THE STATE OF NEW HAMPSHIRE
Cheshire Superior Court
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- 07-E-0028 H.Charles Royce et al v. Town of Jaffrey

Please find the court's order of June 9, 2008 in the above captioned case.

6/09/2008
Date

/s/ Barbara Hogan
Clerk of Court

cc: H. Neil Berkson, Esq.
John J. Ratigan, Esq.

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS SUPERIOR COURT

H. Charles & Ann Royce, et. al.

v.

Town of Jaffrey

07-E-0028, 07-E-0064

* * * * *

Robert Van Dyke

v.

Town of Jaffrey

07-E-0049

ORDER ON COUNT IX

The parties are before the Court on actions arising out of decisions of the Town of Jaffrey Zoning Board of Adjustment ("ZBA") and the Town of Jaffrey Planning Board ("Planning Board") (collectively "Town"). Now before the Court is Count IX of the Cross-Petitioners' Verified Amendment to Cross Petition for *Certiorari*. A hearing was held on Count IX on April 14, 2008. For the reasons set forth, the Court finds and rules as follows.

I. Factual and Procedural History

On August 27, 2007, the Court entered an Order ("August 2007 Order") on four consolidated actions relating to decisions of the ZBA and the Planning Board regarding a parcel of property owned by Robert Van Dyke ("Van Dyke"). The

Court affirmed the underlying decisions of the ZBA, affirmed in part the decisions of the Planning Board, and remanded in part for additional proceedings. On remand the Court asked the ZBA and Planning Board to clarify: (1) whether the variance from Section X of the Wetlands Ordinance that Van Dyke received for a conventional 23-unit subdivision plan applies to the 28-unit Open Space Development Plan ("OSDP") that the Planning Board approved, and (2) whether Van Dyke needs a variance from Section X of the Wetlands Ordinance for the 28-unit OSDP approved by the Planning Board. [1]

On remand, the ZBA and Planning Board held deliberative sessions. The sessions were open to the public, but they were not public hearings and the decisions were based on the prior record. The ZBA found that the variance Van Dyke received from Section X of the Wetlands Ordinance applies only to the 23-unit conventional subdivision. The ZBA reiterated its finding that Section X does not apply to the body of water on Van Dyke's property, but went on to state that assuming Section X does apply, if Van Dyke's OSDP contains 28 lots, he will need to obtain a new variance. The ZBA continued, however, by explaining that if the 28-unit OSDP approved by the Planning Board contains a single lot with a minimum shore frontage of 200 feet, no variance from Section X will be necessary because only lot frontage, and not the number of units, is governed by Section X. The Planning Board found that the 28-unit development will be on a

[1] The Court also requested that the Planning Board clarify whether the setback requirements for septic systems were met within the Sage Engineering plans submitted by Van Dyke. This Order does not address the Planning Board's clarification of that issue, and the septic systems of the proposed development are discussed in this Order only as they are relevant to Count IX.

single lot with 900-1000 feet of frontage, thereby eliminating the need for a variance from Section X.

In response to the clarifications on remand, the Cross-Petitioners moved to amend their petition by adding two additional counts, including Count IX, which states, "It is Unlawful and Illegal to Use the Condominium Form of Ownership to Avoid Compliance with Section X of Jaffrey's Wetlands Ordinance." By its Order of February 15, 2008 ("February 2008 Order"), the Court allowed the amendment. Count IX challenges the ZBA and Planning Board's decisions that no variance from Section X is necessary because Van Dyke's proposed development will be on a single lot. The Court held a substantive hearing on this amendment on April 14, 2008.

II. Standard of Review

Pursuant to RSA 677:6 and RSA 677:15, the burden of proof in appeals from decisions of zoning boards of adjustment and planning boards is on the petitioners to show that the decisions are unlawful or unreasonable. See, e.g., Feins v. Town of Wilmot, 154 N.H. 715, 717 (2007). In Count IX, the Cross-Petitioners contend that the decisions of the ZBA and Planning Board are unlawful under the terms of the zoning ordinance and state law and that the decisions violate the State and Federal Constitutions. "Construction of the terms of a zoning ordinance is a question of law upon which [the trial] court is not bound by the interpretations of the zoning board." Cosseboom v. Town of Epsom, 146 N.H. 311, 314 (2001) (quotation omitted).

