STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-24-384

NEWFIELD SAND

Appellant

v.

TOWN OF NEWFIELD

Appellee

ON APPEAL FROM THE BUSINESS AND CONSUMER COURT
Docket No. BCD-APP-2024-00004

REPLY BRIEF OF APPELLANT NEWFIELD SAND

Dated: February 26, 2025

Kristin M. Collins, Bar No. 9793
Preti Flaherty Beliveau & Pachios, LLP
P.O. Box 1058
45 Memorial Circle
Augusta, ME 04332-1058
(207) 623-5300
kcollins@preti.com

Attorney for Appellant
Newfield Sand

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I. INTRODUCTION

The Town of Newfield far overstepped its administrative authority in attaching conditions to Newfield Sand's mineral extraction use approval that would allow the Planning Board permanent jurisdiction to restrict or revoke Newfield Sand's operating authority. Now, in defense of this appeal, the Town grasps at straws the Business Court did not even consider in an attempt to justify its overreach, trying to paint Newfield Sand as a bad actor that required ongoing oversight. The Town's slander of this small business is not supported by the facts, as Newfield Sand had no record of violating town ordinances and no record of traffic or nuisance problems. The Planning Board did not even connect the supposed need for the conditions with any claim of past violations. And no matter what the purported basis was for the conditions, the Town has failed to point to any grant of authority to the Planning Board to oversee and modify Newfield Sand's business operations. The conditions must be voided.

II. ARGUMENT

A. The Town Misstates Newfield Sand's Compliance Record.

The Planning Board's Findings of Fact make no mention of any alleged past noncompliance by Newfield Sand. Yet from the first paragraph of its Brief, the Town tries to paint Newfield Sand as a bad actor that had to be kept "accountab[le]

for the disruptive impacts its operations pose to residents of the Town of Newfield."

The Town starts off by incorrectly characterizing the approval Newfield Sand sought as "after the fact," suggesting that Newfield Sand had already undertaken the expansion to 85 acres (with 30 "open" acres) for which the Planning Board's approval was sought. That was not the case. The Town originally granted approval to Douglas Woodward in 1994 for a five-acre extraction operation on the Property. A.35. Newfield Sand later acquired the Property, and the Town's permitting file includes a 1998 request by Newfield Sand for new mineral extraction areas on the Property. Planning Board minutes related to that application reference Newfield Sand's request to open a second pit and state that "after discussion and viewing the map, planning board saw no reason to object to this expansion." (see Planning Board minutes attached as Exhibit A and also provided with Newfield Sand's Reply Brief to the Business and Consumer Court ("BCC")). Therefore, Newfield Sand had town approval for the original five acres plus the expansion that was approved in 1998. When Newfield Sand made the subject application to the Planning Board in 2022, it had 19 open acres. A.36. At the time of its 2022 application, it was under no notice of violation, had never been under a notice of violation, and was not otherwise deemed by the Code Enforcement Officer to be in violation of the Town's ordinances or of its prior

approvals. R. 430, 469, It was also not seeking after-the-fact approval, but approval for a new overall scope of work to include 30 open acres. The Town has not demonstrated that Newfield Sand had a record of hazards or violations, and therefore cannot point to any claimed violation as a basis to assert ongoing jurisdiction to modify Newfield Sand's business operations.

If the Planning Board felt that Newfield Sand had "exhibited disdain for the state and local laws that govern it," one would think such commentary would have made it into its 19-page Findings of Fact as support for Conditions 1 and 2. A.34-52. But the Findings lack any mention of past noncompliance as support for the conditions. Moreover, the Findings expressly conclude that the 6:30 am – 5:30 pm operating hours are "unlikely to present a significant adverse impact upon the value and quiet possession of the surrounding properties," and that the 70 truck trips per day / 7 trips per hour restriction "address[es] the potential impact trucking traffic will have on the quiet possession of properties surrounding the site, and located along the routes the Applicant's trucks will travel to access and leave the Property." A.39-40; See also A.48 ("the Board finds these measures appropriate to limit adverse traffic impacts on local roads."); R.444 (Board concludes the traffic hazards that were discussed are not due to Newfield Sand, that the Board can only consider this operation, and that "the seven trips per hour limitation is reasonable based on spreading out traffic on public roads." The Findings not only address

