

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. AP-09-020

AP-09-201
NM - CWN-6/29/2012

PETER CASSAT, et al.,

Petitioners

v.

TOWN OF SCARBOROUGH,
et al.

Respondents

DECISION AND ORDER

STATE OF MAINE
CLERK OF SUPERIOR COURT
RECEIVED

Before the court is the petitioners' amended appeal of the decision of the Scarborough Zoning Board of Appeals (ZBA) is before the court. For the following reasons, the decision of the ZBA is affirmed.

BACKGROUND

The facts in this case were set forth in the court's order of February 4, 2010.

Eralda Adams is the daughter of Phyllis E. Scala, and is a beneficiary of the Phyllis E. Scala Living Trust. The Scala family owns properties in the Higgins Beach neighborhood of Scarborough, Maine. Among their properties are lot 32 on the Tax Map, which has a house on it and fronts both Virdap and Champion Street, and lot 51 on the Tax Map, located at 7 Virdap Street (lot 51[]). Lot 32 is not contiguous to lot 51. Lot 32 is located approximately 150 feet from lot 51. Lot 51 is the subject of this 80B appeal. The Scala family has owned lot 51 for approximately 60 years. Scarborough adopted its Shoreland Zoning Ordinance (SZO) in 1974. Adams hopes to build a modest retirement home on lot 51.

The Higgins beach neighborhood consists primarily of small single-family homes and summer cottages. The neighborhood is bordered by the Atlantic Ocean on the east and by tidal rivers and wetlands on the north and northwest. Lot 51 was created in 1923 as part of the "East Point" subdivision. The property has been in the Scala family since the 1950's. Lots 51, 50, 49, and 48 are all currently vacant and are bordered by wetlands. Plaintiff Summerwind Cottage own lots 50 and 52, both of which abut lot 51. Summerwind Cottage has a cottage on lot 52. The Cassats have a home located at 8 Virdap Street (Lot 43 on the Tax Map), which is directly across the street from Lot 51.

The Town of Scarborough's SZO does not permit construction within 75 feet of the normal high water line of a wetland, stream or marsh.¹ Scarborough SZO § 15(B)(1). In order to develop within the 75-foot zone, a party must obtain a variance in accordance with section 1[6](G)(2)² of the Scarborough Zoning Ordinance.

Section 1[6](G)(2) of the Scarborough SZO provides for "Variance Appeals." It states:

Variations may be permitted only under the following conditions:

- [a. Variations may be granted only from dimensional requirements including but not limited to, lot width, structure height, percent of lot coverage, and setback requirements.]

...

- c. The Board shall not grant a variance unless it finds that:
 - (1) The proposed structure or use would meet the provisions of Section 15 except for the specific provision which has created the non-conformity and from which relief is sought; and
 - (2) The strict application of the terms of this Ordinance would result in undue hardship.

The term "undue hardship" shall mean:

- (i) That the land in question cannot yield a reasonable return unless a variance is granted;
- (ii) That the need for a variance is due to the unique circumstances of the property and not to the general conditions of the neighborhood;
- (iii) That the granting of a variance will not alter the essential character of the locality; and
- (iv) That the hardship is not the result of action taken by the applicant or prior owner.³

[Scarborough SZO § 1[6](G)(1)-(2); (R. 20-21)].

Lot 51 borders the marshlands located to the north and northwest of the Higgins Beach neighborhood. Due to the dimensions of lot 51, a variance from the 75-foot setback requirement is needed in order to build a home

¹ Section 15(B)(1) of the Scarborough SZO provides the following:

All new principal and accessory structures shall be set back at least two hundred fifty (250) feet, horizontal distance, from the normal high water line in the Stream Protection 2 District and seventy-five (75) feet, horizontal distance, from the normal high water line of other water bodies, tributary streams, or the upland edge of a wetland in the other districts.

(Scarborough SZO § 15(B)(1); R. 19.)

