

**THE STATE OF NEW HAMPSHIRE
HOUSING APPEALS BOARD
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**CASE NAME: Brady Sullivan Prospect Hill, LLC v. City of Lebanon
CASE No.: PBA-2021-06**

INTERIM ORDER

The matter before the Housing Appeals Board is an appeal of the City of Lebanon (the "City") Planning Board's 08 March 2021 denial of Brady Sullivan Prospect Hill, LLC's (the "Applicant") request for an extension to continue construction of Phase II of its two-phase residential project development referred to as "Prospect Hill," located in the Lebanon, New Hampshire.

FACTS:

In April of 2005, M&M Equities, LLC obtained approvals from the Lebanon Planning Board for a planned unit residential subdivision known as Prospect Hill. An amendment to the project was approved by the Planning Board in September of 2005. A plan of Phase I for the subdivision was recorded in December of 2005. At this time, M&M Equities, LLC began construction of infrastructure and homes in Phase I. The Applicant purchased the project in November of 2010. At this time, Phase I was partially complete. Phase II of the project was approved in 2007. On 14 April 2014, an amendment adjusting the project timeline for Phase II was approved by the Planning Board. The approved amended timeline required the Applicant to achieve active and substantial development on Phase II within two (2) years and substantial completion within five (5) years.

The Applicant did not begin construction on Phase II by 14 April 2016 per the approved timeline and did not request an amendment to the timeline prior to this date. For this reason, the Applicant submitted a new application for Phase II to the Planning Board on 12 September 2016. This application was approved by the Planning Board on 14 November 2016, including a

new timeline which required active and substantial development of Phase II by 14 November 2018, and substantial completion by 14 November 2021. Per this approval, completion of all Phase I construction and inspections was required prior to the commencement of any construction in Phase II.

By 14 November 2018, construction of Phase II had not yet commenced. The Applicant requested an extension to the Phase II deadlines. The Planning Board granted this extension on 10 December 2018, with new deadlines of 10 June 2019 to record the project plat, active and substantial development by 10 December 2020, and substantial completion by 10 December 2023. The Planning Board also noted in their decision that the Applicant was still subject to all remaining applicable conditions of the 14 November 2016 approval. The Applicant recorded the plat on 12 June 2019 and posted the required performance bond for Phase II.

On 23 March 2020, the City sent an e-mail reminding the Applicant that the active and substantial development deadline of 10 December 2020 was approaching and provided a list of the conditions of approval that still had to be satisfied prior to commencing any site work for Phase II.

On 22 July 2020, the Applicant contacted the City expressing concerns about its ability to meet impending deadlines due to challenges associated with the state of emergency associated with the COVID-19 pandemic.

In response to an inquiry by the Applicant on 06 January 2021, the City informed the Applicant that the deadline for active and substantial development had passed and that the project was in default. The City further informed the Applicant that they would be required to either demonstrate compliance with the Planning Board's 10 December 2018 Notice of Action, or submit an application to the Planning Board requesting an extension.

The Applicant filed an extension request and waiver requests to relax the requirement in the Subdivision Regulations that extensions be requested prior to the expiration of a deadline

(Section 14.1.B. I .c) and the requirement for substantial completion to be achieved within five (5) years of the 2016 project approval (Section 14.5.A). The Planning Board held a hearing on 08 February 2021, at which the 10 December 2020 deadline for submittal to request an extension was waived. The hearing was continued to 08 March 2021, at which the Planning Board voted to deny the Applicant's request for extension, citing "...the lack of active and substantial development or building by December 10, 2020, and not finding good cause for such lack of activity." (CR at 377). This appeal to the Housing Appeals Board followed.

LEGAL STANDARDS:

The legal standards for review of a Planning Board decision under RSA 677:15 are well established. "The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable." RSA 677:15, V; *Durant v. Town of Dunbarton*, 121 N.H. 352, 357 (1981). The burden of establishing that a determination of a Planning Board was unlawful or unreasonable lies with the appealing party. *K & P, Inc. v. Town of Plaistow*, 133 N.H. 283, 292 (1990). See also, RSA 679:9.

DISCUSSION:

The issue before the Housing Appeals Board is whether the City of Lebanon Planning Board denial of the Applicant's request to extend the time for substantial completion of Phase II of its residential housing project was illegal or unreasonable by balance of the probabilities. RSA 679:9, II.

A review of the facts presented discloses that: 1) based upon the Certified Record, the Lebanon Planning Board has not done anything illegal; and, 2) the focus of this case is whether the Planning Board's unwillingness to grant a further two-year extension as allowed by RSA 679:39 was unreasonable.

