

ROCKINGHAM, SS

STATE OF NEW HAMPSHIRE

ROCKINGHAM
SUPERIOR COURT

SUPERIOR COURT

Docket No:

2017 AUG - 9 PM 12:14

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

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 Complaint appealing a decision of the Rye Planning Board of Adjustment pursuant to R.S.A.677:15 as well as seeking other relief.

INTRODUCTION

The Rye regulatory boards have made a mockery of the land development process. They ignored scientific evidence which not only was unrefuted, but was supported by their own consultants. Despite clearly having decided to deny the subdivision from the first meeting, they proceeded to demand study after study and charged an excessive amount for peer review by their consultants – almost \$80,000 for fees and other expenses. The boards, perhaps spurred on by citizen outrage over potential water quality problems caused by an unrelated landfill, in the name of protecting water, decided to irrationally and contrary to law decide to deny development, its merits notwithstanding.

This specific appeal¹ involves two requested waivers. Harbor Street sought a de minimus waiver from an antiquated regulation concerning designated leach field areas (DLA) which is now being used by the Planning Board to prevent lot development. It also sought a waiver from a buffer requirement that makes sense only if you concede water runs up hill. The unrefuted testimony from the NHDES employee who designed the original statewide DLA regulation years ago stated there was no rational purpose for either regulation and no rational reason to deny the requested waivers. Nevertheless, the Planning Board came up with nonsensical reasons for denial, including applying standards not contained in the regulations. Its decision was irrational and, in employing incorrect standards, an error of law. Since the error here is so grievous, the Board's decision must be reversed and the Board ordered to grant the waiver. Finally, even if the Board's action were proper, the regulations themselves are unenforceable as irrational.

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 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.
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.

¹ There will be multiple appeals including denial of a variance, denial of a special exception, denial of lot line adjustment, denial of a conditional use permit and denial of a subdivision application. Plaintiffs will move to consolidate them as decisions come out. In any event, this appeal will not plead every background fact but only those needed to understand the issues at hand.

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 owns a large parcel of land located at 421 South Road, Rye New Hampshire. Each of them has entered into Purchase and Sale Agreements with Harbor Street so that the four parcels can be combined and developed into a residential subdivision. The closing of the sales of each parcel to Harbor Street is contingent on subdivision approval, at which point Harbor Street would own the combined parcel and commence construction.
8. The parcel consists of approximately 98 acres, approximately fifty of which are contiguous wetland. Harbor Street intends to donate this area to the Town for conservation purposes if and when development is approved. The area is zoned residential and the contemplated subdivision meets all requirements of zoning with the exception of one driveway for a single lot needing a special exception or variance concerning wetland and vernal pool buffers.

9. On September 16, 2016 a complete application for development, including subdivision approval was submitted. Harbor Street prosecuted the application on behalf of the owners as well as on its own behalf in light of its interest in the property.
10. Initially, a 22 lot subdivision was proposed. Over time it was reduced to 17 lots. Due to the waiver at issue here and the failure of the Board of Adjustment to grant the special exception for the driveway, it has been further reduced to 15 lots.
11. The Rye Land Development Regulations in relevant part provide:

603.3 Additional Requirements.

A. Designated Leachfield Area: All topographic plans and/or site plans shall indicate a leachfield area which is the larger of twice the minimum size required by NH Admin Rules Ws 1015.05 or 4000 square feet, in order to provide a reserve area should the initial leach area fail.

1. Prohibited Soils: The designated leachfield area shall not occupy nor be within 75 feet of any of the following soils: ...

c. Soils where bedrock or impervious substratum are within 24 inches of the surface

12. Lot 12 of the proposed subdivision could not meet these requirements. One small outcropping of ledge was found with only 18" of cover. Although Harbor Street tried to meet the regulations, it could only design 3,400 square feet of DLA or come within 55 feet of the outcropping instead of the required 75 feet.
13. Harbor Street and its engineers were of the opinion that no functionality of the leachfield would be lost and that there was no risk of detrimental effect if the lot were designed and a waiver of either the 4,000 square foot requirement or the 75 foot buffer requirement were granted.
14. On May 10, 2017, Harbor Side submitted a request for two waivers. A copy of the request is attached as Exhibit 1.

15. On June 30, 2017, Harbor Side submitted a package in support of the request. Expert opinion concerning the relevant regulations from William Evans was included in the package.
16. Section 900 of the Land Development Regulations provides:
“The Planning Board may waive any requirement of these regulations...where...strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations.”
17. The Planning Board held the requisite hearing.
18. The Board issued a decision dated July 11, 2017, denying the two requested waiver. A copy of the decision is attached as Exhibit 2.

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

19. The plaintiffs re-allege and incorporate the above allegations.
20. The vote to deny the waiver concerning the DLA was unreasonable and illegal in that:
 - a. The Board did not consider the merits of the request,
 - b. The Board found no unnecessary hardship when it concluded there were no special condition about the lot when a single ledge probe only had 18” of cover rather than the required 24” however in doing so it ignored that this was an isolated condition that was surrounded by passing soils which would have no practical effect other than to deny development of a lot without a waiver.
 - c. The Board erred in applying an economic advantage test to determine no hardship existed. Moreover, it was incorrect about the number of lots which in fact could be approved without additional zoning relief.

