THE STATE OF NEW HAMPSHIRE
Cheshire Superior Court

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- 05-E-0124 H.Charles & Ann Royce v. Town of Jaffrey, Planning Board

Please find the court's order of August 23, 2006 in the above captioned case.

8/25/2006
Date

/s/ Barbara Hogan
Clerk of Court

cc: H Neil Berkson Esq
John J. Ratigan, Esq.
Matthew R. Serge, Esq

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS 05-E-0124

H. Charles & Ann Royce, et. al.

v.

Town of Jaffrey

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

The petitioners, H. Charles and Ann Royce, et. al. ("the Royces" or "the petitioners") appeal from various decisions of the Town of Jaffrey Zoning Board of Adjustment ("ZBA") and Planning Board ("Planning Board" and collectively, "the Town"), involving the proposed development of an area on Mount Monadnock by intervenor, Richard Van Dyke ("Van Dyke"). Van Dyke now moves for partial summary judgment with respect to count one of the petitioners' writ. The petitioners object and have cross-motioned for partial summary judgment with respect to the same count.[1] Both Van Dyke and the Town object to the petitioners' motion. For the reasons set forth herein, the Court finds and rules as follows.

For purposes of this motion, the Court finds the following facts and procedural history relevant. On October 22, 2004, Van Dyke filed an application with the Planning Board requesting site plan approval for a development involving 40 condominium units in the Mount Monadnock area. Planning Board

[1] The Court notes that the Town of Marlborough, intervenor in this action, joins in the petitioners' motions here.

Certified Record ("PBCR") at 12. Specifically, Van Dyke's plan was designated as an Open Space Development Plan ("OSDP"), under section VII of Jaffrey's Land Use Plan ("LUP"). Pursuant to the LUP, an OSDP "is a form of residential subdivision whereby a developer is permitted a 20% increase in development density above traditional zoning densities and added flexibility in lot size, frontage, and setbacks..." as long as certain conditions are maintained. LUP, Sect. VII, Definition.

The area Van Dyke seeks to develop is situated within the Mountain Zone District.[2] According to the LUP, the purpose of the Mountain Zone District is to "protect and preserve the rural, scenic beauty of Mount Monadnock and its associated highlands...We believe that a regional zone will have positive long-term economic implications for all towns involved." LUP §3.7.2. The LUP emphasizes the need for a uniform zone within the cooperating towns in order to succeed in the Mountain Zone's purpose. See id.; see also §3.7.3 ("In order to create a relatively consistent zone from town to town..."). The LUP significantly limits the acceptable uses within the Mountain Zone. However, a single-family residential use is permitted. Id. at §3.7.5.

Following submission of this Planning Board application, in November 2004, Van Dyke filed an application with the ZBA, requesting a special exception to construct a road within 75 feet of a wetland area, and a variance to allow the forty housing units to be built as part of the subdivision plan then pending before

[2] The Mountain Zone was created by the towns surrounding Mount Monadnock – Jaffrey, Dublin, Marlborough, and Troy – in an effort to protect and preserve Mount Monadnock as a "unique geographical attraction."

the Planning Board. PBCR at 12.[3] The ZBA approved these requests on November 23, 2005. Id. It is unclear whether any appeal was taken from this decision. See id. ("The special exception and variance are final, not subject to further appeal"). Subsequently, on January 11, 2005, Van Dyke submitted an application requesting a special exception to allow him to build an OSDP in the Mountain Zone. PBCR at 13. His request was granted on February 1, 2005. Id.

During this period, the Planning Board began its review of Van Dyke's OSDP application, ultimately denying his request. PBCR at 13. This decision was appealed to the Cheshire County Superior Court. Id. On June 29, 2005, the matter was remanded to the Planning Board for further proceedings, in connection with a proposed settlement approved by the Court, (Arnold J.). Id. The settlement agreement provided, in pertinent part, that Van Dyke would submit an amended plan/application to the Planning Board reflecting a reduced density of 36 units, this amended plan would not be treated as a new application, and the Planning Board would conduct an additional public hearing on the application. Id.

