Rebuttal to Kay and Steve Bennett's 10/29/18 ZBA Appeal
Case No 2018-08
by
James C. Larkin
Member of the Hillsborough Historic District Commission

November 19, 2018

A. THE HISTORIC DISTRICT COMMISSION'S DECISION CORRECTLY INTERPRETED NEW HAMPSHIRE LAW

The Bennett's have attempted to argue that per RSA 672:1, they are entitled to install a renewable energy system. In addition, they have cited RSA 21:34-a in support of that claim. RSA 21:34-a pertains to agriculture and agritourism enterprises. The property at One North Road is neither so RSA21:34-a, is being misapplied and is not pertinent (this application is for a residence not associated with either an agriculture or agritourism enterprise).
Chapter 672 addresses General Provisions, 672:1 clause I states that planning, zoning and related regulations are the responsibility of the municipal government. RSA 672:1 III-d adds to "unreasonable interpretation", "*when practiced in accordance with applicable laws and regulations.* The more relevant chapter would be 674, which addresses Historic Districts. RSA 674:45 states that by establishing an historic district, the heritage of the municipality will be safeguarded by:

1. Preserving districts in the municipality which reflect elements of its culture, social, economic, political, community and architectural history;
2. Conserving property values in such districts;
3. Fostering civic beauty;
4. Strengthening the local economy; and
5. Promoting the use of historic districts for the education, pleasure and welfare of the citizens of the municipality.

RSA 674:46, Authority Granted, empowers the municipality to, by ordinance, establish, change, lay out, and define historic districts. ***Within the district, the municipality is empowered to regulate the construction, alteration, repair, moving, demolition or use of such structures and places*** (also see RSA674:46-a sub section II). This empowerment overrides any other RSAs that are generally applied. As for substituting our own judgment regarding historical appropriateness, Land Use Law Book Chapter 34.05 addresses contents of historic district ordinance. It is stated that the ordinance, by nature, cannot be as specific as a building code or a traditional zoning ordinance. Decisions need to be made based on "character", "appropriateness", "compatibility", and other criteria which are to some extent value judgments and, therefore, not easily delineated in an ordinance. This section of the Land Use Law also lists 6 factors that must be given consideration by the commission. These examples include historical or architectural value of a structure and its setting, the general compatibility of exterior design, arrangement, texture, and materials proposed in relation to the existing building or structures and its setting or surrounding

area, the general size and scale in relationship to the existing surroundings including the overall structures height. This is exactly the criteria the commission used in arriving at its decision (see 10/18 minutes with attached "Questions Pertaining to Solar Panel Application".
Based on the fact that RSA 672:1 has been misapplied by the Applicants in this appeal, "permissive zoning" ***does*** apply. The lack of a regulation that specifically addresses the installation of solar collection systems in the historic district ***does not*** imply such installations are permitted but rather on the contrary that the installation ***is not*** permitted unless first properly reviewed, a certificate of approval issued by the historic district commission per RSA 674:46-a, and a building permit issued per RSA 674:48 (also see Chapter 147, Hillsboro Historic District Regulations). RSA 676:14 addresses local conflicts of law determination of which local ordinance takes precedence (greater restriction).

One final point, the installation of solar panels in the Hillsboro Historic District was not specifically denied but rather the Bennett's proposed installation. The grounds for denial were based on appropriateness and aesthetic impact to the district only (impact on the character and integrity of a well preserved 18th/19th century village setting). It is generally believed that the use of renewable energy solutions is a good thing. This was clearly stated by Jim Larkin at the October 18th meeting when the vote was taken. However, the proposed installation would be highly visible from North Road and visible from Center Road (two public ways) as well as opposing abutters, Hingstons and Larkins (see September 26th and October 18th minutes as well as Hingston letter). The appeal letter only mentions the installation foot print, height at over 10 feet was also a major consideration.
As a side point, per RSA 672:3, neither Charles Denton nor Whitney and Mimi Powers are abutters as listed in the Bennett's appeal.

B. THE HISTORIC DISTRICT COMMISSION'S DECISION MAKING PROCESS COMPLIED WITH NEW HAMPSHIRE LAW

1. NO COMMISSIONER DISQUALIFICATIONS WERE NECESSARY

Being an abutter to the applicants is not a reason for dismissal from voting on this application. RSA673:14 sub section I clearly states the conditions under which a commissioner is to be dismissed from voting. These are stated as:
"if that member has a direct personal or pecuniary interest in the outcome ***which differs from the interest of other citizens*** ~~or~~ if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law." There clearly is no pecuniary interest in the outcome, nor is there action at law. As for personal interest, James Larkin's interest did not differ from other citizens as evidenced by the correspondence on file. This is not a valid point and James Larkin's vote was legitimate.
As a final point, my vote would have remained the same had I not been an abutter and was consistent with the two other voting commissioners (the vote to deny was unanimous), both of which reside on the other end of the historic district and therefore are not abutters.

