

STATE OF NEW HAMPSHIRE

CARROLL, SS

FREEDOM ZONING
BOARD OF ADJUSTMENT
31-41-06

In re: Ossipee Realty Corporation

**MEMORANDUM IN OPPOSITION TO
APPLICATION FOR SPECIAL EXCEPTION**

NOW COMES, the abutter, Kathleen M. Guckert, Trustee of Guckert NH Realty Trust and in opposition to the application of Ossipee Realty Corporation for a special exception respectfully submits the following memorandum:

Procedural History of Applications by Marina

The Ossipee Lake Marina located on Parcels 31-41, 41-1 and 41-2 and 41-3 obtained the status of a permitted nonconforming use at the time of the adoption of the Freedom Zoning Ordinance in 1987. The Marina parcels are located in the General Residential Zone and the Shorefront Overlay District.

In 1997 Kevin Price, owner of the Marina (“Marina”) applied for a special exception to construct two buildings to store boats. The minutes of the ZBA meeting held on October 7, 1997 reflect that Mr. Price indicated that there would be little or no outside storage once the buildings were complete. The Board granted the special exception on the condition that there would be a “Limit of 225 boats inside and 10% additional boats or trailers outside on all 6 Marina lots.”

In 1998 the Marina became the owner of the adjacent residential lot, 31-42. The Marina constructed a parking lot and bathroom facility on Lot 42 after being issued a building permit to do so, but without obtaining the necessary zoning permit. By letter dated October 15, 2001 the Board of Selectmen advised the Marina that it needed to apply for an after-the-fact special exception for the improvements made to Lot 42.

In March 2002, the Marina filed an application to deal with the issues for Lot 31-42 and

also applied for a Special Exception under Article 3, Section 304.6.2, 304.6.3 and 304.6.5.

These are the provisions in the Freedom ordinance for the granting of special exception status to a marina. Application for a special exception was also made under Section 306.1. The purpose of this application was to present a comprehensive plan for the Marina's several lots. As part of this plan the Marina sought:

A designated area for outside storage inside the "courtyard" of the winter storage buildings. This area is screened from the outside by the buildings and the lattice work gate as shown in the plan. It is anticipated that limiting outside winter storage to designated areas screened from public view will also be superior for enforcement instead of a boat count. (See Cooper Memorandum dated March 25, 2002)

The ZBA conducted public hearings on this application on March 26 and May 28, 2002.

During his presentation, Attorney Cooper argued to the Board that the 1997 approval was not limited to the construction of two buildings, but rather was approval of the storage of up to 225 boats on all of the Marina lots. Attorney Malia disagreed and stated that the 1997 ZBA grant of a special exception was limited to the construction of two boat storage buildings to hold not more than 225 boats. Attorney Malia also stated that the 1997 grant of a special exception did not grant special exception marina status to the remaining marina lots and for that reason the provisions of Section 506 which limit the expansion of nonconforming uses to 20% was applicable to the Marina's application for that portion of the marina property not affected by the 1997 approval. (See March 26, 2002 minutes, p. 5).

As part of the testimony presented to the Board at that hearing, Gene Doe, the Freedom Fire Chief, had fire safety concerns about the boat storage requests given the number of homes in Ossipee Lake Village, the proximity of Camp Huckins and the 486 dwellings in Totem Pole Park. He also expressed concern of a questionable emergency vehicle access on Alvino Road depending on the time of year. (Minutes, p. 4)

The Marina's application for the comprehensive plan was denied by the Board.

One of the reasons for the denial was a finding by the Board that the Marina had failed to meet the standard for the grant of marina special exception status because the Board did not approve the plan and design for any winter boat storage area. As to the Special Exception criteria under Section 306, the Board found that the character of the area would be adversely affected by the proposed special exception use. Additionally the Board held that the applicant had failed to provide plans for fire protection or to meet the criteria concerning adequate maneuvering room on the lot for fire, police and emergency vehicles. (See Notice of Decision dated May 31, 2002)

By letter dated June 18, 2002 the Selectmen advised the Marina that the 1997 special exception approval limited the Marina to "10% additional boats or trailers outside on all six marina lots" and the Town intended to enforce outside storage to 23 boats. This decision was appealed to the ZBA. Following a hearing, the ZBA upheld the decision of the Selectmen.

The Marina filed an appeal of the ZBA denial of its comprehensive plan request for a special exception for the marina property as a whole to the Carroll County Superior Court. The Marina also appealed the ZBA decision upholding of the Selectmen's notice that only 23 boats could be stored outside. The Superior Court issued a ruling dated December 24, 2003 in which it upheld the decisions of the ZBA both as to the denial of marina special exception status and as to limitation on outside boat storage.

