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May 2, 2018

*Via email to [zoning@nl-nh.com](mailto:zoning@nl-nh.com)*

Douglas W. Lyon, Chairman, Town of New London Zoning Board of Adjustment (the "Board")  
375 Main Street  
New London, NH 03257

**Re: Objection and Grounds Requiring Denial of the Administrative appeal of a building permit issued for construction at 293 Lamsom Lane, New London, NH (the "Property")**

Hello Mr. Lyon and Fellow Board Members,

This firm represents Timothy and Lucinda Carlson, and I write to object to the administrative appeal filed by John Ryan, by his attorneys Sheehan Phinney, dated April 16, 2018 (the "Appeal"). Pursuant to New Hampshire law, **Mr. Ryan's Appeal must be denied, or more precisely, not accepted for review at all. While we object to the assertions made in the Appeal (and reserve all rights to further that objection in any subsequent proceeding), the simple reality is that the Appeal is woefully late. The Appeal therefore cannot be accepted and/or granted as a matter of law, on either of the following two legal requirements:**

**1.** The Appeal was filed 58 days past the 20-day deadline for appeals established in the Rules of the Town of New London Zoning Board of Appeals (the "ZBA Rules").

**2.** Under RSA 676:5, if the Board had not adopted the ZBA Rules, the Appeal can only be taken if filed within a *reasonable* time after issuance of the building permit. In Tausanovitch v. Town of Lyme, 143 N.H. 144 (1999), the Supreme Court held that 55 days was far beyond a reasonable amount of time. In the matter before the Board, the Appeal was filed 78 days after the building permit was posted on site. The circumstances of the case at hand are strikingly similar to those of Tausanovitch.

As previously stated, the Board may justify its decision to deny the Appeal and uphold the validly issued building permit by any one of the grounds set forth above. **But, the board may not justify a decision to grant the Appeal and invalidate the building permit under law unless it specifically articulates (in writing) the reasons for doing so under both of the grounds set forth below.** We address each of these relevant matters of law in turn below.

I. **Was the Appeal filed in a timely manner as required by the ZBA Rules?**

*No. It was filed woefully late.*

The rules of the Town of New London Zoning Board of Appeals are attached hereto at Tab 1. Page 4 thereof contains the pertinent part of the ZBA rules, which reads, in plain English:

“The appeal must be made within 20 days of the decision, according to the Rules of Procedure of the New London Zoning Board of Adjustment.”

The petitioner has appealed the issuance of a building permit which occurred on January 20, 2018. The permit was posted on site on January 28, 2018. Erring on the side most favorable to the petitioner, the Appeal filed on April 16, 2018 is 58 days late, having been filed 78 days after the building permit was posted on site. There is no interpretation of the law or the facts that could validate the untimely delay of the appellant in filing its Appeal, it must therefore be denied or rejected as a matter of law.

II. **Was the Appeal filed in a reasonable amount of time as required by RSA 676:5?**

*No. The petitioner sat idle for 78 days before filing the Appeal, while watching the owners of the Property demolish the existing structure, commence construction, and incur significant expenses in reconstruction.*

RSA 676:5 holds that any appeal of an administrative decision must be filed in a *reasonable* time after the decision. The Supreme Court specifically held in Tausanovitch v. Town of Lyme, 143 N.H. 144 (1999) that the determination of what is *reasonable* is a two-step process as follows:

1. Determine whether the petitioner should have reasonably had knowledge of the building permit issuance, and whether s/he appealed the issuance in a reasonable amount of time (keeping in mind that the ZBA Rules set that reasonable time at 20 days); and
2. Balance the interest of the building permit holder vs. the interest of the petitioner.

The facts of the Tausanovitch case are very similar to the case before the Board. In Tausanovitch, the petitioner claimed that he did not know the nature of the permits granted, and waited 55 days, while land clearing activities had commenced, to file his appeal. The Supreme Court held that the petitioner had constructive notice, and was unpersuaded that the petitioner did not think to inquire further in the 55 day period while construction activities had already commenced. The appeal was dismissed.