present concerns; words like “unlikely,” and “potential” demonstrate that the Planning Board, in setting the 6:30 am – 5:30 pm hours and 70 truck trips per day / 7 trips per hour conditions, was determining them to be reasonable in light of the possible impacts of the operation. This was the extent of the Planning Board’s authority: to consider the present evidence, extrapolate that evidence to potential future impacts, and control against those impacts through reasonable, fixed conditions. For the Town to now argue that the Planning Board needs to assert permanent jurisdiction over the operation runs counter to the Board’s own statements that the fixed conditions it was applying were sufficient to control for potential impacts from the operation.

B. There is No Nexus Between the Claimed Concerns and the Disputed Conditions.

Even if true, any unapproved expansion by Newfield Sand in the past could not have provided a nexus for asserting ongoing authority over truck trips and hours of operation, the two subjects of the disputed conditions. The Town has not asserted that Newfield Sand ever violated past conditions regarding truck trips or hours of operation. [1] Newfield Sand had been operating under operating hour and truck trip conditions since its acquisition of the Property. The Planning Board heard no evidence that Newfield Sand’s trucks (as opposed to other business’

[1] The Planning Board did work with Newfield Sand to implement measures to ensure that the approved limits of excavation were adhered to. These were incorporated into the approved plan and Findings of Fact.

trucks) were causing unsafe road conditions, or that its hours of operation were causing disturbance. Based upon all the evidence in the record and all the testimony at the public hearing, the Planning Board found it sufficient to retain the same limits on truck trips and hours of operation that had applied to the existing operation. If there had been any record of violation of those conditions, the Planning Board might have been justified in further restricting Newfield Sand's operations through fixed but more restrictive conditions. But it had no such record. There was no factual basis to impose more restrictive conditions, either at the time of approval or through the continuing jurisdiction mechanism imposed under Conditions 1 and 2.

C. The Record does not Support Ongoing Jurisdiction.

In an attempt to support the Planning Board's assertion of continued jurisdiction to modify or revoke Newfield Sand's operating conditions, the Town hyperbolically cites concerns by "*several members of the public*" regarding "*Newfield Sand's existing truck traffic*." Brief of Appellee, at 5. It later refers to "robust public comment explaining the many hazards Newfield Sand's operations currently pose to the Town's residents." *Id.* at 11. But reading on, the Town makes it clear that only two people expressed concerns about truck traffic. Neither of the cited comments pertained to Newfield Sand's existing operation or even to its

proposed operation.[2] A Mr. Marchant commented regarding trucks coming from Sanford, and a Ms. Cannafarina commented about large trucks in general. *Id.* at 5-6. The Town is disingenuous in stating that either comment was about Newfield Sand's existing operation. The Town is also disingenuous in suggesting that any of these comments were sufficient justification to subject only Newfield Sand – and no other extraction or trucking operations - to ongoing review and restriction. Again, the Findings provide no commentary that the impacts of the proposed truck trips or hours of operation were unforeseeable at the time of approval; to the contrary, the Findings state that the 6:30 am – 5:30 pm operating hours and 70 truck trips per day / 7 trips per hour restrictions were sufficient to address the foreseeable impacts. The Planning Board cited no basis to subject only Newfield Sand to special ongoing scrutiny.

Given the lack of any distinguishing facts in the Planning Board's otherwise comprehensive Findings that tie some scant and generic comments about truck traffic to a need for ongoing Planning Board authority over Newfield Sand's operations, the Planning Board essentially asks the Court to give it carte blanche, without supporting legislation, to assert continuing jurisdiction over any approval standards, for any project, for any period of time. As already argued in Newfield Sand's principal Brief, this would vastly overextend the Planning Board's

[2] The Board conceded that issues raised during the hearing didn't relate to Newfield Sand's operation. R.444.

administrative authority and eviscerate the concept of vested rights in land use approvals. The interference with those rights is made worse by the vague mandate to avoid "significant adverse impacts" and the complete lack of any discernible standard of evidence that would apply to any future review by the Planning Board (as opposed to a typical Rue 80K land use enforcement process, where there is a hearing by a judge and rules of evidence and standards of review apply).