"Because the traditional rules of statutory construction generally govern [a court's] review, the words and phrases of an ordinance should be construed according to the common and approved usage of the language." Anderson v. Motorsports Holdings, 155 N.H. 491, 494-95 (2007). Courts will not look beyond the ordinance for indications of legislative intent when the words of the ordinance are plain and unambiguous, nor will they "guess what the drafters of the ordinance might have intended, or add words they did not see fit to include." Id. at 495. Courts must "determine the meaning of a zoning ordinance from its construction as a whole, not by construing isolated words or phrases." Feins, 154 N.H. at 719 (quotation omitted). Courts will avoid an interpretation of an ordinance that renders its terms meaningless. See Cosseboom, 146 N.H. at 314.

III. Cross-Petitioners' Count IX

Applicability of Section X to the Body of Water

As a preliminary matter, the Town and Van Dyke continue to argue that Section X does not apply to the body of water on Van Dyke's property. In its prior orders, the Court has not addressed whether Section X applies to the body of water in question. The Court has previously stated,

> To the extent the ZBA discounted certain bodies of water over one acre by applying a particular size requirement, the Court agrees that the ZBA's interpretation may have been contrary to the plain meaning and the overall intent of the ordinance. However, even assuming, without deciding, that Section X is applicable to the property, the Court upholds the ZBA's decision to grant Van Dyke a variance from this provision.

August 2007 Order at 24. Because the applicability of Section X is potentially dispositive of Count IX, the Court must now resolve this dispute.

Section X of the Jaffrey Wetlands Ordinance governs "Residential Lot Standards," and provides:

> Lots abutting public waters as defined in Section XIII shall conform to the provision of RSA 483-B. All other lots within the Wetlands Conservation District shall have a minimum shore frontage of 200 [feet], as measured at the normal high water level, except noncontiguous wet areas under one acre are not included here for purposes of meeting frontage requirements.

The term "shore" is not defined in the Wetlands Ordinance. The Merriam-Webster Online Dictionary, used by the ZBA, defines "shore" as "1: the land bordering a usually large body of water, specifically : coast." See Town of Jaffrey Trial Mem. at 24; August 2007 Order at 23.

The Court has reviewed both parties pleadings and arguments regarding the applicability of Section X. The Court finds that by its plain language, Section X is applicable. The ZBA continues to describe the requirement as "ambiguous" and construe it as not applying to the body of water on Van Dyke's property, which it describes as "an irrigation pond significantly below 10 acres (3 to 6 acres), without any discernible shoreline." Certified R. of September 27, 2007 ZBA Special Session, Meeting Minutes at n.2. Even if this description is accurate, Section X applies. By definition, there is a shore on Van Dyke's property because there is land bordering water. The body of water must, therefore, be subject to Section X, unless it is a "noncontiguous wet area[] under one acre." See Wetlands Ordinance at Section X. The requirements of Section X are unambiguous.

Section III of the Wetlands Ordinance makes clear that it covers "all ponds, rivers, intermittent and perennial streams, ephemeral ponds, and

wetlands." There is no language in the Wetlands Ordinance that supports the exemption of the body of water on Van Dyke's property. The Wetlands Ordinance anticipates that some bodies of water fluctuate in size and volume. See id. at Section XIII (A) & (E) (defining "ephemeral ponds" and "intermittent streams" and explaining specifically that they fluctuate seasonally). Fluctuation does not exempt bodies of water from the Wetlands Ordinance. The Wetlands Ordinance also anticipates that shorelines are not always the same and requires, therefore, that shore frontage be measured at the normal high water level. See id. at Section X; Section XIII (F) (defining the "normal high water mark"). The Court finds no basis for the ZBA's position that the body of water on Van Dyke's property is not covered by Section X of the Wetlands Ordinance. The Court finds further that such an exemption would undermine the purposes set forth in Section II of the Wetlands Ordinance.

The Town and Van Dyke contend that the doctrine of administrative gloss requires a different conclusion. "The doctrine of administrative gloss is a rule of statutory construction." Anderson, 155 N.H. at 501. "An 'administrative gloss' is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." DHB v. Town of Pembroke, 152 N.H. 314, 321 (2005). "[A] lack of ambiguity in a statute or ordinance precludes the application of the administrative gloss doctrine." Anderson, 155 N.H. at 502; DHB, 152 N.H. at 321 (where there is no ambiguity in the statute, administrative gloss does not apply). In this case, the Court finds

Section X unambiguous because it states clearly the shore frontage requirement and the noncontiguous wet areas to which it does not apply. Accordingly, because the Wetlands Ordinance is unambiguous, the Court need not consider the doctrine of administrative gloss in reaching its decision.

