Town of Goshen
Board of Selectmen
May 14, 2012

DECISION ON NEWPORT SAND & GRAVEL CO., INC.'S MOTION FOR REHEARING ON ZONING PROTEST PETITION

1. Article 2, which appeared on the warrant for the Goshen Town Meeting of March 13, 2012, consisted of a petitioned zoning amendment which would expand the Light Commercial zoning district, and alter the regulations therein as they pertain to excavations. The area proposed to be rezoned by that warrant article is shown in yellow on "Exhibit 1" attached to Attorney Britain's April 25, 2012 Memorandum of Law submitted in this case.

2. Prior to the Town Meeting a protest petition under RSA 675:5 was received by the Selectmen. The legal effect of such a petition, if valid, is to require a 2/3 vote, rather than a simple majority, in order to enact the zoning amendment (RSA 675:5, I-a). The result of the vote on the proposed zoning amendment was that it did pass by a simple majority (around 62%), but did not pass by a 2/3 majority. Thus the issue of the validity of the protest petition became pivotal. Under RSA 675:5, I-a(b), in order to be valid, the protest petition must be signed by "the owners of 20 percent of the area within 100 feet immediately adjacent to the area affected by the change or across a street from such area."

3. On April 4, 2012, the Selectmen at their meeting considered the issue of whether the protest petition was valid under this standard. They did rough calculations based upon the linear perimeter of the area proposed to be rezoned. The total perimeter is roughly 24,000 feet. 20% of that is 4,800 feet. The properties represented by the protest petitioners totaled around 8101 feet of that perimeter, and thus represented around 33.7% of that perimeter. In light of that substantial margin, the Board announced that the protest petition was valid, but invited a possible motion for rehearing under RSA 677:2. Such a motion was submitted by Newport Sand & Gravel Co., Inc. [herein "NSG"] (dated April 4, 2012).

4. Attorney Jed Callen, representing some of the protest petitioners, argues that RSA 677:2 does not apply here, and that NSG's only remedy is a petition to court. However in the case of *Smagula v. Town of Hooksett*, 149 N.H. 784 (2003), the Supreme Court decided a question of zoning protest petition validity via an appeal of the Town's own determination of validity. The Selectmen believe based on that case that they have the authority to determine the validity of the protest, and that a rehearing motion under RSA 677:2 is authorized.

5. Turning to NSG's arguments, it is important to note that NSG's underlying calculations do not differ substantially from those of the Selectmen. As shown in NSG's "Exhibit 1" NSG has calculated the total area within the 100-foot corridor adjacent to the lots to be rezoned as being 2,466,750.1 square feet, and the total of that area which is owned by petition signers as being 821,528.3 square feet, or around 33.3 percent – not dissimilar to the Selectmen's calculation.

6. However NSG does challenge whether certain of the protesters' properties were properly included in the numerator of that calculation. One challenge raised is with respect to Map 204, Lot 13, which is owned by Patricia S. Stephan, Trustee of the Patricia S. Stephan Revocable Trust. NSG claims this lot should not be included because although Patricia Stephan signed the protest petition, she did not explicitly do so as trustee. The Board finds that this property was properly included. In *Town of Alton v. Fisher*, 114 N.H. 359 (1974, a protest petition had been signed by the managing trustee who "before signing the petition, convened a meeting of the trustees who specifically authorizes his signature on their behalf." The Selectmen have received evidence (in the form of a letter) that Patricia Stephan is the sole trustee in this case and therefore clearly had authority to sign. We have been referred to no principle or legal authority which indicates that the omission of the word "trustee" after her signature served to invalidate such signature in the context of a protest petition. In any event NSG admits that the remaining properties would exceed the 20% threshold even without the Stephan property being included.

7. Paragraph 13(d) of NSG's motion questions the inclusion of Map 203, Lot 17, on the ground that there is no deed on record showing that the signer of the protest petition, Alan R. Pike, is an owner of that lot. The Selectmen have received a copy of a will on record in the Probate Court showing that Alan R. Pike is one of the owners of the property.

8. That leaves NSG's primary argument against inclusion of the Pike property as well as multiple of the other properties involved in the protest petition – namely, the fact that the properties are owned jointly, but only one of

the joint tenants signed the protest petition. NSG acknowledges that this subject was addressed by the N.H. Supreme Court in the case of *Disco v. Selectmen of Amherst*, 115 N.H. 609 (1975) – which held that one joint tenant had the authority to protect the property by signing without the other owner's signature. However NSG argues that the *Disco* decision doesn't apply here because (a) it was decided under an older version of the statute, and (b) the land involved in *Disco* was the land actually being rezoned, rather than, as here, the 100-foot strip adjacent to the land being rezoned.

