town, noted that trucks from a gravel company in Sanford had trafficked gravel and/or other materials down Route 11 at high rates of speed.³ (A. 118.) Mr. Marchant expressed concern that Route 11 is a residential road and school bus route, and that trucks hauling gravel on this road will not be able to stop quickly if obstructed. (A. 118.) Susan Cannafarina, who lives on one of the roads Newfield

³ Newfield Sand’s trucks will travel Bridge Street and Route 11 to haul materials from the Property. (R. 352.)

Sand will use to haul materials from the Property, presented the following comment:

I live on Bridge St, right before you go over the bridge and I've been living there since 2017. There would normally be dump trucks going by early morning until a little bit after lunchtime and then it would really calm down. Now the trucks are twice the size, and they have a significant impact going by the house you know it's an old 1800s foundation and the bridge has needed several repairs, which is a DOT thing, but the traffic is taking its toll on that bridge and there's no sidewalks. I live next door to a house where there are quite a few boys, and they like to go up the street and they have their bikes but there's no sidewalks and the trucks are going by constantly and they're bigger than what was historically. I'm concerned about the speed that those trucks are going by and the size of them increasing, and I think that for me anyway the frequency is increasing at least with the larger trucks. The school buses drop off the kids about 3:00 o'clock and there shouldn't be a lot of traffic after that but there is. I think you know tonight it was right up until maybe 4:00 o'clock. I am very concerned about the conditional day on Saturday even if it is 7 to 12. People are out walking their dogs, they're jogging, the kids are out riding their bikes and we don't really need an extra day of trucks going by I'm very concerned about the number of trucks, the size of the trucks, and the times of day, and I would not be in favor of the Saturday expansion in any form. No offense.

(A. 118.) The Planning Board also heard public comment regarding a number of other issues relating to Newfield Sand's application. (A. 118-23.) After its public hearing, the Planning Board received several additional public comments concerning Newfield Sand's application, its existing operations, and the adverse impacts its operations currently pose to Newfield's roads and residents. (A. 135-39.) For instance, Ms. Cannafarina submitted supplementary written comment to the Planning Board, testifying that: (1) there has been a significant traffic increase

from the Property and an adjacent gravel pit, (2) residents “take [their] li[ves] in [their] hands jogging or riding a bike up Bridge Street,” (3) increased traffic from Newfield Sand’s business has put “residents . . . at an increased risk.” (A. 138; *see generally* A. 135-39.)

On August 9, 2023, the Planning Board began its deliberations on the Application. (R. 439.) While assessing the Application’s compliance with the LUZO’s approval standards, which require the Planning Board to consider “the intensity of the proposed use, including amount and type of traffic to be generated, and hours of operation,” the Planning Board discussed Newfield Sand’s hours of operation, the traffic impacts of its operations, and the Original Approval’s existing conditions. (R. 441-44.) At that meeting, the Board voted to impose the following condition: “the applicant shall only operate the open pit Monday to Friday, 6:30 am to 5:30 pm excluding Holidays, no Saturdays. The Board reserves the right to reevaluate hours of operation and traffic conditions if a nuisance or safety issue arises.” (R. 442.) Subsequently, after further consideration of the impacts of Newfield Sand’s trucking traffic, the Board voted to impose the following condition: “the daily truck trips will be limited to not more than seven per hour up to 70 trips per day and the Board reserves the right to revise if hazardous situations occur.” (R. 444.) This vote essentially preserved the Original Truck Trip Condition, with an amendment requiring Newfield Sand’s truck trips to and from

the Property to be limited to seven per hour to ensure that traffic from the Property is not concentrated during particular times of the day. (R. 441, 443-44.) Newfield Sand subsequently objected to the imposition of both conditions. (R. 487-94.)

After considering Newfield Sand's objections to these conditions, the Planning Board reconsidered its votes and adopted revised conditions relating to the future reevaluation of Newfield Sand's hours of operation and permitted daily truck trips, to address Newfield Sand's concerns.⁴ (R. 468, 473-74.) The Planning Board ultimately voted to rescind its two previous votes from the August 9, 2023 meeting. (R. 473-74.) In their place, the Planning Board adopted two conditions of approval that more narrowly defined how and under what limited circumstances the Planning Board could reevaluate Newfield Sand's hours of operation (hereinafter the "Hours of Operation Condition") and its daily truck trips (hereinafter the "Revised Truck Trip Condition"), *i.e.*, if the Town Code Enforcement Officer ("CEO") presents evidence at a duly noticed public hearing that Newfield Sand's hours of operation and/or trucking traffic "have resulted in a significant adverse impact upon the value or quiet possession of surrounding properties greater than would normally occur from such a use in the zoning district in which the Property is located." (A. 50.)

⁴ Notably, Newfield Sand presented its own proposed conditions to the Planning Board, which the Board ultimately declined to adopt, that would have permitted the Planning Board to reconsider Newfield Sand's hours of operation and daily truck trips only if a Court found these features of Newfield Sand's operations to be in violation of the Ordinance. (R. 469, 473.)

The Planning Board concluded that the Hours of Operation and Revised Truck Trip Conditions are “necessary to ensure that the intensity of [Newfield Sand’s] proposed use . . . will not have an adverse impact on the value and quiet possession of surrounding properties.” (A. 040; R. 7.) The Planning Board carefully crafted these conditions to: (1) expressly “tie” the condition’s standards to the LUZO’s conditional use approval requirements, and (2) provide Newfield Sand due process, in the form of notice and a hearing, before the Planning Board could reevaluate Newfield Sand’s hours of operation and trucking traffic. (A. 050, 071; R. 473.)

After considering the LUZO, the Application, public comment, and the record evidence before it, the Planning Board voted to approve the Application subject to the Hours of Operation and Revised Truck Trip Conditions (the “After-the-Fact Approval”). (A. 034-052; R. 1-19.)⁵ Newfield Sand appealed the Planning Board’s imposition of the Hours of Operation and Revised Truck Trip Conditions to the York County Superior Court, and the parties subsequently agreed to transfer the case to the Business and Consumer Docket. (A. 003-4, 023-33.) On August 9, 2024, the Business and Consumer Court affirmed the Planning Board’s After-the-Fact Approval. (A. 005-17.) This appeal followed.

