

The Law Office of Scott E. Hogan

P.O. Box 33
Durham, New Hampshire 03824

Phone: 603-969-1183

hoganlaw@comcast.net

MOTION FOR REHEARING PURSUANT TO RSA 677:2

TO: Rochester Zoning Board of Adjustment (Zoning Board, Board, or ZBA)

FROM: Thomas Demchak
72 Crown Point Road, Rochester, NH

BY: Scott E. Hogan, Esq.

RE: ZBA Decision of March 11, 2020, Denying Variance Requests of Thomas Demchak for property at 72 Crown Point Rd., Rochester, NH

DATE: April 10, 2020

INTRODUCTION

The property at 72 Crown Point Rd. is owned by the Applicant Thomas Demchak, and his daughter Karen Demchak resides on the property. The Record is clear that for the past 13 years Karen has been keeping and raising horses, other livestock (goats) as well as chickens/poultry on the property at 72 Crown Point Road. The Record is also clear that this process began when, several years ago, the prior owner of the abutting residential property, just before listing that property for sale, submitted complaints to the City regarding the agricultural/equestrian uses of the Demchak property. The abutting property was purchased by a new buyer, who has continued those complaints, and claims that at the time of her purchase she was unaware of the long-standing equestrian/agricultural uses of the subject property.

The Record is also clear that Karen enjoys a stellar reputation among equestrians, including large animal veterinarians, equestrian experts, and other professionals, based upon her knowledge and care of her animals, as well as her exemplary breeding program. That written testimony submitted to the Board includes:

“During my first visit, Karen took me on a tour of her farm, and I was not only impressed with her knowledge and land use, but also the love and care she clearly had with her animals... Put simply, it was hard to believe that such a little farm in Rochester, New Hampshire, had such impeccable breeding lines.”

“...Clinically, the horses disposition and body condition scores are excellent. *Their housing and land allowance appears ample and they are exercised at regular intervals. Therefore, I believe Ms. Demchak is in good standing to continue to own her horses and maintain them at her residence.*”

“...To the best of our knowledge and experience caring for them, all of the horses in Karen and Robert’s care are in proper body condition,...provided with ample feed (hay and grain) and fresh, clean water daily and *have adequate shelter and turn-out. Most of their horses are also ridden on a regular basis to supplement their exercise availability.*

It is in our professional opinion that these horses are well cared for and provided for adequately.”

“...*She is very smart about their space and living conditions and feeding program. People seek her out for advice and training assistance and she is more than happy and willing to accommodate their requests.” See 1-10-20 Variance Application cover letter, pp.2-3. (Emphases added).*

The variances requested sought to allow the Demchaks to continue the long-standing agricultural/equestrian uses of the property that have been conducted there for over a decade, in respect of their private property rights.

For the reasons stated below, the Movant respectfully requests that the Board grant this Motion for Rehearing.

STANDARD OF REVIEW/ ZBA JURISDICTION

RSA 677:2 states,

“Within 30 days after any order or decision of the zoning board of adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment, a board of appeals, or the local legislative body, **may grant such rehearing if in its opinion good reason therefor is stated in the motion...**” (Emphasis added).

On the purpose of Motions for Rehearing, the New Hampshire Supreme Court has stated,

“By requiring an aggrieved party to first file a motion for rehearing from an adverse zoning board decision before allowing an appeal to the superior court, **RSA 677:2 is designed to give the ZBA an**

opportunity to correct any errors it may have made.”

Mcdonald V. Town of Effingham Zoning Board of Adjustment, 152 N.H. 171, 175 (2005). (Emphasis added).

THE BOARD SHOULD REHEAR THESE APPLICATIONS

Whether or not the Board ultimately changes its denial of these variance requests, it should grant rehearing of the application, as there is “good reason therefor” and new information, as discussed below:

Prejudgement of Applications

The most obvious aspect of the Board’s decisions is that the majority of the four member Board rotely followed a pre-written script to deny each of the variance applications, without regard for the actual evidence and testimony presented at the public hearing, in violation of the legal requirement to sit as a fair, objective juror, and hear and deliberate on the evidence and testimony, before rendering a decision.

Each member of the Zoning Board was required to sit on these applications *with no prejudgement, and had an obligation to objectively hear the testimony and evidence presented before rendering a decision on the applications.*

The applicable provision which governs the disqualification of ZBA members, RSA 673:14, provides, in relevant part:

“No member of a zoning board of adjustment . . . shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, *or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.*” (Emphasis added).

In construing this provision, the New Hampshire Supreme Court has noted that, where a land use board is acting in a quasi-judicial capacity, the question of the disqualification of a member of such board is subject to “stricter rules of fairness.” *Winslow v. Holderness Planning Bd.*, 125 N.H. 262, 266-67 (1984). Board members can decide *only after weighing and considering the evidence and arguments presented.* *Appeal of Keene*, 141 N.H. 797, 800 (1997) (quoting *Sanborn v. Fellows*, 22 N.H. 473, 489 (1851)). The Supreme Court has further noted that the New Hampshire Constitution requires that all members of local administrative boards acting in a quasi-judicial capacity be “as impartial as the lot of humanity will admit.” *Winslow*, 125 N.H. at 267.

