THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-00008

San-Ken Homes, Inc.

v.

NH Attorney General, Consumer Protection and Antitrust Bureau

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RULE 7 APPEAL OF FINAL DECISION OF THE
HILLSBOROUGH SUPERIOR COURT SOUTHERN DISTRICT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

Gordon J. MacDonald
Attorney General

John W. Garrigan
Assistant Attorney General
Consumer Protection & Antitrust Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-1252
(15 minutes)

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STATEMENT OF THE CASE

This case is about whether the Consumer Protection and Antitrust Bureau ("Bureau"), through its enforcement of the Land Sales Full Disclosure Act ("Act"), RSA 356-A, has the authority to require a successor subdivider to complete road improvements in a subdivision that is also subject to the oversight of a local planning board.

San-Ken Homes, Inc. ("Appellant" or "San-Ken") appealed to the Superior Court the decision of the Bureau to conditionally exempt nine subdivided lots of the Oakwood Common subdivision ("The Subdivision") in New Ipswich, N.H. from certain reporting and registration requirements of the Act, pursuant to RSA 356-A:3, II and attendant agency regulation JUS 1304.07. The Bureau granted San-Ken's exemption on the condition that San-Ken complete construction of the partially-built road servicing the subdivision, pursuant to JUS 1304.07(a)(3) and JUS 1304.07(b). San-Ken and the Bureau entered into a pre-litigation agreement whereby San-Ken agreed to bond a sum of money adequate to cover certain road improvements.

On May 29, 2015, San-Ken filed its appeal to the Hillsborough County – Southern District Superior Court pursuant to RSA 356-A:14, I. San-Ken appealed the Bureau's determinations that (1) San-Ken was a "successor subdivider" under RSA 356-A:1, V and, as such, was required to register or exempt subdivided lots before selling them to the public, given that the Bureau had previously issued a certificate of exemption for the entire subdivision to its previous developer, and (2) that San-Ken was responsible for adding a topcoat of pavement to the subdivision's single road despite San-Ken having obtained approval from the local planning board to complete the road to a lesser quality.

The parties filed memorandums of law on March 2, 2016. The court (*Ignatius*, J.) conducted a hearing on the merits on March 3, 2016, where each side presented oral argument.

The parties cited to the certified record and no additional witness testimony or documentary evidence was offered or admitted.

The court issued a written ruling on June 21, 2016. The court ruled that San-Ken failed to show by a preponderance of the evidence that the Bureau unreasonably or unlawfully determined that San-Ken was a "successor subdivider" for the purposes of registration or exemption under the Act. The court also initially ruled that San-Ken was not required to complete the subdivision's road because the Bureau cannot "disregard and countermand" the decision of a local planning board.

On July 5, 2016, the Bureau filed a Motion for Partial Reconsideration arguing that the court has misapprehended the Bureau's argument that it has the authority to require road improvements under the Act and its related regulations. San-Ken timely filed an objection to the Bureau's motion. The court conducted a hearing on the Bureau's motion on August 29, 2016. On October 14, 2016, the court issued a written ruling that granted the Bureau's motion and found that the Bureau was within its authority under RSA 356-A to require San-Ken to complete the subdivision road because the Bureau's "duty to enforce the consumer protection provisions under the approved Declaration of Subdivision is independent of the municipality's decisions to road construction and paving requirements."

San-Ken subsequently filed a Motion for Reconsideration regarding a clarification of the scope of the specific road construction standard that the court's previous order imposed on San-Ken. The Bureau timely objected to San-Ken's motion. The court granted San-Ken's motion and clarified that San-Ken was to complete the road improvements in accordance with the terms of the parties' pre-litigation escrow agreement. This appeal followed.

STATEMENT OF FACTS

A. Original subdivision by Chestnut LLC St. LLC

On December 5, 2005, 112 Chestnut St. LLC ("Chestnut LLC") obtained and recorded title to a property tract on N.H. Route 123-A in New Ipswich, New Hampshire. CR[1] 492-493, See also Hillsborough County Registry of Deeds, Book #7595, Page #471. The property was mortgaged through TD Banknorth and H.G.A. Ltd. on December 5, 2005. CR 488 – 490, 528 – 533. Chestnut LLC planned a 16-unit subdivision named Oakwood Common. CR 198-199. The subdivision plan was approved by the town on June 7, 2006. Id.

The subdivision plan included a roadway named Old Beaver Road. Id. Chestnut LLC posted a surety bond through TD Bank payable to the Town of New Ipswich guaranteeing the construction of Old Beaver Road in accordance with N.H. Admin. R. Jus. 1304.07(a)(3) and local requirements. An irrevocable standby letter of credit for $301,823 was issued by T.D. Bank for the full amount on December 5, 2005. CR 592.

On August 11, 2006, Chestnut LLC applied to the Bureau for a certificate of exemption from the subdivider registration requirements of RSA 356-A. CR 463-673. Chestnut LLC stated in its application for exemption that, "The roadway servicing the subdivision ("Old Beaver Road") shall be constructed by the Applicant and held as a private way by the future owners of the Lots." CR 470. Chestnut LLC further stated in the application that "The road servicing the subdivision will be built to town specifications and owned and maintained by the Lot owners ..." CR 474. The town planning board requires private roads to be built to full town standards. CR 4.

On October 27, 2006, the Bureau granted the exemption for Chestnut LLC and Oakwood Common and issued a certificate of exemption. CR 674. Chestnut LLC subsequently developed and sold seven lots in Oakwood Common between 2007 and 2010. CR 4, 5. Charles Watt, owner of Chestnut LLC, made oral promises to each buyer that the road would be built to the town specifications and would be completed once all of the lots were formed and the home owners association created. CR 5-6. Town regulations state that private roads must be built to town road specifications. CR 4, 25, See also Subdiv. Regs of the Town of New Ipswich, NH, at 3:12. Town road specifications require 2" of "base course" pavement and 1" of "wear course" top-coat pavement. CR 25, See also Subdiv. Regs of the Town of New Ipswich, NH, at Appendix B:03 (P).

The homeowners have estimated that each of the first seven home buyers invested approximately $20,000 of the purchase money for their homes towards the completion of the road. CR 8. Chestnut LLC began construction on Old Beaver Road. Only approximately ½" of base course pavement was applied to form Old Beaver Road. No top-coat pavement was applied. CR 3, 6, 37-38.

B. Purchase by Appellant and Local Planning Board Hearings

On March 11, 2014, T.D. Banknorth foreclosed on the nine remaining Oakwood Common lots for mortgage default. CR 67-71. The nine lots were sold as one parcel at auction on May 13, 2014. CR 65-66.

