THE STATE OF NEW HAMPSHIRE

GRAFTON, SS. **SUPERIOR COURT**

CBDA Development LLC

v.

Town of Thornton

NO. 2012-CV-567, 2013-CV-071

ORDER

Petitioner, CBDA Development, LLC ("CBDA") appeals a decision of the Planning Board and Zoning Board of Adjustment ("ZBA") of the Town of Thornton ("the Town"), the respondent. CBDA appeals the Planning Board's decision not to approve a site plan and the ZBA's decision to affirm the Planning Board. The Town objects. The Court held a hearing on July 10, 2013. After a review of the parties' arguments and the applicable law, the ZBA and Planning Board decisions are AFFIRMED.

Facts

CBDA originally applied for site plan review on May 23, 2012, proposing to use a parcel of land as a recreational campground. (CR. at 79.) The parcel is located at Tax Map 10, Lot 8-8 on U.S. Route 3, within the Town of Thornton. (CR. at 79.) The property is approximately 37 acres in size and is located in a split Commercial/Industrial Zone. (CR. at 79.) The Town permits campgrounds in both Commercial and Industrial Zones. THORNTON ZONING ORD. §§ V(D)(1) & V(E)(1); THORNTON CAMPGROUND REGULATIONS I(B). In Thornton, the density requirement for campgrounds—1000 square feet for recreational vehicles ("RVs")—are less stringent than the requirements for residences—one acre for single and multiple family dwellings. THORNTON ZONING ORD. § VI(A)(1); THORNTON CAMPGROUND REGULATIONS I(C).

CLERK'S NOTICE DATED
8/14/13
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The Planning Board discussed the application at seven different meetings. (CR. at 153–179.) The Planning Board first discussed the application at a meeting on May 10, 2012—prior to submission of the application for site plan review. (CR. at 153.) At the meeting, Tony Basso, an engineer with Keach Nordstrom, represented CBDA. He explained the proposal as follows:

> The proposal is for about 277 or more lots for park model [recreational vehicles ("RVs")] with an internal road system. It is not meant for residency, and will be sold with one year, renewable leases. There will be a number of community leach fields, septic plans and community wells . . . . There will be a store and pool area within the campground.

(CR. at 153.) The Planning Board also discussed what a "park model" is. (CR. at 153.) Board members described a park model as "basically a mobile home" and said, "the models are meant to be permanent." (CR. at 153.) Mr. Basso explained that individuals would purchase the park models from CBDA and lease the lot on a yearly basis; the models would remain on the lot year-round. (CR. at 153.) One Board member explained, "[t]hey look like trailer parks, but do not meet the criteria of a trailer park." (CR. at 153.)

On June 21, 2012, CBDA presented the completed site plan review application for the proposed project—Thornton Bluffs Campground—to the Planning Board. (CR. at 156.) CBDA represented that the project would include 254 campsites, measuring approximately 40 by 50 feet. (CR. at 156.) Each site would "house a park model RV with two parking spaces." (CR. at 156.) Mr. Basso further described the park models, and explained that the models would be registered as vehicles. (CR. at 156.) Mr. Basso also explained, "the campground would not be open for more than 180 consecutive days, and . . . it would be closed April 1 through May 9 and November 1 through December 15." (CR. at 157.) After hearing from interested abutters, the Planning Board discussed the completeness of CBDA's application, and ultimately accepted the application as complete. (CR. at 158–61.)

On July 19, 2012, the Planning Board voted to defer further consideration of the proposed Thornton Bluffs Campground until August 16, 2012, at the request of CBDA's project manager. (CR. at 162–63.) On August 16, 2012, Mark Lucy from White Mountain Survey, a third party enlisted to conduct peer review of the proposal, was in attendance. (CR. at 164.) The Planning Board questioned whether the proposed Thornton Bluffs project met the definition of "campground" under the Town's Campground Regulations. (CR. at 164.) According to the minutes:

> Ex-officio member Mr. Morton stated that campgrounds are permitted in all zones, and that he noticed that Mr. Lucy did not mention the Thornton Campground Regulations. Mr. Morton read the definition of campground for Thornton and asked if the intended use by the owners allows use by the general public. Mr. Lucy replied, as he understands, anyone from the general public can purchase a unit. Mr. Morton asked for clarification, if anyone from the general public can use the shelters or amenities at the proposed campground. The issue of whether park models fit a recreational vehicle definition was discussed since they require a CDL A to move.

(CR. at 164.)

