

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Strafford Superior Court
259 County Farm Road, Suite 301
Dover NH 03820

Telephone: (603) 742-3065
TTY/TDD Relay: (800) 735-2964
<http://www.courts.state.nh.us>

NOTICE OF DECISION

**Laura Spector-Morgan, ESQ
Mitchell Municipal Group PA
25 Beacon Street East
Laconia NH 03246**

Case Name: **Pine Ledge Holdings, Inc. v Town of Durham Town Council**
Case Number: **219-2012-CV-00259**

Enclosed please find a copy of the court's order of December 03, 2012 relative to:

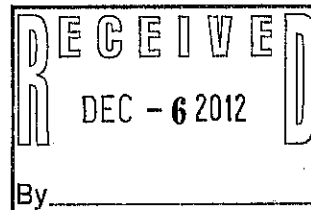
Order on Planning Board Appeal

December 05, 2012

Julie W. Howard
Clerk of Court

(273)

C: Scott E. Hogan, ESQ



THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

No. 219-2012-cv-00259

Pine Ledge Holdings, Inc.

v.

Town of Durham Town Council

ORDER

Pine Ledge Holdings, LLC appeals the determination of the Durham Town Council to rezone a parcel at 20 Strafford Avenue. Finding no error in the Council's decision, the appeal is dismissed.

Background

On the recommendation of the Town of Durham Planning Board, the Durham Town Council considered a motion to "amend[] the Durham Zoning Map in the Zoning Ordinance to remove two parcels (Map 2, Lots 6-0 and 7-1) from the Professional Office (PO) District and incorporate them into the Residence A (RA) District as shown on the Commercial Core Map of the 2000 Master Plan." Certified Record (CR) at 158. Plaintiff Pine Ledge Holdings, Inc. owns one of the parcels, which is located at 20 Strafford Avenue. The Town owns the other property, which is at 49 Madbury Road.

The 2000 Master Plan placed these lots in the RA District, but both were rezoned to PO in 2006. Nevertheless, Pine Ledge's property consisted of two residential structures when the Council took up the motion in February 2012. CR at 173. The 49

Madbury Road property is currently the proposed site for a new town library. The challenge on appeal is to the Council's decision to move 20 Strafford Avenue from the PO District to the residential zone.

Standard of Review

A statute sets the standard of review. The plaintiff has the burden of proving the Council's decision "is unlawful or unreasonable." RSA 677:6 (2008). The Council's findings of fact are considered "*prima facie* lawful and reasonable," and the court may not set aside or vacate the decision "except for errors of law, unless the court is persuaded by the balance of probabilities, on the evidence before it, that [it] is unreasonable." Id. See Brandt Devel. Co. of New Hampshire, LLC v. City of Somersworth, 162 N.H. 553, 555 (2011). Deference to the Council's action is warranted in view of its members' superior knowledge of the area in question. Ouellette v. Town of Kingston, 157 N.H. 604, 611 (2008) (citation and quotation omitted).¹

Discussion

1. Denial of the Motion for Rehearing

Pine Ledge's first challenge is to the Council's denial of its motion for rehearing. It voted to deny the motion because "(1) No new evidence has been submitted and the Council is not convinced that it erred in its original decision; and (2) Since the zoning amendment has already been adopted, Pine Ledge Holdings, Inc. is actually seeking to

¹ In the present case, at least two council members viewed the plaintiff's property and surrounding area before voting. See CR at 170, 173. Other members' comments reflect substantial familiarity with the area. See e.g., CR at 161, 169.

amend the zoning ordinance again, back to its original wording. Such an amendment may not be achieved in this manner.” CR at 187. Pine Ledge focuses on the second ground, which it argues is evidence the Council wrongly denied the motion because it misunderstood the purpose of such motions.

The court may not consider an appeal from the Council’s decision “unless the appellant shall have made application for rehearing as provided in RSA 677:2.” RSA 677:3, I (2008). RSA 677:2 (2008) sets forth the requirements for a motion for rehearing and states in pertinent part that “the local legislative body, may grant such rehearing if in its opinion good reason therefore is stated in the motion.” This requirement gives the original entity “an opportunity to correct any errors it may have made.” McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171, 174 (2005).