D. The BCC Rightfully Rejected the Town's "Untimely Appeal" argument.

The Town tries again here, as it did before the BCC, to argue that Newfield Sand cannot appeal Conditions #1 and 2 because its predecessor did not appeal the truck trip and operating hour conditions attached to its predecessor's 1994 approval for a five-acre gravel pit. The BCC rejected this argument, and rightfully so.

Claim preclusion requires that (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action. *Macomber v. MacQuinn-Tweedie*, 2003 ME 122, ¶ 22, 834 A.2d 131, 138-39 (citing *Machias Sav. Bank v. Ramsdell*, 1997 ME 20, ¶ 11, 689 A.2d 595.) Newfield Sand was neither a party to the 1994 approval, nor its privy. A privity relationship generally involves a party so identified in interest with the other party that they represent one single legal right." *Dep't. of Human Servs. v. Comeau*, 663 A.2d 46, 48 (Me. 1995). "In order for the doctrine of privity to be

invoked, the first litigation must provide substantial protection of the rights and interests of the party sought to be bound by the second." *Id.* (quotation marks omitted). Newfield Sand was a successor to a successor of Woodward, almost 30 years later, and the two have no corporate or personal relationship. Moreover, the subject application sought a new permit for an 85-acre operation, based on entirely new submissions, and did not incorporate or rely upon the prior approval. The fact that an applicant twice removed from Newfield Sand did not challenge conditions attached to an economically insignificant predecessor operation some 30 years in the past cannot preclude Newfield Sand from now doing so.[3]

E. The Planning Board did not Conclude that the Disputed Conditions were Necessary to Find No Significant Adverse Impact.

The Town again misstates the Planning Board's findings when it says that the Board "concluded that it was necessary to impose the challenged conditions to ensure that Newfield Sand's business will meet the [no significant adverse impact] standard." Brief of Appellee at 10. Again, there is no discussion in the Findings explaining that ongoing Planning Board oversight was deemed necessary or appropriate to make a finding that there would be no significant adverse impact. Instead, the Findings explicitly state that the 6:30 am – 5:30 pm operating hour

[3] Because the BCC did not rely upon collateral estoppel in its decision, discussion of this argument is curtailed here. For a more thorough discussion of the issue, please see Newfield Sand's Reply Brief in the BCC docket, dated July 1, 2024.

restriction is "unlikely to present a significant adverse impact," and that the 70 trips per day / 7 trips per hour restrictions are sufficient "to ensure that Applicant's mineral extraction operation does not result in a significant overall increase in traffic to and from the Property" A. 39-40. The Planning Board made no finding that the likelihood of adverse impacts would increase over time, and in fact found that such impacts were unlikely given the conditions imposed. The challenged conditions are therefore unsupported by facts in the record and by the Board's own conclusions of law.

F. The Town Cites no Authority for Continuing Jurisdiction by the Planning Board.

The Town throws out a red herring by trying to construe this appeal as challenging the Planning Board's inherent authority to place conditions on an applicant's operations to ensure that the approval standards can be met. This is not the issue on appeal. The question is whether the Planning Board, having found that the application met the relevant approval standards based upon the full record and the operating hour and truck trip conditions already attached, could hedge against future unforeseen impacts by giving itself authority to retake jurisdiction over the operation and to modify or rescind Newfield Sand's operating privileges at any point in the future. Neither the BCC, nor the Town, have been able to point to any such authority under the LUZO or in relevant caselaw.

