

Cherry v. Town of Hampton Falls

As if the weather weren't enough, here's something else to put a spring in your step.

Cherry wanted to subdivide an 84.5-acre parcel into 19 lots, including construction of a road, which would require filling approximately 10,500 square feet of wetlands. The local zoning ordinance contains a wetland buffer zone of 100 feet, as well as provisions for a special permit, issued by the planning board, for impacts upon wetlands or the buffer zone.

Standard for granting the special permit are as follows:

8.5.1 A special use permit may be granted by the Planning Board for the construction of roads . . . within the District, provided that all of the following conditions are found to exist:

8.5.1.1 The proposed construction is essential to the productive use of land not within the wetlands[;]

8.5.1.2 Design and construction methods will be such as to minimize detrimental impact upon the wetland and will include restoration of the site as nearly as possible to its original grade and condition;

8.5.1.3 No alternative route which does not cross a wetland or has less detrimental impact on the wetland is feasible; and

8.5.1.4 Economic advantage alone is not reason for the proposed construction.

The applicant's representative stated that a safe road could not be build without the wetland impact. The chair of the Conservation Commission stated that a road could be designed that reduced the impact, but also resulted in fewer lots. The applicant's soil scientist stated that he had not considered that alternative. The planning board directed the applicant to submit a new design with options to minimize the wetland impact. The applicant refused, believing that they had presented the most viable option. The planning board denied the special permit request because the applicant had "failed to address the extent of impact in the wetland[s] buffer areas and provide for mediation [sic] and/or mitigation," and also because the applicants "failed to show that there [was] no feasible alternative as required in [subsection 8.5.1.3]." The planning board then denied the subdivision.

The applicant appealed to superior court, which reversed the decision of the planning board, finding that it was not reasonable to reject the plan on the basis of the personal opinion of a member of the conservation commission and upon the notion that a better roadway configuration might be found at some future date. The trial court said that the applicant's plan needs to be reasonable, but that there is no requirement for perfection. The court also relied on the fact that the DES Wetlands Bureau had issued a permit for filling the wetlands as demonstration of the reasonableness of the applicant's plan.

The supreme court reversed the decision of the trial court. In upholding the decision of the planning board, the supreme court found that "...it was neither unlawful nor unreasonable for the planning board to require the plaintiffs to establish that the design and construction of the proposed subdivision road would minimize detrimental impact upon the wetlands buffer and that

no feasible alternative design would have a less detrimental impact" and that the applicant had failed to make such a showing. The court also rejected the trial court's reliance on the DES dredge and fill permit, observing that the permit "...does not prove that the requirements of subsection 8.5 have been satisfied since it does not address the impact of the proposed construction on the wetlands buffer." The court also supported the notion that municipalities may adopt more restrictive rules for wetlands than those required by the state.

A couple of observations:

* The general requirement that planning boards work with the applicant is a two-way street. The applicant has to be reasonable, too.

* Municipalities may adopt more restrictive wetlands rules because the statute specifically states that DES rules shall serve as a minimum. Do not read this decision so broadly as to apply to all state environmental standards--many would-be municipal regulatory approaches are preempted by comprehensive state regulatory schemes. Not so here, however.

* Note that the appeal of the special permit, authorized by the local zoning ordinance, was to superior court--not to the ZBA. Although the opinion is silent on this matter, my assumption is that the special permit is being treated as a "conditional use permit" which is authorized under RSA 674:21,II. As an innovative land use control, decisions made under such authority may be appealed only to superior court, not to the local ZBA (see RSA 676:5, III).

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