

Original

STATE OF MAINE
AROOSTOOK, ss

SUPERIOR COURT
DOCKET NO. AP-06-003

RICHARD CAYER)
)
Plaintiff)
)
vs.)
)
)
TOWN OF MADAWASKA)
)
Defendant)

AMENDED DECISION
and ORDER

This matter comes before the court on Plaintiff's Rule 80B appeal from a June 5, 2006 decision of the Madawaska Zoning Board of Appeals (ZBA). The matter was before the ZBA on an Administrative Appeal brought by Plaintiff's abutting neighbors Emile and Helen Morin following the Madawaska Planning Board's (Board) decision to grant the Plaintiff's two separate land use permit applications.

Pursuant to the provisions of Madawaska's Shoreland Zoning Ordinance (the Ordinance), the Plaintiff had applied for two separate permits regarding his property on the shore of Long Lake. In his first application, the Plaintiff sought a permit to build a permanent boat landing. In his second application, the Plaintiff sought a permit to add a deck and full foundation to the existing structure on his property.

On March 13, 2006, the Board voted to approve the foundation under the existing structure because it met the setback from the water to the greatest practical extent. In a second vote on that same date, the Board declined to grant a permit for a permanent boat landing. (Record at Tab 3) However, on April 27, 2006, the Board revisited the Plaintiff's

request for a boat landing permit and voted to grant that permit conditioned upon approval by the Department of Environmental Protection. (Record at Tab 5)

Attorney Robert Bellefleur represents the Morins and wrote to the Code Enforcement Officer to complain about the Board's decision to grant the Plaintiff a permit for his deck and foundation project. (Record at Tab 4)¹ Attorney Bellefleur argued that the Board had exceeded its authority because the Plaintiff's project would require a variance and only the ZBA could grant a variance and then only after compliance with the pertinent zoning ordinances. Although Attorney Bellefleur's letter was dated April 12, 2006 it was not received by the code enforcement officer until April 24, 2006. (Record at Tab 4)² The letter sets forth the Morins' legal argument regarding the invalidity of the Board's action and warned that "Mr. and Mrs. Morin have instructed me to file an appeal with the Board of Appeals if the permit is issued without the necessary sideline variances." (Record at Tab 4)

On May 22, 2006, Attorney Bellefleur filed a formal notice of appeal from the Board's April 27, 2006 approval of the Plaintiff's application for a boat landing permit. Attorney Bellefleur did not file any formal notice of appeal from the Board's approval of Plaintiff's application for the foundation permit.

At the June 5, 2006 public hearing, the ZBA voted to remand both of the Plaintiff's permit applications back to the Board for further consideration.

¹ Although the Morins filed an Administrative Appeal, they have not participated in this matter beyond that ZBA hearing held on July 17, 2006. The court is satisfied that the Town has standing to participate in these proceedings by virtue of 30-A M.R.S.A. §4353 and Crosby v. Town of Belgrade, 562 A.2d 1228 (Me. 1989)

² The court notes that the written Notice of Administrative Appeal Decision of August 14, 2006 reports that the letter was received on April 21, 2006 which would conflict with the April 24, 2006 date of receipt notation on the letter itself. (Record at Tab 17) In the court's view, this discrepancy is irrelevant.

On June 7, 2006, the Plaintiff asked the ZBA to reconsider its decision (Record at Tab 12), however the ZBA declined to undertake any reconsideration (Record at Tab 13) and on July 17, 2006 informed the Plaintiff that they could take no further action because the request was untimely. The Plaintiff then appealed the ZBA's decision to this court.

The Plaintiff has now filed the present action challenging the decision of the ZBA. The Plaintiff raises several issues but because the court finds the first challenge to be dispositive, it does not address the others. The Plaintiff argues first, that the ZBA order cannot stand because the ZBA was without jurisdiction and further, because there was no timely appeal of the Board's decisions they are now final. The court agrees.³

With respect to the issues before the court, the ZBA has no power except that which is granted in the Ordinance or by statute. Section 16 (G) provides in relevant part:

1. Powers and Duties of the Board of Appeals

The Board of Appeals shall have the following powers:

(a) Administrative Appeals: To hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by or failure to act by, the Code Enforcement Officer or Planning Board in the administration of this Ordinance.

3. Appeal Procedure

a. Making an Appeal

(1) An administrative ... appeal may be taken to the Board of Appeals by an aggrieved party from any decision... of the Planning Board. Said administrative... appeal shall be taken within thirty (30) days of the date of the decision appealed from, and not otherwise, except that the Board, upon a showing of good cause, may waive the thirty (30) day requirement.

