

ROCKINGHAM, SS

STATE OF NEW HAMPSHIRE

SUPERIOR COURT

Michael Russo and Chris Reagan
as members of Neighborhood Guardians

v.

Nottingham Planning Board

**VERIFIED APPEAL FROM DECISION OF
NOTTINGHAM PLANNING BOARD**

NOW COME the Petitioners, Michael Russo and Chris Reagan as members of Neighborhood Guardians, in accordance with RSA 677:15, seeking a certiorari order to the Town of Nottingham Planning Board to review their November 16, 2005 decision granting site plan approval to USA Springs, Inc. to construct and operate a large groundwater withdrawal and bottling facility, and state the following in support thereof:

A. APPEAL SUMMARY

1. USA Springs, Inc. (Applicant) sought site plan approval to construct a facility, including groundwater extraction wells, to withdraw more than 300,000 gallons per day of groundwater and bottle it for distribution. The Applicant obtained a conditional permit from the state for the withdrawal that is currently on appeal to the NH Supreme Court. In accordance with its site plan regulations, the Nottingham Planning Board was required to consider impacts of the proposal on its groundwater and wetlands and to determine whether it posed a danger to the health, safety and prosperity of the community. It did not perform any of these critical functions. Nor did the Planning Board consider impacts to property values for the homes surrounding the proposed development. As such, the Planning Board's actions were unreasonable and unlawful and should be reversed.

The Planning Board prematurely cut off public participation and public comment regarding final documents being considered, including written conditions of approval and a

memorandum of understanding between the Applicant and Planning Board. This procedural defect created a serious impairment of opportunity for fair notice and participation. Such unlawful and unreasonable action by the Planning Board warrants reversal.

B. PARTIES

2. Michael Russo of 28 Garland Road in Nottingham, 03290, actively participated in the planning board proceedings that are the subject of this appeal. He is a near neighbor to the proposed development and lives within the 7,000 foot zone of groundwater influence surrounding the proposed development. He is the Chairman of the Neighborhood Guardians, a non-profit entity that is registered with the New Hampshire Secretary of State. He is a person aggrieved by the decision of the planning board and his property, including his well, is directly affected by the proposed large scale withdrawal of groundwater and the development.

3. Chris Reagan of 81 Freeman Hall Road, Nottingham, New Hampshire, 03290, actively participated in the subject planning board proceedings. He is a near neighbor to the proposed development and lives within the 7,000 foot zone of groundwater influence surrounding the proposed development. He is the Treasurer of the Neighborhood Guardians. He is a person aggrieved by the decision of the planning board and his property, including his well, is directly affected by the proposed large scale withdrawal of groundwater and the development.

4. Neighborhood Guardians is a non-profit association with a mailing address of PO Box 14, West Nottingham, New Hampshire, 03291. Neighborhood Guardians is comprised of approximately 45 members many of whom actively participated in the subject planning board proceedings and are residents of Nottingham and Barrington. The members

formed Neighborhood Guardians out of convenience to challenge the Nottingham Planning Board's November 16, 2005 decision. Members of Neighborhood Guardians are aggrieved by the decision of the planning board and are directly affected by it.

5. The Nottingham Planning Board is duly established under RSA 673:1. Its Chairman is Dave Smith and its mailing address is 139 State Road, P.O. Box 114, Nottingham, New Hampshire, 03290

C. JURISDICTION AND VENUE

6. This Court has jurisdiction over this matter pursuant to RSA 677:15. As the land upon which the controversy relates is located in Nottingham and Barrington, New Hampshire, and all of the parties are from Nottingham, venue is proper in Rockingham County.

D. THE PLANNING BOARD'S DECISION IS UNLAWFUL AND UNREASONABLE

7. The Applicant applied to the Nottingham Planning Board for site plan approval in approximately April 2001 to construct a water extraction and bottling plant in Nottingham (location). It withdrew its original application but resubmitted it in 2004.

8. On November 16, 2005, the Nottingham Planning Board voted (5-2) to grant site plan approval, with conditions. The conditions included water sampling protocols and outlined the Applicant's responsibility and steps to address any potential adverse impacts to groundwater, including neighbors' wells, should they occur.

9. The Applicant sought state approval to withdraw 439,000 gallons per day (amended to 310,000) from the New Hampshire Department of Environmental Services (DES) pursuant to RSA 485-C:21, Groundwater Protection Act. DES approved, with conditions, the request that is now on appeal to the NH Supreme Court.¹

¹ The Boards of Selectmen from the Towns of Nottingham and Barrington and an organization called Save Our Groundwater appealed the DES permit to the NH Supreme Court. The Barrington Board of Selectmen and Save Our Groundwater have appealed the DES wetlands permit to the NH Water Council. The Applicant's driveway permit from the State Department of Transportation expired in September of 2005.

