

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

THE CITY OF PORTSMOUTH

v.

TOWN OF NEWINGTON PLANNING BOARD, ET AL.

Docket Nos. 218-2014-CV-00654
218-2014-CV-01287

INTERVENOR SEA-3, INC.'S MOTION FOR RECONSIDERATION

NOW COMES the Intervenor, SEA-3, Inc. ("SEA-3"), by and through its counsel, Shaines & McEachern, P.A., and, pursuant to New Hampshire Superior Court Civil Rule 12(e), respectfully moves for reconsideration of that portion of the Court's Order on Pending Motions wherein the Court denied SEA's Motion to Dismiss the City of Portsmouth's Appeal based on lack of standing, and in support thereof states as follows:

INTRODUCTION

1. In denying SEA-3's Motion to Dismiss Portsmouth's Appeal for lack of standing, SEA-3 respectfully submits that the Court misunderstood the basis for the Town of Newington's ("Newington") regional impact designation: Newington only notified municipalities through which the railroad traveled, not all of the municipalities in the region. Additionally, SEA-3 submits that the Court failed to properly apply the law of standing as it relates to the issues of injury and proximity.

LEGAL STANDARD FOR RECONSIDERATION

2. SEA-3 is permitted to file a Motion for Reconsideration within ten days of the Clerk's Notice of Decision. "The Motion shall state, with particular clarity, points of law or fact that the

court has overlooked or misapprehended and shall contain such argument in support of the Motion as the movant desires to present; but the motion shall not exceed 10 pages.” N.H. Super. Ct. Civ. R. 12.

BASES FOR RECONSIDERATION

a. The Court Misunderstood Newington’s Regional Impact Designation in Assessing the Change In Use.

3. In ruling that the proposed change was “significant” and weighed in favor of standing under the standard set forth in Weeks Restaurant Corp. v. City of Dover, 119 N.H. 541, 544-45 (1979), the Court relied on the fact that the Newington Planning Board had designated the project as having regional impact (“the designation”). See Order at p. 5. However, the Court’s reliance was based upon a misunderstood fact because the designation was based solely on railroad issues, which are preempted by federal law.

4. The Planning Board’s designation was intended to address the anticipated increase in rail use. In making the regional impact designation, the Planning Board only notified the communities through which the railway travels: Newfields, Stratham, Greenland and Portsmouth. The Planning Board did not notify other towns in the region of similar distances from the SEA-3 site such as Dover, Madbury, Durham, Newmarket, Rye or New Castle, which, distinguishably, are not located along the rail line.

5. If the regional impact designation had instead been based on a generalized concern emanating from the site itself, then Newington would have notified all communities within a given radius, instead of just those communities on the railroad line.

6. As additional proof of the Planning Board’s purpose in making its designation, the “Notice of Regional Impact” issued to the railroad communities states in relevant part:

The Newington Planning Board will hold a public hearing on **Monday December 9, 2013 at 6:30 PM** at the **Town Hall** to consider a proposal by Sea-3 to reconfigure its

terminal at 190 Shattuck Way (Tax Map 14 Lot 2; and Map 20 Lot 13) in order to accommodate Liquefied Petroleum Gas (LPG) shipments via rail, and the export of same via ocean-going ships. The applicant estimates that daily rail traffic will number twelve full tank cars and twelve empty cars.

The Newington Planning Board determined that this project could potentially impact the municipalities of Portsmouth, Greenland, Stratham, and Newfields. Accordingly, those municipalities are accorded the status of abutters pursuant to NH RSA 36:57, and are welcome to testify at the December 9 hearing.

Notice of Regional Impact, Planning Board Certified Record at p. 104 (emphasis in original).

7. The limited scope of the designation and the Notice of Regional Impact's rail-related language prove that the Planning Board's regional impact designation was based on the anticipated effects of increased rail traffic through the host railroad communities and not from any effect emanating from the site itself. It is clear that the site itself was not the basis for the regional impact designation and that the proposed change to the site was not significant as to other communities.