Van Dyke's Need for a Section X Variance

On remand, the ZBA found that "[i]f the 28-unit OSDP approved by the Planning Board contains a single lot with a minimum shore frontage of 200 [feet], no variance is needed from Section X of the Wetlands Ordinance because only lot frontage is governed by Section X, not the number of units." Certified R. of September 27, 2007 ZBA Special Session, Meeting Minutes at 4. The Planning Board also found that the 28 individual units in the proposed development will be on a "single lot to be owned communally and have no lot lines extending to any wetlands," and consequently, no variance from Section X is required. Certified R. of September 27, 2007 Planning Board Special Session, Meeting Minutes at 3. The Cross-Petitioners contend that these decisions are unlawful and run counter to the intent of the Wetlands Ordinance.

The Cross-Petitioners raise both statutory and constitutional arguments. The Court decides cases on constitutional grounds only when necessary. See, e.g., Simplex Techs., Inc. v. Town of Newington, 145 N.H. 727, 732 (2001). Because the Court finds the statutory arguments dispositive, it does not reach the equal protection and substantive due process claims.

The Court first considers the Cross-Petitioners' argument that the Town has misinterpreted Section X of the Wetlands Ordinance. The Cross-Petitioners

contend that the ZBA and Planning Board's decisions undermine the purpose of the Wetlands Ordinance, which is designed in part to "control building sites, placement of structures, and land uses; and conserve shore cover and visual as well as actual points of access to wetlands and natural beauty including scenic views." Id. at Section II(A). They inform the Court that under the Town's interpretation, Van Dyke will be able to build twelve structures along 900 feet of water, where the Ordinance would normally only permit four. The Cross-Petitioners also argue that the single-lot interpretation is not supported by the Wetlands Ordinance or the Land Use Plan ("LUP").

The Court agrees with the Cross-Petitioners that while Section X uses the term "lots," the Wetlands Ordinance as a whole, especially when viewed in conjunction with the LUP, shows that it is intended to control structures. The Wetlands Ordinance contemplates that a lot will have one main building and restricts the size and placement of accessory buildings. See id. at Section XIII (A) (defining "accessory building" as a "subordinate building located on the same lot with the main building"); see also id. at Section IV (A) (limiting erection of "any primary structure or dwellings"); Section VII (limiting placement of "primary building"). Section X of the Wetlands Ordinance was intended to set frontage requirements for lots that would only have one main building or structure. In effect, Section X was, therefore, intended to regulate structures. When read in isolation, Section X does appear to regulate only "lots." In context, however, the Cross-Petitioners are correct that such an interpretation fails. This is especially

true in light of the Wetlands Ordinance's stated purpose to "control building sites, placement of structures, and land uses." Id. at Section II.

The Court also finds, as the Cross-Petitioners argue, that the Town's interpretation of Section X contravenes the goals of the Wetlands Ordinance. Under the Town's interpretation, the Wetlands Ordinance would no longer control placement of structures or land use because developers could always circumvent the regulations by using communal lot ownership. The Town's interpretation also hinders the Wetlands Ordinance from protecting visual access to wetlands and natural beauty including scenic views because it allows uncontrolled development along shorelines by means of communal lot ownership. Such an interpretation, which renders the ordinance meaningless and prevents it from achieving its stated purposes, cannot be sustained. See Cosseboom, 146 N.H. at 314.

The LUP also supports the position that Section X of the Wetlands Ordinance was intended to regulate structures. As the Cross-Petitioners argue, Section 5.1 of the LUP permits only "one principal structure per lot" in the Rural, Residence A, and Residence B districts. A dwelling is a structure. Id. at Section X (definition of "dwelling"). Thus, Section 5.1 of the LUP limits lots in the designated districts to having one principal dwelling. In the context of the overall zoning scheme, the Wetlands Ordinance was drafted with the understanding that lots would have only one principal structure and, therefore, regulating lots would have the same effect as regulating principal structures.

In context, Section X of the Wetlands must be read to control structures and not only lots. Though in isolation the word "lots" could support the Town's position, the zoning ordinance must be construed as a whole. See Feins, 154 N.H. at 719 (quotation omitted). Allowing Van Dyke to sidestep the regulations by describing the property as a single lot would undermine the purpose of the Wetlands Ordinance and render its language regarding main buildings meaningless.

The Court also finds that the Wetlands Ordinance frontage requirements are applicable even though Van Dyke is proposing an OSDP. The Court notes that in its findings, the ZBA cited RSA 674:21 for the proposition that the proposed development is not subject to frontage requirements. That provision addresses village plan alternatives, which have a specific definition under the statute. See id. at VI. This development is not a village plan alternative under that statute. The statute is, therefore, inapplicable.