After a discussion of the Thornton Campground Regulations, Attorney Cronin, representing CBDA, raised questions concerning improper behavior and possible bias of Board members. (CR. at 165.) Mr. Morton explained that he had written letters to other Board members prior to the meeting that raised concerns and opinions regarding the proposed project. (CR. at 165.) Specifically, Mr. Morton explained that the letters expressed his opinion that the proposed Thornton Bluffs Campground project is "not an approvable campground according to the town's regulations." (CR. at 165.) Attorney Cronin then asked Mr. Morton to recuse himself, and argued that the Planning Board has an affirmative duty to work with CBDA to get the site plan approved. (CR. at 165.) Attorney Cronin also questioned Mr. Morton regarding alleged solicitation of the public to attend the meeting and speak against the project. (CR. at 165.) Mr.

Morton denied soliciting the public. (CR. at 165.) The Planning Board discussed the recusal issue and decided to continue the public hearing. (CR. at 166.)

The Planning Board next addressed the issue on September 12, 2012. (CR. at 167.) At the meeting, Mr. Morton explained that "he does not feel he has a conflict of interest" and that "he has an open mind and is impartial." (CR. at 167.) The Planning Board members declined to raise the issue for a vote. (CR. at 168.) Also at the meeting, CBDA addressed the Thornton Campground Regulations, and explained that the project was designed to comply with the regulations and the town ordinances. (CR. at 168.) CBDA also argued that the Town improperly adopted regulations that were stricter than the applicable state statutes. (CR. at 168.) Nonetheless, CBDA represented that the application is "not set in stone" and that they are "willing to make adjustments" to meet the regulation requirements, and provided a packet of supplemental information to the Planning Board. (CR at 168–71.) Notably, the packet contained a sample license agreement—rather than a lease agreement. (CR. at 464–70.)

The Planning Board discussed the meaning of "campground" under the regulations and under state law. (CR. at 171.) Board members expressed their concern with park models not meeting the definition of "recreational vehicles" and were concerned that "it does not fit the traditional definition of a campground." (CR. at 171.) CBDA then asked whether the Planning Board would agree to the use of fifth wheel trailers or tents instead of park models. (CR. at 172.) Board members explained that those alternatives "meet the definition of a traditional campground with use by the general public better than a gated park model community." (CR. at 172.) The Planning Board discussed whether the project, as proposed, could be considered a "traditional campground" and whether park models are recreational vehicles or manufactured homes. (CR. at 172.) After several public comments, the meeting was continued. (CR. at 173.)

On October 18, 2012, the Planning Board again addressed the Thornton Bluffs Campground project. (CR. at 174.) At the meeting, CBDA explained that it was "willing to work with the board regarding the type of park model used in the campground" and was "willing to allow and negotiate other types of structures." (CR. at 175.) It also represented that it is "willing to work with the planning board and compromise on the details of the plan." (CR. at 177.) After hearing from abutters, the Planning Board continued the meeting. (CR. at 175–77.)

The Planning Board held its final meeting on the issue on November 15, 2012. (CR. at 178.) The Planning Board explained that it had not discussed other site plan review matters because it was necessary to first determine whether the proposal meets an allowable use. (CR. at 178.) It notes that, although CBDA proposed to submit changes to the site plan, CBDA never submitted any changes to the Board. (CR. at 179.) According to the meeting minutes, the Planning Board hoped that CBDA would withdraw its application and initiate the design review process. (CR. at 179.) After discussing the nature of the proposal, including the nature of park models, the Planning Board voted to deny CBDA's application. (CR. at 180.)

After the meeting, the Planning Board issued a Notice of Decision. (CR. at 181.) In the decision, the Planning Board acknowledged CBDA's various proposals to make changes to the application, but noted that no formal changes had been submitted. (CR. at 182.) Additionally, the Planning Board discussed the Town's Zoning Ordinance, the Town's Campground Regulations, and applicable state statutes. (CR. at 183.) Among the items discussed were the definition of "campground" under the regulations and RSA 216-I:1, the definition of "recreational campground" under RDSA 216-I:1, VII, the definition of "campsite" under RSA 216-I:1, II, and the definition of "recreational vehicle" under RSA 216-I:1, VIII. (CR. at 183.) The Planning Board explained:

> [T]he intent is not to allow a facility where the residents must enter into a license/rental agreement for one-year terms (renewable every year for up to sixty years), but rather to allow facilities where members of the public can come and go on a temporary basis like traditional campgrounds. The applicant's traffic study confirmed that this facility would not be a traditional campground, and that no tent sites or campsites will be available on a daily or weekly basis for transient guests . . . As a result, the Board finds that the proposed use does not meet the definition of "campground" set forth in the Town of Thornton Campground Regulations or RSA chapter 216-I.

