

THE STATE OF NEW HAMPSHIRE

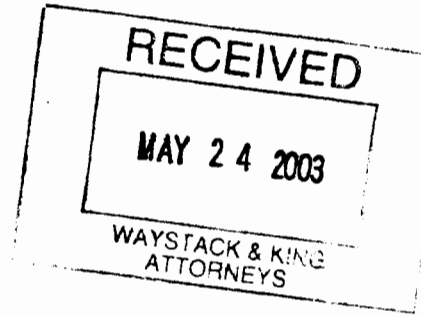
Coos Superior Court

55 School St., Suite 301

Lancaster, NH 03584

603 788-4702

NOTICE OF DECISION



JONATHAN S FRIZZELL ESQ
WAYSTACK & KING
P O BOX 137
COLEBROOK NH 03576

02-E-0100 Tri-County Community Action Program Inc. v. Lancaster Zoning

Please be advised that on 5/23/2003 Judge Houran made the following order relative to:

Other Order ; Issued

05/23/2003

David P. Carlson
Clerk of Court

cc: Paul D. Desjardins, Esq.

RECEIVED

MAY 24 2003

WAYSTACK & KING
SUPERIOR COURT

NO. 02-E-100

THE STATE OF NEW HAMPSHIRE

COOS, SS

Tri-County Community Action Program, Inc.

vs.

Lancaster Zoning Board of Adjustment & Town of Lancaster, New Hampshire

ORDER

This is an appeal from the Lancaster Zoning Board of Adjustment pursuant to RSA 677:4 and an action for declaratory judgment pursuant to RSA 491:22. This action is brought by the Tri-County Community Action Program, Inc. against the Lancaster Zoning Board of Adjustment and the Town of Lancaster. This action arises out of an application for a variance filed by the Tri-County Community Action Program, Inc. with the Lancaster Zoning Board of Adjustment for approval to construct a multi-use mixed commercial and residential structure on Main Street in Lancaster, New Hampshire. That application was denied by notice of decision dated September 3, 2002, and the applicant's motion for rehearing was denied on October 16, 2002, giving rise to this appeal and request for declaratory judgment.

The petitioner, Tri-County Community Action Program, Inc. (Tri-County -CAP) is represented in this action by Attorney Jonathan S. Frizzell. The respondents, The Lancaster Zoning Board of Adjustment (ZBA) and the Town of Lancaster (Lancaster or Town) are represented by Attorney John L. Riff, IV. Hearing was held over the course of two days, with evidence concluding on April 1, 2003. In addition to receiving the legal arguments of counsel, the Court conducted a view of the site which is the subject of this litigation, heard testimony from five witnesses, and received into evidence some thirty-one exhibits, in addition to the certified

CLERK'S NOTICE DATED

5/23/03

Frizzell

Desjardins

record of the proceedings before the ZBA. Upon consideration of the view, the testimony, the exhibits, the certified record below, and the legal arguments and requests of counsel, the court determines and orders as follows.

Background

The property as issue is located at the northwest corner of the intersection of Main Street and Canal Street in Lancaster. The buildings previously located on the property in question burned in 1996 and were subsequently removed. The site has been vacant since that time. Tri-County CAP has been working for several years with a number of local, state, and federal authorities, as well as with non profit agencies, toward the construction of a multi-use mixed commercial and residential property on the site. The project proposed by Tri-County CAP is commonly referred to as "The Phoenix Project".

As part of the residential component of the project, Tri-County CAP plans to build 17 units of affordable residential rental housing. These residential rental units include rental units targeted specifically for low-income individuals and families.¹ Tri-County CAP has long been aware that it would need to secure a variance from the ZBA in order to construct 17 residential units on this site.

The property in question is located in the Commercial-Industrial District of Lancaster. Section 5.03(d) of the Lancaster Zoning Ordinance permits the use of property in the Commercial-Industrial District for: "Apartment houses with a density no greater than two dwelling units per 10,000 square feet of land."

Tri-County CAP's application to the ZBA for a variance describes the land which is the

¹ The project also includes plans for commercial use of the property's Main Street frontage and for a senior meals center on the Canal Street frontage.

subject of the application as having an estimated area of 26,851 square feet.² The 17 residential units proposed for 26,851 square feet of land is in excess of the two-unit per 10,000 square feet density allowed in the Commercial-Industrial District by the Lancaster Zoning Ordinance. The Zoning Ordinance has no provision for application for a special exception to the density provision. Accordingly, Tri-County CAP applied on July 12, 2002 for a variance from Section 5.03 (d) of the Lancaster Zoning Ordinance to permit it to construct the 17 apartments which it proposes. Notice of the ZBA hearing was sent to all abutters and the hearing was held on August 28, 2002.