9. With respect to the latter distinction, the Board finds that it is a distinction without a difference. The *Disco* decision held that one cotenant could act to protect property by protesting a zoning change which would "diminish the protection the ordinance provides to their jointly-owned land" That is precisely what is happening here – the proposed amendment ***would*** (the protesters could reasonably believe) diminish the protection to the abutting lands by relaxing the regulations on the lands being rezoned. The case of *Towle v. Nashua*, 106 N.H. 394 (1965) held that direct abutters in the position of protesters had a direct pecuniary interest in the zoning change, despite the fact that the zoning of their own land was not being altered.

10. With respect to the argument that *Disco* was decided under an older statute, the case was decided in 1975, and at that time the protest petition provision was contained in RSA 31:64 (as amended by Laws of 1965, Ch.318:2), which read in relevant part as follows: "*In case of a protest against such change, signed by the owners of twenty per cent either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending one hundred feet therefrom, or of those directly opposite thereto extending one hundred feet from the street frontage of such opposite lots, such amendment or repeal shall not become effective except by the favorable vote of two thirds of all the members of the legislative body…*"

11. The only portion of this language which is relevant to the issue of which owners must sign is the phrase "signed by the owners of twenty per cent." That phrase (although it has now been broken down into sub-paragraphs) has not changed from the time of the *Disco* decision. The word "owners" upon which NSG places great emphasis in its memorandum, has not changed. The Selectmen have been advised by both the Town's legal counsel and by attorneys at the Local Government Center that the *Disco* case remains good law, and we have not been given any specific basis to believe otherwise. There was also testimony at the public hearing that the protest petitioners relied on a legal opinion from their own attorney that only one cotenant signature was necessary. It is our determination that all of the jointly-owned properties were properly included.

12. NSG also seeks to invalidate the signature of Howard Caron (Map 202, Lot 20, who now states, in an affidavit, that he signed the protest petition based on misrepresentations made by Steve Lamery. A similar issue was raised in the *Disco* case, in that one of the protest petition signers in that case later wrote to the moderator and wished to withdraw his signature. The Court held that "*it is essential that there be a point in time at which signatures cannot be added to or withdrawn from a protest petition. This is required so that all concerned, the proponents and opponents of the measure…will know the status of the protest petition at some time, preferably before the voting begins*…" That same rationale applies here. If signatures were permitted to be withdrawn after the fact because a person who signed later comes to feel that misstatements were made, there could never be reliance on *anyone*'s signature on a petition. In the Board's view this property was properly included.

13. In its "Second Assignment of Error" NSG also challenges the validity of the protest petition on the ground that it was directed toward four zoning amendments, which NSG claims violates the requirement in RSA 675:5, II(b) that "*each protest petition shall apply to only one article in the warrant.*" In this case, although there were four interrelated parts to the proposed zoning amendment, it ***was*** all placed in one warrant article. The record also contains correspondence indicating that Attorney Britain (representing NSG as the lead petitioner) explicitly requested that all four portions of the amendment be placed in one article. There were no other warrant articles containing proposed zoning amendments, hence there was no confusion about which warrant article the protest petition was directed toward.

14. Finally, although it was not raised in NSG's Motion for Rehearing, an additional issue is raised in NSG's 4/25/12 Memorandum of Law under the heading "Lack of Methodology for Determining Validity of Protest Petition." There NSG claims that its Due Process rights were violated because the Town's written records did not reveal to NSG, in advance of the April 25 hearing, what calculations the Selectmen did to determine the validity of the protest petition. NSG states "The Town's production of documents was devoid of any spreadsheets, lists, calculations or documents of any kind showing how the Board of Selectmen reached the conclusion that the protest petition was valid."

15. It is true that the Selectmen's calculations were all done informally without producing written records (other than rough personal notes, exempt from release under the Right-to-Know Law, *see* RSA 91-A:5, VIII). However there is nothing in the Protest Petition statute (RSA 675:5) which sets forth any procedure for the Selectmen to use, or even, in fact, requires them to make a decision at all. RSA 677:2 (while not 100% clear) does appear to require the

holding of a rehearing on the issue if requested, however the underlying subject of that rehearing is the action taken by the Town, not any specific decision made by the Selectmen, or the methodology of such decision. In any event the Board disagrees that NSG's Due Process rights have been violated. It is certainly true, as NSG asserts in paragraph 23 of its Memorandum, that the right to keep acquire, protect and own property are fundamental rights guaranteed by the N.H. Constitution. However no owner can claim a affirmative substantive constitutional right to have its property rezoned. From a procedural Due Process perspective, NSG was given the right, at the April 25 rehearing, to be fully heard by presenting all of the reasons why it believes the protest petition was not valid. And it did so.

Summary: After due consideration of above factors the Board of Selectmen holds that its original decision to validate the Protest Petition stands.

The Board of Selectmen

Robert Bell, Chairmen

Edward Andersen, Sr.

William Ball