The agreed upon public hearing was held on July 14, 2005. PBCR at 13, 31. For the first time, notice of Van Dyke's application and the related public hearing was sent to the Town of Dublin and the Town of Marlborough, both petitioners in this case.[4] Id. at 88-89. The petitioners assert that an email

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[3] The Court notes that the Certified Record with respect to the ZBA begins with the petitioners' appeal of the Planning Board's July 20, 2005 decision to approve Van Dyke's amended subdivision application. The ZBA's Certified Record does not include any documents relating to Van Dyke's original applications for special exceptions and a variance to that Board.

[4] The Certified Record does not reflect the date on which this notice was sent. However, Van Dyke asserts, and the petitioners do not dispute, that notice was sent on June 30, 2005. See Van Dyke's Mot. Summ. J. at 2, ¶ 8.

exchange between Jaffrey Town Manager Jonathan Sistare and Planning Board Recording Secretary Erlene Lemire, indicates the Planning Board had concluded Dublin and Marlborough, along with the SWRPC, should be given notice of the hearing because there may be regional impact involved with Van Dyke's proposed development. See Petr's Mem. of Law in Supp. of Cross Mot. Summ. J. at 8. Specifically, the email from Sistare states, "...make sure we get the notices to all abutters, local paper and I believe the Planning Board wants Dublin and Marlborough notified and the SWRPC as a project of regional impact (why I don't know but that is their call)...." Id. at Ex. 9.

This public hearing was held as scheduled on July 14, 2005. In attendance was Edward Germain, Chairman of the Planning Board for the Town of Dublin, who spoke in opposition of the application, and other Dublin town officials. PBCR at 34. It appears there was no representative from the Town of Marlborough. Id. at 92. On July 20, 2005, the Planning Board approved Van Dyke's application, subject to several conditions, but consistent with the settlement agreement. Id. at 12-17.

On August 17, 2005, the petitioners simultaneously appealed the Planning Board's decision to the ZBA and to this Court. See ZBA Certified Record, ("CRZ") at 4. On September 6, 2005, the ZBA conducted a hearing with respect to the petitioners' appeal. Id. at 44-51. At that hearing, the ZBA determined that the appeal "contain[ed] items and issues which are not reviewable by the ZBA under their authority as contained in RSA 676:5, III." Id. at 49. In addition, the ZBA stated, "...this appeal and the residential project which serves as the

underlying basis for this appeal does not now, and did not at any time as previously reviewed by this Board, meet the requirements for it to be considered a Development with Regional Impact." Id. at 50. The petitioners requested, and were denied, a rehearing on the ZBA's post-decision determination of no regional impact, but did not challenge the ZBA's determination that it lacked jurisdiction to hear the petitioners' appeal of the Planning Board decision. Id. at 38, 54.

Pending before the Court are cross-motions for partial summary judgment as to count one, which alleges that the actions of the Planning Board and the ZBA are illegal because both boards "failed to properly identify, and provide adequate notice regarding, a development of regional impact" pursuant to RSAs 36:56 and 36:57. Petr's Writ at Count One. Van Dyke asserts that he is entitled to judgment as a matter of law because his proposed development has no regional implications, and therefore the Town was not required to satisfy the relevant notice requirements. The petitioners object to Van Dyke's motion and cross-move for summary judgment, asserting that the proposed development does have a regional impact, and that they have suffered prejudice as a result of the Town's failure to provide proper notice. Van Dyke, along with the Town, object to the petitioners' cross-motion.

In order to prevail on a motion for summary judgment, the moving party must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." N.H. REV. STAT. ANN. §491:8-a, III (1997). A fact is "material if it affects the outcome of the litigation under the applicable substantive law." Palmer v. Nan King Rest., Inc.,147 N.H.

681, 683 (2002). In considering a motion for summary judgment, the Court examines the evidence submitted and makes all necessary inferences from that evidence in the light most favorable to the non-moving party. Sintros v. Hamon, 148 N.H. 478, 480 (2002). When a motion for summary judgment is properly made and supported, "the adverse party may not rest upon mere allegations or denials of his pleadings, but his response, by affidavits or by reference to depositions, answers to interrogatories, or admissions, must set forth specific facts showing that there is a genuine issue for trial." N.H. REV. STAT. ANN. §491:8-a, IV (1997). "To the extent that the non-moving party either ignores or does not dispute facts set forth in the moving party's affidavits, they are deemed to be admitted for the purposes of this motion." New Hampshire Div. of Human Servs. v. Allard, 141 N.H. 672, 674 (1997).