⁵ The Planning Board’s signed After-the-Fact Approval does not appear in the Appendix, but can be found in the administrative record filed with the Business and Consumer Court. (A. 34-52; R. 1-19.)

SUMMARY OF THE ARGUMENT

Newfield Sand's appeal of the Revised Truck Trip Condition amounts to an untimely appeal of the underlying Original Truck Trip Condition, which for thirty years has been an express and unequivocal feature of the permit to operate a gravel extraction business on the Property. The Court must dismiss this portion of the appeal because it comes three decades too late.

Even if Newfield Sand's entire appeal were timely, the Planning Board possessed the legal authority to impose the Hours of Operation and Revised Truck Trip Conditions, and its decision to do so is supported by substantial record evidence. The source of the Planning Board's authority to impose the challenged conditions is necessarily inferred from the powers specifically granted to the Planning Board by the LUZO, which inference is specifically permitted under governing Maine precedent. The LUZO gives the Planning Board exclusive jurisdiction to review and approve conditional use permits, and it vests the Board with sweeping authority to attach conditions to conditional use permits to ensure they meet governing ordinance criteria. The LUZO required the Planning Board to find that Newfield Sand's operations will not have a significant adverse impact on the value and quiet possession of surrounding properties, and the Board concluded that it was necessary to impose the challenged conditions to ensure that Newfield Sand's business will meet this standard.

The record evidence before the Planning Board supports its conclusion that the Hours of Operation and Revised Truck Trip Conditions were necessary for the Board to find the LUZO's standards were met. Newfield Sand had nearly two years to present studies, reports, and testimony explaining the current and prospective impacts of its operations on the value and enjoyment of neighboring properties. It largely failed to do so. On the other hand, the Planning Board received robust public comment explaining the many hazards Newfield Sand's operations currently pose to the Town's residents. In light of the evidence it received, or lack thereof in Newfield Sand's case, the Planning Board's determination to preserve its ability to reevaluate two discrete aspects of Newfield Sand's operations in the future, after notice and hearing, should Newfield Sand's operations disrupt the value and quiet enjoyment of local properties *greater than would normally occur from a mineral extraction use*, made abundant sense under the circumstances.

The record compels this Court to affirm the After-the-Fact Approval in its entirety. However, if the Court should grant this appeal, and vacate the Hours of Operation and Revised Truck Trip Conditions, then a remand to the Planning Board for further proceedings is the only appropriate remedy. The challenged conditions are integral to the Planning Board's conclusion that Newfield Sand's project "will not have an adverse impact on the value and quiet possession of

surrounding properties greater than would normally occur from such a use in the zoning district.” If the Hours of Operation and Revised Truck Trip Conditions are removed from the After-the-Fact Approval, then the matter must be remanded back to the Planning Board so that it may decide whether it can still approve Newfield Sand’s conditional use application absent these conditions.

ARGUMENT

I. Standard of Review

The Town is in essential agreement with Newfield Sand’s recitation of the standard of review that applies to this case, but disagrees with Newfield Sand’s application of that standard to the Planning Board’s factual findings. The Town’s disagreement is explained in greater detail in Section III.2 below

II. Newfield Sand’s Appeal of the Revised Truck Trip Condition is Untimely.

Newfield Sand’s appeal from the Planning Board’s imposition of the Revised Truck Trip Condition is an untimely substitute for an appeal from the Original Truck Trip Condition. *See generally Desfosses v. City of Saco*, 2015 ME 151, ¶ 23 n. 14, 128 A.3d 648; *Salisbury v. Town of Bar Harbor*, 2002 ME 13, ¶ 14, 788 A.2d 598 (holding that “[a]n appeal of a certificate of occupancy may not, however, substitute for an appeal of the underlying permit”); *see also Juliano v. Town of Poland*, 1999 ME 42, ¶ 7, 725 A.2d 545 (holding that a stop work order issued on the basis that a two-year old permit was invalidly issued is properly

“[c]onsidered as an appeal from a prior decision of a Code Enforcement Officer,” and “was not timely due to the thirty day appeal period specified in the ordinance”). Newfield Sand’s appeal from the Revised Truck Trip Condition is thirty years too late, and this Court’s precedent compels the dismissal of this component of Newfield Sand’s appeal.⁶

In a similar context, this Court has opined that an appeal from a certificate of occupancy may not be used to collaterally attack the substance of the underlying permit. *See Desfosses*, 2015 ME 151, ¶ 23 n. 14, 128 A.3d 648; *Salisbury*, 2002 ME 13,. In *Salisbury v. Town of Bar Harbor*, the Law Court opined that the issuance of certificate of occupancy, which followed the issuance of a building permit that was not timely appealed, was an appealable event. 2002 ME 13, ¶ 13, 788 A.2d 598. However, the Law Court substantially limited the bounds of such an appeal, opining that “[a]n appeal of a certificate of occupancy may not, however, substitute for an appeal of the underlying permit.” *Id.* at ¶ 14; *Tominsky v. Ogunquit*, 2023 ME 30, ¶¶ 32-33, 294 A.3d 142. *Salisbury*, and the cases that followed it, prohibit an appellant from collateral attacking the substance of a final administrative decision in subsequent proceedings relating or adjacent to that decision. *See also Quirion v. Pub. Utilities Comm'n*, 684 A.2d 1294, 1295–96 (Me.

⁶ The Town concedes that Newfield Sand is not time barred from challenging the Hours of Operation Condition.

1996)(rejecting water utility’s challenge to Public Utilities Commission’s assertion of jurisdiction to regulate it, when utility did not challenge Commission’s claim of jurisdiction until five (5) years after it was exercised in subsequent rate investigation).