(CR. at 184.) The Board found that the park model units were "outside the scope" of structures permitted in campgrounds, focusing primarily on the permanence and portability of the structures. (CR. at 184.) According to the meeting minutes, the Planning Board relied, at least partially, on research conducted by Board members, which showed that the units were "closer in kind to permanent dwellings in fixed locations." (CR. at 184.) The Planning Board also relied on the proposed license agreement, which indicated that the units could remain on the property when the grounds were closed and required professional removal of the units at the end of the lease term. (CR. at 184.) Ultimately, the Planning Board denied CBDA's site plan application, finding that the proposed development was not a campground. (CR. at 184.)

CBDA appealed the Planning Board's decision to the superior court and to the ZBA.[1] (Appeal. 1; CR. at 694.) On January 22, 2013, the ZBA discussed the issue at length. (CR. at 720–27.) The ZBA discussed the license agreement, the Planning Board's treatment of Sugar Shack Campground,[2] the meaning of "campground," density requirements, the duty to assist applicants, and the use, portability and taxation of park models. (CR. at 722–23.) Additionally, the ZBA discussed the Planning Board's use of the term "traditional campground" in the meeting

[1] The Town removed this appeal to Federal Court. The U.S. District Court, District of New Hampshire declined supplemental jurisdiction because CBDA did not assert an independent federal claim. CBDA Development, LLC v. Town of Thornton, 13-CV-58-JD, 2013 WL 1196368 at *2 (D.N.H. Mar. 25, 2013).

[2] Sugar Shack Campground is a campground, also located in Thornton, which received conditional approval of its site plan. (CR. at 260.) CBDA bases several arguments on the Planning Board's action toward and treatment of Sugar Shack Campground. (Pet.'s Trial Mem. 12.)

minutes and in its written decision, noting that the phrase did not appear in the statute or regulations. (CR. at 724.) ZBA members specifically discussed how, when the statute and regulations are read together, "what was proposed simply did not fit the mold whether you call it traditional, common or typical." (CR. at 724.) One member described the proposed site plan as "just a clever way to get around meeting the requirements of [a] subdivision." (CR. at 726.) After some discussion, the ZBA continued the hearing. (CR. at 727.)

On January 30, 2013, the ZBA again discussed CBDA's appeal. (CR. at 730.) One ZBA member explained that the ZBA's jurisdiction is limited to the Planning Board's interpretation of the Zoning Ordinance and noted that the Campground Regulations are not within the purview of the ZBA. (CR. at 730.) The ZBA reasoned that "the proposal [is] more in line with the definition of Manufactur[ed] Home Park or Subdivision than a campground." (CR. at 730.) Board members also considered their personal camping experiences. (CR. at 731.) One member asked if there was "overwhelming evidence that the Planning Board decision was wrong." (CR. at 731.) The ZBA denied CBDA's appeal, finding that the Planning Board did not err. (CR. at 732.)

On February 13, 2013, CBDA moved the ZBA to rehear its January 30 decision. (CR. at 798.) The ZBA considered CBDA's motion at a hearing on February 20, 2013. (CR. at 806.) The ZBA specifically found: (1) The ZBA's decision did not violate RSA 676:3; (2) the ZBA did not impermissibly restrict the scope of its review and impose a higher burden of proof; and (3) the ZBA did not focus upon irrelevant matters rather than the text of the Zoning Ordinance. (CR. at 806–08.) Accordingly, the ZBA denied CBDA's request for rehearing. (CR. at 811.)

CBDA now appeals the ZBA's decision affirming the Planning Board's denial of the proposed site plan. The matter has been consolidated with CBDA's appeal of the Planning Board's denial of the proposed site plan.

Discussion

A. Standard of Review

Any person aggrieved by a Planning Board or ZBA decision may appeal to the superior court. RSA 677:4; RSA 677:15. RSA 677:6 governs the review of appeals from ZBA decisions. RSA 677:15 governs appeals from decisions of the Planning Board. The same standard of review applies to appeals brought under RSA 677:6 and 677:15. Bayson Properties, Inc. v. City of Lebanon, 150 N.H. 167, 169 (2003) (citations omitted). "The superior court [is] obligated to treat the factual findings of both [the zoning board and the planning board] as *prima facie* lawful and reasonable and [can]not set aside their decisions absent unreasonableness or an identified error of law." Hannigan v. City of Concord, 144 N.H. 68, 70 (1999). The appealing party has the burden to show that, by the balance of probabilities, the board's decision was unreasonable. Ltd. Editions Properties, Inc. v. Town of Hebron, 162 N.H. 488, 490–91 (2011). "The review by the superior court is not to determine whether it agrees with the [board]'s [factual] findings, but to determine whether there is evidence upon which they could have been reasonably based." Lone Pine Hunters' Club, Inc. v. Town of Hollis, 149 N.H. 668, 670 (2003) (quotation omitted). If "[i]n another town, on an identical fact pattern, a different decision might lawfully be reached by another [board] [t]his does not mean that either finding or decision is wrong per se." Nestor v. Town of Meredith, 138 N.H. 632, 634 (1994).

