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KSC Realty Trust v. Town of Freedom, 772 A.2d 321 (N.H. 2001)

Robert Lykos

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NEW HAMPSHIRE

KSC Realty Trust v. Town of Freedom, 772 A.2d 321 (N.H. 2001)
(holding spring water transport and sale are accessory to permitted Rural Residential water storage use).

William and Carol Foord appealed the superior court's order affirming the Town of Freedom Zoning Board of Adjustment's ("ZBA") decision to prohibit them from using their land to sell water. The Foord's land contained spring canals releasing underground water, which they first used residentially, but in 1987, when Mr. Foord entered into a contract to sell water, they collected it in tanker trucks and transported it from the property. The Town of Freedom zoned the property as Rural Residential ("RR"), and thus, permitted its use for "Water Recreation and Storage Facilities" under Zoning Ordinance § 304. In 1996, the town's Board of Selectmen ("Board") informed the Foords that selling water was not a permitted use in RR districts. The Foords appealed the decision to the ZBA, which held water sales were not permitted within the Foords' zoning district, and the use was neither nonconforming commercial, nor residential accessory. On appeal, the superior court held water storage was a permitted use, but its sale and removal were not.

The supreme court treated the ZBA's factual findings and ordinance interpretation on these questions of law as *prima facie* reasonable, noting its decision would be upheld unless evidentially or legally unsupported. Zoning Ordinance § 304 is "permissive" in structure, prohibiting land uses unless expressly permitted, or accessory to a permitted principal use, and "subordinate to it." As such, the town claimed sale and transportation were not accessory to the statutorily permitted storage use, and therefore not allowed. However, Zoning Ordinance § 901 permits some commercial uses for water "storage facilities," within its definition as a place for "commodities" and "merchandise." This definition contemplates the water's later transport off the property and sale, evidencing the storage facility's commercial purpose. Therefore, the court reasoned the Foord's transportation and sale were incidental and subordinate to water storage, and, thus, accessory to the permitted use.

Robert Lykos

NEW JERSEY

East Cape May Assoc. v. N.J. Dept. of Env'tl. Prot., 777 A.2d 1015 (N.J. 2001) (holding there is no taking claim when a state agency deems private property a protected wetland).

East Cape May Associates ("ECM") filed suit seeking damages after