San-Ken purchased the nine-lot parcel for $150,000. Id. San-Ken obtained the deed for the nine lots on June 17, 2014 and recorded the deed on June 19, 2014. CR 61-64. In July 2014,

[1] Cites to the certified case record submitted earlier to the Superior Court and San-Ken shall be made to the Bates stamped pages and shall be abbreviated "CR" for the purpose of this pleading.

San-Ken applied for a building permit from the Town of New Ipswich. CR 2, 4. The New Ipswich Board of Selectmen, acting on the recommendation of the town Planning Board, denied the permit until Old Beaver Road could be completed to the town road standards. CR 2, 15, 41, 42. The Planning Board requested an inspection of Old Beaver Road to determine the amount of the bond needed to cover the remaining road work. CR 2.

On August 4, 2014, Brown Engineering, LLC submitted a report on the condition of Old Beaver Road to the New Ipswich Planning Board. The report stated that the base pavement was only ¼" to ½" thick, well below the town standards. The report noted that Old Beaver Road did not have the required 1" top coat of pavement. Brown Engineering estimated that adding 1 ½" of base course and 1" of top coat to the existing road would cost $83,783 and recommended that at the very least a 1" top coat of pavement should be added for a cost of about $43,446. CR 37-39.

San-Ken and some of the Oakwood Common property owners appeared before the New Ipswich Planning Board on August 6, 2014. CR 4-7. The Planning Board acknowledged that the road construction bond put up by the prior subdivider had been lost through the foreclosure and sale process. CR 4. Counsel for San-Ken argued that it was only an "assumption" that San-Ken is a subsequent subdivider and therefore responsible for bonding the remaining road construction work. CR 3, 4. The town attorney suggested that San-Ken could move the Board to amend the original town subdivision plan with respect to the required road standards. Id.

San-Ken and property owners again appeared before the town Planning Board on September 3, 2014. CR 8-14. San-Ken submitted a request to modify the original road requirements. CR 8. San-Ken argued that it can only be considered an individual owner of nine lots and not the subdivider of the remaining nine lots. CR 8-9. The property owners objected,

stating that they were told when they purchased homes in Oakwood Common that the developer was responsible for the road and that San-Ken is now in the same position as Chestnut LLC. Id. The town's attorney took the position that San-Ken is not the developer and that the town is not a guarantor of the completion of road improvements in general. CR 10. The town attorney added that "the Planning Board is not the advocate of the existing owners." Id.

On September 17, 2014, San-Ken asked the Board to amend the local subdivision plan for Oakwood Common to withdraw the requirement that Old Beaver Road meet town road standards. San-Ken proposed a plan to apply a sealant and to fill in a number of potholes in the road. CR 16.

The town's attorney produced a motion to amend Oakwood Common's prior town subdivision approval. The motion read, in part:

> The existing road constructed within the subdivision (with one course of asphalt), is satisfactory as a private road, with no second asphalt course required, subject to the following improvements to be performed within 90 days from the date of this approval by and at the expense of the owner of the 9 remaining unimproved lots in the subdivision (presently San-Ken Homes, Inc.):
>
> - Fix cracks by cleaning and filling
> - Seal coat the entire road
> - Repair all potholes
>
> (CR 18)

The Board sided with San-Ken over the objections of the existing homeowners and voted to adopt the motion to amend the town subdivision approval. The Board required the improvement work to be approved by the town road agent. CR 17. The town road agent has acknowledged that the road is in bad condition and will require major repairs in five to six years. CR 27. San-Ken completed the sealing and pothole repair on or around October 22-24, 2014. CR 27, 739.

C. San-Ken's Application to the Bureau for Exemption

On November 11, 2014, San-Ken applied to the Bureau for a certificate of exemption under RSA 356-A:3, II and JUS 1304.07. CR 254-332. San-Ken sought exemption for the nine lots in Oakwood Common. CR 256. San-Ken's application included the plan of Oakwood Common and Department of Environmental Services approvals for Oakwood Common. CR 300, 309. San-Ken submitted advertisements for the lots which referred to the lots as being in the Oakwood Common subdivision. CR 387.

On April 21, 2015, San-Ken and the Bureau entered into a 24 month escrow agreement under which San-Ken secured a bond for $50,106 to guarantee completion of Old Beaver Road if San-Ken's appeal litigation proved unsuccessful. CR 812-821. This completion includes adding a 1 ½" pavement course on top of the existing pavement in accordance with the recommendation in the Brown Engineering report. CR 37-39, 812, 816-817. The bond is payable to the Bureau. CR 74-75, 812, 816-817. San-Ken's obligation to post the bond for the road improvements was a prerequisite to the issuance of a certificate of exemption to San-Ken. On May 1, 2015, the Bureau issued a certificate of exemption for nine lots in Oakwood Common to San-Ken. CR 77.

SUMMARY OF THE ARGUMENT

A. The trial court properly ruled that the Bureau and local planning boards have concurrent jurisdiction over subdivision regulation.

The trial court correctly found that the Bureau and local planning boards share concurrent, but distinct, oversight authority over the subdivision approval and development process. The Act is a comprehensive statute that protects consumers who purchase subdivided lands. The Act and Title LXIV are complementary statutes whereby the Bureau administers the Act to enforce consumer protection laws and the local planning board administers Title LXIV to oversee the municipal planning and safety aspects of subdivision development.

B. The trial court properly ruled that the correct standard of review for a Superior Court appeal of a Bureau decision in the administration or enforcement of the Act is a preponderance standard akin to the standard applied to appeals of other state agency decisions under RSA 541.

The trial court found that RSA 356-A:14 is silent on a standard of review for appeals to the Superior Court. The "as justice may require" language included in 356-A:14 is more accurately viewed as determining the scope of equitable remedies available to the court rather than as a standard of review or a burden of proof. The court did not err in adopting a "clear preponderance" standard, similar to the standard for appeals in RSA 541, because the nature of this appeal is most similar to Superior Court appeals of the administrative decisions made by other state agencies.

The trial court appropriately extended deference to the Bureau's interpretation and application of the Act and its rules. By statute, the Bureau is charged with the administration and enforcement of the Act and should be granted deference akin to the deference that is afforded to other state agencies in appeals filed under RSA 541 arising from the exercise of judgment and

the decisions that those agencies have made in the administration and enforcement of the statutes that they oversee.

