

**THE STATE OF NEW HAMPSHIRE**

Rockingham Superior Court

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603 642-5256

**NOTICE OF DECISION**

JOHN TEAGUE  
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04-E-0066 Cheryl Poussard, et al vs. Town of Nottingham

Enclosed please find a copy of the Court's Order dated 5/26/2004  
relative to:

**Order on Merits**

05/26/2004

Raymond Taylor  
Clerk of Court

cc: Scott W LaPointe

MAY 27 2004

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Cheryl Poussard et al.

v.

The Town of Nottingham

04-E-66

**ORDER**

Petitioners, Cheryl Poussard et al., appeal a Nottingham Zoning Board of Adjustment ("the Board") decision granting Nelson E. Smith, Sr. ("Smith") a special exception from the Town of Nottingham Zoning Ordinance ("ZO") allowing for the operation of his excavation business. Petitioners claim the Board's decision is unlawful and unreasonable. The Court held a hearing on this matter on May 13, 2004. Upon review of the parties' arguments, submissions, the certified record and the relevant law, the Court finds<sup>1</sup> and rules as follows.

Petitioners are abutters or live within close proximity of Smith's property at 91 McCrillis Road, Nottingham, New Hampshire.<sup>2</sup> Smith's property consists of one lot identified as Map 25, Lot 16-2 on the Nottingham Tax Maps. In Fall 2001, petitioners began raising complaints with Town Selectmen regarding certain commercial activity occurring on Smith's property. Specifically, petitioners complained about excessive noise and fumes caused by Smith's vehicles and heavy machinery, excavation and filling of

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<sup>1</sup> The facts set forth in this Order appear in the Certified Record. However, because the pages of the Certified Record are not numbered, the Court does not cite to the specific documents in which the facts appear.

<sup>2</sup> Although leading petitioners, Cheryl Poussard and Richard Poussard, have since moved, the Court finds and the parties do not contest that all remaining petitioners continue to have standing to bring their appeal.

Smith's property, storage of manure and use of a loam screener. After holding hearings on the matter, on September 22, 2003, the Nottingham Town Selectmen found Smith in violation of ZO Article III, sections C (Home Business) and A-3 (Commercial/Industrial Use in Other Zones). They ordered Smith to cease and desist any commercial use of his property until he received a special exception from the Board. Smith appealed the decision and simultaneously requested a special exception under Article III, section A-3 of the ZO in order to continue his excavation business.

On November 4, 2003, the Board held a hearing on Smith's application for a special exception. After hearing testimony from Smith, Smith's attorney, the opposing abutter's attorney and numerous abutters, both for and against the special exception, the Board decided to perform a site walk on the property on November 8, 2003 and recessed Smith's hearing until December 2, 2003. In addition, the Board requested Smith submit an Impact Statement pursuant to ZO Article III, section A-4.

At the site walk on November 8, 2003, petitioners expressed concern that the equipment Smith normally used was not present on the property and had been replaced by other equipment. They alleged that the equipment on the property did not adequately represent the equipment that caused loud noise and emitted fumes. Because noise levels were in dispute, the Board voted to cancel the site walk.

On December 2, 2003, the Board held its second hearing on this matter. Smith submitted an Impact Statement he had written, which outlined his use of the property and its impact to others and the environment. The Board approved Smith's request for a special exception on December 3, 2003, allowing for the operation of his excavation business. The Board conditioned its approval on the following: (1) the operation be run

only from April 1<sup>st</sup> – November 30<sup>th</sup> of each year; (2) the hours of operation are from 8:00 am – 5:00 pm, Monday – Friday; and (3) upon Smith’s retirement the special exception will cease. Petitioners filed a timely request for a rehearing, which the Board denied. This appeal followed.

Appeals of Board decisions receive very limited judicial review. The Court will only determine “whether, on the balance of the probabilities, the decision was unlawful or unreasonable.” Lone Pine Hunters’ Club v. Town of Hollis, 149 N.H. 668, 670 (2003) (quotations and citations omitted); RSA 677:6 (1996 & Supp. 2003). All findings of the Board are considered to be prima facie lawful and reasonable, and the party appealing the Board decision bears the burden of proving that the Board’s findings are unlawful or unreasonable. RSA 677:6. The standard of review is not whether the Court would find as the Board did, but whether the evidence reasonably supports the finding. See Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992).

