

STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

Docket No:

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

v.

The Zoning Board of Appeal of The Town of Rye

Complaint and Petition of Harbor Street LLC, et. al.
Appealing a Decision of the Zoning Board of Appeal 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 Zoning Board of Adjustment pursuant to R.S.A.677:4 as well as seeking other relief.

INTRODUCTION

The Rye Zoning Board of Adjustment acted unreasonably and illegally when it denied alternative requests for a variance or special exception to construct a driveway in a vernal pool and wetlands buffer. Instead of considering the actual, de minimus impact on the buffers, which request was supported by overwhelming scientific evidence, the Board looked at potential speculative development impacts on the lot and the entire subdivision to determine that the addition of a house on the proposed lot would be a threat to Rye's wellbeing. The Board did not fairly consider the impacts of the requested variance/special exception, it acted to minimize development and attempted to render the entire subdivision uneconomic in an effort to prevent

development. It ignored its own wetland's scientist who agreed there was minimal impact. The Board well exceeded its authority.

Not only did it exceed its authority, its reasons were nonsensical. For example, the Board was concerned that if a driveway was allowed through the grant of a variance/special exception, a house may be constructed and inhabited by people who have pets. Somehow, in the Board's view, a single theoretical dog on a 100-acre site posed grave risk to the Town. The Board's action was patently unreasonable.

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 Zoning Board of Appeal of the Town of Rye is the duly existing and constituted Planning Board of the Town of Rye which itself is a 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 of them 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. The parcel consists of approximately 98 acres, approximately fifty of which are contiguous wetland. Harbor Street intend to donate approximately 40-acres of wetland and open space to the Town for conservation purposes if and when development is approved. The area is zoned residential.
9. Other than the variance/special exception appealed here, the contemplated subdivision meets all requirements of the zoning ordinance.
10. Proposed Lot 2 needed zoning relief to allow a driveway to be constructed in an area of overlapping wetlands buffer and vernal pool buffer. The Developer applied for both a variance and a special exception. No construction was proposed in the wetlands themselves or in the vernal pool.
11. The scientific evidence demonstrated that there would be no detrimental impact on the environment. This was confirm by the Town's consultants.

12. In an attempt to remedy the Board's concerns regarding possible impact on the wetlands and vernal pool, the applicant proposed a voluntary restrictions on cutting, which would have increased the integrity of the wetlands and vernal pool.
13. Instead of focusing on the impact of the proposal on the buffers, the vernal pool, and the wetlands, the Board took a broader focus and decided that the development of a house lot may affect water quality 2,500 feet away at the Rye Water District Wells. There was no factual basis for their concern.
14. Additionally, overall water protection concerns are properly within the Planning Board's purview, and in fact the Planning Board spent an enormous amount of time considering the impact of the subdivision on the Rye water supply.
15. There was no legal basis for the Zoning Board to substitute itself for the Planning Board.
16. On July 5, 2017, the Board voted to deny the special exception and waiver. Copies of the decisions are attached as Exhibits 1 and 2.
17. The Developer filed a timely request for rehearing, a copy of which is attached as Exhibit 3.
18. On August 9, 2017, the Board, without reasoning, denied the request for rehearing.

Count I
(Planning Board Appeal R.S.A. 677:4)

19. The plaintiffs re-allege and incorporate the above allegations.
20. The vote to deny the special exception was unreasonable and illegal in that:
 - a. The Board failed to fairly consider the requests.
 - b. The Board illegally confused considering the variance for one lot with the totality of the parcel being divided. This is in blatant disregard of rights to simply suggest taking a lot away when the requested relief was minor.