In rendering its decision the Court made certain rulings that are important to this Board's consideration of the current application. First, the Court ruled that "nothing in the language of the 1997 ZBA Decision or corresponding minutes changes the status of the marina property from a 'preexisting condition and a nonconforming use' to any other classification. The Court finds the 1997 ZBA Decision granted the Marina a Special Exception to construct two inside boat

storage buildings, and did not change the status of the existing marina lots.” (Order, p. 19) Because the status of the remainder of the Marina as a nonconforming use was not affected by the 1997 special exception grant, the Court held that the ZBA did not err when it found that additional boat storage could not be expanded on the original marina lots in excess of the 20% rule in the Freedom zoning ordinance.

The Court also addressed the Marina’s assertion that the 1997 ZBA grant of a special exception was an approval of storage of 225 boats, rather than an approval to construct two storage buildings to hold up to 225 boats. The Court specifically found that the 1997 approval was for the buildings only, not an approval for storage of 225 boats anywhere on the Marina’s property. This ruling by the Court upheld the position of the Selectmen as contained in their letter of June 18, 2002 that the Marina could only lawfully store 23 boats and trailers outside.

The Marina has now filed an application seeking to modify the Special Exception granted on October 9, 1997 to allow unlimited outside storage of boats and trailers within a fenced area on the Marina property.

Argument

The Ossipee Lake Marina has been before the ZBA four times on the issue of boat storage: a) In 1997 to get a special exception to construct two buildings for boat storage; b) As part of the 2002 comprehensive plan application for special exception which included boat storage requests; c) In an appeal of the decision of the Selectmen that the 1997 approval limited outside storage to 23 boats; and, d) the newest application seeking unlimited outside storage. Two of these applications were denied by the ZBA and, following an appeal, those denials were upheld by the Court. Yet despite these previous decisions, the Marina is once again asking this Board to rewrite the specific conditions that permitted the 1997 approval of the special exception

and to increase the outside storage of boats.

The New Hampshire Supreme Court has made it clear that subsequent applications by unsuccessful applicants will be limited. The Court in Fisher v. Dover, 120 NH 187 (1980) established a two part test that must be met before a second application may lawfully be considered by the zoning board. First, the applicant must prove that a material change in circumstances has occurred since the first application affecting the merits of the application. And second, the applicant must prove that the new application is for a use which is materially different in nature and degree. If the new application does not meet this two part test, the Board may not lawfully reach the merits of the new application. The Court in the Fisher decision clearly stated the basis for this rule: “If it were otherwise, there would be no finality to proceedings before the board of adjustment, the integrity of the zoning plan would be threatened and an undue burden would be placed on property owners seeking to uphold the zoning plan.”

As a legal result of the prior appearances before the Zoning Board certain findings have been made that this Board is bound by. First, the Board of Selectmen, the 2002 Zoning Board of Adjustment and the Superior Court have found that the 1997 grant of a special exception was for the construction of two buildings to permit up to 225 boats for *inside* storage, not approval for storage of 225 boats anywhere on the Marina property. Second, the prior Board specifically found that the overall marina parcel does not meet the criteria for the grant of special exception marina status under Section 304.6.2. This decision was upheld by the Court. Third, the prior Board found that the original marina property, except for the special exception for the storage building, remains a nonconforming use subject to the limitations of Section 502. This finding was upheld by the Superior Court.

Thus as this Board considers the current application, it needs to be mindful of the impact

of the previous appearances of the Marina before the ZBA. The Board must first consider whether this is really an application it should even consider. In doing so, the Board must examine what are the changes in circumstances, if any, since this last application. The status of the marina property remains unchanged, except the additional uses that were permitted to continue on the Lot 42 portion of the marina property. The only change of circumstance related to and affecting the merits of the present application from the last, is that the Marina has acquired off-site property which can be used lawfully for the purpose for which the new application is made. From a business standpoint the applicant does not need to do additional boat storage on the Marina property in Freedom, because it can do additional winter boat storage on its property in Ossipee. But, as to the property which is the subject of the application, the Board should find that there have been no changes in circumstances.

The Board should also find that the present application to increase outside boat storage is not materially different in nature and degree from the prior application. Once again the applicant seeks to create a corral on the nonconforming marina parcel for unlimited outside storage. This proposed use was in the prior application which was denied.