Members of the ZBA present at the August 28, 2002 hearing were Chairman C. Sutherland, and Members or Alternate Members A. Savage, J. Hammond, D. Merrow, A. Bouthillier, and R. Oleson. At the hearing, Alternate Member A. Beuthillier was appointed to replace a ZBA member disqualified on this matter. The ZBA then heard from representatives of Tri-County CAP on the application, then heard from a number of abutters, and then heard from a number of members of the public. After hearing from all who wished to speak, the ZBA closed the hearing to public comment and commenced deliberations. Upon conclusion of deliberations, ZBA Member A. Savage moved, seconded by Alternate Member A. Bouthillier, to deny the Tri-County CAP application "because of the diminution of property values as evidenced by the abutter's disapproval and because the requested density is far and above what is allowed and the proposal is contrary to the spirit of the ordinance." That motion to deny the application passed upon a roll call vote, with Members A. Savage, J. Hammond, and A. Bouthillier voting in support of the motion to deny the application and member D. Merrow voting against that motion.

² The application describes the property in question as: 56 Main Street (lot 35); 62 Main Street (lot 34); 66 & 68 Main Street (lot 33); and 19 Canal Street (lot 14).

On September 3, 2002 the ZBA issued its notice of decision denying the Tri-County CAP variance application, stating as "reasons/facts supporting the denial: 1. would be a diminution of property values as evidenced by abutters' disapproval; 2. requested density variance is far and above what is allowed; 3. the use is contrary to the spirit of the ordinance; and 4. zoning restriction does not interfere with other reasonable uses of property. "

On September 25, 2002, Tri-County CAP filed a timely motion for rehearing with the ZBA.³ Tri-County CAP's motion for rehearing was heard by the ZBA on October 16, 2002. The minutes of that meeting reflect that: "Based on advice from the Town's attorney [Member] D. Merrow moved to grant the request for a rehearing. There was no second to the motion." With no second, the motion for rehearing failed, and this appeal pursuant to RSA 677:4 and petition for declaratory judgment pursuant RSA 491:22 followed.

Tri-County CAP's Petition to this Court requests: first, that the Court rule that the current density component of the Lancaster Zoning Ordinance is invalid; second, that the Court grant Tri-County CAP a "builder's remedy" pursuant to Britton vs. Town of Chester, 134 N.H. 434, 442-44 (1991) permitting it to proceed notwithstanding Section 5.03(d) of the Lancaster Zoning Ordinance, or third, that the Court reverse the decision of the ZBA as illegal, unlawful, or unreasonable and remand this matter to the ZBA for further proceedings. In support of its request that the court reverse the decision of the ZBA, Tri-County CAP asserts, inter alia: that a voting board member had a disqualifying conflict of interest; that the ZBA did not have a reliable factual basis upon which to find that the proposal would result in a diminution of property values; that the ZBA selectively applied and interpreted the density provision of Section 5.03(d) of the zoning ordinance; that the ZBA erred in determining that the proposal contradicted the spirit of

³ That motion for rehearing lists the properties in question as: 56 Main Street (lot 35); 66-68 Main Street (lots 33 & 34); 18-20 Canal Street (lots 7 & 8); and 19 Canal Street (lot 14).

the zoning ordinance; and that the ZBA erred in adopting an overly restrictive and unreasonable view of what would constitute reasonable uses of the property.

The ZBA and the Town of Lancaster assert that the record supports the decision of the ZBA as neither unlawful nor unreasonable, and request that the Court accordingly uphold that decision. The ZBA and the Town further assert that Tri-County CAP is neither entitled to a “builder’s remedy” nor otherwise entitled to declaratory relief.

Decision of the Lancaster Zoning Board of Adjustment

There is a threshold question presented in this action. That question concerns whether the decision of the Lancaster Zoning Board of Adjustment should be declared void because of a conflict of interest of one of its voting members. The Court takes up this question first because, if it determines that one of the members of the ZBA had a conflict of interest barring him from participation in this matter, and then determines that because of that conflict, the decision of the ZBA is void, the Court’s inquiry would end there. See e.g., Winslow vs. Holderness Planning Board, 125 N.H. 262, 268-69 (1984). The Court’s inquiry would end at that point because, as to Tri-County CAP’s remaining claims on appeal from the ZBA decision pursuant to RSA 677:4, such a determination would render those claims moot, since the decision of the ZBA appealed from would be void, that is, as if never made. Id. Likewise, as to Tri-County CAP’s claim that it is entitled to a “builder’s remedy” by declaratory judgment pursuant to RSA 491:22, such a determination, would render that claim moot, since, as Tri-County CAP correctly notes in its memorandum of law, the determination whether an applicant is entitled to a “builder’s remedy” requires a review of the subject zoning ordinance as applied. See Britton vs. Town of Chester, 134 N.H. 434, 442-45 (1991). Accordingly, the Court first takes up the question whether a member of the ZBA had a disqualifying conflict of interest and, if so, whether the decision of the

ZBA is void.