- d. The hardship was not created by the applicant. The applicant had worked with the Board and had redesigned the subdivision several times between its submittal in September 2016 and the date it discovered the ledge, April 20, 2017. It would be unreasonable and next to impossible to re-engineer the entire subdivision at that late date in the process, particularly in light of the extensive review that had occurred. The applicant did not intentionally put a lot line where there would be issues, rather a ledge probe after a later round of testing revealed a possible technical violation.
- e. The waiver met the spirit and intent of the regulations. The Board performed an unreasonable analysis of the relation of leachfield size to lot area when the analysis lacked any reasoning about the performance of the leachfield. It is patently unreasonable for the Board to attempt to justify DLA without any scientific or engineering analysis.
- f. The Board committed an error of law when it referred to the Marjorie Way subdivision. The regulation in question by its express terms is designed to protect against failed leachfields. It is undisputed that the issues at Marjorie Way had nothing to do with leachfields. Further the Board engaged in an improper economic analysis of replacing all components of a system rather than just a leachfield. Finally, even if the homeowner decided to install a traditional system, there was sufficient area for three systems to be installed which is more than envisioned under the original regulation. As it stands with the advanced SeptiTech systems, there is a margin of 13 leachfields. Nonetheless, the unrefuted testimony is that leachfields today are replaced in their original location so that no additional area is needed.

- g. The Board went into an extraneous analysis of non-compliant septic systems. The regulations by their express terms protect against failed leachfields. They have nothing to do with the operation of other components of the septic system.
- h. The Board wrongfully concluded there may be less than 3,400 square feet of DLA due to "tapers". This is legally and factually wrong. The regulation requires a minimum area for DLA, however it does not specify in any manner how this DLA may be configured. Thus, the Board went beyond the requirements of the regulations. Further there was no evidence of any kind showing the areas to be unusable or insufficient.
- i. The Board's final reason for denial, that it would set precedent establishes that the Board had another agenda and did not consider the merits of the request. This is unreasonable and an error of law.

21. The vote to deny the waiver concerning the 75 foot setback was unreasonable and illegal in that:

- a. The Board did not consider the merits of the request.
- b. The Board made no findings on the request.
- c. The unrefuted evidence was that it would be unreasonable not to grant a waiver reducing a 75 foot buffer to a 55 foot buffer, particularly when the ledge conditions requiring the waiver had no impact on the functioning of the DLA and proposed septic system.
- d. There is no engineering basis for requiring a buffer up gradient or side gradient from any septic system.
- e. Based on the Board's arbitrary conduct, a remand would serve no purpose and the Board must be reversed.

Count II
(Declaration of Invalidity of Regulations)

22. The plaintiffs re-allege and incorporate the above allegations.
23. There was unrefuted testimony that the 4,000 square foot DLA and the 75 foot buffer have no rational basis.
24. Despite the total lack of rational basis, the regulations were used to deny development of an otherwise conforming lot.
25. If the regulations are allowed to stand and deny development, they constitute an unconstitutional taking of reasonable use of property.
26. As applied, the regulations must be declared unconstitutional.

Count III
(Damages v. Planning Board)

27. The plaintiff re-alleges and incorporates the above allegations.
28. The Board never fairly considered the applicant's request for a waiver.
29. The plaintiff is entitled to damages and attorneys' fees as a result of the Board's conduct.

Count IV
(Official Oppression)

30. The plaintiff re-alleges and incorporates the above allegations.
31. The Board, in failing to fairly consider the waiver, knowingly refrained from a duty imposed by law.
32. Such conduct violates R.S.A. 643:1.
33. 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.
34. The plaintiff is entitled to damages and attorneys' fees as a result of the Board's conduct.

WHEREFORE the plaintiffs requests relief against the defendants as follows:

1. That the Court reverse the decision of the Planning Board as to the waiver sought,
2. That the Court declare the rights of the parties.
3. That the Court award damages in an amount to be determined at trial.
4. That the Court award attorneys' fees to the plaintiffs and
5. That the Court enter such other and further relief as justice may require.

Verification

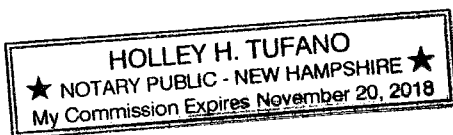
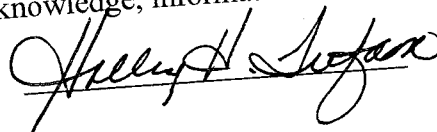
I, Joseph Falzone of Harbor Street, under oath, state that the allegations in this complaint are true based on my knowledge, information and belief.



State of New Hampshire

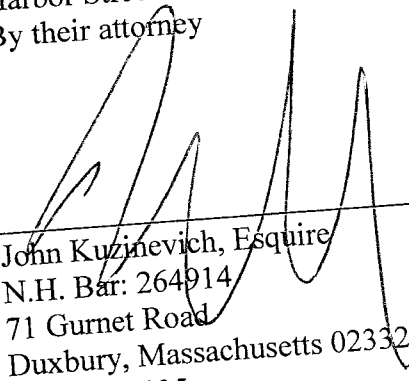
Rockingham County

Before me, the undersigned notary appeared Joseph Falzone who after being duly sworn stated the above allegations are true based on his knowledge, information and belief.



Respectfully submitted,

Harbor Street LLC, et al
By their attorney



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