

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

Strafford Superior Court
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NOTICE OF DECISION

**Ari B. Pollack, ESQ
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PO Box 1415
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Case Name: **9 Madbury Road, LLC, et al v Town of Durham**
Case Number: **219-2013-CV-00440**

Enclosed please find a copy of the court's order of January 14, 2014 relative to:

Order on Motion to Dismiss

January 14, 2014

Julie W. Howard
Clerk of Court

(273)

C: Christopher P. Mulligan, ESQ; Laura Spector-Morgan, ESQ

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

9 Madbury Road, LLC, et al.

v.

Town of Durham, &
Golden Goose Capital, LLC

Docket No.: 219-2013-CV-00440

ORDER

The petitioners, 9 Madbury Road, LLC and 6 Jenkins Court, LLC (collectively "petitioners"), have appealed three variances granted by the Town of Durham, Zoning Board of Adjustment ("ZBA"). The Town of Durham ("Town") and intervenors, Golden Goose Capital, LLC, move to dismiss, arguing the petitioners do not have standing to appeal the ZBA's decision.

In a motion to dismiss based on standing, the court "must look beyond [the petitioners'] unsubstantiated allegations and determine, based on the facts, whether the [petitioners have] sufficiently demonstrated [their] right to claim relief." Johnson v. Town of Wolfeboro Planning Bd., 157 N.H. 94, 96 (2008). Only "persons aggrieved" may appeal a ZBA's decision to the superior court. RSA 677:4 (Supp. 2013). The petitioner has the burden of proving it qualifies as an aggrieved person, a factual determination made by the trial court. Nautilus of Exeter v. Town of Exeter, 139 N.H. 450, 452 (1995). In making this determination, "the trial court may consider 'factors such as the proximity of the plaintiff's property to the site for which approval is sought, the type of change proposed, the immediacy of the injury claimed, and the plaintiff's participation in the

administrative hearings.” Id. (quoting Weeks Rest. Corp. v. City of Dover, 119 N.H. 541, 545 (1979)).¹

The petitioners are not abutters but are lot owners, about 165 and 321 feet from the boundary of the property at issue here. This proximity supports the petitioners’ claim for standing. Compare Johnson, 157 N.H. at 99 (“The Johnsons’ unit is approximately two hundred feet from [the subject] parcel and less than five hundred feet from the proposed structure. Thus, proximity weighs in favor of standing.”). Additionally, the petitioners provide evidence of participation in the administrative process, which also supports standing. See Obj. Mot. Dismiss Ex. C.

The court does not find the type of change proposed as grand as the petitioners allege. See id. ¶ 9. The zoning ordinance already permits four story buildings in this district, and requires certain floors to be commercial uses. Pet. ¶ 11. The main changes, per the variances appealed, allow construction of five story buildings instead of four, and decrease the amount of commercial space required while increasing the amount of residential space allowed. Pet. ¶ 14. The property is not currently a vacant lot but is developed and used for residential purposes. See Town of Durham’s Answer at 1. All variances, by their very nature, necessarily require some deviation from the standards of the zoning ordinance. See, e.g., Golf Course Investors of N.H. v. Town of Jaffrey, 161 N.H. 675, 683 (2011) (finding that turning an existing inn into condominiums and building a separate garage did not “dramatically alter the footprint of the existing . . . building or its visual character.”). The court does not find the type of change proposed so great as to support standing.

¹ Petitioners also claim standing because the ZBA sent them notice of the variance application. Obj. Mot. Dismiss ¶ 3–5. However, petitioners point to no authority indicating why notice itself automatically confers standing.

With regard to the injury alleged, the New Hampshire Supreme Court has stated that increased competition with one's business alone "is insufficient to entitle the plaintiffs' standing to appeal the ZBA's decision." Nautilus, 139 N.H. at 452; see also Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 770 (2013) ("An appeal of a ZBA decision is not a weapon to be used to stifle business competition."). The Court stated it "is mindful of the fact that injury resulting from competition is rarely classified as a legal harm but rather is deemed a natural risk in our free enterprise." Nautilus, 139 N.H. at 452 (quotation omitted). Further, the Court in Nautilus rejected the argument that the petitioners "as citizens of the town, property owners, taxpayers, and owners of a business within commercial district" were entitled to standing. Nautilus, 139 N.H. at 451.


Here, the petition states "[t]here is a definite loss to the Petitioners and their economic interests if the variances are upheld." Pet. ¶ 34 ("Petitioners' estimated their potential annual revenue loss at up to \$443,315.35."). To that end, "the Petitioners submitted a detailed analysis regarding the ability of the Applicant to introduce into the downtown market housing units with significantly reduced rents, affecting the financial viability of the existing mixed used development, such as those maintained by the Petitioner." Id. ¶ 43. The petitioners reiterate this injury in their objection to the motion to dismiss, stating the variances give the applicant "the ability to drop rents to attract students, by '[p]roviding the best student housing value proposition[,]' *precisely the concern articulated by the Petitioners.*" Obj. Mot. Dismiss ¶ 21 (emphasis added). Petitioners' injury, by their own admission, is the increased competition that comes with the greater availability of local residential housing as a result of the variances.

Petitioners argue their "concerns over increased competition are not, by themselves, sufficient to deprive it of standing." Obj. Mot. Dismiss ¶ 22 (citing Thomas v. Town of Hooksett, 153 N.H. 717, 721 (2006)). That case, however, cited for the proposition that "the presence of an anticompetitive motive does not by itself deprive the plaintiff of standing" is quoting the Court's decision in Weeks. Weeks, 119 N.H. at 545. A look at that quote in its entirety is informative: "[i]n this case the plaintiff has alleged adverse impact upon its business *other than by increased competition*, and the presence of an anticompetitive motive does not by itself deprive the plaintiff of standing." Id. (emphasis added). The petitioners here do not allege any injury other than from the increased competition. See generally Obj. Mot. Dismiss ¶ 14–22. Thus, the factor heavily weighs against standing.

Based on the preceding discussion, the court finds that the petitioners have not carried their burden of proving they are "aggrieved" persons under RSA 677:4. Therefore, the court grants the Town's motion to dismiss.

So Ordered.

January 15, 2014



Kenneth C. Brown
Presiding Justice