Lacking any supporting language under the LUZO, the Town leans on *Churchill v. S.A.D. No. 49 Teachers Ass'n* for the idea that authority to place conditions could come "by necessary inference as an incidence essential to the full exercise of the powers specifically granted" by the LUZO. 380 A.2d 186, 192 (Me. 1977) (see Brief of Appellee at 15). *Churchill* could not be less on point. It relates to application of the Maine Public Employees Labor Relations Law, not to administrative authority under a land use ordinance. But more importantly, *Churchill* goes on to find that the school district could not find authority, in the absence of any statutory provision, to require nonunion members to pay a fee as a condition of continued employment in the bargaining unit. *Id.* at 193.

The Planning Board's jurisdiction is expressly confined by the terms of the LUZO. The Board is to serve as a purely administrative agency, applying the specifically enumerated approval standards to a specific set of required application submissions. An application is measured against those approval standards and found to either be compliant, compliant if certain specified conditions are met, or not compliant and therefore denied. Once the business is operational, the Code Enforcement Officer has sole enforcement authority to determine whether the property remains in compliance with its approval and with any ongoing performance standards under the applicable ordinances. The administrative and enforcement roles are clearly defined and distinct.

The implication from this structure is that the Planning Board's authority ceases on permit issuance, at which point the Code Enforcement Officer's and court's authority takes over. There is by no means any "clear inference" under the LUZO that the Planning Board's jurisdiction over an application may extend beyond the approval, and to the point of modifying or revoking a permit issued years or even decades prior. The sole exception to this is where the application itself has changed: only then may the Planning Board reconsider the application and even then, only to those changed provisions of the application.

Lacking any ordinance-based authority for the Planning Board's assertion of continued jurisdiction, the Town can only cite the purpose statement of the LUZO. But the purpose statement only informs the approval and performance standards, to the extent they are vague; it cannot supplant them. Nor does the concept of a "conditional use" give a planning board unfettered discretion over a land use in perpetuity. 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." Here, the Planning Board did find, by its specific Findings and Conclusions, Newfield Sand's use to be acceptable when restricted by the specific operating hour and truck trip conditions that were attached.

Nothing in the conditional use standards gives the Planning Board the authority to reassert jurisdiction over unforeseen and unforeseeable changes in impacts of an operation. An approval by its very nature is a one-time deal. The LUZO could have set up an ongoing review structure and provided such authority to the Planning Board, but it does not do so. The Planning Board instead is given tools to obtain thorough information about a proposed use, and to comprehensively study an application, but it must make a judgment and attach conditions based upon those materials. If the Planning Board found Newfield Sand's application to have provided insufficient proof of its ability to meet the approval standards in the future, it could have denied the application. But the Planning Board did not make that finding; it instead found that with the specific operating hours and truck trip conditions attached, Newfield Sand's project would be acceptable. Having met those standards, Newfield Sand is entitled to vested rights in its conditional approval, so long as the fixed conditions are satisfied. It cannot be subject to permit modification or revocation at the hands of a Planning Board that lacks legislatively based authority to do so.

G. Caselaw Weighs Heavily Against the Town's Arguments.

Neither the BCC nor the Town has cited any case supporting a planning board's authority to modify the terms of an approval outside of an amendment requested by the applicant. Nor have they attempted to distinguish the many New

England cases holding that a planning board has no such authority or jurisdiction. Among these are *Czyoski v. Planning Bd. of Truro*, 928 N.E. 2d 987 (Mass. 2010), and *Young v. Planning Bd. of Chilmark*, 525 N.E. 2d 654 (Mass. 1988), which each hold that rescission of an approval is inappropriate where a "plan met all requirements of law and the rules and regulations of the planning board when it was approved." *Stoner v. Agawam*, 266 N.E.2d 891 (Mass. 1971) holds that "the intention of relevant sections of the Subdivision Control Law is to set up an orderly procedure for definitive action within stated times, and for notice of that action in offices of record within stated times, so that all concerned may rely upon recorded action or the absence thereof," and holds that an approval, once given, cannot be rescinded without the landowner's approval.[4]

