

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2008 TERM

NO. 2007-0848

**KATHLEEN M. GUCKERT, TRUSTEE OF
GUCKERT NEW HAMPSHIRE REALTY TRUST**

v.

TOWN OF FREEDOM

Appeal from Final Order of Carroll County Superior Court

BRIEF OF THE TOWN OF FREEDOM

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QUESTIONS PRESENTED

- I. WHETHER THE RECORD SUPPORTS THE TRIAL COURT'S FINDING THAT THE ZBA COULD NOT LAWFULLY REACH THE MERITS OF THE SPECIAL EXCEPTION APPLICATION BECAUSE IT HAD PREVIOUSLY CONSIDERED AN APPLICATION THAT WAS SUBSTANTIALLY THE SAME. Transcript, pp. 7-10.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

This case is a mandatory appeal from a final decision issued by the Carroll County Superior Court (hereinafter “Superior Court” or “Trial Court”). In its final decision, the Superior Court erroneously reversed a decision made by the Town of Freedom Zoning Board of Adjustment (hereinafter “Town” or “ZBA”) approving Ossipee Lake Marina’s (hereinafter “the Marina”) Application for a Special Exception (hereinafter “the 2006 application”). The Superior Court’s decision rested on its finding that the 2006 application was substantially the same as a prior application and so the ZBA should not have reached the merits of the 2006 application.

There is a complicated history of interactions between the Marina and Town between 1997 and the present all involving efforts by the Marina to improve its property located on the shores of Ossipee Lake. A detailed version of the history is set forth in pages 1-14 of a prior decision (“Order on Pending Motions”) issued by the Carroll County Superior Court on December 24, 2003. That decision (hereinafter referred to as “12/24/03 Order, p. ___”), is contained in the Appendix attached hereto (hereinafter “App., p. ___”). In addition, in this case the Marina submitted a “Memorandum in Support of Application for Special Exception,” which is located at pages 101-106 of the Certified Record (hereinafter referred to as “CR, p. ___”). The following abridged version of the history, which is derived from those two documents, sets forth a summary of the interactions between the Marina and Town that are relevant to this appeal.

A. The Marina’s Pre-Existing, Non-Conforming Use

Prior to the adoption of the Town’s Zoning Ordinance on October 6, 1987, the Marina was located on Lots 41, 41-1, 41-2, 41-3, 41-4, and 41-5 on the Town’s Tax Map 31. See 12/24/03 Order, p. 3; CR, p. 101. At that time, the uses of the Marina included boat and engine

repair, boat slips, and winter boat storage. *Id.* Upon the adoption of the Freedom Zoning Ordinance, the Marina was located within the General Residential District and partially located within the Shore Front District. *See* 12/24/03 Order, p. 3. Under §304.2 of the Zoning Ordinance, winter boat storage facilities are not permitted in the General Residential District; however, under §§304.5 and 304.6.2 of the Zoning Ordinance, marinas are permitted in the Shore Front District by special exception and winter boat storage facilities are permitted as an accessory use to special exception marinas. *Id.* However, the Marina continued to operate as a pre-existing, non-conforming use. *See* 12/24/03 Order, p. 3; CR, p. 101.

B. The Marina's 1997 Application for a Special Exception

In 1997, the Marina submitted an Application for a Special Exception under §§ 304.5 and 304.6.2 of the Ordinance proposing the construction of two new boat storage sheds each to be 50' x 200' and each to store 50 boats. *See* 12/24/03 Order, pp. 3-4. On October 7, 1997, the ZBA conducted a public hearing and unanimously approved the application subject to certain conditions (hereinafter "the 1997 ZBA decision"). *Id.* One condition, which has been extensively debated and discussed over the past ten years, was a "limit of 225 boats stored inside and no more than 10% additional boats or trailers outside on all 6 marina lots." *Id.* Another condition was the merger of Lots 41-3, 41-4, and 41-5 into one lot. *Id.*¹