² In its decision, the court cites to Section 15(G) of the Scarborough SZO. Under the Scarborough SZO, as amended in July 2009, section 16 governs variances. (See R. 20-21.) The amendment did not change the requirements for a variance.

³ The definition of "undue hardship" under section 16(G)(2)(c) of the Scarborough SZO is identical to 30-A M.R.S. § 4353(4).

on the property. The 75-foot setback from the wetland area encompasses most of lot 51 and it covers the entire building envelope. Adams requested a 50-foot variance from the 75-foot setback requirement within the shoreland zone. Adams also requested a limited reduction of 10 feet from the front setback and 5 feet from the side setback under the Scarborough Zoning Ordinance.⁴ In order for Adams to build on the property, the Town of Scarborough must approve the 75-foot setback variance and the limited reduction of the Scarborough front and side setback zoning requirements so that the property will have a sufficient building envelope. If the Scarborough ZBA approves these two variances, the Maine Department of Environmental Protection will then review Adams' proposed project to determine if it satisfies the requirements for Activities Adjacent to Protected Natural Resources and for Coastal Sand Dune Projects.

On April 21, 2009, the Scarborough Code Enforcement Officer denied Adams' variance appeal for a 50-foot variance from the 75-foot setback requirement, noting that it would allow Adams to build a structure 25 feet from the edge of the marshlands. The Scarborough ZBA heard Adams' shoreland zoning variance application on May 13, 2009. The ZBA considered the four-pronged undue hardship criteria and voted 4-1 in favor of granting the variance application. During the May 13th hearing, the ZBA tabled Adams' request for a limited reduction of 10 feet from the front setback and 5 feet from the side setback, pending further inquiry about the design of the house proposed for lot 51.

Summerwind Cottage v. Town of Scarborough, 2010 Me. Super. LEXIS 25, *1-6 (Feb. 4, 2010) (Crowley, J.). Additional facts were set forth in the court's order of March 18, 2011:

Summerwind Cottage and the Cassats filed an 80B appeal challenging the ZBA's decision. The court remanded the case back to the Town for further findings of fact and conclusions on February 4, 2010. [Cottage, 2010 Me. Super. LEXIS 25, at *11.] The ZBA issued written findings on April 14, 2010. [(R. 30-32.)]

Cassat v. Town of Scarborough, 2011 Me. Super. LEXIS 36, *5-6 (Mar. 18, 2011) (Mills, J.). The court remanded the case again to the ZBA for further findings regarding compliance with section 15 of the SZO. Id. at *28. The ZBA held a public hearing on September 14, 2011, to consider the section 15 criteria for the variance application. (R.

⁴ Under the Scarborough Zoning Ordinance, the front of the house must be 30 feet from the property boundary and the side set back is 15 feet.

33.) The ZBA voted unanimously to approve the Adams variance application. The ZBA issued written findings on October 21, 2011. (R. 33–37.)

For a third time, the petitioners appeal the ZBA’s decision. They argue that the ZBA did not have the authority to grant the variance because the lot at issue is in the Resource Protection District, where no new residential development is permitted. They argue further that, even if the lot is in the Shoreland Overlay District, the variance was improperly granted because the lot does not meet the applicable requirements for a variance. (Pet. Br. 5.)

