

## STATE OF NEW HAMPSHIRE

CARROLL, SS

SUPERIOR COURT

Docket No. 07-E-180

Motorsports Holdings, LLC

v.

Town of Tamworth Planning Board

## ORDER ON MOTION FOR SUMMARY JUDGMENT

Pending<sup>1</sup> before the court is the Motion for Summary Judgment filed by the petitioner Motorsports Holdings, LLC (Motorsports), to which the respondent Town of Tamworth Planning Board (the Town or the Planning Board) and the Intervenors object. The parties have waived hearing on this motion and requested that the court rule on the pleadings and record before it.<sup>2</sup> For the following reasons, the motion for summary judgment is granted.

In deciding whether to grant summary judgment, the court considers the pleadings, affidavits and related documents, as well as all inferences properly drawn from them, in the light most favorable to the non-moving party. *See Purdie v. Attorney General*, 143 N.H. 661, 663 (1999). Summary judgment may be granted only where no genuine issue of material fact is present and the moving party is entitled to judgment as a matter of law. *Id.*; RSA 491:8-a, III.

In the present case, there is no dispute about the facts material to the two issues raised by Motorsports in its motion for summary judgment. Accordingly, the court

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<sup>1</sup> Also pending are several motions concerning proposed additions to or deletions from the certified record and a motion concerning discovery. The grant of Motorsports' motion for summary judgment renders those other pending motions moot.

<sup>2</sup> On November 18, 2008, the court granted the assented-to request that it cancel the scheduled hearing on this and other motions and that it rule on the pleadings and record. That action rendered the pending motion for summary judgment ripe for decision at that time. It was brought to my attention the last week of August 2009 that this motion remained in the file, ripe for review but without decision. That the delay is a consequence of oversight in a busy court is no doubt of little solace to parties anxious for a decision on a matter both important on its own circumstances and entitled to priority by statute, *see* RSA 677:15, IV. I can do no more, or less, than to take this matter up now ahead of other matters awaiting decision, and to offer the parties my apologies for the delay.

examines whether Motorsports is entitled to judgment as a matter of law on those two issues.

Motorsports asserts two reasons for summary judgment in its favor. First, Motorsports asserts that the Planning Board violated the Right to Know Law, RSA Chapter 91-A, by meeting in nonpublic session on June 27, 2007 without satisfying the procedural requirements for such a meeting, *see* RSA 91-A:3, and by doing so with recused members present. Second, Motorsports asserts that the Planning Board violated RSA 676:4, I(h) by failing to adequately state the grounds for its September 26, 2007 disapproval of Motorsports' application.

Because a review of the record before the court shows that Motorsports is correct in both its assertions, the real issue presented is what, if any, remedy should be imposed. *See e.g. Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 155 N.H. 307, 312 (2007) (concerning remand to a zoning board of adjustment).

#### *Right to Know Law*

The Intervenors assert that no violation of the Right to Know Law occurred at the June 27, 2007 Planning Board meeting. The court disagrees. The Town itself admits that the Planning Board failed to follow the procedures set out in RSA 91-A:3 for going in to nonpublic session by failing to state the reason for doing so and failing to take a roll call vote, RSA 91-A:3, I(b). The court's review of the record confirms these violations of RSA 91-A:3, I(b). Because "[n]o body or agency may enter nonpublic session, except pursuant to a motion properly made and seconded," RSA 91-A:3, I(a), the June 27, 2007 nonpublic session violated the Right to Know Law.

Further, the Town's assertions notwithstanding, the Right to Know Law would not have authorized a nonpublic session concerning the Motorsports application at issue in this case in any event. The Planning Board's attorney was not present for legal consultation, and there were then no "pending claims or litigation . . . filed against the body," RSA 91-A:3, II(e), concerning the application at issue here.

The court concludes that the Planning Board's June 27, 2007 nonpublic session, at which the record shows matters concerning Motorsports' application were discussed for an hour, was conducted in violation of the Right to Know Law.

*Statement of Grounds for Disapproval*

When a planning board disapproves an application, the law requires that “the ground for such disapproval shall be adequately stated upon the records of the planning board.” RSA 676:4, I(h). The Planning Board voted to deny Motorsports’ application on September 26, 2007 without discussion, and without any reference to the ground or grounds for the disapproval. The notice of decision dated September 28, 2007 sets out no ground or grounds for disapproval.

The Town and the Intervenors argue that the emails solicited after the September 28, 2007 notice of decision and received from two of the three members voting to disapprove satisfy the RSA 676:4, I(h) requirement for an adequate statement upon the records of the planning board of the ground or grounds for denial. The court disagrees.

The court assumes without deciding that a Planning Board, could, as a body, supplement an insufficient notice of decision with a later notice of decision satisfying RSA 676:4, I(h). *Cf.* RSA 677:15, I (right to amend petition to court where minutes of planning board meeting, including written decision, not issued within 144 hours of the vote). That is not, however, what happened here. The purpose of requiring a statement of a board’s grounds for disapproval of an application is to provide the applicant “meaningful judicial review,” *Alcorn v. Rochester*, 114 N.H. 491, 495 (1974) (zoning board of adjustment), and to provide the court with an opportunity to conduct such a meaningful review.

The haphazard after-the-fact process followed here, while no doubt well intentioned and while providing some insight into the individual thoughts of two of the voting members, does not provide an opportunity for meaningful review of the decision of the Board as a whole. Without any discussion of the grounds for disapproval at the September 26, 2007 meeting and without any statement in the written notice of decision concerning the Planning Board’s grounds for disapproval, the after-the-fact emails of two of the three members voting to disapprove do not sufficiently assist the court in determining upon what ground or grounds the Planning Board as a body based its disapproval.