C. The Marina's 1998 Acquisition of Lot 42

On June 26, 1998, the Marina purchased Lot 42. *See* 12/24/03 Order, p. 4. Subsequent to its purchase, the Marina made improvements to an existing road and constructed a parking lot on Lot 42. *Id.* In 1999, the Marina applied for and obtained a building permit from the Town to construct a bathroom building on Lot 42. *Id.* at 5. In 2000, the Marina applied for and obtained a building permit from the Town to construct a third boat storage shed to be 80' x 100' on Lot

¹ The 1997 ZBA decision is contained in the Appendix at Page 1.

42. Id. Although the Marina obtained building permits, the Marina did not apply for or obtain any approval from the ZBA for the improvements or construction on Lot 42. Id. at 4-5.

D. The Selectmen's 2001 Letter to the Marina and Subsequent Meeting

On October 15, 2001 the Town's Selectmen sent a letter to the Marina informing the Marina of several issues, including issues with regard to the improvements and construction on Lot 42, and also informing the Marina that the Town's Zoning Officer would be investigating allegations that the Marina was not in compliance with the conditions imposed by the 1997 ZBA decision. Id. at 6. The Marina raised several defenses to the issues contained in the Selectmen's letter. One such defense offered a different interpretation of the conditions imposed by the 1997 ZBA decision. Id. at 6-7. In an attempt to resolve these issues, a meeting of all interested parties was held. Id. at 7. At the meeting it was agreed that the Town would defer all enforcement action against the Marina to allow the Marina to prepare an overall comprehensive plan for its entire property that addressed all of the issues. Id.

E. The Marina's 2002 Application for a Special Exception

On March 12, 2002, the Marina submitted an Application for a Special Exception (hereinafter "the 2002 application") under §§304.6.2, 304.6.3, and 304.6.5 of the Town's Zoning Ordinance that contained a comprehensive Marina plan. In addition to the aforementioned road improvements, parking lot and bathroom building, the plan included (1) expansion of the pre-existing marina on Lots 41, 41-1, 41-2, 41-3 to include Lot 42, (2) increasing the pre-existing marina to include Lot 42 and utilize the boat storage capacity of Lot 42 to increase the number of boat slips to a total of 66, with 53 in/out boating season dry storage, 54,520 sq. ft. of inside winter storage and designated areas for outside winter storage, and (3) making improvements on the entire marina to make it less non-conforming. Id. at 7-8.

On May 28, 2002, the ZBA unanimously denied the 2002 comprehensive plan application without prejudice. *Id.* at 8. The ZBA's denial was based in part on its determination that the plan failed because the proposed storage sheds must comply with §502 of the Zoning Ordinance which limits the expansion of non-conforming uses, and the plan did not contain adequate access from the highway for emergency vehicles. *Id.* at 9.

F. The Marina's 2002 Applications for Special Exception and Variance

The Marina's comprehensive plan having been denied, the Marina picked out certain aspects of its comprehensive plan and filed (on June 14, 2002):

1. An Application for Special Exception seeking after the fact approval of the road that the Marina had constructed on Lot 42 without ZBA or DES approval;
2. An Application for Special Exception seeking after the fact approval of the bathroom building the Marina had built on Lot 42 without ZBA approval;
3. An Application for Special Exception seeking after the fact approval of the parking lot that the Marina had built on Lot 42 without ZBA approval; and
4. An Application for Variance seeking an exemption from §502 of the Zoning Ordinance (which prohibited the proposed 52,520 sq. ft. of inside winter boat storage). *Id.* At 9-10.

G. The Marina's 2002 Appeal of Administrative Decision

On June 18, 2002, the Selectmen sent another letter to the Marina informing the Marina that, the Marina's comprehensive plan having been denied, the Selectmen intended to enforce its interpretation of the 1997 ZBA decision limiting outside boat/trailer storage to an additional 10%. *Id.* at 10. The Marina treated the letter as an administrative decision and filed an Appeal of Administrative Decision requesting that the ZBA reverse the Selectmen's interpretation of the 1997 ZBA decision. *Id.* The ZBA upheld the Selectmen's administrative decision and denied the Marina's appeal. *Id.* at 11.