**Step 1. Did Petitioner Ryan have knowledge of the nature of construction authorized by the building permit? Most certainly.** The case at hand is similar to the Tausanovich case, except that petitioner Ryan waited *much longer* than the petitioner in Tausanovich, and had much more reason to know the nature of the construction authorized by the building permit. **Indeed, Petitioner Ryan was notified of the house plans a full 320 days before filing the Appeal.** On May 25, 2017, Petitioner Ryan received, via certified mail, notice of the NHDES Shoreland Permit Application filed in connection with the Property. That application contained plans that showed the location of the home to be built on the Property. **The plans that Petitioner Ryan submitted with the Appeal are the same plans from that application, which Petitioner Ryan received notice of 320 days ago.** Accordingly, any assertion that Mr. Ryan was unaware of where the house was being built on the Property until he obtained the Building Permit on April 5, 2018 is belied by the facts. Under the legal standards set forth in Tausanovich v. Town of Lyme, and as illustrated by the facts below, Petitioner Ryan undoubtedly had knowledge of the building permit and the nature of the construction associated therewith. Yet, Petitioner Ryan sat idly while the owners of the Property began construction and incurred significant expense.

- The Appeal was filed 72 days after the building permit was posted on site (01/28/18).
- The Appeal was filed 71 days after demolition of the existing house commenced on site (01/29/18).
- The Appeal was filed 72 days after the Appellant, Mr. John Ryan, entered the property and confronted construction contractors and viewed the building permit on site (01/28/18).
- The Appeal was filed 64 days after excavation for the foundation commenced (02/05/18).
- The Appeal was filed 61 days after footings for the foundation were placed (02/08/18).

The Appeal must fail as a matter of law under the ZBA Rule, RSA 676:5, and the law stated by the Supreme Court in Tausanovich v. Town of Lyme. Any argument that Petitioner Ryan did not know the location of the future house at least 61 days before filing the appeal, when the foundation footings had been placed, simply does not hold water. Pictures of the foundation footings being placed are included in the Appeal.

**Step 2. Balancing the interests of the Petitioner vs. the Property owner benefitted by the building permit.**

The Petitioner has asserted no particular benefit in appealing the issuance of the building permit. Indeed, the Petitioner has only stated that the house to be constructed under the building permit is 12' from the property line, where 20' is required under the current Ordinance. **The Petitioner fails to mention, however, that the lawfully existing house prior to demolition was located 6.3' from the Property line. The house allowed by the building permit is more**

**conforming than the previously existing structure, such that the Petitioner is benefitted by the building permit.**

Conversely, Tim and Cindy Carlson who own the Property, suffer an extraordinary detriment and hardship if the untimely Appeal is granted in violation of New Hampshire law. The Carlsons relied in good faith upon a validly issued building permit and demolished the existing home on the Property. They then undertook construction activities in compliance with all applicable laws, and currently suffer losses of more than \$2,000 each day that the project is halted as a result of this Appeal filed in bad faith. Under Step 2 of the analysis as set forth above, there is no legal justification to grant the Appeal filed by Petitioner Ryan. Doing so would result in a significant hardship to the Carlsons, who lawfully have already torn down their previous home.

Summary.

Tim and Cindy Carlson, owners of the Property at issue, have in good faith relied upon a building permit validly issued by the town of New London. In doing so, they have razed their existing home, in an effort to build a better home for themselves and one that results in a better effect on the community as a whole. As a direct result of Mr. Ryan's untimely appeal and the stop work order, they have incurred many thousands of dollars in expenses, and continue to incur expenses in excess of \$2,000 each day this project is delayed.

In contrast, Petitioner Ryan has idly sat by watching construction unfold, filing the Appeal only after the existing home had been razed, and 78 days after the building permit was posted. There is no legal justification to allow Mr. Ryan's untimely appeal to cause further hardship to the Carlsons.

We respectfully request that this Board deny or reject the Appeal at its May 7, 2018 meeting, and welcome you to contact us via any means listed above with any questions. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'CS', is written over the closing 'Sincerely,'.

Christopher Swiniarski, Attorney for Timothy and Lucinda Carlson

**Peter TAUSANOVITCH and another**  
v.  
**TOWN OF LYME and Myron Crowe.**

No. 97-053.

Supreme Court of New Hampshire.

Nov. 9, 1998.

Rehearing Denied Feb. 2, 1999.

Objectors sought review of decision of town zoning board of adjustment (ZBA) issuing building permit to landowner for construction of bed and breakfast in rural zoning district. The Superior Court, Grafton County, Smith, J., dismissed. Objectors appealed. The Supreme Court, Brock, C.J., held that objectors did not appeal to ZBA within "reasonable time," as required by town ordinance.

Affirmed.

#### 1. Zoning and Planning ⇨745.1

In reviewing trial court's granting of motion to dismiss objectors' appeal of zoning board of adjustment's (ZBA) decision granting building permit, Supreme Court would evaluate whether objectors' allegations could be reasonably construed to permit relief.