The LUP also does not exempt OSDPs from the Wetlands Ordinance. The LUP permits "flexibility of building requirements such as lot sizes, frontages and setbacks" for OSDPs. Id. at Section VII. Lot sizes, frontages and setbacks for OSDPs are governed by Section 5.1 of the LUP. That Section clarifies that it is street frontage, not water frontage, that is flexible for OSDPs. See also RSA 674:21, I (defining "frontage" in the planning and zoning context as "that portion of a lot bordering on a highway, street or right-of-way"). Moreover, the flexibility is limited because residences within an OSDP must still have 125 linear feet of frontage.

It is also worth noting that one of the criterion for an OSDP is that it must be "environmentally sensitive in nature." Id. at VII (K). Interpreting the LUP in a manner that exempts OSDPs from provisions of the Wetlands Ordinance, which is plainly designed to protect wetlands and the surrounding environments, and simultaneously requires OSDPs to be environmentally sensitive would produce inconsistency. The Court finds no support in the LUP for exempting OSDPs from Section X of the Wetlands Ordinance. To the extent that Van Dyke believes that the proposed OSDP should be exempt from Section X because there is no substantive reason to have 200 feet of shore frontage for each structure as long as septic setbacks are met, that argument is relevant to whether he is entitled to a variance, not to whether a variance is required.

The Court finds further that if it were to read Section X of the Wetlands Ordinance as exempting the proposed development based only on its condominium-style ownership, the provision, as applied, would violate RSA 356-B:5. Condominiums, by reason of their form, may not be "treated differently by any zoning or other land use ordinance which would permit a physically identical project or development under a different form of ownership." Id. (emphasis added). The statute prevents disparate treatment of condominiums. See Cohen v. Town of Henniker, 134 N.H. 425, 428 (1991). To the extent that local ordinances conflict with this provision, they are preempted. See Town of Rye Bd. of Selectmen v. Town of Rye Zoning Bd. of Adjustment, 155 N.H. 622 (2007).

Even if the Court could find that Section X of the Wetlands Ordinance allows Van Dyke to develop the property in a manner normally impermissible by

calling it a condominium, state law prohibiting disparate treatment of condominiums would preempt it. The proposed development has consistently been described as containing 28 "units." The Court recognizes that this term may be confusing insofar as it does not clarify that the development will be composed of 28 completely separate structures. It will not simply be 28 dwelling units, but rather 28 separate detached dwellings. Under other forms of ownership, it would be impermissible to build twelve of these structures along the body of water on the property. Such disparate treatment is impermissible under RSA 356-B:5. Accordingly, were the Court to conclude that Section X of the Wetlands Ordinance did not regulate this development, it would also find that it is preempted by state law.

IV. Conclusion

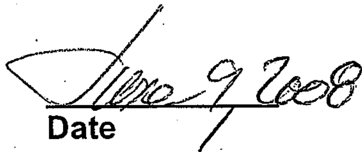
The Court finds that the ZBA and Planning Board acted unlawfully by finding that Van Dyke does not need a variance from Section X of the Wetlands Ordinance. The Court vacates the decisions with respect to this issue. Because the ZBA has determined that the variance Van Dyke previously received does not apply to the 28-unit OSDP the Planning Board approved, Van Dyke will need to obtain a new variance if he intends to proceed with the 28-unit OSDP.

Based on the Court's ruling, it appears that the Court need not address Count X of the Cross-Petitioners' Verified Amendment to Cross Petition for *Certiorari*. In Count X, the Cross-Petitioners argue that the previously granted variance only applied to a development with municipal septic, and that the Planning Board should not have relied on the variance in granting approval for

the 28-unit OSDP with on-site septic. Pursuant to this Order, Van Dyke will need to obtain a new variance from Section X. Arguments regarding the prior variance are moot. The Court will not, therefore, address Count X unless the parties can present the Court with reasons that it must be addressed at this juncture.

Intervenor's Request for Findings of Fact and Rulings of Law: numbers 1-11, 14, 16, 22, 24, and 25 are granted; numbers 15, 17, and 18 are denied; numbers 12-13, 19-21, 23, 26, and 27 are neither granted nor denied. With respect to number 17, the Court recognizes the ZBA's familiarity with the site, but the decision quoted constitutes a legal conclusion and not "fact finding."

SO ORDERED.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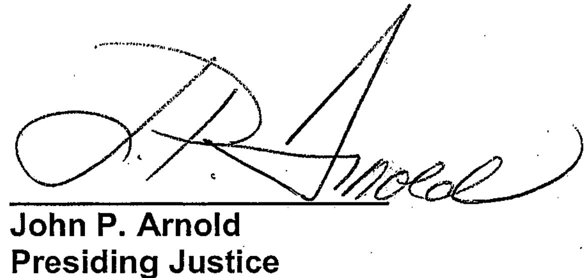
John P. Arnold
Presiding Justice