The ZBA approved the Marina's special exception applications for the road construction (the "restoration plan"), the bathroom building and the parking lot. The ZBA denied the Marina's variance application. *Id.* At 11-12.

H. The Marina's 2006 Application for a Special Exception

On September 6, 2006, the Marina essentially picked out another aspect of its comprehensive plan, outside winter boat storage, and filed an Application for a Special Exception (the "2006 application") to approve the construction of a fence and modify the 1997 ZBA decision to allow unlimited outside storage of boats and trailers within the fenced in area (as opposed to a limit of 10% additional boats).² CR, p. 3. A number of residents and visitors of the Town wrote to the ZBA, some in favor of the Marina's request and some against it. CR, pp. 15-95. The ZBA held public hearings on November 28, 2006 (CR, pp. 96-99), December 12, 2006 (CR, pp. 107-09), and January 23, 2007 (CR, pp. 153-57). The ZBA granted the Marina's 2006 application on January 23, 2007. CR, pp. 159-62. The Petitioner filed a Motion for Rehearing that was denied on March 7, 2007. CR, p. 177. The Petitioner then filed an appeal with the Carroll County Superior Court.

After a hearing, the Trial Court reversed the ZBA's decision based on a finding that the 2006 application was substantially the same as a prior application. *See* Page 8 of the 11/15/07 Carroll County Superior Court Notice of Decision (hereinafter "Order, p. ____").³ The Town now respectfully requests that this Court reverse the Trial Court's decision for the following reasons.

² The 2006 application also sought approval of a boat wash facility on the Marina property. CR, p. 3. However, that request was subsequently withdrawn by the Marina. CR, p. 97.

³ The Order indicates that the court also conducted a view. The undersigned counsel for the Town was unaware that a view was conducted. Perhaps this is a typographical error.

SUMMARY OF ARGUMENT

In this case, the record and transcript reveal that the Marina's 2006 application was materially different from all other prior applications heard by the ZBA. It was therefore lawful and reasonable for the ZBA to reach the merits of the application and determine that fenced in outside boat storage during the winter months is an appropriate accessory use to the special exception marina. The Superior Court erroneously reversed the ZBA's decision.

The Marina's 2006 application was materially different from all prior applications because it was the only application that proposed outside boat storage inside a designated fenced in area. It was also the only application endorsed by the Town's Fire Chief.⁴ Even though prior interactions between the Marina and Town dealt with outside boat storage, all such proposals were denied partly because of safety concerns expressed by the Town's Fire Chief. The 2006 application not only sets forth a different design than previously proposed, but also addressed the safety concerns. Therefore, it was lawful and reasonable for the ZBA to reach the merits of the application.

Although the Superior Court did not reach this issue, the ZBA correctly determined that the Marina's 2006 application qualified as an appropriate accessory use to the special exception marina. The Marina gained special exception status for its entire marina property as a result of the 1997 ZBA decision. The Marina's 2006 application set forth a use that satisfied the Town's 13 requirements for an accessory use to a special exception marina. Therefore, it was lawful and reasonable for the ZBA to grant the special exception for the accessory use.

Again, although not reached by the Superior Court, it was also lawful and reasonable for the ZBA to determine that the Marina's 2006 application was not subject to §502 of the Zoning

⁴ By letter dated January 18, 2007, Freedom Fire Chief Eugene F. Doe, Jr. stated that he was in agreement with the proposed 2006 application although he did set forth 10 conditions on approval. CR, p. 153. The ZBA granted the 2006 application subject to the 10 conditions. CR, p.154.

