

STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

SUPERIOR COURT  
Docket Nos. 07-E-0101  
08-E-0005  
08-E-0006

Saint Benedict Center

v.

Town of Richmond, et al.

John Boccalini, et al.

v.

Town of Richmond, et al.

**Objection of John Boccalini and Other Interested Parties to Saint Benedict Center's Partially Assented to Motion to Dismiss Accessory Use Claim as Moot**

NOW COME John Boccalini, Kathleen Whitham, and Other Interested Parties, the Intervenor in Docket Nos. 07-E-0101 and 08-E-0006 and the Petitioners in Docket No. 08-E-0005, and object to Saint Benedict Center's Partially Assented to Motion to Dismiss Accessory Use Claim as Moot as follows:

1. John Boccalini, Kathleen Whitham, and other interested parties (the "Abutters") appealed a determination made by the Town of Richmond Zoning Board of Adjustment ("ZBA") in the context of an administrative appeal by the Saint Benedict Center ("SBC") regarding the need for zoning relief for its proposed school use.

2. More specifically, the Abutters asserted that the ZBA's finding that the SBC's proposed school use would be an allowable accessory use to its proposed house of worship use was both unlawful and unreasonable.

3. SBC also appealed the ZBA's determination that a variance was required for what SBC had argued and the ZBA had found was an allowable accessory school use.

4. SBC also argued that requiring a variance for an accessory school use violated RLUIPA.

5. SBC intervened in the Abutters' appeal, the Abutters intervened in SBC's appeal, and the cases were consolidated with a related planning board appeal.

6. SBC now moves to dismiss the Abutters' appeal as moot.

7. More specifically, in support of its motion, SBC asserts that "[the Abutters] argued in Docket # 08-E-005 that SBC's religious school is not accessory to its house of worship because SBC did not obtain a special exception for its house of worship and therefore SBC must obtain a variance for its religious school." Partially Assented-To-Motion to Dismiss Accessory Use Claim as Moot, ¶4.

8. SBC further asserts that, because the Town has invoked its alleged authority under RLUIPA to require neither a special exception for a house of worship nor a variance for a the accessory school, the Abutters' claim is moot.

9. First, SBC, in an effort to further its own ends, materially misrepresents in its motion the nature of the Abutters' claim on appeal.

10. While the Abutters, in part, asserted that SBC had failed to establish that the house of worship had been a lawful principal use, the Abutters did not assert that SBC had to obtain a variance for its school because it failed to obtain a special exception for its house of worship.

11. The Abutters asserted that SBC had failed to satisfy any of the legal elements

under the accessory use rule, including establishing that the house of worship had been a lawful principal use. *See, e.g., Appeal of Decision of Town of Richmond Zoning Board of Adjustment*, ¶60.

12. In this regard, the Abutters, in part, also asserted that to the extent that the ZBA relied upon the decision in *City of Concord v. New Testament Baptist Church*, 118 N.H. 56 (1978), its reliance was misplaced. *Appeal*, ¶63.

13. Second, SBC challenged the need for a variance for the proposed school use on the grounds that it was an allowable accessory use.

14. As such, any settlement it might have reached, at best, meant that a variance was not required for an accessory school use.

15. If the Abutters prevail on their appeal, the school would not be an accessory use, but rather a principal use, and, as such, any settlement it might have reached should not govern.

16. Finally, to the extent that SBC suggests that it, as an intervenor, may settle the Abutters' claim against the Town through an agreement with the Town, it cites no authority for such a proposition and the Abutters are not aware of any such authority.

17. Indeed, such a rule would effectively chill any appellate rights by allowing a municipality to defeat any appeal simply through an agreement with a "friendly" intervening party.

WHEREFORE, the Abutters respectfully request that this Honorable Court:

A. Deny SBC's Motion to Dismiss;

B. Award the Abutters their costs and attorney's fees incurred in connection with this

Motion in light of SBC's material misrepresentation under Superior Court Rule 59; and

C. Grant such other relief as it may deem just and proper.

Respectfully submitted,

JOHN BOCCALINI, ET AL.,  
By and through their attorney,  
CRONIN & BISSON, P.C.

Dated: April \_\_, 2010

By:

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Daniel D. Muller, Jr., Esquire, NHB #12132  
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Certification

I do hereby certify that a copy of the foregoing Objection was forwarded on this \_\_\_\_ day of April, 2010 by first class U.S. mail, postage prepaid, to Michael Tierney, Esquire, and Daniel Mullen, Esquire.

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Daniel D. Muller, Jr., Esquire