

THE STATE OF NEW HAMPSHIRE

Carroll Superior Court

96 Water Village Road - Box 3

Ossipee, NH 03864

603 539-2201

NOTICE OF DECISION

FAY E MELENDY ESQ

MELENDY & LEE PA

PO BOX 2046

CONWAY NH 03818

07-E-0059 Guckert NH Realty Trust v Town of Freedom, ZBA

Please be advised that on 11/15/2007 Judge Fitzgerald made the following order relative to:

Order on Merits ; Order Made

copy attached

11/15/2007

Patricia Lenz
Clerk of Court

cc: Peter J. Malia, Jr., Esq.

THE STATE OF NEW HAMPSHIRE

CARROLL COUNTY

SUPERIOR COURT

Kathleen M. Guckert, Trustee of Guckert N.H.

v.

Town of Freedom

Docket No.: 07-E-059

ORDER

The petitioner, Kathleen M. Guckert the Trustee of Guckert N.H., appeals the decision of the Town of Freedom Zoning Board of Adjustment ("the ZBA") denying the petitioner's motion for rehearing, which challenged the ZBA's granting a special exception to the Ossipee Lake Marina ("the Marina"). The Town objects. The Marina did not intervene. On August 28 and 29, 2007, the court held a hearing on this matter and conducted a view. After review of the parties' arguments and the applicable law, the court finds and rules as follows.

The following background facts are taken from the certified record ("CR"). The court additionally incorporates herein the facts from the court's (O'Neill, J.) order dated December 24, 2003. Ossipee Lake Marina is the owner of Lots 31 and 41¹ as shown on the Ossipee Tax Map. (CR at 3). In 1997, the ZBA granted the Marina a special exception to construct two buildings for inside boat storage with a variety of conditions. The relevant condition provided a: "Limit of 225 boats inside and 10% additional boats and trailers on all 6 marina lots." (CR at 103) ("the 1997 decision").

¹ Merged Parcels 31-41, 41-1, and 41-2, 41-3, and 4.

By letter dated October 15, 2001, the Selectmen informed the Marina of several decisions that had made regarding the status of the Marina property. (Ossipee Realty Corp. v. Town of Freedom Zoning Board of Adjustment et al., Carroll County, No. 02-E-0104 (Dec. 24, 2003) (Order, O'Neil, J.) at 10). In relevant part, the letter included an advisement that the zoning officer would be investigating allegations that the Marina was not in compliance with the five conditions imposed by the ZBA in the 1997 decision. Id.

In 2002, the Marina applied to the ZBA for a special exception under Article 3, Section 304.6.2, as well as Sections 304.6.3 and 304.6.5, of the zoning ordinance in an attempt to acquire special exception status for the entire marina. The application included, among other things, an increase in the pre-existing marina use to include the boat storage capacity of Lot 22 for a total of 66 boat slips, 53 in/out boating season dry storage, 54, 520 sq. ft. of inside winter storage and designate areas for outside winter storage. (Id. at 12) In May, 2002, the ZBA denied the Marina's application. The application was denied in part, because the ZBA ruled that the outside boat storage in the proposed plan violated the limitation on outside boat storage imposed by the 1997 decision. (Answer of Resp't Town of Freedom ZBA ¶ 5).

In June 2002, the Marina submitted to the ZBA a motion for rehearing addressing the denial of the special exception, three applications for special exceptions and an application for a variance. (Order at 13). The ZBA considered, among other things, the Marina's appeal of administrative decisions requesting the ZBA reverse the Selectmen's interpretation that the 1997 decision granted the Marina approval for two inside boat storage buildings with 10% outside boat storage. The ZBA unanimously upheld the

Selectmen's decision and denied the Marina's appeal, reasoning that the Marina originally requested two boat storage buildings. (Id. at 14-16).

In July 2002, "the Marina filed a Motion for Rehearing of the ZBA's decision regarding the Marina's Appeal of the Selectmen's Administrative Decision, which denied the Marina outside boat storage for more than 23 boats." (Id. at 17). The ZBA unanimously denied the request. "The ZBA denied the Marina's Motion for Rehearing finding there was no new evidence presented by the Marina." (Id. at 17).

Subsequently, the Marina appealed the ZBA's decision to this court. The Marina appealed, among other things, the Selectmen's enforcement of the conditions imposed on the Marina by the 1997 decision allowing only "[t]en percent additional boats or trailers outside on all six Marina lots." The court issued a ruling dated December 24, 2003, in which it upheld the decisions of the ZBA both as to the denial of marina special exception status, and as to the limitation of outside boat storage. In rendering its decision the court stated, "While acknowledging the intent of the 1997 ZBA was unclear, and after considering all issues presented to it, the ZBA upheld the Selectmen's interpretation of the 1997 ZBA Decision, denying the Marina's appeal of that decision. The Court finds this evidence is sufficient to support the Selectmen's and the ZBA's interpretation of the 1997 ZBA Decision." (Id. at 38).

On September 15, 2006, the Marina filed an application for special exception with the ZBA. (CR at 3). The application requested, in relevant part: "To approve the construction of a fence as shown on the plan submitted herewith and incorporated herein and modify the Special Exception granted October 9, 1997 to allow unlimited outside storage of boats and trailers within the fenced in area." (CR at 3 & 103) (citation

omitted). The ZBA held three public hearings and granted the application on January 23, 2007. (CR at 96-99, 107-109, & 153-157).