With respect to the legal interpretation of a zoning ordinance, a different standard applies. "Construction of the terms of a zoning ordinance is a question of law upon which [the trial] court is not bound by the interpretations of the zoning board." Cosseboom v. Town of Epsom, 146 N.H. 311, 314 (2001) (quotation omitted). "Because the traditional rules of statutory construction generally govern [a court's] review, the words and phrases of an ordinance should be construed

according to the common and approved usage of the language." Anderson v. Motorsports Holdings, 155 N.H. 491, 494–95 (2007). Courts will not look beyond the ordinance for indications of legislative intent when the words of the ordinance are plain and unambiguous, nor will they "guess what the drafters of the ordinance might have intended, or add words they did not see fit to include." Id. at 495. Courts must "determine the meaning of a zoning ordinance from its construction as a whole, not by construing isolated words or phrases." Feins v. Town of Wilmot, 154 N.H. 715, 719 (2007) (quotation omitted).

B. Appeal from Planning Board

On appeal, CBDA argues that the Planning Board's decision was unlawful and unreasonable because: (1) Ex-Officio Member Morton should have recused himself; (2) the Planning Board lacked authority to enact the Campground Regulations; (3) the Campground regulations are preempted by state law; (4) the Planning Board misinterpreted the Campground Regulations and RSA chapter 216-I by adding words that the legislature did not see fit to include and relying on independent research; and (5) the Planning Board improperly violated the equal protection clause by summarily approving Sugar Shack Campground's site plan with minimal review. CBDA also argues that it is eligible for attorney's fees because the Planning Board acted in bad faith.

Recusal Claim

Disqualification of Planning Board members is governed by RSA 673:14. That statute provides that a member will be disqualified when he or she "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." RSA 673:14, I (emphasis added). RSA 500–A:12 governs the "juror standard." See Dover

v. Kimball, 136 N.H. 441, 445 (1992). The statute states, in pertinent part: "Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he ... [h]as directly or indirectly given his opinion or has formed an opinion." RSA 500–A:12, I. Disqualification is only appropriate where "it appears that any juror is not indifferent . . . ." RSA 500–A:12, II. Here, CBDA argues that the Planning Board's decision should be invalidated because Mr. Morton should have been disqualified. CBDA raises two concerns: (1) approval of CBDA's site plan application would have a negative pecuniary impact on Sugar Shack Campground, which is owned and operated by a family member of Mr. Morton's colleague, Selectmen Benton; and (2) if this were a trial, circulation of a letter rendering an opinion on Mr. Morton's view of the outcome would warrant his disqualification as a juror.

CBDA's arguments are without merit. Under New Hampshire law, "[a]dministrative officials who serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result. The burden is on the party alleging bias to present sufficient evidence to rebut this presumption." Webster v. Town of Candia, 146 N.H. 430, 441-42 (2001) (quoting Petition of Grimm, 138 N.H. 42, 52 (1993)). CBDA has failed to overcome this presumption. Mr. Morton has no direct interest in the success of Sugar Shack Campground, and CBDA does not allege that Mr. Morton formed an opinion prior to review of its site plan review application. Even if he had, a reading of the allegedly improper correspondence makes clear that any opinions expressed were based on his interpretation of law, which is entirely proper. N.H. Milk Dealers' Ass'n v. N.H. Milk Control Bd., 107 N.H. 335, 339 (1966) (citation omitted) (explaining bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification). Moreover, although there is some evidence that Mr. Morton solicited the public, he denied these allegations. (CR. at 165.)

Accordingly, the Planning Board did not err by declining to disqualify Mr. Morton.

Improper Delegation of Legislative Authority Claim

"In general, the planning board may be given such powers by the municipality as may be necessary to enable it to fulfill its functions, promote municipal planning, or carry out the purposes of this title." RSA 674:1, VI. Under RSA 674:16, the ZBA has the authority to adopt or amend zoning ordinances for the purpose of promoting the health, safety, or the general welfare of the community. This power "is delegated to it by the State, and the municipality must, therefore, exercise this power in conformance with the enabling legislation." Britton v. Town of Chester, 134 N.H. 434, 441 (1991). Here, the applicable ordinance grants the Planning Board authority to, "adopt regulations and approve a campground so long as it meets all state requirements in the area in which it is proposed." THORNTON ZONING ORD. § V(A)(14).