Moreover, neither the BCC nor the Town has adequately explained why it is appropriate here to deviate from the long-established rule that "zoning laws, whether statutes or ordinances, in as much as they curtail and limit uses of real estate and are in derogation of the common law must be given a strict construction and the provisions thereof may not be extended by implication." *Zappia v. Old Orchard Beach*, 2022 ME 15, ¶ 10 (citing *LaPointe v. City of Saco*, 419 A. 2d 1013, 1015 (Me. 1980)). Finally, neither the BCC nor the Town has addressed how

[4] Compare, also, a New Hampshire statute, RSA 676:4-a, authorizing recission of a planning board-issued approval only upon certain specified occurrences. Maine lacks such a statute, and similar language is not found in Newfield's LUZO.

the vague requirement in the disputed conditions to avoid "significant adverse impacts" has not "reduce[d] [Newfield Sand[to a state of total uncertainty and…deprive[d] [it] of the use of [its] property." *Wakelin v. Town of Yarmouth*, 523 A. 2d 575, 577 (Me. 1987).[5] In sum, the BCC's decision marks a departure from established law which is not based upon cognizable distinctions.

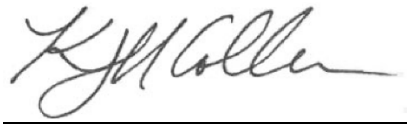
III. CONCLUSION

Newfield Sand had been operating in the Town of Newfield with no violation of its existing permit conditions on operating hours or truck trips, and no evidence of having created any traffic hazards. The Planning Board's comprehensive Findings of Fact include no reason why Newfield Sand should not be entitled to vested rights in its approval when the Planning Board had found that its application met all relevant standards. While the Planning Board has broad authority to apply conditions as part of a conditional review process, those conditions cannot cast the Planning Board into a judicial and enforcement role. Only an ordinance can do that. The disputed conditions are unsupported by the LUZO and must be voided so that Newfield Sand can operate with confidence in the terms of its approval.

Respectfully submitted,

[5] Indeed, Newfield Sand has been cripped by uncertainty related to the disputed conditions and has therefore refrained from proceeding with its full expansion as authorized.

Dated: February 24, 2025



Kristin M. Collins, Bar No. 9793
PRETI FLAHERTY
P.O. Box 1058
45 Memorial Circle
Augusta, ME 04332-1058
(207) 623-5300
kcollins@preti.com

Attorney for Appellant
Newfield Sand

CERTIFICATE OF SERVICE

I, Kristin M. Collins, hereby certify that I served electronically the foregoing Brief of Appellant and two copies via U.S. mail, first-class, postage prepaid when prompted to the parties listed below addressed as follows:

Benjamin Plante, Esq.
Drummond Woodsum
84 Marginal Way
Suite 600
Portland, ME 04101-2480

Dated: February 24, 2025

/s/ Kristin M. Collins
Kristin M. Collins, Bar No. 9793
Preti Flaherty Beliveau & Pachios, LLP
P.O. Box 1058
45 Memorial Circle
Augusta, ME 04332-1058
(207) 623-5300
kcollins@preti.com

Attorney for Appellant
Newfield Sand

Meeting Dec 1, 1998
Present: J. Moriarty, E. Gerry, N. Jordan
R. Frothingham *also present was Arthur Ott

Notes of the November meeting were read and accepted. Atty. Peter Faulkner and his clients, owners of Newfield Sand appeared before the board with a proposal to open a second pit in their gravel extraction operation near Bridge Street. DEP was asked to review the plan and had no objection. After discussion and viewing the map, planning board saw no reason to object to this expansion.

There being no more business the meeting was ajourned at 8:05

Respectfully submitted
Natalia Jordan

Meeting Jan 5, 1999
Present: J. Moriarty, Wanda Neville,
Arthur Ott, Natalia Jordan, Earland Gerry, Jim Campbell,

Minutes of the December meeting were read and amended to reflect the [illegible] appearance of Arthur Ott, [illegible] the

EXHIBIT A