Salisbury and its progeny prohibit Newfield Sand from collaterally attacking the underlying Original Truck Trip Condition through an appeal of the Revised Truck Trip Condition decades later. The Planning Board imposed the Original Truck Trip Condition in 1994, which permitted it to reevaluate Newfield Sand’s daily truck traffic in the future if “hazardous situations occur.” (R. 495.) Mr. Woodward never challenged the Original Truck Trip Condition, and Newfield Sand acquired the Property subject to its limitations. The Planning Board’s imposition of the Revised Truck Trip Condition applied the Original Approval’s existing truck traffic limits to Newfield Sand’s expanded extraction operations. The only substantive differences between the Revised Truck Trip Condition and the Original Approval’s existing truck traffic limits are to: (1) limit Newfield Sand to seven truck trips per hour, and (2) establish concrete procedures to govern any future reevaluation by the Planning Board, which did not exist in the Original Approval. (A. 50; R. 442-44, 459, 461, 468, 473-474.) Put another way, the Planning Board applied the Original Truck Trip Condition’s essence to Newfield Sand’s expanded

extraction operation, but amended the condition simply to ensure it provided procedures protecting Newfield Sand's due process rights.⁷

Newfield Sand may not collaterally attack the substance of an existing condition of approval that was amended to apply to Newfield Sand's expanded operation. The time to challenge the underlying Original Truck Trip Condition came and went some thirty years ago. *Desfosses*, 2015 ME 151, ¶ 23 n. 14, 128 A.3d 648; *Salisbury*, 2002 ME 13, ¶ 14, 788 A.2d 598. Newfield Sand's attempt to resurrect long expired appeal rights must be rejected as a matter of law and any grounds of appeal relating to the Planning Board's right to reevaluate the number of daily truck trips must be denied.

III. The Planning Board's Imposition of the Hours of Operation and Revised Truck Traffic Conditions is Consistent with the LUZO and Supported by Substantial Record Evidence.

The Planning Board's authority to affix conditions to its approval of a conditional use permit must be found in either the LUZO's express terms or "by necessary inference as an incidence essential to the full exercise of the powers specifically granted" by the LUZO to the Planning Board. *Churchill v. S. A. D. No. 49 Teachers Ass'n*, 380 A.2d 186, 192 (Me. 1977). The LUZO broadly and

⁷ Ironically, unlike the Revised Truck Trip Condition, which establishes a robust notice and hearing process, the Original Truck Trip Condition permitted the Planning Board to simply reassess Newfield Sand's daily truck trip limitation "if hazardous situations occur." (R. 495.) In other words, the Revised Truck Trip Condition benefits Newfield Sand as it provides *more* process than the Original Truck Trip Condition.

expressly authorizes the Planning Board both to issue conditional use permits, and to “attach conditions to its approval of a conditional use permit.” (A. 070-72, 094.) The source of the Planning Board’s authority to impose the challenged conditions is, as the Business and Consumer Court ostensibly concluded, necessarily inferred as an incidence of the powers essential to the Planning Board’s authority to regulate conditional uses. *See S.D. Warren Co. v. Bd. of Env’t Prot.*, 2005 ME 27, ¶ 28, 868 A.2d 210, *aff’ on other grounds sub nom. S.D. Warren Co. v. Maine Bd. of Env’t Prot.*, 547 U.S. 370 (2006); *Hallssey v. Sch. Admin. Dist. No. 77*, 2000 ME 143, ¶ 11, 755 A.2d 1068. The LUZO’s terms, purpose, and structure compel this conclusion.

1. The LUZO Authorizes the Planning Board to Reopen and Amend Conditions of Approval Regulating Newfield Sand’s Operations.

The Planning Board’s authority to impose the Hours of Operation and Revised Truck Trip Conditions is not, as Newfield Sand would have this Court believe, opaque or abstract. To the contrary, as the Business and Consumer Court concluded, the “LUZO is replete with broad and permissive language where it describes conditional uses, performance standards applicable to them, and the Board’s authority to impose conditions upon approval of a conditional use.” (A. 12.)

Article II of the LUZO identifies its purposes, specifying, in part, that “[t]he Ordinance . . . is designed to encourage the most appropriate use of land

throughout the Town . . . to protect and foster village and neighborhood areas . . . to promote traffic safety . . . to promote a wholesome home environment . . . [and] to conserve natural resources, wildlife habitats and scenic beauty.” (A. 056.)

Article XI of the LUZO clarifies that “[i]nterpretation of what may not be clear in this Ordinance *shall be according to the intent of the Ordinance* and the comprehensive plan.” (A. 108.) The LUZO defines a “conditional use,” like Newfield Sand’s mineral extraction operation, as “a use which would not be appropriate without restriction but is acceptable if controlled as to number, area, location, relation to the neighborhood and similar criteria.” (A. 110.)

Articles VIII and X of the LUZO give the Planning Board *exclusive* jurisdiction to review and issue conditional use permits. (A. 070, 094.) The Planning Board may only issue a conditional use permit if an applicant has demonstrated it meets: (1) LUZO, Article VIII, Section 3’s conditional use approval standards, (2) LUZO, Article IX’s general performance standards, which apply to all uses, and (3) LUZO, Article X’s specific performance standards for mineral extraction uses. (A. 071, 073-087, 094-96.) Article VIII, section 3 of the LUZO specifies that the Planning Board may only grant conditional use approval if several standards are met, including the following standard:

A. Neither the proposed use nor the proposed site upon which the use will be located is of such a character that the use will have significant adverse impact upon the value or quiet possession of surrounding properties greater than would normally occur from such a use in the zoning district. In reaching a determination on this standard, the Planning Board shall consider:

1. the size of the proposed use compared with surrounding uses;
2. the intensity of the proposed use, including amount and type of traffic to be generated, hours of operation, expanse of pavement, and similar measures of intensity of use, compared with surrounding uses;
3. the potential generation of noise, dust, odor, vibration, glare, smoke, litter and other nuisances;
4. unusual physical characteristics of the site, including size of the lot, shape of the lot, topography, and soils, which may tend to aggravate adverse impacts upon surrounding properties;
5. the degree to which landscaping, fencing, and other design elements have been incorporated to mitigate adverse impacts on surrounding properties.