2. SOLICITING RECOMMENDATONS FROM VARIOUS LOCAL AGENCIES WAS NOT NECESSARY UNDER THE COMMISSION'S REGULATIONS.

RSA 676:8 uses the word "shall" in regards to the commission's responsibility to review applications for building permits for their impact on the historic district and objectives. The balance of that sentence "by" provides guidelines as to how that may be accomplished by soliciting input from available resources. In addition, Section 147-3 subsection D2 of the Hillsboro Historic District Regulations, Certificates of Approval, uses the wording "may" which implies that the use of these resources is at the commission's discretion. Keep in mind that RSA674:46-a sub-section II allows for the historic district commission to adopt and amend regulations.

- The regulations and zoning for the historic district are established and clear as well as consistent with both the Master Plan and Zoning Ordinance in the Town of Hillsboro. Input from either the Board of Selectman (they appointed the historic commissioners to carry out duties as defined in RSA674:46-a) or Planning Board was deemed unnecessary.
- The application was assessed on the basis of aesthetic impact only. Therefore, input from the Fire Chief, Health Officer, or other town officials was deemed unnecessary.
- If the application had been approved and a certificate of approval issued, the Building Inspector would have had a chance to review prior to issuing a building permit. Soliciting input from building inspector was deemed redundant and not pertinent to the basis of evaluation of the application by the commission.
- The commission did solicit professional and expert input opinion via published documents concerning installation of solar collection systems in an historic district. These resources are listed in the denial letter to the Bennetts dated October 24th, 2018.

3. APPLICANT'S ASSERTIONS OF OTHER "IRREGULARITIES" ARE UNFOUNDED.

All correspondence from abutters and residents were mentioned, discussed, and are stored as public record at the town offices. In addition, input from abutters and residents of the center was solicited at the public meeting and mentioned in the meeting minutes. The applicants have repeatedly been told that they are entitled to copies per 91-A.
At no time did the Hillsboro Historic District Commission nor any of its members meet outside of a public forum nor were any correspondence or testimony fabricated by the commission or its individual members. This is an attack on the integrity of the commission, as well as commissioners. Clearly the proof of such serious allegations falls on the accusers - the applicants. The Hillsboro Historic Commission conducted itself entirely within the applicable RSAs, Land Use Law, granted authority, and regulations in arriving at their decision on this application.

C. APPLICANT'S ASSERTIONS FAIL TO REFUTE THE COMMISSION'S FINDINGS THAT THE PROPOSED SOLAR ARRAY INSTALLATION WOULD NEGATIVELY IMPACT THE HISTORIC DISTRICT'S SETTING, PROVIDE INADEQUATE SCREENING FROM THE PUBLIC VIEW AND RESULT IN A LARGE SCALE AND SIZE THAT WAS NOT APPROPRIATE.

The notion that solar panels are traditional in the context of a 18th/19th century setting is absurd. The sources cited in the denial letter to the Bennetts were used in making a determination by the commission as previously mentioned. There is a common theme in those documents with regards to ground mounted solar arrays, *screen from public way view.* At the September 26th meeting, there was a considerable amount of discussion regarding how the Bennetts could accomplish this and mitigate the commissions concerns. ***This constituted a condition of approval*** , provided that said screening met the appropriateness criteria as set forth in the regulations. It was motioned and approved that the final vote on the Bennett's application be postponed to the following meeting to provide the Bennetts an opportunity to mitigate the concern. At the October 18th meeting, the Bennetts stated that they were declining that opportunity and that their application stood as presented without modification. The commission voted on the application as originally filed.

CONCLUSION:

Based on the above, it is requested that the Zoning Board of Adjustment uphold the Hillsborough Historic District's decision on this application and deny approval of the Bennett's application and appeal.

James C. Larkin
595 Center Road
Hillsboro, NH 03244
cratelarkin3@gmail.com
603.933.3012

GROUNDS FOR APPEAL

--

APPEAL OF ADMINISTRATIVE DECISION PURSUANT TO RSA 676:5 I.

A. The Historic District Commission unreasonably interpreted the Historic District Ordinance in a manner directly inconsistent with New Hampshire Law

The Historic District Commission is a creation of New Hampshire statute. The Historic District Commission receives its delegated powers pursuant to RSA 674:46-a, and all regulatory powers are mandated to be "compatible" with the zoning ordinance of the city, town, or county in which they exist. RSA 674:46-a. IV.

