THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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NOTICE OF DECISION

File Copy

Case Name: **Warner Road Holdings, LLC v Town of Warner**
Case Number: **217-2017-CV-00199**

Enclosed please find a copy of the court's order of July 28, 2017 relative to:

ORDER

August 02, 2017

Tracy A. Uhrin
Clerk of Court

(485)

C: Paul J. Alfano, ESQ; Jamie N. Hage, ESQ; Michael P. Courtney, ESQ; Katherine Elisabeth Hedges, ESQ; Sharon Cuddy Somers, ESQ; Mark H. Puffer, ESQ; Amy M. Manzelli, ESQ

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Warner Road Holdings, LLC

v.

Town of Warner

No. 217-2017-CV-199

ORDER

The Plaintiff, Warner Road Holdings, LLC, brought this action against the Defendant, the Town of Warner ("the Town"), seeking to appeal a decision of the Town of Warner Zoning Board of Adjustment ("ZBA") following the ZBA's grant of a special exception for Dragonfly Holdings, LLC ("Dragonfly") to construct and operate an indoor gun range. Dragonfly and the Town of Hopkinton are Intervenors in the case. Before the Court are Sara Lansil and Justin Carroll's Motion to Intervene, the Town's Motion for Remand and the Plaintiff's Cross Motion for a ruling that the ZBA's order was void, and the Plaintiff's Motion to Expand the Record. The Court held a hearing on the motions on June 26, 2017. For the reasons stated in this Order, the Motion to Intervene is GRANTED, the Motion for Remand is GRANTED, in part, and DENIED, in part, and the Cross Motion for a ruling that the ZBA's order was void is GRANTED. Because the case is remanded back to the ZBA, the Motion to Expand the Record is DENIED AS MOOT.

I

The Court first addresses Sara Lansil and Justin Carroll's Motion to Intervene. Lansil and Carroll lease property the Plaintiff owns that is located directly next to the

Dragonfly property subject to this appeal ("the Subject Property"). Lansil and Carroll have lived with their young daughters in the leased property for approximately two years on a month-to-month lease.

Currently, the Subject Property consists of vacant, undeveloped forest land. Dragonfly seeks to construct an indoor gun range and retail store on the Subject Property. (C.R. at 1.) Lansil and Carroll claim that the first notice they received about Dragonfly's application for a special exception to construct the gun range was on March 30, 2017, which was after the ZBA granted the special exception on March 8, 2017.[1] Carroll then participated in the application process on April 17, 2017, when he spoke at the Planning Board public hearing regarding site plan approval for the Subject Property. (Mot. to Intervene Ex. B at 22–23.) Lansil and Carroll now seek to intervene in the instant action.

"Any person whose rights may be directly affected by the outcome of the appeal may appear and become a party, or the court may order such persons to be joined as parties as justice may require." RSA 677:7; see also Super. Ct. Civ. R. 15 ("Any person shown to be interested may become a party to any civil action upon filing and service of an Appearance and pleading briefly setting forth his or her relation to the cause. . . ."). To establish that it is "directly affected" for standing purposes, a party must show "some direct, definite interest in the outcome of the action or proceeding." Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 767 (2013) (quotation omitted). "Whether a person's interest in the challenged administrative action is sufficient to confer standing is a factual determination to be undertaken on a case by case basis." Id. (quotation omitted).

[1] In their Motion to Intervene, Lansil and Carroll stated that they did not receive notice of the March 8, 2017 public hearing until the day of the hearing. (Mot. to Intervene ¶ 19.) However, at the hearing on June 26, 2017, counsel for Lansil and Carroll stated that the date laid out in the Motion to Intervene was erroneous and that notice was not received until March 30, 2017.

The Court "may consider factors such as the proximity of the [party's] property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the [party's] participation in the administrative hearings." Weeks Rest. Corp. v. City of Dover, 119 N.H. 541, 545 (1979). The Court addresses these four factors in turn.

First, because Lansil and Carroll live on the property located next to the Subject Property, they are in close proximity to the site for which approval is sought. Although Lansil and Carroll do not own their leased property and merely have a month-to-month tenancy, they have lived on the property with their family for over two years. While in most cases the value of a lease is the right to occupy a building, it is nonetheless true that a tenant is considered both the owner and occupier of land during the term of the lease in order to provide the tenant with remedies to protect his or her interest of landlord and others. Kline v. Burns, 111 N.H. 87, 90-91 (1971). Moreover, ownership is not a requirement under Weeks.[2] Thus, the first factor weighs in Lansil and Carroll's favor.