CBDA does not have a valid improper delegation of legislative authority claim. CBDA argues, "to the extent that the construction of the Campground Regulations is not considered a zoning question within the jurisdiction of the [ZBA] on the pending administrative appeal, the Planning Board lacked statutory authority to adopt such regulations." (Appeal ¶ 57.) Although CBDA raises this argument, it has not briefed the issue and cites no law in support of its claim. Further, the Town argues that the ordinance does not grant the Planning Board authority to enact regulations related to zoning, and that the grant of authority is specifically limited. (Respondent's Mem. 13.) The Court agrees. The ordinance explicitly states that the regulations must meet all state requirements and the Court finds that it does.

Accordingly, CBDA has failed to show that Planning Board lacked authority to enact the Campground Regulations.

Preemption Claim

"It is well settled that towns cannot regulate a field that has been preempted by the State." JTR Colebrook v. Town of Colebrook, 149 N.H. 767, 770 (2003) (quotation omitted). Municipal legislation is invalid if it is "repugnant to, or inconsistent with, State law." Town of Lyndeborough v. Boisvert Properties, LLC, 150 N.H. 814, 817 (2004) (quoting Town of Hooksett v. Baines, 148 N.H. 625, 627 (2002)). Municipal legislation is preempted when it "expressly contradicts State law or if it runs counter to the legislative intent underlying a statutory scheme." JTR Colebrook, 149 N.H. at 770. "Local ordinances and regulations governing a particular field run counter to a statute's legislative intent if the intent is to preempt that field . . . . We infer an intent to preempt a field when the legislature enacts a comprehensive, detailed regulatory scheme." Arthur Whitcomb, Inc. v. Town of Carroll, 141 N.H. 402, 406 (1996).

CBDA does not have a valid preemption claim. CBDA argues, "to the extent that [the Campground Regulations] conflict with or frustrate the purposes of RSA Chapter 216-I, [they] are . . . preempted by the comprehensive scheme established by RSA Chapter 216-I." (Appeal ¶ 59.) Although CBDA raises this argument, it has not briefed the issue and cites no law in support of its claim. While the Campground Regulations and RSA chapter 216-I both govern campgrounds, the two are not inconsistent. See RSA 216-I:1, et seq.; see also THORNTON CAMPGROUND REGS. I–V. Moreover, in certain circumstances, municipalities are permitted to have stricter regulations than what is provided by statute. Anderson v. Motorsports Holdings, LLC, 155 N.H. 491, 501 (2007). Here, CBDA has failed to raise specific inconsistencies between the regulations and the statute. Further, CBDA has not cited law indicating that municipalities are unable to enact stricter regulations relating to campgrounds and land use.

Accordingly, CBDA has failed to show that RSA chapter 216-I preempts the Town's Campground Regulations.

Misinterpretation Claims

As noted above, "the words and phrases of an ordinance should be construed according to the common and approved usage of the language." Anderson, 155 N.H. at 494–95. Further, in reviewing a statute, a court must:

> [F]irst look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. [A court must] interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. [A court must] construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover, [a court must] not consider words and phrases in isolation, but rather within the context of the statute as a whole.

In re Athena D., 162 N.H. 232, 235 (2011) (citations and quotations omitted).

CBDA does not have a valid claim that the Planning Board misinterpreted the Campground Regulations and RSA chapter 216-I. CBDA argues that the park models are recreational vehicles, rather than manufactured housing. (Pet.'s Trial Mem. 14.) The Campground Regulations define "campground" as "a specific area approved by the Planning Board for use by the General Public on a controlled, commercial basis utilizing, as shelters, tents, pop-up trailers, motor homes, house trailer [sic], fifth wheelers etc.," and also adopts the definitions set forth in RSA 216-I:1. THORNTON CAMPGROUND REGS. § I(A) & (C). RSA 216-I:1 sets forth the following relevant definitions:

> "Campsite" means a parcel of land in a recreational campground or camping park rented for the placement of a tent, recreational vehicle, or a recreational camping cabin for the overnight use of its occupants . . . .
>
> "Recreational campground or camping park" means a parcel of land on which 2 or more campsites are occupied or are intended for **temporary** occupancy for recreational dwelling purposes only, and not for permanent year-round residency, excluding recreation camps as defined in RSA 485-A:23 . . . .