Here, the parties' main dispute lies in whether Van Dyke's proposed development has, or could potentially have, a regional impact, and whether the Town was therefore required to comply with New Hampshire's regional impact statutes. See N.H. REV. STAT. ANN. §§ 36:54-58 (2000 & Supp. 2005). The Court is somewhat surprised that all parties in this case desire the question of regional impact to be decided on summary judgment, as it appears such a determination is factually driven. However, given the parties' explicit intent to have this issue decided at this time, the Court will determine the question of regional impact based upon the facts as they are presented.[5]

[5] See Petrs.' Cross-Mot. Summ J. at 12; Van Dyke's Mem. of Law in Supp. of Obj. at 4; Resp't Obj. to Pet'r Mot. Summ. J. at 7 (requesting that the Court grant Van Dyke's motion for summary judgment).

The purpose of the regional impact statute and its notice requirement is to "[p]rovide opportunities for the regional planning commission and the potentially affected municipalities to furnish timely input to the municipality having jurisdiction" and to "[e]ncourage the municipality having jurisdiction to consider the interests of other potentially affected municipalities." RSA 36:54, II – III. RSA 36:56 provides,

> A local land use board, as defined in RSA 672:7, upon receipt of an application for development, shall review it promptly and determine whether or not the development, if approved, reasonably could be construed as having the potential for regional impact. Doubt concerning regional impact shall be resolved in a determination that the development has a potential regional impact.

RSA 36:55 defines regional impact as "any proposal before a local land use board which in the determination of such local land use board could reasonably be expected to impact on a neighboring municipality...." The statute goes on to provide six nonexclusive factors to be considered when making a regional impact determination. These are: 1) the relative size or number of dwelling units compared with existing stock; 2) the proximity to the borders of a neighboring community; 3) transportation networks; 4) the anticipated emissions such as light, noise, smoke, odors, or particles; 5) the proximity to aquifers or surface waters which transcend municipal boundaries; and 6) the shared facilities such as schools and solid waste disposal facilities. RSA 36:55. Once a determination of regional impact has been made, the local land use board is required to provide notification to surrounding towns of the determination, and, more significantly, notice of any public hearing fourteen days prior to that

hearing, so that the surrounding municipality may have an opportunity to be heard on the proposed development. RSA 36:57.

Van Dyke submits that the actions of both the ZBA and Planning Board were valid because no reasonable land use board could have found his proposed development would have a regional impact. Specifically, Van Dyke notes that none of the six statutory factors point to a finding of regional impact. See Van Dyke's Mot. Summ. J. at ¶¶ 21-28. In addition, Van Dyke argues that, since no reasonable board could have found regional impact "[a]ny absence of an initial formal determination regarding regional impact on the part of either Board is harmless error...." Van Dyke's Mem. of Law in Supp. of Response to Petr's Obj. at 4. Van Dyke further argues that this land's location in the Mountain Zone does not, in and of itself, make this a project that will have regional impact. Id. at 7.

Taking the contrary position, the petitioners argue that Van Dyke's development is one of regional impact, and maintain that "[t]he most compelling factor in support of this assertion is the fact that the proposed subdivision is located in the overlay district...the Mountain Zone District." Petr's Cross Mot. Summ. J. at 2. The petitioners submit that the approval of Van Dyke's plan, both at the ZBA and Planning Board levels, "egregiously violates the spirit and intent of the Mountain Zone" as it represents a 41% increase in residential housing in the Mount Monadnock region of the Mountain Zone in Jaffrey. Id. at 14. The petitioners further argue that some consideration should be given to the fact that both the towns of Marlborough and Dublin disapprove of the development and fear that it will set a "dangerous" precedent within the Mountain Zone. Id.

In response, both Van Dyke and the Town submit that the fact this land lies within the Mountain Zone is not an appropriate factor for consideration in determining regional impact. Van Dyke's Mem. of Law in Supp. of Response to Petr's Obj. at 5; Town's Obj. to Petr's Cross Mot. Summ. J. at ¶ 24. Specifically, each argues that, although the factors provided in RSA 36:55 are not exhaustive, the land's position within this multi-town overlay district is not a proper additional factor because such a consideration would be inconsistent with the factors that are enumerated in the statute. In support of this assertion, both the Town and Van Dyke rely upon our Supreme Court's interpretation of the statutory terms "including" and "not limited to" in Conservation Law Found. v. New Hampshire Wetlands Council, 150 N.H. 1, 6 (2003). In that case, the Conservation Court noted that "the phrase 'including but not limited to,' when used in a statute preceding a list of specified items, limits the applicability of the statute to those *types* of items therein particularized." Conservation Law Found., 150 N.H. at 5-6 (citing Roberts v. General Motors Corp., 138 N.H. 532, 538 (1994)) (internal quotations and brackets omitted).