DISCUSSION

1. Standard of Review

When reviewing governmental action under M.R. Civ. P. 80B, the Superior Court reviews the operative decision of the municipality for “abuse of discretion, errors of law, or findings not supported by the substantial evidence in the record.” Camp v. Town of Shapleigh, 2008 ME 53, ¶ 9, 943 A.2d 595 (quoting McGhie v. Town of Cutler, 2002 ME 62, ¶ 5, 793 A.2d 504). The ZBA’s “characterizations and fact-findings about whether [a lot] meets Ordinance standards are entitled to ‘substantial deference.’” Bizier v. Town of Turner, 2011 ME 116, ¶ 11 n.5, 32 A.3d 1048. The ZBA’s interpretation of the SZO’s requirements is reviewed de novo. Id. at ¶ 14. An ordinance is examined for its plain meaning and construed based on the purposes and objectives of the ordinance. If an ordinance is clear, the plain meaning controls. Id. If a term in an ordinance is defined, the term will not be redefined. Rudolph v. Golick, 2010 ME 106, ¶ 9, 8 A.3d 684. Overall, the court does “not make any findings other than those found explicitly or implicitly by the Board” and does “not substitute [its] judgment for that of the Board.” Camp, 2008 ME 53, ¶ 9, 943 A.2d 595.

2. Resource Protection District

The petitioners argue that lot 51 should be in the Resource Protection District established by the SZO, and thus prohibited from receiving a variance for residential construction. (Br. of Pet. 3, 5–8.) The Town of Scarborough disputes this argument in three ways: (1) the petitioners waived the argument by not raising the issue as part of the original proceedings; (2) the court cannot review whether the property is properly zoned because establishing zoning boundaries is a legislative act; and (3) the boundaries on the zoning maps are entitled to deference and are consistent with ordinances.⁵ (Br. of Scarborough 3, 4, 6.)

a. Waiver of Argument

In its March 18, 2011, order this court noted that the petitioners had waived the argument that the ZBA did not have the authority to grant the variance because petitioners had failed to raise the argument at the May 13th hearing. Cassat, 2011 Me. Super. LEXIS 36, at *7–8 n.5. The petitioners attempted to correct this waiver by addressing the issue during the hearing on September 14, 2011. (R. 33.) The ZBA discussed this argument and made findings “despite the possibility that this question is not a proper topic for the Board to address in light of the fact that it is unrelated to the Section 15 criteria and was not an issue on remand from the Superior Court.” (Id.)

Claims not raised before the ZBA are not preserved for consideration by the court. Tarason v. Town of S. Berwick, 2005 ME 30, ¶ 8, 868 A.2d 230. Here, the issue was raised before the ZBA. (R. 33.) The more significant question is whether it was proper to address on remand. The court’s prior decision and order found, “[t]here is no competent evidence to support granting the variance because the Town did not

⁵Based on the court’s conclusion that it cannot review legislative actions as part of an 80B appeal, this third argument is not addressed.

consider whether the proposed structure complied with the requirements of section 15 of the SZO. This case is remanded to the ZBA for further proceedings consistent with this decision and order.” Cassat, 2011 Me. Super. LEXIS 36, at *28. Although the order did not invite the ZBA’s review of the Resource Protection argument, the ZBA considered the issue. The court assumes, for the purpose of argument on this appeal, that the issue is preserved.

b. Court Review of Legislative Action

The Town of Scarborough argues that the court cannot review whether the property was properly zoned because that is a legislative act. (Br. of Scarborough 4.) The petitioners claim that correcting a clear error in the zoning map is not improper. (Reply to Scarborough 2.) Zoning⁶ is a legislative, not administrative, action. Benjamin v. Houle, 431 A.2d 48, 49 (Me. 1981); see also Veerman v. Town of China, 1994 Me. Super. LEXIS 145, *4 (Apr. 13, 1994) (“Allowing zoning administrators to amend boundary lines based on their individual view as to which side of the line an applicant’s lot should be on would open the door to considerable mischief in municipal zoning practice, an area already affected with considerable factfinding discretion and unpredictability.”). “Rule 80B does not create judicial authority to review governmental action or inaction.” F.S. Plummer Co., Inc. v. Town of Cape Elizabeth, 612 A.2d 856, 859 (Me. 1992).⁷ On this 80B appeal, the court may review administrative

⁶ The Law Court utilized the now repealed 30 M.R.S.A. § 4962(1)(H) definition of zoning: “the division of a municipality into districts and the prescription and reasonable application of different regulations in each district.” Benjamin v. Houle, 431 A.2d 48, 48 (Me. 1981) (quoting 30 M.R.S.A. § 4962(1)(H) (repealed in 1987)).

