

STATE OF NEW HAMPSHIRE

CARROLL, SS

SUPERIOR COURT

Kathleen M. Guckert, Trustee of
Guckert NH Realty Trust

vs.

Town of Freedom and the Freedom
Zoning Board of Adjustment**PETITION FOR REVIEW OF BOARD OF ADJUSTMENT
DECISION PURSUANT TO RSA 677:4**

NOW COMES Kathleen M. Guckert, Trustee of Guckert NH Realty Trust owner of property situate in Freedom, County of Carroll and State of New Hampshire and abutter to the Ossipee Lake Marina and complains against the Town of Freedom and its Zoning Board of Adjustment as Plaintiff is aggrieved by a decision of said Board which is both unreasonable and illegal and requests that said decision be reversed and in support of said request says as follows:

1. Ossipee Realty Corp d/b/a Ossipee Lake Marina (the "Applicant") is the owner of lots in Freedom depicted on tax map 31, parcels 41, 41-1, 41-2, 41-3 and 42, all of which are located in the General Residential Zone and the Shorefront Overlay District. Parcels 41, 41-1, 41-2 and 41-3 are lots upon which a pre-existing marina is located. Parcel 42 was acquired by Ossipee Realty Corp after the purchase of the marina property and was an undeveloped residential lot not previously a part of the marina.

2. The Freedom Zoning Ordinance permits marina use in the Shorefront Overlay District by special exception. The marina use on Lots 41, 41-1, 41-2 and 41-3 is a nonconforming use which existed prior to the enactment of the zoning ordinance

3. Lot 42 was purchased by Ossipee Realty Corp in 1998 and without necessary permits was cleared of trees and filled to create three customer parking lots. In 1999 a State septic system approval was obtained and in 2000 a cinder block bathroom building was constructed on the lot also without necessary zoning permits.

4. By letter dated October 15, 2001 the Freedom Board of Selectmen advised the Applicant that because the bathroom and parking lots had been constructed without required zoning approval, an application to the Board of Adjustment needed to be made for "after-the-fact" approvals.

5. By application dated March 12, 2002, the Applicant filed for a special exception to expand the pre-existing marina on the marina lots and to include Lot 42 for all the uses as shown on the plan submitted with the application.

5. At the time of the initial application and throughout the proceedings before the Zoning Board of Adjustment Lot 42 has been a separate lot of record, not merged with the marina lots.

6. The plan submitted with the March 12, 2002 application requested approvals for uses on Lot 42 for the bathroom facility and for additional parking for the marina.

7. After two nights of hearings on the marina's application at which numerous abutters, concerned citizens, the fire chief and others spoke in opposition to its approval, on May 28, 2002 the Board denied all aspects of the application for special exception including the toilet facility and parking lots on Lot 42.

8. Despite the provisions of RSA 676:3 that the Board shall issue a *final* decision which either approves or disapproves an application, the Board Chairman on May 28, 2002 stated that the application was rejected as presented without prejudice.

9. The Applicant filed a timely Motion for Rehearing on the denial of the special exception. The motion was denied on July 9, 2002.

10. Following the denial of its application for special exception based on its March 12, 2002 application, the applicant filed separate applications dated June 14, 2002; one for a special exception to approve a bathroom building on Lot 42 as an accessory use to the marina parcels and one to approve a parking lot on Lot 42 as an accessory use to the marina lots.

11. A Board of Adjustment may not lawfully reach the merits of a subsequent application for the same use without first finding that a material change of circumstances affecting the merits of the prior application has occurred or that the second application is for a use that is materially different in nature and degree from the use previously applied for and denied by the Board. Fisher v. City of Dover, 120 N.H. 187, 190 (1980)

12. The June 14 applications sought approval for the existing bathroom and parking lots on Lot 42. That the bathroom in the first application included an exterior shower whereas in the second application the bathroom did not have a shower, did not make the second application "materially different in nature and degree" from the application that the Board had previously denied. Nor does the fact that the second application regarding the parking lot was for fewer spaces make that application materially different.

13. No change of circumstances had occurred between May 28 and June 14 which effect the merits of the application and the subsequent application as it relates to Lot 42 was not materially different.

14. The basis for the rule concerning subsequent applications are to assure finality to proceedings before the Board of Adjustment, to preserve the integrity of the zoning plan and to

not place an undue burden on property owners seeking to uphold the zoning plan. Fisher at 190.

15. The Board committed legal error in reaching the merits of the June 14, 2002 applications for special exceptions to permit the bathroom facility and parking lot on Lot 42 when the Board had denied those very uses in its May 28, 2002 decision.

16. On June 14 and July 9, Lot 42 remained a separate lot of record on which no marina uses had been approved. The adjacent marina lots are nonconforming lots on which a pre-existing marina use is permitted but for which no special exception has been granted, except for the construction of winter storage buildings which were granted a special exception in 1997.

17. The minutes of the May 28, 2002 hearing indicated that Town Counsel agreed that the special exception granted for the construction of the winter storage buildings "was not for the entire marina".

18. Section 1702 of the Freedom Zoning Ordinance defines an "accessory use" as a use subordinate and customarily incidental to a permitted use or a special exception use on the same lot.

19. Lot 42 is situated in the General Residential District and the Shorefront Overlay Districts. Both districts permit uses which are "accessory to a special use exception".

20. Neither free standing bathroom facilities nor parking lots are listed as permitted (primary) uses in the General Residential District nor the Shorefront District in the Freedom Zoning Ordinance.

21. The Freedom Zoning Ordinance only permits accessory uses for "uses accessory to special exception uses" See Section 304.2 and 304.5

22. Further the Board specifically stated that the finding that no marina uses can be made of Lot 42 would not be effected by a future merger of that lot with the marina lots.

23. As a result of the findings of the Board on both the March 12 and June 14 applications, neither the marina lots nor Lot 42 have been granted a special exception for marina use by the Freedom Zoning Board of Adjustment.

24. Given that none of the lots to which the accessory uses of a bathroom facility and parking lots would be incidental or subordinate, the granting of an application for these accessory uses is not permitted under the Freedom Zoning Ordinance.

25. The Board committed legal error in granting a special exception for the accessory uses of the bathroom facility and parking lots on a lot where the principal use, to which the accessory uses are subordinate, is neither a permitted use nor a special exception use.

26. In rendering its decision on July 9, 2002 the Board impermissibly reached the merits of the applications and disregarded the provisions of its own Zoning Ordinance and its decision

should be found to be both illegal and unreasonable.

WHEREFORE your Petitioner prays this Honorable Court:

1. Find that the decision of the Freedom Board of Adjustment to reach the merits of the applications dated June 14, 2002 for uses which had been denied on May 28, 2002 on a prior application was illegal, unjust and unreasonable and reverse the same.

2. Find that the decision of the Freedom Board of Adjustment granting a special exception for the bathroom facility and parking lot on Lot 42 as accessory uses to a pre-existing nonconforming marina on adjacent lots contrary to the provisions of the Freedom Zoning Ordinance was illegal, unjust and unreasonable and reverse the same.

3. That the Clerk issue Orders of Notice requiring a certified copy of the record appealed from be filed with the Court as required by RSA 677:8.

4. Grant such further relief as may be just and proper.

Respectfully submitted,

Kathleen M. Guckert, Trustee of
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