Here, the six factors listed in RSA 36:55 are preceded by the phrase "because of such factors as, but not limited to, the following...." Van Dyke and the Town assert consideration of the land's location within the Mountain Zone District is not the same "type" of factor as those listed in the statute, and therefore, should not be considered when making a determination of regional impact. Van Dyke submits, "The limitation to 'same type' of factors analysis...can be summed up as types of factors that have some sort of direct

and immediately proximate effect..." and further states, "'like type' items can transcend municipal boundaries or can impact shared municipal public infrastructures." Van Dyke's Mem. at 6-7.

While the Court agrees with Van Dyke's assessment of what constitutes "same type" regional impact factors to some degree, it finds that considering a proposed development's location within a multi-town overlay district is sufficiently similar to the enumerated statutory factors as to make such consideration appropriate. In particular, an examination of the six factors listed in the statute illustrates a focus upon potential effects, both direct and indirect, on a neighboring municipality. These factors include impacts that may not otherwise be contemplated by the municipality with jurisdiction, such as the potential effects upon shared roadways and schools, as well as less tangible effects, such as the emissions of light, noise and odors – all of which transcend municipal borders.

Likewise, the very nature of the Mountain Zone District surpasses rigid town lines in order to ensure a consistent and continual environment throughout the protected area. It is the opinion of this Court that the creation of the Mountain Zone indicates that all of the towns involved, including Jaffrey, understood the potential impacts that one town's actions within the Zone may have on the neighboring municipalities. Thus, this Court cannot say that to consider location within the Mountain Zone when determining regional impact is so unrelated to the statutory factors that it would be inappropriate to contemplate.

Furthermore, the Court finds the fact that this land lies within the Mountain Zone is not only an appropriate consideration, but also a necessary one. It is

undisputed that the Mountain Zone is an area that the Town of Jaffrey recognized is in need of special protection, and indeed, has taken action to implement such protection. Although the Court recognizes that the six factors enumerated in RSA 36:55, in isolation, weigh in favor of finding no regional impact, consideration of those factors alone is insufficient in this case given the unique circumstances of the land at issue. Certainly, to evaluate the potential regional impact of a development on Mount Monadnock without any consideration of the area's special status, a status given to it by the very Town evaluating the proposal, would be to ignore the purpose of the Mountain Zone – a collective effort to protect the natural, scenic beauty of this area. Although both the Town and Van Dyke argue that the Mountain Zone is not an important factor to consider, the Court cannot so easily discount the exceptional steps taken between several towns to preserve the character of this area. Moreover, it appears contradictory that the Town would establish this Mountain Zone, expressly created to ensure a consistent area throughout the cooperating towns, and then not consider the fact that an area is within the Mountain Zone when determining whether the proposed development would have a regional impact.

Additionally, it appears from the record that neither Board made an affirmative determination of regional impact at the outset of Van Dyke's application process. However, it also appears that in later stages of this process, the Boards took differing opinions as to whether this was a development of regional impact – the ZBA specifically denying regional impact, and the Planning Board sending notice to the towns of Dublin and Marlborough and the SWRPC,

presumably because of potential regional impact. Therefore, it appears that there was at least some dispute within the Town as to whether Van Dyke's proposed development would have a regional impact. Given the statute's express provision that even questionable impact is enough to invoke the notice requirement, this Court cannot overlook the Planning Board's actions.

After consideration of the property's location in the Mountain Zone, and in light of all the facts as they were before the various boards, this Court finds that Van Dyke's proposed development is one which has a potential regional impact. All the towns in the Mountain Zone have an interest in a development that may create significant inconsistencies in the protected area from town to town, thereby disrupting or even negating the goal of the Zone. While the Court takes no position as to the reasonableness of the Planning Board's approval of Van Dyke's subdivision plan, to approve it without allowing the surrounding municipalities a chance to be heard was in error.