8. Because the Court does not have jurisdiction over railroad operations, it cannot rely on a regional impact designation that was based on railroad impacts to serve as the basis for standing in this matter.

b. The City of Portsmouth Failed to Demonstrate A Definite Injury.

9. In its Decision, the Court correctly ruled that "[s]tanding requires a 'definite' injury, as a merely speculative injury is not enough," see Order at p. 3 (citing Joyce v. Town of Weare, 156 N.H. 526, 530 (2007)). The Court also ruled that "[t]he burden lies on the putative intervenors to demonstrate standing." See Order at p. 4.

10. While the Court properly identified the 'definite injury' test, the Court inharmoniously held that Portsmouth's mere "risk of injury" was sufficient to grant standing. See Order at p. 7. That holding is not compatible with the 'definite injury' test.

11. In support of its holding, the Court observed that, in the event of a catastrophic emergency, “presumably Portsmouth Fire Department and EMS personnel would respond, potentially on Portsmouth’s dime.” See Order at p. 7. Portsmouth asks the Court to assume, without substantiation, that a change of the site constitutes a heightened risk. Portsmouth’s pleadings fail to make the requisite showing of a definite injury.

12. SEA-3 submits that the Court’s holding is contrary to the State’s longstanding, well-established body of law which places the burden on Portsmouth to demonstrate an injury in fact and not some unsubstantiated risk of injury or potential for injury. To expand the concept of injury for standing to every municipality and town that might respond to the aid of another community would exponentially expand the concept of standing.

13. Had the legislature seen fit to recognize municipalities as having special status when it comes to standing, it easily could have done so. Instead, the legislature provided that affected municipalities are afforded the status of abutters “for the limited purpose of providing notice and giving testimony.” See RSA § 36:57, I. Consequently, Portsmouth must demonstrate an injury in fact and not a speculative risk of injury in order to obtain standing.

14. In support of its decision, the Court states, “Portsmouth has standing to contest the environmental injury.” See Order at p. 8. However, there is no evidence that the completion of the proposed project will result in any environmental injury. While Portsmouth may have a general interest in its own natural resources, that interest does not give it a say in what goes on within the Town of Newington unless Portsmouth can demonstrate that it will result in an injury in fact. Portsmouth has not demonstrated an injury in fact, so it does not have standing.

c. Portsmouth Failed to Prove Proximity.

15. SEA-3 submits that Portsmouth failed to meet its burden of proof in demonstrating proximity to the site. The mere fact that the two communities share a common boundary is insufficient to support a finding of proximity. Portsmouth fails to allege the distance between its border with Newington and the SEA-3 site. The point-to-point distance between Portsmouth's closest border and the SEA-3 site is approximately 4,440 feet, or 0.84 miles. Affidavit of Stephen J. Haight, P.E., Zoning Board Certified Record at p. 27. The distance weighs against a finding of proximity. See Nautilus of Exeter, Inc. v. Town of Exeter, 139 N.H. 450, 452, 656 A.2d 407, 408 (1995) (finding intervenors of minimum distance of 0.8 miles lacked proximity).

CONCLUSION

For the foregoing reasons, SEA-3 respectfully submits that the Court should reconsider its Order and grant SEA-3's Motion to Dismiss the City of Portsmouth's Appeal because Portsmouth lacks standing.

WHEREFORE, SEA-3, Inc. requests this Honorable Court:

- A. Grant its Motion for Reconsideration;
- B. Dismiss Portsmouth's Appeal; and
- C. Grant such other and further relief as the Court may deem just.

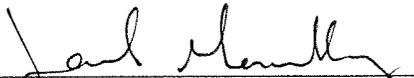
Respectfully submitted,

SEA-3, Inc.

By Its Attorneys,

SHAINES & McEACHERN, P.A.

Dated: May 18, 2015

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CERTIFICATE OF SERVICE

I certify that on this date I have forwarded a copy of the foregoing via U.S. Postal Service, first class mail to the following:

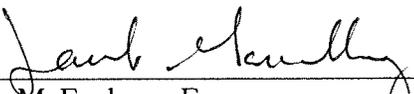
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