If the Board does determine that the new application meets the two part criteria as set forth in Fisher, as the Board proceeds it must treat the application as one on behalf of a property already ruled to have nonconforming use status. Because of the nonconforming status, the Board should apply the provisions of Section 502 which limits the expansion of nonconforming uses to a 20% rule. And given that there is already a legal determination that the outside storage number as provided by the 1997 approval is 23 boats and trailers, for expansion purposes, the twenty percent rule is applicable to this number.

As the Board considers the current application, it should also give appropriate deference

to the rulings of prior Boards. The Board must recognize that it is being asked to rewrite the 1997 special exception approval. In order to grant the original special exception, it was necessary for the prior Board to determine that the applicant met all the criteria set forth in Section 306.1. The 1997 Board found that the applicant satisfied the provisions of 306.1, *but only* with the stated conditions incorporated into the approval. The prior Board decided that both the applicant and neighborhood were served by an approval of the construction of two buildings which facilitated the storage of boats inside rather than continuing existing outside storage. And to emphasize this apparent goal of the approval, the Board imposed the specific condition of the limitation of the outside storage of boats. Now that the buildings have been constructed for the inside boat storage in accordance with the 1997 approval, the applicant has returned to the ZBA and asks this Board to undo the *quid pro quo* of the prior approval by eliminating the stated limitation on the outside storage which underpinned that approval. Such an action by this Board would only work to undermine the zoning adjustment process. Therefore, this Board is urged not to reformulate the sound decision of the 1997 Board by approving the present application. For to do so will eliminate the well founded limitation on outside storage and permit the unregulated expansion of boat storage on the balance of the marina parcel by the owner of an already nonconforming property.

The Board should also deny this application because the application cannot satisfy the requirements of Section 306.1. This section of the Ordinance sets forth the specific criteria that an applicant must satisfy to qualify for the grant of a special exception. Several of the assertions in the Applicant counsel's memorandum must be challenged.

On the standard of whether the proposed special exception use will adversely affect the character of the area, the Applicant asserts this question is answered by the ordinance itself

because winter storage is permitted in a marina having special exception status. The Applicant's property has been determined by both the prior Board and the Court to not have special exception marina status specifically because it does not meet the criteria of the Ordinance. The Applicant is not an approved marina. Rather it is a lawful nonconforming marina. So the fact that the ordinance would permit the use to an "approved" marina is irrelevant to this applicant. The Board must examine the actual impact on the character of the neighborhood by the expansion of the uses of the nonconforming marina property in a general residential zone. Once again, it needs to be definitively stated that the right of the marina to continue its historic operation as a lawful nonconforming use is not disputed. However, the fact that the Marina is nonconforming property is relevant and germane to a request to expand that use in the residential zone. When the Board hears testimony asserting an adverse effect on the residential zone, that evidence needs to be seriously considered. The fact that properties scattered all over Town may have individual boats stored on them if they cannot store them at the marina, does not mean that the concentrated storage of several hundred boats on this nonconforming property in this long standing, densely settled residential zone does not constitute an adverse impact on the immediate neighborhood of the marina sufficient to disallow a special exception.

On issue B, the Applicant has once again asserted that it has the right to store 248 boats. As noted above, the marina has the legal right to store the number of boats which can be stored within the two buildings, plus 23 boats and trailers. To assert that the number of boats will increase from 248 to 300 is a misstatement of the current status of the property. It is believed that Mr. Price testified to the Board that the buildings hold approximately 160 boats. So with the permitted outside storage, he can now only store less than 200 boats. Although the applicant

mentions that the increase will be to a certain number, the application is for “unlimited” outside storage within the corral. So once again it is urged that the Board not permit approval of this request.

On the critical issue of fire protection and the ability of fire, police and emergency vehicles to maneuver, the Applicant makes no representations on this criteria. The Board is reminded that one of the reasons the previous application by the marina was denied, was specifically because it was found not to have satisfied this criteria. Nothing in the present application provides any information that would alter the fire safety issues that the Freedom Fire Chief in his testimony to the prior Board as set forth in the minutes of the March 26, 2002 meeting. In light of that testimony and the finding of the prior Board on this criteria, this Board should also find that the storage plan raises serious concerns concerning fire safety.

For all of the foregoing reasons, the Abutter respectfully requests that the Board deny the application to amend the limitations previously imposed on the grant of the special exception for the boat storage buildings.

Guckert

Kathleen M. Guckert, Trustee of the
New Hampshire Realty Trust

By: _____
Fay E. Melendy