STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS SUPERIOR COURT

Docket No: 218 2017 cv 871

Harbor Street LLC,
and
William Chisholm Family Trust, Brigham Family Trust,
WNRV, LLC, and PV & Hyde F. Jenness Rev. Trust

v.

The Planning Board of The Town of Rye

**First Amended Verified Complaint and Petition of Harbor Street LLC, et. al. Appealing a Decision of the Planning Board of The Town of Rye**

NOW COME the plaintiffs Harbor Street, LLC. et al., through their attorney, the LAW OFFICE OF JOHN KUZINEVICH, and bring this Amended Complaint and Petition appealing a decision of the Rye Planning Board pursuant to R.S.A.677:15 as well as seeking other relief.

INTRODUCTION

The Rye Planning Board has made a mockery of the land development process. It ignored scientific evidence which was unrefuted and supported by its own consultants. Despite clearly having decided to deny the subdivision application from the first hearing, the members of the Planning Board demanded study after study, charging an excessive amount for peer reviews by their consultants – over $80,000 during the course of the past year. The Board, perhaps spurred on by citizen outrage over the risk to water quality caused by an unrelated landfill in another town, decided to irrationally deny the proposed development in the name of protecting the Town's water, its merits notwithstanding. The Board's decision is contrary to both law and reason.

This specific appeal rests on several theories. First, the proposed subdivision met all of the land development regulations in the Town of Rye with the exception of two lots which needed minor waivers. Second, all the engineering and scientific evidence, confirmed by the Board's independent peer reviewers, demonstrated that the proposed subdivision would not harm the environment or Rye's water supply and, thus, the Board's decision is without any evidentiary merit. Third, the Board failed to carry out its duties by fairly considering the application, as evidenced by the Chairman's improper conduct after the Board's vote on the application. The Chairman presented a written harangue, prepared in advance of the meeting at which a vote was taken, condemning the subdivision and the threat to Rye. Clearly his mind was made up before considering all the evidence. As a result, the Board's decision was irrational and an error of law.

PARTIES

1. The plaintiff, Harbor Street LLC is a duly formed and existing New Hampshire limited liability company with its principal office in Stratham, New Hampshire. It is the lead in developing the land which is the subject of the suit and all plaintiffs have worked together and authorized Harbor Street to act on their behalf.
2. The plaintiff William Chisholm Family Trust is a duly formed and existing trust with its principal office in Byfield, Massachusetts. It owns the portion of the property identified as Tax Map/Lot 004-025. Although the William Chisholm Family Trust was identified in the subdivision application, the correct name of the trust is the Virginia P. Chisholm Revocable Trust.
3. The plaintiff Brigham Family Trust is a duly formed and existing trust with a principal office in Rye Beach, New Hampshire. It owns the portion of the property identified as Tax Map/Lot 004/027.
4. The Plaintiff WNRV, LLC is a duly formed and existing New Hampshire limited liability company. It owns the portion of the property identified as Tax Map/Lot 004/031.

5. The plaintiff PV & Hyde F. Jenness Rev. Trust is a duly formed and existing trust with a principal office in Rye Beach, New Hampshire. It owns the portion of the property identified as Tax Map/Lot 004/032.

6. The defendant the Planning Board of the Town of Rye is the duly existing and constituted Planning Board of the Town of Rye which itself is a legally existing New Hampshire town with an office address at Ten Central Avenue, Rye, New Hampshire.

FACTS

7. The plaintiffs William Chisholm Family Trust, Brigham Family Trust, WNRV, LLC, and PV & Hyde F. Jenness Rev. Trust, each own a large parcel of land located at 421 South Road, Rye, New Hampshire. Each has entered into a Purchase and Sale Agreement with Harbor Street, which intends to combine the four parcels into one lot and develop said resulting lot into a residential subdivision. Each sale is contingent on subdivision approval.

8. Together the parcels consist of approximately 98 acres, approximately fifty of which are contiguous wetland. The parcels are zoned residential and are in the Wellhead Protection District.

9. On September 16, 2016, Harbor Street, LLC filed an application seeking approval of a Major Subdivision, Lot Line Adjustment, and Conditional Use Permit for the properties located at 421 South Road, tax Map 4, Lots 25, 27, 31, and 32.