(A. 71.) To ensure that conditional uses are sufficiently “controlled as to number, area, location, relation to the neighborhood and similar criteria,” Article VIII, section 5 of the LUZO authorizes the Planning Board to “attach conditions to its approval of a conditional use permit.” (A. 72.) The Ordinance specifies that “[t]hese conditions may include, but [are] not limited to, such requirements as . . . A. Street Improvements; B. Access Restrictions; C. Hours of Use; D. Buffering and screening; D. Utility improvements; F. Performance guaranties for require off-site improvements.” (A. 72.)

Article X establishes performance standards for specific uses, including mineral extraction operations. (A. 094-96.) Article X, Section 7 of the LUZO establishes submission requirements and thirteen specific performance standards for applicants seeking Planning Board approval to conduct mineral extraction. (A. 095-96.) Among other things, these performance standards provide that “[t]he

hours of operation at any extraction site shall be limited as the Planning Board deems advisable to ensure operational compatibility with nearby residences.” (A. 096.)

When read together, as they must be, these LUZO provisions broadly empower the Planning Board to limit and restrict conditional uses to reduce their disruptive impacts on the community. The Planning Board possessed exclusive authority to issue Newfield Sand’s after-the-fact permit and to affix conditions to the permit to ensure the intensity of Newfield Sand’s operation does not have a significant adverse impact on the value and quiet possession of surrounding properties greater than would normally occur from a mineral extraction use. (A. 056, 070, 072, 094.)⁸ The LUZO, by definition, disfavors Newfield Sand’s conditional use, and the Planning Board’s authority to reevaluate Newfield Sand’s most hazardous and disruptive operations is essential to “appropriate[ly] . . . restricti[ng]” Newfield Sand’s use “as to . . . location, relation to the neighborhood and similar criteria.” (A. 110.) Regardless, any ambiguity in the LUZO must be resolved “according to the intent of the [LUZO],” which is to “protect and foster . .

⁸ Newfield Sand falsely claims the Town could not cite to any authority authorizing the Planning Board’s imposition of the disputed conditions during the Business and Consumer Court’s oral argument. (Blue Br. 17.) As the Town’s brief explains in detail, the Planning Board’s authority to impose the conditions at issue is supported by numerous LUZO provisions. *See* pages 16-19, *infra*. In any event, the Court reviews the Planning Board’s After-the-Fact Approval directly, so arguments made during the Business and Consumer Court’s oral argument are not relevant to this Court’s consideration. Moreover, Newfield Sand did not request a transcript of the Business Court’s oral argument, and it is inappropriate to now advance arguments based on a record it has not preserved for this Court’s consideration.

. neighborhood areas” and “to promote traffic safety.” (A. 056.) The Hours of Operation and Revised Truck Trip Conditions themselves promote the LUZO’s intent, as does the Planning Board’s authority to reevaluate and amend restrictions it establishes for conditional uses, which are only appropriate when sufficient regulatory controls are in place.

The Town acknowledges that the LUZO does not include an explicit proviso allowing the Planning Board to reopen and amend its conditions post-approval. But Newfield Sand erroneously argues that the LUZO must explicitly grant the Planning Board authority to impose the disputed conditions, or no such authority exists. (Blue Br. 19.) To the contrary, the Law Court has repeatedly confirmed that the source of an administrative board’s authority must “be found in the enabling statute either expressly *or by necessary inference as an incidence essential to the full exercise of powers specifically granted.*” *Hallissey*, 2000 ME 143, ¶ 11, 755 A.2d 1068 (emphasis added); *see also S.D. Warren Co.*, 2005 ME 27, ¶ 27, 868 A.2d 210; *Churchill*, 380 A.2d at 192. Indeed, on several occasions, this Court has confirmed that the authority to impose specific approval conditions may be inferred from sweeping statutory authority to generally condition administrative approvals on terms necessary to further the purposes of the enabling statutory scheme. *See S.D. Warren Co.*, 2005 ME 27, ¶ 27, 868 A.2d 210; *Fitanides v. City of Saco*, 2015 ME 32, ¶¶ 11-14, 113 A.3d 1088.

For instance, in *S.D. Warren Co. v. Board of Environmental Protection*, the Law Court affirmed the Board of Environmental Protection's ("BEP") imposition of "reopener" conditions to a Clean Water Act ("CWA") certification, "that permit the certification to be reopened and the conditions amended following notice and hearing." *S.D. Warren Co.*, 2005 ME 27, ¶¶ 23-28, 868 A.2d 210. The CWA requires any applicant applying for a federal license to operate a hydroelectric dam to obtain a state certification that any contemplated discharge from the hydroelectric facility will comply with the State's and CWA's water quality standards. *Id.* at ¶ 8; *see also* 33 U.S.C. § 1341(a)(1). The United States Supreme Court interprets 33 U.S.C. § 1341(d), which provides that limitations set forth in a certification "shall become a condition on any Federal license or permit," to mean that "a state may attach any conditions that are necessary to ensure compliance" with federal and state water quality standards. *S.D. Warren Co.*, 2005 ME 27, ¶ 24, 868 A.2d 210. The Law Court concluded that the BEP's "reopener" conditions do not violate federal or Maine law, reasoning that "[c]onsidering the purpose of Maine's water quality standards . . . the authority to include 'reopeners' is 'essential to the full exercise of powers specifically granted' to the BEP." *Id.* at ¶ 28. The Court found that the "[t]his authority is essential because if the conditions are not as effective as planned, the water quality standards will not be met and the BEP's goal to 'restore and maintain the chemical, physical and biological integrity

of the State's waters ...' will not be achieved during the . . . term of the FERC license." *Id.*

Similarly, in *Fitanides v. City of Saco*, the Law Court rejected the notion that an Ordinance must expressly grant authority to impose specific conditions of approval when the Ordinance vests a Planning Board with broad authority to impose conditions in furtherance of the Ordinance. 2015 ME 32, ¶ 14, 113 A.3d 1088. The *Fitanides* Court upheld the Planning Board's imposition of a condition of approval delegating authority to the City planner to approve minor deviations from a conditional use plan, when the applicable ordinance gave the Planning Board authority to "attach such conditions . . . it finds necessary to further the purposes of this Ordinance," and the condition at issue furthered such purposes "by ensuring that even minor deviations from the approved plans will be subject to municipal review for compliance with zoning and building laws." *Id.* Notably, the *Fitanides* Court addressed arguments similar to those Newfield Sand makes here, rejecting the Appellants' claim that the "Ordinance does not affirmatively grant the Planning Board power to authorize the City Planner to approve minor deviations from conditional use plans, and that it is thus prohibited from doing so."⁹ *Id.*

⁹ Newfield Sand argues that the Business and Consumer Court placed undue emphasis on the fact that the LUZO does not explicitly constrain the Planning Board's authority to reevaluate conditions it attaches to a conditional use permit, (Blue Br. 16), but the *Fitanides* Court emphasized that exact point in its decision, noting that "Fitanides conceded that the Ordinance does not contain any provision that prohibits the Planning Board from delegating some tasks to the City Planner." *Fitanides*, 2015 ME 32, ¶ 14, 113 A.3d 1088.

