

THE STATE OF NEW HAMPSHIRE

Rockingham Superior Court

PO Box 1258
Kingston, NH 03848 1258
603 642-5256

RECEIVED

OCT 15 2008

NOTICE OF DECISION

STEVEN A CLARK
BOUTIN & ALTIERI PLLC
PO BOX 1107
LONDONDERRY NH 03053

08-E-0273 Marc Sneider vs. Town of Windham

Enclosed please find a copy of the Court's Order dated 10/03/2008
relative to:

Final Order

10/14/2008

Raymond Taylor
Clerk of Court

cc: Bernard H Campbell
John G Cronin

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

SUPERIOR COURT

Mark Sneider

v.

Town of Windham, et al

Docket No: 08-E-0273

FINAL ORDER

This case presents an appeal pursuant to RSA 677:4 from the decision of the Windham Zoning Board of Adjustment which denied the plaintiff's request for rehearing on the granting of a variance to the owner of property located at 120 Haverhill Road, Windham, New Hampshire, "to expand an existing towing company." The plaintiff is a direct abutter to the property at 120 Haverhill Road and objects to the ZBA's decision as both being unlawful and unreasonable.

The within litigation appears to be the third case involving the use of the property located at 120 Haverhill Road in Windham, New Hampshire. The property is owned by Brian Bauchman either in his individual capacity or as trustee. It is just under five acres in size and is located completely in the "rural" district of the town. No commercial activity is permitted in said district.

Bauchman purchased the property in 1993 with the intention of housing commercial vehicles on it that he used as part of his towing business. He claims that prior to taking title to the property he discussed his plan with the then building inspector of the Town. He reported that the building inspector approved of his use. In 1995 Bauchman applied for and received a building permit to construct a 40' x 30' garage to store his towing vehicles. Notwithstanding said approval, later in 1995 the Town filed an equity pleading seeking to enjoin the building of this garage.

The Town's lawsuit against Bauchman was filed in this Court and given the docket No. 95-E-0470. In March of 1997 a trial was held by the Court (Gray, J). His Order is dated March 10, 1997 and was in favor of Bauchman. That Order provides the foundation upon which the within appeal is constructed. Judge Gray specifically found: "All of the activities that involve towing have been and continue to be conducted off the premises of the 120 Haverhill Road site (p. 2)...Accordingly the Court finds that the defendants are not conducting a commercial activity or other business use on the premises in question. (p. 5)"

Although Bauchman's activities on the property were the subject of some controversy, things remained quiet for nearly ten years. Then an enforcement action was brought by the Town against Bauchman in 2006. That case was also filed in Rockingham County and has been given the docket No. 06-E-0592. In said action the Town alleged that: "Bauchman has initiated the practice of storing towed vehicles which are being parked on an overnight and/or continuing basis on their property. Further, the defendants (Bauchman) have begun an auto repair or "garage" business on said premises, apparently in conjunction with the towing business carried on by Bauchman." On the day that that case was to be tried the parties agreed that the litigation would be held in abeyance to afford Bauchman an opportunity to apply for a variance.

In fact Brian Bauchman did apply for a variance. Specifically he asked to be permitted to construct a 100' x 50' garage to store up to ten towing vehicles and conduct his towing business including customer parking on the property. He also requested permission to use a portion of his property to repair motor vehicles. The ZBA conducted a public hearing on Bauchman's request on March 11, 2008. The ZBA elected to bifurcate that request. It took up the request for the expansion of his towing business at the March 11, 2008 meeting, and at a meeting conducted on April 8, 2008, the Board took up

Bauchman's request for permission to repair motor vehicles on the property. The ZBA after hearing several citizens speak both for and against the use variance request, granted that portion of the request that pertained to the expansion of the towing business but denied that portion of the request that pertained to the establishment of a motor vehicle repair shop on the property. The within appeal involves only the ZBA approval of the expansion of the towing business; no party has appealed the ZBA's denial of Bauchman's request for an auto repair business on the property.

The Court has examined the Certified Record, conducted a hearing on the plaintiff's appeal on September 23, 2008, and reviewed various pleadings filed by both parties and the intervenor. Suffice it to say, the Court adopts the position taken by the plaintiff on all issues.