C. The trial court properly ruled that San-Ken is a successor subdivider.

The trial court correctly ruled that San-Ken is a successor subdivider because the factual record demonstrates that San-Ken is developing and selling lots in the subdivision to residential homeowners and has the same legal rights to develop and sell lots as the original subdivider had. San-Ken, therefore, stands in the same relation to the subdivision as the previous subdivider.

D. The trial court correctly ruled that the Bureau had the authority and jurisdiction to order San-Ken to complete construction of the subdivision road.

The trial court appropriately ruled that the Bureau was within its authority and jurisdiction to order San-Ken to complete the subdivision road because the Bureau has the authority under the Act to protect purchasers by insisting that the subdivider complete certain road improvements that were originally promised to the purchasers. The Bureau is not bound by the decision of the local planning board to not accept further surety to guarantee the completion of the road.

ARGUMENT

I. THE TRIAL COURT PROPERLY RULED THAT THE BUREAU AND LOCAL PLANNING BOARDS HAVE CONCURRENT JURISDICTION OVER SUBDIVISION REGULATION

A. The Land Sales Full Disclosure Act is comprehensive and provides protection to consumers who purchase property from subdividers.

Understanding the structure and function of the Act and the Bureau's role in administering and enforcing the Act provides context for the propriety of the Bureau's actions, and the appropriateness of the trial court's judgment, in this case. The State will first present an overview of the Act and an illustration of its functionality before turning to San-Ken's arguments attacking the trial court's rulings.

The Act requires that subdividers of subdivided lands seek either registration under the Act or exemption from the provisions of the Act from the Bureau prior to disposing of subdivided lots to residential consumers. RSA 356-A:4, I. The Act further requires that subdividers provide public offering statements to purchasers. RSA 356-A:4, II. These statements contain disclosures about the infrastructure and amenities that the subdivider promises to complete as part of the sales offer to subdivision lot purchasers. RSA 356-A:6, JUS 1307. The Act grants purchasers the right to cancel their purchase within five days of the contract date. RSA 356-A:4, II.

The Attorney General has the authority to create regulations to exempt subdivisions from the Act if "... the enforcement of all of the provisions of this chapter with respect to such subdivision or lots, parcels, units or interests is not necessary in the public interest and for the protection of purchasers..." RSA 356-A:3, II. These regulations are encapsulated in JUS chapter

1300. The regulations provide, among other things, guidance and rules relating to several types of exemptions, the forms that subdividers need to use in their applications, and the information that subdividers need to provide in their applications. JUS 1300 – 1311.

The Act is structured so that subdividers of larger developments must comply with more comprehensive application, disclosure, and annual reporting requirements than subdividers of smaller subdivisions. RSA 356-A:3, I – II, RSA356-A:5, II. The Act requires that subdividers of subdivisions with more than 50 lots apply for registration. Id. The application for registration requires the subdivider to provide significant financial and business record disclosures to the Bureau. RSA 356-A:5, I. A subdivider must provide copies of all local and state level approvals relating to the subdivision. RSA 356-A:5, I(n).

The Act and its related regulations provide for several exemptions for subdivisions of more than 15 units up to 50 units in size. RSA 356-A:3, I-a – II, RSA 356-A:5, II, JUS 1304.3, JUS 1304.7, JUS 1304.10. The exemptions allow subdividers to provide less information to the Bureau in the application process and allow subdividers to forego certain ongoing disclosure requirements that registered subdivisions must provide. Id. There is a separate exemption for the sale of lots to other developers. JUS 1305.02. The Act does not apply to subdivisions with fewer than 15 units. RSA 356-A:3, I. Successor subdividers are required to submit a separate application to the Bureau, though they may incorporate contents of the previous subdividers application by reference. JUS 1306.19.

The Bureau reviews the applications for registration or exemption in accordance with the statutory strictures of RSA 356-A:7 to determine:

1) That the subdivider can convey or can reasonably be expected to convey subdivision units in compliance with the terms of the offer to the purchaser;

2) That there are reasonable financial assurances that all proposed improvements will be completed as represented;
3) That the general promotional plan is not false or misleading, complies with the standards prescribed by the Attorney General's rules, and affords full and fair disclosure;
4) Whether the subdivider has been convicted of any crime or been subjected to any injunctions involving land dispositions; and
5) That the public offering statement requirements have been satisfied.

The Bureau creates and maintains a factual record of each application for registration or exemption by compiling the documents provided by the applicant and any other records that the Bureau may uncover during its investigation including deed records, recorded plans, or details about other projects that the subdivider has worked on. RSA 356-A:4, I, RSA 356-A:14, III.

The Bureau has ongoing oversight authority over subdivision developments. Certain subdividers must provide annual progress reports to the Bureau. RSA 356-A:9. All subdividers must seek the Bureau's approval before instituting any material change to their plan for development or sales. RSA 356-A:8, V, JUS 1306.18. Additionally, any successors to the original subdivider must be registered or exempted under the Act before they can sell lots to consumers. RSA 356-A:1, V, RSA 356-A:4, I, JUS 1305.05(a)(5).

The Attorney General has the authority to conduct investigations to determine whether any person has violated the Act or its rules. RSA 356-A:11. On conclusion of an investigation, the Attorney General may bring a civil action to enjoin the subdivider and enforce compliance with the Act. RSA 356-A:10, II. The Attorney General may also petition the court to appoint a receiver to take charge of the subdivider's business. RSA 356-A:10, III-a. Finally, a violation of the Act or any rule adopted under it constitutes a class-B felony. RSA 356-A:15.

The following illustration demonstrates the functionality of the Act, which coincides with local land use boards, as intended by the legislature.

Subdivider Smith purchases a large parcel of land and creates a 16-unit subdivision with two roads, Red Street and Blue Street, using proper local land use processes and recording requirements. Units #1-8 are located on Red Street and Units #9-16 are located on Blue Street. The subdivider then submits an application for exemption to the Bureau pursuant to RSA 356-A:3, II and regulation JUS 1304.07. After conducting its factual and legal review, see, e.g., RSA 356-A:7, the Bureau issues a certificate of exemption on the condition that the subdivider complete the Red and Blue Streets in accordance with RSA 356-A:3, II and regulation JUS 1304.07(a)(3). As part of the its core function during this review process, the Bureau approves Subdivider Smith's proffered public offering statement which assures residential buyers that the streets will be paved to the town's standards as of the date of approval. See, e.g., RSA 356-A:6.

