

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

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David F. Dietz and Katherine W. Dietz

v.

Town of Tuftonboro

Case Number: 2017-0536

REPLY BRIEF OF DAVID F. DIETZ
AND KATHERINE W. DIETZ

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and Katherine W. Dietz:

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Oral Argument Requested to be
Argued by Michael J. Tierney, Esq.

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ARGUMENT

I. The Statutory Language of RSA 674:33-a Requiring Specific Findings Differs From the Statutory Language of RSA 674:44(III)(e) Which Explicitly Allows the Basis of the Decision to be Stated in the Minutes

In its Opposition Brief, Sawyer Point argues, for the first time, that this Court's application of RSA 674:44(III)(e) in *Property Portfolio Group, LLC v. Town of Derry*, 163 N.H. 754 (2012), should control as RSA 674:44(III)(e) is a "nearly identical statute" to RSA 674:33-a, the statute applicable in this case. Sawyer Point Brief, p. 9-10.¹ This argument was not considered by the Superior Court and should be rejected by this Court. First, the statute describing the process by which a Planning Board grants a waiver from a site plan regulation and the statute describing the process by which a Zoning Board grants an equitable waiver from a zoning ordinance is materially different. Second, even if the holding of *Property Portfolio Group* was applicable to RSA 674:33-a, the Tuftonboro ZBA did not even meet that lesser standard.

RSA 674:44(III)(e), provides that a Planning Board shall "[i]nclude provision for waiver of any portion of the [site plan] regulations. The basis for any waiver granted by the planning board shall be recorded in the minutes of the board. The planning board may only grant a waiver if the board finds, by majority vote, that. . ." The language both requires that waivers be granted from any portion of the regulations and that the basis for a waiver can be simply stated in the minutes. The statutory language for equitable waivers is more limited. RSA 674:33-a provides that a ZBA "shall, upon application by and with the burden of proof on the property owner, grant an equitable waiver from the requirement, if and only if the board makes all of the following findings . . ." RSA 674:33-a requires a ZBA to first make "all of the following findings" while

¹ This argument was not made by Sawyer Point below and was not considered by the Superior Court in the Superior Court's decision.

RSA 674:44(III)(e) allows “[t]he basis for any waiver granted by the planning board [to only] be recorded in the minutes of the board.”

The different statutory language reflects the different purposes of waivers granted by the Planning Board as compared to equitable waivers granted by the Zoning Board. While a Planning Board must grant waivers whenever it is shown that the “circumstances relative to the site plan, or conditions of the land in such site plan, indicate that the waiver will properly carry out the spirit and intent of the regulations,” an equitable waiver cannot be granted by the Zoning Board unless specific factual findings are first made including that the applicant was “in ignorance of the facts constituting the violation.” RSA 674:44(III)(e); RSA 674:33-a(I)(d); *Taylor v. Town of Wakefield*, 158 N.H. 35, 42 (2008)(equitable waivers are only “available under the narrow requirements of” the statute which is more narrow than “a variance or, alternatively, an appeal of administrative decision.”)

Second, Sawyer Point implies in its Brief that under *Property Portfolio Group*, a board does not need to make specific findings for each of the statutory criteria prior to granting relief. SP Brief at 9-10. This is incorrect. In *Property Portfolio Group*, this Court held that a Planning Board was still required to state the “basis” for granting relief in the minutes but was not required to take separate votes on specific findings under RSA 674:44(III)(e). *Id.* at 758-759. Even if this standard was applied to equitable waivers, the Zoning Board was still required to have “the underlying rationale of the board’s decision to grant a waiver be adequately reflected in its minutes.” *Id.* at 758. In this case, the Tuftonboro ZBA did not adequately state the basis in the minutes.

The ZBA’s deliberations total less than a half page and do not separately address the criteria for the 1999 and 2008/2009 construction. See CR 21; see also *Motorsports Holdings, LLC v.*

Town of Tamworth, 160 N.H. 95, 105 (2010)(minutes of planning board looking at multiple wetlands at the same time did not sufficiently explain basis for decision.) The Superior Court, recognizing that the ZBA did not even discuss all of the statutorily required findings in its minutes, instead held that the required findings were “implicit” in the ZBA’s decision to grant relief. Order at 13, Add. 14 (“the ZBA’s decision to grant Sawyer Point’s equitable waiver application for the 1999 addition ‘amounted to an implicit finding’ by the ZBA that all of the statutory requirements for an equitable waiver had been met”); Order at 23 to 24 at Add. 24-25(ZBA’s decision to grant a waiver for 2008/2009 construction amounted to an “implicit” finding that the necessary factual findings had been met).