Much like the BEP's authority to impose "reopeners" in *S.D. Warren Co.*, the Planning Board's authority to reevaluate Newfield Sand's hours of operation and trucking traffic post-approval is "essential to the full exercise of powers granted to the" Planning Board. The LUZO vests the Planning Board with much the same authority vested in the BEP: to impose approval conditions necessary to ensure compliance with the governing statutory scheme. *Compare* A. 072 with 33 U.S.C. § 1341(d); *see also S.D. Warren Co.*, 2005 ME 27, ¶ 24, 868 A.2d 210 (citing *PUD No. 1 of Jefferson Cnty. v. Washington Dep't of Ecology*, 511 U.S. 700, 712-13(1994)). The Planning Board's authority to amend Newfield Sand's hours of operation and trucking traffic in the future, after notice and hearing, is fundamental to its charge to ensure that Newfield Sand's operations do not have a significant adverse impact on the value and quiet possession of surrounding properties greater than would normally occur from a mineral extraction use. (A. 71); *see also Total Quality, Inc. v. Town of Scarborough*, 588 A.2d 283, 285 (Me. 1991) (affirming Planning Board's imposition of three approval conditions relating to traffic safety, because "conditions are reasonable means of achieving the goals stated in the Ordinance of promoting traffic safety and minimizing the impact of the property use on abutting properties"); *Kittery Water Dist. v. Town of York*, 489 A.2d 1091, 1093 (Me. 1985) (affirming vacation of condition that was inconsistent with the governing Ordinance's purposes). Otherwise, Newfield Sand's operations

may disrupt the value and quiet enjoyment of neighboring properties in perpetuity, denigrating the very purposes for which the LUZO requires conditional use review.

Newfield Sand also contends the Planning Board's jurisdiction ended the moment the After-the-Fact Approval issued, and it claims the Planning Board improperly reserved authority to enforce the terms of Newfield Sand's approval, thus usurping the CEO's enforcement authority. Neither argument withstands scrutiny.

First, this Court has never concluded that, as a general principle of administrative law, an administrative tribunal's authority over a permit ceases the moment the permit issues. (Blue Br. 20.) Instead, as evidenced by the cases discussed above, the Court has repeatedly confirmed a public body's authority is defined by the statutory framework governing the body. Moreover, as a general matter, this Court has held that a Planning Board possesses the authority to determine whether conditions attached to its approval have been met, or not. *See Bushey v. Town of China*, 645 A.2d 615, 617 (Me. 1994). Specifically, in *Bushey v. Town of China*, the Law Court affirmed an appeals board's revocation of a conditional use permit issued by the China Planning Board, after the Planning Board's jurisdiction was subsequently reinvoked to determine whether its conditions of approval had been met by a permittee post-approval. *Id. Bushey* demonstrates that Planning Boards possess the authority to determine whether the

conditions attached to their decisions are satisfied post-approval. A Planning Board, as the tribunal that reviews and issues the decision to which conditions are attached, is uniquely positioned to determine whether its approval's mandates are met. Nothing in LUZO divests the Planning Board of jurisdiction to decide whether a permittee has complied with the Board's conditional approval, and to amend approval conditions, and this jurisdiction is entirely consistent with the Planning Board's authority to administer the LUZO. (A. 058, 070-72, 108.)

Indeed, this authority is essential to guarantee that conditional uses are, as required under the LUZO, appropriately restricted "as to number, location, relation to the neighborhood and similar criteria." (A. 110.)

Second, the Planning Board's authority to reevaluate and amend Newfield Sand's hours of operation and trucking traffic does not, on its face, constitute impermissible "enforcement" of the LUZO. The LUZO specifically vests the Planning Board with exclusive jurisdiction to administer the LUZO's conditional use permitting framework, and the Planning Board's imposition of permitting conditions allowing the Board to reconsider the limitations it has imposed is consistent with its administrative jurisdiction. (A. 070, 094.) The CEO is responsible for verifying that Newfield Sand's traffic does not exceed 70 trips per day, and that it operates within the hours allowed by the Planning Board—this is "enforcement" of the LUZO and the permit's terms. Conversely, the challenged

conditions do not authorize the Planning Board to independently monitor or enforce the limits established by the Hours of Operation and Revised Truck Trip Conditions. Rather, they authorize the Planning Board to amend the limits the CEO enforces if the CEO submits evidence, not that the permits terms have been violated, but that Newfield Sand’s hours of operation and/or truck traffic have caused significant adverse impacts upon the value or quiet possession of surrounding properties greater than would normally occur from such a use.¹⁰ (A. 50.) Newfield Sand fails to grasp this significant distinction—which respects the enforcement authority vested in the CEO and the Town’s Board of Selectmen.