Pine Ledge complied with RSA 677:3 by moving for a rehearing, which the Council denied. Whatever the fault with the Council’s second explanation for denying the motion, the first stated ground is sufficient. After considering the motion, the Council denied it for a valid reason when it concluded there was no basis to find the decision was erroneous.

2. Pine Ledge Did Not Prove the Council’s Decision was Unreasonable

Pine Ledge contends the decision to rezone is unreasonable on its face and that it amounts to spot zoning.

The Council had substantial evidence before it to support the zoning change. A number of persons residing in the area advocated the rezoning in order to mitigate the impact on residential neighborhoods from encroachment by commercial and university

student activities. One resident argued it would "allow a healthy separation of uses." CR at 163. Another cited the need to include Pine Ledge's property in the residential district "to clearly separate the commercial from residential." CR at 165; see CR at 155.

The Council considered that if Pine Ledge was able to develop its property in the manner permitted in the PO district, it "would have a significant impact on the neighborhood because of the tenant traffic that would go through it." CR at 172; see CR at 173. Finally, the Council noted the 2000 Master Plan placed Pine Ledge's property in the RA zone, and that even though it was rezoned to PO in 2006, the reason for deviating from the Master Plan was unclear. CR at 162, 173, 174. See Quinlan v. City of Dover, 136 N.H. 226, 230 (1992) (appropriate to use master plan "as a basis for considered zoning activity."). These circumstances support the Council's finding and militate against a conclusion that it was unreasonable.

Pine Ledge contends the Council's action is invalid because it resulted in unlawful spot zoning. Again, Pine Ledge has the burden of showing the rezoning is unreasonable or unlawful on this basis. Portsmouth Advocates, Inc. v. City of Portsmouth, 133 N.H. 876, 880 (1991).

Property is spot zoned if "it is singled out for treatment different from that of similar surrounding land which cannot be justified on the bases of health, safety, morals or general welfare of the community and which is not in accordance with a comprehensive plan." Schadlick v. City of Concord, 108 N.H. 319, 322 (1967). "The invalidity of 'spot zoning' depends on more than the size of the 'spot.'" Edgewood Civic v. Blaisdell, 95 N.H. 244, 246 (1948) (quotation omitted). "The mere fact that the

amendment zoned a small area at the request of a single owner does not itself make the result spot zoning.” Id.

In Miller v. Town of Tilton, an abutting residential property owner petitioned to modify the zoning ordinance to enlarge an agricultural buffer zone back to its original boundary. 139 N.H. 429, 430 (1995). The change affected parcels of land along a border zoned “industrial,” which included the plaintiff’s land. Id. The court affirmed the superior court’s finding that it did not constitute spot zoning, but “a change in an area border Thus, the zoning amendment did not create a new incongruous district, it merely extended the pre-existing agricultural land.” Id. at 432.

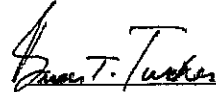
The present case is like Miller. The Council did not place Pine Ledge’s lot in a zoning district that is completely incompatible with its surroundings, but rather moved the boundary line of an adjacent district in a way that encompassed Pine Ledge’s property. Pine Ledge argues its property does not fit with a residential zone because it is not oriented toward a single family residential neighborhood, but rather toward Strafford Avenue and its “multi-unit housing, parking lots, University uses, and commercial properties.” Pine Ledge Mem. Law at 7. However, the area immediately behind Pine Ledge’s lot is residential. See CR at 161. And as noted earlier, despite being in the PO district, Pine Ledge’s property was in residential use when the Council decided to place it in the residential zone.

Conclusion

For the reasons given, Pine Ledge has not shown the Council's action was invalid. The appeal is dismissed.

SO ORDERED

Date: December 3, 2012

A handwritten signature in cursive script, appearing to read "Brian T. Tucker", is written over a horizontal line.

Brian T. Tucker
Presiding Justice