Under subparagraph I(a) of RSA 679:39, a subdivision approval is protected from changes to subdivision regulations, site plan review regulations, and zoning ordinances if the following conditions apply:

- (a) Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved subdivision plat within 24 months after the date of approval, or in accordance with the terms of the approval, and, if a bond or other security to cover the cost of roads, drains, or sewers is required in connection with such approval, such bond or other security is posted with the city, town, or county in which there are located unincorporated towns or unorganized places, at the time of commencement of such development;
- (b) Development remains in full compliance with the public health regulations and ordinances specified in this section; and
- (c) At the time of approval and recording, the subdivision plat or site plat conforms to the subdivision regulations, site plan review regulations, and zoning ordinances then in effect at the location of such subdivision plat or site plan.

The statute goes on to say:

III. The planning board may, as part of its subdivision and site plan regulations or as a condition of subdivision plat or site plan approval, specify the threshold levels of work that shall constitute the following terms, with due regard to the scope and details of a particular project:

- (a) "Substantial completion of the improvements as shown on the subdivision plat or site plan," for purposes of fulfilling paragraph II; and
- (b) "Active and substantial development or building," for the purposes of fulfilling paragraph I.

Finally:

IV. Failure of a planning board to specify by regulation or as a condition of subdivision plat or site plan approval what shall constitute "active and substantial development or building" shall entitle the subdivision plat or site plan approved by the planning board to the 5-year exemption described in paragraph I. The planning board may, for good cause, extend the 24-month period set forth in subparagraph I(a). (Emphasis supplied.)

As the facts reveal, this project was to be developed in two (2) phases. Essentially, both phases are separate and distinct from each other. Specifically, the infrastructure work and initial construction could be, and was, commenced for Phase I, while Phase II never "got off the ground."¹ As a result, the Applicant was required to approach the Planning Board under

¹ However, the pump station and location of utilities in easement areas provided by the Applicant, while "separate" from Phase II, would be beneficial to Phase II if Phase II is constructed. (CR at 88).

RSA 674:39, IV, to request, “for good cause, an extension to the 24-month period set forth in subparagraph I(a)” of the referenced statute.²

Prior to the 2021 extension denial, this same relief was previously granted by the Planning Board to give the Applicant additional time to commence active and substantial development of Phase II improvements. This the developer failed to do, which resulted in this appeal application being filed with the Housing Appeals Board after the most recent extension request was denied by the Planning Board on 08 March 2021.³

This case rests on two words: “good cause.” Unfortunately, there is no clear definition of those words in RSA 674:39, IV, which states: “The planning board may for good cause extend the 24-month period set forth in subparagraph I(a).” (Emphasis supplied). A further search of various statutes also discloses no good legislative assistance. New Hampshire case law also does not provide clear, focused assistance in applying the “good cause” allowance contained in RSA 674:39, IV.⁴ Thus, a good starting point may be to try to define this concept and then to apply it to available facts.

Black’s Law Dictionary 251 (9th ed. 2009) defines “good cause” as “a legally sufficient reason” or “the burden placed on a litigant to show why a request should be granted or an

² The Housing Appeals Board acknowledges the Applicant’s argument that they have a “vested right” to complete Phase II of the project; thus, no RSA 674:39 extension is needed. A review of the facts discloses no reasonable basis for that contention. Under the City’s ordinance and regulations, the two phases are separate. While money spent on the design of Phase II may be considered in a “good cause” request, this factor does not trigger Phase II vesting. *See, Piper v. Meredith*, 110 N.H. 290 (1970).

³ The Housing Appeals Board notes that throughout the previous 2-year extension, the City provided updates regarding the status of the time limit to remind the Applicant of its obligations. In spite of these reminders, the Applicant failed to meet the requirement to request a further extension within the appropriate timeline allowed by the City’s regulations. The Applicant should have made a request for an extension prior to the 10 December 2020 substantial completion date and failed to do so. However, at the Planning Board meeting on 08 February 2021, the Planning Board did waive that requirement in order to consider the Applicant’s request for an additional 2-year extension. The fact that the Applicant did not file a timely RSA 674:39 extension request should not be considered in evaluating “good cause” since the Planning Board granted a waiver of the time limit on 08 February 2021.