10. The contemplated subdivision meets all zoning requirements with the exception of: one lot's driveway which required a special exception or variance with regard to wetland and vernal pool buffers; and one lot which required a de minimus waiver with regard to the required leachfield area.

11. Harbor Street intends to donate approximately 40 acres of wetland and open space to the Town for conservation purposes if and when development is approved. As initially proposed, the subdivision plan included 22 lots. Through the iterative hearing process, the number of lots was reduced to 17.

12. Due to the Board's denial of the requested leachfield waiver, appealed as part of this action, and the failure of the Board of Adjustment to grant the special exception or variance for the driveway on another lot (under separate appeal), the subdivision has been further reduced to 15 lots.

13. Accordingly, this lawsuit and the other appeals concern the prevention of 13 new lots in a town which already has over 2,700 existing housing units. The four parcels which are being combined are already legal residential building lots. These four lots could use traditional septic systems rather than the advanced treatment systems proposed for the subdivision which may be less environmentally friendly than the carefully engineered systems proposed here.

14. The Board held numerous public hearings on the application over the course of a year. From the very first hearing, several Board members indicated they would protect Rye's water at all costs.

15. On August 8, 2017, the Board issued a written decision denying the Conditional Use Permit, the subdivision and the lot line adjustment. A copy is attached as Exhibit 1.

16. A Conditional Use Permit was required because the parcels are within the Wellhead Protection District.

17. The Board denied the Conditional Use Permit.

18. The Board found that the developer had not demonstrated that "*the proposed use will not detrimentally affect the quality of the groundwater contained in the aquifer by directly*

*contributing to pollution or by increasing the long-term susceptibility of the aquifer to potential pollutants.*"

19. The Board irrationally required absolute guarantees from the applicants' experts that there would be zero impact on the water supply, rather than accepting conclusions based on reasonable scientific certainty, which were provided both by the applicants' experts and confirmed by the Board's peer reviewers.

20. The Board relied upon speculation in denying the application because "the lineaments [found on the property] could represent zones of preferential ground water flow," despite overwhelming evidence from the applicant's hydrogeologist, confirmed by the Board's peer reviewer, that the groundwater on the property flows away from the Town wells which were the focus of the Board's concerns.

21. The Board also based the denial of the Conditional Use Permit on the developer's refusal to conduct further prohibitively expensive geophysical testing which the developer's experts explained were unnecessary as sufficient data existed and had been presented to the Board to demonstrate that the proposed subdivision would not impact the Town's water supply

22. The Board required that the developer agree to use advanced septic system technology to further protect the Town's water. However, after the developer agreed to use such systems, the Board concluded, based on an unfortunate experience with a different subdivision developed by a different developer, that such systems could not provide adequate protection. The applicant's experts presented a wealth of evidence to the Board that said systems, when properly installed and maintained, are safe, efficient, and more than adequate to protect the Town's water. The applicant agreed to stringent controls to ensure that said systems would operate as intended. The Board's peer reviewer did not provide any evidence to the contrary.

23. The Board denied the CUP because it found that the developer had not demonstrated that "*the proposed use will discharge no waste water on site other than that typically discharged by domestic waste water disposal systems and will not involve on-site storage or disposal of toxic or hazardous wastes as herein defined.*" The Board's only justification for this finding was that some of the driveway may require salting, despite the applicant's agreement to include a no-salt requirement in the homeowner's association documents and deeds. There was no evidence that the proposed subdivision would discharge any waste water beyond that from a typical residential subdivision.

24. The Board denied the CUP because it found that the developer had not demonstrated that "*the proposed use will not cause a significant reduction in the long-term volume of water contained in the aquifer or in the storage capacity of the aquifer*."[1] The Board purports to rely upon information from the Rye Water District.

25. The Rye Water District did indicate that there is a higher demand for water in the summer due to lawn irrigation. The residents of this subdivision would be required to follow whatever restrictions on water use applied throughout the town.

26. Finally, the Board denied the CUP because the developer had not demonstrated that "*the proposed use complies with all other applicable sections of this Section*."