The petitioner asserts that the ZBA acted unlawfully and the decision was unreasonable. First, the petitioner argues the ZBA never should have reached the merits of a subsequent application for substantially the same use without first finding that a material change of circumstances affecting the merits of the prior application has occurred since the prior denial. Second, the petitioner contends that the ZBA erred in granting a special exception to a nonconforming marina applicant. Finally, the petitioner argues that the granting of approval of unlimited boat storage was an impermissible expansion of a nonconforming use. The Town objects, asserting that this application for a special exception was not substantially the same as any prior application or request filed by the Marina. Second, that the Marina's property does qualify for a special exception. Finally, that the Marina's application did not seek an impermissible expansion of a nonconforming use.

RSA 677:6 provides, in pertinent part:

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 . . . to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment . . . 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.

(1996).

The court's review "is not to determine whether it agrees with the zoning board of adjustment's findings, but to determine whether there is evidence upon which they could have been reasonably based. The court thus may not review the evidence *de novo*." Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 583 (2005) (quotations and citation omitted).

The court first addresses the petitioner's assertion that the ZBA's decision to modify the 1997 limitation on outside boat storage was illegal because the ZBA never should have reached the merits of the new application. Specifically, the petitioner asserts that the question of the permissibility of unlimited outside boat storage has been before the ZBA three times and therefore the ZBA needed to find either that there was a material change of circumstances affecting the merits of the application, or that the application is for a use that materially differs in nature and degree from former applications. First, the issue of outside storage was in front of the ZBA as a condition of granting the special exception for the construction of two boat storage buildings, the ZBA imposed a specific limitation on outside boat storage. Second, the ZBA denied approval of granting the Marina special exception status, specifically because the proposal included a plan for unlimited outside boat storage. Third, the Selectmen, when reacting to the Marina's outside boat storage practices that violate the 1997 limitation, directed the Marina to limit its outside boat storage to twenty-three boats. The Selectmen's decision was upheld by the ZBA when it heard the Marina's appeal of the Selectmen's enforcement action.

"When a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the board of adjustment may not lawfully reach the merits of

the petition.” Fisher v. City of Dover, 120 N.H. 187, 190 (1980). “If it were otherwise, there would be no finality to proceedings before the [ZBA], the integrity of the zoning plan would be threatened, and undue burden would be placed on property owners seeking to uphold the zoning plan.” Id.

“The burden of proving a material change of circumstances before the [ZBA] lies on the party seeking the variance.” Id. (citation omitted). “The determination of whether changed circumstances exist is a question of fact which necessitates a consideration of the circumstances which existed at the time of the prior denial.” Id. at 190-91 (quotation and citation omitted). “Resolution of this issue must be made in the first instance, by the [ZBA]. On appeal all findings of the [ZBA] are prima facie lawful and reasonable.” Id. at 191 (citing RSA 31:78).

Initially, the court assumes the ZBA found that the 1997, 2002, and 2006 applications were not the same because the ZBA went on to grant the application without addressing whether there was a change of circumstance, or if the application is materially different in nature and degree from their predecessors. Evidence of the ZBA’s treatment of the applications as different may be found in the following interchange at the hearing:

Ned Hatfield, Freedom resident and Zoning Officer, asked why the ZBA is being asked to review the same request. Attorney Malia stated **that this is not a repeat request as the fence idea has never been submitted** and it is the proper way to submit this request.

(CR at 98) (emphasis supplied). After this interchange, and during the next continued hearing, the ZBA approved the Marina’s application. The petitioners bear the burden of proof and the court may set aside the ZBA’s decision if, after reviewing all of the evidence, it appears that the ZBA’s decision to treat the 2006 application as different was unlawful or unreasonable. See Fisher, 120 N.H. at 191.

The 1997 special exception application requested permission to build two boat storage sheds enabling the inside storage on the property. This application was granted subject to conditions. The main, and most relevant condition limited the number of inside boats to 225, allowing for 10% additional boat storage outside.

In its 2002 application the Marina specifically sought, in part:

A designated area for outside storage inside the "courtyard" of the winter storage buildings. **The area is screened from the outside by the buildings and the lattice work gate as shown in the plan.** It is anticipated that limiting outside winter storage to designated areas screened from public view will also be superior for enforcement purposes of a boat count.

Pl.'s Trial Mem. at 3 (citing Cooper Mem. dated March 25, 2002; see also Answer of Rsp't Town of Freedom Zoning Board of Adjustment at ¶ 3: "The ZBA admits that in 2002 the Marina filed an application of a special exception, but denies that the quotation [referenced above] ... was an 'integral part' of the application.") (emphasis supplied)).

Then, on September 15, 2006, the Marina filed an application with the ZBA for special exception that is the basis of this appeal. (CR at 3). The application described the purpose of the special exception in relevant part:

To approve the construction of a fence as shown on the plan submitted herewith and incorporated herein (See Article 3, Section 309.1, C and F) and modify the Special Exception granted October 9, 1997 to allow unlimited outside storage of boats and trailers within the fenced in area.

(CR at 3) (emphasis supplied).

The court finds, based on the balance of the probabilities, that the current application is not for a use that materially differs in nature and degree from its predecessor, and the ZBA's determination that the applications were different was


unreasonable. Consequently, because the applications were substantially the same, the ZBA could not lawfully reach the merits of the petition.

In light of the rulings made herein, the court declines to address the remaining arguments. Accordingly, the ZBA's decision reaching the merits of the Marina's application for unlimited boat storage and granting the special exception is reversed.

So Ordered.

Date

11/15/07


Edward J. Fitzgerald, III
Presiding Justice