

Jeffrey E. Raymond, Trustee of J&R Realty Trust v. Town of Plaistow
New Hampshire Supreme Court
Case Nos. 2022-0236
July 28, 2023

New Hampshire Supreme Court affirms that zoning boards cannot factor anticipated future noncompliance with zoning laws into its decisions, even if an applicant has previously violated the zoning ordinance at other properties.

In 2020, property owner J&R Realty Trust submitted a site plan application to the Town of Plaistow regarding a 1.18-acre lot in the town's "Commercial 1" zoning district. The plan showed an existing building to be razed and replaced with a two-story, 2,200-square-foot office building and one-and-a-half-story, 3,400-square-foot warehouse for use under lease by a home improvement business involved in the sale, service, and installation of windows, siding, roofing, decks, and gutters. The Commercial 1 district allows several uses, including "Trade Business." Upon reviewing the proposed development, Plaistow's building inspector determined the plan's proposed use constituted a "Contractor's Storage Yard" under the zoning ordinance, which is not permitted in the Commercial 1 district. The Trust appealed the inspector's ruling to the Zoning Board of Adjustment arguing that the use would be more similar to Trade Business, and also sought a variance, hoping that the use be allowed even if the decision were not reversed.

In December 2020 and January 2021, the ZBA heard these arguments. In both hearings, the prospective tenant's zoning violations at other properties were raised by ZBA members concerned that enforcement costs would be high and they could not rely on voluntary compliance, calling it "a trust issue." The property owner said that the new warehouse would create the storage space needed to cure the noncompliance. In both hearings, the ZBA decided against the application. It said that the primary use would be "industrial in nature," which it interpreted as adverse to the intent of the ordinance and refused to grant a variance. In declining to overrule the building inspector's determination that the use was Contractor's Storage Yard, the ZBA noted that the company calls itself "contractors" on its website and, commented again, it could not be trusted adhere to the zoning requirements in light of its past transgressions.

The Trust appealed to Superior Court, claiming that the ZBA's denials were insufficiently supported by the record and "influenced by improper considerations" (the prospective tenant's zoning violations at other properties). The Superior Court found for the Town of Plaistow, saying the plaintiff failed to show how the ZBA's decision violated the law or was unreasonable. The Supreme Court overturned the Superior Court's orders decision It addressed both issues: whether the proposed use is a Trade Business or Contractor's Storage Yard, and whether it was lawful and reasonable for the ZBA to consider violations at other properties.

First, the Supreme Court found that the proposed use does fall within the plain language of the zoning ordinance's definition of a Trade Business, because there would be an office building with management, sales, and retail workers, plus a showroom. The plaintiff also convinced the court that "light vehicles" including box trucks and trailers would not violate the prohibition against heavy equipment. The Supreme Court said the website's mention of "contracting work" was not dispositive and that certain types of contractors are allowed under Trade Business according to the ordinance.

Second, the Supreme Court found that "the ZBA erred in considering evidence of the purported zoning violations at the other Plaistow property when it affirmed the zoning determination..." Citing a

Connecticut case *Miklus v. Town of Fairfield*, the Court wrote that a ZBA cannot base a decision on anticipating that a company might violate the ordinance by unauthorized use later. 225 A.2d 637, 659 (Conn. 1967). The proper way to handle future violations, according to the Court, is to use the proper enforcement mechanisms when the time comes. The Court pointed to *Farrar v. City of Keene*, in which it held that arguments that a company would not use a site for the proposed and allowed use “is an issue for code enforcement,” not the ZBA. 158 N.H. 684, 692 (2009).

The Supreme Court reversed the Superior Court’s and ZBA’s decisions, ordering the site plan be treated as a Trade Business, thus making its approval likely and confirming that it conforms to the zoning ordinance.

Practice Pointer: the evidence that zoning boards are permitted to consider is limited and does not include past zoning violations at other properties by owners or prospective tenants, and decisions made on those grounds alone will be subject to overturning by the courts.