⁴ In *Carr v. Town of New London*, 170 N.H. 10 (2017), the Supreme Court in a tax abatement case considered “good cause” in evaluating the request. While the final result in the case was based on an objective date (a “...fire related building loss occurring after April 1 may constitute ‘good cause’ under RSA 76:16...”) it cited *Barksdale v. Town of Epsom*, 136 N.H. 511 (1992) for the proposition that “good cause” is not confined to financial inability. The Supreme Court further cited *Briggs Petition*, 29 N.H. 547 (1854), which allowed a “good cause” finding for “other misfortunes” and allowed the responsible decision maker a liberal framework to “...promote equitable resolutions.” *Id.* at 551-554.

action excused.” Put in slightly different terms: a reason for taking action or failing to take an action that is reasonable and justified when viewed in the context of surrounding circumstances.⁵

The Housing Appeals Board believes that “good cause” is a subjective concept based upon fundamental fairness, which must be carefully evaluated.⁶ That said, the factors that should be explored in determining whether “good cause” exists should be objective and free from underlying prejudice and emotions with the responsible agency focusing on the facts in making any decision.⁷

Oftentimes, when the words “good cause” are considered, the decision is an easy one. As an example, if one of the litigants in a legal matter is hospitalized the day before their trial, should the matter be continued for “good cause?” Of course it should, since this was an unexpected event and if the trial is not continued, it would be fundamentally unfair and unjust. Also, what if an attorney fails to file an appearance to preclude their client from being defaulted in a civil court action? Does it make a difference if the attorney “just forgot,” or whether there may have been a death in the attorney’s family a few days prior to the deadline? While the actual “good cause” event to be considered is exactly the same—failure to prevent the client from being defaulted—the underlying facts are somewhat different and may trigger a different analysis of “good cause” when applied to a motion or request to file a late appearance.

In the case before the Housing Appeals Board, a number of factors are in play; first among these are the several RSA 674:39 extensions granted by the Planning Board and the continued failure of the Applicant to focus on necessary statutory compliance to protect Phase II of the project from being subject to zoning or planning changes. However, should that factor have been considered in evaluating the “good cause” argument heard by the Planning Board

⁵ See, *Averbeck v. State*, 791 N.W. 2d 559 (Minn. App. 2010).

⁶ While RSA 674:39, IV outlines the extension procedure, it does not define “good cause.” But this is not fatal to a “good cause” analysis since “[t]he necessary specificity...need not be contained in the statute itself, but rather, the statute in question may be read in the context of related statutes, prior decisions, or generally accepted usage.” *State v. Porelle*, 149 N.H. 420, 423 (2003).

⁷ As discussed at the outset, the Housing Appeals Board finds that the City did not illegally deny the requested extension, since its own regulations clearly itemize how project phases are to be handled and the Applicant was well aware of this factor in 2016 when the renewal of Phase II needed to be approved.

on 08 March 2021? The Housing Appeals Board finds that prior-granting of an extension request should not be a factor in determining whether to grant the current extension request. The focus by the Planning Board must be on new and current facts and conditions presented by the Applicant, along with prior facts which continue to directly affect an analysis of “good cause.”

At the Planning Board meeting on 08 March 2021, the Applicant and the Planning Board had a discussion concerning the issues faced by the Applicant, together with the City’s concerns about the continued Phase II delays.⁸ Apparently, when the plan was revisited in 2016, the City zoning ordinances did not create an impediment to “re-approval” of Phase II of the project as originally proposed and approved. Since that time, the City zoning ordinances and planning regulations have been modified, which necessitates significant revision of the Phase II plan in order to allow Phase II to proceed, unless the City Zoning Board of Adjustment grants zoning relief and the Planning Board reviews and approves plan changes.⁹ This is a factor that merits consideration for at least two reasons.

First, the land area slated for development was designed as a two-phase project. This by itself is an important component in evaluating “good cause,” since funds were expended and a plan design was created and engineered for the two (2) phases. (CR at 204). To conclude that because each phase can “stand alone” disregards the original project intent and design.

Second, while the Phase I utilities do not directly service Phase II, a pump station and utilities were installed for future expansion into Phase II. Again, while this does not “link” the phases, it is a possible component of “good cause” under the Housing Appeals Board definition.¹⁰

⁸ It must be remembered that failure to comply with a substantial completion/active and substantial development requirements of RSA 674:39 does not necessarily extinguish the approval granted by the Planning Board. Essentially, if the time limits are not met, then the project is not protected from subsequent changes in subdivision regulations, site plan review regulations, or zoning ordinances.

⁹ See, Section 501 of the City of Lebanon Zoning Ordinance and Section 6.6 of the City of Lebanon Site Plan Regulations. See *also*, CR at 11 and Appendix E at 76, Appendix F at 77; Appendix B at 40, Appendix D at 38.

¹⁰ Clearly, the City’s regulations allow it to treat Phase II as a “separate” site and subdivision plan for the purposes of RSA 674:39 compliance. See, Footnote 7 and CR at Appendix A at 22.

Thus, “good cause” can include a requirement that, if the extension is not granted, the Applicant would need to re-engineer and prepare new plans for the Phase II land. While zoning and planning regulations have changed, Phase II was part of a plan approved by the Planning Board consistent with its then-existing ordinances and regulations. This is important since Phase I owners may have an expectation that what was fully approved is what will be built as well.

