

RUDMAN WINCHELL MEMORANDUM

From: Ed Bearor, Esq., Rudman Winchell
To: Town of Lamoine Board of Appeals
Date: March 6, 2015

Re: Friends of Lamoine v. Code Enforcement Officer

Landowner Doug Gott & Sons, Inc. (“Gott”) provides the following Memorandum to the Town of Lamoine Board of Appeals (the “Board”) regarding a complaint filed by the Friends of Lamoine (the “Friends”) against Gott.

Background

The Friends filed a complaint, dated October 22, 2014, for an alleged violation of the 2013 Lamoine Gravel Ordinance. In their complaint, the Friends alleged that Gott had excavated over 500 cubic yards of gravel on land owned by Gott, identified as Lots 6 and 8 on Map 3 of the Lamoine Assessor’s Maps, without a permit issued pursuant to the Gravel Ordinance.

In a letter, dated November 13, 2014, the Lamoine Code Enforcement Officer responded to the complaint, finding that no violation of the Gravel Ordinance had occurred and that disturbance of gravel and topsoil was associated with a construction project on the property. This project was proposed in a January 21, 2014 Site Plan Review Ordinance application submitted by Gott (the “Gott Application”) to the Lamoine Planning Board. The Gott Application included removal of approximately 70,000 cubic yards of gravel and overburden to reduce the grade of the project site prior to construction. After an initial denial, and subsequent appeal by Gott to the Board, the Planning Board issued a permit on August 13, 2014.

On December 11, 2014, the Friends appealed the Code Enforcement Officer’s November 13, 2014 decision to the Board, requesting a hearing on the matter.

Discussion

The Board should deny the appeal and request for a hearing by the Friends because: 1) the Board does not have jurisdiction; 2) the Friends do not have standing; and 3) their complaint was not timely. Each of these issues is discussed below.

Jurisdiction of the Board

Municipal boards of appeals are governed by statute under Title 30-A, Section 2691 of the Maine Revised Statutes. Subsection 4 of that section governs jurisdiction of a board of appeals, providing as follows:

Any municipality establishing a board of appeals may give the board the power to hear any appeal by any person, affected directly or indirectly, from any decision, order, regulation or failure to act of any officer, board, agency or other body when an appeal is necessary, proper or required. No board may assert jurisdiction over any matter unless the municipality has by charter or ordinance specified the precise subject matter that may be appealed to the board and the official or officials whose action or nonaction may be appealed to the board. . . . Any such decision that is not timely appealed is subject to

the same preclusive effect as otherwise provided by law. 30-A M.R.S. §2691(4),
emphasis added.

The Friends' complaint is for an alleged violation of the Town's Gravel Ordinance. Section 7(G)(1) of that ordinance, governing appeals, states, in pertinent part, that "[a]ny decision of the Planning Board may be appealed by any party of standing to the Lamoine Board of Appeals."

The language in Section 7(G)(1) of the Gravel Ordinance limits the type of appeals that the Board can hear to decisions of the Planning Board. No other town official is specified. Here, the Friends are not appealing a decision of the Planning Board, but a determination by the Code Enforcement Officer that a violation of the Gravel Ordinance has not occurred. The enforcement provisions contained in Section 7(H) do not provide for an administrative appeals process. Because the Gravel Ordinance only specifies that decisions of the Planning Board, not violation determinations by the Code Enforcement Officer, are subject to appeal, the Board does not have jurisdiction under 30-A M.R.S. §2691(4) to hear the Friends' appeal.

Determination of Parties and Standing of the Friends

Notwithstanding the Board's lack of jurisdiction in this matter, the Friends also do not have standing to pursue this appeal.

The question of standing depends on the language of the governing ordinance. See Nergaard v. Town of Westport Island, 2009 ME 56, ¶ 12, 973 A.2d 735, 739 (2009). As stated above, Section 7(G)(1) of the Gravel Ordinance provides that "[a]ny decision of the Planning Board may be appealed by any party of standing to the Lamoine Board of Appeals." The term "party of standing" is not a defined term under the Gravel Ordinance.