ZBA Alternate Member Bouthillier was appointed at the August 28, 2002 hearing to sit on the ZBA for consideration of the Tri-County CAP application. He participated in the hearing, seconded the motion made by another member to deny the Tri-County CAP application, and was one of the three members of the ZBA to vote in favor of the motion to deny the application.

It is uncontroverted that Mr. Bouthillier signed a petition dated July 2, 2001 stating opposition to the Tri-County CAP project. Specifically, the July 2, 2001 petition signed by Mr. Bouthillier stated that: "We, the undersigned taxpayers in Lancaster, N.H. are presenting the attached petition to the Planning Board of Lancaster, N.H. in reference to the proposed Housing Project on the corner of Main and Canal Streets. All listed resident taxpayers are opposed to this proposal."

The petitioner asserts that Mr. Bouthillier's signature on a petition expressing opposition to the project constitutes a conflict of interest disqualifying him from ZBA action on the Tri-County CAP application, and that such disqualification invalidates the ZBA's decision. The respondents acknowledge that Mr. Bouthillier signed the petition, but assert that his signature does not constitute a conflict because the proposal at the time of application was different in detail from the proposal as it existed on July 2, 2001, over a year before. The respondents further assert that the petitioner's objection should have been made at the ZBA hearing and accordingly is too late to permit consideration now. The respondents further assert that the petitioner has failed to meet its burden of rebutting the presumption of good conscience and fairness attributable to members of bodies such as the ZBA. Finally, the respondents assert that, even if there was a disqualifying conflict, the decision of the ZBA is voidable, not void, and that the Court should decline to void the decision but should, instead, uphold the decision as

legal, justified and reasonable.

The parties do not dispute that proceedings before a zoning board of adjustment on variance applications are adjudicatory in nature. RSA 673:14, I provides that no member of a zoning board on adjustment "shall participate in deciding or shall sit upon the hearing of any question which the board is to decide" in such a capacity "if that member has a direct personal or pecuniary interest in the outcome which differs from the interests of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law." Here, there is no allegation that Mr. Bouthillier had any direct personal or pecuniary interest in the outcome of the Tri-County CAP application; accordingly, the Court looks to whether he would be disqualified from acting as a juror in the same matter. RSA 673:14, I.

The constitutional requirement that judges shall be "as impartial as the lot of humanity will admit" also applies to both jurors and members of boards acting in an adjudicatory capacity. Winslow, 125 N.H. at 267. Among the questions to be asked in determining whether a juror is not impartial or indifferent are whether the juror "directly or indirectly given his opinion or formed an opinion" and whether the juror is "prejudiced to any degree regarding the case." RSA 500-A:12, I (d)(f).

"Administrative officials that serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result. The burden is upon the party alleging bias to present sufficient evidence to rebut this presumption." Webster vs. Town of Candia, 146 N.H. 430, 441-42 (2001)(citation omitted).

In this case, ZBA Alternate Member Bouthillier had previously directly given his opinion concerning the same matter he later sat on and voted on as a ZBA member. By signing the

July 21, 2001 petition, Mr. Bouthillier clearly and unequivocally stated his opinion in opposition to the project. Contrary to the respondents' assertion, the project opposed by Mr. Bouthillier in July 2001 was not so substantially different from the project proposed to the ZBA and acted upon in August 2002 as to render Mr. Bouthillier's prior opposition irrelevant; his opposition to the project as then proposed is reasonably understood to be opposition to the project as it existed at the time of the ZBA hearing.

Mr. Bouthillier testified at the hearing that, at the time of his designation to sit as an alternate ZBA member on this matter, he did not recall signing the petition. He also, however, candidly testified that if he had remembered signing the petition, he would have disqualified himself from hearing this matter.

Notwithstanding Mr. Bouthillier's feelings that he could set aside any opinions he had in voting on the information and issues presented at the hearing, one of the signal elements of disqualification is expression of a prior opinion on the subject matter being heard. RSA 500-A:12, I(d); see 15 P. Loughlin, New Hampshire Practice, Land Use, Planning and Zoning, § 20.07 at 245 (3d ed. 2000). Mr. Bouthillier's direct expression of his opinion in opposition to the project prior to his appointment to the ZBA and prior to his sitting on and acting on the Tri-County CAP application is a disqualifying conflict of interest. See Winslow, 125 N.H. at 267-68.