#### 2. Zoning and Planning ⇨747

In reviewing trial court's granting of motion to dismiss objectors' appeal of zoning board of adjustment's (ZBA) decision granting building permit, Supreme Court would assume truth of objectors' well pleaded allegations of fact and construe all reasonable inferences from them most favorably to objectors.

#### 3. Zoning and Planning ⇨701

Trial court accepts all findings of zoning board of adjustment (ZBA) upon all questions of fact properly before court as prima facie lawful and reasonable.

#### 4. Zoning and Planning ⇨605, 702

Supreme Court will uphold superior court's decision in zoning matter unless decision is not supported by evidence or is legally erroneous.

#### 5. Zoning and Planning ⇨231

Interpretation of zoning ordinance is question of law which Supreme Court reviews de novo.

#### 6. Zoning and Planning ⇨233

Words and phrases of zoning ordinance should always be construed according to common and approved usage of language.

#### 7. Administrative Law and Procedure ⇨722.1

Generally, time for appeal from administrative officer's decision begins to run when appealing party knows or should have known about decision.

#### 8. Zoning and Planning ⇨442

Precise meaning of phrase "reasonable time," or "reasonable period of time," for purposes of appealing to zoning board of adjustment (ZBA), depends on circumstances in particular case. RSA 676:5.

#### 9. Zoning and Planning ⇨655

Whether facts in particular case support finding that party appealed decision to zoning board of adjustment (ZBA) within "reasonable time" is ultimately a question of fact. RSA 676:5.

#### 10. Zoning and Planning ⇨442

To determine whether period of time for appealing to zoning board of adjustment (ZBA) is reasonable, interests of party benefiting from administrative officer's, or town's, actions should be balanced against interests of aggrieved party appealing to ZBA. RSA 676:5.

#### 11. Zoning and Planning ⇨442

"Reasonable time" to appeal to zoning board of adjustment (ZBA) is that time which upholds and saves to each of the interested parties the rights to which they are entitled and protects them from injury or loss. RSA 676:5.

See publication Words and Phrases for other judicial constructions and definitions.

#### 12. Zoning and Planning ⇨442

Factors relevant to determining reasonableness of period of time to appeal to zoning

board of adjustment (ZBA) include knowledge of parties, their conduct, their interests, possibility of prejudice to any party, and any reason for delay in appealing. RSA 676:5.

### 13. Zoning and Planning $\Leftrightarrow$ 442

Objectors had actual or constructive notice in June about issuance of building permit to landowner for construction of bed and breakfast in rural zoning district as well as landowner's construction activities, and thus, objectors' decision to wait until August to file appeal to zoning board of adjustment (ZBA) did not constitute filing within a "reasonable time", as required by town ordinance; objectors were aware that landowner was planning to build bed and breakfast when objectors purchased portion of landowner's property, objectors received notice of hearings with respect to matter, and planning board's approval of subdivision of landowner's parcel included permission to build bed and breakfast if landowner obtained building permit. RSA 676:5.

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Suloway & Hollis, P.L.L.C., Concord (Daniel P. Luker, on the brief and Martin L. Gross, on the brief and orally), for petitioners.

Schuster, Buttrey & Wing, P.A., Lebanon (Barry C. Schuster, on the brief and orally), for respondent Myron Crowe.

Baldwin & de Seve, Concord, for respondent Town of Lyme, filed no brief.

#### BROCK, C.J.

The petitioners, Peter and Kelly Tausanovitch and the Lyme Zoning Equity Group, appeal a decision of the Superior Court (*Smith, J.*) granting a motion to dismiss filed by the respondents, the Town of Lyme (town) and Myron Crowe. We affirm.

The record reveals the following facts. Myron Crowe owned a parcel of land in the town of Lyme in a rural zoning district. On February 8, 1995, the town planning board met and approved an application, with certain conditions, that Crowe had submitted for subdividing one parcel into two lots, lot 1 and lot 2. The Tausanovitchs had contracted to purchase lot 2 from Crowe in January 1995.

One of the conditions for subdividing the parcel required Crowe to obtain a building permit from the zoning board of adjustment (ZBA) before building a residence or bed and breakfast because the proposed areas for development contained agricultural soil. On February 12, 1995, Crowe applied to the town for a permit to build on twenty-five percent of lot 1. An administrative officer of the town denied his request and referred it to the ZBA for consideration of a special exception to allow construction on the lot's agricultural soil.