Second, Dragonfly seeks to change the Subject Property from its current use as vacant, undeveloped forest land to the site of an indoor gun range and retail store. The parties agree that the Subject Property is located in the Town's Commercial C-1 district, in which indoor gun ranges are only permitted with a special exception from the ZBA.

[2] The Town argues that Lansil and Carroll are not abutters under RSA 672:3 because they do not own land. RSA 672:3 defines an "abutter" as "any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board." "For purposes of receiving testimony only, and not for purposes of notification, the term 'abutter' shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration." RSA 672:3. Thus, like the Weeks factors, a plain reading of RSA 672:3 does not require an abutter to own the property that will be affected. Nor does Weeks require a party seeking to intervene to qualify as an abutter under RSA 672:3 in the first place.

(Town's Answer ¶ 10.) Such a change is significant. Thus, the second factor weighs in Lansil and Carroll's favor.

Third, as residents of the property next to the proposed gun range, Lansil, Carroll, and their children will be directly impacted by the change in the use of the Subject Property. Thus, the third factor weighs in Lansil and Carroll's favor.

Fourth, once they learned about the proposed use of the Subject Property, Lansil and Carroll participated in Dragonfly's application process when Carroll spoke at the April 17 Planning Board hearing. Thus, the final factor also weighs in Lansil and Carroll's favor. As a result, all four Weeks factors support Lansil and Carroll. Their Motion to Intervene, therefore, is GRANTED.

II

The Court next turns to the Town's Motion for Remand. In its Motion for Remand, the Town seeks to remand the case for the limited purpose of allowing the ZBA to determine if Dragonfly's application is of regional impact and allowing the State to provide comments. In response, the Plaintiff objects to a limited remand and cross moves for a ruling that the ZBA's order is void. The Court first addresses the Plaintiff's Cross Motion, as it finds that motion to be dispositive.

In its Cross Motion, the Plaintiff first argues the ZBA's granting of the special exception was void because the ZBA lacked jurisdiction due to its failure to comply with statutory notice requirements. In particular, the Plaintiff argues the ZBA lacked jurisdiction to hear Dragonfly's application because, prior to convening a public hearing to address the application, the ZBA did not provide proper notice to all abutters of the Subject Property, including the State of New Hampshire Department of Transportation,

the Department of Resources and Economic Development, and the Department of Transportation Right-of-Way Division (collectively "the State").

RSA 676:7 requires that prior to "exercising its appeals powers, the board of adjustment shall hold a public hearing." Notice of the public hearing is required as follows:

> The appellant and *every abutter* and holder of conservation, preservation, or agricultural preservation restrictions shall be notified of the hearing by certified mail stating the time and place of the hearing, and such notice shall be given not less than 5 days before the date fixed for the hearing of the appeal. The board shall hear all abutters and holders of conservation, preservation, or agricultural preservation restrictions desiring to submit testimony and all nonabutters who can demonstrate that they are affected directly by the proposal under consideration. The board may hear such other persons as it deems appropriate.

RSA 676:7 (emphasis added). "'Abutter' means any person whose property is located in New Hampshire and adjoins or is directly across the street or stream from the land under consideration by the local land use board." RSA 672:3. "The word 'person' may extend and be applied to bodies corporate and politic as well as to individuals." RSA 21:9. The State, therefore, is a person under the statute.

Here, the Town does not contest that the State owns multiple parcels that are across the street from the Subject Property. The State, therefore, qualifies as an abutter under RSA 672:3. Thus, the ZBA was required to give the State notice under RSA 676:7 regarding Dragonfly's application for a special exception. The parties agree that the ZBA failed to provide such notice to the State. (Town's Answer ¶ 13.) The Plaintiff argues that because the State did not receive the proper notice, the ZBA lacked jurisdiction to grant Dragonfly's application.

"A necessary prerequisite to a zoning board of adjustment's jurisdiction to consider a request for a [special exception] is that any statutory notice procedure be

satisfied." Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992). Thus, it is necessary for every abutter to be provided the notice that RSA 676:7 prescribes in order for a ZBA to have jurisdiction to hear an applicant's request for a special exception. See id. at 232. When proper notice is not given to all abutters, then a ZBA lacks jurisdiction to hear an application for a special exception. See id. If a ZBA lacks jurisdiction, then the granting of a special exception is invalid and of no effect, it confers no rights upon the applicant, and is void from the date it was issued. See id. ("Because the ZBA lacked jurisdiction, the variance which was granted in 1987 was invalid and of no effect; it conferred no rights upon plaintiff Hussey, as it was void from the very date on which it was issued.").