While the Town of Hillsborough has not expressly adopted zoning regulations relating to solar power, the New Hampshire legislature has set out express legal parameters relating to the use of solar. Specifically, RSA 672:1 III-a. states:

> Proper regulations encourage energy efficient patterns of development, the use of solar energy, including adequate access to direct sunlight for solar energy uses, and the use of other renewable forms of energy, and energy conservation. Therefore, the installation of solar, wind, or other renewable energy systems or the building of structures that facilitate the collection of renewable energy shall not be unreasonably limited by use of municipal zoning powers or by the unreasonable interpretation of such powers except where necessary to protect the public health, safety, and welfare.

The upside of RSA 672:1 III-a is that municipalities have extremely limited regulatory powers to limit the use of solar energy or other renewable forms of energy, as any regulation is only permitted where there is a showing of a direct impact to public health, safety or welfare. That is to say, only if the regulation is made pursuant to the police power can it be consistent with New Hampshire law.

In addition to the more theoretical language of RSA 672:1 III-a, the New Hampshire legislature in RSA 672:1 III-d provides more concrete guidance as to what constitutes an "unreasonable interpretation":

> For purposes of paragraphs III-a, III-b, III-c, and III-e, "unreasonable interpretation" includes the failure of local land use authorities to recognize that agriculture and agritourism as defined in RSA 21-:34-a, forestry, renewable energy systems, and commercial and recreational fisheries, when practiced in accordance with applicable laws and regulations, are traditional, fundamental and accessory uses of land throughout New Hampshire, and that a prohibition upon these uses cannot necessarily be inferred from the failure of an ordinance or regulation to address them;

New Hampshire has a system of "permissive zoning", that is, in general, unless a use is expressly permitted in a district, the use is prohibited. Windham v. Alfond, 129 N.H. 42 (1986). New Hampshire RSA 672:1 III-d provides that with respect to renewable energy systems, "permissive zoning" does not apply, and such uses are *per se* permitted, and further (in conjunction with RSA 672:1 III-a), may only be regulated by express regulations, and only if necessary under the police power.

The application of this statute to the application made to the Historic District is clear. The Town of Hillsborough has adopted no ordinance in relation to renewable energy systems such as solar, and therefore, such energy systems are permitted throughout Hillsborough. Further, the renewable energy system is *by operation of law* a "traditional, fundamental and accessory use" of the property, and the findings of the Historic District Commission that the solar energy is not "traditional", e.g. "historically inappropriate", represents a substitution of its own judgment over the judgment of the Legislature. The Historic District Ordinance, as unreasonably interpreted by the Historic District Commission, is not compatible with the zoning ordinance of the Town of Hillsborough as established pursuant to RSA 672:1.

From a theoretic perspective, one might find fault with the New Hampshire Legislature, or second guess its judgment, or even work to lobby the Legislature to change state law. However, from the standpoint of an appeal of an Administrative Decision, this Board has one and only one duty: not to substitute its judgment for the Legislature, but to follow the law. For this reason, the decision of the Historic District Commission must be reversed, and the building permit granted.

B. The Historic District Commission conducted a public hearing directly inconsistent with New Hampshire Law

The Historic District Commission is a body created by statute with express powers and procedural limitations as provided by state law. The process by which the Historic District Commission came to its illegal decision is as tainted as the clearly erroneous substance of its decision of October 24, 2018 (following a public meeting on October 18, 2018).

The decision-making body itself was tainted and unsound. James Larkin, a direct abutter to the applicants, saw fit to participate and vote as a member of the Historic District Commission, despite the fact that as a direct abutter he had an irrebuttable conflict of interest. Without Larkin, the Commission on October 18 and 24, 2018, would not have had a quorum to vote, and the only way the Commission could proceed was through using a member with an un-waivable conflict of interest. The application was submitted on September 12, 2018. The Historic District Commission, properly constituted, had 45 days to deny the application, or the building permit should have been granted by operation of law, RSA 676:9. The Historic District Commission could have requested an extension of time until it could convene a quorum of persons without conflicts of interest. It did not, illegally denying the application. As an improperly constituted body, the Historic District Commission lacked subject matter jurisdiction to confer on the application, and its decision is void ab initio, and the permit should be granted pursuant to RSA 676:9 for failure of the Commission to lawfully act on the application for 45 days.

Procedurally, the Historic District Commission acted contrary to state authorizing statue. The Historic District Commission is empowered to review applications pursuant to RSA 676:8, which does not provide for a public hearing or testimony from the public. Rather, it mandates the Commission to solicit recommendations regarding feasibility from the planning board, fire chief, building inspector, health officer and other town administrative officials, as well as permitting advice from private experts. The Historic District Commission did not solicit the testimony or recommendations of any town officials on the project's "feasibility", directly contrary to state law, nor did it receive any expert advice. Instead, it conducted an illegal public hearing which consisted of neighbor's complaining about the project, in direct contravention of RSA 676:8.