27. The "other applicable sections" that the Board refers to is § 306.2, the "Purpose" section of the Zoning Ordinance, which is so vague as to afford the Board unlimited and illegal discretion in denying the application.

28. The Board denied the Major Subdivision Application for failure to comply with multiple sections of the Rye Planning Board Land Development Regulations; specifically, the

[1] There appears to be a typo in the Decision – the Decision initially states that the "requirement is met" but later states that it is not.

sections titled “General,” “Character of Land for Development,” “Woodlands and Trees,” Groundwater Protection,” and “Natural Features.”

29. As an initial matter, the Board appears to have made a finding that the “natural terrain” of the entire parcels is to be protected, notwithstanding the fact that the features to be protected pursuant to the Land Use Regulations includes discrete items such as “trees, scenic points, brooks,” etc.

30. The Board’s denial of the Major Subdivision is based on multiple unsupported conclusions, including, but not limited to, the following:

    a. “The *clearance of woodlands and re-grading for development . . . unreasonably increases the alteration of the natural terrain*.” There is no standard in the Land Use Regulations which set a standard for alteration of natural terrain. Neither the applicant’s consultants nor the Board’s peer reviewers raised objections to the alteration of the land. Alteration of land is anticipated in any subdivision and is in fact explicitly contemplated in the Land Use Regulations.

    b. “*Adequate woodland buffers of abutting properties are not preserved on Francis Path and adjacent to the gravel wetland*.” There is no requirement in the Land Use Regulations requiring buffers on abutting properties.

    c. “*The proposed subdivision poses an unreasonable risk to the Atlantic White Cedar Forest.”* There is no specific requirement for a buffer for the Atlantic White Cedar Forest in the Regulations. The Developer is proposing a 700-foot buffer between the Forest and the closest residential lot line. There was no scientific evidence presented that such a buffer is inadequate to protect the Forest. Rather, the Board simply speculated that it was insufficient. The Board also relied again on its gut feeling that the

advance-treatment systems and other controls which the Developer offered to impose on the use of certain chemicals would be insufficient to protect the Forest.

d. "*The proposed subdivision poses an unreasonable risk to the vernal pools and other wetlands on the tract.*" The Board relies on statements from one member that a culvert will drain a wetland. This is factually incorrect, is total speculation, and was not a concern of the Board's peer reviewing engineers. In fact the Board's peer review engineers certified that the plans comply with the Land Use Regulations. The Board also points out that the applicant has used a variety of drainage features in the proposed subdivision. The applicant's engineering consultant put together a comprehensive plan which was signed off on in all respects by the Board's peer review consultant. All the experts agreed that the drainage plan and other engineering was sufficient, adequately protected the wetlands on site, and fully complied with the Land Use Regulations.

e. The Board claims the developer failed to propose restrictions on tree cutting on the lots. The Land Use Regulations do not require such restrictions; however, the developer did in fact propose limits on tree cutting. Despite the Board's effort to cover their unsupported concern by claiming "common knowledge," where there was no evidence of any reason for concern regarding cutting, and where it was not raised by any of the hired experts, and where is it not a concern of the Regulations, the Board improperly relied on it to deny the Major Subdivision.

f. The Board relied upon the need for fill and grading as not maintaining the character of the land. The Regulations refer to "character of land" in

terms of ensuring safety from hazards; it is not an aesthetic standard to be met. The Board's experts found that the proposed filling and grading were consistent with the Regulations. The Board should not ignore its own experts simply to force an outcome it desires.

g. "*The ditch [along an abutter's property] may overflow onto the Seiner property during heavy storms.*" This is pure speculation. The Regulations require that water not flow offsite; the Developer complied with said Regulation, and the Board's experts agreed that the plans are in conformity with the Regulations.

h. "*[The gravel wetland] is not compatible with residential living* and "*may be a structure which would require a variance*." There is no standard for determining how the Board concluded that a wetland is not compatible with residential living. Both the Board's engineers and the Developer's engineers concluded that the plan, including the wetland, complies with the Regulations. Moreover, the Decision is the first time that the Board mentioned anything about the possible need for a variance from the Zoning Ordinance for the wetland. The Board is simply grasping at straws in attempting to find objections to the Major Subdivision.