³ The Town contends that the court should not review the ZBA decision in this appeal, but rather should review directly the determination of the Board because it was the operative decision. In the court's opinion, it doesn't matter whether the ZBA decision or the Board's decision is the *operative municipal decision* within the analytical framework set forth in *Stewart v. Town of Sedgwick*, 2000 ME 157, 757 A.2d 773 because the Boards' decision became final in the absence of a timely appeal.

(2) Such appeal shall be made by filing with the Board of Appeals a written notice of appeal which includes:

(i) a concise written statement indicating what relief is requested and why it should be granted.

(ii) A sketch drawn to scale showing lot lines, location of existing buildings and structures and other physical features of the lot pertinent to the relief sought.

1. Boat Landing Permit

Upon further review of the proceedings before the Planning Board, the parties are now in agreement that the Planning Board decision to issue a permit for a permanent boat landing, subject to DEP permitting, should be upheld.

2. Foundation Permit

The court concludes that there was no effective appeal from the Planning Board's March 13, 2006 decision to approve the construction of a foundation under the existing structure. The court concludes that by its own language, Attorney Bellefleur's letter dated April 12, 2006 was not a clear notice of an intent to appeal but rather was only a conditional threat of an appeal. However, for argument's sake, even if one might construe the letter as an effective notice of appeal, the record is clear that the Town did not receive this "notice of appeal" until April 24, 2006. (Record Tab 4 and Tab 17)⁴ The thirty (30) day period for filing a notice of appeal expired on April 12, 2006. In the absence of a timely notice of appeal, the Board's decision to grant both the boat landing permit and the foundation became final. The Law Court has told us that "strict compliance with the appeal procedure of an ordinance is necessary ..." and that notices

⁴ As indicated above, there is some record support for receipt on April 21, 2006 at Record Tab 17.

of appeal filed outside of the prescribed time period are untimely.⁵ Juliano v. Town of Poland, 1999 ME 42, ¶7, 725 A.2d 545, 548.

Accordingly, this court concludes that the June 5, 2006 determinations of the ZBA to remand both the Plaintiff's boat landing application and foundation application to the Board are not supported by law because both Board determinations were final and beyond the authority of the ZBA to address in any way.

The entry shall be:

The Plaintiff's appeal is sustained and the matter is remanded back to the Madawaska Planning Board with an order to issue the permit for a permanent boat landing subject to DEP approval, and to approve a foundation under the existing structure as set forth in its March 13, 2006 vote.

Date: October , 2007

JUSTICE, SUPERIOR COURT

⁵ There is nothing in this record to indicate that the Town or the Morins ever sought leave to extend the time for filing an administrative appeal for "good cause as provided by Section 16 (G)(3)(a).

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Pursuant to the provisions of Madawaska's Shoreland Zoning Ordinance (the Ordinance), the Plaintiff had applied for two separate permits regarding his property on the shore of Long Lake. In his first application, the Plaintiff sought a permit to build a private permanent boat landing. In his second application, the Plaintiff sought a permit to add a deck and full foundation to the existing structure on his property.

On March 13, 2006, the Board voted to ~~grant the Plaintiff a permit for his deck and foundation~~ approve the foundation under the existing structure because it met the setback from the water to the greatest practical extent. In a second vote on that same

date, the Board declined to grant a permit for a permanent boat landing. (Record at Tab 3) However, on April 27, 2006, the Board revisited the Plaintiff's request for a boat landing permit and voted to grant that permit conditioned upon approval by the Department of Environmental Protection. (Record at Tab 5)

Attorney Robert Bellefleur represents the Morins and wrote to the Code Enforcement Officer to complain about the Board's decision to grant the Plaintiff a permit for his deck and foundation project. (Record at Tab 4)¹ Attorney Bellefleur argued that the Board had exceeded its authority because the Plaintiff's project would require a variance and only the ZBA could grant a variance and then only after compliance with the pertinent zoning ordinances. Although Attorney Bellefleur's letter was dated April 12, 2006 it was not received by the code enforcement officer until April 24, 2006. (Record at Tab 4)² The letter sets forth the Morins' legal argument regarding the invalidity of the Board's action and warned that "Mr. and Mrs. Morin have instructed me to file an appeal with the Board of Appeals if the permit is issued without the necessary sideline variances." (Record at Tab 4)

On May 22, 2006, Attorney Bellefleur filed a formal notice of appeal from the Board's April 27, 2006 approval of the Plaintiff's application for a boat landing permit. Attorney Bellefleur did not file any formal notice of appeal from the Board's approval of Plaintiff's application for the ~~deck and~~ foundation permit.

¹ Although the Morins filed an Administrative Appeal, they have not participated in this matter beyond that ZBA hearing held on July 17, 2006. The court is satisfied that the Town has standing to participate in these proceedings by virtue of 30-A M.R.S.A. §4353 and Crosby v. Town of Belgrade, 562 A.2d 1228 (Me. 1989)

² The court notes that the written Notice of Administrative Appeal Decision of August 14, 2006 reports that the letter was received on April 21, 2006 which would conflict with the April 24, 2006 date of receipt notation on the letter itself. (Record at Tab 17) In the court's view, this discrepancy is irrelevant.