Ordinance since it did not propose to expand a non-conforming structure or use as defined by the Zoning Ordinance. The Marina's 2006 application was for increased outside boat storage *within a designated fenced in area*. It did not propose to expand any structure or building or the use of any structure or building. It was lawful and reasonable for the ZBA not to apply §502 of the Zoning Ordinance.

A zoning board's findings are entitled to significant deference and its decisions should not be set aside unless the court is persuaded by the balance of the probabilities that the decision is unreasonable. RSA 677:6. In this case, the record and transcript support the ZBA's findings and decision and so it was an error for the Superior Court to reverse the ZBA's decision.

ARGUMENT

I. The ZBA lawfully reached the merits of the Marina's Special Exception Application for fenced in outside boat storage because the application was substantially different than all other applications the Marina had previously submitted to the ZBA.

In general, a zoning board of adjustment may not lawfully reach the merits of an application if the application is not substantially different than a prior application. Fisher v. Dover, 120 N.H. 187 (1980). Since the Marina's 2006 application was substantially different than all other prior applications filed with the ZBA, it was lawful and reasonable for the ZBA to reach the merits of the application.

In Fisher, it was an error for the ZBA to reach the merits of the application because the board did not first find "either that a material change of circumstances affecting the merits of the application had occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for." Fisher, 120 N.H. at 191. In Fisher, the chairman of the ZBA testified that he did not compare the applications, he did not believe it mattered whether the applications differed, and he thought the applications were essentially the

same. Id. at 189-90. Thus, where the ZBA conceded that two applications were essentially the same, it was unlawful for the ZBA to reach the merits of the second application.

In Morgenstern v. Rye, 147 N.H. 558 (2002), it was an error for the ZBA not to reach the merits of a second application that was for the same use but asserted a different design proposal than a prior application. Morgenstern, 147 N.H. at 565-66. The ZBA denied prior applications based on concerns about the impact that a proposed use would have on wetlands and so the applicant submitted a new application with a different design standard to address the concerns. Id. Thus, where the second application was not substantially the same as the prior application, the ZBA should have reached the merits of the second application.

Unlike in Fisher, in this case, the ZBA was asked to compare this application with prior applications. At the November 28, 2006 hearing on the 2006 application, a Freedom resident asked whether the ZBA was being asked to review “the same request.” The ZBA’s attorney replied that “this is not a repeat request as the fence idea has never been submitted.” CR, p. 98.⁵ The minutes do not reveal any evidence presented to the ZBA in opposition to this statement until the ZBA met on February 27, 2007 to decide the Motion for Rehearing filed by the Guckert NH Realty Trust. CR, p.173. The ZBA was obviously not persuaded that the Marina’s 2006 application was substantially the same as a prior application; therefore the Motion for Rehearing was denied. Id. Furthermore, the ZBA member who chaired the public hearings on the Marina’s 2006 application, Chris Niiler, was also on the ZBA in 2002 when the prior applications (which were the subject of the Superior Court’s 12/24/03 Order) were submitted and decided. Surely he would have known if this application was substantially the same as something he had seen before.

⁵ It is important to note that the ZBA’s attorney had represented the ZBA throughout the previous application process and the 12/24/03 Order, which is a 40 page decision addressing a variety of Marina issues.

Looking at the prior applications, in 1997, the Marina submitted a plan which called for the construction of two buildings for **interior** boat storage. However, the application was approved upon the condition that outside winter boat storage would be limited to “10% additional boats or trailers outside on all 6 Marina lots.” App., p. 1.