A ZBA member is disqualified from hearing a case under the same standard as for the disqualification of a juror in a trial, i.e., “if it appears that he or she is ‘not indifferent.’” *Id.* The analysis of disqualification takes into account various “juror standards” used in trial court

proceedings, *which would prevent a person from serving as a juror on a matter where the person has already formed an opinion.*

In the present case the Record is clear that 3 of the four Board members present conducted no deliberations based on the evidence and testimony presented, but instead supported/capitulated to the pre-written denials that were crafted before the public hearing ever began, and were adopted by 3 of 4 members on each of the three variance requests.

The pre-destined nature of the majority's decisions was so obvious that despite the different evidence and testimony presented on each of the three different variance requests, the pre-written position of the majority was presented each time as the "same as before". Each application was then denied in turn by the 3-member majority, based only on the pre-determined position, not the actual evidence and testimony presented. The transcript and the video of the Board's hearing will make this clear for any reviewing authority, but the Board should grant rehearing on this issue alone, as it goes to the merits of the five variance requirements for each of the three applications, and each of the issues presented in this Motion.

No Deliberation on the Merits or Even Determination of Which Variances Were Required

As further evidence of the majority Board's pre-determined decisions, it never even made a determination as to the actual variances that were required. (After extensive consultation with the City, the Applicant requested three separate variances, but presented them "in the alternative", as the Board was required to determine whether the subject use was a "commercial stable", or a 'residential accessory use' before it could reasonably act on the requests). Instead of actually recognizing, or deliberating on that distinction, and the evidence supporting each separate request, the majority of the Board simply followed the pre-written script, and denied each variance, without making any of the required distinctions.

As above, the Board conducted no independent deliberations on each of the five variance requirements for each of the three variance requests, as is required before rendering a decision, so that its decisions can be fairly reviewed by the Court if necessary.

When reviewing a zoning board decision that it finds unclear and lacking findings, the superior court has several options. *Id.* at 276. "Consistent with its statutory authority, the court c[an:] (1) "conduct its review based upon the decision and record before it," (2) "take additional evidence, or" (3) "remand the case to the [zoning board] for clarification." *Id.*; see also *Kalil*, 155 N.H. at 309–13 (reviewing zoning statutes and case law and determining that the superior court has the authority to remand decisions to zoning boards). A court cannot remand a case to a zoning board for the latter's failure to make factual findings, as a zoning board's failure to make specific factual findings is not an error in and of itself. *Id.* at 310. However, a "remand to permit clarification does not necessarily mean that the court is either ordering the [zoning board] to make findings or finding error where findings are absent[,] or "that the court has reversed the [zoning board's] decision." *Id.* at 311. "It simply means that the court opts to not reach the merits of the appeal because it is uncertain as to the board's rationale or conclusions." *Id.*

Here, there is no basis to determine the actual reasons or evidence for the Board's separate denials, and it should grant rehearing at least to clarify such bases, to avoid a future remand for that purpose.

Failure to Recognize Statutory Protection Of Agricultural Uses

As with every substantive aspect of the variance requests, the Board failed to even mention or deliberate on the historic, statutory protection afforded to established New Hampshire equestrian agricultural uses, and the unique context in which such variance requests must be viewed by Zoning Boards. These long-standing and specific laws were detailed specifically to the Board in the variance requests, but were also ignored. This was separate legal error.

Denial of View Request as Further Evidence of Prejudgement/ Lack of Evidence

The Applicant specifically requested Board members to come view the property for themselves, as that is the best evidence of how the variance requests comply with the law, and to establish/ reconcile the facts and evidence presented. (Specific issues such as the "Special Conditions" of the property are of particular substantive importance). The fact that the three-member majority of the Board refused to even consider taking a view (and the Chair going as far as stating that a view was "moot") is further evidence of the majority's prejudgement of the applications, and further evidence that the Record supported approval of the applications, and there is no basis in the Record to properly and legally support or explain the Board's denials.

New Information

The property owner Tom Demchak is in the process of approaching the abutting property owner to the rear of the subject property, to determine if he can purchase or lease several acres of land abutting 72 Crown Point Road. Such land would be to the rear of the subject property and the complaining abutter, "behind" the stream at the base of the property, such that the majority of the equestrian/ agricultural uses would be removed from the vicinity of the subject and abutting residences. *This action is taken by the Applicant, even though the subject uses have been conducted on this property for over a decade, and meet all requirements for variances as discussed above.* The Applicant would consider this as a condition of the Board's approval at any rehearing of the matter.

CONCLUSION

For all of the reasons stated above, the Movant respectfully requests the Board to grant this Motion for Rehearing.

Respectfully submitted,

Thomas Demchak

By his attorney,
THE LAW OFFICE OF SCOTT E. HOGAN

DATE: April 10, 2020

/s/ Scott E. Hogan /s/

Scott E. Hogan, Esq.

P.O. Box 33

Durham, NH 03824

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NH Bar ID#: 10542