The Town argues that procedural defects, such as a lack of notice, may only render a ZBA's decision void if the defect creates "serious impairment of opportunity for notice and participation," and that the State here was not so impaired. (Town's Mem. of Law 1, 8 (citing Mountain Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642, 653 (2000)).) The New Hampshire Supreme Court has held that a ZBA's failure to provide proper notice does not warrant the invalidation of a ZBA application where the failure to notify was not prejudicial. Mountain Valley Mall Assocs., 144 N.H. at 653. In Tenn v. 889 Assocs., Ltd., 127 N.H. 321, 330 (1985), the board of adjustment "unquestionably failed to give the plaintiff written notice" of its meeting, but the plaintiff "just as unquestionably had reasonable actual notice of it." Thus, "no prejudice resulted from the failure to provide the plaintiff with written notice." Id.

Likewise, although the State was not provided notice here, it "was aware of the proposal and saw no need to comment." (C.R. at 108.) The lack of notice to the State, therefore, did not create a serious impairment of opportunity for notice and participation and, therefore, did not divest the ZBA of jurisdiction.

The Plaintiff also argues that the ZBA lacked jurisdiction because it failed to analyze whether Dragonfly's application was of regional impact at the March 8, 2017 public meeting. The Town argues that the Plaintiff cannot raise the issue of regional impact now because it was not raised in the Plaintiff's motion for rehearing of the ZBA's decision. A motion for rehearing must "set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." RSA 677:3, I. "A timely motion for rehearing is a necessary prerequisite to maintenance of an appeal, and to the jurisdiction of the superior court on an appeal." Pelletier v. City of Manchester, 150 N.H. 687, 690 (2004) (quotation omitted). "Under RSA 677:3, I, 'no ground not set forth in the [motion for rehearing] shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.'" Town of Bartlett Bd. of Selectmen v. Town of Bartlett Zoning Bd. of Adjustment, 164 N.H. 757, 760 (2013).

It is true that the issue of regional impact was not raised until the Plaintiff's appeal to this Court. However, the "issue of whether the ZBA has jurisdiction to entertain a particular application or appeal may be raised at any time in court and is not waived if it was not included in a motion for rehearing." 15 Loughlin, New Hampshire Practice: Land Use Planning & Zoning § 25.01, at 440 (4th ed. 2010); see also Daniel v. B & J Realty, 134 N.H. 174, 176 (1991) (stating a question of jurisdiction may be raised at any time). The Court must therefore consider the Plaintiff's argument regarding regional impact.

Under RSA 36:56, when a ZBA receives an application, it shall review it promptly and determine if the proposed development "reasonably could be construed as having the potential for regional impact." A "'development of regional impact' means 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. . . ." RSA 36:55. "Upon determination that a proposed development has a potential regional impact, the local land use board having jurisdiction shall afford the regional planning commission and the affected municipalities the status of abutters as defined in RSA 672:3 for the limited purpose of providing notice and giving testimony." RSA 36:57.

Here, the ZBA did not analyze the potential for regional impact at the March 8, 2017 meeting. Abutting towns and the regional planning commission, therefore, did not receive notice of the public meeting to discuss Dragonfly's application. Just as the ZBA in Hussey lacked jurisdiction because notice was not provided to all abutters, the ZBA here also lacked jurisdiction to hear Dragonfly's application because the Town of Hopkinton, an abutting town, and the regional planning commission were not provided proper notice of the public hearing on the application. The special exception granted to Dragonfly, therefore, is *void ab initio*. See Hussey, 135 N.H. at 231. Therefore, the ZBA's decision must be VACATED, and the case remanded back to the ZBA in its entirety[3].

III

In sum, for the reasons stated in this Order, Lansil and Carroll's Motion to Intervene is GRANTED; the Town's Motion for Remand is GRANTED, to the extent that it seeks to allow the ZBA to determine if Dragonfly's application is of regional impact and allowing the State to provide comments, and DENIED, as it relates to the remand being of limited nature; and the Plaintiff's Cross Motion for a ruling that the ZBA's order was void is GRANTED. The ZBA's decision, therefore, is VACATED, and the case is

[3] Because the Court finds that the ZBA lacked jurisdiction, it need not address the Plaintiff's argument regarding the recusal of a ZBA member during the application process.

remanded back to the ZBA for a hearing *de novo*. In light of the resolution of the other Motions, the Plaintiff's Motion to Expand the Record is DENIED AS MOOT.

SO ORDERED

7/28/17
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice