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Objective Testimony from Residents, Combined with Personal Knowledge of Observable Facts by Board Members Can Refute Expert Opinions

Three Ponds Resort, LLC v. Town of Milton

New Hampshire Supreme Court Docket No. 2019-0278

Wednesday, June 3, 2020

The New Hampshire Supreme Court upheld a decision of the Milton Zoning Board of Adjustment that a proposed campground expansion would be an undue nuisance or serious hazard to pedestrian or vehicular traffic notwithstanding contrary expert traffic engineering evidence. Three Ponds Resort sought a special exception to substantially expand its seasonal campground. A central feature of the hearings before the ZBA was whether the road providing access to the campground could reasonably support the additional traffic that the increased number of campsites would generate.

A traffic study provided by Three Ponds, along with an independent technical review of the submitted traffic study, both concluded that the additional campground traffic was not expected to have an undue or inordinate impact on traffic safety. Due to the apparent uncontradicted content of these traffic studies, Three Ponds argued that *Condos East Corp. v. Town of Conway*, 132 N.H. 431 (1989), and *Continental Paving v. Town of Litchfield*, 158 N.H. 570 (2009) precluded the ZBA from reaching a contrary result.

The Supreme Court distinguished *Condos East* and *Continental Paving* ruling that the ZBA was entitled to question and reject the conclusions of the expert's traffic assessment by relying on objective facts provided through the testimony of town residents and the personal knowledge of board members. The Court observed that the methodology of the traffic study did not consider pedestrian traffic on the impacted town road. Furthermore, these were not personal opinions, but rather descriptions of the actual experience of using the road. The ZBA also relied upon New Hampshire Department of Transportation Minimum Geometric & Structural Guides for Local Roads and Streets (Guidelines) that contradicted the traffic study's statement that Townhouse Road had "ample width." The ZBA also had an objective basis to conclude that the traffic study did not accurately represent peak traffic on the affected town road.

The Supreme Court concluded that the ZBA could have reasonably concluded the traffic study did not fully reflect the current conditions the affected town road; that the road was not wide enough to accommodate existing traffic comfortably, and that increasing the number of wide vehicles using the narrow road – with no shoulders or sidewalk – would endanger people walking, cycling, or running on the road.

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Additional Information:

Practice Pointer: Critical examination of the methodology of an expert traffic report, combined with direct evidence of objective evidence provided by abutters, residents and board members can support a land use board's decision to reject the conclusions of expert testimony and reports.

DISCLAIMER: *This is an unpublished opinion. Readers should be aware that Supreme Court Rule 20(2) states that an order disposing of any case that has been briefed but in which no opinion is issued, shall have no precedential value. However, it may be used for persuasive purposes.*



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