> "Recreational vehicle" means . . . . [r]ecreational trailer, which is a vehicular, portable structure built on a single chassis, 400 square feet or less when measured at the largest exterior horizontal projections, calculated by taking the measurements of the exterior of the recreational trailer including all siding, corner trim, molding, storage space and area enclosed by windows but not the roof overhang. It shall be designed primarily not for use as a permanent dwelling but as a **temporary** dwelling for recreational, camping, travel or seasonal use.

RSA 216-I:1 (emphasis added). The Planning Board found that these definitions, when read together, require that the use of a campsite be temporary. This is a reasonable interpretation based on the clear reading of the statute and ordinance. The term "temporary" is commonly defined as: "Lasting for a time only; existing or continuing for a limited (usu. short) time; transitory." Black's Law Dictionary 1602 (9th ed. 2009). Because the Planning Board made a factual determination that the park models would not be temporary because they would be leased on a yearly basis, renewable for up to 60 years, it is likewise reasonable to conclude that such a use would not be a temporary one.

Accordingly, CBDA has failed to show that the Planning Board erred in its interpretation of the statute, ordinance, or regulations.

Equal Protection Claim

In an equal protection claim, it is necessary to show more than that the enforcement was merely historically lax. Bacon v. Town of Enfield, 150 N.H. 468, 474 (2004). The party "must show that the selective enforcement of the ordinance against [them] was a conscious intentional discrimination." Id. "In addition, the plaintiff[s] must assert and demonstrate that the '[town] impermissibly established classifications and, therefore, treated similarly situated individuals in a different manner.'" Id.

CBDA does not have a valid equal protection claim. CBDA argues that it was treated differently than Sugar Shack Campground because "[there was no inquiry or requirement for

Sugar Shack to explain or detail what type of camping structures were to be placed on the camp sites." (Pet.'s Trial Mem. 12.) However, the certified record reflects that Sugar Shack Campground provided this information to the ZBA in an application for a special exception. (CR. at 225.) Specifically, the plan for Sugar Shack Campground involved "tent[s] and pop-up trailers." (CR. at 225.) Additionally, the Planning Board's approval of Sugar Shack Campground was conditional. (CR. at 260.) Moreover, even if there were disparate treatment, CBDA points to no evidence in the record that the Planning Board engaged in conscious intentional discrimination. Bacon, 150 N.H. at 474.

Accordingly, CBDA has failed to show that Planning Board's review of its site plan application violated the equal protection clause.

Failure to Assist Claim

"[I]n furtherance of Part I, Article 1 of our State Constitution, municipalities have an obligation to provide assistance to all their citizens seeking approval under zoning ordinances. Richmond Co., Inc. v. City of Concord, 149 N.H. 312, 314–15 (2003) (citing Savage v. Town of Rye, 120 N.H. 409, 411 (1980); Carbonneau v. Town of Rye, 120 N.H. 96, 99 (1980)). In Savage, the New Hampshire Supreme Court found that the "measure of assistance certainly includes informing applicants not only whether their applications are substantively acceptable but also whether they are technically in order." 120 N.H. at 415. In Carbonneau, although it upheld the town zoning board's decision to deny a building permit, the New Hampshire Supreme Court encouraged the town to attempt to "negotiate a workable plan acceptable to both parties." 120 N.H. at 99. However, as noted in Richmond, these cases "are aimed at preventing municipalities from ignoring an application or otherwise engaging in dilatory tactics in order to delay a project." 149 N.H. at 315.

CBDA does not have a valid failure to assist claim. CBDA argues that the Planning Board "refused to engage in negotiations to reach an acceptable plan. Rather than cooperate, assist, or negotiate, the Planning Board invited CBDA to withdraw [its] plan and start over." (Pet.'s Trial Mem. 12.) CBDA was provided with a meaningful opportunity to address the application with the Planning Board. The Planning Board held several hearings, where CBDA was permitted to address the Board. Additionally, the Planning Board made it clear, as early as August 6, 2012, that it was concerned with whether the proposal constituted a campground under applicable law. (CR. at 164.) CBDA was well aware of the Planning Board's concerns; however, although CBDA offered to make changes to the application, it never submitted any formal changes. (CR. at 182.) As noted by the Town, the decision not to withdraw the application and submit a new one was CBDA's choice alone.

Accordingly, CBDA has failed to show the Planning Board failed to provide reasonable assistance to CBDA.

