

[Hooksett Conservation Commission v. Hooksett Zoning Board of Adjustment](#)

Argued: June 12, 2002 Reargued: January 14, 2003 Opinion Issued: January 23, 2003

The latest from the supreme court helps to define who a "party" is for the purposes of appeals of ZBA decisions.

The Hooksett planning board was hearing an application for a gas station/convenience store, and the conservation commission submitted to it a memo claiming that the use wasn't permitted under the zoning ordinance. The planning board sought the opinion of the code enforcement officer (CEO), who determined that the use was permitted. The commission appealed that determination to the ZBA, which found in favor of the CEO. The commission's motion for rehearing was denied by the ZBA. The commission then appealed to superior court. The ZBA moved to dismiss the case, arguing that the commission didn't have standing to appeal to superior court. The court denied the motion. The ZBA appealed the denial of the motion to dismiss to the supreme court. The supreme court found in favor of the ZBA--meaning that the commission did not have standing to appeal to superior court--and reversed the lower court: therefore, case dismissed.

This seems simple enough, but the supreme court's opinion is a rich analysis of statutory history that warrants reading. It resulted in a rare 3-2 split among the justices and an invitation to the legislature for clarification.

There are three basic steps in a ZBA appeal, each invoked by a different statute and each entitling different people to take action:

Appeal to ZBA. RSA 676:5, 1--appeals may be taken to the ZBA regarding anything within the board's jurisdiction by "any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer." Here the conservation commission easily fits into this as a municipal "board" affected by the decision of the CEO.

Motion for rehearing. RSA 677:2--rehearing of the ZBA decision may be requested by "the selectmen, any party to the action or proceedings, or any person directly affected thereby". This is the crux of the matter, as you will soon see. Apparently, the Hooksett ZBA originally believed that the conservation commission had standing to move for a rehearing, as the ZBA denied the motion, rather than refusing to consider it altogether (but this point is not clear in the supreme court's opinion).

Appeal to superior court. RSA 677:4--appeal of a ZBA decision may be made by "Any person aggrieved by any order or decision of the zoning board of adjustment ... For purposes of this section, 'person aggrieved' includes any party entitled to request a rehearing under RSA 677:2."

In argument to the supreme court, the ZBA maintained that the conservation commission did not have standing to appeal to the superior court because it also did not have standing to request a rehearing by the ZBA--specifically, that the commission was not a "party to the action." The court found that among municipal boards, only the selectmen have the authority to request the ZBA to rehear a decision. To support this reasoning the court said:

"The policy considerations stem from the fact that there are undoubtedly many instances when a municipal board may disagree with a ZBA's interpretation of a zoning ordinance. If municipal boards were permitted to appeal in every such instance, 'the prompt and orderly review of land use applications ... would essentially grind to a halt.'... Suits by different municipal boards could cause considerable delays and thus unfairly victimize property owners, particularly when no party directly affected by the action such as abutters has seen fit to challenge the application ... Public funds will also be drawn upon to pay the legal fees of both contestants, even though the public's interest will not necessarily be served by the litigation ... Finally,

'[t]o permit contests among governmental units ... is to invite confusion in government and a diversion of public funds from the purposes for which they were entrusted ... Practical politics being what they are, one can readily foresee lively wrangling among governmental units if each may mount against the other assaults.'" (citations omitted)

So even though it was the conservation commission that brought the original appeal to the Hooksett ZBA, it should not be considered "party" to the matter for the purpose of moving for rehearing or subsequent appeal to superior court. Among municipal boards, only the selectmen can act in that role. I think that a different result might occur if the conservation commission could demonstrate that it was an abutter or had some other particularized interest in the matter being considered. So, if the conservation commission owned or held an easement on abutting property, or if it could demonstrate that land it controlled would be adversely impacted by a proposal even though not directly abutting, then the conservation commission might be able to demonstrate standing to move for rehearing and also to appeal to superior court. Note that the supreme court dismissed the notion that the conservation commission should be considered party to the action because it has a statutory duty to protect the town's natural resources. The court said that duty only allows it to appeal to the ZBA, not to take the action any further than that.

In her dissent, Justice Dalianis said "As the commission initiated the proceedings before the ZBA, it seems evident to me that the commission is a 'party' to [the proceedings before the ZBA]. Accordingly, the commission was entitled to appeal the ZBA's decision to the superior court."

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