i. The Board contends that water draining into wetlands <u>on the property</u> which connect to wetlands <u>off the property</u> may violate the prohibition in the Regulations on water draining offsite. This interpretation, notwithstanding that some of the "drainage" relied on by the Board is speculation and not supported by the evidence, see above paragraph, this is an unreasonable and unlawful interpretation of the Regulations.

j. The Board contends that the Town lacks resources to ensure that the requirements imposed via the homeowners' association, deeds, and condo documents to protect the water. It is pure speculation that the restrictions will not function as intended to protect the water and other natural features. After multiple rounds of peer reviews, all the Board's consultants were satisfied that the plans comply with the Land Use Regulations which are intended to ensure just such protection.

k. "*Driveway sight distance easements required to assure safe egress from driveways on some lots have not been depicted on the Easement Plan.*" This is simply factually incorrect. All easements required to be shown on the plans have been shown, and the Board's consultants have certified that the plans comply with the Regulations.

l. "*The amount of bedrock to be jack hammered for infrastructure, house and septic system construction will be a noise nuisance in the neighborhood*." The applicant initially proposed to use blasting to remove impediments to construction. After discussion with the Board the applicant agreed to completely avoid blasting in an attempt to meet the Board's unsubstantiated concerns regarding water quality impacts. Now, for the first time, in the Decision the Board has raised the noise of jackhammering as a neighborhood nuisance. All construction creates noise, at least for a period of time. The Board failed to mention at any of the multiple hearings on this application that the majority of them are close neighbors of the property. The Board's bias in this respect and attempt to protect their own properties from temporary noise at the

expense of the land owners' and developer's right to develop the land is unlawful and improper.

31. In short, the Board has denied the applications based upon unsupported, factually incorrect speculation which is contradicted by not just the applicant's consultants, but by the Board's own peer review consultants.

32. The Board, through excessive review, delay, and attempts to reduce lots, attempted to render the subdivision uneconomic so that the applicant would abandon the project.

33. The Board engaged numerous peer review experts to independently review the information submitted by the applicant.

34. All of the peer reviewers indicated the proposed subdivision met the Town's requirements and posed no realistic danger to the environment.

35. The Board at its July 18, 2017, meeting voted to deny the conditional use permit, the subdivision application, and the lot line adjustment application. It approved the notice of decision which combined all issues in a 9-page decision on August 8, 2017.

Count I
(Planning Board Appeal R.S.A. 677:15)

36. The plaintiffs re-allege and incorporate the above allegations.

37. The vote to deny the conditional use permit, the subdivision application, and lot line adjustment application was unreasonable and illegal in that:

    a. The Board did not consider the merits of the request,

    b. The Board had predetermined the outcome of the applications and failed to consider the evidence presented to it in favor of speculation which supported the pre-determined choice to deny the application.

    c. The Board considered irrelevant material and material outside the record. Certain statements in the Decision are not based on any evidence that was

presented during the hearings. For example, the Decision states that historically the parcels to be developed were not farmable and used for woodlots or grazing. There is simply no evidence in the record supporting this statement. Moreover, any historical use is irrelevant when considering whether the application meets the Board's Regulations.

d. There is no evidence that there would be any measureable effect on water quality even if the groundwater from the subdivision travelled to the wells, which it does not.

e. In denying the Conditional Use Permit, the Board applied an illegal standard in that it is required a "guarantee" from the Developer and his consultants that there would be no threat to Rye's water from the proposed subdivision. This is an impossible and meaningless standard. Moreover, there was overwhelming testimony that, based on reasonable scientific certainty, no threat was posed to the water supply.

f. The Board tried to increase costs for the Developer throughout the proceedings as an indirect way of preventing the subdivision. At the last minute the Board requested further hydrogeologic studies which could have cost hundreds of thousands of dollars to acquire marginally-useful new information. Such conduct was unreasonable and irrational.

g. The Board further acted irrationally when it required the use of advance septic systems only to conclude that said systems do not work, which conclusion was based on a programming error at another subdivision by another developer. Here, the Developer presented several ways to avoid a repeat of the issues at a subdivision which he was not involved with in an effort to alleviate the Board's concerns.