Pursuant to the approved public offering statement, Subdivider Smith sells Units #1-8 at a price that incorporates the promised amenities and infrastructure and completes Red Street as so promised. Subdivider Smith subsequently runs into financial constraints and no longer has enough financing to pave Blue Street to the standards incorporated in the RSA 356-A approval process. The subdivider secures approval from the local land use board to apply lesser quality standards to Blue Street (such as a gravel road) and then files a material change request with the Bureau pursuant to JUS 1306.18.

The Bureau reviews the request and determines, in its discretion under RSA 356-A:3, II, that the material change to Blue Street does not retroactively affect the purchasers on Red Street because those purchasers received the completed Red Street that they were promised and as they had purchased. The Bureau grants the material change request on the condition that Subdivider

Smith update its public offering statement going forward to reflect the road condition changes. Accordingly, residential purchasers of Units #9-16 along Blue Street are fully aware at the time they negotiate a purchase price that they will live on a gravel road and not a paved road.

By contrast, in the facts underlying the present case, Oakwood Common has a single road servicing all 16 units. Chestnut LLC's application to the Bureau asserted that the road would be built to the town standards, which the Bureau understood to mean the town standards as of the date of the application. After Bureau approval, Chestnut LLC sold seven units on the promise of a complete road. The record shows that the purchase prices reflected the promised road standards. San-Ken's request retroactively injures the seven purchasers, who would not receive the quality of road that they were promised. The Bureau, in exercising its statutory discretion to "protect purchasers," granted, in effect, a material change to the existing subdivision approval under RSA 356-A whereby the existing purchasers will receive a road of sufficient quality to protect their interests.

B. The local planning board and the Bureau have separate, but concurrent, jurisdiction over different areas of subdivision regulation.

The Bureau is not a "super planning board." Appellant's Brief at 20. Rather, the Bureau and the planning board govern two separate areas of subdivision development and approval. The planning board, through Title LXIV and, specifically, RSA 674, has the authority to regulate subdivisions to "[p]rovide against such scattered or premature subdivision of land as would involve danger or injury to health, safety, or prosperity by reason of the lack of water supply, drainage, transportation, schools, fire protection, or other public services, or necessitate the excessive expenditure of public funds for the supply of such services" and to "[p]rovide for the harmonious development of the municipality and its environs." RSA 674:36, II(a) - (b).

Conversely, the Bureau, through administration and enforcement of the Act, has the sole jurisdiction to regulate subdivision developers for the purposes of consumer protection. RSA 356-A:2. The Act functions by requiring subdividers to submit to the Bureau's registration process and oversight authority. RSA 356-A:4, I. Subdividers must disclose their plans and promises to purchasers in writing. RSA 356-A:4, II. The Bureau is tasked with reviewing developer finances and project records to determine if the developer is capable of delivering on its promises to the purchasers. RSA 356-A:7. Simply put, the Act functions to assure that promises made by subdividers are kept.

San-Ken argues that the Bureau has interjected itself in the local planning process and has "manipulated" that process. Appellant's Brief at 24. To the contrary, the Bureau took no part in the local planning board approval process. The Bureau does not have the authority to re-draw lot lines or road lines, or to weigh in on whether the subdivision has adequate sewers, fire hydrants, street lights, and electrical lines to ensure the safety of the residents. The Bureau does, however, have the authority to ensure that promises made to buyers about such infrastructure and amenities are kept by subdividers in the interest of consumer protection.

San-Ken also argues that local planning boards have "exclusive" control over subdivision regulation and that the legislature could not have intended for subdivisions to be subject to two different approval processes. Appellant's Brief at 22, 27. San-Ken states that "The Bureau's position in this case creates a two-prong subdivision approval process where a single prong currently exists." Appellant's Brief at 27. This argument is without merit as the continued existence of both the Act and RSA 674 in New Hampshire law shows, on its face, that the legislature did intend for two different approval processes. The Act was signed into law in 1970 while RSA 674 was enacted in 1983. See N.H. Laws 1970, 55:1, N.H. Laws 1983, 447:1. The

legislature was fully aware of the requirements of the Act at the time it enacted RSA 674. The legislature could have repealed the Act in 1983, but did not, and, as such, the two processes work concurrently. The legislature created a two-pronged subdivision approval process 34 years ago. The Bureau simply enforces one of the prongs, the Act, which has been in existence for 47 years.

Other state agencies also share regulation over subdivisions for other areas of concern. For instance, NH DES must approve the subdivision's subsurface waste system plans before a developer can begin construction. See RSA 485-A:29-44 and ENV-WG chapter 1000. San-Ken's application for exemption acknowledges and discloses several other government agency approvals for the Oakwood Common subdivision including NH DES Subsurface Systems Bureau approval for subdivision septic systems, NH DES Wetlands approval for dredging, NH DOT approval for construction of entrance to subdivision, and US Army Corp of Engineers authorization to conduct wetlands dredging and filling. CR 261, 300.

San-Ken argues that the more "specific" statute, RSA 674, must control over the Act based on the Bureau's reliance on a "statement of general purpose" that the Bureau has the authority to "protect purchasers." Appellant's Brief at 25. San-Ken's brief misconstrues the Bureau's quote. The quoted language does not come from a general purpose statement but rather is a required item from the specific statute and regulation, RSA 356-A:3,II and JUS 1304.07, under which San-Ken applied for exemption. San-Ken does not provide any further evidence that RSA 674 is somehow more "specific" than the Act. To the contrary, a plain reading of the Act and its associated regulations show that the Act is both specific and detailed.

A local planning board cannot waive state consumer protection regulations because consumer protection is explicitly a state function. The Bureau has the exclusive authority to administer and enforce numerous statutes that protect the consumers of this state. See RSA 21-

M:9. San-Ken here is arguing that, in effect, the town should have the authority to interject itself in the Attorney General's consumer protection-based review and approval process.

The State is not contesting that planning boards do have exclusive jurisdiction over the orderly planning of the municipality to protect against "...danger or injury to health, safety, or prosperity..." RSA 674:36, II(a). However, the Bureau has exclusive jurisdiction to prevent and punish unfair and deceptive acts against consumers, just as the Department of Environmental Services ("NH DES") has the exclusive jurisdiction to approve subsurface systems and enforce environmental protection statutes. All of these departments and authorities can enforce their laws, within their exclusive jurisdictions, in the context of a subdivision. As such, San-Ken's argument that the planning board, and only the planning board, has exclusive control over all facets of subdivision permitting and development cannot hold true.

C. San-Ken's position would, if given effect, render the consumer protections guaranteed by RSA 356-A meaningless.

San-Ken's position poses a grave risk to the effectiveness of the consumer protections guaranteed to subdivision home purchasers by the Act.

