

STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

SUPERIOR COURT

No. 01-E-90

Marty Eaton, et al.

v.

Town of Swanzey, et al.

DECREE

This case arises out of the decision of defendant, Town of Swanzey Zoning Board of Adjustment (Board), granting the special exception request of the intervenor, Southwestern Community Services, Inc. (intervenor), to build additional multi-family units on a property which had an existing multi-family unit. The plaintiffs appeal the Board's decision pursuant to RSA 677:4 (1996). On December 6, 2001, the Court held a hearing on the merits of the appeal. Upon due consideration, the Court **AFFIRMS** the Board's decision and **DISMISSES** plaintiffs' appeal.

I. Factual Background

The Court finds the pertinent facts are as follows. On or about April 30, 2001, the intervenor submitted to the Town of Swanzey an application for a special exception under the Town of Swanzey, New Hampshire Zoning Ordinance (Ordinance) to build multi-family dwellings on a lot located at 28 Main Street. At that time, there was an existing four-unit dwelling on the approximately eight-and-one-half acre subject property.

The property is situated in the Village Business District. The Town of Swanzey Zoning Ordinance provides that a multi-family

dwellings are permitted in the district by special exception. See Ordinance, . (V) (A) (2) (b).

A public hearing was conducted on May 21, 2001. The intervenor presented testimony in support of its application on each of the four criteria for special exception. There was opposition to the application. Concerns included the impact on traffic, the density of the project, maintaining the traditional New England appearance in the area, and access to open spaces. A Board member expressed concern that the project may be perceived as a low-income housing project. Another member stated that this perception is not necessary if the building is properly constructed, as the intervenor had done successfully at other locations. At the conclusion of that meeting, the Board resolved the factual issues in favor of the intervenor and granted the intervenor's application for a special exception.

In granting the special exception, the Board made two recommendations to the Planning Board for consideration during the site plan review for the intervenor's project. First, the Board recommended that the Planning Board ensure that the construction would be in keeping with the traditional New England character of the surrounding area and, second, that it carefully study the impact on vehicle traffic.

Although he was not present at the public meeting, plaintiff Wesley Liebeler filed a timely application for a rehearing, claiming that the intervenor's application failed to satisfy any

of the criteria for a special exception. His application for rehearing was denied. This timely appeal followed.

II. Standard of Review

In appeals of zoning board decisions, the burden of proof is on the appellant to show that the order or decision appealed from is unlawful or unreasonable. See RSA 677:6 (1996). The Board's findings are considered to be *prima facie* lawful and reasonable. Id. The Board's decision will not be set aside or vacated, except for errors of law, unless the Court is persuaded by the balance of the probabilities, on the evidence before it, that the decision is unreasonable. See id. "[T]he review by the superior court is not to determine whether it agrees with the [Board's] findings, but to determine whether there is evidence upon which they could have been reasonably based." See Hussey v. Town of Barrington, 135 N.H. 227, 231 (1992). As a general rule, the Court confines its review to consideration of the Board's certified record and the pleadings, but the Court may receive additional evidence as it did in this case. See RSA 677:10 (1996); Lake Sunapee Protective Ass'n v. New Hampshire Wetlands Bd., et al., 133 N.H. 98, 106-07 (1990).

III. Discussion

The plaintiffs appeal the Board's decision granting the special exception, arguing that its decision was unlawful or unreasonable because: (1) there was insufficient evidence before the Board to show that the intervenor's application satisfied the

criteria for a special exception; and (2) the Board's decision is void because of the chairman's conflict of interests. The Board argues that there is sufficient evidence on which to base its decision, and that the conflict issue should not be addressed because it was not timely raised. It also questions the standing of some named plaintiffs.

A. Standing

As a preliminary matter, the Court addresses the Board's arguments that the plaintiffs have no standing to appeal the Board's decision, and that the scope of the appeal is limited by the grounds raised in the plaintiffs' motion for rehearing.