However, the irregularities in the proceedings were actually worse than simply conducting an illegal public hearing. Commissioners made reference to correspondence which was not read into the record, and which the applicants (upon making 91-A Requests to the Town) were advised were not part of the file. There are only two possible explanations for this development: 1.) either the Commissioners fabricated testimony or 2.) the Commissioners conducted illegal, nonpublic meetings with interested parties outside of the public meeting, and then relied on feedback at these illegal public hearings in denying the application. Although the first is possible, the second alternative is more probable, making the denial subject to invalidation pursuant to RSA 91-A:8, III., and the Town of Hillsborough potentially subject to attorneys' fees pursuant to RSA 91-A:8, I. This appeal affords the Town of Hillsborough an opportunity to reverse a decision of the Historic District Commission that is fundamentally flawed in all possible respects: an improperly constituted and conflicted Commission utilizing illegal procedures to act upon an application and arriving at a substantive result in direct variance with New Hampshire law.

C. The Historic District Commission failed to consider factual testimony concerning the "traditional" character of solar energy systems, and possible conditions to minimize visual impact

Solar energy is not new, nor are historic districts. The applicants provided information from the U.S. Department of Interior, National Park Service, Technical Preservation Services regarding best management practices for incorporating solar energy systems in historic structures. Like the express findings of the State of New Hampshire, the United States views solar energy systems as compatible with historic structures, but recommends that solar systems be detached and differentiated from the historic structure itself (as the Applicant's proposed system is).

Looking at the three findings in the Decision of October 24, 2018, and starting from the last, it is clear that the Decision is contrary to law. For reasons addressed in section A, the finding "the proposed structure would negatively impact the historic district's setting and goals of enhancing the historical, architectural qualities of the district" is contrary to state law.

The second finding, that there would be no screening, is absurd. The Historic District Commission had every opportunity to consider conditions of approval to mitigate visual impact, but did not. It did solicit a new/revised application in the middle of the approval process from the Applicant, but soliciting a new application (when acting on an existing application) is not the same

as considering appropriate conditions of approval. Given state law concerning solar installations (and their presumptive permissibility), this failure on the part of the Historic District Commission is clearly erroneous. If the Commission had concerns about the visual impact of the approval, the appropriate response was to condition approval on conditions, not to solicit a new application nor to deny the application (given the legal presumption of its reasonableness).

The first finding of the Commission "the large scale and size of the proposed structure in relation to existing surroundings was not appropriate" is fanciful. The foot print of the proposed solar array is 325 square feet, the approximate area of a wood shed or a small garage, hardly beyond the "scale and size" of a permissible accessory use to a single family residential dwelling on a 2.9 acre lot. The proposed solar array is accessory to the Bennett's single family house and estimated to provide 75% of their energy needs. While the Historic District Commission's own regulations make no mention of "size and scale", they do refer to consideration of the appropriateness of a proposed alteration. State law indicates the proposed alteration is presumptively reasonable.

FOR THE ABOVE REASONS, the Applicants ask the Hillsborough Zoning Board of Adjustment to:

A. Reverse the Decision of the Hillsborough Historic District Commission denying the application and grant the permit; in the alternative,

B. Declare the Decision of the Hillsborough Historic District Commission void *ab initio* as improperly constituted due to an unwaivable conflict of interest and lack of quorum, and grant the issuance of a building permit due to the Commission's failure to act on the application within 45 days pursuant to RSA 676:9; in the alternative,

C. Such other relief as is equitable and just.

THIS DOCUMENT PREPARED WITH THE ASSISTANCE OF KELLY E. DOWD, ESQ., NH BAR #14890

November 1, 2018

Historic District Commission
Town of Hillsborough
P.O. Box 7
Hillsborough, NH 03244

Re: Minutes from September 26, 2018 meeting of the Hillsborough District Commission

We believe the minutes of the September 26, 2018 meeting were incomplete as approved by the Commission. We request a revision of the minutes including all notes taken and/or audio recorded by the Recording Secretary and others documenting the solar project presentation, statements by those in attendance, statements from the Commissioners opining on tthe project and reporting statements made by those not in attendance. Written, oral and electronic communications are also requested.

Updates to the approved minutes can be written as part of the current meeting minutes and have it stated that this is a correction to the minutes of the September 26th meeting.

Thank you,

Kay Bennett

Stephen Bennett

1 North Road
Hillsborough, NH 03244

603-464-3063