

THE STATE OF NEW HAMPSHIRE

CARROLL COUNTY

SUPERIOR COURT

Guckert N.H. Realty Trust

v.

Town of Freedom, Zoning Board of Adjustment

Docket No.: 07-E-0059

ORDER

The petitioner, Kathleen M. Guckert, Trustee of Guckert N.H. Realty Trust, appeals the decision of the Town of Freedom Zoning Board of Adjustment (“the ZBA”) denying her motion for rehearing, which challenged the ZBA’s decision to grant a special exception to the Ossipee Lake Marina (“the Marina”). The respondent, the ZBA, objects. The case originally came before the court on appeal in August of 2007. Kathleen M. Guckert, Trustee of Guckert N.H. Realty Trust v. Town of Freedom ZBA, Carroll County Super. Ct. No. 07-E-0059 (Nov. 11, 2007) (Order, Fitzgerald, J.) (“the Fitzgerald Order”). The Marina did not intervene in the appeal. The respondent appealed the Fitzgerald Order, and the Supreme Court reversed and remanded the case to this court for further findings. The court held a hearing on this matter on February 3, 2009. After a review of the facts, the parties’ arguments, and the applicable law, the court finds and rules as follows.

The background facts in the Fitzgerald Order are incorporated herein. The court additionally incorporates the facts from the court’s (O’Neill, J.) Order dated December 24, 2003. Ossipee Realty Corp. v. Town of Freedom Zoning Board of Adjustment, Carroll County Super. Ct. No. 02-E-0076, 02-E-0095 (Dec. 24, 2003) (Order, O’Neill, J.) (“the O’Neill Order”). The court determines the following facts to be particularly relevant for purposes of this order. The Marina is comprised of a number of lots in Freedom, New Hampshire. The Marina, as it exists on several of the lots, preexisted the Town of Freedom Zoning Ordinance (“FZO”). The Marina, in its entirety, is located in the General Residential

District. Part of the Marina is also located in the overlay Shore Front District. See FZO, Section 304.2. Winter boat storage facilities are not permitted within the General Residential District, but marinas are permitted within the Shore Front District upon approval of a special exception. See FZO, Section 304.2, 304.5, 304.6.2.

In 1997, the ZBA granted the Marina a special exception to construct two buildings for inside boat storage with a number of conditions, including that the boat storage would be limited to 225 boats inside and ten percent of that number (or twenty-three) additional boats on trailers on all marina lots ("the 1997 decision"). In May 2002, the Marina applied to the ZBA to gain special exception status for the entire marina. The ZBA denied that application, in part because it ruled that the Marina's request for additional boat storage, if granted, would have violated the conditions of the 1997 decision. At that time, the ZBA also considered the Marina's appeal of a letter decision by the Town Selectman denying the Marina's request for outside storage of more than twenty-three boats. The ZBA upheld that decision and denied the Marina's appeal. The Marina appealed that decision to this court, along with the ZBA's denial of the Marina's special exception request. The court upheld the ZBA's denial of the Marina's request for special exception status and the enforcement of the conditions of the 1997 decision, including the outdoor storage of no more than twenty-three boats on the entire Marina property. In the O'Neill Order, the court also upheld the ZBA's July 9, 2002 decision to grant the Marina two after-the-fact special exceptions for a bathroom and a parking lot on one of the Marina's lots as an accessory use to the Marina.

This case arises from an application filed by the Marina on September 15, 2006 for a special exception to construct a fence and to modify the 1997 decision to allow for unlimited outside storage of boats and trailers within the fenced area. (Certified Record ("CR") at 3, 103.) The application is for a special exception under Section 304.5.5 of the FZO, which allows for accessory uses to other special exception uses in the Shore Front District. See FZO, Section 304.5 Table. The ZBA held three public hearings and ultimately granted the application on January 23, 2007. (CR at 96-99, 107-109, 153-157, 161.)

The petitioner appealed that decision to this court, arguing initially that the ZBA should not have reached the merits of the application because the question of unlimited boat storage by the Marina had been before the ZBA on three prior occasions, and that there was no showing of a material change in circumstances that would have allowed the ZBA to hear the

merits of the application again. The court in the Fitzgerald Order concurred with the petitioner, and the respondent appealed. The Supreme Court reversed that decision and remanded the case to this court for consideration of the petitioner's remaining arguments.

