

handed out at meeting

State of New Hampshire

Strafford, SS

Superior Court

William C. Colbath

v.

Thomas Clark, Kevin and Lisa Turgeon and The City of Dover

Docket No. 08-E-0165

RESPONSE TO MOTION TO DISMISS

NOW COMES William C. Colbath as plaintiff to respond to the motion to dismiss by the City of Dover through their Attorney Walter L. Mitchell and submit the following answer to the Motion to Dismiss:

1. Admitted
2. Denied

This case involves more than the rebuilding of a fire damaged structure. This case is brought to reverse the illegal acts of the City of Dover Building and Code Enforcement Official Mr. Clark.

This case is about a City Code Enforcement Official disregarding the decisions of the ZBA, and Dover Zoning Regulations in violation of RSA 676:13. All of the items complained of were done with the knowledge they were not allowed by statute and by the order of the ZBA.

A) Decisions of ZBA

The Dover ZBA issued two decisions regarding the property in question denying the

variance requested by the landowners for a relocation and massive expansion of a non-conforming use in January and July, 2007.

The Dover ZBA instructed the landowners that by grandfathered allowances in the ordinance they would be allowed to repair the existing non-conforming structure and would be allowed a modest addition to the structure and allowed the conversion to a duplex.

#### B) Conversion to Duplex

The right to convert from single family to duplex was allowed for the existing non-conforming structure by virtue of the age of the non-conforming structure.

If the structure was relocated or removed the current single family zoning as well as all applicable setbacks would apply.

In the minutes of the June 21, 2007 ZBA meeting the planning advisor to the ZBA stated “you would not be able to tear it down to the foundation and decide to rebuild a duplex”. Not only did the property owner tear it down to the foundation they totally removed the foundation as well.

The duplex conversion right clearly was forfeit, yet Mr. Clark is allowing the conversion to continue and the relocation of the structure without compliance to setbacks.

#### C) Allowable Addition Size

The ZBA was concerned that the addition be modest and not dwarf the original structure or the adjacent home.

The size of the addition for the expansion of the non-conforming use (2 family) would be limited to 20% by ordinance. This point was argued by Mr. Clark and the planning representative Mr. Byrd that the 20% in our ordinance would not apply. The ZBA had a

different opinion, but were willing to allow Mr. Clark to show past conversions with additions to support his claim.

When asked how big an addition would be allowed by past practices, Mr. Clark offered no direct answer and did not have any data on past practices as the ZBA had asked in the June meeting.

When discussing the issue Mr. Clark stated in the July 18, 2007 meeting “The conversion is what is allowed here. To add a 2000 sq. foot addition and then say they want to convert to a duplex he does not think that is in compliance, and would not be allowed”

Despite his own description of what would be an unacceptable size for an addition, Mr. Clark approved a permit for an addition to the original structure of 2052 sq. ft. on October 19, 2007.

3. Admitted

4. Admitted

5. Denied

The plaintiff did file an administrative appeal, the appeal is allowed as an officer of the municipality under RSA 676:5. There was no change from the position of ZBA vice chair in order to file the appeal.

6. Denied

The plaintiff admitted in the ZBA meeting he was not an abutter. However, he was a “person with a substantial interest in the outcome of the case” given the acts complained of and the longevity of service on the ZBA by the plaintiff. To allow the total disregard of two decisions of the ZBA to go unchallenged and uncorrected would have been wrong.

If allowed to stand the actions of the Dover Code Enforcement Officer would make it impossible to enforce the Dover zoning regulations for non conforming uses and structures.

The plaintiff stated that his standing as a taxpayer to complain of illegal acts of a city official comes from Richard P. Green v. John Shaw 1974 "It is well settled in this State that plaintiffs, as taxpayers, have standing to seek regress for the unlawful acts of their public officials.