Implicit findings do not meet the requirements of RSA 674:33-a nor would they meet the less stringent requirements of RSA 674:44(III)(e) which still requires the basis for the decision to be stated in the minutes. Where the Superior Court recognized the statutorily required findings were neither made as required by RSA 674:33-a nor even stated in the minutes as allowed for Planning Board by RSA 674:44(III)(e), the Superior Court should have reversed the granting of an equitable waiver.

II. All Provisions of RSA 674:33-a Must Be Given Meaning to Effectuate the Purpose of the Entire Statute

Sawyer Point argued to the ZBA that the express language of RSA 674:33-a(I)(d) must have been a legislative drafting mistake. C.R. 147. In its Brief, Sawyer Point argues that RSA 674:33-a(I)(d) cannot be applied as written as it “would render RSA 674:33-a, II meaningless.” This is incorrect. RSA 674:33-a(II) only exempts the application of RSA 674:33-a(I)(a) and RSA 674:33-a(I)(b). RSA 674:33-a(II) does not exempt any part of RSA 674:33-a(I)(d).

The requirement in RSA 674:33-a(I)(d) that the applicant show the applicant’s own “ignorance of the facts constituting the violation” is not identical to subpart (a). RSA 674:33-

a(I)(d) requires the current owner to show only that the current owner was ignorant at the time the current owner constructed or bought the property with the pre-existing violation. RSA 674:33-a(I)(a), on the other hand, applies not just to the current owner but to prior owners and their agents as well. An applicant for an equitable waiver in the first 10 years after the violation must show that no “owner, former owner, owner’s agent, or representative” was aware of the facts under subpart (a). This requirement does not apply to subpart (d).

The legislature could have reasonably determined that an applicant for an equitable waiver more than 10 years after the violation need not show a former owner’s ignorance under subpart (a) but must still show the current owner’s own ignorance “of the facts constituting the violation.” One might entail practical difficulties in determining factual knowledge of a prior owner eighteen or nineteen years ago. There would be fewer difficulties if the owner at the time of the violation was still the owner at the time of the application for an equitable waiver. Furthermore, there is less equity in granting a waiver where the applicant was itself aware of the factual issues. In this case, where Sawyer Point has admitted that they knew the 1999 construction was within the 50 foot setback but misunderstood the legal requirements,² there can be no dispute that Sawyer Point failed to meet their burden under RSA 674:33-a(I)(d).

III. Cost of Correction Under RSA 674:33-a(I)(d) Will Be Different Based on the Circumstances of Each Individual Case

The second part of RSA 674-33-a(I)(d) requires an applicant to show that the “cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.” In this case, cost of correction could be the minimal cost

² Both below and in its Brief to this Court, p. 3, Sawyer Point admits that it was aware of its violation in 1999 when it completed its construction but argues that at that time “Sawyer Point believed in good faith that no zoning relief was required. See C.R. 10.” See also Answer, ¶ 100, at Appx. 48. Regardless of what Sawyer Point believed, “an owner’s error in interpreting a zoning ordinance is not” a valid basis for granting an equitable waiver. *Taylor v. Town of Wakefield*, 158 N.H. 35, 41 (2008).

of applying for a variance and the Superior Court erred in holding the cost of correction so far outweighed any public benefit to be gained. In its Brief, Sawyer Point argues that if the cost of correction in this case is recognized to be the minimal cost of applying for a variance, “the cost of correction in any equitable waiver appeal would be the cost of applying for a variance. The amount would be essentially fixed in every case, rendering the balancing test meaningless.”

Sawyer Point Brief, p. 14. This is not accurate. The cost of correction in this case is the cost of applying for a variance because Sawyer Point has never applied for a variance. In most other cases, an applicant will have already applied for variance or apply for an equitable waiver and a variance simultaneously. The fact that Sawyer Point does not meet the statutory requirements for an equitable waiver does not preclude a variance where Sawyer Point has not even applied for a variance. See *Taylor v. Town of Wakefield*, 158 N.H. 35, 42 (2008)(applicant did not meet “narrow” criteria for an equitable waiver under RSA 674:33-a but is not precluded from obtaining a variance under RSA 674:33-a which was applied for simultaneously with the equitable waiver).

IV. Sawyer Point’s Misrepresentation by 10 Feet on its 2008 Application Was More Than a “Trivial” Difference

In its Brief, Sawyer Point argues that “there was absolutely nothing for Sawyer Point to gain” by intentionally misrepresenting the setback line 10 feet closer to the lake in its 2008 application than it had represented in its 1999 application. SP Brief, p. 17; see also CR 164 and 165.

Sawyer Point’s 2008 application conveniently drew the 50 foot setback line to exclude the entire rear addition in footprint from the setback area. See CR 164. Sawyer Point argues that this misrepresentation of either 54 or 102 square feet was “trivial.” S.P. Brief, p. 17.³

³ Sawyer Point argues in its Brief to this Court that the difference between what it represented in 2008 and the actual construction was a “trivial difference of 54 s.f.” S.P. Brief, p. 17. Nevertheless, Sawyer Point represented to DES that there was a 102 square foot impact in the waterfront buffer, roughly twice the amount represented to this Court.