- c. There was no basis to find economic advantage was the sole reason for the request. There were no special savings by this driveway configuration. It was the environmentally soundest solution to access the property.
- d. There was no basis to conclude that the driveway would be detrimental to the buffers. To the contrary, voluntary cut restrictions would have improved the integrity and function of the buffers.
- e. Vehicles using the driveway would not pose an unreasonable risk of spillage.
- f. The Board improperly failed to consider the effect of the variance on the buffer and instead illegally considered the entire subdivision and wanted to stop development of a single lot without any basis..
- g. There was no basis to conclude that construction or maintenance of the driveway would affect wetlands or other resources.
- h. There was no basis to conclude the driveway was injurious and detrimental to the neighborhood.
- i. The Board's conclusion that the driveway was not in harmony with the purpose of the ordinance is an error of law. The area is zoned residential. The purpose of the ordinance is the proper development of property. Here all expert opinion was that the ordinance and regulations were met on this lot except for the needed driveway crossing. It is the intent of the ordinance to allow variances or special exceptions when a minor issue needs to be addressed.
- j. The Board had no basis to conclude that protective restrictions would be ineffective. In addition, it applied the wrong legal standard of seeking a guarantee of compliance.

21. The vote to deny the variance was unreasonable and illegal in that:
- a. The Board failed to fairly consider the request.
 - b. The Board found that construction of a driveway may harm the environment without any evidence and no detail of any possible reasons for detrimental effect.
 - c. The Board unreasonably denied the driveway by saying it would be used as a driveway and there are risks of spillage. It is unreasonable to conclude a single family driveway poses threat. If this were the case, all driveways could be per se prohibited.
 - d. The Board illegally and unreasonably determined the construction of a single family out of a 17 home subdivision, had a potential negative environmental effect. There was no evidence to support this. Again, this could apply to every proposed home anywhere.
 - e. The Board set an illegal and unreasonable standard when it concluded compliance with homeowner restrictions was impossible to guarantee. Again, this standard could prevent all future subdivisions,
 - f. The Board concluded there were alternate routes for the driveway. No evidence supported this as there are buffers surrounding the useable area of the lot. Moreover, after over a year of design and hearings before the Planning Board, it was unreasonable to suggest re-drawing lot lines.
 - g. The Board found there was no hardship, however, it was denying reasonable use of over a 3 acre parcel. The Board does not have the right to reduce the number of lots in a subdivision because they think it is not a hardship. It is a hardship with the use of the land.

- h. There was no basis for the Board finding that values of surrounding properties would be diminished. Due to its location in the subdivision, a house on lot 2 would barely be seen, The area is zoned residential and the lot, but for the driveway met all zoning and land development requirements. It is unreasonable to conclude that putting one brand new single family house in a residential area will drive down values.
- i. There was no basis for the Board to conclude the driveway was contrary to the public interest. Instead the Board focused on general opposition to the entire subdivision, which was not properly before it.
- j. The variance is not contrary to the public interest. The public interest is in the orderly development of land. The Developer proposed restrictions which enhance environmental protection and are more stringent than the Town's existing regulations.
- k. There are special conditions, in that buffers surround an otherwise buildable lot. Clearly, this is different than other properties as this is the only variance sought for the entire subdivision.

22. Accordingly, the plaintiffs are entitled to a variance or a special exception.

Count II
(Official Oppression)

- 23. The plaintiff re-alleges and incorporates the above allegations.
- 24. The Board, in failing to fairly consider the special exception and waiver, knowingly refrained from performing a duty imposed by law.
- 25. Such conduct violates R.S.A. 643:1.
- 26. 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.

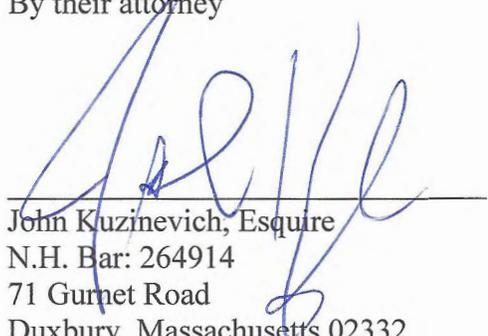
27. The plaintiff is entitled to damages and attorneys' fees as a result of the Board's conduct.

WHEREFORE the plaintiff demands relief against the defendants as follows:

1. That the Court reverse the decision of the Zoning Board of Appeal as to the special exception and variance 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.

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