Newfield Sand often resorts to hyperbole to exaggerate the effects the Hours of Operation and Revised Truck Trip Conditions will have on its business, and—more broadly—Maine law. (Blue Br. 24-25.) Its claims are misplaced. These conditions do not give the Planning Board unfettered authority to reverse its approval, or to altogether eliminate Newfield Sand’s hours of operation or trucking traffic. To the contrary, the conditions are limited and only permit the Planning Board to reevaluate two discrete components of Newfield Sand’s operation, after

¹⁰ Newfield Sand posits that the LUZO, Article X’s performance standards are ongoing obligations that apply to its operations post-approval. If this is true, then Article X, section 7(C)(9), which provides that “[t]he hours of operation at any extraction site shall be limited *as the Planning Board* deems advisable to ensure operational compatibility with nearby residences,” must reasonably be construed to vest the Planning Board with exclusive authority to establish, and subsequently limit, a mineral extraction use’s hours of operation irrespective of whether the Planning Board has imposed a condition allowing it to reevaluate hours of operation post-approval, as the Planning Board has done here, or not. (A. 096) (emphasis added.)

notice and hearing, when the CEO reinvokes the Planning Board’s jurisdiction.¹¹ These conditions require the CEO to present substantial evidence, such as appraisals, expert testimony, and affidavits, demonstrating that Newfield Sand’s operations have caused significant adverse impacts on the value or quiet possession of surrounding properties *greater than would normally occur from such a use in the zoning district where the Property is located*. The standard contained within the challenged conditions is not rudderless or indefinite; it restrains Newfield Sand from perpetuating operating conditions that will, for instance, reduce local property values *beyond* what would normally occur. *See Wolfram v. Town of N. Haven*, 2017 ME 114, ¶ 17, 163 A.3d 835 (considering an identical standard). The evidence to meet that standard is extraordinary, and would require the CEO to affirmatively prove that property values have decreased beyond any reductions that would customarily be linked to a property’s proximity to a mineral extraction business. Consequently, Newfield Sand can rely on its approval for years to come, just as it, and its predecessors-in-title, have for the past thirty years.

Contrary to Newfield Sand’s suggestions, denying this appeal will not occasion a sea change in Maine municipal law. The Planning Board’s authority to

¹¹ In the event the Planning Board decides to amend the limits established by the disputed conditions, the LUZO authorizes judicial review of “[a]ny . . . action of the Planning Board,” providing Newfield Sand the assurance that it may challenge any future administrative proceedings on its permit. (A.108); *see also Fitandes*, 2015 ME 32, ¶ 15 n. 4, 113 A.3d 1088 (noting that appeal was likely authorized from city planner’s decision to grant minor amendments to plan).

reevaluate conditions attached to its conditional use approvals is a creature of the Town's LUZO. Similar authority, vested in a different administrative agency, must be found in the statutes that define the agency's authority. Generally, a municipality's legislative body is entitled, as a matter of policy, to establish a planning board's powers—which may include jurisdiction to amend approval conditions. The Town acknowledges that this authority must be balanced with principles of finality; however, the authority to reopen and amend approval conditions is entirely distinct from the authority to revoke a final decision altogether. The Planning Board has not engineered its own lever to revoke Newfield Sand's approval at some date in the future. Instead, the Planning Board has preserved a mechanism to reevaluate circumscribed aspects of Newfield Sand's operations, if necessary, and only after adequate process.

2. The After-the-Fact Approval is Supported by Substantial Record Evidence.

Newfield Sand claims that the Planning Board only received testimony concerning the general impacts of trucking traffic within the Town, but that this public comment was not specific to Newfield Sand's operations. Newfield Sand's claim is not only false, but also it asks the Court to reweigh the evidence for the Planning Board, which it cannot do. *Friends of Lincoln Lakes v. Bd. of Env't Prot.*, 2010 ME 18, ¶ 14, 989 A.2d 1128 (explaining that the substantial evidence standard “does not involve any weighing of the merits of evidence”). To combat

public testimony detrimental to its position, Newfield Sand argues that its own failure, or outright refusal, to provide affirmative evidence addressing its current and future traffic impacts somehow negates the written and oral public comment addressing the adverse impacts of Newfield Sand's existing operations. (Blue Br. 30-31.) A dearth of evidence supporting the notion that Newfield Sand's operations will have minimal traffic impacts is not itself evidence that refutes public testimony evidencing the opposite conclusion. The record is clear, and the only evidence before the Planning Board demonstrates that Newfield Sand's operations pose real and immediate hazards to the local populace—necessitating the conditions the Board imposed.

For instance, Susan Cannafarina testified to the Planning Board that: (1) dump trucks and large tractor trailers travelling from the Property have a significant impact on her house's foundation, rattling it as they travel by, (2) she has observed an increasing frequency of large trucks—including Newfield Sand's trucks—traversing local roads to transport materials, (3) there are children that play on these roads, and the size and speed of the trucks travelling to and from Carroll's Pit Road—where Newfield Sand's operation is located—poses a danger to pedestrians, and (4) she has noticed that these trucks create traffic at a time when school buses are transporting students to their homes, due to Newfield Sand's and at least one other extraction operation's operating hours. (A. 118, 138.) Peter

Marchant also testified at the hearing that Route 11 is a residential route, and trucks of the size used by Newfield Sand's operation will be unable to stop if a school bus, for instance, comes to an abrupt stop. (A. 118.)

The Law Court has time and again confirmed that municipal boards may rely on public testimony to support their decisions. *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d 1128 (“[a]ny Court review that would redecide the weight and significance given the evidence by the administrative agency would lead to ad hoc judicial decision-making”). In one instance, the Law Court affirmed the denial of a building permit to construct a house on the coast where the applicant's expert geologist testified that waves could not reach the level of the proposed house site, but neighbors testified that they had observed waves washing over the house site during weather events. *Mack v. Municipal Officers of Town of Cape Elizabeth*, 463 A.2d 717, 720-21 (Me. 1983). The Law Court concluded that the neighbors' testimony presented “sufficient evidence to support the Board's finding that wave action could make the house unsafe for its inhabitants,” and thus the decision was not premised upon a “visceral reaction to the project.” *Id.* at 720.

The Planning Board received public testimony attesting not only to the impacts Newfield Sand's operations may have in the future, but also to the impacts and traffic conditions its operations have already created. *Mack*, 463 A.2d at 720-21. The testimony of residents who have directly observed Newfield Sand's

trucking operations is the type of competent evidence upon which Planning Boards customarily base decisions. *See Mack*, 463 A.2d at 720; *Osprey Fam. Tr. v. Town of Owls Head*, 2016 ME 89, ¶ 10, 141 A.3d 1114 (a “[b]oard's decision is not wrong because the record is inconsistent or a different conclusion could be drawn from it”). Newfield Sand offered no affidavits, traffic studies, expert opinions, or direct testimony to controvert residents’ observations. The only competent evidence in the record supports the Board’s conclusion that the Hours of Operation and Revised Truck Trip Conditions are “necessary to ensure that the intensity of [Newfield Sand’s] proposed use . . . will not have a significant adverse impact on the value and the quiet enjoyment of surrounding properties” in the years to come. (A. 40.)