The Marina’s 2002 application set forth a comprehensive plan that “encompassed many aspects of the Marina and the marina property.” See 12/24/03 Order, p. 37. The comprehensive plan included the designation of an area for outside boat storage in the existing courtyard between the winter storage buildings. *Id.* The Marina’s 2002 application was denied in part because of fire safety concerns. The current application not only sets forth a different design for the construction of a fence within which to store boats in the winter, but also addresses the fire safety concerns. Unlike the 2002 application, which included many other changes to the Marina besides outside boat storage, the 2006 application was limited only to the issue of outside boat storage. In fact, one merely has to look at the reasons why the ZBA denied the 2002 comprehensive plan application to see that it was an entirely different application. The Superior Court summarized the ZBA’s decision as follows:

Specifically, the ZBA determined the Marina’s comprehensive plan failed Section 304.6.2.3, because the storage sheds located outside the Shore Front District but within the General Residential District, must comply with Section 502 of the Zoning Ordinance, which limits the expansion of a non-conforming use to no more than 20% of the gross floor area of the main building. Second, the ZBA determined the comprehensive plan did not meet Section 304.6.2.6, pertaining to the requirement that the Marina provide a pumping facility for the removal of holding bulk waste. Third, the ZBA found the comprehensive plan contained in the amended application did not meet all of the general requirements pertaining to special exceptions, which are contained in Section 306 of the ordinance. Specifically, the ZBA determined the proposed plan: (1) would adversely affect the character of the area; (2) did not contain adequate access from the public highway and sufficient room on the lot for emergency vehicles to maneuver; and (3) did not meet the ordinance requirements for lighting. See 12/24/03 Order, p. 9.

Surely, it cannot be said that the 2002 comprehensive plan application was substantially the same as the 2006 application.

Likewise, the Marina's 2002 appeal of the Board of Selectmen's administrative decision (pertaining to the 1997 ZBA decision) was not even close to being substantially the same as the 2006 application for outside storage within a fenced in area. Although the ZBA considered the meaning of the provisions of the 1997 ZBA decision regarding inside and outside boat storage, there was no new application setting forth a specific plan for outside storage. It was merely a request to clarify the meaning of "10% additional boats or trailers outside on all 6 Marina lots."

Interestingly, in its 12/24/03 Order the Superior Court distinguished the 2002 comprehensive plan application from two subsequent applications for after-the-fact special exception approval of the parking lot and bathroom constructed on Lot 42. The Superior Court agreed with the ZBA that the two subsequent applications were "very limited in scope and materially different from the comprehensive Amended Application submitted by the Marina and denied by the ZBA on May 28, 2002." *See* 12/24/03 Order, p. 37. It is difficult to comprehend how the Superior Court could find in that case that the two subsequent applications were substantially different because they set forth new proposals (even though the comprehensive plan contained the parking lot and bathroom building), and yet found the opposite in this case, although Judge Fitzgerald obviously did not have the benefit of hearing the prior case back in 2003.

CONCLUSION

The Marina applied to the ZBA in 2006 for permission to expand its outside storage of boats during the winter months within a fenced in area. Although the ZBA in the past had considered the issue of outside winter boat storage, the Marina's 2006 application set forth a

proposal that was materially different than any prior applications. The ZBA carefully considered the Marina's 2006 application and the input received from the residents and visitors of the Town and determined that it was lawful and reasonable to grant the special exception application. The expansion of the outside winter storage of boats, the ZBA found, was an appropriate accessory use to the special exception marina and the proposed plan met the thirteen requirements established by the Town for a special exception. The ZBA disagreed with the contention that the Marina's 2006 application was substantially the same as a prior marina application. The record reasonably supports the ZBA's findings and decision. The Trial Court's decision should therefore be overturned.

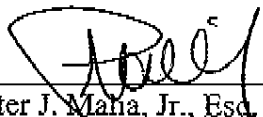
ORAL ARGUMENT

The Town of Freedom requests oral argument before the full court and designates Peter J. Malia, Jr., Esq. to be heard.

Respectfully submitted,

TOWN OF FREEDOM
Through its attorneys,
HASTINGS LAW OFFICE, P.A.

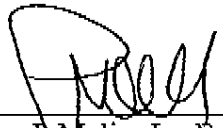
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief was mailed by first class mail to Fay E. Melendy Esq. on the above date.



Peter J. Malia, Jr., Esq.