At the June 5, 2006 public hearing, the ZBA voted to remand both of the Plaintiff's permit applications back to the Board for further consideration.

On June 7, 2006, the Plaintiff asked the ZBA to reconsider its decision (Record at Tab 12), however the ZBA declined to undertake any reconsideration (Record at Tab 13) and on July 17, 2006 informed the Plaintiff that they could take no further action because the request was untimely. The Plaintiff then appealed the ZBA's decision to this court.

The Plaintiff has now filed the present action challenging the decision of the ZBA. The Plaintiff raises several issues but because the court finds the first challenge to be dispositive, it does not address the others. The Plaintiff argues first, that the ZBA order cannot stand because the ZBA was without jurisdiction and further, because there was no timely appeal of the Board's decisions they are now final. The court agrees.³

With respect to the issues before the court, the ZBA has no power except that which is granted in the Ordinance or by statute. Section 16 (G) provides in relevant part:

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The Board of Appeals shall have the following powers:

(a) Administrative Appeals: To hear and decide appeals where it is alleged that there is an error in any order, requirement, decision, or determination made by or failure to act by, the Code Enforcement Officer or Planning Board in the administration of this Ordinance.

3. Appeal Procedure

a. Making an Appeal

³ The Town contends that the court should not review the ZBA decision in this appeal, but rather should review directly the determination of the Board because it was the operative decision. In the court's opinion, it doesn't matter whether the ZBA decision or the Board's decision is the *operative municipal decision* within the analytical framework set forth in Stewart v. Town of Sedgwick, 2000 ME 157, 757 A.2d 773 because the Boards' decision became final in the absence of a timely appeal.

(1) An administrative ... appeal may be taken to the Board of Appeals by an aggrieved party from any decision... of the Planning Board. Said administrative... appeal shall be taken within thirty (30) days of the date of the decision appealed from, and not otherwise, except that the Board, upon a showing of good cause, may waive the thirty (30) day requirement.

(2) Such appeal shall be made by filing with the Board of Appeals a written notice of appeal which includes:

(i) a concise written statement indicating what relief is requested and why it should be granted.

(ii) A sketch drawn to scale showing lot lines, location of existing buildings and structures and other physical features of the lot pertinent to the relief sought.

1. Boat Landing Permit

Upon further review of the proceedings before the Planning Board, the parties are now in agreement that the Planning Board decision to issue a permit for a private permanent boat landing, subject to DEP permitting, should be upheld.

2. Foundation/~~Deck~~ Permit

The court concludes that there was no effective appeal from the Planning Board's March 13, 2006 decision to ~~grant the Plaintiff a permit to approve the construction of a foundation and deck upon his property under the existing structure.~~ approve the construction of a foundation and deck upon his property under the existing structure. The court concludes that by its own language, Attorney Bellefleur's letter dated April 12, 2006 was not a clear notice of an intent to appeal but rather was only a conditional threat of an appeal.

However, for argument's sake, even if one might construe the letter as an effective notice of appeal, the record is clear that the Town did not receive this "notice of appeal" until April 24, 2006. (Record Tab 4 and Tab 17)⁴ The thirty (30) day period for filing a notice of appeal expired on April 12, 2006. In the absence of a timely notice of appeal, the

⁴ As indicated above, there is some record support for receipt on April 21, 2006 at Record Tab 17.

Board's decision to grant both the boat landing permit and the foundation/~~deck~~ permits became final. The Law Court has told us that "strict compliance with the appeal procedure of an ordinance is necessary ..." and that notices of appeal filed outside of the prescribed time period are untimely.⁵ Juliano v. Town of Poland, 1999 ME 42, ¶7, 725 A.2d 545, 548.

Accordingly, this court concludes that the June 5, 2006 determinations of the ZBA to remand both the Plaintiff's boat landing permit application and foundation/~~deck~~ permit application to the Board are not supported by law because both Board determinations were final and beyond the authority of the ZBA to address in any way.

The entry shall be:

The Plaintiff's appeal is sustained and the matter is remanded back to the Madawaska Planning Board with an order to issue the permits for a ~~private~~ permanent boat landing subject to DEP approval, and to approve for a foundation and deck as initially approved under the existing structure as set forth in its March 13, 2006 vote.

Date: ~~May 9~~ October , 2007

JUSTICE, SUPERIOR COURT

⁵ There is nothing in this record to indicate that the Town or the Morins ever sought leave to extend the time for filing an administrative appeal for "good cause as provided by Section 16 (G)(3)(a).