Newfield Sand mischaracterizes an exchange between the Planning Board Chair, the Board’s contract planner, and its counsel, as the smoking gun demonstrating that the Planning Board conceded the record contained no evidence to support the Hours of Operation and Revised Truck Trip Conditions. (Blue Br. 30.) Newfield Sand takes this exchange completely out of context, and perverts its substance. During the Planning Board’s deliberations, the Planning Board’s chair considered decreasing the truck trips established by the Original Truck Trip Condition. (R. 443.) The Planning Board’s contract planner and counsel advised the Planning Board that if it intended to decrease the existing truck trip limitation,

that decision would need to be supported by the record evidence, and as an example the contract planner explained that accident data may serve as a basis to decrease the Original Truck Trip Condition's daily truck trip limitation. (R. 443.) The Planning Board's counsel noted that there was, for instance, no accident data in the record, but that the record contained the public's complaints, comments, and observations concerning the impacts of Newfield Sand's existing operations. (R. 443.) Considered in context, this is nothing more than Planning Board's advisors counseling that the Planning Board's decision to reduce Newfield Sand's trucking limitations would have to be supported by substantial record evidence. The Planning Board's members never conceded that there was no evidence to support the imposition of the disputed conditions. The record, in fact, clearly demonstrates that the public's testimony weighed heavily on the Planning Board's deliberations. (R. 461.)

3. The Vested Rights and Unlawful Delegation of Legislative Authority Doctrines are Inapplicable to this Appeal.

Newfield Sand relies on two inapplicable legal doctrines, namely the vested rights and unlawful delegation of legislative authority doctrines, to assert that the Hours of Operation and Revised Truck Trip Conditions are voidable. (Blue Br. 23-29.) Neither doctrine has any application to this appeal. First, the rights that vest in Newfield Sand's conditional use permit are dictated by the permit itself. The Hours

of Operation and Revised Truck Trip Conditions limit what rights vest in the After-the-fact Approval. Second, vagueness and the unlawful delegation of legislative authority are legal doctrines that offer a means to attack a legislative standard that is either “so vague that people of common intelligence must guess at its meaning,” or that “fails to ‘contain standards sufficient to guide administrative action.’” *Uliano v. Bd. of Env't Prot.*, 2009 ME 89, ¶ 15, 977 A.2d 400. Newfield Sand does not claim that the Ordinance failed to establish sufficient standards to guide the Planning Board’s review of the Application. Moreover, this Court has previously upheld legislative standards nearly identical to those contained in the Hours of Operation and Revised Truck Trip Conditions.

A. Vested Rights.

Newfield Sand misapprehends Maine’s vested rights doctrine, and its reliance on it is misplaced. The Law Court has invoked the vested rights doctrine in the “municipal-law context” to protect a developer’s right to proceed with construction authorized by a validly issued building permit “once a developer undertakes significant, visible construction in good faith and with the intent to carry construction through to completion.” *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 46, 281 A.3d 618; *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 24, 856 A.2d 1183; *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266. The extent of any rights conferred by a permit are

subject to any limitations imposed by the issuing authority, meaning that any vested rights in and to a permit are limited by the terms of the permit itself. In this case, as the Business and Consumer Court concluded, Newfield Sand's rights to certain operating hours and to 70 trips from the Property per day are limited by the Planning Board's authority to reevaluate both features of Newfield Sand's operation. (A. 011.) In other words, Newfield Sand's rights vest subject to the Planning Board's authority to reevaluate those rights.

Regardless, the vested rights doctrine is inapplicable to the Planning Board's imposition of conditions of approval that were necessary for Newfield Sand's operation to meet the LUZO's conditional use approval standards. *NECEC Transmission LLC*, 2022 ME 48, ¶ 52, 281 A.3d 618 (applying vested rights doctrine to permitted large-scale infrastructure project when legislation retroactively revoked construction permits); *Kittery Retail Ventures*, 2004 ME 65, ¶ 24, 856 A.2d 1183 (holding "that 'bad faith or discriminatory enactment of a zoning ordinance for the purpose of preventing a legal use by the applicant may confer vested rights on the applicant'"); *Sahl*, 2000 ME 180, ¶¶ 4, 14, 760 A.2d 266 (applying vested rights doctrine to preserve permit to construct a motel when retroactive ordinance amendment voided permit). The Town has not passed legislation that would effectively preclude or substantially limit Newfield Sand's operations. Instead, the Planning Board conditioned its approval of Newfield

Sand's Application. The imposition of approval conditions to a permit is an adjudicatory, not a legislative, act limiting what the permit allows. The LUZO, at the time the After-the-Fact Approval issued, authorized the Planning Board to impose the Hours of Operation and Revised Truck Trip Conditions. Unlike the circumstances in *NECEC Transmission LLC*, *Kittery Retail Ventures*, and *Sahl*, the Planning Board's approval conditions do not retroactively revoke Newfield Sand's permit, nor do they authorize the Planning Board to do so in the future. Instead, these conditions allow the Planning Board to reevaluate two discrete aspects of Newfield Sand's operations in narrowly defined circumstances, after notice and a public hearing. In the absence of new legislation that would invalidate, or substantially reduce the activities permitted by, the After-the-Fact Approval, the vested rights doctrine has no application to this appeal.