The only way for consumer protection laws to be effective is by expressly not allowing bad actors opportunities to circumvent them. If San-Ken's arguments are affirmed, several avenues for developers to either skate around, ignore, or directly frustrate the Act would open up. San-Ken's interpretation of the Act and the planning board statutes would allow a subdivider to represent to the Bureau and early purchasers that significant infrastructure will be completed in a timely manner. However, the subdivider would be free to then return to the local board and lobby to amend the local approvals to vacate or lower the infrastructure promises. The Bureau

would be powerless to protect the purchasers and the planning board's judgment would handcuff the Bureau's consumer protection authority.

Contrary to San-Ken's belief, "chaos" between the Bureau and local planning boards will not ensue if the Court affirms the judgment of the trial court. The Act and Title LXIV have existed cooperatively for over 30 years. The fact that this is, as far as the State is aware, the first case raised to this court regarding a confrontation between the Act and Title LXIV evidences the fact that there has been little "chaos" between the Bureau and municipal authorities.

II. THE TRIAL COURT CORRECTLY ADOPTED A CLEAR PREPONDERANCE STANDARD OF REVIEW AND PROPERLY GRANTED DEFERENCE TO THE BUREAU FOR SAN-KEN'S APPEAL TO THE SUPERIOR COURT UNDER RSA 356-A:14

A. A clear preponderance standard is the most appropriate standard to apply in this case because appeals under RSA 356-A:14 are most similar to appeals of other state agency administrative decisions under RSA 541.

The trial court properly adopted a clear preponderance standard of review to San-Ken's Superior Court appeal in this matter. RSA 356-A:14 is silent on a standard of review and a clear preponderance standard is the most appropriate standard to apply in light of the statutory nature of the Bureau's authority under the act and is similar to the standard applied to appeals from other analagous regulatory administration and enforcement decisions of other state agencies.

The standard for determining whether the Bureau's decision was unreasonable or unlawful is not expressly articulated in the statute. RSA 356-A:14, I and II state as follows:

> I. Any person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require.
>
> II. The filing of the petition does not itself stay enforcement of the attorney general's decision. The attorney general may grant, or the superior court may order, a stay upon appropriate terms.

"When we interpret a statute, we ascribe the plain and ordinary meaning to the words used." Appeal of Town of Seabrook, 163 N.H. 635, 644 (2012) (citing Appeal of Town of Rindge, 158 N.H. 21, 24 (2008)). Courts do not look beyond the language of the statute to determine legislative intent if the language is clear and unambiguous. Id. However, the courts "are still the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole." Id.

The first sentence of 356-A:14, I describes the right of appeal by stating that "[a]ny person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for review." The statute stipulates that the Superior Court engage in a "review" but does not provide any further guidance on what "review" means or what standards or burdens apply to that review.

The legal standard for a Superior Court appeal from the administrative decision of a state agency is well established in both statutory and common law. RSA 541:13 states:

> Upon the hearing the burden of proof shall be upon the party seeking to set aside any order or decision of the commission to show that the same is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.

This court has held that it "will not overturn agency decisions or orders, absent an error of law, 'unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable.'" Appeal of Dell, 140 N.H. 484, 487-488 (1995) quoting Appeal of Stetson, 138 N.H. 293, 295 (1995).

The most appropriate standard of review to apply in RSA 356-A:14 appeals should be one akin to the RSA 541:13 standard due to the close relation between the natures of appeals from the Attorney General's enforcement and administration of the Act and appeals taken from the enforcement and administration of other regulatory statutes by other state agencies. San-Ken has conceded that the Bureau is an administrative body. Appellant's Brief at 19. Further, it is unquestioned that the Bureau has the authority to administer and enforce the Act, and has the authority to exercise its discretion to approve or deny applications for registration or exemption. RSA 356-A:2, RSA 356-A:3, II.

Appeals from numerous other state administrative agencies are heard by the Superior Court pursuant to the RSA 541:13 standard including appeals from the Victims Compensation Board[2], Board of Registration in Medicine[3], Department of Labor[4], Public Utilities Commission[5], Land Surveyors Board[6], Trust Company Incorporation Board[7], Department of Insurance[8], and the Personnel Appeals Board[9]. Appeals from these boards and agencies are based on allegations that the boards or agencies made unreasonable or unlawful decisions in the exercise of their discretionary authority. Likewise, an appeal from the Bureau's actions in enforcing the Act, such as this present appeal, is based on allegations that the Bureau acted on an unreasonable or unlawful use of discretion.

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[2] JUS 603:3
[3] Dell at 487-488
[4] Appeal of Seacoast Fire, 146, N.H. 605 (2001)
[5] Appeal of Richards, 134 N.H. 148, (1991)
[6] Appeal of Boucher, 120 N.H. 38 (1980)
[7] Appeal of Manchester Savings Bank, 120 N.H. 129 (1980)
[8] Mannone v. Wherland, 118 N.H. 86 (1978)
[9] Appeal of Nolan, 134 N.H. 723 (1991)

B. The trial court properly granted deference to the Bureau's findings of fact and construction of the Act.

Deference to the Bureau is appropriate based on the wording in 356-A:14 regarding the appeal fact finding process and the well-established statutory and common law precedence granting deference to agencies over the statutes that they administer.

"[T]he construction of a statute by those charged with its administration is entitled to substantial deference." New Hampshire Retirement Sys. v. Sununu, 126 N.H. 104, 108 (1985). The deference afforded, however, is not absolute. Appeal of Weaver, 150 N.H. 254, 256 (2003). Courts will not defer to an agency's interpretation if it clearly conflicts with the express statutory language, Appeal of Stanton, 147 N.H. 724, 728, (2002), or if it is plainly incorrect, Appeal of Levesque, 136 N.H. 211, 213, (1992).

In a RSA 356-A:14 appeal, the Superior Court does not act as the primary statutory fact finder, but rather defers to the factual findings and records obtained and compiled by the Attorney General. RSA 356-A:14, III states that:

> Within 30 days after the service of the petition, or within further time allowed by the court, the attorney general shall transmit to the superior court the original or a certified copy of the entire record of the proceeding under review. By stipulation of all parties to the review proceedings, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional costs. The court may require or permit subsequent corrections or additions to the record.

RSA 356-A:14, IV provides further evidence of the Superior Court's statutory deference to the Bureau by allowing an appellant to present, on leave of the court, new evidence regarding the case first to the Attorney General's Office, who then has the discretion to modify its findings and present the evidence and new findings or decisions to the court. RSA 356-A:14, IV states:

> If, before the date set for a court hearing, application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that

> the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the attorney general, the court may order that the additional evidence be taken before the attorney general upon conditions determined by the court. The attorney general may modify his findings and decision by reason of the additional evidence and shall file that evidence and any modifications, new findings, or decisions with the superior court.