Sawyer Point's misrepresentation was not trivial as the 2008 application specifically argued that a variance should be granted because it would *not add to the footprint*. See CR 158 (twice stating that the construction would not add to the footprint). Had Sawyer Point accurately identified the setback line in 2008, or at least indicated the setback line as accurately as they had in their 1999 application, it would have shown an increase in the footprint and minimized the chance of obtaining approvals from both the Town and DES. Sawyer Point had an incentive to misrepresent whether it would be adding to the footprint so as to obtain approvals and obfuscate the extent of the violations.

V. Sawyer Point Cannot Obtain Piecemeal Relief From Some Provisions of the Ordinance When the Construction Remains in Violation of Other Provisions of the Ordinance

In addition to violating the front setback prohibiting structure within 50 feet of the lake, Sawyer Point's 2008/2009 construction also increased the footprint on the undersized lot in violation of the lot coverage limitation of Section 4.2 of the Tuftonboro Zoning Ordinance. See C.R. 83 (lot coverage limitation in lakefront district is 20%) and Appx. 117 (after construction lot coverage is increased to 29.5%). Dietz brought both of these violations to Sawyer Point's attention almost four years ago. Nevertheless, the ZBA and the Superior Court erred in granting an equitable waiver from the front setback requirement when the structure would still violate the lot coverage limitation. In its Brief, Sawyer Point argues that it could obtain an equitable waiver from the setback while "Sawyer Point could simply seek a separate equitable waiver or variance from the ZBA for lot coverage." SP Brief, p. 18. This would be illogical. It would be a waste of the parties and judicial resources to endure multiple trips to the ZBA for noncompliance arising from the same unlawful structure. *Brandt Dev. Co. of New Hampshire, LLC v. City of*

See Appx. 117. Regardless of the amount of the footprint misrepresented in 2008, the increase in the footprint was only 25 feet from the Dietz's property and visible from the Dietz beach area. Appx. 117; C.R. 78.

Somersworth, 162 N.H. 553, 556 (2011)(recognizing ZBAs should not consider successive applications without a material change in circumstances). A zoning board should not approve partial relief from one section of an ordinance when the same unlawful structure violates another section of the ordinance.

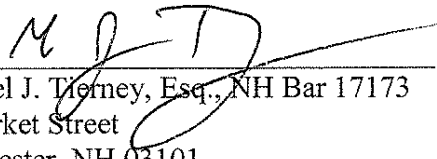
VI. CONCLUSION

“[A] zoning board has the authority to grant equitable relief from a zoning ordinance *only* when the statutory prerequisites for an equitable waiver, a variance, or a special exception are satisfied.” *Dembiec v. Town of Holderness*, 167 N.H. 130, 135 (2014). Sawyer Point did not meet all of the requirements for an equitable waiver under RSA 674:33-a. The Carroll County Superior Court, recognizing that Sawyer Point had admitted it was factually aware its construction was within the 50 foot setback, erroneously held the clear language requiring an applicant to show it was “in ignorance of the facts constituting the violation” could be ignored as contrary to legislative intent. Order at 17-18 at Add. 18-19. “The legislature is not presumed to waste words or enact redundant provisions and whenever possible, every word of a statute should be given effect.” *Garand v. Town of Exeter*, 159 N.H. 136, 141 (2009). For all the reasons stated in Dietz’s Opening Brief, as well as in this Reply Brief, this Court should reverse the decision of the Superior Court and hold the statutory requirements for an equitable waiver were not met in this case.

STATEMENT REGARDING ORAL ARGUMENT

This case presents important questions regarding statutory construction and the application of RSA 674:33-a. Oral argument before the full Court would be helpful to resolving these issues. If oral argument is granted, the Appellant requests 15 minutes to be presented by Attorney Michael J. Tierney.

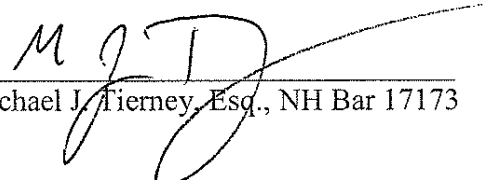
Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that two copies of Reply Brief of David F. Dietz and Katherine W. Dietz has this day been mailed to Richard D. Sager, Esq., Sager & Smith, PLLC, 5 Courthouse Square, PO Box 385, Ossipee, NH 03864-0385 and to Daniel M. Deschenes, Esq., John L. Arnold, Esq. and Jamie S. Myers, Esq., Hinckley Allen, 650 Elm Street, Manchester, NH 03101.


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