In order to have a right of appeal, the plaintiffs must be "persons aggrieved" within the meaning of RSA 677:4 (1996). The Board argues that because the plaintiffs did not attend the public hearing, they effectively gave up the right to claim that they are aggrieved by the Board's decision. While this is one factor to consider in determining whether a plaintiff is a person aggrieved, see Nautilus of Exeter v. Town of Exeter, 139 N.H. 450, 452 (1995) (citing several factors for a court to consider), it is not, without more, conclusive on the issue. The Court finds no other factor to support a finding that the plaintiffs are not persons aggrieved.

The Board also argues that because plaintiff Wesley Liebeler was the only party to the motion for rehearing, he is the only plaintiff with standing to challenge the Board's decision. The

Court agrees. In Carter v. City of Nashua, the New Hampshire Supreme Court held that the trial court properly denied a motion to add parties to an appeal on the grounds that they were not parties to the application for rehearing and therefore not entitled to become parties to the appeal. See 113 N.H. 407, 421 (1973). The Court finds that only Wesley Liebeler, as the sole party to the motion for rehearing, is entitled to appeal from the Board's decision. Therefore, the remaining parties are **DISMISSED** from the instant appeal.

B. Issues Timely Raised

Also as a preliminary matter, the Board argues that the Court should not consider arguments that the plaintiff failed to raise in his petition for appeal. Specifically, the plaintiff claims that the special exception is null and void because: (1) the plan submitted to the Planning Board for site review is different from that submitted to the Board, see Sklar Realty v. Town of Merrimack, 125 N.H. 321, 330 (1984); and (2) the Board's chairman had a conflict of interests. The plaintiff did not raise either issue in his application for rehearing.

RSA 677:3 provides that "no ground not set forth in the application [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." See RSA 677:3, I. The New Hampshire Supreme Court "'requires issues to be raised at the earliest possible time, because trial forums

should have a full opportunity to come to sound conclusions and to correct errors in the first instance.'" Appeal of Cheney, 130 N.H. 589, 594 (1988) (quoting Sklar Realty v. Town of Merrimack, 125 N.H. at 328). "Although '[i]nterested parties are entitled to object to any error they perceive in governmental proceedings, . . . they are not entitled to take later advantage of error they could have discovered or chose to ignore at the very moment when it could have been corrected.'" Sanderson v. Town of Candia, N.H. slip. op. at 4 (decided July 6, 2001) (quoting Cheney, 130 N.H. at 594).

The claim that the intervenor submitted a significantly different plan to the Planning Board for site review than the one before the Board was not timely raised, and therefore the Court need not address it.¹

With respect to the chairman's alleged conflict of interests, based on the evidence before the Court, it is clear that the plaintiff could have known or reasonably could have discovered the relationship between the chairman and the selectmen, and the selectmen's support of the intervenor's project. The plaintiff could have raised the conflict issue at the public hearing, had he

¹ The Court notes, however, that the only appreciable differences between the plans are those which address the concerns expressed by the Board in granting the special exception and in the Board's recommendations to the Planning Board for site plan review. None of these rise to the level of the conditions at issue in Sklar. They are purely *de minimus* in nature. Moreover, the plaintiff waived his "Sklar claims" by failing to appeal the subsequent decision of the Planning Board approving the site plan.

chosen to attend, or in his application for rehearing. Therefore, the Court finds the plaintiff has not shown good cause to allow him to raise the alleged conflict of interest here.² Accordingly, the Court addresses the merits of the appeal.

C. Merits of Appeal

The plaintiff argues that there was insufficient evidence before the Board to sustain its decision granting the special exception. In order to issue a special exception, the Board must find that the special exception is allowed by the ordinance and that the following conditions exist:

- (1) the proposed use is similar to one or more uses already authorized in the zoning district and the proposed location is an appropriate location for such a use;
- (2) the approval will not reduce surrounding property values or be otherwise injurious, obnoxious or offensive to the neighborhood;
- (3) there will not be a nuisance or serious hazard to vehicles or pedestrians; and
- (4) adequate facilities will be provided for the proper operation of the proposed use.

² The Court notes, however, that having considered the grounds for juror disqualification, there is insufficient evidence of the chairman's bias to conclude that his disqualification was necessary. See RSA 500-A:12 (1997) and Winslow v. Holderness Planning Board, 125 N.H. 262, 268 (1984) (citing RSA 500-A:12 and finding that the planning Board member was "not indifferent" and therefore should have been disqualified). The chairman's familial relationship to selectmen who had expressed support of the project, without more, is too attenuated to necessitate his disqualification.