The language of RSA 356-A:14, III and IV explicitly shows that the Superior Court defers to the facts that the Bureau compiles rather than conducting a full evidentiary hearing.

Of note, RSA 677:6 dictates that the Superior Court grant deference to the findings of a planning board during an appeal to the Superior Court from the decisions of local planning boards[10]. RSA 677:6 states:

> In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment or any decision of the local legislative body **to show that the order or decision is unlawful or unreasonable**. All findings of the zoning board of adjustment or the local legislative body upon all questions of fact properly before the court **shall be prima facie lawful and reasonable.** The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded **by the balance of probabilities**, on the evidence before it, that said order or decision is unreasonable. (emphasis added).

This standard mirrors the agency administrative appeal standard under RSA 541:13 in that (1) the burden is on the appellant to show that the board's decision is unlawful or unreasonable, (2) the Superior Court shall grant deference to the factual findings of the board, and (3) the court must be "persuaded by the balance of the probabilities," that the decision is unreasonable or unlawful, which, in effect, enacts a preponderance standard of review. Similarly to the court's deference to the factual record compiled by the Bureau in a RSA 356-A:14 appeal, the board acts as the primary fact finder in the matter and the Superior Court defers to the board's factual findings.

In light of the significant and numerous similarities between an appeal under RSA 356-A:14 and the appeals of other administrative agency or local board decisions pursuant to RSA 541and RSA 677, the trial court properly adopted a preponderance standard of review to its "review" of an appeal under RSA 356-A:14.

C. "As justice may require" refers to the scope of remedies available to the Superior Court and does not articulate a standard of review or burden of proof for determining whether the Bureau acted unlawfully or unreasonably in enforcing the Act.

San-Ken has argued that the Superior Court should have, in effect, a totally discretionary standard of review when hearing appeals under RSA 356-A based on the language found in the second sentence of RSA 356-A:14, I that states "... as justice may require." Appellant's Brief at 11-13. However, the plain language read in the full context of RSA 356-A:14 relates to the broad scope and discretion of the equitable remedies available to the court that applies only in the event that the Superior Court finds that the Bureau has made an unreasonable or unlawful decision.

The second sentence of RSA 356-A:14, I states that "[t]he superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require." The language and context of this sentence demonstrates that its purpose is to elucidate the remedies available to the court after it has reviewed the decisions and actions of the Attorney General.

The language plainly states that the court has three distinct options on how to rule on a RSA 356-A:14 appeal. The court may, (1) affirm the decision of the Attorney General, (2) reverse the decision or action of the Attorney General, or (3) modify the decision or action of the

[10] The State raises RSA 677:6 solely as a persuasive comparison of a topically-similar situation. The State does not argue, nor concede, that RSA 356-A is subject to RSA 677 or that the strictures on planning board appeals in any way control or confine the State's authority or appeals under RSA 356-A.

Attorney General as justice may require. Given the sequential commas, the "as justice may require" phrase attaches only to the "modify" option, not to the "affirm" or "reverse" option. This language should be interpreted to mean that the court, after its "review" of the Attorney General's decisions or actions and finding by a clear preponderance of the evidence that the Attorney General has acted unlawfully or unreasonably, has the broad equitable discretion and authority to modify the Attorney General's decisions or actions as it sees necessary to carry out the ends of justice.

San-Ken cites to Tau Chapter of Alpha XI Delta Fraternity v. Town of Durham, 112 N.H. 233 (1972), a case involving a tax abatement appeal pursuant to RSA 76:17, and Del Rio v. N. Blower Co., 574 F.2d 23 (1st Cir. 1978), a case regarding a motion for costs pursuant to RSA 525:3, in support of its argument that "as justice may require" is the applicable standard of review under RSA 356-A:14. However, each of those cases demonstrate the court applying equitable discretion to the outcome of its judgment, not to the burden of proof that the parties must meet or to the evidentiary or legal standards that they must produce or prove. As in this case, "as justice may require" granted the courts broad discretion in awarding relief, but does not correspond into an applicable standard to guide the court's review.

D. San-Ken's argument for a plenary de novo standard of review for a Superior Court appeal is undercut by the legislative history of RSA 356-A:14.

San-Ken argues for a type of de novo standard to apply to RSA 356-A:14 appeals to the Superior Court. However, San-Ken's position conflicts with the legislative history of the Act.

The legislative history of RSA 356-A:14 show that the statute was originally enacted in 1970 with the following language:

> I. Any person aggrieved by a decision or action of the attorney general may, by petition, appeal from said decision or action to the superior court for a **trial de novo**. The superior court may affirm, reverse, or modify the decision or action of the attorney general as justice may require. (emphasis added). 1970 N.H. Laws, 55:1.

In 1977, the legislature passed a series of amendments to RSA 356-A, including amending the language of 356-A:14 to remove the phrase "trial de novo" and replace it with "review." 1977 N.H. Laws, 469:27.

The legislature could have freely left the "de novo" language in place if it had desired for the standard of review to remain "de novo." However, the legislature removed that phrase and replaced it with "review," which indicates that the legislature desired for the standard of review to be something other than the kind of "de novo" standard that San-Ken urges here.

As such, a clear preponderance standard, with deference granted to the Bureau, is the correct standard to apply to the Superior Court's "review" under RSA 356-A:14, I based on the plain language of the statute, the construction of the entire statutory scheme, and the similarities between RSA 356-A:14 appeals and RSA 541 appeals.

III. THE TRIAL COURT PROPERLY DETERMINED THAT SAN-KEN IS A SUCCESSOR SUBDIVIDER UNDER THE ACT

A. San-Ken is a successor subdivider because it is offering or disposing of lots for sale, it stands in the same relation to the subdivision as the previous subdivider, and San-Ken's lots are part of a common promotional plan of advertising and sale.

The trial court properly determined that San-Ken is the successor subdivider to the subdivision because it is offering or disposing of lots in the subdivision for sale to residential customers pursuant to a common plan of promotion and San-Ken stands in the same relation to the subdivision as its predecessor.

The Act requires successor subdividers to register with the Bureau prior to offering subdivision lots for sale or selling subdivision lots to non-commercial purchasers. RSA 356-A:1, VI defines "Subdivision" and "Subdivided Lands" as:

> ... any land in this or another state which is, or has been, or is proposed to be, divided for the purpose of disposition into lots, parcels, units or interests and also include any land whether contiguous or not if said lots, parcels, units or interests are offered as a part of a common promotional plan of advertising and sale; provided, however, that the terms "subdivision" and "subdivided lands" shall not include condominiums;

RSA 356-A:V defines "Subdivider" as:

> ... a person who is an owner of subdivided land or one who offers it for disposition. Any successor of the person referred to in this paragraph who comes to stand in the same relation to the subdivided lands as his predecessor did shall also come within this definition; provided, however, the term "subdivider" shall not include any homeowners association which is not controlled by a subdivider;

The Act only applies to "subdivided lands" of more than 15 total lots, parcels, or interests. See RSA 356-A:3, I(a) and JUS 1303.05. "Subdivided lands" includes the total lots, parcels, units, or interests in the entire subdivision, meaning the totality of all lots being offered as part of a "common promotional plan of advertising and sale." The total lots include each and every lot in a named subdivision, not just the lots owned or offered for sale by one subdivider. As such, a successor subdivider who owns fewer than 15 lots in an established subdivision of more than 15 total lots, that has a common promotional plan or scheme, is subject to the requirements of the Act.

The Act and its rules allow for developers to apply for several different exemptions for developments of 50 or fewer lots. The different exemptions are generally based on the population of the town or city where the subdivision is located. See e.g. JUS 1304.03, RSA 356-A:3, I-a. JUS 1305.02(a), the exemption for "Sales to Developers and Builders," gives guidance

on what type of entity or person constitutes a successor subdivider for the purposes of the statute. That rule states:

> A subdivider may dispose of subdivided lots, parcels, units, or interests, prior to being registered or exempted from registration under any other provision of these rules, to persons who will further develop or improve them and offer and dispose of them to purchasers for residential use...

Further, that rule provides that a successor subdivider must seek registration or exemption of the lots prior to offering them for sale, even if the successor subdivider plans to offer or dispose of fewer than 16 lots. JUS 1305.02(a)(5) states:

> All lots, parcels, units, or interests subject to Jus 1303.05 shall be registered or exempted by the bureau prior to offers or dispositions being made to purchasers for residential use, regardless of whether a subsequent subdivider, developer, or builder is to offer or dispose of fewer than 16 lots, parcels, units, or interests;

San-Ken has argued that it cannot be forced to seek registration or exemption under the Act because it only owns nine lots and does not surpass the 15 lot threshold. Appellant's Brief at 17-18. As discussed above, the 15 lot threshold is determined by looking at the total lots in the "subdivided lands," which include all lots that are part of a common promotional plan. Oakwood Common has 16 total lots. The entirety of the Oakwood Common subdivision is part of a singular promotional and organizational plan. San-Ken pursued local subdivision plan modification as the developer of the existing subdivision. San-Ken applied for, and received, exemption from the Bureau under the existing subdivision name. San-Ken did not seek local approval to create a new subdivision, rename the subdivision, or split the existing subdivision into two distinct developments, one with Chestnut LLC's seven lots and one with its own nine lots. Further, the original seven homeowners who purchased their lots from Chestnut LLC will be part of the same homeowners association as the nine subsequent who have, or will, purchase

lots from San-Ken[11]. In this case, San-Ken is offering subdivided lands for sale in accordance with a common scheme of advertising and promotion for the subdivision, and has come to stand in the same relation to the subdivision as the previous subdivider.

The application of the Act to successor subdividers with fewer than 15 lots avoids a situation where some successor subdividers of a large subdivision own more than 15 lots and others own fewer than 15 lots and, as a result, some homebuyers receive the five day right of rescission and the public offering statement while other homebuyers in the same subdivision do not. As an illustrative example of this effect, Sunrise Subdivision contains 100 lots. The original subdivider sells lots to six different successor subdividers, "Alan" (10 lots), "Bob" (15 lots), "Carly" (15 lots,) "Deanna" (15 lots), "Eddie" (20 lots) and "Freddie" (25 lots) who all market their lots under the Sunrise Subdivision name. Under San-Ken's reading of the statute, only Eddie and Freddie's lots would be subject to the Act. This would mean that only Eddie and Freddie would need to have their lots registered or exempted and only the 45 purchasers of Eddie and Freddie's lots would receive a public offering statement and a five day right of rescission. The other 55 purchasers of Alan, Bob, Carly, and Deanna's lots would not receive any protections under the statute despite living in the same subdivision and counting on the same infrastructure and amenities as Eddie and Freddie's purchasers. Further, the Bureau would be limited to vetting only Eddie and Freddie's financials, history, and development plan. The Bureau would be unable to review the other successor subdivider's plans even though they hold the majority of the lots in a very large subdivision.

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[11] The State is not aware of the current status of the homeowners association. On information and belief, the existing homeowners and San-Ken were in the process of creating an association at the time this litigation commenced.

San-Ken cannot be viewed simply a homeowner who happens to own nine lots. Appellant's Brief at 17. San-Ken is a corporation that seeks to develop and sell the subdivision lots. San-Ken will move on to its next development project once the lots are built and sold, and the homeowners association assumes full authority to manage the subdivision. In contrast, the seven existing homeowners are private citizens who purchased homes with the intention of residing in those homes and have no other commercial interest in the subdivision.

San-Ken argues that it cannot be considered to be in the "same relation to the land" as the previous subdivider as it does not own, and has never owned, the full fee interest in all 16 lots. Appellant's Brief at 16-17. However, the statute only requires that the successor be in the "same relation to the land." It does not require the successor to hold the same exact legal interest in all of the same land as the previous subdivider. San-Ken holds the exact same rights to develop, market, and sell the lots in the subdivision that Chestnut LLC had. San-Ken simply owns seven fewer lots than Chestnut LLC owned at inception. For all intents and purposes, San-Ken has picked up where the previous subdivider left off and stands in the exact same shoes as Chestnut LLC at the time of the foreclosure.

San-Ken argues that the Bureau's interpretation would lead to the "unjust" result of forcing a developer who purchases a single lot, for the purpose of building and selling to a consumer, to seek registration or exemption under the Act. Appellant's Brief at 18-19. However, the Act is a consumer protection statute, not a developer protection statute. The efficacy of the Act hinges on the requirement that the subdivider provide every purchaser with a five day right of rescission and a public offering statement that describes, among other things, the improvements and infrastructure that the purchaser can expect the developer to complete and the anticipated date of that completion. An absurd result would occur if all homeowners do not

receive the protections guaranteed by the Act because the developer only owns one lot in a large subdivision.