⁷ The petitioners argue also that the zoning map contains a clear error and is inconsistent with the purpose of the zoning ordinance. This argument is not subject to review in an 80B appeal, but may be brought as part of a declaratory judgment. See F.S. Plummer Co., 612 A.2d at 859 (Me. 1992) (noting that zoning may be reviewed by the court in a declaratory judgment action); LaBonta v. City of Waterville, 528 A.2d 1262, 1263 (Me. 1987) (80B appeal converted to a declaratory judgment action in order to review a zoning amendment).

actions and, therefore, will not consider whether the zoning boundaries are appropriate. Because lot 51 is zoned outside of the Resource Protection District, the lot is not subject to the additional restrictions associated with that district.

3. Section 15

a. 2008 Ordinance and 2010 Amendments

Whether lot 51 complied with section 15 of the SZO is a question of ordinance interpretation. The ZBA considered each part of section 15 and found that lot 51, as a non-conforming lot, complied with the section 15 requirements. (R. 34–37.) The ordinance was amended in 2010. The ZBA stated that “[t]he findings are done according to the 2008 Ordinance and any relevant changes between 2008 and 2010 are addressed throughout.” (R. 33.) The ZBA found that “any changes between the 2008 and the 2010 ordinances do not impact the Board’s findings on this issue.” (R. 34.) The petitioners assert that the variance application is controlled by the 2008 version of the SZO. (Reply to Scarborough 3.)

When an ordinance is amended, 1 M.R.S. § 302 explains which version of the ordinance controls:

Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby. For the purposes of this section, a proceeding shall include but not be limited to petitions or applications for licenses or permits required by law at the time of their filing. For the purposes of this section and regardless of any other action taken by the reviewing authority, an application for a license or permit required by law at the time of its filing shall be considered to be a pending proceeding when the reviewing authority has conducted at least one substantive review of the application and not before. For the purposes of this section, a substantive review of an application for a license or permit required by law at the time of the application shall consist of a review of that application to determine whether it complies with the review criteria and other applicable requirements of law.

1 M.R.S. § 302 (2011).

Although “[e]ach . . . application is a separate ‘proceeding’ for the purpose of applying the grandfathering provision of section 302,” Larrivee v. Timmons, 549 A.2d 744, 746 (Me. 1988), here the ZBA considered, on three occasions, the same application.⁸ The Law Court has held that “an application is pending for the purposes of section 302 ‘when a municipality takes the threshold step of acting on the substance of a proposal.’” Walsh v. Town of Orono, 585 A.2d 829, 831 (Me. 1991) (quoting Littlefield v. Inhabitants of Town of Lyman, 447 A.2d 1231, 1235 (Me. 1982)). Although the ZBA reexamined the application on each remand, the application had been pending since 2009 and the 2008 ordinance controls this evaluation.

b. Relevant Provisions from the 2008 Ordinance

Three provisions from the SZO are relevant to this appeal.

First, section 12(E)(1) – Non-conforming Lots:

A non-conforming lot of record as of the effective date of this Ordinance or amendment thereto may be built upon, without the need for a variance, provided that such lot is in separate ownership and not contiguous with any other lot in the same ownership, and that all provisions of this Ordinance except lot size and frontage can be met. Variances relating to setback or other requirements not involving lot size or frontage shall be obtained by action of the Board of Appeals.

Scarborough SZO § 12(E)(1); (R. 14).

Second, section 15 – Land Use Standards

...

A. Minimum Lot Standards

...

2. The minimum shore frontage for all lots in the Shoreland Zone shall be 100 feet, measured in a straight line between the points of intersection of the side lot lines with the shore line at the normal high water line. The minimum width of any portion of any lot within 100 feet, horizontal

⁸ Although the ZBA required “new materials” to address the court’s concerns on remand, (Ex. A attached to Scala/Adams Br.), the ZBA considered the same request, a variance for lot 51 to permit construction of a structure on the lot.

distance of the normal high water line of a water body or upland edge of a wetland shall be equal to or greater than 100 feet.