To establish standing, a party must demonstrate that: 1) it has party status; and 2) that it has suffered a particularized injury or harm. See Nergaard, 2009 ME 56, ¶ 12, 973 A.2d at 740.

Regarding the party status of a citizens group such as the Friends, the Law Court has stated "an appellant need not have formally appeared as a party as long as it participated throughout the process." *Friends of Lincoln Lakes v. Town of Lincoln*, 2010 ME 78, ¶ 12, 2 A.3d 284, 288 (2010). In that case, the Court held that a citizens group did not have standing to appeal an approval of a wind power permit because it did not offer proof that any of its members participated in any proceeding, only that some had attended those meetings.

The proceedings associated with the Gott Application must be examined in order to gauge the Friends' participation. As noted above, the Gott Application involved removal of approximately 70,000 cubic yards of material, including gravel, prior to construction. This is the same material that is subject of the Friends' complaint against the Code Enforcement Officer.

The minutes of Planning Board and Board of Appeals meetings reflect that members of the Friends did attend some of those meetings. There is, however, no record of any members participating in the meetings or otherwise offering input or comments regarding the Gott Application. Notably, the minutes of the Board's May 14, 2014 hearing on Gott's appeal of the Planning Board's initial denial of Gott Application reflect that no members of the Friends were present. Prior to this hearing, the Board solicited written testimony from any party in standing in its public notice for the hearing, dated April 14, 2014. No party offered any testimony.

As supported by *Friends of Lincoln Lakes*, the lack of participation by the Friends in the permitting process for the Gott Application is ample grounds to deny them standing.

Further, the Friends have not alleged that it, or any of its members, have suffered some particularized harm or injury. Such an injury is one that “adversely and directly affects a party’s property, pecuniary or personal rights.” *Friends of Lincoln Lakes*, 2010 ME 78, ¶ 14, 2 A.3d at 289. The Court has noted that “standing has been liberally granted to people who own property in the same neighborhood as the property that is subject to a permit . . .” *Id.* However, even if the Friends could overcome this minimal threshold, they still are not a party of standing because they do not have, and never did have, party status due to their lack of participation in the permitting proceedings.

Timeliness

In addition to the Board’s lack of jurisdiction and the Friends’ lack of standing, any appeal by the Friends relating to activities on the Gott property is not timely.

The proper time for an appeal would have been after the Board’s June 4, 2014 decision sending the Gott Application back to the Planning Board for reconsideration. The Board’s Notice of Decision specifically made a finding of fact that addressed the disturbance of gravel and other material on the project property. See Fact 2 of Notice of Decision, Doug Gott & Sons, Inc. v. Lamoine Planning Board, June 4, 2014.

Under Title 30-A, Section 2691(3)(F), the Board “may reconsider any decision reach under this section within 45 days of its prior decision. A request to the board to reconsider a decision must be filed within 10 days of the decision that is to be reconsidered.” Any request to reconsider the Board’s June 4, 2014 decision would have been due on June 14, 2014. No such request was filed.

Alternatively, the Friends could have appealed the Planning Board’s decision to issue the Site Plan Review Ordinance permit that was approved during the Planning Board’s August 13, 2014 meeting. The Town’s Site Plan Review Ordinance provides, in pertinent part, that:

[i]f the board . . . grants approval with conditions that are objectionable to the applicant or to any abutting landowner or any aggrieved party, . . . the applicant, an abutting landowner, or aggrieved party that has standing may appeal the decision of the board, as follows:

- a. A written appeal must be filed within thirty (30) days of the time the applicant receives a written notice of the board’s decision.

Town of Lamoine Site Plan Review Ordinance, Section M (Appeals), March 6, 2001, as amended. The Planning Board approved the Gott Application on August 13, 2015. Under this Section M of the Site Plan Review Ordinance, an appeal by a proper party with standing must have been received within thirty (30) days. Again, no such appeal was filed.

Because all appeal periods have run for the applicable permitting process under the Site Plan Review Ordinance, the Friends have no recourse to the appeals process have no grounds to resort to enforcement of the Gravel Ordinance—an ordinance that both the Planning Board and Board of Appeals have determined does not apply to the Gott property.