The ZBA scheduled a public hearing for March 2, 1995, regarding an application submitted by Crowe for a special exception. See *Lyme, N.H., Zoning Ordinance* art. IV., § 4.64B (1996) (governing uses and special exceptions for agricultural soils conservation district). During the hearing, which a representative of the petitioners attended, the ZBA discussed Crowe's proposed subdivision and building plans. The ZBA voted to continue the application until Crowe submitted more specific information.

Crowe submitted additional information, and on March 23, 1995, the ZBA reviewed a site plan for lot 1, which included a table showing the amount of agricultural soil on the lot, the amount to be developed, and the "planned development including the *bed and breakfast*, allowance for septic area, driveway, [and] maintenance buildings." (Emphasis added.) The ZBA granted Crowe a special exception but required him to meet certain conditions before he could obtain a building permit. The conditions limited the developable acres to a maximum of 3.55 acres of agricultural soil, required Crowe to grant a conservation easement to the town, and required a map displaying the development and easement as substantially conforming with a proposed subdivision drawing previously submitted by Crowe.

On May 22, 1996, Crowe submitted a building permit application with maps and plans to the town for the proposed construction of a bed and breakfast on lot 1. On June 12, 1996, the zoning administrator issued Crowe the permit. The zoning administrator wrote on the notice approving the permit that he did not refer the application to the ZBA

because a “special exception [was] granted before this application on 3/23/95.”

On August 6, 1996, the petitioners appealed the issuance of the permit to the ZBA and asked the Lyme Board of Selectmen (board) to “take legal steps to stop further construction on [the] lot.” (Emphasis omitted.) On August 15, 1996, the ZBA heard the merits of the appeal, including testimony from the zoning administrator, the abutters, the petitioners, Crowe, and the public. The ZBA denied the appeal, reasoning, *inter alia*, that all notice provisions under the ordinance had been met, that the petitioners were present or represented at the planning board meeting and ZBA meeting approving the subdivision and conditionally approving the building of a bed and breakfast, that the special exception granted in 1995 covered the construction of a bed and breakfast, and that the issue of whether construction falls within the parameters of the permit was not properly before it. Subsequently, the ZBA denied the petitioners’ motion for a rehearing.

The petitioners appealed the ZBA’s decision to the superior court. The respondents moved to dismiss, arguing that the petitioners’ appeal to the ZBA was not timely filed. The trial court granted the motion, finding that the petitioners failed to file the appeal with the ZBA within a reasonable time as required by a town ordinance. *See Lyme, N.H., Zoning Ordinance* art. X, § 10.20 (1996). This appeal followed.

The petitioners argue that the trial court erroneously applied the reasonable time standard for administrative appeals. In accordance with RSA 676:5 (1996), article X, section 10.20 of the Lyme Zoning Ordinance provides that appeals, other than from denials by the ZBA, “shall be taken within a reasonable period of time by filing with the [ZBA] a notice of appeal specifying the grounds for appeal.” Neither the statute nor the ordinance defines “reasonable period of time.” See generally RSA 676:5; *Lyme, N.H., Zoning Ordinance* art. X.

The petitioners assert that they “did not have actual or constructive notice that the building permit had been issued until late July or early August, 1996,” and that they “appealed to the ZBA within just a few days

of learning that the building permit had been issued.” The petitioners argue that the superior court erred in concluding that they chose to delay the filing of their appeal to the ZBA until August 6, 1996, and in applying a *per se* rule in determining that the passage of fifty-five days from the issuance of the permit until the appeal was unreasonable. We disagree.

[1–4] In reviewing the trial court’s granting of the motion to dismiss, we evaluate whether the petitioners’ allegations may be reasonably construed to permit relief. *See, e.g., Hickingbotham v. Burke*, 140 N.H. 28, 29–30, 662 A.2d 297, 298–99 (1995). “We assume the truth of the [petitioners’] well pleaded allegations of fact and construe all reasonable inferences from them most favorably to the [petitioners].” *Id.* at 30, 662 A.2d at 299 (quotation and ellipsis omitted). The trial court, however, accepts “[a]ll findings of the zoning board of adjustment . . . upon all questions of fact properly before the court [as] *prima facie* lawful and reasonable.” *Ray’s Stateline Market v. Town of Pelham*, 140 N.H. 139, 143, 665 A.2d 1068, 1070 (1995). “This court, in turn, will uphold the decision of the superior court unless that decision is not supported by the evidence or is legally erroneous.” *Id.* at 143, 665 A.2d at 1071 (quotation omitted).