Scarborough SZO § 15(A); (R. 18).

Third, section 17 – Definitions

Non-conforming lot:

A single lot of record which, at the effective date of adoption or amendment of this Ordinance, does not meet the area, frontage, or width requirements of the district in which it is located.

Scarborough SZO § 17; (R. 22).

The petitioners argue that the lot does not comply with the lot width requirement set forth in section 15(A)(2) and thus an additional variance is required.⁹ (Pet. Br. 8-9.) The Scala/Adams respondents admit that the lot does not meet the requirements presented in section 15, but claim that the lot is exempt from this requirement because it is a “non-conforming lot.” (Br. of Scala/Adams 8.) Non-conforming lots are parcels that did not meet the “area, frontage, or width requirements of the district in which it is located” at the time the ordinance was adopted. Scarborough SZO § 17; (R. 22). These non-conforming lots do not require certain variances because of section 12(E)(1) of the SZO, which provides that non-conforming lots can be developed without a variance as long as “all provisions of this Ordinance except lot size and frontage can be met.” Scarborough SZO § 12(E)(1); (R. 14).

The petitioners argue that lot width is not included in the grandfathered in aspect of non-conforming lots. (Br. of Pet. 9.) The Scala/Adams respondents assert that “lot size and frontage” includes “lot width.” (Br. of Scala 8–9.) The court must consider

⁹ The petitioners also argue that the SZO only allows one variance for each parcel. (Br. Of Pet. 10.) The petitioners rely on language in the Ordinance: “The Board shall not grant a variance unless it finds that: (1) the proposed structure or use would meet the provisions of Section 15 except for the specific provision which has created the non-conformity and from which relief is sought.” Scarborough SZO § 16(G)(2)(c); (R. 20.) This argument is not addressed because one variance, the setback variance, is requested in this case.

the plain meaning of the ordinance. Bizier, 2011 ME 116, ¶ 14, 32 A.3d 1048. Under the definition of non-conforming lots, the ordinance uses the terms “area,” “frontage,” and “width.” Scarborough SZO § 17; (R. 22). The term “lot size” in section 12(E)(1) encompasses both “area” and “width” when considered in conjunction with section 17.¹⁰ As a result, the plain meaning of the ordinance includes lot width in the grandfathered in aspect of non-conforming lots. A separate variance is not required.

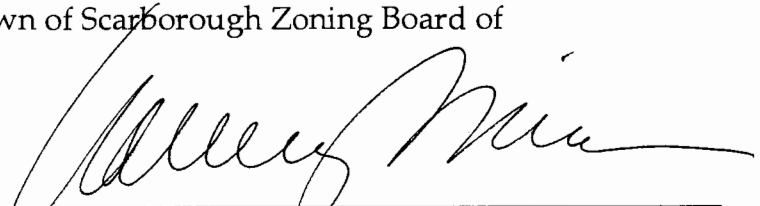
Conclusion

The ZBA has the authority to grant a variance for the lot 51. Further, the ZBA’s interpretation of the SZO rest on the plain meaning of the ordinance. Based on the 2008 ordinance, the parcel is a non-conforming lot and the only variance necessary is one with regard to the setback. A previous court decision in this case upheld the setback variance pending the ZBA’s determination that the section 15 requirements are met. The ZBA found in 2011 that Lot 51 complies with the section 15 requirements.

The entry is

The Decision of the Town of Scarborough Zoning Board of Appeals is AFFIRMED.

Dated: June 29, 2012



Nancy Mills
Justice, Superior Court

¹⁰ In common usage “size” is defined as “physical proportions, dimensions, magnitude, or extent.” Webster’s II New College Dictionary 1033 (1987).