Planning Board Decision Unlawful and Unreasonable Where No Consideration Of Impact To Groundwater Or Wetlands And No Consideration Of Whether Proposal Posed Danger To Health, Safety and Prosperity In The Community

10. The Groundwater Protection Act specifically preserves the role of local planning and management in groundwater protection. RSA 485-C:1, I, Statement of Purpose. The Act expressly provides that it does not preempt local authority to enact its own regulations affecting groundwater, other than groundwater withdrawals. RSA 485-C:20, Effect on Local Ordinances.

11. Nottingham Planning Board site plan review regulations (in effect since 1986) state that the purpose of site plan approval is to ensure safe development and to guard against conditions that present a danger or injury to “health, safety and prosperity.”

12. The town’s regulations expressly identify “**inadequate protection of the quality of groundwater**” as well as inadequate drainage, discharges to the environment, noise and fire safety as conditions that it must consider to ensure that a proposed development will not threaten “health, safety and prosperity” of its residents.

13. In addition, the site plan approval regulations required the planning board to review the applicant’s Impact Statement to assess, among other things, public safety, increased consumption of groundwater, pollution of water or air and disturbance to other aspects of the natural ecology. Site Plan Review Regulations, Section V, B (9).

14. Aspects of the natural ecology include wetlands that are hydrologically connected to the groundwater from which the applicant proposed to withdraw water.

15. The Applicant’s property (approximately 100 acres) that is being proposed for development is primarily located in the Town of Nottingham with a smaller portion (20

acres) in the Town of Barrington. The parcel contains wetlands in both towns. The wetlands in the Town of Barrington are designated prime wetlands.

16. Towns are permitted to protect wetlands more stringently than the state. See Cherry v. Town of Hampton Falls, 150 NH 720, 725 (2004).

17. The Town of Nottingham has no public water system. Its inhabitants, schools and businesses rely solely on groundwater wells for water.

18. The Planning Board had reports and evidence before it that the proposed development would negatively impact the groundwater, surrounding wells and wetlands, including the prime wetlands. The Planning Board's own expert identified the need to evaluate the potential for water quality impacts.

19. Notwithstanding its express authority and responsibility to consider whether the proposed development and groundwater withdrawal would impact groundwater quality or quantity or the wetlands and/or whether it would present a danger or injury to the "health, safety and prosperity" of the community, the Planning Board chose not to.

20. At its final hearing on November 16, 2005, the Planning Board unanimously approved the following motion:

The Nottingham Planning Board has not considered or reviewed the effects of the Large Groundwater Withdrawal on the safety or prosperity of the surrounding properties, nor the direct effects of the Large Groundwater Withdrawal on the wetlands on the property. This action was taken due to the preemption of planning board review of the State of New Hampshire Large Groundwater Withdrawal Permit No. 2004-0003.

See Minutes of Planning Board Meeting and Decision, November 16, 2005, p. 6.

21. A Planning Board member explained the motion was to make it clear to a reviewing court that the planning board did not agree that the state groundwater permit protected the town and that if the court remanded the matter to review potential impacts, it would do so. The Planning Board minutes from November 16, 2005 provide:

Mr. Caron feels that if we do not go on the record stating this, if/when a court reviews our action, they might be under the impression that the Large Groundwater Withdrawal Permit protected the Town and we agreed. If we want to vote on this and make a motion, it will be clear in court that if they felt we were supposed to take them into account, it will remand to us and will be very clear between us and the Applicant that we are supposed to review the quantity issue. If we do not, I have a problem voting on the application tonight. We need to do this. We need to have a better understanding of the permit and its affect.

22. The Planning Board's failure to adequately investigate and consider groundwater impacts and/or impacts to wetlands is an unlawful and unreasonable breach of their unambiguous regulatory obligation under its site plan approval regulations. 23.

The Planning Board's decision not to consider whether the proposed withdrawal or the development, in general, would threaten the "health, safety and prosperity" of its residents is an unlawful and unreasonable breach of their unambiguous regulatory obligations under its site plan approval regulations.

24. The Planning Board also failed to consider the affect of the large groundwater withdrawal or the development, in general, on the values of neighboring properties as it was required to do under its general authority to assess "health, safety and prosperity" of the community. As such the decision is unreasonable and unlawful.

The Planning Board's Decision To Close Public Comment Period Before Conditions Of Approval And Other Documents Finalized Was Unreasonable and Unlawful And Where Information Not Readily Accessible To Public Board Acted In Unreasonable And Unlawful Manner

25. The Planning Board's consultants worked with the Applicant to develop a set of Conditions of Approval.

26. The Planning Board closed oral public comment on August 17, 2005, before the Conditions of Approval were finalized.

27. The consultants continued to work out the details of the Conditions of Approval.

28. Subsequent to closing oral public comment, the Planning Board agreed to allow their consultants to develop a Memorandum of Understanding with the Applicant.

29. At the September 14, 2005 Planning Board meeting the Planning Board's consultant gave planning board members copies of draft Conditions of Approval and draft Memorandum of Understanding. The chairman read the water monitoring conditions out loud.

30. The draft Conditions of Approval and Memorandum of Understanding were not made available to the public in written form.