h. The Board irrationally concluded salt for driveway use was a hazardous material when such a conclusion is not supported by the Town's regulations and is an error of law. Thus, there was no basis to deny the subdivision because a few driveways might be salted particularly where the Developer has proposed subdivision restrictions on salting.

i. The Board improperly used the generic "purpose" and other sections of the regulations to deny the Condition Use Permit. These sections are so vague as to allow the Board to make arbitrary and capricious decisions.

j. All of the Board's peer reviewers indicated the subdivision met the regulations. It is irrational and unlawful for the Board to ignore the scientific evidence presented by both the Developer's consultants and its own peer reviewers.

k. The Board irrationally and subjectively determined that the land would be altered too much. Every subdivision requires some alteration of land. There are no objective standards to support the Board's decision.

l. The Board irrationally concluded there was a threat to the Atlantic White Cedar Forest. There was no evidence to support the threat of any harm.

m. The Board illegally required the Developer to guarantee the future conduct of homeowners. While restrictions can be set in place, they do require the homeowners to comply in good faith, with the Developer unable to guarantee compliance. If applied, this standard would prevent every possible subdivision in Rye, which is contrary to the very existence of the Land Development Regulations.

n. There was no evidence of risk to wetlands or vernal pools.

o. The Board was irrational when it based its decision on the fact that five different types of drainage structures were present in the subdivision. All were properly engineered and chosen for their best function. The number of types of drainage structures is in no way indicative of any detriment in the system as designed.

p. The Board irrationally required tree cutting buffers that are not required by the regulations.

q. There was no engineering evidence of excessive filling and grading. The subdivision proposed such filling and grading as would be common to any subdivision.

r. There was no evidence of improper stormwater management.

s. Two lots with narrow issues under appeal is not cause to deny a subdivision when the Developer agreed to a restriction on them until the issues were resolved.

38. In all, the Board relied on numerous unsupported reasons to unfairly deny a subdivision and related applications. The Board had been prejudiced against this proposed subdivision from the first hearing. It did not listen to the evidence. This can be confirmed by the Chairman's reading of an impassioned pre-prepared speech about the denial at the conclusion of the final hearing. Clearly, he, and others, had prejudged the proposed subdivision.

39. Further, although they did not disclose it, the majority of the Board lives close to the site, with two of the members living within 800' on the same road. One of the grounds for denial was noise during construction which one Board member admitted he would hear. Thus, it appears that rather than applying the law, the Board made a decision based on personal convenience to prevent construction in their own neighborhood.

40. As a consequence of all of the above, the Board's decision must be reversed.

Count II
(Damages v. Planning Board)

41. The plaintiffs re-allege and incorporate the above allegations.

42. The Board never fairly considered the applicant's application.

43. The plaintiffs are entitled to damages and attorneys' fees as a result of the Board's conduct.

Count III
(Official Oppression)

44. The plaintiffs re-allege and incorporate the above allegations.

45. The Board, in failing to fairly consider the subdivision, knowingly refrained from performing a duty imposed by law.

46. Such conduct violates R.S.A. 643:1.

47. There is an implied private right of action under R.S.A. 643 as otherwise public officials would be allowed to harm individuals without redress.

48. The plaintiffs are entitled to damages and attorneys' fees as a result of the Board's conduct.

WHEREFORE the plaintiffs demand relief against the defendants as follows:

1. That the Court reverse the decision of the Planning Board as to the conditional use permit sought;
2. That the Court reverse the decision of the Planning Board as to the subdivision and lot line adjustment approvals sought;
3. That the Court declare the rights of the parties;
4. That the Court award damages in an amount to be determined at trial;
5. That the Court award attorneys' fees to the plaintiffs; and

6. That the Court enter such other and further relief as justice may require.

Respectfully submitted,

Harbor Street LLC, et al
By their attorney,

John Kuzinevich, Esquire
N.H. Bar: 264914
71 Gurnet Road
Duxbury, Massachusetts 02332
781 536-8835
jjkuz@comcast.net

Certificate of Service

I hereby certify that I served a copy of the forgoing by email on Michael Donovan, Esq., Town Counsel on this 2 day of August 2017.