B. Unlawful Delegation of Legislative Authority and Vagueness.

“[V]agueness and unlawful delegation are often raised simultaneously and properly treated as a single inquiry.” *Uliano v. Bd. of Env't Prot.*, 2009 ME 89, ¶ 15, 977 A.2d 400. Maine's unlawful delegation of legislative authority doctrine dictates that “the absence of specific standards in zoning ordinances results in a denial of equal protection of the laws to the property owner who is ‘reduce[d] ... to a state of total uncertainty and ... deprive [d] ... of the use of his property,’” *Wakelin v. Town of Yarmouth*, 523 A.2d 575, 577 (Me. 1987), and a statute or ordinance

provision is unconstitutionally vague “when its language either forbids or requires the doing of an act in terms so vague that people of common intelligence must guess at its meaning, or if it authorizes or encourages arbitrary and discriminatory enforcement,” *Ouellette v. Saco River Corridor Comm'n*, 2022 ME 42, ¶ 15, 278 A.3d 1183.

Newfield Sand does not bring any facial challenge to the constitutionality of the Ordinance itself. Rather, Newfield Sand challenges the constitutionality of conditions of approval that are premised upon presumptively constitutional Ordinance provisions. *Town of Baldwin v. Carter*, 2002 ME 52, ¶ 9, 794 A.2d 62 (“[a] statute is presumed to be constitutional and the person challenging the constitutionality has the burden of establishing its infirmity”); *Maine Milk Producers, Inc. v. Comm'r of Agric., Food & Rural Res.*, 483 A.2d 1213, 1218 (Me. 1984) (“[a]ny party attacking the constitutionality of a state statute thus carries a heavy burden of persuasion . . . plaintiffs must prove that no logical construction can be given to the words of the [challenged statute] that will make it constitutional”). Vagueness and unlawful delegation of legislative authority are vehicles to challenge the constitutionality of an ordinance itself, not a condition that the Planning Board found necessary in order for Newfield Sand to meet the LUZO standards that applied to its project. These legal doctrines simply have no application to this appeal.

Nonetheless, if these doctrines could be applied to the disputed conditions, any challenge premised on vagueness or unlawful delegation of legislative authority would fail. The Hours of Operation and Revised Truck Trip Conditions are expressly tied to a conditional use approval standard—in Article VIII, section 3(A) of LUZO—that required Newfield Sand to demonstrate that its use will not “have a significant adverse impact upon the value or quiet possession of surrounding properties.” (A. 050, 071.) In *Gorham v. Town of Cape Elizabeth*, the Law Court affirmed the constitutionality of a conditional use approval standard that required a Zoning Board of Appeals to determine whether a “use ‘will not adversely affect the value of adjacent properties,’” much like Article VIII, section 3(A) of the Ordinance. 625 A.2d 898, 900 (Me. 1993). The Law Court reasoned that “the maintenance of property values is a legitimate interest served by zoning restrictions,” and thus it was “a specific and discernible standard.” *Id.* at 902. Much like the standards at issue there, which are virtually identical to the conditions at issue here, the Hours of Operation and Revised Truck Trip Conditions are not vague and arbitrary. To the contrary, they present “specific and discernable standard[s]” to guide the Planning Board’s review. *Id.*

IV. A Remand to the Planning Board for Further Proceedings is Required if the Hours of Operation and Revised Truck Trip Conditions Are Vacated.

Newfield Sand asks this Court to strip the Hours of Operation and Revised Truck Trip Conditions from the After-the-Fact Approval, and to affirm the remainder of the decision. However, the Court cannot void integral components of conditions the Planning Board found “necessary to ensure that the intensity of [Newfield Sand’s] proposed use . . . will not have an adverse impact on the value and quiet possession of surrounding properties,” without then remanding the matter back to the Planning Board to determine if it can issue the After-the-Fact Approval in these conditions’ absence. (A. 40; R. 461, 473-74.) If the Court finds that the Planning Board lacks authority to reevaluate Newfield Sand’s hours of operation and trucking traffic post-approval, then it must remand the matter back to the Planning Board to determine whether the application must be denied *in toto*.

M.R. Civ. P. 80B authorizes the Court to “affirm, reverse, or modify the decision under review,” or to “remand the case to the governmental agency for further proceedings.” M.R. Civ. P. 80B(c). The Law Court has consistently balanced the relief it may award with a “governmental agency[’s]” authority to weigh the significance of, and adjudicate, the facts before it. *Friends of Lincoln Lakes*, 2010 ME 18, ¶ 14, 989 A.2d 1128 (“[a]ny Court review that would redecide the weight and significance given the evidence by the administrative agency would lead to ad hoc judicial decision-making”). For example, the Law Court has repeatedly declined to usurp the role of the administrative agency when its findings

of fact are “[in]sufficient to apprise the court of the decision's basis.” *Murray v. City of Portland*, 2023 ME 57, ¶ 14, 301 A.3d 777; *Chapel Rd. Assocs., L.L.C. v. Town of Wells*, 2001 ME 178, ¶ 10, 787 A.2d 137. In those cases, the Court has concluded that a remand is appropriate for the agency to develop sufficient written factual findings to apprise the Court of the basis for its decision. *Murray*, 2023 ME 57, ¶ 14, 301 A.3d 777 (ordering remand to develop written findings).

Conditions of approval generally constitute requirements that are necessary to gain an agency’s approval. Here, the Planning Board explicitly stated that *but for* the Hours of Operation and Revised Truck Trip Conditions the After-the-Fact Approval would not issue. (A. 039-40.) The Law Court would inappropriately step into the Planning Board’s shoes if it were to strike the challenged components of the Hours of Operation and Revised Truck Trip Conditions and affirm the remainder of the After-the-Fact Approval. To do so would result in the Court redeciding, on the Planning Board’s behalf, that the record evidence is sufficient to meet the LUZO’s conditional use approval standards without the disputed conditions that the Planning Board found necessary to issue Newfield Sand’s permit. The Law Court’s demonstrated reluctance to do precisely this in the past compels a remand to the Planning Board should the Court find that the Planning Board’s imposition of the Hours of Operation and Revised Truck Trip Conditions exceeded its authority.

CONCLUSION

For the foregoing reasons, the Town respectfully requests that the Court deny Newfield Sand's appeal, and affirm the Planning Board's imposition of the challenged conditions. In the event the Court strikes down the conditions, the Town respectfully requests that the matter be remanded to the Planning Board to determine whether it can approve Newfield Sand's conditional use application without them.

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