31. In the month of October, 2005, the Planning Board's consultants and the Applicant continued to work on the draft documents, including the development of draft attachments 1 and 2 to the Memorandum of Understanding. Attachment 1 was entitled Domestic Well Water Supply Contingency Plan. Attachment 2 was entitled Residential Well Monitoring Plan.

32. The draft documents continued to be unavailable to the public throughout this period.

33. At the October 27, 2005 Planning Board meeting, Chairman Smith remarked that amendments were still needed to the Memorandum of Understanding. He reminded the public who attempted to speak that public comment was closed on August 27, 2005.

34. When a member of the public inquired if the board would accept written comment, Chairman Smith replied that they had not decided on a final date. Thereafter, the board agreed to close all public comment on November 2, 2005.

35. Members of the public expressed concern about the documents not being available for inspection or copying.

36. A draft Memorandum of Understanding and Conditions of Approval were provided by the Applicant for public inspection on or about November 1, 2005, one day before the public comment period closed.

37. Despite the fact that the public comment period had closed, changes were allegedly made to the draft documents between November 2, 2005 and November 16, 2005, including a change to one of the conditions on the night of the final approval.

38. At the final hearing on November 16, 2005, a member of the public advised the board that he could not get a copy of the Memorandum of Understanding from the library where the board had claimed it was located.

39. A member of the public also pointed out that nine other towns had not received the Conditions of Approval as part of their Regional Impact involvement.

40. RSA 673:17 provides that a land use board's records must be maintained in accordance with RSA 91-A, and, thus remain open to the public.

41. The Memorandum of Understanding, attachments and Conditions of Approval were not open to the public. Thus, the Planning Board's actions were unreasonable and unlawful.²

42. RSA 676:4, IV, Board's Procedures on Plats, provides for mandatory reversal in the event opportunity for notice and participation are not allowed. It states:

Procedural defects shall result in the reversal of a planning board's actions by judicial action only when such defects create serious impairment of opportunity for fair notice and participation.

43. The Planning Board's failure to allow a meaningful opportunity for the public to engage in and participate in the discussions and meetings pertaining to the Conditions of Approval, Memorandum of Agreement and attachments 1 and 2 was a procedural defect that created a serious impairment of opportunity for fair notice and

² At the meeting, Planning Board members revealed that they had exchanged email communications with the Applicant and/or Applicant's consultants in connection with developing the Memorandum of Understanding. A formal Right to Know request for a file review including email correspondence was made on or about November 23, 2005 for a file review to be conducted on November 29, 2005. At the November 29th file review, the subject emails were not in the Planning Board's file. At the November 30, 2005 Planning Board meeting, Chairman Smith instructed all board members to print and submit their emails to the board's counsel. One board member stated he had deleted all e-mail correspondence concerning the case. None of the requested email correspondence was in the file during a file review conducted on December 12, 2005.

participation. Such unlawful and unreasonable action by the Planning Board warrants reversal. See also, Sklar Realty, Inc. v. Merrimack & Agway, Inc., 125 NH 321, 329 (board's failure to allow plaintiff opportunity to challenge applicant's claim that it satisfied conditions was a serious impairment of opportunity for participation for which reversal was the only effective remedy).

44. The Petitioners hereby adopt, incorporate and join in any issues raised in any appeal petition to this Court pursuant to RSA 677:15 that is filed on behalf of Town of Barrington Board of Selectmen and/or Town of Nottingham Board of Selectmen.

WHEREFORE the Petitioners respectfully request that this Honorable Court:

- A. Grant certiorari review of the decision of the Planning Board;
- B. Issue an Order remanding the decision of the Planning Board; and
- C. Grant such other and further relief as this Court deems just and equitable.

Respectfully submitted,

Michael Russo and Chris Reagan on
behalf of Neighborhood Guardians

By their attorneys,
Baldwin, Callen & Ransom, PLLC

By: _____
Geoffrey J. Ransom
101 N. State Street
Concord NH 03301
(603) 225-2585

Dated: _____

I, Michael Russo, upon oath do hereby depose and state that I have reviewed the within VERIFIED APPEAL FROM DECISION OF NOTTINGHAM PLANNING BOARD and state that it is true and accurate to the best of my knowledge and belief.

Dated: _____

Michael Russo

STATE OF NEW HAMPSHIRE
COUNTY OF _____

On this _____ day of December, 2005, before me, the undersigned officer, personally appeared, _____, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within document and acknowledged that he executed the same for the purpose therein contained.

In witness whereof I hereunto set my hand and official seal.

Justice of the Peace/Notary Public

I, Chris Reagan, upon oath do hereby depose and state that I have reviewed the within VERIFIED APPEAL FROM DECISION OF NOTTINGHAM PLANNING BOARD and state that it is true and accurate to the best of my knowledge and belief.

Dated: _____

Chris Reagan

STATE OF NEW HAMPSHIRE
COUNTY OF _____

On this _____ day of December, 2005, before me, the undersigned officer, personally appeared, _____, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within document and acknowledged that he executed the same for the purpose therein contained.

In witness whereof I hereunto set my hand and official seal.

Justice of the Peace/Notary Public