

THE STATE OF NEW HAMPSHIRE

STRAFFORD, S.S.

SUPERIOR COURT

William C. Colbath

v.

Thomas Clark, et als.

Docket No. 08-E-0165

MOTION TO DISMISS

NOW COMES the City of Dover, by and through its attorneys, Mitchell Municipal Group, P.A., and in moving to dismiss this action, states as follows:

1. The plaintiff, William Colbath, is a Dover resident and local electrical contractor doing business as W.C. Colbath Electrical Contractor. As his pleading explains, he has also served for the past 23 years as a regular member of the Dover Zoning Board of Adjustment (ZBA).
2. This case involves the rebuilding of a fire damaged structure on property owned by Kevin and Lisa Turgeon on Green Street in Dover, New Hampshire.
3. Mr. Colbath sat as a voting member of the ZBA in various meetings and hearings relating to this rebuilding project in January, February, June and July of 2007, in which the Turgeons' application for a variance was initially denied, a rehearing was granted, and the variance was then denied again in July, 2007. In those proceedings, the Turgeons' neighbors, the Cheneys, opposed the granting of that application.
4. Mr. Colbath also sat as a voting member of the ZBA on May 15, 2008, when the ZBA considered and rejected an administrative appeal by the Cheneys seeking to challenge Turgeons' rebuilding of the structure, claiming that the Turgeons had lost

their vested rights to rebuild. That appeal by the Cheneys was denied with Mr. Colbath being the sole dissenting vote. The Cheneys did not seek reconsideration of that decision or appeal to this court.

5. Twelve days after that vote, on May 27, 2008, Mr. Colbath changed from his position of ZBA member and in his own name filed his own administrative appeal to the ZBA regarding the Turgeons' rebuilding of the structure, making the very same claims as made by the Cheneys. The ZBA denied that administrative appeal.

6. Mr. Colbath is neither an abutter to the Turgeons property, nor does he reside or own property anywhere in their neighborhood. However, in spite of his 23 years of experience and training as a ZBA member, he made the bald claim that despite the statutory requirements that one seeking to appeal a ZBA decision must be "directly affected" (RSA 677:2) and "aggrieved" (RSA 677:4) , and regardless of the fact that the New Hampshire Supreme Court has clearly defined those terms, he has standing to file this appeal both by having sat on this very case *as a ZBA member*, and by being a citizen of Dover who does not like the zoning interpretation that he challenges.

7. The only other known connection that Mr. Colbath has to this property or the abutters is that apparently, at a date unknown, he established a business relationship with the Cheneys, as evidenced by his filing for an electrical permit to do work on the Cheneys' property, which permit application was filed with the city on the very same date (May 27, 2008) that he filed his appeal to the ZBA on the Cheneys behalf. See a copy of that application, attached to this motion as **Exhibit A**.

8. Additionally, despite the requirements of RSA 677:2 and 677:3, Mr. Colbath failed to file a motion for rehearing within 30 days of the ZBA's denial of his appeal.

This court therefore lacks jurisdiction to hear this appeal. See, e.g., Mountain Valley Mall Assocs. v. Municipality of Conway, 144 N.H. 642 (2000).

9. Both because of Mr. Colbath's lack of standing and because of the court's lack of jurisdiction due to Mr. Colbath's failure to file a required motion for rehearing, his pleading should be dismissed.

10. Further, given Mr. Colbath's 23 years of experience as a ZBA member, he knew or should have known both of the motion for rehearing requirement and that he did not have standing to bring an appeal to this court.

11. Additionally, Mr. Colbath knew or should have known that it is especially improper for a person sitting in a quasi-judicial capacity as a member of the ZBA, who is unhappy with a majority decision of the board, to file his own petition with the court.

12. The filing of this petition under these circumstances is frivolous and vexatious, and any reasonable person would have known that the filing of such a petition was both improper and would accomplish nothing except to place a considerable financial burden on the shoulders of the Dover taxpayers for the defense of this matter. The city is therefore entitled to recover its costs and attorney's fees incurred in the defending of this action and the filing of this motion. See Harkeem v. Adams, 117 N.H. 687 (1977).