See Ordinance, . (XII) (A) (2).

The Board argues that the plaintiff failed to state sufficient grounds for appeal in his motion for rehearing, because he merely recited that these four criteria were not met, without specifying substantive reasons. See Pl.'s Letter to Board (requesting rehearing), June 19, 2001.

The purpose of requiring the aggrieved party to apply for a rehearing is to ensure that the Board has an opportunity to correct its alleged error. See Dziama v. City of Portsmouth, 140 N.H. 542, 544 (1995). The Court finds that although the plaintiff's request for a rehearing was a mere recitation of the standard for granting a special exception, it was sufficient to put the Board on notice of his allegation that the intervenor's application failed to satisfy all four conditions. The Court therefore addresses whether there was sufficient evidence before the Board to sustain its decision.

The plaintiff claims that the intervenor's application for special exception failed to satisfy all four conditions, but does not contest that the use is permitted by special exception under the Ordinance. See Ordinance, . (V) (A) (2) (b).

In its application, the intervenor detailed the reasons that the proposed use satisfied all four conditions. See Application for Special Exception, p. 3. The statements in the application were supported by the testimony at the public hearing. See Swanzev Zoning Board of Adjustment Minutes, 5/21/01 at pp. 5-6.

Taken together, the Board had sufficient evidence to supports its decision.

As to the first condition, the intervenor stated that the use is similar to other multi-family uses in the area, including the current use on the subject property which is a multi-family dwelling (in addition to the current use of the plaintiff's abutting property). Further, the proposed use was well suited for such a large parcel of land, near an elementary school, a library and other recreational areas.

As to the condition that it not reduce the value of surrounding properties, the intervenor stated that the building would be constructed so as to reflect the traditional construction in the area. In its discussion of the issue, the Board noted that none of the abutters had stated any opposition based upon this criterion. The Board went on to reason that if the construction of the proposed use fit with the traditional character of the surrounding area, it would not effect property values in the district. The Board recommended to the Planning Board that in reviewing the intervenor's site plan it should ensure that the construction match the traditional New England decor of the existing residences. See Notice of Board Decision.³ Ultimately,

³ Before the Court there is evidence that there may have been some negative impact on surrounding properties. See attachments to Pl.'s Mot. Supplement Record. The plaintiff submitted to the Court two letters which contain opinions that there may be some negative impact on abutting properties. These letters were not presented to the Board at the public hearing or attached to the application for rehearing, nor did the plaintiff seek to

the Board found that the surrounding property values would not be adversely affected by the intervenor's project.

The Board found that there would be no serious nuisance or hazard to traffic or pedestrians because of limited use of the ingress and egress for the property. Further, and with respect to this criterion, the Board recommended to the Planning Board that it carefully examine the impact on traffic. Id.

As to the final criterion, the intervenors were prepared to either hook up to the public water system or dig an additional well to provide water, and the property was already serviced by town sewer lines. The Board concluded that there was adequate and appropriate facilities for the proper operation of the proposed use.

Based on the information before it, the Board, applying its own knowledge of the area, as well as its experience and understanding, found that the criteria were satisfied. See Nestor v. Town of Meredith, 138 N.H. 632, 636 (1994). The Court finds and rules that, although there may have been conflicting evidence presented by the abutters at the hearing, there was ample evidence upon which the Board could reasonably base its conclusion that the four criteria were met.

IV. Conclusion

supplement his application for rehearing with the appraiser's opinion. Further, the Court finds that the letters have no probative value on the issues before it.

The Court finds and rules that the Board's decision granting the intervenor's application for a special exception was neither unreasonable nor unlawful. Accordingly, the Board's decision is **AFFIRMED** and the plaintiffs' petition for appeal is **DISMISSED**.

In view of the detailed narrative order, the Court declines to rule on the numerous requests for findings of facts and rulings of law submitted in this case. See Geis v. Bourassa, 140 N.H. 629, 632-33 (1996). The requests are granted to the extent they are consistent with this order and are otherwise denied.

So **ORDERED**.

DATE: JANUARY 10, 2002

Gary E. Hicks
Presiding Justice