“A special exception is a use permitted upon certain conditions as set forth in a town’s zoning ordinance.” McKibbin v. City of Lebanon, 149 N.H. 59, 61 (2003) (citation omitted). “[I]n considering whether to grant a special exception, [Boards] may not vary or waive any of the requirements as set forth within the zoning ordinance.” Id. (citation omitted). Additionally, the Board must have sufficient evidence before it “to support favorable findings on all of the ordinance’s requirements.” Id. (citation omitted).

Article III, section A-3 of the ZO sets forth the following criteria for granting a special exception:

- a.) whether the goals set forth in NH RSA 674:17 I will be infringed by granting such special exception;

- b.) whether the terrain or configuration of the lot make it more appropriate than not for such a special exception to be granted; and
- c.) whether the granting of such a special exception would adversely impact neighboring parcels or rural character of the Town.

Under Article III, section 4 of the ZO:

- a. All proposed commercial and industrial development plans shall, in addition to the above requirements, include the following:
  - 1.) an impact study shall be required from the applicant which will respond to the issues in Appendix A, Impact Considerations.
  - 2.) The impact study and other considerations will be used in determining lot size and improvements adequate for the proposed use.
  - 3.) An impact statement is required for activity included in this section.

Appendix A, Impact Considerations include but are not limited to the following:

- 1.) Soil Suitability.
- 2.) Noise, smoke, fumes, and other hazards.
- 3.) Off-street parking, acceptable traffic impact (see NH RSA 249:17 Driveway and Other Accesses to the Public Way).
- 4.) Floodplain – erosion, obstruction of floodwaters and floatable material.
- 5.) Wetlands – groundwater recharge, reduction of sponge effect, and preservation of wildlife habitat.
- 6.) Steep slope – erosion and surface water runoff whenever lot slope of 15 percent or more.
- 7.) Aesthetic value – preservation of view, waterfall, geological formation, natural growth and rural atmosphere in general.
- 8.) Historic District – compatibility whenever tract contains or is near a designated Historic District or other monument of importance.
- 9.) Community – preservation of the rights of others, both individual and group, including safety, economic and environmental impact in general.

According to petitioners, the Board acted unreasonably and illegally by failing to find that all of the conditions for a special exception were met under ZO Article III, sections A-3 and 4. Further, petitioners claim the Board acted unreasonably and illegally in expanding upon Smith's request by allowing his operation to be run forty (40) hours a week and by not limiting Smith's storage of manure, loam or heavy equipment. The Board maintains it did not err in granting Smith's request for a special exception because it was presented with ample evidence that the special exception requirements had been met.

In this case, the evidence before the Board established that Smith met the special exception conditions set out in Article III, sections A-3 and 4. Specifically, petitioners contest that Smith presented enough evidence to demonstrate the goal in RSA 674:17 I(i), of encouraging the preservation of agricultural lands and buildings, would not be infringed upon by granting the special exception. See ZO Article III, section A-3 (a). However, the record shows the Board heard the testimony of supporting abutters, Smith and Smith's attorney on the specific commercial use of Smith's property. (C. R. at Nov. 4, 2003 ZBA Minutes and Dec. 2, 2003 ZBA Minutes.) Thus, the Court finds that there was enough evidence before the Board to demonstrate that the goal of RSA 674:17 I(i) would not be infringed by granting Smith a special exception.

Petitioners also contend there was insufficient evidence to demonstrate that the terrain and configuration of the lot make it more appropriate than not for the granting of a special exception and the granting of the special exception would not adversely affect neighboring parcels or the rural character of the town. See ZO Article III, sections A-3 (b) and (c). The record contains a map of Smith and abutter's property and testimony from Smith's attorney regarding the configuration of the property and that it cannot be

seen from McCrillis Road. (C. R. at Undated abutter's map and Nov. 4, 2003 ZBA Minutes, Test. of Atty. Harlan.) The Board need not hear evidence of the conditions for a special exception "by experts or witnesses with firsthand knowledge." P. LOUGHLIN, 15 NEW HAMPSHIRE PRACTICE, LAND USE PLANNING AND ZONING § 23.04, at 290 (2000). See also Hannigan v. City of Concord, 144 N.H. 68, 74 (1999) (allowing applicant's attorney to testify as to specific evidence of special exception criteria). In addition, although shortly after beginning the site walk the Board cancelled the walk, the Board was able to obtain an initial cursory inspection of the property. See Nestor v. Town of Meredith Zoning Board of Adjustment, 138 N.H. 632, 636 (1994) (a Board "can consider their own knowledge concerning such factors as traffic conditions, surrounding uses, etc., resulting from their familiarity with the area involved." (quotation and citation omitted)).

The record also contains testimony from Smith and supporting abutters, supplemental materials in support of Smith's request and Smith's Impact Statement regarding the affect of his use on the neighboring parcels. (C. R. at Nov. 4, 2003 ZBA Minutes, Mem. from Mary Bonser to the Board of Selectman and Public, and Smith's Impact Statement.) Several abutters testified that they have lived near Smith for years and have never had a problem with noise, fumes or vibrations. (C. R. at Nov. 4, 2003 ZBA Minutes.) Thus, the Court finds there was ample evidence before the Board to ascertain Smith met the requirements of ZO Article III, sections (b) and (c).

Petitioners further claim Smith's Impact Statement failed to address any of the required impact considerations. See ZO Appendix A, Impact Considerations. Smith's Impact Statement addressed the noise, dust and fumes from his business, the working conditions on the property, off-street parking, wetlands issues, the aesthetic value of

preservation of the view of the abutters, and the preservation of rights of others, including safety, economic and environmental impact in general. (C. R. at Smith's Impact Statement.)

Although Smith's Impact Statement does not specifically address soil suitability issues, in this case the Court finds this consideration was not necessary to the Board's decision of whether to grant Smith a special exception. Additionally, Smith's Impact Statement does not address floodplain issues or erosion or surface water run-off issues. However, Appendix A only requires erosion or surface water run-off issues to be addressed "whenever [there is a] lot slope of 15 percent or more." See Appendix A, Impact Considerations 6. There was no evidence before the Board that Smith's property contained a lot slope of 15 percent or more, rendering it unnecessary for Smith to address this issue in his Impact Statement. Furthermore, the record contains numerous documents from the New Hampshire Department of Environmental Services ("NHDES") regarding wetlands and waste management issues that had been addressed on Smith's property. (C. R. at Aug. 15, 2002 NHDES Wetlands Bureau Field Inspection Report, Aug. 30, 2002 NHDES Letter of Deficiency, Sept. 6, 2002 NHDES Wetlands Bureau Letter of Deficiency, Oct. 23, 2002 NHDES Letter of Compliance for Letter of Deficiency, June 5, 2003 NHDES Waste Mgmt. Div. Activity Report, Sept. 9, 2003 NHDES Wetlands Bureau approval letter.) Therefore, the Court cannot find the Board acted unreasonably when deciding Smith's Impact Statement sufficiently addressed all necessary conditions as the Board had support for those issues not specifically addressed from other documents in the record. See Nestor, 138 N.H. at 636.

Finally, petitioners claim the Board acted illegally and unreasonably in expanding upon Smith's request for a special exception by allowing Smith to operate his business forty (40) hours a week and not placing limitations on his storage of manure, loam and heavy equipment. Petitioners fail to cite any law restricting Boards from expanding on an applicant's request. Although a Board "may not vary or waive any of the requirements as set forth within the zoning ordinance," McKibbin, 149 N.H. at 61 (citation omitted), there is no New Hampshire law restricting a Board from expanding on the applicant's request for a special exception. Furthermore, although Smith's Impact Statement does not request more than ten (10) hours a week and states that he will limit his storage and use of manure, loam and heavy equipment, his testimony before the Board established his interest in running his business forty (40) hours a week and that he only rents a loam screener 2-3 days a year. (C. R. at Nov. 3, 2003 ZBA Minutes and Dec. 2, 2003 ZBA Minutes, Test. of Smith.) The Court therefore finds and rules that the Board's decision granting Smith's request for a special exception was neither unlawful nor unreasonable. Accordingly, the Board's decision is **AFFIRMED**, and petitioner's appeal is **DISMISSED**.

So **ORDERED**.

5-26-04

DATE



Robert E.K. Morrill  
Presiding Justice