San-Ken also argues that the "... Bureau's interpretation puts the Attorney General's Office (and not the legislature) in the powerful position of determining whether or not an owner of lots must register their land under the Act, at the Bureau's whimsy and convenience, without regulatory guidance, and without providing owners with reasonable notice of the applicable legal framework." Appellant's Brief at 19. The Bureau has a statutory mandate, created by the legislature, to administer and enforce the provisions of the Act. The Act clearly lays out the definitions of "subdivider" and "subdivision," and the statute and its attendant regulations clearly list the requirements for registration or exemption under the Act. Any person or entity seeking to develop subdivided land for sale to the public has the responsibility to do due diligence to apprise themselves of the laws and regulations governing subdivisions prior to engaging in such a venture. These include local planning and zoning ordinances, environmental protection statutes and regulations, fire protection and gas line statutes, tax laws, architectural statutes, and, consumer protection statutes including the Act.

San-Ken is the successor subdivider to Oakwood Common because it is offering or disposing of lots in the subdivision for sale to residential customers pursuant to a common plan of promotion. Oakwood Common's subdivided lands contain more than 15 lots. San-Ken stands in the same relation to the subdivision as its predecessor.

IV. THE TRIAL COURT PROPERLY UPHELD THE BUREAU'S AUTHORITY TO CONDITION THE ISSUANCE OF A CERTIFICATE OF EXEMPTION ON SAN-KEN'S COMPLETION OF CERTAIN ROAD IMPROVEMENTS

A. The Bureau has regulatory authority to require road improvements as a condition of granting an exemption under JUS 1304.07.

The Bureau has the regulatory authority to protect previous and future consumers by requiring that a successor subdivider complete road improvements as a condition for issuing a certificate of exemption under RSA 356-A:3, II, JUS 1304.07(a)(3) and JUS 1304.07(b).

JUS 1304.07 is a regulatory exemption for subdivisions containing 50 or fewer lots. San-Ken applied for exemption for the nine Oakwood Common lots under RSA 356-A:3, II and JUS 1304.07. That regulation states, in relevant part:

> (a) The bureau shall exempt a subdivision from the registration and annual reporting requirements of RSA 356-A:4, I and RSA 356-A:5 through RSA 356-A:9 if the following conditions are met:
>
> ...
>
> (3) **If the streets or roads providing access to the subdivision and to the lots, parcels, units, or interests for which exemption is applied are not complete at the time the application is filed, the subdivider shall post surety acceptable to the town or city as follows:**
>
> **a. The surety shall be in the full amount of the cost of completing the streets or roads to assure completion to local standards** and;
>
> b. The surety shall be in the form prescribed by Jus 1304.14;
>
> ...
>
> (b) **Notwithstanding the provisions of Jus 1304.07(a), above, an exemption shall not be granted if it does not protect purchasers pursuant to RSA 356-A.**

In this case, Chestnut LLC promised the original seven homebuyers that it would build the subdivision road to the full town standards. That promise was memorialized in the Oakwood

Common subdivision plan, Chestnut LLC's application for exemption, and the public offering statement that it distributed to the seven homebuyers. Those buyers estimated that they each contributed $20,000 of their purchase costs to the road. Chestnut LLC only completed the base course of gravel and did not complete the road prior to the foreclosure and sale to its successor.

San-Ken, as successor subdivider, picked up where Chestnut LLC left off when it purchased the remaining nine lots at the foreclosure. However, rather than complete the road voluntarily, San-Ken sought a modification of the subdivision plan at the local level to amend the road requirement to put only a layer of sealant on top of the base course of gravel and fix a number of pot holes. An engineer estimated that the road would only last a handful of years. The board granted the modification by taking the position that San-Ken is not the developer, that the town does not guarantee the completion of road improvements, and that "the Planning Board is not the advocate of the existing owners." CR 10.

The Bureau, in its review of San-Ken's application for exemption, determined that San-Ken's road repairs neither constituted a "complete" road as promised to the first seven homeowners under JUS 1304.07(a) nor protected the interests of the seven purchasers, who had invested significant sums of money on the promise of a completed road, under JUS 1304.07(b). The Bureau required that San-Ken, as successor subdivider, to complete the road by adding a 1.5" thick top-coat layer. This condition was made in accordance with the recommendations provided to the local planning board by Brown Engineering.

San-Ken argues that the bond requirement of JUS 1304.07(a) is null and void because the local planning board determined that it no longer required a bond for road improvements. Appellant's Brief at 21. However, JUS 1304.07(a)(3)(b) dictates that the form of a surety shall be prescribed by JUS 1304.14, which states that the surety for road improvements can be a bond,

irrevocable letter of credit, mortgage, or "other form acceptable to the town or city and to the Bureau." However, JUS 1304.14(b) states "Jus 1304.14 shall not be construed as requiring a town or city to accept any of the forms of surety described in paragraph Jus 1304.14(a), **nor shall it be construed as requiring the bureau to accept the form or amount of any surety accepted by the town or city.**" (emphasis added). As such, the Bureau is not required to accept the town's decisions to not require any additional surety of any amount, meaning that Bureau may dictate its own terms for the road improvement surety required under JUS 1304.07.

In accordance with the plain language of JUS 1304.07(a) and (b), the Bureau acted pursuant to its clear authority to require that the successor subdivider complete the subdivision road as a condition of granting a certificate of exemption. The road condition was necessary to protect the original seven purchasers by ensuring that promises made will be promises kept.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgments of the court below.

ORAL ARGUMENT

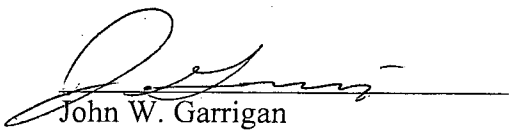
The State requests a 15-minute oral argument. Assistant Attorney General John W. Garrigan will argue on behalf of the State.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

By its attorneys,

Gordon J. MacDonald
Attorney General

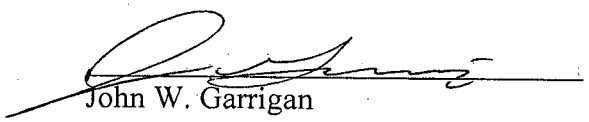


John W. Garrigan
NH Bar No. 21001
Assistant Attorney General
Consumer Protection & Antitrust Bureau
33 Capitol Street
Concord, N.H. 03301-6397
(603) 271-1252

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed this day, postage prepaid, to Michael A. Klass, Esquire, counsel of record for San-Ken.

July 31, 2017



John W. Garrigan