

Tidd v. Alton

Earlier this month the NH Supreme Court issued an opinion in [William Tidd v. Town of Alton](#).

The case centered upon a special exception granted by the Alton ZBA, which abutters maintained was illegal.

Remember that special exceptions are authorized under RSA 674:33, IV: "A local zoning ordinance may provide that the zoning board of adjustment, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance. All special exceptions shall be made in harmony with the general purpose and intent of the zoning ordinance and shall be in accordance with the general or specific rules contained in the ordinance."

Consistent with the statute, the Town of Alton had such "rules" in its ordinance, which included that the use "would promote the public health, safety, and general welfare ..." The ordinance also required that the ZBA find that eight specific conditions ALL were met, among them that "IV. There is no valid objection from abutters based on demonstrable fact," "V. There is no undue nuisance or serious hazard to pedestrian or vehicular traffic, including the location and design of access ways and off-street parking," and "VIII. The proposed use or structure is consistent with the spirit of this ordinance and the intent of the Master Plan."

Briefly, here's what happened: the Holts owned 40 acres in a rural zone in Alton and wanted to establish a campground there, which is permitted by special exception under the town's zoning ordinance. They applied for a special exception in 1998 for a campground with 136 sites and a 75-foot buffer from neighboring properties. After a hearing, the ZBA denied the application, stating "there [was] valid objection based on the fact that noise, traffic and smoke ... would destroy the neighborhood features" and that the proposal presented "a serious hazard and undue nuisance to vehicular traffic ... [and] a threat to pedestrians." The application was again denied upon rehearing.

In May 1999, the Holts reapplied, reducing the proposed number of sites to 100. The ZBA voted not to accept the application, as it was not materially different from the one they had denied. In June 1999, the Holts applied again, keeping the number of sites at 100, but increasing the size of the buffer zone and redesigning the interior roads. The ZBA accepted this application. At the public hearing, experts for the opposing abutters testified about traffic hazards and negative property impacts. The ZBA granted the special exception with conditions, one of which was approval by the planning board and department of transportation (DOT) "for traffic regulations".

After the ZBA denied their motion for rehearing, the abutters appealed to superior court, which held that (1) the last application was not materially different from the one originally denied by the ZBA (meaning that the ZBA shouldn't have accepted it), and (2) even if the ZBA had been correct to accept the application, it shouldn't have granted the special exception because the "rules" of the zoning ordinance had not been met--a nuisance or serious hazard had been identified, and the ZBA was relying on other parties (planning board and DOT) to resolve them--and there was uncontroverted evidence of the negative impact upon the neighborhood.

The Supreme Court chose not to address the first issue--whether or not the final application was materially different from the one originally denied by the ZBA (so the superior court's decision on this stands)--and instead focused on the ZBA's decision to grant the special exception. The Supreme Court agreed with the trial court, and found that the ZBA had in effect varied the terms of the zoning ordinance by granting the special exception without all eight 'rules' having been met (remember that the zoning ordinance said that 'all' of the conditions for a special exception must be met). Particularly notable in the Supreme Court's opinion is the conclusion that the ZBA was relying on the planning board and DOT to resolve the traffic problems apparently inherent in the proposal.

Lessons learned:

(1) While zoning boards might shy away from tackling issues that they feel are more appropriately addressed by a planning board, there are some situations where the ZBA must take on that 'planning board' role. In those cases, the ZBA simply cannot say 'we'll let the planning board take care of that.'

(2) If your ordinance says 'shall' and 'all', it means it.

(3) A 'materially different' subsequent application is one that makes an effort to address the bases for the original denial. It does require some level of analysis by the board prior to accepting the application, and this might seem awkward, but that's the way it is.

Q & A: Couldn't the Holts apply for a variance? Yes, but the ZBA cannot grant a variance when the application is for a special exception.

Note: This is a clear and especially helpful opinion from the court, which could have simply relied on the lack of material difference between applications as the basis for upholding the superior court's decision. It is also Justice Broderick's first opinion since returning from his extended absence after being assaulted earlier this year. Welcome back!