The petitioner argues that the ZBA erred in granting a special exception to the nonconforming Marina, and that the ZBA in fact allowed an impermissible expansion of a nonconforming use when it granted that special exception. In support of this argument, the petitioner directs the court's attention to the O'Neill Order, which, the petitioner alleges, found that the granting of the special exception for the construction of the inside boat storage buildings did not change the overall status of the marina from a nonconforming use to a special exception marina (which would permit accessory uses under Section 304.5 of the FZO). As a result, the petitioner contends that the Marina remains a nonconforming use, and as such is not entitled to accessory uses. According to the petitioner, the ZBA has allowed an impermissible expansion of a nonconforming use in that it allowed an enlargement in storage area that is greater than that permitted under the FZO.

The respondent objects, arguing that the O'Neill Order actually granted the Marina special exception status, and as such, the Marina may receive a special exception for accessory uses subordinated thereto. Additionally, the respondent argues that Section 502 of the FZO, which limits the expansion of nonconforming buildings, does not apply to an application for outside, uncovered boat storage.

RSA 677:4 provides for appeals to the superior court by "[a]ny person aggrieved by any order or decision of the zoning board of adjustment." RSA 677:4 (2008). Concerning such appeals, RSA 677:6 provides, in pertinent part:

In an appeal to the court, the burden of proof shall be upon the party seeking to set aside any order or decision of the zoning board of adjustment . . . to show that the order or decision is unlawful or unreasonable. All findings of the zoning board of adjustment . . . upon all questions of fact properly before the court shall be prima facie lawful and reasonable. The order or decision appealed from shall not be set aside or vacated, except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that said order or decision is unreasonable.

RSA 677:6 (2008).

The court's review in such an appeal "is not to determine whether it agrees with the zoning board of adjustment's findings, but to determine whether there is evidence upon which they could have been reasonably based. The court thus may not review the evidence *de novo*." Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 583 (2005) (quotations and citation omitted).

The initial question for the court is the status of the Marina following the O'Neill Order. In the O'Neill Order, the court found that the Marina was a nonconforming use as defined by the FZO prior to the 1997 decision, and that as a result the Marina and its normal activities were "grandfathered" under the Ordinance. (O'Neill Order at 22-23.) The court added that nothing in the 1997 decision changed the status of the marina property from a preexisting, nonconforming use to any other status. (O'Neill Order at 24.) The court also, however, upheld a decision by the ZBA to allow a special exception for uses accessory to the Marina on Lot 42, which was not owned by the Marina at the time the FZO was enacted and was therefore not "grandfathered" as a preexisting, nonconforming use. In coming to that conclusion, the court reasoned that it was not unlawful or unreasonable for the ZBA to allow accessory uses to the Marina on that lot because the Marina had "effectively gained special exception status." (O'Neill Order at 43.)

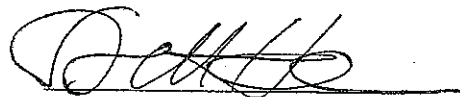
The ZBA's reliance on the portion of the O'Neill Order which states that the Marina had "effectively gained special exception status," O'Neill Order at 43, is understandable but wrong. This court recognizes that the O'Neill Order is subject to differing interpretations with regard to the status of the Marina, given that in one context it states that the Marina had "effectively gained special exception status," O'Neill Order at 43, but that in another context it states that the Marina remained a preexisting, nonconforming use which had not changed to any other status, O'Neill Order at 22-4. It is, however, the O'Neill Order's ruling in the later context, not the former, which is relevant to the issues now before the ZBA and this court. The Marina was specifically denied special exception status in 2002 by the ZBA, and the O'Neill Order upheld that decision and explicitly stated that the property as a whole remained a preexisting, nonconforming use, and that nonconforming use had not changed to any other status, O'Neill Order at 24. That is the law of this ongoing case (as well as being, in the view of this court, the correct result on the record and the law).

The court accordingly finds that the Marina is a preexisting, nonconforming use, and that the ZBA thus erred when it approved a special exception for accessory use under Article 3, Section 304.5.5 of the FZO. The ZBA's grant of the special exception is reversed and remanded.

Because the court finds that the ZBA erroneously granted the special exception and remands, it need not and does not reach the petitioner's remaining arguments.

So Ordered.

April 24, 2009



Steven M. Houran
Presiding Justice