Because this Court has found that Van Dyke's project involves at least a potential for regional impact, the Court must next evaluate whether the petitioners have been prejudiced as a result of the Town's failure to comply with the relevant notice requirements. The petitioners argue that they have suffered material prejudice as a result of the ZBA and Planning Board's failure to give timely notice because they were not provided a full and fair opportunity to participate with respect to the approval of Van Dyke's various applications. Van Dyke and the Town object. The Court will address each argument in turn.

Upon a finding of regional impact, "RSA 36:57 requires that surrounding towns and the regional planning commission receive notice of all public hearings regarding the development and the minutes of any meeting at which the board made a decision regarding the regional impact of the development." Mountain Valley Mall Assoc. v. Mun. of Conway, 144 N.H. 642, 653 (2000) (internal citations omitted). However, not every failure to meet this notice requirement warrants a complete invalidation of a land use board's decision. See id. Rather, failure to abide by a particular procedure must be accompanied by a material prejudice to the abutter. Id. (citing Tenn, Trustee v. 889 Associates, LTD., 127 N.H. 321, 330 (1985)); see also RSA 676:4, IV (Supp. 2005) ("planning board's actions reversed for procedural defects only when defects create serious impairment of opportunity for notice and participation").

With respect to the ZBA, Van Dyke submits that the petitioners suffered no prejudice as a result of this Board's failure to provide notice under the regional impact statute. Specifically, Van Dyke submits that, because the ZBA never considered this a project of regional impact, the petitioners would never have received notice – irrespective of whether the determination was made initially, or at a later hearing. While this argument may have rung true before the Court's findings of this date, it cannot stand now. The Court has previously concluded that Van Dyke's development is one which implicates the regional impact statute. Thus, the ZBA was required to comply with all of the notice requirements found therein. The undisputed facts demonstrate that the ZBA never provided any notice with respect to any ZBA proceeding on Van Dyke's application until the

petitioners' appealed the Planning Board decision in August 2005. By failing to provide any such notice, the ZBA has essentially deprived the petitioners of their right to be heard on an issue of significant magnitude – an application proposing to bring considerable new construction into the Mountain Zone. This deprivation is inherently prejudicial, and, as such, is readily distinguishable from our Supreme Court's decision in Mountain Valley Mall Associates. Consequently, this matter must be remanded to the ZBA such that proper notice, from the initial stage of Van Dyke's various applications, may be provided to the petitioners.

Similarly, Van Dyke and the Town argue that there is has been no prejudice with respect to the July 20, 2005 decision of the Planning Board because the Board provided timely notice and the opportunity to be heard on Van Dyke's amended subdivision application. Van Dyke asserts that it is inappropriate for this Court to review Van Dyke's original 40-unit subdivision application because it has been previously denied, and the amended application is the decision from which the petitioners appeal. Van Dyke further submits that, with respect to the amended application, all notice requirements were substantially complied with, and any failure to make a formal determination was harmless error.

While the Court agrees that the petitioners were provided notice with respect to the amended application, Van Dyke fails to consider that this amended application was pursuant to settlement agreement based entirely on his initial application – an application that the petitioners did not receive notice of. This Court will not venture to guess what may or may not have ultimately occurred

had the petitioners been properly noticed and given the opportunity to be heard during the initial hearings. However, the undisputed fact remains that the petitioners were not able to participate in any manner until an application, suitable to Van Dyke and the Town, had been fashioned. Because the amended application was based upon, and incorporated with, Van Dyke's initial application, and because the petitioners were not afforded the right to be heard on that application, this Court finds that the petitioners have been materially prejudiced by their inability to participate in the application process from its earliest stages. Therefore, the Court vacates the decision of the Planning Board, and remands this matter such that the process may begin again proper notice being provided.

Lastly, the Town argues that the regional impact statute is limited to applications specifically entitled "application for development." The Court has previously addressed this argument, and will not do so again here. See Order on Respondent's Motions to Dismiss (June 14, 2006).

Accordingly, for the reasons set forth herein, Van Dyke's motion for partial summary judgment as to count 1 is denied and the petitioners' motion for partial summary judgment as to count 1 is granted. This matter is remanded to the respective Boards for further proceedings consistent with this order.

SO ORDERED.

Date: August 23, 2006

John P. Arnold
Presiding Justice

CLERK'S NOTICE DATED
8/25/06
CC: Bassett
Bukaty
Ratigan