Claim for Attorney's Fees

"[A] citizen should not be compelled to bear the financial burden of judicial intervention to secure his clearly defined and established property right from an unconstitutional abuse of power found to constitute a taking." Dugas v. Town of Conway, 125 N.H. 175, 183 (1984). Municipalities are liable for attorney's fees where they enact or enforce ordinances that are clearly unconstitutional or invalid. Id. Here, the ordinance is not clearly unconstitutional or invalid, and CBDA has shown no unconstitutional abuse of power on the part of the Planning Board.

Accordingly, CBDA's request for attorney's fees and costs is DENIED.

C. Appeal from ZBA

On appeal, CBDA argues that the ZBA's decision was unlawful and unreasonable because: (1) the ZBA failed to provide written reasons for its disapproval pursuant to RSA 676:3; (2) the ZBA employed an improper standard of review; and (3) the ZBA misinterpreted the Zoning Ordinance. CBDA also argues that it is eligible for attorney's fees because the ZBA acted in bad faith.

Failure to Provide Written Reasons for its Disapproval Claim

The procedures of local land use boards are subject to the requirements of RSA 646:3. If a board decides not to approve an application, "the board shall provide the applicant with written reasons for the disapproval." RSA 676:3, I. "The purpose of this requirement is to insure that the developer receives written reasons for the disapproval, and that a record of the Board's reasoning exists so that the decision may be reviewed on appeal." K & P, Inc. v. Town of Plaistow, 133 N.H. 283, 289–90 (1990) (citing Patenaude v. Town of Meredith, 118 N.H. 616, 619–20 (1978)). This requirement may be satisfied by a letter from the board to the applicant, along with minutes of board meetings. Id.

CBDA does not have a valid claim for noncompliance with RSA 676:3. CBDA argues, "Given the unknown nature of the ZBA's rationale as a whole, the ZBA acted unlawfully when it failed to provide written reasons for disapproval." (Appeal ¶72.) While the ZBA's notice of decision did not provide detailed reasons for its decision to affirm the Planning Board, CBDA fails to consider the reasoning provided by the meeting minutes. (CR. at 734.) As reflected in the meeting minutes of January 22, 2013, the ZBA discussed several issues, including the meaning of "campground," and the density requirements under the ordinance and under state statutes, which are incorporated under the ordinance. (CR. at 722–23.) ZBA members also discussed how

the proposed use does not "fit the mold" of campground as contemplated by the statute. (CR. at 724.) Moreover, one member explained that the proposed site plan was improper because it was nothing more than "a clever way to get around meeting the requirements of [a] subdivision." (CR. at 726); See e.g., Town of Tuftonboro v. Lakeside Colony, Inc., 119 N.H. 445, 452 (1979). Further, as reflected in the meeting minutes from January 30, 2013, the ZBA reasoned that "the proposal [is] more in line with the definition of Manufactur[ed] Home Park or Subdivision than a campground." (CR. at 730.)

CBDA contends that it is "not clear from the written decision if the ZBA . . . consider[ed] the Campground Regulations." (Appeal ¶ 68.) However, when evaluating the meeting minutes, it is clear this is not the case. (CR. at 721) (noting "regulations are not within the purview of the ZBA"). In fact, the ZBA specifically voted not to consider the Campground Regulations. (CR. at 730). Although the ZBA did reference the Campground Regulations, it always did so in conjunction with a reference to state statute. (See e.g., CR. at 724) ("as the term does not appear in Thornton Campground Regulations or state statute.") When considering the meeting minutes, in conjunction with the written decision, it is clear that the ZBA denied CBDA's appeal because the Planning Board did not err in its interpretation of the zoning ordinance.

Accordingly, CBDA did not show that the ZBA failed to provide written reasons for its disapproval of CBDA's appeal.

Improper Standard of Review Claim

When reviewing a Planning Board decision on appeal, the ZBA has the same powers as the Planning Board, and can: (1) grant the requested relief; (2) deny the requested relief; or (3) modify the relief granted or denied by the Planning Board. RSA 674:33, I–II. In essence, the ZBA has authority to review the Planning Board's interpretation of a zoning ordinance de novo.

Ouellette v. Town of Kingston, 157 N.H. 604, 609 (2008). Because a ZBA uses the de novo standard of review, it is not required to give deference to the Planning Board's decision. Id. at 612. Where a ZBA applies an improper standard of review, the court must remand the matter to the ZBA to consider the evidence presented under the proper standard unless the court can find, as a matter of law, that the correct legal standard was met. Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 583 (2005) (citing Appeal of Cote, 139 N.H. 575, 580 (1995)).