WHEREFORE, the City of Dover respectfully requests that this Honorable Court:

A. Dismiss the plaintiff's petition as, on its face, it is clear that the petitioner neither has standing to file it, nor has he met the statutory jurisdictional requirement of filing a motion for reconsideration;

B. Order that Mr. Colbath reimburse the City for all expenses that it has incurred in the defending of this action and the filing of this motion, including its attorney's fees; and

C. Grant such other and further relief as may be just.

Respectfully submitted,

CITY OF DOVER

By Its Attorneys
MITCHELL MUNICIPAL GROUP, P.A.

Date: 8/5/08

By:




Walter L. Mitchell, Bar No. 1778
25 Beacon Street East
Laconia, New Hampshire 03246
(603) 524-3885

CERTIFICATION

I hereby certify that a copy of the foregoing has been sent by first class mail, postage prepaid to William C. Colbath, pro se, and James Schulte, Esquire.

Date: 8/5/08



Walter L. Mitchell



✓ Exhibit A

ELECTRICAL PERMIT APPLICATION

Subject Property 7 Beech St. Road Electrical Permit # 08-155
 Owner Chuck Chirny Address Same Address
 Electrical Contractor (please print) W.C. Colbeth Elect. Contr.
 Address 21 Crosby Rd. Dover NH 03820
 Master Electrician # 6586 Phone 749-0963 No. of Units Now 1 When Complete 1

BUILDING DATA

USE: Residential Business Industrial Other _____ Wiring Method: NM AC MC Conduit Other _____
 Type of Installation: New Addition Alteration Luminarie Retrofit Repair Other _____ Building Permit # _____

Services, Panels, and/or Disconnects	Quantity	Amount	Devices \$1.00 ea	Quantity	Fixtures \$2.00 ea	Quantity
\$5.00 per 100 amps			Receptacles		Incandescent	
60		\$5.00	Switches		Fluorescent	
100		\$5.00	Motion Sensor		Neon	
200		\$10.00	Other		Smoke Detectors	
400		\$20.00			Exit/Emergency Lts.	
600		\$30.00			Exh/Paddle Fan	
800		\$40.00	Total Quantity		Total Quantity	
1000		\$50.00	Device Fee		Fixture Fee	
1200		\$60.00	Equipment \$5.00 ea			
1600		\$75.00	Range/Cooktop		Washer	
2000		\$100.00	Wall Oven		Dryer	
Meters		\$5.00	Microwave		Boiler Gas /Oil	
Motors		\$5.00	Dishwasher		Furnace Gas /Oil	
Air Compressor/Condenser		\$15.00	Disposal		A/C Unit	
Electric Heat		\$5.00	HW Heater		Door openers	
Heat Pump		\$10.00	Refrigerator/Freezer		Sump Pump	
Pre-manufactured		\$25.00	Total Equip. Quantity		Equip. Fee	
Modular		\$75.00	Transformers			
Fire Pump		\$100.00	Up to 25 KVA		\$25.00 ea	
Standard Temp Service		\$15.00	25 KVA & over		\$50.00 ea	
Illuminated Sign		\$15.00			Trans. Fee	
Above ground pool/Hot Tub		\$25.00	Generators and Transfer Switches			
In Ground pool		\$50.00	Up to 10 KVA		\$25.00 ea	
Misc.			10 KVA to 75 KVA		\$50.00 ea	
Application Fee/Meter Reset		\$25.00	Over 75 KVA		\$100 ea	
Services, Panels, Disconnects Fee			Transfer Switches		same as above	
Total Electrical Permit Fee		\$25	Generator and Transfer Fee			

Paid: Check Cash Amount \$ 25 Collected by SC Date 5/27/08 Check # 104 Plans Submitted _____

* Permit Fees Doubled if Work is Started Before Permit is Issued *

Applicant certifies that all information provided is correct, agrees to allow reasonable notification for inspections, and that all work shall be installed in compliance with State of NH RSA: 319-c and all pertinent City Ordinances.

Inspections Required (1) when rough in is complete prior to concealing (2) Upon completion prior to Occupancy

Failure to correct deficiencies which require a third site visit for the same issue Re-Inspection Fee of \$75.00

Description of Work: Install 2 grd Rode for PSNH Meter float.

Chuck Chirny
Signature of Applicant/Agent

5/27/08
Date

Thomas L. Paul
Electrical Inspector/Building Official