Ordinarily, allegations of a conflict of interest are to be raised prior to or at the commencement of the public hearing. See RSA 673:14, II. The respondents assert that, because the petitioner could have discovered Mr. Bouthillier's signature on the petition prior to the hearing, the petitioner has waived any right to assert the conflict now. See Appeal of Cheney, 130 N.H. 589, 594 (1988). Tri-County CAP does not dispute that its personnel were aware that a petition in opposition to the project had been filed with the Town, nor does it

dispute that it was not until after the ZBA hearing that its personnel saw the petition. While an applicant generally has a duty to raise with the adjudicatory body allegations of conflicts of interest prior to the vote, in the present case Tri-County CAP personnel did not become aware of the conflict until a Town official pointed out, after the vote, that the alternate ZBA member voting to deny the application had signed the petition opposing the project.

Further, upon learning that Alternate Member Bouthillier had signed a petition against the project, Tri-County Cap properly raised the issue with the ZBA at its first opportunity, in its September 25, 2002 motion for rehearing. In that motion, at paragraph 4(b), Tri-County CAP expressly requested a rehearing based on its assertion that the action of the ZBA was unlawful or unreasonable due to Alternate Member Bouthillier's conflict of interest arising out of his signature on the July 2, 2001 petition opposing the project. Here, the petitioner met its obligation to act diligently, and timely gave the ZBA an opportunity to take corrective action. See Appeal of Cheney, 130 N.H. at 594. Upon learning in the petitioner's motion for rehearing of the conflict of interest of one of its voting members, the ZBA was given an opportunity to grant rehearing and correct the error, but failed to do so.

The Court concludes that the petitioner raised with the ZBA the allegation of conflict of interest at its first reasonable opportunity, in its motion for rehearing, and accordingly has not waived its right to assert to this Court that conflict of interest in support of its request that the ZBA decision be voided.

The respondents assert that, even if a conflict of interest did exist, that conflict renders the ZBA decision voidable, but not void, citing Winslow, 125 N.H. at 268 and Rollins vs. Conner, 74 N.H. 456, 459 (1908). These cases, however, instead stand for the proposition that, where one member of an adjudicatory body is disqualified, "the entire decision must be invalidated."

15 P. Loughlin, New Hampshire Practice, Land Use, Planning and Zoning § 20.07 at 246 (citing Rollins, 74 N.H. 456 and Winslow, 125 N.H. 262). Invalidation is the result whether or not the vote of the disqualified member of a quasi-judicial body directly impacted the outcome. Id. The underlying rationale for this rule is that it is impossible to estimate the influence one member might have on other members, even if that member's vote did not affect the outcome. Id. Therefore, even if the disqualified member's vote did not affect the outcome, given the important property rights involved and the state constitutional mandate for judicial impartiality, the participation of a disqualified member is sufficient to invalidate an adjudicatory body's decision. See Winslow, 125 N.H. at 268; Rollins, 74 N.H. at 459. Thus, in this case, whether or not the disqualified member's vote affected the decision, his participation is sufficient to invalidate that decision.

Further, however, it cannot be said that the disqualified member's vote in this case did not affect the decision. First, the disqualified member was the member who seconded the motion to deny the application. Second, if the disqualified member voted differently, the vote on the motion to deny would have been tied, instead of a majority for denial. The vote of a disqualified member of even a nonadjudicatory body which affects the outcome invalidates the body's decision. See Michael vs. City of Rochester, 119 N.H. 734, 736 (1979).

Conclusion

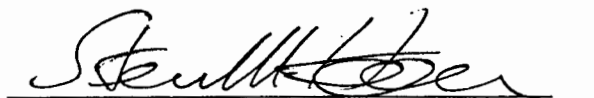
An alternate member of the ZBA who voted on the Tri-County CAP application for a zoning variance had previously signed a petition in opposition to the project, disqualifying him from sitting and acting on the Tri-County CAP application. Upon learning of the conflict after the hearing and vote, Tri-County CAP raised the issue with the ZBA at its first opportunity, in its motion for rehearing, yet the ZBA failed to take corrective action. As a result of the participation

and vote of a disqualified member, the decision of the ZBA is void. Accordingly, the decision of the ZBA is vacated in its entirety and the matter is remanded for a new hearing. Because, as explained above, the determination set forth herein is dispositive, all other pending requests of the parties are moot. See Winslow, 125 N.H. at 268-69; Britton, 134 N.H. at 442-45.

Both parties have submitted extensive specific requests for findings of fact and rulings of law. As to the dispositive issue addressed herein, the Court has set forth its reasoning as to essential findings of fact and rulings of law in the narrative portion of this order. Accordingly, the parties' requests for finding of fact and rulings of law relevant to that issue are granted, denied, or determined to be unnecessary, as consistent with the narrative order. E.g. Howard vs. Howard, 129 N.H. 657, 659 (1987). The balance of the parties' requests are, given the outcome set forth above, moot.

SO ORDERED.

Dated: May 19, 2003



Steven M. Houran,
PRESIDING JUSTICE