When the court reaches the merits of an appeal from a decision of a planning board denying an application, it is to determine on the record before it whether the decision was unreasonable or erroneous as a matter of law. *Star Vector Corp. vs. Town of Windham*, 146 N.H. 490, 492-93 (2001). Where there are no factual findings made by the Board, *see Bayson Properties v. City of Lebanon*, 150 N.H. 167, 170 (2003), and where the grounds for disapproval are not adequately stated by the Board, the risk of the court inappropriately speculating, or worse, substituting its judgment, is simply too great. The court concludes that the Planning Board failed to adequately state upon its records the ground for disapproval, *see* RSA 676:4, I(h).

#### *Remedy*

If the only issue concerned the failure to adequately state the grounds for disapproval, it is likely the remedy would be to vacate the decision of the Planning Board, RSA 677:15, V, and remand for the opportunity to clarify the decision based on the pre-existing record, *see Kalil*, 155 N.H. at 312. As the *Kalil* court noted, the statutory scheme does not generally contemplate remands to a board as many times as necessary in order to allow the board to elicit testimony or modify its record in order to sustain a denial. *Id.* Accordingly, where findings or grounds stated are inadequate, generally the scope of remand should be to give the board an opportunity to clarify its decision based upon the pre-existing record, *see id.*, and not an opportunity for the applicant, the intervenors, or the board to enlarge the record or to introduce new evidence or testimony, *see id.*

Here, however, we also have a violation of the Right to Know Law. The Town calls the Right to Know Law violation “innocent” and “technical,” and urges that the court find that making the minutes of the nonpublic session available the day after the meeting is a sufficient remedy. Motorsports urges that the proper remedy is to vacate the Planning Board decision and to grant Motorsports’ requested Special Use Permit. The Intervenor, while arguing that there was no violation of the Right to Know Law, urge that if the court finds otherwise the proper remedy would be to vacate the Planning Board’s decision and remand to the Planning Board for reconsideration of Motorsports’ application. Having found a violation of the Right to Know Law, the court agrees with the Intervenor concerning the appropriate remedy.

The Right to Know Law provides that, in event of a violation, the court may, among other things, “invalidate an action of a public body or agency taken at a meeting held in violation of this provision of this chapter, if the circumstances justify such invalidation.” RSA 91-A:8, II. The Town asserts that this statute constrains the court’s ability to invalidate an action of a public body to only those actions taken at the illegal meeting. Such a narrow interpretation of the court’s authority would be in contravention of the purpose of the Right to Know Law “to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.” *Lambert v. Belknap Cty. Convention*, 157 N.H. 375, 379 (2008) (citation and quotation omitted). Such an interpretation would avoid any consequence where a public body holds an illegal nonpublic session but does not take action until a later public session.

Such a result would be particularly disturbing here, where not only did the Planning Board conduct a nonpublic session in violation of the Right to Know Law, but where in addition members of the Planning Board recused from participating on the Motorsports application nevertheless attended and participated in that nonpublic session. The ability of the applicant to be confident in the fair and impartial consideration of its application, of the intervenors to be confident in the fair and impartial consideration of their views, of the court to be confident that it is reviewing the product of fair and impartial consideration, and of the public to be confident in the outcome reached by its representatives requires more than a remand to clarify and reissue the Planning Board’s decision.

Planning board members are held to the judicial standard of impartiality. *Appeal of Grimm*, 141 N.H. 719, 720 (1997) (“as impartial as the lot of humanity will admit,” N.H. CONST. pt. 1, art. 35). Accordingly, upon remand, each member participating must first determine for himself or herself whether under all the circumstances, including but not limited to their own participation in the nonpublic session held in violation of the Right to Know Law and the improper participation of recused Planning Board members at that June 27, 2007 nonpublic session, he or she continues to meet that standard of impartiality.

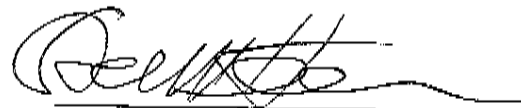
If, after following that impartiality review process, all non-recused members of the Planning Board who participated in the proceedings leading to the September 26, 2007 decision are able and willing to participate, the Planning Board shall reconsider Motorsports application. Reconsideration shall, at a minimum, include the opportunity for the applicant and intervenors to be heard before a decision is made. This order, while not requiring the Planning Board to provide an opportunity for the applicant or the intervenors to enlarge the record or to introduce new evidence, does not constrain it from deciding to do so.

If, on the other hand, after following that impartiality review process, not all non-recused members of the Planning Board who participated in the proceedings leading to the September 26, 2007 decision are able or willing to participate, once reconstituted the Planning Board shall conduct such further hearing or hearings or other proceedings as necessary and appropriate, *see e.g. Auger v. Town of Strafford*, 156 N.H. 64, 69 (2007) and *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 708, 716 (1984) and cases cited therein, such that all participating members of the reconstituted Planning Board are sufficiently informed as to have a reasonable basis upon which to evaluate the Motorsports application, *see id.*

For the foregoing reasons, the court grants Motorsports' motion for summary judgment. The decision of the Planning Board denying its application for a Special Use Permit is vacated and the matter is remanded to the Planning Board for proceedings consistent with this order.

So ordered.

September 10, 2009



Steven M. Houran  
Presiding Justice