While emotions ran high at the 08 March 2021 Planning Board meeting, any denial of the extension for “good cause” should not be based on same. It must be viewed in light of relevant existing facts of record, including those presented by the Applicant, which included the impact of the COVID-19 epidemic. As the Planning Board pointed out, this did not prevent other developers from continuing with building projects, but, while the City may have experienced other residential development during the COVID-19 pandemic, what is central is the Applicant’s situation.

In this instance, the Applicant reduced its construction activity and evaluated where best to allocate resources. (CR at 376). What one developer may do versus what another developer may do in light of COVID-19 safety considerations can impact the availability of workers and materials in order to proceed with substantial completion of improvements. The Applicant’s base of operations and the location where construction is to be commenced is a factor that should be considered.

Along with the foregoing, the 08 March 2021 Planning Board meeting reveals that Phase I played a role in the Phase II delay. (CR at 375). As the Certified Record reflects, the Applicant was not the original developer and invested significant time and money “cleaning up” and completing Phase I issues. Thus, issues arose from the prior developer’s actions or inactions—not from the Applicant. This is a factor which continued into 2020 and should be considered since it likely impacted the Applicant’s ability to proceed during the latest extension. (CR at 375-376).

The Planning Board also referenced climate and environmental changes as reasons for voting against an extension. (CR at 376-377). While a possible concern, there was no expert evidence regarding how Phase II, as currently proposed, would contribute to climate change or cause environmental damage. While reasonable opinions based on a member's knowledge of the community are a relevant consideration, to insert these concepts into a "good cause" evaluation without some expert, scientific support is suspect.¹¹

The Town may have a right to be frustrated and concerned about the several prior Phase II extensions with no commencement of construction. However "good cause" must not be based on emotional considerations, but on relevant facts as applied to this specific extension. The prior extensions, while historical markers, should only be used in evaluating facts which still apply to the current extension request. Likewise, public and Planning Board comments about "quality of construction" or "we don't need more housing" are not relevant in examining "good cause" since, as noted, unsupported opinions should not play a role in an extension decision. (CR at 376).

In conclusion, based upon the Certified Record, the Housing Appeals Board believes an interim order is appropriate.¹² Rather than "guess" or engage in speculative assumptions, the Housing Appeals Board orders the following:

- 1) The vote denying the requested two-year extension is to be RECONSIDERED by REMANDING the RSA 674:39 request back to the Planning Board for further review consistent with this opinion. That review shall focus on "good cause" in the following manner:

¹¹ In *Derry Senior Center Development, LLC v. Town of Derry*, 157 N.H. 441 (2008), the Supreme Court held that "[a]lthough the board is entitled to rely upon its own judgment and experience in acting upon applications for site plan review, the board may not deny approval on an ad hoc basis because of vague concerns." (Citing, *Smith v. Town of Wolfeboro*, 136 N.H. 337 (1992)). "Further, the board's discussion must be based upon more than the mere personal opinions of the members." (Citing, *Condos East Corp v. Town of Conway*, 132 N.H. 431, 438 (1989)).

¹² While not statutorily required, the Housing Appeals Board notes that the 08 March 2021 vote to deny the Applicant's extension does not reference relevant facts considered. This contributes to the difficulty in evaluating the Planning Board's "good cause" analysis.

- a) The fact that the Applicant has previously requested and received plan extensions under RSA 674:39 shall not be factored into any decision.¹³
- b) Prior facts which remain relevant to the current request may be considered;
- c) Other relevant factors for consideration can include, but are not limited to:
 - i. The Applicant’s ability to have commenced substantial completion of improvements and active and substantial development of this specific project in light of existing business conditions including the impact of the COVID-19 pandemic; and,
 - ii. The current overall municipal impact, if any, resulting from the Applicant’s failure to commence construction of Phase II during the previous extension.

The above are non-exclusive items to be considered. In addition, this interim order is not intended to require the Planning Board to deny or approve the Applicant’s extension request—it is intended to be a guide in the effort to find whether “good cause” exists in making a final decision.

As part of this order, the requests for findings and rulings submitted by the City of Lebanon shall be held in abeyance. The remanded hearing shall be held within 60 days of the date of this order with costs to be paid by the Applicant. Following the hearing, certified copies of the proceedings shall be furnished to the Housing Appeals Board for review and further action.

**HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:**



Elizabeth Menard, Clerk

Date: September 28, 2021

¹³ The parties are reminded that because the Applicant was granted prior extensions does not mean a new extension request is a perfunctory matter since RSA 674:39 provides no such allowance.