[5, 6] We first interpret the zoning ordinance. The interpretation of a zoning ordinance is a question of law, which we review *de novo*. *See, e.g., Healey v. Town of New Durham*, 140 N.H. 232, 236, 665 A.2d 360, 365 (1995). “In general, the traditional rules of statutory construction will govern here. Thus, the words and phrases of an ordinance should always be construed according to the common and approved usage of the language . . . .” *Id.* (quotation and brackets omitted).

[7–10] Generally, the time for an appeal from the administrative officer’s decision begins to run when the appealing party knows or should have known about the decision. *See Zeilstra v. Barrington Zoning Bd. of R.*, 417 A.2d 303, 308 (R.I.1980); *State v. Strange*, 960 P.2d 1016, 1018 (Wyo.1998). The precise meaning of the phrase “reasonable time,” or “reasonable period of time,”

for appealing, however, depends upon the circumstances in a particular case. See *Long v. Equitable Life Assur. Soc.*, 75 Ohio App. 277, 60 N.E.2d 805, 807 (1945); *Zeilstra*, 417 A.2d at 308; 75A Am.Jur.2d *Trial* § 755 (1991). Whether the facts in a particular case support a finding that a party appealed a decision to the ZBA within a “reasonable time” is ultimately a question of fact. See *Long*, 60 N.E.2d at 807. To determine whether a period of time is reasonable, the interests of the party benefiting from an administrative officer’s, or a town’s, actions should be balanced against the interests of the aggrieved party appealing to the ZBA. Cf. *Keating v. Zoning Board of Appeals of City of Saco*, 325 A.2d 521, 523–25, n. 5 (Me.1974) (balancing the interests of the parties receiving building permits against the interests of the aggrieved party).

[11, 12] A reasonable time is “that time which upholds and saves to each of the interested parties the rights to which they are entitled and protects them from injury or loss.” *Meers v. Frick-Reid Supply Corporation*, 127 S.W.2d 493, 498 (Tex.Civ.App.1939) (discussing personal property right). Some factors relevant to determining the reasonableness of a period of time include the knowledge of the parties, their conduct, their interests, the possibility of prejudice to any party, and any reason for the delay in appealing. Cf. *Healey*, 140 N.H. at 241, 665 A.2d at 368 (discussing unreasonable delay necessary to finding laches). Although the party relying on an administrative officer’s action is entitled to know when the order becomes final, the parties objecting to the officer’s action should be given sufficient time to file an appeal to protect their interests. *Keating*, 325 A.2d at 523–25. In this case, the Tausanovitchs were aware that Crowe was planning to build a bed and breakfast when they purchased some of Crowe’s land. The ZBA further found that the notices provided to the petitioners for the hearings held in February and March 1995 complied with the administrative procedures in effect at that time. Additionally, the planning board approval of Crowe’s proposed subdivision of the parcel stated that Crowe could build a bed and breakfast on lot 1 if he obtained the necessary building permit. Even if the actu-

al notices from the ZBA and planning board failed to alert the petitioners that they should act, the petitioners were on constructive notice that the ZBA approved the special exception and building permit for Crowe to build a bed and breakfast.

The petitioners stated in their motion for reconsideration to the superior court that they “did not fully comprehend that construction of the new bed and breakfast facility” had commenced. They also stated in their objection to Crowe’s motion to dismiss to the superior court that “[d]uring the months preceding and the weeks following the issuance of the building permit, Crowe’s contractors were engaged in site clearing activities. . . .” Despite the petitioners’ admissions, they claim that they could not observe the extent of construction from the road and that they believed that the construction was for the renovation of an existing residential structure. We find their arguments unpersuasive, especially in light of their admission that a building permit, which they had observed to be blank, was posted on Crowe’s property. The record is not clear whether the petitioners ever attempted to clarify the purpose of the permits.

[13] The facts support a conclusion that the petitioners had actual or constructive notice in June about the building permit and Crowe’s construction activities. Accordingly, we agree with the superior court’s finding that the petitioners’ “decision to wait until August 6, 1996 to file their appeal does not constitute filing within a reasonable time.”

After further review of the record, we conclude that the parties’ remaining arguments are without merit and warrant no further discussion. See, e.g., *Vogel v. Vogel*, 137 N.H. 321, 322, 627 A.2d 595, 596 (1993).

*Affirmed.*

All concurred.