CBDA's improper-standard-of-review claim fails. CBDA argues that by "establishing a higher burden of proof, the [ZBA] committed legal error." (CR. at 799.) CBDA explains:

> After members discussed issues such as the sample licensing agreement and taxation, the ZBA Chairman asked "if there is overwhelming evidence that the Planning Board decision was wrong." (CR. at 731.) He further stated that "case law indicates that the burden of proof is on the applicant and if the Planning Board has a reasonable basis for a decision it should be upheld." (CR. at 731.) Another member jumped upon the ZBA Chairman's "overwhelming evidence" standard and immediately made a motion to deny the administrative appeal. (CR. at 731.)

(Appeal ¶¶ 51–53) (citations added). An "overwhelming evidence" standard of review is not the same as a de novo standard of review. However, during a discussion of CBDA's request for rehearing, "Board members expressed that their decision was not influenced by the comments of [the Chairman]." (CR. at 807.) Moreover, although the Chairman made reference to "overwhelming evidence," the motion to deny the appeal does not appear to apply that standard. Specifically, the motion stated, "The Thornton Zoning Board of Adjustment determines that the Planning Board did not err in its decision and therefore the appeal of administrative decision submitted by the applicant is denied as it relates to the Zoning Ordinance." (CR. at 732.)

Even if the ZBA had applied an improper standard of review, the Court finds, as a matter of law, that the correct legal standard was met. Chester Rod & Gun Club, Inc., 152 N.H. at 583. As noted above, the legal interpretation of a zoning ordinance is a question of law, and the

Planning Board did not err in its interpretation of the zoning ordinance or the applicable statute. Cosseboom, 146 N.H. at 314.

Accordingly, CBDA has failed to show that the ZBA employed an improper standard of review.

Misinterpretation Claim

As noted above, both zoning ordinances and statutes should be construed according to their ordinary meaning, and unless the language is ambiguous, courts should not look beyond the language of the ordinance or statute. In re Athena D., 162 N.H. at 235; Anderson, 155 N.H. at 494–95.

CBDA's misinterpretation claim also fails. CBDA argues:

> The plain language of the Zoning Ordinance indicates that the voters intended to allow any campground permissible under state law . . . . In [finding that the proposed use does not meet the definition of campground under state law], the ZBA attempted to add language, such as "traditional," or concepts, such as "easily moveable" recreational vehicles or the need to move recreational vehicles every season, not found in the Zoning Ordinance or the state law which it incorporates, but which rather reflected their own individual notions of a campground.

(Appeal ¶¶ 80–82.) In short, CBDA asserts that the ZBA essentially grafted requirements on to the zoning ordinance that neither the ordinance nor the law permits the ZBA to consider.

As discussed above, the ZBA correctly determined, based on the plain language of the ordinance and statute, that CBDA's proposed use did not meet the definition of "campground." Further, even if ZBA members considered their own experiences, they did so to aid in the determination of the ordinary meaning of the term "temporary," which they are entitled to do. See Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 520 (2011).

Accordingly, CBDA has failed to show that the ZBA misinterpreted the zoning ordinance or state law.

Claim for Attorney's Fees

As noted above, a land use board is only liable for attorney's fees and costs where, citizens are "compelled to bear the financial burden of judicial intervention to secure [a] clearly defined and established property right from an unconstitutional abuse of power found to constitute a taking." Dugas, 125 N.H. at 183. Here, the ordinance is not clearly unconstitutional or invalid, and CBDA has shown no unconstitutional abuse of power on the part of the ZBA.

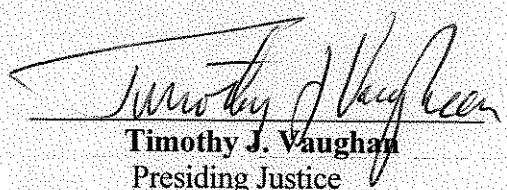
Accordingly, CBDA's request for attorney's fees and costs is DENIED.

Conclusion

CBDA failed to establish any facts supporting their claim that the Planning Board erred. The Planning Board did not err by declining to disqualify Member Morton, enacting Campground Regulations, finding that the Campground regulations are not preempted by state law, or interpreting Campground Regulations and RSA chapter 216-I to prohibit the proposed use. Further, the Planning Board did not violate the equal protection clause, or act in bad faith. CBDA also failed to establish any facts supporting their claim that the ZBA erred. The ZBA did not err by declining to include specific reasoning in its written decision where the reasoning is discernible from the meeting minutes. The ZBA did not employ an improper standard of review, and it did not misinterpret the Zoning Ordinance. Moreover, the ZBA did not act in bad faith. CBDA's appeals are therefore DENIED.

SO ORDERED.

Dated: 8/12/2013



Timothy J. Vaughan
Presiding Justice