It is clear from the record that the ZBA misunderstood the status of the Bauchman property when it considered the use variance. It was under the impression that Judge Gray's Order had permitted Bauchman to operate his towing business out of the property in question. The Court is compelled to reach that conclusion by reviewing the language of the ZBA decision of March 11, 2008 approving the expansion of the towing business. In its decision the ZBA concluded: "A use variance was granted as requested from Section 602.1 of the Zoning Ordinance for expansion of the existing Towing Company with a restriction limited to ten vehicles relating to the towing business and a solid eight foot high wood fence to be placed on the rear lot line."

As the plaintiff has pointed out in his pleadings, Judge Gray's Order did not permit a towing business to operate on the property. He specifically found that the nature of the business was that it was conducted off site. All his Order did was to permit Bauchman to store three commercial vehicles on his residential lot. The fact that the ZBA concluded

that Judge Gray had authorized a business use of that property is wrong. Because Bauchman was never permitted to operate a towing business on the property, the ZBA could not approve an expansion of his business on the property.

As the plaintiff concluded in his trial brief, the effect of the ZBA decision was to allow a commercial towing business to operate from the property where none legally is allowed either under the zoning ordinance or as a result of Judge Gray's decision. In his Memorandum of Law the plaintiff correctly opined:

"The ZBA's decision to grant the variance was both unreasonable and unlawful because it erroneously found that this was an expansion of an existing towing business. This is factually incorrect and an incorrect legal conclusion. Judge Gray's Order is clear that Bauchman could store three towing vehicles. Granting a variance to allow ten tow trucks as a natural expansion of an existing business was incorrect. What the ZBA has done is allowed a new business to be established and allow it to store up to ten large tow trucks at the rear of the property. The decision should be reversed."

The Court grants the plaintiff's appeal and vacates the use variance awarded to Bauchman to operate his towing business out of the property. He will still be permitted to enjoy the use given to him by Judge Gray's Order, namely the storage of three commercial vehicles. No business can be conducted however on site.

Given the Court's Order herein, it need not conduct an analysis of the criteria to be considered by a ZBA when deciding whether to grant a use variance. That having been said, several factors exist which weigh against the awarding of a use variance in this case even if the business had been permitted by Judge Gray's Order. The property in question is wholly inside a rural zone. The fact that there may be other more expansive zones within one half mile of this property is of no legal significance. Close only counts in horseshoe pitching. It is not as though any of the abutting properties are in a different zone. The fact that the property sits on a major highway wherein thousands of vehicles


pass by it every day is not a sufficient reason to permit a non-conforming use. If that were the criteria then virtually anyone owning property on a major road could petition for a use not permitted in a particular zone. If Bauchman wishes to expand the use of his property the only avenue that he can pursue is a change in the zoning.

The Court finds no merit in his argument that under the Town's Zoning Ordinance a rural zone could encompass the use of heavy equipment and thus such a zone should not be considered to be for agricultural use only. It also has in mind the legitimate comments found in the Certified Record from abutters regarding Bauchman's past use of the property. The plaintiff stated in his letter to the ZBA: "He (Bauchman) should not be rewarded with a variance for having operated in the past in violation of the zoning laws." The Zachas' wrote in their letter to the ZBA: "It appears to us that if the Board approves the application it would send the signal to everyone in town that it is acceptable to ignore Town regulations for years and then to effectively benefit from it in the end." The fact that the municipal police and fire department support the expansion is not surprising given that they used Bauchman's services in the past.

The intervenor has filed a series of Requests for Findings of Fact and Rulings of Law. The Court grants all of the Requests with the except of Requests 4, 21, 23, 24, 34 through 41, 46, 47, 52, 54, 55 and 56. Requests 21, 23, 24, 46, 47, 52, 54, 55 and 56 are denied. Request No. 4 is neither granted nor denied there being insufficient evidence available for the Court to definitively rule on it. Requests 34 through 41 are not addressed specifically because they are not relevant to this appeal.

So Ordered.

DATED: October 3, 2009


Kenneth R. McHugh
Presiding Justice