The assertion that the plaintiff is attempting to overturn a decision of the majority because he disagrees with it is not supportable. The plaintiff has participated in hundreds of decisions in which he voted in the minority. He has not appealed any decision in the past, because even though he disagreed the decisions were made by legitimate methods in accordance with statutes. The actions of the ZBA by not accepting an appeal from an abutter violates RSA677:2 and their opinion that they did not have authority over enforcement of the zoning ordinance or their decisions seems in conflict with RSA 674:33.

7. Denied

The plaintiff has filed an appeal for himself and the citizens of Dover to complain of illegal acts. There is no connection between work done for Mr. Cheney and this case.

8. Denied

After the plaintiff's appeal was not heard due to an improper determination of lack of standing. And given that the prior appeals brought forth by an aggrieved abutter were not heard it was abundantly clear that the City of Dover would not allow any appeal to Mr. Clark's illegal acts to be heard. There was no other logical choice, but to appeal to the

Superior Court in an attempt to be heard.

10. Denied

The issue of standing needed to be determined by the court and is part of the petition for declaratory judgment filed. One of the points of Weeks v. City of Dover 1979 case, was that standing needed to be determined on a case to case basis and should be determined by the court.

11. Denied

There is nothing improper in questioning errors in judgment of the Dover ZBA and questioning their interpretation of RSA 674:33 when a decision appears to be in opposition to the RSA.

There is nothing improper in seeking regress for illegal acts committed by a municipal official. Cloutier v. State Milk Control Bd. 1942 "questions of law belong to the judiciary for final determination .... The right to apply to the courts for relief from illegality may not be unduly abridged."

12. The plaintiff asserts that there is nothing frivolous or vexatious in the nature of the petition filed. All of the illegal acts complained of in the petition can be seen and proven by the records in the municipal files attached.

A) ZBA file for decisions in January and July 2007 and related minutes from the Dover Planning Office File

B) Two building permits and related documents from the Dover Building Inspection Office File

C) Copy of the appropriate pages of the Dover Zoning Ordinance

D) Tax Card for 55 Back River Road showing size and description of the former structure.

WHEREFORE, the plaintiff William Colbath respectfully requests the court declare the following:

A. Declare that RSA 676:13 prohibits the Code Enforcement Officer from issuing any permit that does not comply with any and all Zoning Ordinances which are in effect.

B. Declare that under RSA 674:33 the Zoning Board of Adjustment is the correct venue for appeal from an administrative decision made by the Code Enforcement Officer in his enforcement of a zoning ordinance.

C. Declare that the Dover ZBA should have accepted the appeal from the aggrieved abutter to be heard according to RSA 674:33.

D. Declare that RSA 677:2 allows William C. Colbath standing to bring an appeal to the Dover Zoning Board of Adjustment in this matter.

E. Declare that RSA 676:5 allows William C. Colbath as an officer of the municipality standing to bring an appeal to the Dover Zoning Board of Adjustment in this matter.

F. Declare that under NH Case Law William C. Colbath has standing to bring an appeal based on the illegal acts of a City Official.

G. Declare that under RSA 676:6 the Code Enforcement Officer must issue a cease construction order when an appeal of a building permit is received.

H. Declare that all structures at 55 Back River Road be made compliant with current Dover Zoning regulations.

I. Declare that all uses of the property at 55 Back River Road be compliant with current Dover Zoning regulations.

J. Grant William Colbath filing fees and costs to file the petition for declaratory judgment.

K. Grant any other relief as may be just.

Respectfully submitted,  
Dated August 15, 2008

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William C. Colbath  
129 Silver Street  
Dover, NH 03820  
603-312-2513

Certification of Service

I, William C. Colbath certify that on August 15, 2008, a copy of this summary statement was mailed to:

Counsel for

City of Dover and Thomas Clark -  
Walter L. Mitchell, Esq.  
25 Beacon Street East  
Laconia, NH 03246

and

Counsel for Kevin Lisa Turgeon -  
James H. Shulte  
680 Central Avenue  
Dover, NH 03820

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William C. Colbath